REL: May 22, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2190044

Alabama Department of Environmental Management

v.

Roland H. "Joey" Douglas II

Appeal from Montgomery Circuit Court
(CV-19-900109)

EDWARDS, Judge.

The Alabama Department of Environmental Management ("ADEM") appeals from a judgment entered by the Montgomery Circuit Court ("the trial court") reducing the civil penalty

that ADEM had assessed against Roland H. "Joey" Douglas II from $5,000 to $500. We reverse and remand.

On January 18, 2019, ADEM filed a complaint against Douglas in the trial court. The complaint included (1) a claim for enforcement of a February 7, 2018, administrative order that had imposed a $5,000 civil penalty against Douglas, see Ala. Code 1975, § 22-22A-5(18)a., and (2) a claim seeking an order imposing additional penalties against Douglas for his failure to comply with the obligations imposed on him by the February 2018 order, see Ala. Code 1975, § 22-22A-5(18)b. The February 2018 order concerned two open-burning incidents that had occurred on property where Douglas operated a tree-service business in Marshall County.[1] The open-burning incidents

[1]The proper venue for a claim under § 22-22A-5(18)a. is "in the Circuit Court of Montgomery County or the county in which the defendant does business." The proper venue for a claim under § 22-22A-5(18)b. is "in the circuit court of the county in which the defendant or any material defendant resides or does business or in which the violation occurred ...." Rule 82(c), Ala. R. Civ. P., provides that, "[w]here several claims ... have been joined, the suit may be brought in any county in which any one of the claims could properly have been brought." Because Montgomery County was the proper venue for ADEM's claim under § 22-22A-5(18)a., ADEM also could bring its claim under § 22-22A-5(18)b. in Montgomery County.

purportedly violated the Alabama Air Pollution Control Act, Ala. Code 1975, § 22-28-1 et seq.

Regarding ADEM's claim for enforcement of the $5,000 civil penalty that ADEM had assessed against Douglas, ADEM alleged that Douglas had not appealed the February 2018 order to the Environmental Management Commission pursuant to Ala. Code 1975, § 22-22A-7 (discussing the procedures applicable to administrative appeals to the Environmental Management Commission), that the February 2018 order therefore had become final, and that Douglas had not paid the $5,000 civil penalty as required by the February 2018 order. See § 22-22A-5(18)a. (stating that a civil penalty must be paid "in full within 45 days after issuance of such order unless any person has filed a timely request for a hearing to contest the issuance of such order in accordance with Section 22-22A-7"). ADEM also alleged that the February 2018 order itself was not subject to judicial review in its action against Douglas seeking the enforcement of that order. See Ala. Code 1975, § 22-22A-7(c)(7) ("Administrative action with respect to which review ... could have been obtained under this section shall not be subject to judicial review in any civil or criminal proceeding

for enforcement."). Regarding ADEM's claim for the assessment of additional penalties against Douglas, ADEM alleged that it was entitled to an assessment of "additional penalties by [the trial c]ourt for [Douglas's] fail[ure] to comply with [the February 2018 order] and applicable ADEM regulations." ADEM requested that the trial court order Douglas to comply with the February 2018 order and applicable law and that the trial court "assess the maximum penalty allowed by law against [Douglas], including the unpaid $5,000.00 civil penalty."

Douglas appeared pro se; he did not file an answer or a motion in response to ADEM's complaint. The trial court set ADEM's action for a trial to be held on July 9, 2019. On that date, the trial court conducted an ore tenus proceeding, receiving testimony from Donald W. Barron II, who heads the Special Services Section of ADEM, and from Douglas. During the trial, the February 2018 order was admitted into evidence. The February 2018 order states:

> "4. ADEM Admin. Code r. 335-3-3-.01(2)(b)1, states that '... open burning must take place on the property on which the combustible fuel originates.'
>
> "5. ADEM Admin. Code r. 335-3-3-.01(2)(b)2, states that '... open burning must be at least 500 feet from the nearest occupied dwelling other than

a dwelling located on the property on which the burning is conducted.'

"6. ADEM Admin. Code r. 335-3-3-.01(2)(b)7, states that '[t]he fire shall be attended at all times.'

"7. On May 22, 2017, [ADEM] conducted a complaint investigation at [Douglas's business] and observed evidence of illegal open burning of imported vegetation approximately 220 feet from the nearest occupied dwelling not on the property in violation of ... r. 335-3-.01(2)(b)1 and [r.] 335-3-3-.01(2)(b)2. [ADEM's] inspector provided Douglas with a copy of the ADEM open burning regulations and explained the regulations to Douglas.

"8. On May 23, 2017, [ADEM] issued a Warning Letter to Douglas regarding the unauthorized open burning. The Warning Letter was returned to the Department on June 12, 2017, as unclaimed.

