

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania :  
 :  
 v. : No. 1703 C.D. 2009  
 :  
 James L. Karn, : Submitted: December 31, 2009  
 Appellant :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
 HONORABLE ROBERT SIMPSON, Judge  
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
 BY SENIOR JUDGE KELLEY

FILED: March 8, 2010

James L. Karn (Karn), *pro se*, appeals from an order of the Court of Common Pleas of Allegheny County (trial court), which adjudged Karn guilty of five violations of the International Property Maintenance Code of 2003 (Code) of the Borough of Ben Avon (Borough)<sup>1</sup> and fined him \$3,600 plus costs. We affirm.

Karn is the owner of residential property located at 518 Dickson Avenue, Ben Avon, Pennsylvania (Property). On December 30, 2008, the Borough issued Karn five citations for the failure to comply with the following provisions of the Code: Section 301.2 (responsibility); Section 304.2 (protective treatment); Section 304.7 (roofs and drainage); Section 304.9 (overhang extensions); Section 307.1 (accumulation of rubbish and garbage). Each citation carried a \$100 fine.

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<sup>1</sup> The Code was adopted by Borough Ordinance No. 695. Certified Record (C.R.), Exhibit No. 5.

Karn filed a timely appeal to the district magistrate. On March 30, 2009, following a summary trial, the district magistrate found Karn guilty of the violations and imposed fines totaling \$500, plus costs. Karn appealed to the trial court.<sup>2</sup> The trial court initially scheduled a hearing on Karn's summary appeal for May 26, 2009, but postponed the hearing for 60 days to abate the violations.

At the *de novo* hearing held on July 21, 2009,<sup>3</sup> the Borough's Code Enforcement Officer and the Commonwealth of Pennsylvania's Certified Electrical Inspector, Plan Review and Building Code Official testified for the Borough. The Borough also offered photographs of the Property, copies of the deed, tax assessment information, the Code and Borough Ordinance No. 695. Based upon the testimony and evidence presented, the trial court found Karn guilty of the Code violations. By order dated July 21, 2009, the trial court adjudged Karn guilty and entered a \$3,600 fine against him, plus costs.<sup>4</sup> This appeal now follows.<sup>5</sup> The

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<sup>2</sup> Docket No. SA 953 of 2009.

<sup>3</sup> Karn was not represented by counsel at the hearing, but William S. Karn, Esq., has acted on Karn's behalf, including filing the summary appeal with the trial court. R.R. at 31a-34a. Any person choosing to represent himself in a legal proceeding must, to a reasonable extent, assume that his lack of expertise and legal training will be his undoing. Huffman v. Unemployment Compensation Board of Review, 555 A.2d 287, 288 (Pa. Cmwlth. 1989) (citing Groch v. Unemployment Compensation Board of Review, 472 A.2d 286 (Pa. Cmwlth. 1984)).

<sup>4</sup> While the opinion refers to six violations, the order only refers to five. Review of the summary appeals docket reveals that Karn was cited for violating Section 302.7 (accessory structures) of the Code, but was not found guilty of this violation by the district magistrate.

Karn was previously cited on August 13, 2007 for multiple violations of Code, including the five violations cited herein. Karn appealed. On September 26, 2007, following a summary trial, the district magistrate found Karn guilty and imposed a fine of \$600 for each violation, plus costs. Karn appealed to the trial court at Docket No. SA 3254 of 2008. The summary appeals were heard together by the trial court on July 21, 2009. The summary appeals docket for Docket

(Continued....)

Borough has filed an Application for Dismissal of Appeal, which we shall address first.

The Borough contends that Karn's appeal should be dismissed due to serious violations of the Pennsylvania Rules of Appellate Procedure, namely, the failure to file a designation of content of reproduced record or a reproduced record and the failure to file a brief in support that materially complies with the rules. We disagree.

Rule 2154 of the Pennsylvania Rules of Appellate Procedure provides:

(a) General rule.-- ... the appellant shall not later than 30 days before the date fixed by or pursuant to Rule 2185 (service and filing of briefs) for the filing of his or her brief, *serve and file a designation of the parts of the record which he or she intends to reproduce* and a brief statement of issues which he or she intends to present for review. ... In designating parts of the record for reproduction, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall not engage in unnecessary designation.

Pa. R.A.P. 2154 (emphasis added). If an appellant fails to file his designation of reproduced record, brief or any required reproduced record within the time prescribed, an appellee may move for dismissal of the matter. Pa. R.A.P. 2188.

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No. SA 3254 of 2008 reveals that Karn was found not guilty of Section 307.2 (rubbish) of the Code.

