

RENDERED: JULY 1, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001529-DG

TERRY SUTTON

APPELLANT

v. ON DISCRETIONARY REVIEW
FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS WINGATE, JUDGE
ACTION NO. 13-XX-00005

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, MAZE, AND THOMPSON, JUDGES.

MAZE, JUDGE: This case is before us on discretionary review of the Franklin Circuit Court's August 20, 2014 opinion and order affirming his conviction for violations of Frankfort City Ordinances regarding permitting and erosion prevention plans for work Sutton conducted on his property. Sutton alleges that the doctrine of *res judicata* barred his prosecution due to prior litigation

concerning the same property. Alternatively, he contends that enforcement of the ordinances in question constituted an *ex post facto* application of the law against him and that the District Court erred when it admitted photographs at trial which he argues were not properly authenticated. Sutton also argues that the fines the district court imposed against him were improper and must be vacated. However, for various reasons further explained herein, we affirm the circuit court's ruling as to all of the above issues.

Background

Sutton owns a tract of largely undeveloped property at the corner of Collins Lane and the East-West Connector in Frankfort, Kentucky. In 2000, Sutton sued the City of Frankfort (hereinafter "the City"), raising several issues stemming from the City's easement over the property and construction of a drainage tunnel and fence. Sutton's suit brought claims of, *inter alia*, inverse condemnation and trespass. In 2004, the City cited and fined Sutton for failing to prepare a grading plan on his property pursuant to Franklin City Ordinance (FCO) 53.04. Sutton appealed this, and in December 2004, Sutton and the City settled all of the above issues in a Settlement Agreement and Release (hereinafter "the Agreement") and an Agreed Order of Dismissal filed with the court.

Under the terms of the Agreement, both cases were dismissed with prejudice and the City paid Sutton the sum of \$50,000.00 while admitting no liability. Additionally, the Agreement included a provision which stated that the City released

all claims, actions, losses and expenses which it has, or claims to have, at law or equity and by statute or regulation, whether known or unknown, against [Sutton], arising from or connected in any way whatsoever with the construction of the drainage tunnel, the construction of the fence, and the failure to prepare and obtain approval of a grading plan including but not limited to those claims that were made, or that could have been made in Civil Action No. 00-CI-01457 and Civil Action No. 04-CI-1192.

In 2005, Frankfort amended its ordinances, including Chapter 53, in 2005. On March 13, 2013, Jeff Hackbart, an engineer employed with the City, filed a criminal complaint alleging that Sutton had violated FCO 53.04 and 53.06 in failing to “obtain a permit to conduct a land disturbance activity” and failing to “obtain approval for an Erosion Protection and Sediment control plan prepared by a licensed professional engineer.” According to the complaint, the violations occurred in April 2011.

Prior to trial, Sutton moved for dismissal of the case, arguing that the City had released any future claims under the Agreement and dismissal in the 2000 and 2004 cases. The district court overruled Sutton’s motion, and the matter proceeded to a bench trial on December 17, 2012. At trial, Hackbart testified to Sutton’s failure to submit or acquire the proper documentation, and that Sutton had ignored at least two Stop Work Orders. During Hackbart’s testimony, the Commonwealth sought to place a number of items into evidence, including the Stop Work Orders and photographs of Sutton’s property. Sutton objected to admission of the photographs on the basis that they were not “legal pictures.”

However, the district trial court admitted the photographs as Commonwealth's Exhibit 2. On cross-examination, Sutton asked Hackbart who took the photographs contained in Exhibit 2. Hackbart responded that he could not recall, but that he was present when the photographs were taken.

Sutton testified at trial, as well. During his testimony, he admitted that he lacked the documentation required under FCO 53.04 and FCO 53.06. Sutton maintained that the Agreement constituted the City's assent to his grading plan as it was in December 2004, and that he was performing work on the property according to that plan.

The district court found Sutton guilty of both violations and imposed a fine of \$27,100 per violation, for a total of \$54,200.¹ However, the trial court suspended all but \$2,000 of the fine on the condition that Sutton obtain and submit the necessary documentation and move forward with his work on the property before May 2013. Sutton appealed the district court's decision to the Franklin Circuit Court, arguing that the doctrine of *res judicata* barred prosecution of the case against him. The circuit court disagreed and rejected Sutton's argument that the City's case against him constituted an *ex post facto* application of the law to actions which he argued pre-dated 2005. The circuit court also affirmed admission

¹ The district court calculated this total by imposing a fine of \$100 per day, per violation from April 1, 2012 to the date of trial. Pursuant to FCO 53.99, failure to comply with the ordinances Sutton violated "shall be punishable by a fine of not less than \$100 and not more than \$500, or by imprisonment for not more than 90 days, or both, for each separate offense. Each day there is a violation of any part of this chapter shall constitute a separate offense."

of the photographs contained in Exhibit 2. Sutton sought discretionary review before this Court, and we granted his request.

