

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

THE CITY OF CONNEAUT,	:	O P I N I O N
Plaintiff-Appellee,	:	CASE NOS. 2009-A-0042
- vs -	:	and 2009-A-0043
RUDOLPH BABCOCK,	:	
Defendant-Appellant.	:	

Criminal Appeals from the Conneaut Municipal Court, Case Nos. 09 CRB 83 and 09 CRB 84.

Judgment: Affirmed.

David A. Schroeder, Conneaut Law Director, and *Luke P. Gallagher*, Assistant Conneaut Law Director, City Hall Building, 294 Main Street, Conneaut, OH 44030 (For Plaintiff-Appellee).

Brett R. Joseph, Joseph Law Services Co., LPA, 256 Main Street, Conneaut, OH 44030 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellant, Rudolph Babcock, appeals from the August 12, 2009 judgment entry of the Conneaut Municipal Court, in which he was sentenced for failure to file city income tax returns.

{¶2} On March 6, 2009, appellee, the city of Conneaut (“City”), filed two complaints against appellant for failure to file city income tax returns for tax years 2006 (Case No. 09

CRB 83) and 2007 (Case No. 09 CRB 84), misdemeanors of the first degree, in violation of Section 191.04(a) of the city of Conneaut Income Tax Code. Appellant pleaded not guilty to the charges in both complaints at his initial appearance on March 17, 2009.

{¶3} Also, on March 17, 2009, appellant filed motions to dismiss both complaints, which were denied by the trial court on March 25, 2009.

{¶4} A jury trial was held on July 23, 2009.

{¶5} At the trial, Christine Brown (“Brown”), Moderator with the First Congregational United Church of Christ (“Church”), testified for the City that appellant provided ministerial services to the Church in 2006 and 2007 pursuant to a written “Call Agreement,” which is a contract for services. Brown indicated that under the terms of the 2006 and 2007 contracts, appellant received a base annual salary of \$12,000 or \$13,000, an annual housing allowance of \$13,000, a car allowance of \$3,000, a hospital allowance, and three weeks paid vacation.¹

{¶6} Drusilla Bartone, Treasurer with the Church, testified for the City that as a result of appellant’s employment with the Church, he was issued a 1099 Miscellaneous Income Tax Form for the years 2006 and 2007.

{¶7} Larry Gasch (“Gasch”), Income Tax Administrator for the City during the time periods at issue, testified for the City that appellant failed to file tax returns for 2006 and 2007, which were due on or before April 15, 2007 and April 15, 2008, respectively. According to Gasch, he sent two letters of inquiry for each of the tax years in question to appellant. Gasch indicated that he sent approximately four hundred such letters in 2006 and 2007 as a courtesy to taxpayers. Appellant sent back both letters, indicating that he

1. There is a discrepancy in the record as to whether appellant’s base annual salary was \$12,000 or \$13,000.

was retired. Gasch then sent a third letter to appellant, explaining that the City was in possession of a 1099 showing that he had taxable income for the years at issue. Pursuant to a request made by appellant, Gasch sent him a certified copy of the city of Conneaut Income Tax Code. At no time during this process did appellant ever file the prescribed form for city income taxes for the tax years 2006 and 2007.

{¶8} John Williams (“Williams”), Finance Director for the City, testified for the City that his office operates with the current tax code as adopted by the City. Williams indicated that although appellant was required to file income tax returns for 2006 and 2007, he failed to do so.

{¶9} Judy Parlongo (“Parlongo”), a Trustee at the Church, testified for appellant that he made it clear to the Church that he was retired and would not come out of retirement.

{¶10} Following the trial, the jury found appellant guilty of both offenses charged in the complaints, failure to file city income tax returns for tax years 2006 (Case No. 09 CRB 83) and 2007 (Case No. 09 CRB 84), misdemeanors of the first degree, in violation of Section 191.04(a) of the city of Conneaut Income Tax Code.

{¶11} Pursuant to its August 12, 2009 judgment entry, the trial court sentenced appellant to the following: with respect to Case No. 09 CRB 83, appellant was ordered to pay a fine in the amount of \$1,000 plus court costs and to serve six months in jail, to be served intermittently; and with regard to Case No. 09 CRB 84, appellant was ordered to pay a fine in the amount of \$1,000 plus court costs and to serve six months in jail, consecutively to the sentence in Case No. 09 CRB 83 and intermittently. The trial court further ordered that appellant’s intermittent jail sentence shall be served in twelve day blocks of time. The

trial court indicated that if appellant files a proper city income tax return, the balance of his jail sentence shall be suspended and he will not be required to serve any additional time. Appellant's sentence was stayed pending appeal. It is from that judgment that appellant filed timely appeals, asserting the following assignments of error for our review:²

{¶12} “[1.] The Trial Court committed prejudicial error by overruling [appellant’s] pre-trial motion to dismiss predicated on grounds, *inter alia*, that [appellant] was prosecuted without first having been afforded his right to procedural due process of law; specifically, his right to receive timely, written notification of his right to an administrative appeal of the decision of the City Income Tax Administrator[.]”