<sup>5</sup> Our scope of review of a trial court's determination on appeal from a summary conviction is limited to determining whether there has been an error of law or whether the findings of the trial court are not supported by competent evidence. Commonwealth v. A.D.B., 752 A.2d 438 (Pa. Cmwlth. 2000).

Here, while Karn did not file a designation of contents of reproduced record, Karn did file a reproduced record. The only item contained in the reproduced record is the July 21, 2009 hearing transcript. The fact that parts of the record are not included in the reproduced record shall not prevent the parties or this Court from relying upon the original record.<sup>6</sup> Pa. R.A.P. 2152(c). Karn's failure to file a designation of contents has not been prejudicial to the Borough. Accordingly, we decline to dismiss the case on this basis. See Reliance Insurance Co. v. IRPC, Inc., 904 A.2d 912 (Pa. Super. 2006), petition for allowance of appeal denied, 591 Pa. 736, 921 A.2d 497 (2007).

The Borough also contends that Karn failed to file a brief in support that materially complies with the rules. Specifically, the Borough asserts that Karn's brief does not include an appropriate statement of jurisdiction, appropriate scope and standard of review and appropriate statement of questions involved with answers. Upon review, Karn's brief does include these components in compliance with Rule 2111. The brief also contains the text of the order appealed from (Pa. R.A.P. 2115), a copy of the trial court's opinion (Pa. R.A.P. 2111(b)), a statement of the case (Pa. R.A.P. 2117), summary of argument (Pa. R.A.P. 2118), and argument (Pa. R.A.P. 2119). While Karn's brief is by no means a model of appellate draftsmanship, his brief materially conforms to the basic requirements of the Pennsylvania Rules of Appellate Procedure.

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<sup>6</sup> An appellate court is limited to considering only those facts which have been duly certified in the record on appeal. Berninger v. Workers' Compensation Appeal Board (East Hempfield Township), 761 A.2d 218 (Pa. Cmwlth. 2000), petition for allowance of appeal denied, 565 Pa. 650, 771 A.2d 1287 (2001). While the Borough objects to "Exhibit A" of Karn's brief on the basis that it is not part of the certified record, the brief filed with this Court does not include an Exhibit A. The only item appended to Karn's brief is a copy of the trial court's

*(Continued....)*

Finally, the Borough contends that Karn failed to preserve issues raised on appeal as required by Rule 302 of the Pennsylvania Rules of Appellate Procedure. Rule 302 provides, as a general rule, “[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.” Pa. R.A.P. 302. An issue must be raised in the trial court in order to provide that court with the opportunity to consider the issue, rule upon it correctly, and obviate the need for appeal. Gustine Uniontown Associates, Ltd. ex rel. Gustine Uniontown, Inc. v. Anthony Crane Rental, Inc., 892 A.2d 830 (Pa. Super. 2006).

In this appeal, Karn raises the following issues for our review:

1. Whether there was a failure of due process of law in not dismissing charges when on May 26, 2009, the Borough’s building inspector failed to appear at the hearing.
2. Whether there was a failure of due process of law in the subsequent truncation of the court ordered 60-day continuance.
3. Whether there was a failure of due process of law when the Borough’s expert witness appeared at trial without prior notice to Karn and without proper delivery of written statement of substance of expected expert testimony.
4. Whether there was a failure of due process of law in accepting as meaningful the expert witness statement of electric wire appearance without meaningful instrument measuring of electrical performance.
5. Whether there was a failure of due process of law creating prejudice in linking the present property maintenance action to a civil rights cause of action

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opinion, which is contained in the certified record and required by Rule 2111(b) of the Pennsylvania Rules of Appellate Procedure.

asserted by a third person who is not a party to the case before the Court.

6. Whether there was a failure of due process of law in that the original citation named as defendant only a deceased party and the July 21, 2009 court order omitted a middle initial introducing further ambiguity into the record.

Review of the July 14, 2009 hearing transcript reveals that these objections were raised throughout the proceedings. While the issues were not framed as due process claims, Karn did argue unfairness. In the Concise Statement of Matters Complained of on Appeal filed by Karn with the trial court, Karn presented these issues as due process claims. The trial court addressed these issues in the opinion filed October 1, 2009. Thus, Karn's due process issues have been adequately preserved for appellate review. Accordingly, we deny the Borough's Application for Dismissal of Appeal. We now turn our attention to the merits of Karn's appeal.

