

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania :  
 :  
 v. : No. 489 C.D. 2008  
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 Joseph B. Whiteford, :  
 Appellant :  
 :  
 Commonwealth of Pennsylvania :  
 :  
 v. : No. 490 C.D. 2008  
 : Submitted: August 29, 2008  
 John K. Whiteford, :  
 Appellant :

OPINION NOT REPORTED

MEMORANDUM OPINION  
PER CURIAM

FILED: December 5, 2008

Joseph B. Whiteford and John K. Whiteford (collectively, the Whitefords) appeal, *pro se*, two orders of the Court of Common Pleas of Allegheny County (trial court) imposing penalties upon the Whitefords for violating the excavation and grading ordinance of Penn Hills.<sup>1</sup> The Whitefords assert that the ordinance provisions are preempted by the Oil and Gas Act and, further, the trial court's orders have placed them in double jeopardy. Finding no merit to the Whitefords' constitutional claims, we affirm the trial court.

In 2003, the Whitefords received approval from the Pennsylvania Department of Environmental Protection (DEP) to dig a gas well on property they

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<sup>1</sup> One order pertained to Joseph Whiteford and the other order pertained to John Whiteford. This Court approved consolidation of the appeals at the request of the Whitefords.

own along Dalecrest Road in Penn Hills.<sup>2</sup> The Whitefords also submitted a site plan that was approved by the Penn Hills Planning Commission. However, the Whitefords never obtained a grading permit from Penn Hills as required by the Penn Hills Existing Structures Code (Code). As a result, Penn Hills issued a notice of violation to Joseph Whiteford, instructing him, *inter alia*, to apply for a grading permit. When he failed to do so, Penn Hills filed two complaints against Joseph Whiteford, one for a violation on July 26, 2004, and the other for a violation on July 28, 2004.<sup>3</sup> The two complaints alleged violations of Section 301.2 (“Grading and Drainage”) and Section 301.12 (“Performance Standards”) of the Code for failing to: develop the property in accordance with the site plan; prevent damage to adjacent property; obtain a grading permit for work not approved by the site plan; and comply with grading and excavation standards and performance principles.<sup>4</sup>

Joseph Whiteford was convicted of the violations and fined \$400. He appealed, and this Court affirmed the convictions. *Commonwealth v. Joseph B. Whiteford*, 884 A.2d 364 (Pa. Cmwlth. 2005) (*Whiteford I*). This Court observed that although Penn Hills erred in bringing the actions on a criminal form when the actions were actually civil in nature, it was of no moment because Joseph Whiteford received a higher degree of protection as a criminal defendant than he would have received as a civil defendant. The Court also determined that Joseph Whiteford failed to carry his high legal burden of demonstrating that the Code

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<sup>2</sup> According to the Whitefords, John Whiteford is the supervising well engineer and Joseph Whiteford is the well operator. Whiteford brief at 19.

<sup>3</sup> Under Section 110.2 of the Code, each day that work proceeds without a permit constitutes a separate offense.

<sup>4</sup> The Whitefords put in a road that was much wider than the one shown on the site plan and took down more trees than permitted by the approved site plan. Notes of Testimony, January 22, 2008, at 20.

provisions applied to him were preempted by the Oil and Gas Act.<sup>5</sup> We concluded that the ordinance regulated activities not addressed by the Oil and Gas Act.

On December 12, 2005, Penn Hills again cited Joseph Whiteford for violating Sections 301.2 and 301.12 of the Code for the same conduct previously adjudged to violate the Code. This time he was ordered to pay a \$2,000 fine plus costs. Joseph Whiteford appealed, and this Court affirmed in *Joseph B. Whiteford v. Municipality of Penn Hills and Howard Davidson* (No. 1931 C.D. 2006, filed March 14, 2007) (*Whiteford II*). Noting that most of Whiteford's arguments centered on his belief that he was not required to comply with the cited Code sections because they were preempted by the Oil and Gas Act, we held that the preemption issue was barred by collateral estoppel and the law of the case doctrine. The issue had already been decided in *Whiteford I*. We also rejected Whiteford's substantial evidence claim because the violations established in *Whiteford I* were final and non-appealable, and Whiteford admitted that he still had not applied for a grading permit. Finally, this Court determined that Whiteford's appeal was frivolous and remanded for the trial court to award attorney's fees to Penn Hills.<sup>6</sup>

On January 22, 2007, the Code was amended to provide for imprisonment as a possible penalty for violating its provisions. On February 9, 2007, Penn Hills issued a notice of violation to both Joseph and John Whiteford for violating Sections 301.2 and 301.12 of the Code by reason of the exact same

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<sup>5</sup> Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S. §§601.101-601.605.

