

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania :
 :
 v. : No. 2381 C.D. 2010
 : SUBMITTED: July 8, 2011
Mikaela A. Fisher, :
 Appellant :

**BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge**

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: September 27, 2011

Appellant, Mikaela A. Fisher, appeals from the order of the Court of Common Pleas of Allegheny County (trial court), which found her guilty of violating Chapter 15, Section 205 of the Mt. Lebanon Code and imposed a fine of \$300, plus costs. We affirm.

Appellant owns rental property located at 244 and 242 Lemoyne Avenue, Pittsburgh, Pennsylvania. On July 29, 2009, Mount Lebanon code enforcement officer Doug Baird sent Appellant a letter via certified mail. The letter informed Appellant that her property was in violation of Chapter 15, Section 201 (Notice to Construct or Repair Sidewalk) of the Mt. Lebanon Code and Section 205 (Obstruction of Sidewalk Prohibited) of the Mt. Lebanon Code.

Section 201 requires that property owners properly maintain the surface and structure of the sidewalk. Section 205 provides in relevant part:

It shall be unlawful for any person to deposit any dirt, glass, rubbish, garbage or refuse matter, upon any of the sidewalks in the public highways of the Municipality. The sidewalks shall be kept open and unobstructed at all times for the use of the public, and the owner of the abutting property shall keep the sidewalk areas free from weeds, hedges and other similar obstructions at all times...

The letter requested that Appellant “maintain sidewalk & roadway along Lemoyne Avenue from plants, weeds and other debris.” Baird sent Appellant a second letter citing the same violations on August 3, 2009. On August 28, 2009, Baird sent a third letter citing violations of both Section 201 and 205. This letter was accompanied by a citation for only a violation of Section 201.

Appellant filed a *pro se* summary appeal of the citation. The trial court held two *de novo* hearings on July 20, 2010 and September 28, 2010. Code enforcement officer Baird testified at both hearings. Appellant testified on her own behalf and cross-examined Baird. Appellant testified that she did not want the responsibility to maintain grass at a rental property so she planted lilac bushes on the front lawn and the strip between the sidewalk and the curb. The Commonwealth submitted photos of the property showing that the lilac bushes, which ranged in height from two to five feet in height, completely occupied Appellant’s entire property from the curb to the sidewalk and from the sidewalk to the front door. Appellant testified that after she received the letters she used rope to tie up the lilac bushes so that the bushes did not encroach upon the sidewalk. Baird testified that the bushes, particularly when weighed down by water, still encroached upon the sidewalk. At the close of the July 20 hearing, the trial court

stated that it was going to postpone ruling for sixty days. At the September 28 hearing, the Commonwealth submitted additional photographs of the property taken the day prior showing that the condition of the property was unchanged. At the close of the hearing, the trial court found Appellant guilty and fined her \$300 plus costs. This appeal followed.

Appellant challenges the trial court's ruling on three grounds.¹ First, Appellant asserts that the trial court erred because the Commonwealth failed to submit sufficient evidence to show that Appellant had violated Section 205. Second, Appellant argues that the trial court violated her right to due process by allowing the Commonwealth to submit evidence of violation of Section 205 when the citation asserted only a violation of Section 201. Finally, Appellant contends that the trial court violated her right to due process when it permitted the Commonwealth to submit additional evidence at the September 28, 2010 hearing.

Appellant asserts the trial court erred because the Commonwealth failed to show that sidewalk in front of Appellant's property was obstructed by plant material. Appellant argues that the essence of the Commonwealth's concern is that the lilacs obstructed adjoining property owners' view of the street when exiting their driveways and that this concern is not an element of the code provisions at issue. Appellant also asserts that the Commonwealth's concerns regarding encroachment upon the sidewalk are merely hypothetical because Baird testified that the ropes "could" break and the vegetation would obstruct the

¹ The Commonwealth has the never-shifting burden of proving all elements of a summary offense beyond a reasonable doubt. In considering whether the evidence is sufficient to convict, the Court must "view all of the evidence admitted at trial, together with all reasonable inferences therefrom, in the light most favorable to the Commonwealth." *Commonwealth v. Nicely*, 988 A.2d 799, 803 (Pa. Cmwlth. 2010) [quoting *Commonwealth v. Spontarelli*, 791 A.2d 1254, 1258 (Pa. Cmwlth. 2002)].

pathway. These arguments are without merit. Although Baird did testify regarding obstruction of the sightlines and did testify regarding the ropes potentially breaking, the Commonwealth also submitted numerous photographs demonstrating that the vegetation, despite being held back by rope, continued to overhang the sidewalk and otherwise encroach upon the right-of-way. Accordingly, there is ample evidence of record to find a violation of Section 205.

