IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DEL CHAPEL ASSOCIATES,	)	
	)	
Appellant,	)	
Defendant-Below,	)	
	)	**Criminal ID No. 9512005645**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Appellee,	)	
Plaintiff-Below.	)	

Submitted: November 28, 2000
Decided: July 31, 2001

Edmund Daniel Lyons, Jr., Esquire; 1526 Gilpin Avenue, P.O. Box 579, Wilmington, DE 19899. Attorney for Appellant, Defendant-Below.

Roger A. Akin, Esquire; City Solicitor, City of Newark, 220 Elkton Road, P. O. Box 390, Newark, DE 19715. Attorney for Appellee, Plaintiff-Below.

Appeal from Decision of the Court of Common Pleas -
AFFIRMED IN PART AND REVERSED IN PART

CARPENTER, J.

O P I N I O N

This is an appeal from a decision of the Court of Common Pleas, finding Del

Chapel Associates guilty of violating the Newark City Code. While the history of the 15 year effort to resolve building and fire code violations at the old industrial site abandoned by the Budd Company and sold to Del Chapel in 1978 is rather extensive, it is imperative to briefly review the last few years of litigation in order to address the issues at hand.

BACKGROUND

On December 6, 1995, the City of Newark ("City")[1] charged Del Chapel Associates ("Del Chapel"), who owned a vacant factory at 70 South Chapel Street in Newark, Delaware, with two violations of the Newark City Code. The alleged violations included failure to keep openings into the property closed and to keep doors

[1] This matter was prosecuted by the State in the Court of Common Pleas since the City does not have independent prosecuting authority to pursue criminal violations in that Court. However, since this dispute revolves around the enforcement of the City of Newark's building and fire codes, in order to avoid confusion the Court will identify the prosecution as the "City." The Court also notes that the case was prosecuted in the Court of Common Pleas by the City Solicitor in his capacity as a specially designated Deputy Attorney General. While the indictment was signed by another deputy, she had no particular involvement in the litigation other than the pro forma signing of the document.

and windows at the property repaired and in sound condition.[2]

On June 5, 1996, Del Chapel was found guilty of both violations in the Alderman's Court and was ordered, as to each violation, to pay fines, which were suspended on the condition it successfully complete the other terms of the Order, and was placed on twelve months of probation. In essence, the terms required that Del Chapel make the property secure and compliant with the Code within thirty days. Furthermore, on or before October 4, 1996, Del Chapel was required to provide the status of its demolition plans and its efforts to sell portions of the property. In addition, the City was required to inspect the property between July 5, 1996 and July 19, 1996 and file a report.

After the City submitted a report dated July 31, 1996 based on two inspections since June 5, 1996, the Alderman's Court held a hearing on November 13, 1996 to determine whether Del Chapel complied with the probationary terms. In an Order dated November 20, 1996, the Alderman found that the probationary terms were violated in that Del Chapel's plans for demolition of the property were unreasonable. In an Order dated March 5, 1997, the Alderman's Court revised its sentencing order and imposed a fine of $100.00 on each violation effective as of November 20, 1996

[2] *See* Fire Prevention Code, Chapter 14, Section F-110.3 and Property Maintenance Code, Chapter 17, Section PM-304.11 of the Newark Code of Delaware.

which would continue at a rate of $100 per day until the Court issued an order indicating the violations had been corrected. In addition, Del Chapel was required to have the demolition of all structures on the property completed on or before August 31, 1997 and was to take immediate steps in securing the property from threat of trespass. The Court's review of the record reveals that there were three opinion/orders regarding these citations issued by Alderman Loreto P. Rufo which present a well organized, thoughtful and scholarly review of the history of the litigation and a practical and common sense approach in an attempt to resolve what had clearly become an environmental and aesthetic blight to the City of Newark. The Court would be remiss if it did not note the outstanding effort made by the Alderman Court in regards to the litigation.