Due process affords a party notice and an opportunity to be heard. Weaver v. Franklin County, 918 A.2d 194 (Pa. Cmwlth.), petition for allowance of appeal denied, 593 Pa. 751, 931 A.2d 660 (2007). Due process principles require an opportunity, among other things, to hear evidence adduced by an opposing party, cross-examine witnesses, introduce evidence on one's own behalf, and present argument. See Callahan v. Pa. State Police, 494 Pa. 461, 431 A.2d 946 (1981).

Karn contends that there was a failure of due process of law when the trial court continued the May 26, 2009 hearing. We disagree.

The hearing which was originally scheduled for May 26, 2009 was continued by the trial court to July 21, 2009. Counsel for the Borough explained that the Borough did appear at the originally scheduled date albeit without the presence of its only witness; based upon representations made by Karn that the

Property was in substantial compliance, the matter was continued to determine if the problems were indeed abated. Reproduced Record (R.R.) at 49a-50a; Borough's Brief at 10. The trial court's continuance order states "60 days to abate" and directs that the "CASE SHALL BE HEARD ON July 21, 2009 at 8:30 AM." Karn was given notice of the continuance order and appeared at the rescheduled hearing.

At the July 21, 2009 hearing, Karn argued that he was prepared to present his case at the originally scheduled hearing, but was not prepared on the ultimate hearing date. R.R. at 49a-50a. However, Karn did not request a continuance of the July 21, 2009 hearing. The court-ordered continuance had given Karn additional time to prepare his case and abate the violations on the Property. We find no due process violation in this regard.

Alternatively, Karn argues that he was denied due process because he was not given the full "60 days" as ordered. The continuance order clearly states that the hearing was rescheduled for July 21, 2009, which is approximately 60 days from the first scheduled hearing. We find no merit in this due process claim.

Karn further contends that he was denied due process because he was entitled to and did not receive notice of the appearance of the Borough's expert witness and a written statement regarding the substance to which the expert was expected to testify. We disagree.

The procedures governing summary cases are set forth in Chapter 4 of the Rules of Criminal Procedure. Within that chapter, there are no provisions pertaining to pretrial discovery. The rules pertaining to pretrial discovery are set forth in Rule 573 of the Pennsylvania Rules of Criminal Procedure. Rule 573(B)(2)(b) provides:

If an expert whom the attorney for the Commonwealth intends to call in any proceeding has not prepared a report of examination or tests, *the court, upon motion, may order that the expert prepare, and that the attorney for the Commonwealth disclose, a report stating the subject matter on which the expert is expected to testify; the substance of the facts to which the expert is expected to testify; and a summary of the expert's opinions and the grounds for each opinion.*

Pa.R.Crim.P. 573(B)(2)(b). The pretrial discovery procedures are only applicable to court cases, not summary cases for a property code violation. See Commonwealth v. Lutes, 793 A.2d 949 (Pa. Super. 2002) (A summary case is not a “court case” within the meaning of the Pennsylvania Rules of Criminal Procedure, and thus the rules related to pretrial discovery are inapplicable).<sup>7</sup> Even if this rule did apply, Karn did not file a motion for discovery.<sup>8</sup> At the hearing, Karn was given an opportunity to review all documentary evidence presented and

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<sup>7</sup> Rule 573(B)(2)(a) of the Pennsylvania Rules of Criminal Procedure provides:

In all *court cases*, except as otherwise provided in Rule 230 (Disclosure of Testimony Before Investigating Grand Jury), if the defendant files a motion for pretrial discovery, the court may order the Commonwealth to allow the defendant's attorney to inspect and copy or photograph any of the following requested items, upon a showing that they are material to the preparation of the defense, and that the request is reasonable.

(Emphasis added). The term “court case” is defined as “a case in which one or more of the offenses charged is a misdemeanor, felony, or murder of the first, second, or third degree.” Pa.R.Crim.P. 103. “Summary case” is defined as “a case in which the only offense or offenses charged are summary offenses.” Id. The explanatory note to Chapter 4 provides that “[u]nless otherwise provided in Chapter 4 or elsewhere in the Rules of Criminal Procedure, the court case rules are not intended to apply to summary cases.”

<sup>8</sup> “In such motion the party must set forth the fact that a good faith effort to discuss the requested material has taken place and proved unsuccessful.” Pa. R.Crim.P. 573(A).



cross-examine the Borough's witnesses. Due process requires nothing further in this regard.

Karn also claims that there was a failure of due process of law by the trial court's acceptance of the expert witness's testimony on the appearance of an electrical wire without any meaningful instrument measuring of electrical performance.

