

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of PA :
 :
 v. : No. 2059 C.D. 2010
 : Submitted: March 25, 2011
 Thomas Zeller, :
 Appellant :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
 HONORABLE MARY HANNAH LEAVITT, Judge
 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY JUDGE LEAVITT

FILED: August 3, 2011

Thomas Zeller appeals from an order of the Court of Common Pleas of Westmoreland County (trial court) which denied his *de novo* appeal of a summary conviction based on a citation issued by the Borough of Scottdale (Borough) for rubbish accumulation on his property. Zeller contends that the summary conviction should be set aside because of procedural irregularities in the issuance of the citation and because the items accumulating on his property do not constitute rubbish. Discerning no merit to these arguments, we affirm.

On December 11, 2009, Zeller received a notice of violation, stating that he had accumulated an excessive number of garbage bags on his property in Scottdale, Pennsylvania, which posed a threat to public health, safety and welfare. Zeller was advised that he had 72 hours to remove the garbage and junk from his property. Reproduced Record at 12a (R.R. __). The notice also advised Zeller that

the exterior doors and roof of his house needed to be repaired within 30 days. The notice listed an “abate by” date of January 11, 2010. R.R. 10a.

On December 17, 2009, Zeller was issued a non-traffic citation for violating Section 307.1 of the International Property Maintenance Code (Code),¹ which was adopted in 2007 by the Borough as its own property maintenance code.² The citation stated that the property had an “accumulation and storage of rubbish/junk.” R.R. 13a. Zeller was not cited for not doing the structural repairs identified in the violation notice. The citation assessed Zeller a penalty of \$600, plus costs. A Magisterial District Judge found him guilty of the summary offense, and Zeller appealed his conviction to the trial court, which held a hearing on April 21, 2010.

At the hearing, Barry Whoric, Borough Manager, testified that the Borough contracts with Building Inspection Underwriters (BIU) to enforce the Code. Zeller’s property was inspected by George Lender, an employee of BIU.

Lender testified that he inspected Zeller’s property on December 2, 2009, and prepared the violation notice. When Zeller did not respond, Lender issued a citation. In support of the substance of the citation, Lender produced a number of photographs, which were entered into evidence. Lender testified that he visited the property two days prior to the hearing and found that it was still in the condition depicted in the photographs.

¹ INTERNATIONAL PROPERTY MAINTENANCE CODE (International Code Council 2006) (CODE).

² It provides that “[a]ll exterior property and premises, and the interior of every structure, shall be free from any accumulation of rubbish or garbage.” CODE, §307.1; R.R. 9a.

Lender explained that Zeller had accumulated garbage bags, buckets, cardboard, tires and several child-sized swimming pools in his yard. The swimming pools were filled with garbage bags and other debris. The photographs showed stacked bags of garbage that were encroaching into the street and on neighboring properties. He counted approximately 200 garbage bags in the yard and observed that Zeller himself had told Lender that there were over 500 bags in the yard. The garbage bags were not filled with household waste, but with yard waste and leaves.

Lender explained that Section 307.1 of the Code prohibits the accumulation of garbage or rubbish. The Code defines garbage as “animal or vegetable waste resulting from the handling, preparation, cooking and consumption of food.” CODE, §202; R.R. 7a. Lender agreed that the waste in the bags did not meet this definition. However, he stated that leaves and other yard waste in the bags did meet the definition of rubbish.³ Further, the bags create a habitat for fleas and vermin. The plastic swimming pools and buckets collect water and attract fleas and mosquitoes, which also creates a safety issue.

On cross-examination Lender was questioned about why the violation notice contained conflicting deadlines. The notice gave Zeller a 30-day “abate by” date, but it also stated that he had 72 hours to remove the garbage and junk.

³ Rubbish is defined as follows:

Combustible and noncombustible waste materials, except garbage; the term shall include the residue from the burning of wood, coal, coke and other combustible materials, paper, rags, cartons, boxes, wood, excelsior, rubber, leather, tree branches, yard trimmings, tin cans, metals, mineral matter, glass, crockery and dust and other similar materials.

CODE, §202; R.R. 8a.