Subsequently, Del Chapel appealed the decision of the Alderman's Court *de novo* to the Court of Common Pleas. Since such matters may only proceed in the Court of Common Pleas by information, the State filed an Information on July 24, 1997 alleging that Del Chapel committed the following offenses:

> COUNT I. A VIOLATION
>
> UNSAFE CONDITIONS, in violation of Chapter 14, Section F-110.3 of the Newark Code of Delaware.
>
> DEL CHAPEL ASSOCIATES, on or about the 6th day of December, 1995 in the City of Newark, State of Delaware, did fail to keep openings in to it's property at 70 South Chapel Street closed.
>
> COUNT II. A VIOLATION

> WINDOW AND DOOR FRAMES, in violation of Chapter 17, Section PM-304.11 of the Newark Code of Delaware.
>
> DEL CHAPEL ASSOCIATES, or about the 6th day of December, 1995 in the City of Newark, State of Delaware, did fail to keep doors and windows at the 70 South Chapel Street property repaired and in sound condition.

The trial was held on March 13, 1998. Junie Mayle, Director of the Building Department and the Fire Marshall's Office for the City of Newark, was the only witness and testified that based on his inspection of 70 South Chapel Street on December 6, 1995, he cited Del Chapel with the charged violations.

The Court of Common Pleas concluded verbally at the end of the hearing that Del Chapel was not guilty as to Count II of the information but was guilty of the first count for failure to keep openings in its property closed under Chapter 14, Section F-110.3. In addition, the Court of Common Pleas found that a continuing violation could be brought and that the violation would continue until it was proven that Del Chapel took corrective action. The Court of Common Pleas ordered the City to provide documents to the Court as to when corrective action was taken after which it advised the parties it would hold a separate penalty hearing to determine the length of time the violation continued.[3]

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[3] Counsel for Del Chapel objected by stating:

> I believe [it] is putting a burden of proof on the defendant that it does not bear.

> There is -- we're in a criminal case. There is no requirement that we assist the State in proving its case, that's number one. Number two, the State rested, and if they want to rely upon a charge of continuing offense, then it seems to me they ought to prove it. They didn't prove it. They have rested. And to require us to and to permit them, with or without our assistance to, in effect, reopen to determine the parameters of the offense that they have charged, but not proven, seems to me to be inconsistent with what we know to be --

(Tr. Hr'g of 3/13/98 at 124.)

A penalty hearing was held on April 16, 1998, and again Mr. Mayle was the only witness. The Court of Common Pleas found that the City met its burden of establishing that there was a continuing and uninterrupted violation from December 6, 1995 to March 13, 1998[4] based upon the City's inspections in July 1996 and on March 13, 1998. Furthermore, using the Alderman's decision as illustrative, it found that the violation continued since there was a failure of total compliance until March 13, 1998.[5] The Court sentenced Del Chapel to pay $100 per day commencing December 6, 1995 and payable each day thereafter, Sundays, Saturdays, and holidays included until March 13, 1998 and interest at the rate of 8.5 percent would accrue if these amounts were not paid within 10 days of September 15, 1998.[6]

STANDARD OF REVIEW

[4] There was testimony that on March 14, 1998, the openings were fixed.

[5] After such rulings, Del Chapel noted its objection for the record stating that as a *de novo* appeal, the Court of Common Pleas improperly relied upon a finding of the Alderman's Court.

[6] In addition, the Court of Common Pleas denied the City's motion to order demolition of the structure because such a punishment was not consistent with the language of the statute that imposes a penalty for the violation.