<sup>6</sup> We pointed out that: (1) all relevant issues of law and fact had been decided in *Whiteford I*; (2) Whiteford refused to comply with that decision by obtaining a grading permit; (3) the parties agreed to postpone the hearing for six months in order to allow Whiteford to obtain a grading permit in exchange for a withdrawal of the pending charges but Whiteford did not do so; and (4) Whiteford refused to accept a settlement, negotiated by the trial court, that would have allowed him to apply for a grading permit in exchange for the dismissal of all pending charges.

conduct adjudicated in *Whiteford I* and *II*. In addition, Penn Hills issued private criminal complaints against Joseph and John Whiteford for the violations that were committed on various days throughout the month of February 2007.

The Whitefords responded by filing an amended complaint in equity against Penn Hills Code Enforcement Officer, Howard Davidson, and against Penn Hills. Their complaint alleged that the various complaints filed against the Whitefords contained false statements that were defamatory; violated the Whitefords' protection against Double Jeopardy; were contrary to DEP site inspections that found no violations of the Pennsylvania Clean Streams Law<sup>7</sup> with respect to grading, excavating, erosion and sedimentation; and contained allegations of damage to adjacent property which the Whitefords had repaired in 2004. Davidson and Penn Hills filed preliminary objections to the Whitefords' complaint. The trial court sustained the objections, and it dismissed the Whitefords' complaint.

This Court affirmed the trial court's dismissal of the Whitefords' complaint in *John K. and Joseph B. Whiteford v. Howard Davidson and Penn Hills Municipality* (No. 2220 C.D. 2007, filed April 2, 2008) (*Whiteford III*). This Court affirmed with regard to the libel, Double Jeopardy and Ex Post Facto issues on the basis of the trial court opinion. We declined to revisit the Oil and Gas Act preemption issue as it had already been decided in *Whiteford I* and *Whiteford II*. Finally, we concluded that the Whitefords' appeal was frivolous and remanded for an award of attorney's fees.

In November 2007, before a District Justice, the Whitefords were convicted of the charges that arose from their conduct in February 2007. They

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<sup>7</sup> Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§691.1-691.1001.

appealed to the trial court, which conducted a hearing on January 22, 2008. On February 15, 2008, the trial court issued an order adjudging Joseph Whiteford guilty of twelve successive violations and fining him \$6,000 plus costs. On the same date, the trial court issued an order adjudging John Whiteford guilty of ten successive violations and fining him \$5,000 plus costs. The present appeal followed.<sup>8</sup>

On appeal, the Whitefords raise three main issues.<sup>9</sup> First, they argue that Penn Hills' "repeated and retroactive prosecutions" of the Whitefords for the same code violations are proscribed by the Double Jeopardy prohibition, Ex Post Facto prohibition and Due Process guarantee of the United States Constitution. Next, the Whitefords argue that they proved that the accusations of Penn Hills were knowingly false, perjured and invalid because the Code is preempted by the Oil and Gas Act. Finally, the Whitefords assert that the Municipality failed to present competent evidence that proved beyond a reasonable doubt that the conduct alleged in each of the 22 criminal complaints filed against them is true.

Regarding their constitutional claims, the Whitefords maintain that the latest criminal prosecution was barred by the prohibition against Double Jeopardy because it involved 22 simultaneous criminal prosecutions for the same offenses and because there has been a previous criminal prosecution for the same Code violations. The Whitefords further argue that the latest criminal prosecution was barred by the Ex Post Facto prohibition because the same conduct was previously

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<sup>8</sup> Our scope of review of a trial court's determination on appeal from a summary conviction is limited to determining whether there has been an error of law or whether the findings of the trial court are supported by competent evidence. *Commonwealth v. Brandon*, 872 A.2d 239, 241 n.1 (Pa. Cmwlth. 2005).

<sup>9</sup> We have rearranged the order of the arguments for organizational purposes.

punished by the 2004 civil enforcement action. The Whitefords believe that because they were prosecuted for what were once civil offenses under the Code, they cannot be prosecuted criminally for violations after January 22, 2007, at which time the Code was amended to provide for possible imprisonment for those offenses.<sup>10</sup> The Whitefords assert that their right to Due Process has been violated because the trial court did not address these constitutional defenses in a way that is consistent with binding legal precedent. They also assert that the courts are simply repeating their initial error by continuing to convict them of violations of the Code.

