IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania	:	
	:	
	:	
v.	:	No. 398 C.D. 2007
	:	Submitted: June 27, 2008
John F. Birl, Jr.,	:	
	:	
Appellant	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE FLAHERTY FILED: October 22, 2008

John F. Birl, Jr., (Birl) appeals from the verdict and sentence imposed by the Court of Common Pleas of Delaware County (trial court), wherein the trial court found that Birl had violated the Upper Chichester Township Ordinance 456 (Ordinance 456) and ordered him to pay $300.00 for each of the two citations that had been issued. We reverse.

On May 8, 2005, Carl Spangler, Jr., the assistant Health Officer for the Board of Health of Upper Chichester Township (Township), notified Birl, via certified and regular mail, that he was in violation of Ordinance 456 in that refuse, debris, junk items, several trash cans with no lids, miscellaneous wood/metal items, and inoperable motor vehicles were stored on his property at 1119 Galbreath Avenue, and such created a public health nuisance/safety and potential rodent/animal harborage condition. The

letter informed Birl that Ordinance 456 is a matter of public record and is available at the Township Building for review. The letter further apprised Birl that he had ten days to take corrective action and that failure to do so could result in the filing of an information with the district justice. Thereafter, on April 28, 2005, Spangler issued citation P4585057-1 against Birl which stated that on April 8, 2005, Birl was notified that he was in violation of Ordinance 456, as Birl's property contained inoperable vehicles that were creating a public health nuisance. Citation P4585058-2 was also issued on that same date by Spangler and alleged that Birl was in violation of Ordinance 456 for storing refuse, debris, junk/bulk items and other miscellaneous items on his property.

Birl was found guilty before a district justice of violating § 307 of Ordinance 456, relating to maintaining clean and sanitary conditions so as to prevent vector harborage and § 502 of Ordinance 456 relating to motor vehicle nuisances. Thereafter, Birl filed a notice of appeal from summary conviction with the trial court and also filed preliminary objections, claiming that the trial court lacked subject matter jurisdiction. At the hearing, both Birl and Spangler testified. Spangler testified that Birl's property is located in a residential neighborhood near a daycare and a commercial food establishment. Spangler testified that he observed old furniture, debris, trash cans and junk on the front porch. Additionally, Spangler observed a pop-up trailer and four vehicles, three of which were unregistered. Spangler also presented pictures in support of his testimony. In his testimony, Birl admitted that he has vehicles on his property which he personally owns along with some building materials.

The trial court entered an order finding Birl guilty of violating Ordinance 456 and sentenced him to pay $300 for each citation, plus costs. In its subsequent opinion, the trial court concluded that the condition of the property was unsightly and encouraged the harbor of rodents, vermin and other animals. The trial court found that the condition of the property posed a threat to the health and general welfare of the citizens. As to Birl's preliminary objections which challenged the trial court's jurisdiction, the trial court concluded that although Ordinance 456 permits an administrative hearing, there was no evidence that Birl made a timely request for such a hearing. Birl appealed to our court.[1]

On appeal, Birl argues that he was entitled to a hearing before the Board of Commissioners prior to the Township proceeding before the district justice, that substantial evidence does not support the trial court's determination that his property constituted a nuisance in fact and that he was denied a speedy trial.

Initially, we address Birl's claim that it was error to commence proceedings with the district justice and then the trial court because Birl was first entitled to an administrative hearing. Specifically, Birl claims that with respect to the storage of property which the Health Officer deems to be a nuisance, Part 1, § 106 of Ordinance 456 provides that "[a]ny person aggrieved by the decision of the Health Officer may request and shall then be granted a hearing before the Board of Commissioners; provided, he files

[1] Our review of a trial court's determination on an appeal from a summary conviction is whether there has been an error of law or whether the findings of the trial court are supported by competent evidence. Commonwealth v. Creighton, 639 A.2d 1296 (Pa. Cmwlth. 1994).

with the Board of Commissioners within ten (10) days after notice of the Health Officer's decision, a written petition requesting such hearing …." (Emphasis in original.) As to motor vehicles that the Health Officer has deemed to be a nuisance, Part 5, § 506 of Ordinance 456, contains the identical language to that contained in Part 1, § 106 with respect to a hearing before the Board of Commissioners.