"9. On July 17, 2017, [ADEM] conducted a second complaint investigation at [Douglas's business] and observed a large pile of burning/smoldering imported logs. The flames were visible, and the fire was unattended. This burning was conducted in violation of ... r. 335-3-.01(2)(b)1 and [r.] 335-3-3-.01(2)(b)7.

"10. On August 1, 2017, [ADEM's] staff spoke with Douglas by telephone concerning the Warning Letter and the burning. Douglas gave his email address during this conversation and a message was sent the following day by email informing him to send his response by August 25, 2017. [ADEM] has never received a response from Douglas.

"11. Pursuant to Ala. Code [1975,] § 22-22A-5(18)c., as amended, in determining the amount of any penalties [ADEM] must give

> consideration to the seriousness of the violation, including any irreparable harm to the environment and any threat to the health or safety of the public; the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty."

The February 2018 order then recited ADEM's consideration of the factors quoted above, assessed a $5,000 civil penalty against Douglas for the 2 open-burning violations, and directed Douglas to pay the civil penalty within 45 days of the issuance of the order.[2] Attached to the February 2018 order was a "certificate of service" indicating that a representative of ADEM had personally served Douglas with the February 2018 order on February 8, 2018. Also admitted into evidence was a letter from ADEM to Douglas that purportedly was hand delivered to Douglas on February 8, 2018. That letter informed Douglas that the civil penalty described in the February 2018 order must be paid within 45 days and that

[2]An attachment to the order described the allocation of the civil penalty as $2,500 for the seriousness of the two open-burning violations, $1,000 for Douglas's failure to satisfy the pertinent standard of care, $500 for a history of previous violations, and $1,000 for the economic benefit to Douglas.

he had a right to appeal to the Environmental Management Commission regarding the February 2018 order.

On July 10, 2019, the trial court entered a judgment that states:

> "THIS CAUSE comes before this Court for an enforcement of [the February 2018] order from [ADEM] against ... Douglas. ... After listening to the testimony and arguments made by the parties, as well as a review of all the filings, this Court hereby rules as follows:
>
> > "1.) The Court finds in favor of ... ADEM[] and against ... Douglas.
> >
> > "2.) However, this Court feels that the fine originally assessed at $5,000.00 is arbitrary and capricious, so therefore this Court hereby reduces the fine to $500.00 ...."

ADEM filed a timely postjudgment motion, renewing an argument that it had made during the trial, namely, that the February 2018 order was not subject to judicial review in the action and that the trial court therefore could not reduce the civil penalty that ADEM had assessed against Douglas in the February 2018 order. On August 20, 2019, the trial court entered an order denying ADEM's postjudgment motion. ADEM filed a timely notice of appeal to this court.

The standard of review that we apply in cases in which the trial court considers oral testimony is well settled.

> "[A] presumption of correctness attaches to a trial court's factual findings premised on ore tenus evidence. Ex parte J.E., 1 So. 3d 1002, 1008 (Ala. 2008). When evidence is taken ore tenus and the trial judge makes no express findings of fact, this Court will assume that the trial judge made those findings necessary to support the judgment. Transamerica Commercial Fin. Corp. v. AmSouth Bank, N.A., 608 So. 2d 375, 378 (Ala. 1992) (citing Fitzner Pontiac-Buick-Cadillac, Inc. v. Perkins & Assocs., Inc., 578 So. 2d 1061 (Ala. 1991)). We will not disturb the findings of the trial court unless those findings are 'clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence.' Gaston v. Ames, 514 So. 2d 877, 878 (Ala. 1987) (citing Cougar Mining Co. v. Mineral Land & Mining Consultants, Inc., 392 So. 2d 1177 (Ala. 1981)). '"The trial court's judgment [in cases where evidence is presented ore tenus] will be affirmed, if, under any reasonable aspect of the testimony, there is credible evidence to support the judgment."' Transamerica, 608 So. 2d at 378 (quoting Clark v. Albertville Nursing Home, Inc., 545 So. 2d 9, 13 (Ala. 1989), and citing Norman v. Schwartz, 594 So. 2d 45 (Ala. 1991)); see also Ex parte Perkins, 646 So. 2d 46 (Ala. 1994).
>
> "'However, the ore tenus standard of review has no application to a trial court's conclusions of law or its application of law to the facts; a trial court's ruling on a question of law carries no presumption of correctness on appeal.' Ex parte J.E., 1 So. 3d at 1008 (citing Perkins, 646 So. 2d at 47, and Eubanks v. Hale, 752 So. 2d 1113, 1144-45 (Ala. 1999)). This Court '"review[s] the trial court's conclusions of law and its application of law to the facts under the de novo standard of

> review."' Id. (quoting Washington v. State, 922 So. 2d 145, 158 (Ala. Crim. App. 2005))."

