

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

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| STATE OF OHIO, | : | O P I N I O N |
| Plaintiff-Appellee, | : | |
| - vs - | : | CASE NO. 2003-T-0142 |
| ESTATE OF THEODORE WYLAND, | : | |
| Defendant-Appellant. | : | |

Criminal Appeal from the Newton Falls Municipal Court, Case No. 01 CRB 00728.

Judgment: Reversed and judgment entered for Appellant.

Richard F. Schwartz, Newton Falls City Prosecutor, 19 North Canal Street, Newton Falls, OH 44444, and *Neil D. Schor*, 26 Market Street, #1200, Youngstown, OH 44503 (For Plaintiff-Appellee).

Francis L. Dunn and *John E. Fowler II*, 119 West Market Street, Warren, OH 44481 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} On March 16, 2001, the Trumbull County Court of Common Pleas issued a judgment entry affirming the decision of the Lordstown Board of Zoning Appeals denying appellant, Theodore Wyland, a zoning permit for an existing structure on his property.

{¶2} On July 2, 2001, the state filed a complaint against appellant in the Municipal Court of Newton Falls, Trumbull County, Ohio. The complaint was a result of

appellant's failure or refusal to comply with certain specified zoning ordinances of the Village of Lordstown, Ohio, i.e., Sections 1125.03(A), 1141.04(A)(1), 1137.01 R-1, and 1137.04(A). Pursuant to section 1125.99 of the Village of Lordstown Codified Ordinances, zoning violations constitute unclassified misdemeanors and violations may result in a fine of \$100. It is worth noting that the complaint alleged violations occurring "on or about July 2, 2001," i.e., the charging instrument only reflected one specific day on which the violations existed. The complaint concluded quoting the penal ordinance; to wit, "each day the violation continues shall be deemed a separate offense."

{¶3} After various pretrial, status, and review hearings, the trial court set the matter for trial on August 26, 2003. Approximately one week before trial, appellant sought a continuance due to a medical appointment. On the day of trial, the trial court denied appellant's motion. Although appellant was not present for trial, he was represented by counsel. Without hearing testimony or receiving evidence, the trial court found appellant guilty of the misdemeanor.¹ Although the complaint only charged appellant for the day of July 2, 2001, the court determined that appellant's non-compliance had continued for 785 days and accordingly imposed a fine of \$78,500 (\$100 X 785).²

{¶4} Appellant now appeals and assigns the following errors for our review:

1. As will be discussed *infra*, the trial court relied solely upon Judge Logan's March 20, 2001 judgment entry affirming the Lordstown Board of Zoning Appeals' decision denying appellant's zoning permit.

2. As suggested *supra*, the penal ordinance states that each day the *violation* continues, such *violation* shall be deemed a separate offense. However, we point out that there can be no violation until a court convicts a party on a charge. Consequently, the trial court "placed the cart before the horse" when it fined appellant \$100 for each successive day proceeding the filing of the charge as no conclusive violation existed until it rendered its judgment of conviction on August 26, 2003. That said, a charging instrument must specify a particular time during which the violation(s) occurred. For the trial court to validly sentence appellant in the manner it did, the charging instrument would have to allege violations throughout the defined period of July 2, 2001 through August 26, 2003. Under the circumstances, the trial court

{¶5} “[1.] The trial court committed reversible error in convicting appellant of failing to comply with regulations of the codified ordinances of Lordstown Village, as charged, because the evidence adduced at trial, at most, established violations of said regulations by only a preponderance of the evidence, and did not establish beyond a reasonable doubt that appellant violated said ordinances.

{¶6} “[2.] The trial court committed reversible error and abused its discretion by failing to grant appellant’s motion for continuance of the trial where appellant was unavailable for trial on the scheduled trial date due to appellant being gravely ill and needing medical care, and where the trial court made no finding on the record that appellant’s failure to be present at trial was deliberate or voluntary.

{¶7} “[3.] The trial court committed reversible error and violated appellant’s constitutional right to be present at his trial where the trial court held the trial in appellant’s case without appellant present at the trial and where the court did not find that appellant’s failure to appear was deliberate or voluntary.

{¶8} “[4.] The trial court committed reversible error by sentencing and fining appellant seventy-eight thousand five hundred dollars (\$78,500) for a violation of the codified ordinances of Lordstown Village, sections 1125.03(A), 1141.04(A)(1), 1137.01 R-1, and 1137.04(a).”

{¶9} In his first assignment of error, appellant contends the trial court erred because there was insufficient evidence to support his conviction beyond a reasonable doubt. Specifically, the trial court relied on a judgment entry from appellant’s administrative appeal when it convicted him of the unclassified misdemeanor in

inappropriately counted backwards from the date of the hearing and sentenced appellant to a running total of 785 violations. Such a technique is procedurally invalid.

question. In that appeal, the Trumbull County Court of Common Pleas determined that the zoning board's denial of a building permit was supported by a preponderance of the evidence. Appellant complains that, in relying solely on the evidence presented at his administrative appeal, the trial court essentially reduced the burden of proof to the civil standard of a preponderance of the evidence. Thus, appellant concludes that there was insufficient evidence supporting his conviction. We agree with appellant, but not for the reasons he asserts.

