IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

CITY OF SIERRA VISTA,
Plaintiff/Appellee,

v.

ANTHONY S. WENC,
Defendant/Appellant.

No. 2 CA-CV 2018-0010
Filed February 5, 2019

Appeal from the Superior Court in Cochise County
No. CV201700395
The Honorable Charles A. Irwin, Judge

AFFIRMED

COUNSEL

Nathan J. Williams, Sierra Vista City Attorney
By Nathan J. Williams, Sierra Vista
Counsel for Plaintiff/Appellee

Ahwatukee Legal Office P.C., Phoenix
By David L. Abney
Counsel for Defendant/Appellant

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 Appellant Anthony Wenc appeals from a final judgment of the superior court in an action appealed from a judgment of the Sierra Vista Municipal Court assessing Wenc civil fines under Sierra Vista's municipal code §§ 150.23(17) and 150.25(1). We affirm.

Issues

¶2 Wenc contends that § 150.23(17) is facially invalid because it is unconstitutionally vague, preempted by state law, and creates a mandatory rebuttable presumption. He contends that § 150.25(1) is facially invalid as unconstitutionally vague. The city contends both are valid. As a preliminary matter, however, we determine whether Wenc preserved his challenges to the facial validity of the ordinances by first adequately raising them in the municipal court.

Factual and Procedural Background

¶3 Wenc was cited by Sierra Vista officials for having "inoperable vehicles" and "trash, litter, [and] debris" on his residential rental property in Sierra Vista, in violation of §§ 150.23(17) and 150.25(1), respectively. A trial was held on the violations in Sierra Vista Municipal Court. Wenc, apparently, filed a motion to dismiss for lack of jurisdiction and violation of due process before trial, although the motion was not included in the record. Nonetheless, the objections raised in the motion were seemingly argued in full at trial. The trial court addressed and denied Wenc's claim of lack of jurisdiction before the taking of evidence.

¶4 After the close of evidence, the trial court addressed the remaining procedural arguments raised by Wenc, again, ostensibly first in his written motion. These were couched as due process arguments. Wenc argued that his due process rights were violated because (1) he was given insufficient time to correct deficiencies; (2) he was not given the opportunity to voluntarily comply; (3) he was not given notice of his due process rights

or appeal rights; and (4) the city inspector did not follow business license inspection procedure. The court determined there were no constitutional due process violations. Wenc was found responsible on five counts and assessed a $100 fine per count.

¶5 On direct appeal to the Cochise County Superior Court, Wenc re-asserted, among other arguments, the jurisdiction and due process arguments. He also raised for the first time a claim that § 150.23(17) (as to the inoperable vehicles) was both unconstitutionally overbroad and had been preempted by state law. As to the citation under § 150.25(1) (as to trash, debris, and litter), he merely argued that the materials he was cited for were not trash, debris, or litter.

Analysis

¶6 Our jurisdiction in this matter is limited to reviewing the facial validity of the two Sierra Vista ordinances in issue. A.R.S. § 22-375(A) ("An appeal may be taken . . . from a final judgment of the superior court in an action appealed from a . . . municipal court[] if the action involves the validity of a . . . statute."). In such a review, we do not examine whether the statute was unconstitutionally applied. *State v. Okken*, 238 Ariz. 566, ¶¶ 6-8 (App. 2015). And, as in any case, we only address matters over which we have jurisdiction and which were timely and adequately raised. *See In re Marriage of Thorn*, 235 Ariz. 216, ¶¶ 3-10 (App. 2014); *Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994) (failure to object in the trial court waives the issue on appeal).

¶7 Despite Wenc having raised the constitutional over-breadth, vagueness, and pre-emption arguments for the first time on direct appeal to the superior court, that court addressed them on the merits and affirmed the judgment. The superior court was well within its discretion to address the merits of the newly raised arguments, although it would also have been within its discretion to deem them waived and not address them on the merits. *See Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503 (1987) (court has discretion to address constitutional arguments raised for the first time on appeal); *see also Englert v. Carondolet Health Network*, 199 Ariz. 21, ¶ 13 (App. 2000) (even constitutional issues may be waived by failure to raise them below). Similarly, when justice requires, this court may also address the merits of issues raised despite waiver, *Liristis v. American Family Mut. Ins. Co.*, 204 Ariz. 140, ¶ 11 (App. 2002), because waiver is procedural rather than jurisdictional, *Evenstad v. State*, 178 Ariz. 578, 582 (App. 1993) ("If application of a legal principle, even if not raised below, would dispose of

an action on appeal and correctly explain the law, it is appropriate for us to consider the issue."). Both the principle of waiver and the exceptions to it are "established for the purpose of orderly administration and the attainment of justice." *Hawkins,* 152 Ariz. at 503. "Whether this court should review a question raised here for the first time depends upon the facts and circumstances disclosed by the particular record. It undoubtedly has the power, but ordinarily will not exercise it. The question is one of administration, not of power." *Id.* (quoting *Town of S. Tucson v. Bd. of Supervisors*, 52 Ariz. 575, 582-83 (1938)).

¶8 Notwithstanding the superior court's discretionary determination of the constitutional and pre-emption arguments raised for the first time on direct appeal, we conclude Wenc has waived these arguments by failing to preserve them in the municipal court, and, in our discretion, do not address them. *Ariz. Farm Bureau Fed'n v. Brewer*, 226 Ariz. 16, ¶ 37 (App. 2010). We affirm the superior court ruling on this alternative basis. *See Citibank (Ariz.) v. Van Velzer*, 194 Ariz. 358, ¶ 5 (App. 1998) ("[W]e will uphold the trial court's decision if it is correct for any reason.").

Disposition

¶9 For the foregoing reasons, we affirm the superior court's ruling.