{¶13} “[2.] The Trial Court committed prejudicial error by overruling [appellant’s] pre-trial motion to dismiss for lack of ripeness, specifically, by rejecting [appellant’s] affirmative defense that [appellee] prematurely charged him with failure to file income tax return, in a manner that effectively foreclosed [appellant’s] right to seek a final administrative determination regarding his obligation to file, pursuant to applicable statutory administrative remedies provided under [Conneaut Codified Ordinance Section] 191.13(a-f)[.]”

{¶14} In his first assignment of error, appellant argues that the trial court erred by overruling his pre-trial motions to dismiss both complaints. Appellant maintains that he was prosecuted without first having been afforded his right to procedural due process, specifically his right to receive timely, written notification of his right to an administrative appeal of the decision of the City Income Tax Administrator.

{¶15} Appellant presents three issues under his first assignment of error:

2. This court, sua sponte, consolidated appellant’s appeals, Case Nos. 2009-A-0042 and 2009-A-0043 for purposes of briefing and disposition.

{¶16} “[1.] Did [appellee], through its Income Tax Administrator, deprive [appellant] of procedural due process by failing to conform its exercise of taxing power to mandatory procedural requirements specified in both state statute and local ordinance, constituting an abuse of discretion?

{¶17} “[2.] Did the trial court commit prejudicial error by failing to determine, upon a pre-trial motion to dismiss, that [appellee] failed to provide a statutorily-mandated notice to [appellant] of his right to administrative appeal of the determination of the Income Tax Administrator, and that such failure constituted a denial of [appellant’s] right to procedural due process?

{¶18} “[3.] Did the trial court err by failing to determine that the denial of [appellant’s] procedural due process rights, coupled with evidence showing the Administrator’s routine use of misleading and deceptive correspondence, unnecessarily subjected [appellant] to the ordeal of an unexpected and avoidable criminal prosecution, thereby resulting in a deprivation of [appellant] of his substantive, constitutionally protected rights to liberty and property?”

{¶19} Because appellant’s three issues are interrelated, we will address them together.

{¶20} Preliminarily, we note that we review a trial court’s decision on a motion to dismiss pursuant to a de novo standard of review. *State v. Wendel* (Dec. 23, 1999), 11th Dist. No. 97-G-2116, 1999 Ohio App. LEXIS 6237, at 5. A de novo review requires the appellate court to conduct an independent review of the evidence before the trial court without deference to the trial court’s decision. *Brown v. Scioto Cty. Bd. Of Commrs.* (1993), 87 Ohio App.3d 704, 711.

{¶21} Conneaut Codified Ordinance Section 191.04(a) states:

{¶22} “Every Taxpayer, on or before each Annual Return Due Date, shall make and file a return for the Applicable Tax Year with the Administrator on a form prescribed by the Administrator or on a generic form containing all of the information required by the Administrator’s form. Such returns shall be made and filed by Employees regardless of whether an Employer has withheld all or a portion of the Employee’s City income tax liability. The return form prescribed by the Administrator shall be designed so that Residents receiving no income taxable under Section 191.02 or receiving income exempted by Section 191.15 may report such information, without filling out the remainder of the form.”

{¶23} We note that the instant case involves a failure to file a tax return. Appellant does not cite any authority that prohibits the City from instituting criminal action for failure to comply with the foregoing ordinance. Nothing prohibits the City from enforcing the foregoing ordinance until an alleged administrative appeal has been conducted. The City gave appellant the opportunity to be heard at a meaningful time and manner. Appellant exercised his constitutional right to a jury trial and was afforded every constitutional protection throughout the entire process. Appellant’s procedural due process rights were fully protected by the trial court, which provided him a right to a jury trial.

{¶24} Although appellant alleges that the City failed to comply with posting its tax ordinances, rules, procedures, and forms on the Internet, no evidence of that sort was adduced at trial. The events which appellant claims resulted in his loss of procedural due process occurred after the dates the criminal offenses occurred, i.e., the days after the due dates for the filing of income tax returns. In addition, although the City’s forms appear to

improperly indicate that a retiree falls under an exemption, the record establishes that appellant had knowledge that the City required him to file income tax returns, specifically with respect to the City's November 28, 2007 letter to appellant.

{¶25} Also, we know of no liberty interest in an administrative procedure for tax appeals. The record establishes that the trial court informed appellant that he is entitled to an administrative review as to whether he owes taxes after he files his income tax returns, which has not yet occurred. Appellant was provided a certified copy of the city of Conneaut Income Tax Code. However, he never filed an administrative appeal in this case. There is no evidence that the City ever denied him the right to do so.

{¶26} Appellant's first assignment of error is without merit.

{¶27} In his second assignment of error, appellant contends that the trial court erred by overruling his pre-trial motion to dismiss for lack of ripeness, specifically by rejecting his affirmative defense that the City prematurely charged him with failure to file income tax returns in a manner that foreclosed his right to seek a final administrative determination regarding his obligation to file, pursuant to remedies under Conneaut Codified Ordinance Section 191.13(a)-(f).