An appeal from the Court of Common Pleas to the Superior Court is on the record and is not tried de novo.[7] The standard of review for this Court "in addition to correcting errors of law, is 'whether the factual findings made by the trial judge are sufficiently supported by the record and are the product of an orderly and logically deductive process.'"[8] Findings of the trial court which are supported by the record should be accepted even if the reviewing court, acting independently, would reach a contrary conclusion.[9] Questions of law are reviewed de novo.[10]

DISCUSSION

When the matter was appealed to the Court of Common Pleas, the Attorney General's Office filed a criminal information charging the defendant with two criminal violations. The violations were alleged to have occurred on or about December 6, 1995 and related to the condition of the defendant's property located at 70 South Chapel Street in Newark. After finding the defendant guilty of Count I of

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[7] Title 11 *Del. C.* § 5301(c) provides in part as follows:

> "From any order, rule, decision, judgment or sentence of the Court in a criminal action, the accused shall have the right of appeal to the Superior Court in and for the county wherein the information was filed. . . .Such appeal to the Superior Court shall be reviewed on the record and shall not be tried de novo."

[8] *Mellon Bank v. Dougherty*, Del. Super., C.A. No. 88A-DE-3-A, Steele, J. (Aug. 24, 1989)(*citing Smart v. Bank of Delaware*, Del. Supr., C.A. No. 82A-DE-5, Christie, J. (Dec. 5, 1984)).

[9] *Stigars v. Mellon Bank*, Del. Super., C.A. No. 96A-02-009, Gebelein, J. (Feb. 3, 1998)(Op. and Order).

[10] *Henry v. Nissan Motors Acceptance Corp.*, Del. Super., 1998 WL 961759, No. 98A-02-023, at 1, Quillen, J. (Oct. 21, 1998).

the information entitled "Unsafe Conditions" the Court proceeded to fine the defendant for not only the violation which occurred on December 6, 1995 but for a continued violation over the following 27 months.

The Court of Common Pleas verbally ruled on March 13, 1998 that:

> For the purposes of this section, each violation of any section of Chapter 14 and each day a violation continues after, and this is the important part, after a service of notice as provided for in the chapter shall constitute a separate offense. Therefore, the provision does not envision, nor does it require that the City allege or cite for each separate day. The code provides that after the initial citation, each day that the code, that the violation continues, it constitutes a violation under the statute. That's a fair reading of the provision, and I so hold. In conclusion, I am satisfied that the evidence established beyond a reasonable doubt that the building was unsafe and open on December the 6th, and that the violation continues each day thereafter until the violation is corrected.[11]

In a subsequent Order dated September 15, 1998, the Court of Common Pleas addressed, *inter alia*, Del Chapel's motion for reconsideration of the continuing offense finding. In denying the motion, the Court of Common Pleas stated:

> The explicit language of the Code provides that each day a violation continues, constitutes a separate offense under Section F-112.3. The Code does not impose upon the City the obligation to verify the existence of the unsafe conditions each day after the citation is initially issued. Furthermore, it would be unreasonable to require the City to inspect a property each day. The more consistent approach under the Code is that after the citation is issued, the property owner incurs an affirmative obligation to remedy or make safe the unsafe conditions and thereafter, schedule a reappointment so that the official can reinspect. [12]

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[11] (Tr. Hr'g of 3/13/98 at 121-23.)

[12] *State v. Del Chapel Associates*, Del. CCP, Cr. A. No. 9512005645, Smalls, J. (Sept. 15, 1998) at 3-4.

The issue now before the Court is whether the imposition of a continual fine by the Court of Common Pleas was legally correct when the information charged that the Code violation occurred only on a specific date.

An indictment or information performs two essential functions: to put the accused on full notice of what he is called upon to defend, and to preclude subsequent prosecution for the same offense.[13] An indictment or information should be drafted with such particularity that a defendant is fully informed of the charge, will be given a reasonable opportunity to prepare a defense and will be shielded against future prosecution for the same offense.[14]

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[13]*Malloy v. State*, Del. Supr., 462 A.2d 1088, 1092 (1983). *See also White v. State*, Del. Supr., 348 A.2d 688, 689 (1975) (citing *Demonia v. State*, Del. Supr., 210 A.2d 303 (1965)(observing that both the Sixth Amendment of the United States Constitution and Art. I § 7 of the Del. Const. require that the accused be plainly and fully informed of the nature and cause of the accusation against him)).

