**[Cite as *Olmsted Falls v. Bowman*, 2015-Ohio-2858.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 102129**

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## CITY OF OLMSTED FALLS

PLAINTIFF-APPELLEE

vs.

## TED BOWMAN

DEFENDANT-APPELLANT

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**JUDGMENT:**
REVERSED AND REMANDED

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Criminal Appeal from the
Berea Municipal Court
Case No. 07 CRB 01486

**BEFORE:** Boyle, J., Jones, P.J., and E.A. Gallagher, J.

**RELEASED AND JOURNALIZED:** July 16, 2015

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MARY J. BOYLE, J.:

**{¶1}** Defendant-appellant, Ted Bowman, appeals his conviction and sentence. Finding merit to the appeal, we reverse and remand for further proceedings.

Procedural History and Facts

**{¶2}** This case has a long history involving two earlier appeals. In 2006, the city of Olmsted Falls ("city") notified Bowman that his real property was in violation of the city's zoning code. Bowman was ordered to bring his property into compliance. When Bowman did not comply with the notice, he was issued a citation and charged with failure to comply with that notice pursuant to Olmsted Falls Codified Ordinance 1210.03(b).

**{¶3}** In August 2007, Bowman pleaded not guilty to the charge. In April 2008, he moved to dismiss the citation, arguing that the citation issued to him did not charge a criminal offense and that the city had engaged in selective prosecution against him.

**{¶4}** Beginning in June 2008, Bowman served subpoenas upon several individuals, including Robert McLaughlin, Olmsted Falls Building and Zoning Administrator. Attached to McLaughlin's subpoena was a duces tecum, requesting several documents, including items related to Bowman's property as well as 11 other properties. The record reflects that Bowman filed successive subpoenas upon McLaughlin. On March 23, 2009, McLaughlin and the city filed a written motion to quash the subpoena duces tecum, which was served upon McLaughlin on March 17, 2009. They argued that the subpoena duces tecum was unreasonable, oppressive, and

the information requested was irrelevant and "costly to produce." McLaughlin's affidavit was attached to the motion to quash, wherein he averred the following:

> That Affiant has reviewed the Subpoena, and noted immediately that most of the items requested thereon are either concerned with Properties outside the scope of this Case, are requesting items and documents that have been prepared over ten years ago, are in the possession of the Defendant, are available elsewhere, and would place a burden upon the City relative to copying costs for items which have no relevancy to the matter before the Court.

**{¶5}** On March 23, the court granted the motion to quash, in part — quashing the documents requested for the 11 other properties, but ordering the city to provide the documents and items requested that pertained to Bowman's property. Bowman filed a motion for reconsideration the next day, arguing that he needed these documents for his selective enforcement claim. The trial court denied Bowman's motion for reconsideration and ordered for the trial to go forward as scheduled.

**{¶6}** On April 22, 2009, the parties appeared for trial. The record reflects that the trial court granted the prosecutor's motion in limine to limit evidence at trial, over Bowman's objection. The court, however, granted Bowman one week to file his evidentiary proffers to preserve any error for appeal. Bowman then elected to withdraw his not guilty plea and entered a no contest plea.

**{¶7}** On April 29, 2009, Bowman filed his evidentiary proffers, indicating that had the motion in limine and the motion to quash not been granted, he would have elicited testimony and evidence as to the following facts: (1) "there are no zoning compliance certificates contained in the records" or permits of the neighboring properties that he

identified, and (2) there were no citations for any violations pertaining to the identical conduct of these neighboring property owners. Bowman further argued that this evidence was necessary to establish selective enforcement. Bowman also attached undated photographs of properties that allegedly were in violation of the zoning code.

**{¶8}** The trial court accepted Bowman's written proffer to be accepted in the record and subsequently sentenced him to a fine of $100 plus court costs and 60 days in jail.

**{¶9}** Bowman appealed, challenging, among other things, that the trial court failed to comply with Crim.R. 11. *See Olmsted Falls v. Bowman*, 8th Dist. Cuyahoga No. 94000, 2010-Ohio-5767 ("*Bowman I*"). This court agreed, reversed Bowman's conviction, and remanded the case for further proceedings.

**{¶10}** On remand, the matter proceeded to a bench trial. Prior to the start of trial, the city orally moved to quash the subpoena duces tecum that Bowman issued to McLaughlin in June 2012 — the same subpoena duces tecum previously served and that the trial court previously quashed in part. The trial court agreed to quash the subpoena duces tecum again, specifically finding that reference to any other property would be irrelevant. The trial court then proceeded to hear the evidence and ultimately found Bowman guilty. The court sentenced Bowman to a $1,000 fine and 180 days in jail, which was deferred for 60 days with a reduction in the penalty if Bowman brought the property into compliance.