Espinoza v. Rudolph, 46 So. 3d 403, 412 (Ala. 2010).

ADEM argues that § 22-22A-7(c)(7) precluded the trial court from modifying the civil penalty that ADEM had imposed against Douglas in the February 2018 order.[3] We agree.

[3]Regarding the trial court's stated grounds for reducing the civil penalty from $5,000 to $500, i.e., that $5,000 was an "arbitrary and capricious" amount for the penalty, Douglas made no argument to the trial court that the $5,000 civil penalty was arbitrary and capricious; he presented no evidence that would support such a defense; and he presented no evidence to support the conclusion that $500 was a more appropriate civil penalty. However, ADEM did not argue to the trial court, and ADEM has not argued on appeal, that the trial court's determination that the $5,000 amount was arbitrary and capricious was not supported by the evidence. ADEM instead has relied solely on the logically antecedent argument that the trial court could not consider the issue whether the civil penalty assessed in the February 2018 order was arbitrary and capricious because § 22-22A-7(c)(7) precludes judicial review in a civil-enforcement proceeding of an "[a]dministrative action with respect to which review ... could have been obtained under [§ 22-22A-7] ...." Thus, ADEM waived any argument that the evidence would not support the trial court's conclusion that $5,000 was an arbitrary and capricious amount for the civil penalty imposed by the February 2018 order. See, e.g., Gary v. Crouch, 923 So. 2d 1130, 1134 (Ala. Civ. App. 2005).

Also, a claim pursuant to § 22-22A-5(18)b. may not include an assessment of a civil penalty for a violation that is already the subject of "an order assessing a civil penalty for such violation" under § 22-22A-5(18)a. To the extent that ADEM's complaint included a claim for an assessment of a civil penalty pursuant to § 22-22A-5(18)b. -- i.e., for violations in addition to the open-burning violations addressed in the

Barron, the head of ADEM's Special Services Section, testified that one of his responsibilities was to oversee open-burning issues for ADEM. Barron authenticated a copy of the February 2018 order that was introduced into evidence, and he testified that, based on numerous complaints ADEM had received from Douglas's neighbor, ADEM had investigated an open burning that Douglas was conducting, that an ADEM inspector had spoken with Douglas about that burning, and that thereafter ADEM had investigated a second open burning by Douglas. During direct examination by counsel for ADEM, Barron stated that ADEM had

> "mailed ... Douglas a warning letter regarding the open burning, and we -- it was returned to us. The -- I then contacted ... Douglas by phone, and he gave me his e-mail address, and I e-mailed it to him and gave him a date to respond, and no response was received.
>
> "At that point, we moved forward with a proposed administrative order that was hand-delivered by an

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February 2018 order -- Ala. Code 1975, § 22-22A-5(18)c., requires the consideration of several factors in determining the amount of any civil penalty. ADEM presented no evidence at trial regarding those factors and made no argument to the trial court regarding ADEM's claim seeking additional penalties under § 22-22A-5(18)b. Accordingly, ADEM abandoned its claim seeking an order imposing additional penalties against Douglas pursuant to § 22-22A-5(18)b. See Parker v. Harville, 58 So. 3d 1270, 1271 n.1 (Ala. Civ. App. 2010) (concluding that a claim was abandoned when the claimant "presented no evidence in support of [the claim] at trial"); Van Hoof v. Van Hoof, 997 So. 2d 278, 284 n.12 (Ala. 2007).

> inspector and allowed [Douglas] time to contact [ADEM] to discuss this, have a show-cause meeting, and no response was received.
>
> "At that point, after 30 days, I believe -- usually that's the time. We moved forward with the administrative order process."

Barron testified that the February 2018 order was then issued and hand delivered to Douglas. According to Barron, Douglas did not thereafter timely request a hearing with the Environmental Management Commission regarding the February 2018 order. Douglas did not object to any of Barron's testimony.

After Barron's testimony, the trial court asked Douglas, who had been sworn as a witness, if he wanted to tell the trial court anything. During Douglas's testimony, ADEM objected to Douglas's attempt to "relitigate" the administrative action that was the subject of the February 2018 order, referencing § 22-22A-7. The trial court made no express ruling on ADEM's objection. Douglas testified:

> "[I] was contacted by the inspector about burning. He showed up on my property, and I was there. He had informed me that he thought I was importing material in and burning it on my property; I was not. I was cleaning up trees that I've cut on my property, making room for the larger building to go in, a 50-by-75 metal building going in. And he told me that I asked him, do I need to put it out? He

> said, no, I can finish letting it all burn up, but don't burn no more.
>
> "I cleaned up everything, and I have not burned any more. I've got pictures of what the site looks like now."