The Township responds that, in accordance with Section 1502 of the First Class Township Code (Code), Act of June 24, 1931, P.L. 1206, as amended, 53 P.S. § 56502, Upper Chichester, as a first class township, has the authority to bring suit for enforcement of its ordinances. The Code authorizes first class townships to enact ordinances and to set fines for violations of such ordinances. Specifically, in accordance with Section 1502 of the Code, a first class township may:

> Prescribe fines and penalties … for violation of a building, housing, property maintenance, health, fire or public safety code or ordinance and for water, air and noise pollution violations … for a violation of any other township ordinance, which fines and penalties may be collected by suit brought in the name of the township before any justice of the peace …. (Emphasis added.)

Thus, notwithstanding the fact that Birl could have had a hearing before the Board of Commissioners had he requested such within ten days of the Health Officer's determination such does not change the fact that a first class township may, as the Township did here, seek to enforce a violation of its Ordinance before the district justice.

Next, Birl argues that there was insufficient evidence to support the trial court's determination that he violated Ordinance 456. We observe that Birl was found guilty of violating §§ 307 and 502 of Ordinance 456.

Part 3 of Ordinance 456 is titled "Vector Control" and § 307 1.A. therein provides that "[t]he interior and exterior of all premises shall be maintained in a clean and sanitary condition which shall prevent vector harborage …." Additionally, § 307 4.A. requires that "[t]he exterior spaces of all premises shall be kept free of all accumulated garbage, rubbish, and junk …." In determining that Birl was in violation of § 307, the trial court credited the testimony of the Health Officer who described the premises, which testimony was corroborated by pictures that showed junk, debris, trash and unidentified items covered by tarps on Birl's property. The Health Officer stated that such conditions encouraged the harbor of rodents, vermin and other animals.

As to § 502 of Ordinance 456, we observe that it states the following:

> § 502. Motor Vehicle Nuisances Prohibited. It shall be unlawful for any person, owner or lessee to maintain a motor vehicle nuisance upon the open private grounds of such person, owner or lessee within the Township of Upper Chichester. A motor vehicle nuisance shall include any motor vehicle which is unable to move under its own power **and** has any of the following physical defects …. (Emphasis added.)

Section 502 then lists twenty physical defects.[2] The trial court in this case did not find that the automobiles had any physical defects such as broken mirrors, frames or lights but instead concluded that Birl was in violation of § 502 in that the inoperable, unregistered vehicles threatened the health, safety and welfare of the citizens of the Township. Specifically, the stored vehicles, along with the junk, debris and trash, constituted unsightly conditions which encouraged the harbor of rodents, vermin and other animals and posed a threat to the health, safety and general welfare of the citizens.

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[2] 1. Broken windshields, mirrors or other glass, with sharp edges.

2. One or more flat or open tires or tubes which could permit vermin harborage.

3. Missing doors, windows, hood, trunk or other body parts which could permit animal harborage.

4. Any body parts with sharp edges including holes resulting from rust.

5. Missing tires resulting in unsafe suspension of the motor vehicle.

6. Upholstery which is torn or open which could permit animal and/or vermin harborage.

7. Broken headlamps or tail-lamps with sharp edges.

8. Disassembled chassis parts apart from the motor vehicle stored in a disorderly fashion or loose in or on the vehicle.

9. Protruding sharp objects from the chassis.

10. Broken vehicle frame suspended from the ground in an unstable manner.

11. Leaking or damaged oil pan or gas tank which could cause fire or explosion.

12. Exposed battery containing acid.

13. Inoperable locking mechanism for doors or trunk.

14. Open or damaged floor boards including trunk and firewall.

15. Damaged bumpers pulled away from the perimeter of the vehicle.

16. Broken grill with protruding edges.

17. Loose or damaged metal trim and clips.

18. Broken communication equipment antennae.

19. Suspended on unstable supports.

20. Such other defects which could threaten the health, safety and welfare of the citizens of the Township.

Birl argues, however, that the trial court erred finding him guilty of the Ordinance 456 violations inasmuch as the prosecution failed to prove that the activity constituted a nuisance in fact.[3]

In McClellan v. Commonwealth of Pennsylvania, 499 A.2d 1150 (Pa. Cmwlth. 1985), the township ordinance prohibited a landowner from keeping on his premises "any garbage refuse or junk" without permission from the township. Id. at 1150. The evidence presented showed that the landowner had six abandoned vehicles, oil barrels and some scrap metal on the property. This court concluded that although a township may enact ordinances prohibiting nuisances, including the storage of junked automobiles and scrap "in proceedings against persons for violating such an ordinance the prosecution must prove that the activity in fact constituted a nuisance." Id. at 1151. Because the prosecution failed to show that the landowner's actions resulted in noise, offensive odor, vermin or harm to others, this court concluded that the landowner's actions did not constitute a nuisance.