**{¶11}** Bowman appealed his conviction, arguing, among other things, that the trial court erred in failing to hold an evidentiary hearing prior to quashing his subpoena. We agreed, reversed the trial court's decision, and remanded for further proceedings, including conducting an evidentiary hearing and applying the appropriate standard on the city's motion to quash. *See Olmsted Falls v. Bowman*, 8th Dist. Cuyahoga No. 99012, 2014-Ohio-109 ("*Bowman II*").

**{¶12}** On remand, the trial court held a hearing on the city's motion to quash. The subpoena duces tecum at issue sought citations, zoning compliance certificates, and occupancy permits issued since October 1997 with respect to 11 properties in the immediate vicinity of Bowman's property. According to Bowman's counsel, "these were specifically identified because conditions had been observed and this was all in an effort to show that these other individuals were similarly situated to my client and were not prosecuted." The city again objected to the production of these documents on the grounds that they were irrelevant and that Bowman could have procured this information himself prior to trial, such as through a public records request.

**{¶13}** The trial court reached the same conclusion as before and granted the city's motion to quash the subpoena duces tecum, finding that (1) the documents were not relevant, (2) that Bowman could have procured this information in advance of trial, and (3) that while Bowman could not prepare for trial to pursue "his line of attack" without the documents, the documents were nonetheless irrelevant. The trial court found, however, that Bowman was seeking the documents in good faith and that the subpoena

duces tecum is not intended as a general "fishing expedition." The trial court then adopted its previous guilty verdict and set the matter for sentencing. The trial court ultimately ordered Bowman to pay a $1,000 fine and sentenced him to 180 days in jail.

**{¶14}** Bowman now appeals, raising the following three assignments of error:

> I. The trial court erred in granting appellee's motion to quash appellant's subpoena duces tecum directed to Robert McLaughlin and to exclude all evidence and testimony regarding properties other than the subject parcel herein.
>
> II. The trial court erred in granting appellee's motion to exclude evidence and testimony regarding procedural defects in the enactment of the zoning ordinance under which appellant was charged.
>
> III. The trial court erred in imposing a harsher sentence upon appellant subsequent to his successful appeals of his conviction herein.

Motion to Quash

**{¶15}** Crim.R. 17(C) confers upon the trial court the discretion to quash or modify a subpoena duces tecum requesting the production of documents prior to trial if compliance would be "unreasonable or oppressive." When deciding such a motion, a trial court shall hold an evidentiary hearing. *In re Subpoena Duces Tecum Served Upon Attorney Potts*, 100 Ohio St.3d 97, 2003-Ohio-5234, 796 N.E.2d 915, paragraph one of the syllabus. The Ohio Supreme Court has adopted a four-part test with regard to a motion to quash filed pursuant to Crim.R. 17(C). *Id.*, citing *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). In accordance with *Nixon*, the proponent of the subpoena must show (1) that the subpoenaed documents are evidentiary and relevant; (2) that they are not otherwise reasonably procurable in advance of trial by

due diligence; (3) that the proponent cannot properly prepare for trial without production and inspection of the documents and that the failure to obtain the documents may tend to unreasonably delay the trial; and (4) that the subpoena is made in good faith and is not intended as a general fishing expedition. *Potts* at *id.*

**{¶16}** Bowman argues that the trial court's decision granting the city's motion to quash is fatally flawed because the trial court treated the motion as a post-trial motion and erroneously applied the *Nixon* factors retrospectively without the benefit of an upcoming trial scheduled. We agree.

**{¶17}** The record reflects that the trial court erroneously believed that this court in *Bowman II* did not reverse the conviction and that it was only necessary to hold an evidentiary hearing. But that was incorrect. We reversed the conviction in *Bowman II* and remanded the case for further proceedings, which included holding an evidentiary hearing. Our reversal and remand required the trial court "to proceed from the point at which the error occurred." *State v. Gonzalez*, 151 Ohio App.3d 160, 2002-Ohio-4937, 783 N.E.2d 903, ¶ 61 (1st Dist.). Aside from having an evidentiary hearing on the motion to quash, our reversal of Bowman's conviction required the trial court to vacate the conviction and have a new trial on the underlying charge.

**{¶18}** Under the unique circumstances of this case, we further find that the trial court abused its discretion in applying *Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039, and finding that the motion to quash should be granted. Initially, we note that the trial court specifically found that Bowman was not engaging in a fishing expedition and

that he was requesting these documents in good faith; therefore, only three *Nixon* factors are at issue on appeal.

**{¶19}** We find the trial court's stated finding with respect to the first factor to be unreasonable. Bowman has consistently maintained throughout the criminal proceedings, including in his pretrial motion to dismiss as well as his motion for reconsideration, that the city has engaged in selective enforcement in issuing him the underlying citation.