[14]*State v. Toth*, Del. Super., Cr. A. No. IN97-04-0085 & 0086, Quillen, J. (Aug. 28, 2000) (*citing Pepe v. State*, Del. Supr., 171 A.2d 216, 218, *cert. denied*, 368 U. S. 31 (1961) (citing cases)).

In the Court of Common Pleas, prosecution begins with an information. As provided in Ct.Cm.Pls.Crim.R. 7(b), "[t]he prosecution shall proceed in appeals *de novo* on a new information filed in the Court of Common Pleas charging substantially the same offense as the defendant was convicted [of] in the Court below." Rule 7(c) sets forth two affirmative requirements as to the content of the information. First, "[t]he information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Second, for each count, the information shall provide the citation for the statute or other provision of law which the defendant is charged with violating. These provisions are substantially the same as those presented in the parallel rules of both the Superior Court and the federal courts,[15] except that all cases proceed by way of information in the Court of Common Pleas.

In the case at bar, Count I of the Information for which the defendant was found guilty[16] charged a violation of Chapter 14, § F-110.3 of the Fire Prevention Code of the City of Newark, Delaware. The applicable code section states in pertinent part as follows:

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[15] *See Demonia v. State*, Del. Supr., 210 A.2d 303, 305 (1965) (noting that Super. Ct. Crim. R. 7(c), which requires an information to contain the essential facts constituting the offense charged, tracks the federal rule of the same number).

[16] See page 4 of Opinion for contents of the charge.

F-110.3 Unsafe conditions: . . . A vacant structure which is not secured against entry shall be deemed unsafe. Unsafe structures or equipment shall be reported to the building code official who shall take appropriate action as deemed necessary under the provisions of the building code listed in Chapter 44.[17]

[17]Appendix to Answering Brief at Exhibit 2.

The corresponding penalty provision states as follows:

> **F-112.3 Penalty for Violations**: Any person, firm, corporation, partnership, or representatives thereof, violating any of the provisions of Chapter 14, Code of the City of Newark, Delaware, shall be guilty of a misdemeanor and upon conviction, shall be punished by a fine of not less than $100.00 nor more than $500.00, or imprisonment for not more than 30 days, or both, as provided by the appropriate court for each offense. For the purpose of this section, each violation of any section of Chapter 14, and each day a violation continues, after a service of notice as provided for in Chapter 14, shall constitute a separate offense.[18]

[18] *Id.* at Exhibit 3.

Two things are obvious. First, the Information accurately cited the pertinent Code section. Second, the plain and unambiguous language of the Chapter 14 penalty provisions put Del Chapel on notice that each day a violation continued could be a separate offense which would subject them to additional penalties.[19] In fact, Del Chapel does not argue that it was unaware of the possible continuing nature of the violation. In the prior proceedings in Alderman's Court, the City focused on the long-term nature of the problem, and the Alderman's initial decision suspended the fines on the condition that Del Chapel take corrective action. Following that Order, there was further litigation in Alderman's Court regarding the sufficiency of Del Chapel's efforts. Thus, Del Chapel cannot show that it was without notice of the alleged continuing nature of their violations. Instead the assertion is simply that the State chose, whether intentionally or not, to only charge a violation for December 6, 1995 and it is only this violation for which the lower court was free to sentence the defendant.

[19] *See Malloy v. State*, Del. Supr., 462 A.2d 1088 (1983)(noting that allegedly faulty indictment gave sufficient notice partly because it contained official citation to statute and name of the offense charged).