Similarly in Teal v. Township of Haverford, 578 A.2d 80 (Pa. Cmwlth. 1990), petition for allowance of appeal denied, 527 Pa. 659, 593 A.2d 429 (1991), Teal was cited for violating the township ordinance which prohibited disabled vehicles from remaining on private property for more than seventy-two hours. Although the vehicles lacked registration plates and inspection stickers, this court determined that there was no evidence that the

[3] A nuisance is defined in Part 1, § 101 and Part 5, § 501 as:

> any condition, structure, or improvement which shall constitute a threat or potential threat to the health, safety, or welfare of the citizens of the Township.

vehicles constituted a public nuisance. There was no evidence presented that the vehicles posed any public danger, inconvenience or distraction.

Based on the above case, Birl argues that the Township failed to prove that the junk and automobiles on his property constituted a nuisance in fact. The Township responds, however, that the testimony of the Hearing Officer was credited by the trial court and that his testimony established that a nuisance in fact existed. The test for determining the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the Commonwealth as verdict winner and drawing all proper inferences in the Commonwealth's favor, the fact finder reasonably could have determined that all elements of the offense have been established beyond a reasonable doubt. Scott v. Commonwealth, 578 A.2d 1022 (Pa. Cmwlth. 1990). We agree with Birl that there was insufficient evidence to prove a nuisance in fact.

In his direct testimony, the Hearing Officer described seeing "trash cans, an old desk, an old cabinet and what appears to be junk" on Birl's front porch and trash cans along the side porch. (Notes of Testimony (N.T.) at 13, 16.) He also described seeing four vehicles in the front of the property, only one of which was licensed and registered. (N.T. at 14.) In the rear of the yard, the Hearing Officer described a white motor vehicle which hadn't been moved for at least four years and a pop-up trailer. (N.T. at 14.)

When asked why he thought the condition of Birl's property constituted a nuisance under the Ordinance, the Health Officer stated:

> A. Well I think the property, in my opinion, is in deplorable condition. There's refuse, debris,

> junk items, things covered with tarps on the property, numerous vehicles that aren't licensed that are apparently not used, to the best of my knowledge. There's numerous conditions that would provide ideal harborage for rodents, animals, cats, you name it. I don't think it's fair to the people in the community who live by this property who have to deal with this. It's very unsightly and to me a public health nuisance.
>
> Q. Do you feel that this condition of the property would encourage and actually be a harbor for rodents, vermin and other animals?
>
> A. Every condition needed for such infestation is on that property.

(N.T. at 16, 17.) On cross-examination, the Health Officer conceded that there were no noises, offensive smells or odors coming from the property and that he "did not witness any evidence of any rodents." (N.T. at 18.) Moreover, he acknowledged that none of the cars were on jacks, which could have been a hazard. (Id.)

When further questioned as to how he determined that the property was a nuisance, the Health Officer responded:

> A. Because to me it's a nuisance condition. It provides ideal harborage for a number of things.
>
> Q. But there are none there.
>
> A. It's a violation of public -- well, that's a matter of determination. Because I didn't see any doesn't mean they're not there.

(N.T. at 18, 19.)

Contrary to the Township's contention, merely because the Health Officer stated that a nuisance existed, such does not make it so. The record as a whole must be viewed to determine whether the vehicles and junk stored on Birl's property constituted a nuisance. The record reflects that although Birl's property may be unsightly, like the facts in McClellan and Teal, there was no evidence of noise, smell, or rodent infestation or that the vehicles posed any public danger, such that a nuisance in fact existed.[4]

Since there is no competent evidence to support the finding of the trial judge that the storage of vehicles, junk, debris and trash cans threatened the health, safety and general welfare of the citizens, the decision of the trial court is reversed.

JIM FLAHERTY, Senior Judge

[4] Because of our determination, we need not address Birl's final argument that he did not receive a speedy trial under Pa. R. Crim. P. 622.

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O R D E R

Now, October 22, 2008, the Order of the Court of Common Pleas of Delaware County, in the above-captioned matter, is reversed.

JIM FLAHERTY, Senior Judge