Standard of Review

The issues of *res judicata*, collateral estoppel and application of the law to Sutton's current and past cases present mixed questions of law and fact. We review the trial court's factual findings for clear error, reversing only if they are unsupported by substantial evidence in the record. *Miller v. Eldridge*, 146 S.W.3d 909, 917 (Ky. 2004); *see also* CR 52.01. Furthermore, we review questions of law, including the interpretation and application of statutes, *de novo*. *See Commonwealth v. Love*, 334 S.W.3d 92, 94 (Ky. 2011) (citing *Commonwealth v. McBride*, 281 S.W.3d 799, 803 (Ky. 2009)).

However, to the extent that Sutton challenges the admission of evidence, such matters are reserved to the discretion of the trial court, and we will only overturn evidentiary rulings if it is apparent that the trial court abused its discretion. *See Wiley v. Commonwealth*, 348 S.W.3d 570, 580 (Ky. 2010) (citing *Commonwealth v. King*, 950 S.W.2d 807, 809 (Ky. 1997)). An abuse of discretion arises when the trial court's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Id.* (citing *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994)).

Analysis

Sutton first argues that prosecution of the violations was barred under the related but distinct doctrines of *res judicata* and collateral estoppel. The circuit

could held that Sutton failed to establish one or more elements necessary to dismiss the case against him on these grounds. We agree.

The doctrine of *res judicata*, also known as claim preclusion, is an affirmative defense which prevents the relitigation of the same issues in a subsequent suit, including “every matter belonging to the subject of the litigation which could have been, as well as those which were, introduced” as part of an original suit. *Miller v. Admin. Office of the Courts*, 361 S.W.3d 867, 871 (Ky. 2012) (internal citations and quotation marks omitted). To successfully assert the doctrine of *res judicata*, a movant must show (1) an identity of parties between the two actions; (2) an identity of the two causes of action; and (3) the prior action must have been decided on the merits. *Id.* at 872 (citation omitted).

Sutton’s assertion of *res judicata* fails at least two of the three requisite elements. The 2000 and 2004 causes of action are distinguishable from the criminal action the City brought in 2012. Most apparent is the fact that the former actions were civil in nature while the latter brought criminal charges against Sutton. Also, Sutton’s 2000 suit alleged inverse condemnation and trespass – topics the 2012 criminal charges do not, and could not, touch upon. Finally, it could hardly be said that an agreed order of dismissal in which the City admitted no fault constituted a decision on the merits of the prior suits. Simply stated, the civil suits of more than a dozen years ago and the criminal case currently before us are distinguishable, and Sutton was not entitled to assert a defense based upon *res judicata*.

Sutton next alleges that the City's effort to enforce its ordinances against him was an impermissible *ex post facto* application of those amended ordinances. However, we agree with the trial court that this argument is wholly without merit.

Sutton's argument is based upon his apparent and fallacious belief that the City's criminal complaint charged him for events taking place prior to 2005 – specifically, for his failure to comply with his 2004 grading plan. However, the City's 2013 criminal complaint cited Sutton for new violations occurring in 2011. Therefore, there could be, and was, no violation of the constitutional prohibition on *ex post facto* laws.

Sutton next takes issue with the district court's decision to admit photographs of his property which he argued at trial were not "legal." At trial, Sutton's objection initially surrounded the fact that Hackbart, who issued the Work Stop Notice to which the photographs were attached, did not take the pictures himself.² However, Sutton's questioning of Hackbart also expressed his concern that Hackbart did not have permission to be on the property at the time the photographs were taken. Sutton's argument on appeal exclusively concerns the Commonwealth's alleged failure to properly authenticate the photographs. The circuit court ruled that Sutton failed to preserve any objection as to authentication.

² On appeal, Sutton states that the nature of his objection was that the photographs "were old and did not depict the land at the time in question." However, our observation of the same video record does not reflect this.

For different reasons, we agree with the circuit court that the district court did not abuse its discretion in entering the photographs into evidence.

It is not clear from the record whether Sutton's objection at trial concerned authentication under KRE³ 901, Hackbart's legal right to be on the land when the pictures were taken, or both. Having reviewed the video record, we are inclined to say his objection concerned Hackbart's right to be on the spot from which the pictures were taken. Even assuming Sutton's objection that the pictures were not "legal" concerned their authenticity, the district court heard Hackbart testify that he was present when the pictures were taken and that the land they depicted was the property at the heart of this case. Hence, the district court's decision to admit them over Sutton's vague objection did not constitute an abuse of discretion.

Finally, Sutton argues that the trial court imposed "improper" fines upon him following his conviction. We are unable to locate in the record before us where Sutton preserved this argument before the circuit court and for our review. Therefore, we lack the requisite jurisdiction to address it.

Conclusion

We observe no error in the circuit court's decision affirming Sutton's conviction on two violations of Frankfort City Ordinances. Accordingly, the August 20, 2014 Order of the Franklin Circuit Court is affirmed.

³ Kentucky Rules of Evidence.

ALL CONCUR.

BRIEF FOR APPELLANT:

Josian A. Passalacqua
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Rick Sparks
Franklin County Attorney

Robert C. Moore
Frankfort, Kentucky