Lender explained that the 72-hour deadline applied to the direction to remove the garbage and “junk,” with the word “junk” meaning “rubbish.” The “abate by” date referred to the structural defects in Zeller’s house.

Zeller then testified. He agreed that the photographs accurately depicted his property. However, he claimed he was using his property as an “urban garden.” R.R. 54a. In this “garden” grew 150 medicinal herbs and two-dozen vegetables. Counsel for the Borough objected to the testimony, arguing that it was irrelevant whether Zeller’s rubbish was used for gardening. Counsel contended that regardless of whether Zeller believed the rubbish served a useful purpose, it was still rubbish under the Code and constituted a public health threat. The trial court sustained the objection.

On cross-examination, Zeller admitted that there are rats in his neighborhood. However, he claimed that the rats were attracted by his neighbors’ bird feeders, not his yard accumulations. Zeller denied that his garbage bags created a habitat for mosquitoes or fleas.

Following the trial, the trial court, noting that the two separate time periods for compliance in the violation notice may have confused Zeller, deferred a ruling on Zeller’s appeal. Accordingly, Zeller was given 30 days to clean up his property. The trial court noted that the property’s rubbish accumulations violated the Code and that if Zeller did not correct the problems, he would be found guilty.

On June 29, 2010, the hearing reconvened before the trial court. Lender testified that he inspected Zeller’s property on May 21, 2010, 30 days after the trial, and found it unchanged. In support, Lender offered photographs that showed a yard overgrown with weeds, numerous cardboard boxes strewn

throughout and several large piles of garbage bags. Certified Record, Borough Exhibit 1. Zeller testified that he did remove the tires that were on the property and that “out of the 500 bags of mulch there, I removed 400 of the bags.” R.R. 76a-77a. Counsel for Zeller agreed that the property is not “up to the borough’s satisfaction,” but he argued Zeller had made a good faith effort to clean it up.⁴ R.R. 75a.

The trial court held that Zeller violated the Code and fined him \$600, plus costs. Zeller has now appealed to this Court.⁵

Zeller presents four issues for our review. First, Zeller argues that it was improper for the citation to be issued prior to the abatement date listed on the notice of violation and that this defect was not cured by the trial court’s 30-day continuance. Second, Zeller argues that the violation notice speaks to “garbage” and “junk,” which was not on his property. Third, Zeller argues that the trial court impermissibly prevented him from testifying as to how each item in his yard was instrumental to his urban farming undertaking, arguing that yard “rubbish” is not “waste” because it serves a useful purpose. Finally, Zeller asserts that it was unconstitutional to interpret the Code in a way that determines whether something is rubbish based on its composition rather than its use.

We begin with Zeller’s claim that the citation should have been dismissed because the notice of violation contained an abatement date of January

⁴ Zeller did not provide any explanation as to why he did not remove all of the rubbish. No claims of hardship, such as time constraints or monetary issues, were raised.

⁵ Our review in an appeal from a summary conviction is whether competent evidence supports the findings or whether an error of law has been committed. *Commonwealth v. Nicely*, 988 A.2d 799, 803 n.3 (Pa. Cmwlth. 2010).

11, 2010, and the citation was issued on December 17, 2009, prior to the expiration of the abatement date.

Lender explained that the abatement date in the violation notice applied to the repairs, not the rubbish removal. The trial court gave Zeller the benefit of the doubt by allowing him 30 days to remove the rubbish. Zeller acknowledges that the Pennsylvania Rules of Criminal Procedure provide that a citation will not be dismissed based on a defect in its form or content, unless prejudice is established. PA. R. CRIM. P. 109.⁶ However, Zeller claims that giving him 30 additional days to correct the problem does not cure the legal deficiency of the citation, which was issued prematurely. He claims that the trial court should have dismissed the citation.

Zeller offers no authority to support his argument that the citation had to be dismissed because of an ambiguity in the violation notice. The violation notice gave Zeller 72 hours to remove the rubbish. The trial court gave him until June 29, 2010, to cure the violation, effectively replacing the original 72-hour deadline with a new one, over six months later. Zeller chose to squander this gift of time to comply with the Code and to avoid sanctions. His procedural argument lacks merit.