{¶10} “When assessing the sufficiency of evidence upon which a criminal conviction is based, the role of an appellate court is to determine whether the state introduced sufficient evidence on each statutory element of the offense such that a rational trier of fact could infer the offense was committed beyond a reasonable doubt.” *State v. Newton* (June 27, 1997), 11th Dist. No. 96-L-058, 1997 Ohio App. LEXIS 2802, at 12.

{¶11} When engaging in this inquiry, the evidence shall be viewed in a light most favorable to the prosecution. See, *Id.*

{¶12} In the case at bar, the state presented no competent evidence on which the trial court could base its conviction. That is, at trial, the court initially denied appellant's motion for a continuance; following this denial, the trial court began a lengthy narrative in which it indicated that it was in possession of the administrative appeal judgment entry and that this judgment entry contained sufficient evidence on which the court could base its conviction. In particular, the court stated:

{¶13} “*** [T]his matter with respect to trial, will move forward, based upon Judge Logan’s³ determination, which has been unreversed, since March 16th of 2001.

{¶14} “This matter alleges that the defendant has failed to comply with the zoning ordinances, which would require that that – that particular structure either be in compliance or removed. That has not occurred. The penalties in that particular ordinance are fines of \$100 a day for each and every day that that situation is allowed to continue.

{¶15} “Based upon the findings of the Common Pleas Court that the structure is not in compliance with the zoning ordinance, based upon the failure or refusal of the defendant to comply with the zoning ordinance, I find that he is in violation of that ordinance. The penalties for that ordinance are \$100 a day. I’ve calculated some 785 days in which that situation has continued at \$100 a day.

{¶16} “Therefore, imposed is an unclassified misdemeanor a fine of \$78,500. He can take that matter to the Court of Appeals, if he gets around to that.”

{¶17} At no point did the court permit the prosecutor or defense to put forth any evidence. Although the prosecutor did note that he was prepared to present all necessary evidence to support his case, the judge stated his belief that such a presentation was unnecessary and an “exercise in futility.”

{¶18} A trial is a judicial examination of issues between parties. Trials are governed by established procedural rules and usually involve offering of testimony or other evidence. At a criminal proceeding, the prosecution has the burden of proving all

3. The decision to which the trial court is referring is a judgment entry filed on March 20, 2001 by Judge Andrew Logan of the Trumbull County Court of Common Pleas. The judgment was the result of appellant’s administrative appeal in which Judge Logan affirmed the decision of the Lordstown Board of Zoning Appeals.

elements of the offense charged and must persuade the factfinder, beyond a reasonable doubt, of the facts necessary to establish each of those elements. See, e.g. R.C., 2901.05(A); see, also, *Sullivan v. Louisiana* (1993), 508 U.S. 275, 277-278. The current matter was tried to the bench; under such a circumstance, the trial judge acts as the trier of fact, receives evidence and renders his or her decision on the basis of said evidence.

{¶19} Under the circumstances, no evidence was submitted on behalf of the prosecution. When the prosecutor advised the judge he was prepared to move forward and offer evidence the judge indicated that doing so was both unnecessary as well as futile. The trial court accordingly convicted appellant without the benefit of evidentiary admissions or testimony. In essence, although adequate evidence *may have* existed on which the lower court could have relied to convict appellant, the so called trial is devoid of any such evidence. The trial judge, in relieving the prosecution of its burden, precluded the introduction of evidence necessary to uphold the conviction. As the prosecution failed to put forth any evidence, we hold that appellant's conviction is not supported by sufficient evidence.⁴

{¶20} Further, by relieving the state of the burden of putting forth evidence, the trial judge deprived appellant of his right to due process of law. The Fifth Amendment to the United States Constitution as well as R.C. 2901.05(A) require the prosecution to

4. Although the trial court relied solely upon the evidence set forth in the judgment entry, the issues addressed therein do not mirror the criminal complaint upon which the proceedings in this matter were premised. Specifically, the criminal complaint states that appellant failed to comply with "Regulations of Zoning ordinances in violation of sections 1125.03(a); 1141.04(a)(1); 1137.01 R-1; 1137.04(a) ***". However, Judge Logan's judgment entry does not ostensibly address the violation of section 1141.04(a)(1), to wit, exceeding the height of 16'6 for an accessory structure. Thus, even had the evidence been properly submitted and considered, the judgment entry was insufficient, on its own, to establish the violations set forth in the complaint.

prove a charged offense beyond a reasonable doubt. Under the circumstances, the trial judge rendered his decision based upon a document that was not admitted into evidence by the prosecution. In doing so, the trial judge sua sponte put forth the evidence on which the conviction was based and thereby acted as an advocate for the state. In a bench trial, the trial court acts as both factfinder and judge; however, the trial judge rose above his station, in violation of the Constitution, when he submitted the judgment entry that was the basis for his conviction, and effectively precluded the admission of competent evidence by the prosecutor.

{¶21} Appellant's first assignment of error is sustained.

{¶22} Because appellant's first assignment of error is dispositive of the current appeal, it is unnecessary for us to address his remaining assigned errors. For the foregoing reasons, appellant's conviction rests upon insufficient evidence and is therefore reversed and judgment is entered for Appellant.

DONALD R. FORD, P.J.,

WILLIAM M. O'NEILL, J.,

concur.