The trial court, as the finder of fact, passes upon the credibility of witnesses and the weight to be afforded the evidence produced. Commonwealth v. Griscavage, 512 Pa. 540, 517 A.2d 1256 (1986); Commonwealth v. Spontarelli, 791 A.2d 1254 (Pa. Cmwlth. 2002). The finder-of-fact is free to believe all, part, or none of the evidence, and this Court will not disturb the trial court's credibility determinations. Id.

Here, the Borough presented Robert Kauer, a Certified Electrical Inspector, Plan Review and Building Code Official. Kauer testified that on October 16, 2008, he personally inspected the exterior electrical system on the Property. R.R. at 36a. Based upon his visual inspection, he observed that the neutral conductors were exposed, the outer jacket was torn, and water was capable of entering the system in violation of the Code and National Electrical Code (2005 edition). R.R. at 36-37, 41. Kauer testified that subsequent to his inspection he reviewed photos of the Property, which showed that an attempt was made to cover the exposed cable with tar, but that it was not an acceptable repair. R.R. at 38a.

Karn cross examined the witness, but his questions focused on whether the electrical system was tested and functional. At the hearing, the trial court made it clear that the standard is not about performance or even safety, but whether it is in compliance with the objective standards set forth in the Code. R.R. at 45a-46a. According to the witness's testimony, the electrical system does

not comply with the Code. The trial court was free to accept the expert's testimony regarding the appearance of the electrical system and did not violate Karn's right to due process in doing so.

Karn further contends that he was denied due process because he was prejudiced by the linking of the present property maintenance action to a civil rights cause of action asserted by a third person, William S. Karn, who is not a party to the instant case. We disagree.

The discussion of the federal lawsuit arose in the context of settlement negotiations. R.R. at 28a. The Borough agreed to settle the case if the federal lawsuit, which the Borough averred is related to the instant matter, was withdrawn. R.R. at 5a, 29a. A settlement was not reached. R.R. at 28a-29a. Other than the Borough's brief synopsis, details of the federal lawsuit are not contained in record.<sup>9</sup> It is unclear how Karn was prejudiced in any way or denied due process by the Borough's offer to settle the case if the federal lawsuit was withdrawn.

Finally, Karn maintains that he was denied due process because the original citation named as the defendant a deceased party without ownership and the July 21, 2009 trial court order omitted a middle initial introducing further ambiguity into the record. We disagree.

The Borough admitted into evidence a deed in which William S. Karn conveyed full interest in the Property to his brother "James B. Karn" in life estate and to his nephew "James L. Karn" a contingent remainder interest. R.R. at 13a-

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<sup>9</sup> The Borough stated that the federal suit was filed by William S. Karn against the Borough on the grounds that he is being subjected to involuntary servitude for having to fix the Property without being compensated by the Borough in violation of the 13<sup>th</sup> Amendment of the U.S. Constitution. R.R. at 5a-6a. William S. Karn resides at the Property, but is not an owner of the Property and was not cited for violations of the Code. Id.

14a; C.R., Exhibits No. 2. The Board also presented assessment information showing “James L. Karn” as the owner of the Property and “James B. Karn” as an owner in life estate. R.R. at 11a, 14a; C.R., Exhibits No. 1. At the hearing, Karn stated that he is the current owner of the Property following the death of his father, James B. Karn, from whom he inherited the Property. R.R. at 4a-5a, 13a. The citations contained in the certified record, issued on December 30, 2008, identify “James Karn” as the defendant. Karn conceded that he had received and signed for the original citations. R.R. at 34a-35a. While we agree that the inclusion of Karn’s middle initial would have eliminated any doubt, it is clear that “James L. Karn”, not the deceased “James B. Karn”, is the owner of the Property and the defendant named in the citations and trial court order. As Karn was given proper notice, we find no due process violation in this regard.

Ultimately, we find no merit in any of Karn’s due process claims. The trial court held a *de novo* hearing on the merits of Karn’s appeal. Karn had notice of the hearing, attended the hearing and enjoyed an opportunity to be heard on all the issues he wished to raise. Karn heard the evidence adduced by the Borough, cross-examined its witnesses and presented argument. Karn was afforded all the process he was due.

Accordingly, the order of the trial court is affirmed.

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JAMES R. KELLEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Commonwealth of Pennsylvania | : |                    |
|                              | : |                    |
| v.                           | : | No. 1703 C.D. 2009 |
|                              | : |                    |
| James L. Karn,               | : |                    |
|                              | : |                    |
| Appellant                    | : |                    |

**ORDER**

AND NOW, this 8th of March, 2010, the Application for Dismissal of Appeal is DENIED and the order of the trial court, at Docket No. SA 953 of 2009, dated July 21, 2009, is AFFIRMED.

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JAMES R. KELLEY, Senior Judge