⁶ It provides, as follows:

A defendant shall not be discharged nor shall a case be dismissed because of a defect in the form or content of a complaint, citation, summons, or warrant, or a defect in the procedures of these rules, unless the defendant raises the defect before the conclusion of the trial in a summary case or before the conclusion of the preliminary hearing in a court case, and the defect is prejudicial to the rights of the defendant.

PA. R. CRIM. P. 109.

Zeller's second claim of error is that he actually complied with the violation notice because the notice only refers to "garbage" and "junk." Because his garbage bags did not contain "garbage," as defined by the Code, and "junk" is not defined, Zeller argues that no violation was demonstrated.

The notice of violation contained more than a reference to "garbage" and "junk." As noted by the Borough, it refers several times to "rubbish." It also informed Zeller that his property has an excess accumulation of "garbage bags," which were intruding upon neighboring properties. "Garbage" is defined as "animal or vegetable waste resulting from the handling, preparation, cooking and consumption of food." CODE, §202; R.R. 7a. Although the contents of the bags may not be "garbage," that is irrelevant. The notice further informs Zeller that accumulations of "rubbish *or* garbage" violate the Code. R.R. 11a (emphasis added).

Section 307.2 of the Code requires the disposal of rubbish in a sanitary manner, and Section 307.2.1 of the Code states that "the owner of every occupied premises shall ... be responsible for the removal of rubbish." CODE, §307.2.1; R.R. 9a. We reject Zeller's argument that he complied with the violation notice because his garbage bags contained rubbish, as opposed to garbage.

Zeller's third allegation of error challenges the trial court decision not to admit his testimony that the "garbage bags" served a useful purpose because they were used in his urban farming program. Zeller notes that Section 202 of the Code defines rubbish as "[c]ombustible and noncombustible waste materials...." CODE §202; R.R. 8a. He claims that the items in his yard were not rubbish because

they were being used, and “waste materials” are materials that are neither useful nor wanted.

The Code defines “rubbish” as follows:

Combustible and noncombustible waste materials, except garbage; the term shall include the residue from the burning of wood, coal, coke and other combustible materials, paper, rags, cartons, boxes, wood, excelsior, rubber, leather, tree branches, yard trimmings, tin cans, metals, mineral matter, glass, crockery and dust and other similar materials.

CODE, §202; R.R. 8a. “Rubbish” includes many items that even Zeller admits were in his yard, such as cartons, rubber, tree branches and yard trimmings. Even Zeller’s counsel referred to the items as “garbage bags of leaves.” R.R. 58a. We agree with the trial court that Zeller was properly cited for an accumulation of rubbish on his property. The Code does not make an exception for “useful rubbish.”⁷ Thus, any testimony from Zeller in this regard is irrelevant.

Zeller’s final issue is that it is improper to construe the word “rubbish” in the Code by its composition rather than by its use. Zeller argues that the Code is unconstitutionally vague and broad and that he cannot be held criminally responsible for conduct which he could not reasonably understand to be proscribed. The Borough argues that Zeller has raised this issue for the first time in his appeal to this Court and that the issue is not developed in a cogent fashion. We agree.

⁷ Indeed, such an exception would render the Code irrelevant as one could find some useful purpose in almost any item of rubbish.

“Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.” PA. R.A.P. 302(a). This includes issues that raise a constitutional claim. *Commonwealth v. Parente*, 956 A.2d 1065, 1069 n.10 (Pa. Cmwlth. 2008). Because Zeller did not raise this issue at the hearing, it has not been preserved. Accordingly, it will not be addressed.

For the above-stated reason, we affirm the trial court.

MARY HANNAH LEAVITT, Judge

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Commonwealth of PA	:	
	:	
v.	:	No. 2059 C.D. 2010
	:	
Thomas Zeller,	:	
Appellant	:	

ORDER

AND NOW, this 3rd day of August, 2011, the judgment of sentence of the Court of Common Pleas of Westmoreland County, dated June 29, 2010, in the above captioned matter is hereby AFFIRMED.

MARY HANNAH LEAVITT, Judge