As a threshold matter, the Court agrees with the trial judge that when an information is properly charged as a continuing violation the City is not required to prove each and every day that the violation continued. The City's position is that it does not have sufficient staff to document each day of a violation, and other courts have accepted this reasoning. As examples, the Supreme Court of Vermont [20] found that the town had sustained its burden of establishing a continuing violation by offering proof of periodic complaints by neighbors and periodic inspections by the zoning administrator.[21] Similarly, the Court of Appeals of Texas found that evidence of periodic inspections, as well as an inspector's testimony that the site's appearance had not changed in the relevant time period, was sufficient to prove a continuing violation.[22] These cases provide useful guidance in determining the quantum of evidence necessary to prove a continuing violation[23] and this Court agrees that

[20] *In re Jewell*, Vt. Supr., 737 A.2d 897 (1999).

[21] *Id.;* citing *United States v. SCM Corp.*, D. Md., 667 F. Supp. 1110 (1987).

[22] *State v. City of Greenville*, Tex. App., 726 S.W. 2d 162, 167 (1987).

[23] *See, e.g., Marathon County v. Leonard*, Wis. Ct. App., 493 N. W. 2d 270 (table) 1992 WL 353528 (affirming conviction of violation of zoning ordinance and fine of $10 per day for 267 days because complaint stated that violations were continuous, even though it did not charge each day as a separate violation); *Village of Sister Bay v. Hockers*, Wis. Ct. App., 317 N. W.2d 505 (1982)(finding that trial court is required to assess a daily fine where zoning ordinance provides that each day violation continues constitutes a separate violation and complaint gives notice that violations were continuous); *Duhon v. State*, Ark., 774 S. W. 2d 830 (1989) (modifying defendant's fine for 60 days violation because she was charged with only one count of violating a statute that provided for continuing violation).

requiring proof of each day of a continuing violation would be so onerous as to render it nearly impossible to demonstrate a continuing violation and would invalidate the purpose of the statute. However, equally important in deciding the primary issue of this case is that it appears in each decision that addresses the evidence needed for continuous violations, the charging document reflected a continuous offense. It is the omission of any language in the information to reflect a continuous violation that is the crux of the problem in this litigation and distinguishes it from other decisions in this area.

While recognizing the practical reasoning of the decisions of the lower courts and appreciating the appropriateness of the penalty in light of the outrageous condition of defendant's premises, this Court must find that the information filed by the Attorney General charged only a single violation and the lower court's sentencing for a continuous violation beyond that date was error.

The penalty statute [24] in this case specifically stated that each day a violation continued after proper notice constituted a separate offense. In a criminal context, this language is significant and *does not* reflect an intent to impose a continuous fine until evidence is produced to demonstrate the violation has been cured.[25] Instead, the

[24] See page 11 of the Opinion for the full text of the statute.

[25] The Court also notes that although the trial judge found the defendant not guilty of the

language allows, but does not require, the prosecuting authority to charge a separate and distinct criminal offense for each day a violation continued. Thus the City had several options when they filed criminal charges in the Court of Common Pleas. They could have filed an information charging 802 separate counts for each day a violation occurred or they could have alleged and encompassed into a single count a continuous violation between December 6, 1995 and March 13, 1998 or they could have grouped the violations into any other logical progression such as month, year or date of inspections. They failed to exercise any of these charging options and thus the defendant was only charged for a single violation of the municipal code.

What is perhaps equally frustrating to the Court is that this issue was raised by defense counsel before the presentation of any evidence and thus could have been easily corrected by the City. However, instead of simply modifying the Information by writing the dates of the continuous violation and eliminating this issue altogether, the City chose to rely upon a legal argument that this Court now finds unpersuasive. While the Court is confident that the City acted in good faith and consistent with their understanding of the statute, it is difficult to understand why common sense and

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property maintenance Code violation found in Chapter 17 of the City Code, there is a significant difference in the penalty provision of Chapter 17 and Chapter 14 that perhaps has caused confusion in this litigation. The Chapter 17 provision allows for punishment by fine of not less than $100 nor more than $500 or imprisonment for not more than 30 days, or both; **and the further sum of not less than $50 nor more than $500 for each and every day that such violation is permitted to continue**. The bolded language is not included in the Chapter 14 violation which simply states that each day a violation continues is a separate offense.