{¶28} Appellant presents one issue under his second assignment of error:

{¶29} "Did the trial court err by allowing the criminal case to proceed to trial, notwithstanding the availability of administrative remedies mandated by statute and local ordinance, respectively, and which [appellant] at the time of being criminally charged, was actively seeking to utilize as a matter of right?"

{¶30} Conneaut Codified Ordinance Section 191.13 provides:

{¶31} “(a) A Board of Review, hereafter called the Board, is hereby created. The Board shall be composed of the City Director of Law, the Director of Finance and the President of Council. All rules, regulations, and amendments or changes to this chapter that are adopted by the Administrator under the authority conferred by this chapter must be approved by the Board before the same become effective. After approval, such rules, regulations, and amendments or changes must be filed with the Clerk of Council and are open to public inspection.

{¶32} “(b) Whenever the Administrator issues a decision regarding a City income tax obligation that is subject to appeal, the Administrator shall notify the Taxpayer at the same time of the Taxpayer’s right to appeal the decision and the manner of such appeal.

{¶33} “(c) Any Person dissatisfied with any determination or ruling of the Administrator made under the authority conferred by this chapter may appeal to the Board in writing within thirty (30) days from the announcement of such ruling or decision stating why the decision should be deemed incorrect or unlawful.

{¶34} “(d) The Board shall schedule a hearing within forty-five (45) days after receiving an appeal pursuant to subsection (c) hereof, unless the Person appealing waives a hearing. The Board may affirm, reverse, or modify any determination or ruling appealed and shall issue a decision on the appeal within ninety (90) days after the final hearing on the appeal, and send notice of its decision by ordinary mail to the Taxpayer within fifteen (15) days after the date of its decision.

{¶35} “(e) A majority of the members of the Board will constitute a quorum. The Board may adopt its own procedural rules and shall keep a record of its transactions.

{¶36} “(f) All hearings by the Board may be conducted privately and the provisions of Section 191.12 with reference to the confidential character of information required to be disclosed by this chapter shall apply to all such matters as may be heard by the Board on appeal. ***”

{¶37} In the case at bar, the record establishes that appellant received taxable income and resided within the City limits with respect to the tax years at issue. Again, even assuming arguendo that appellant had a right to an administrative appeal before filing an income tax return, he never requested and was never denied an administrative appeal. During this case, appellant was informed that he had a right to an administrative appeal after he filed a tax return, which right presently still exists.

{¶38} Appellant’s second assignment of error is without merit.

{¶39} For the foregoing reasons, appellant’s assignments of error are not well-taken. The judgment of the Conneaut Municipal Court is affirmed. It is ordered that appellant is assessed costs herein taxed. The court finds there were reasonable grounds for this appeal.

CYNTHIA WESTCOTT RICE, J., concurs,

TIMOTHY P. CANNON, J., concurs with Concurring Opinion.

TIMOPHY P. CANNON, J., concurring.

{¶40} I concur with the judgment of the majority, but write separately for the following two reasons.

{¶41} First, R.C. 718.11 does not apply here. As noted by the majority, appellant was not charged with failure to pay an assessed tax. As Conneaut Codified Ordinance Section 191.04(a) makes clear, if you do not think you are obligated to pay tax, you must still file the return. Appellant bases his argument on the failure of the city to afford an administrative review as required by R.C. 718.11. However, that administrative review is in regard to “a decision regarding a municipal income tax obligation ***.” The statute further provides that it applies to “[a]ny person who is aggrieved by a decision by the tax administrator *and who has filed with the municipal corporation the required returns ***.*” (Emphasis added.) Id. Appellant never invoked the requirements of the statute because he never filed the required returns.

{¶42} Second, I have a significant concern regarding the form notices sent to appellant by the city of Conneaut. There were at least two forms sent to appellant. The form dated November 6, 2007, directs appellant to complete the form and return it if “you feel this notice is in error.” There are several potential items to check off at the bottom of the form. These items are “Married, Divorced, Retired, Other (explain), Military, Student, Under 18 Yrs. of age, and Non-Resident.” Appellant assumed these were exemptions, checked “Retired,” and returned the form. A second form was sent on November 17, 2007, again requesting a reply. However, this form significantly misleads the taxpayer. It states: “If any of the following exemptions apply, please so indicate and return this letter to the above address within the ten (10) day deadline.” The same options are given at the bottom of this form. The problem is these are not exemptions from filing Conneaut income tax

returns. It is difficult to know why these items are listed. The actual exemptions are listed in Conneaut Codified Ordinance Section 191.15. A taxpayer is *not* exempt from filing a city income tax return because they are married, divorced or retired. Why the form suggests this is inexplicable.

{¶43} The City Income Tax Administrator seems to have somewhat cleared up the issue with his letter dated November 28, 2007. After receiving that letter, there should have been no question about the obligation to file a return. The jury obviously did not feel the defendant was justified in failing to file a return, but the misleading notices should not form the basis of any prosecution for failure to file.