Douglas's photographs were then admitted into evidence. Douglas later testified that the second open-burning incident had occurred. Thereafter, Douglas testified that he had not had a conversation with Barron or any other ADEM agent about his e-mail address and that he had not received the February 2018 order or any other documents from ADEM before the filing of the complaint. Also, after initially admitting that the open burnings at issue had occurred within 500 feet of the complaining neighbor's home, Douglas attempted to "withdraw" that testimony. The following colloquy then occurred:

> "[COUNSEL FOR ADEM]: Judge, these would have been some wonderful things to bring up if he had showed up at the administrative hearing or asked for one.
>
> "MR. DOUGLAS: I would have loved to have known about that.
>
> "THE COURT: All right. Here's my last question. And I understand, you know, the rules say once you pass the administrative portion, you're in the enforcement portion, I don't get to review the administrative side.
>
> "However, my question is -- and this is for you.

> "You hang tight.
>
> "The fines. Because that's -- is that something that's within my purview? That's my question.
>
> "[COUNSEL FOR ADEM]: Judge, I think that I would say that you can't disturb the order, is the way I understand the law is that you can only basically, it's like recognizing a judgment from another state almost. You have to -- you would accept the order and recognize it from another state.
>
> "THE COURT: Okay.
>
> "[COUNSEL FOR ADEM]: The way I read the law, he don't get to retry his case.
>
> "THE COURT: I understand. And I got that part. I do understand that.
>
> "All right. I'll take a look at it."

Section 22-22A-7(c)(1), Ala. Code 1975, requires that a request for a "hearing to contest an administrative action of [ADEM] ... must be filed with the Environmental Management Commission within 30 days of the contested administrative action." Although Douglas argued at trial that he had not received the February 2018 order, the letter informing him of his right to appeal the February 2018 order to the Environmental Management Commission, or any other documentation from ADEM during the investigation of the alleged open-burning incidents, the trial court appears to

have rejected that argument and accepted as true Barron's testimony that ADEM had provided Barron with notice regarding its investigation and the February 2018 order and accompanying letter that were hand delivered to Douglas on February 8, 2018. It is undisputed that Douglas failed to timely appeal from that order.

Our standard of review precludes this court from rejecting a trial court's express or implicit findings of fact when ore tenus evidence was presented supporting the same. Thus, we must accept the trial court's implicit conclusion that Douglas received the February 2018 order and that he failed to timely appeal that order. As ADEM correctly notes, § 22-22A-7(c)(7) states that "[a]dministrative action with respect to which review ... could have been obtained under this section shall not be subject to judicial review in any civil or criminal proceeding for enforcement." See also Ala. Code 1975, § 22-22A-3(8) (defining "administrative action" as including "the issuance, modification or repeal of any order, notice of violation, citation, rule or regulation by [ADEM]"); Ala. Code 1975, § 22-22A-7(c)(3) (authorizing the Environmental Management Commission to enter an order on

appeal "modifying, approving or disapproving [ADEM's] administrative action"); and § 22-22A-7(c)(6) (authorizing an appeal to the appropriate circuit court from "[a]ny order of the Environmental Management Commission made pursuant to the above procedure, modifying, approving or disapproving [ADEM's] administrative action").

> "'When the language of a statute is plain and unambiguous, ... courts must enforce the statute as written by giving the words of the statute their ordinary plain meaning -- they must interpret that language to mean exactly what it says and thus give effect to the apparent intent of the Legislature.'"

Ex parte Pfizer, Inc., 746 So. 2d 960, 964 (Ala. 1999) (quoting Ex parte T.B., 698 So. 2d 127, 130 (Ala. 1997)).

ADEM's action sought enforcement of the February 2018 order, an order for which Douglas could have sought review under 22-22A-7(c)(7). Douglas failed to timely seek such review. Accordingly, the trial court erred by reviewing the merits of that order and by modifying the $5,000 civil penalty assessed in that order. See § 22-22A-7(c)(7); see also United States v. Gulf States Steel, Inc., 54 F. Supp. 2d 1233, 1242 (N.D. Ala. 1999) (citing § 22-22A-7(c) for the proposition that "Alabama state law ... expressly prohibits an alleged ... violator from collaterally attacking the terms of its permit

in an enforcement proceeding"); City of Graysville v. Glenn, 46 So. 3d 925, 931 (Ala. 2010) (affirming a summary judgment in favor of the director of ADEM when the City of Graysville failed to exhaust its administrative remedies by appealing ADEM's order to the Environmental Management Commission and no exception to the doctrine of exhaustion of administrative remedies was applicable).

Based on the foregoing, the July 2019 judgment is reversed, and this case is remanded to the trial court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Thompson, P.J., and Moore, Donaldson, and Hanson, JJ., concur.