practical realities were not exercised in this situation. This decision will result in the defendant's penalty hearing being substantially reduced and in the Court's view will cause an unjust result. But how defendants are charged is a responsibility solely resting with the prosecution, and the Court may not modify that decision even to correct a perceived unjust result. Unfortunately this is not a mere technical default in an information to which the Court could find no prejudice to the defendant. Here the information as drafted states a legally sufficient charge. It simply does not encompass the range of criminal activity that the City is now attempting to punish the defendant.

It is also clear that this issue could have been avoided if the lower court had responded to defense counsel's objection at the beginning of the trial as to the relevance of any evidence being introduced beyond the December 6, 1995 date charged in the information. Unfortunately, the lower court failed to recognized the significance of counsel's statements and the trial proceeded without addressing the issue.

The only remaining question is whether sufficient evidence was presented to satisfy the State's burden of proving that a violation occurred on December 6, 1995. Junie Mayle, Director of the Building Department and the Fire Marshal's Office of the City of Newark, testified about his inspection of the property on December 6, 1995. The inspection lasted approximately an hour, was documented by photographs

and reflects the discovery of numerous unsecured openings into the defendant's property. The Court finds that there was sufficient evidence presented to establish a violation on December 6, 1995 beyond a reasonable doubt.

Before concluding this opinion the Court believes it is important to emphasize that in a criminal case, the burden remains with the governmental entity to prove its case, even in penalty proceedings. However, the trial judge repeatedly implied that there is a shifting of the burden of proof. In court he stated that "this is a penalty hearing to see whether once the City has established a prima facie case in the first instance, whether there had been actual compliance with [the Alderman's] order such that the continuing violation under the Code does not apply."[26] In his post-trial order, he further explained this concept, as follows:

> after the citation is issued, the property owner incurs an affirmative obligation to remedy or make safe the unsafe conditions and thereafter, schedule a reappointment so that the official can reinspect.[27]

On this reasoning, the sole burden on the City would be to prove a violation on a single day, at which time the defendant would continue to be guilty of a continuing violation until the defendant proved not only that it complied with the Code but also that it set up a reinspection with the City. There is nothing in the Code to support this

[26] *Id.* at 27.

[27] *State v. Del Chapel Assoc.,*, Del. CCP, Cr. A. No. 9512005645, Smalls, J. (Sept. 15,

proposition and in the context of a criminal prosecution, the burden of proof remains with the governmental entity to present sufficient evidence of a continuing violation.[28] Therefore to the extent there is any inference in the lower Court rulings that there is a shifting of the burden in municipal code violation cases, such comments are rejected by this Court.

1998) at 3.

[28] *United States ex rel. Crosby v. Delaware*, D. Del., 346 F. Supp. 213 (1972).

Finally, the Court finds that the other arguments made by the defendant as to alleged errors in the proceeding below have been mooted by the decisions made in this opinion and thus need not be addressed. However, the Court does note with interest that the City appeared to be sufficiently satisfied with the efforts of the defendant to correct the conditions at the location in July of 1996 to report that progress to the Alderman. [29] Thus, without further explanation, there appears to be some inconsistency to argue in subsequent criminal proceedings that the violations relating to the December 6, 1995 violations continued beyond that date. However, this issue need not be addressed.

CONCLUSION

For the reasons set forth above, the decision of the Court of Common Pleas finding the defendant guilty of a violation of Chapter 14, Section F-110.3 of the Newark Code of Delaware occurring on March 6, 1995 is AFFIRMED and the penalty imposed for this single violation shall remain as previously ordered. The decision of the Court of Common Pleas which imposed penalties beyond March 6, 1995 is REVERSED and those penalties are vacated.

Judge William C. Carpenter, Jr.

[29] Pages 53-55 of penalty hearing April 16, 1998.