Appellant also argues that there is a strong inference that she complied with the request made in the three letters because the citation alleged a violation of Section 201 only. This argument is also without merit. The third letter and the citation were mailed together. The third letter specifically notes a violation of Section of 205. Further, the citation lists the three letters mailed to Appellant and notes that there was no change to the condition of the property following mailing of the first and second letter.

Appellant asserts that the trial court violated her right to due process by proceeding upon a violation of Section 205 when the citation noted only a violation of Section 201. Procedural due process requires that an individual be given adequate notice of the charges against the individual and an opportunity to be heard. *Dunn v. Dep't of Transp.*, 819 A.2d 189 (Pa. Cmwlth. 2003). Due process is not an inflexible, technical conception with a fixed meaning unrelated to the particular circumstances of a case. *Id.* Due process is satisfied if a citation specifically states what section of a law or regulation a person is charged with violating and provides enough information about the charges so that the individual can properly defend herself. *Commonwealth v. Nicely*, 988 A.2d 799, 807 (Pa. Cmwlth. 2010). Minor or technical errors do not implicate due process concerns. *Commonwealth v. Ohle*, 503 Pa. 566, 470 A.2d 61 (1983). Pennsylvania Rule of

Criminal Procedure 109 provides that a case shall not be dismissed due to a defect in a citation, unless the defendant raises that defect prior to the conclusion of the trial.²

The trial court did not err in allowing the Commonwealth to submit evidence regarding a violation of Section 205. Although the citation itself lists only a violation of Section 201, the accompanying letter and the prior two letters clearly informed Appellant that the Commonwealth was also asserting a violation of Section 205. Thus, if read together, the third letter and the citation clearly informed Appellant that the Commonwealth was asserting violations of Section 201 and Sections 205. There is no evidence that Appellant was unable or unprepared to defend against the alleged violation of Section 205. Appellant was able to testify on her own behalf and to cross-examine the Commonwealth's witness. In addition, the violation of Section 205 was the only violation presented during the course of two hearings. Finally, Appellant failed at any time during the hearings to object to the defect in the citation. *See* Pa.R.Crim.P. 109.

Appellant argues that common pleas violated her due process rights by allowing the Commonwealth to submit additional evidence at the September 28 hearing. It is within the trial court's discretion to allow either side to reopen its case, prior to judgment, to prevent a failure or miscarriage of justice. *Commonwealth v. Flood*, 627 A.2d 1193 (Pa. Super. 1993). The admissibility of

² Pa.R.Crim.P. 109 provides in relevant part:

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...and the defect is prejudicial to the rights of the defendant.

evidence is a matter solely within the discretion of the trial court. *Commonwealth v. Smith*, 548 Pa. 65, 75, 694 A.2d 1086, 1091 (1997).

The trial court never formally closed the record after the first hearing. At the close of the July 20 hearing, the trial court stated that it was going to check the law on this issue and that it was giving Appellant sixty days to meet the requirements of the code. July 20, 2010, Notes of Testimony at 11. At the beginning of the September 28 hearing, the trial court noted that it was supposed to make a judgment. September 28, 2010, Notes of Testimony at 2. However, the trial court then asked the parties to state their positions. The trial court allowed both the Appellant and the Commonwealth to make further arguments. It also permitted the Commonwealth to submit additional photographic evidence and allowed code enforcement officer Baird to testify and be cross-examined. Appellant failed to object to the trial court's actions at any time during the September 28 hearing and, in fact, fully participated in the hearing. Thus, we conclude that the trial court did not abuse its discretion.

For all of the foregoing reasons, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

Judges Leavitt and Brobson did not participate in the decision in this case.

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ORDER

AND NOW, this 27th day of September, 2011, the order of Court of Common Pleas of Allegheny County is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge

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 HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
 BY SENIOR JUDGE KELLEY

FILED: September 27, 2011

I respectfully dissent.

In any criminal proceeding, a defendant is entitled to formal notice of the charges against her, and she cannot be convicted of a crime for which she was never formally charged. Commonwealth v. MSG Associates, Inc., 638 A.2d 441 (Pa. Cmwlth. 1994). See also DeJonge v. State of Oregon, 299 U.S. 353, 362 (1937) (“[C]onviction upon a charge not made would be sheer denial of due process....”). Because the citation did not charge Fisher with violating Section 205, and because the citation was never amended to include such a charge, the trial court erred in finding her guilty of violating that provision. MSG Associates, Inc.

Accordingly, I would vacate the trial court’s order.

JAMES R. KELLEY, Senior Judge