**{¶20}** In *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, the Ohio Supreme Court set forth the following standard for analyzing a claim of selective prosecution:

> The decision whether to prosecute a criminal offense is generally left to the discretion of the prosecutor. *United States v. Armstrong*, 517 U.S. 456 at 464, 116 S. Ct. 1480, 134 L. Ed. 2d 687. That discretion is, however, subject to constitutional equal-protection principles, which prohibit prosecutors from selectively prosecuting individuals based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.*, quoting *Oyler v. Boles*, 368 U.S. 448, 456, 7 L.Ed.2d 446, 82 S.Ct. 501 (1962). Although a selective-prosecution claim is not a defense on the merits to the criminal charge itself, a defendant may raise it as an "independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *State v. Getsy*, 84 Ohio St.3d 180, 203, 702 N.E.2d 866 (1998).
>
> To support a claim of selective prosecution, "a defendant bears the heavy burden of establishing, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." *State v. Flynt*, 63 Ohio St.2d 132, 134,

407 N.E.2d 15 (1980), quoting *United States v. Berrios*, 501 F.2d 1207, 1211 (C.A.2, 1974).

*LaMar* at ¶ 43 - 44.

**{¶21}** The information concerning the neighboring properties, therefore, would be relevant to his selective enforcement claim. Such information is necessary to prove the first element of his selective enforcement claim. And if Bowman successfully met the heavy burden of demonstrating selective prosecution, this evidence would support a motion to dismiss the action.

**{¶22}** As for the second *Nixon* factor, we likewise find that the trial court unreasonably concluded that Bowman could have reasonably procured the information in advance of trial by the exercise of due diligence. The city, and specifically McLaughlin, the custodian of the records at issue, was the only source of the information that Bowman was seeking. We find no basis to conclude that Bowman should have pursued a public records request to the city as a means to obtain these documents. Bowman's subpoena duces tecum directed to McLaughlin was timely filed in advance of trial. Contrary to the city's argument on appeal, this is not a situation where Bowman served the subpoena duces tecum the day of trial or shortly before without ever engaging in any discovery. Indeed, the record contains evidence of a successive subpoena duces tecum directed to McLaughlin, well before the scheduled trial date.

**{¶23}** Finally, the trial court's resolution of the third *Nixon* factor was also unreasonable. Believing that the requested documents are irrelevant, the trial court likewise found that Bowman did not need the documents prior to trial. But this belief

was incorrect. Again, the information regarding these properties would be necessary to prove his selective enforcement claim. The trial court clearly believed that, even if Bowman successfully demonstrated selective enforcement, it would have no effect on the underlying criminal complaint. We find this to be error.

**{¶24}** We emphasize, however, that our resolution of this assignment of error makes no finding as to the likelihood of Bowman prevailing on his selective enforcement claim as grounds for dismissal. We further note that Bowman must also separately prove "that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." *Lamar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, at ¶ 43-44.

**{¶25}** The first assignment of error is sustained.

Enactment of the Zoning Ordinance

**{¶26}** In his second assignment of error, Bowman again challenges the underlying zoning ordinance giving rise to the criminal complaint, arguing that the trial court abused its discretion in granting the city's motion to exclude evidence regarding procedural defects in the enactment of the zoning ordinance. Bowman contends that the ordinance was not properly enacted because "the votes taken on the ordinance in question were 'yes' and 'no' votes rather than a roll call 'by yeas and nays.'" We have already addressed this exact assignment of error in *Bowman II*, finding that it had no merit. *See Bowman II* at ¶ 17.

**{¶27}** Bowman claims, however, that our resolution of the argument relied on the App.R. 9(C) record before the court at that time — not a complete transcript, which would alter our analysis. But Bowman elected to file an App.R. 9(C) record on appeal in *Bowman II*, instead of submitting a transcript. Having already decided this exact issue, we find his challenge of the ordinance for the second time is barred by law of the case. *State v. Leggett*, 6th Dist. Williams No. WM-00-003, 2002-Ohio-533, citing *State v. Wallace*, 121 Ohio App.3d 494, 497-498, 700 N.E.2d 367 (10th Dist.1997). Bowman fails to offer any compelling reason for us to revisit this issue.

**{¶28}** The second assignment of error is overruled.

Sentencing

**{¶29}** In his final assignment of error, Bowman argues that the trial court imposed an unlawful, retaliatory sentence following the bench trial. But based on our resolution of the first assignment of error, and that the trial court must vacate the conviction and hold a new trial on remand, this assignment of error is moot. *See* App.R. 12(A)(1)(c).

**{¶30}** Judgment reversed and case remanded for a new trial. On remand, the trial court should order McLaughlin to comply with the subpoena duces tecum prior to the date of the scheduled trial.

It is ordered that appellant recover from appellee the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Berea Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MARY J. BOYLE, JUDGE

LARRY A. JONES, SR., P.J., and
EILEEN A. GALLAGHER, J., CONCUR