Penn Hills counters that these issues are barred because they have been previously litigated and decided by this Court.<sup>11</sup> We agree. *Whiteford III* addressed and disposed of the Double Jeopardy and Ex Post Facto arguments. Further, any Due Process violations alleged in the Whitefords' prior litigation with Penn Hills are not properly before us, as we are concerned only with this particular litigation.

Nevertheless, given the recurring nature of the litigation between the parties, we feel compelled to address briefly the merits of the Whitefords' constitutional arguments. These arguments stem from the Whitefords' lack of understanding of the Code. Each day constitutes a new and separate violation of the Code, so long as a breach of the Code goes uncorrected. Stated otherwise, until the Whitefords obtain a grading permit for work done to the site, each day that

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<sup>10</sup> At hearing, John Whiteford asserted:

I just want to say that the ordinance can be criminally enforced against anyone but the Whitefords, because they have enforced these violations as civil violations in the past, three years ago.

Notes of Testimony, January 22, 2008, at 55.

<sup>11</sup> In fact, Penn Hills has filed a motion to quash the appeal. We decline to quash the appeal; however, Penn Hills is correct that the bulk of the appeal concerns issues already litigated.

passes without their having that permit constitutes a new and separate violation of the Code.<sup>12</sup> Therefore, the prosecution of the Whitefords for violations occurring in February 2007 does not run afoul of the Double Jeopardy and Ex Post Facto prohibitions.

The Whitefords next argue that the violations asserted by Penn Hills with respect to their conduct in February 2007 are knowingly false, perjured, and preempted by the Oil and Gas Act. According to the Whitefords, this Court's holding in *Great Lakes Energy Partners v. Salem Township*, 931 A.2d 101 (Pa. Cmwlth. 2007), established that the Code provisions in question are preempted by the Oil and Gas Act.<sup>13</sup> Further, the Whitefords contend that three DEP inspections have found no well site grading or excavation errors, which proves that Penn Hills' enforcement actions are knowingly false and perjured.

These issues have all previously been addressed. In *Whiteford III*, this Court addressed the contention that Penn Hills made false and perjured accusations. What is more, it has been established in *Whiteford I*, *Whiteford II*,

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<sup>12</sup> Section 301.2 of the Code provides in relevant part:

No changes shall be made in the contour of the land, no grading, excavation, removal or destruction of the topsoil, trees or other vegetative cover of the land shall be commenced until such time as a plan for minimizing erosion and sedimentation has been processed with, and reviewed by, the Municipality, or there has been a determination by the Municipality that such plans are not necessary.

Further, Section 301.12 of the Code requires that "[a]ll premises shall continue to meet the performance standards," meaning that failure to obtain a permit from Penn Hills is not merely a one-time violation because there could very well be remedial measures required of the permittees. This illustrates why the Whitefords are not guilty of only one violation, but rather, commit a different violation each day.

<sup>13</sup> In that case, this Court affirmed the trial court's determination that the township's oil and gas regulations were preempted by the Oil and Gas Act. It did not hold that Penn Hills' regulation of grading and excavation was preempted.

and *Whiteford III* that the provisions of the Code at issue here, that regulate excavation and grading, are not preempted by the Oil and Gas Act. We will not revisit these issues. These issues are the law of the case and/or barred by collateral estoppel.

The Whitefords next argue that Penn Hills failed to present competent evidence sufficient to prove beyond a reasonable doubt that the violations in each of the 22 criminal complaints in this case are true. Penn Hills submitted photographs from 2004 but no later ones.<sup>14</sup> The Whitefords also contend that they were not required to obtain a grading permit because the demand for such permits is preempted by the Oil and Gas Act.

At the hearing, Davidson testified that although he did not actually inspect the gas well on February 9, 2007, he drove by the area and observed the site to be unchanged from the time the initial grading violations were found to have occurred. New photographs were not necessary to prove the fact that the grading violations had not been corrected. Again, the Whitefords are attempting to relitigate issues that have already been decided. The Whitefords repeatedly argue that no new violations have occurred at the site since May 2004; however, this Court has previously affirmed the finding that the exact same violations the Whitefords were charged with in February 2007 were present at the site in July 2004 and December 2005. It is undisputed that the site has remained the same since May 2004 and that the Whitefords have not attempted to obtain a grading permit. Therefore, Penn Hills proved the existence of new violations. The Whitefords are merely attempting to relitigate whether the violations ever took

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<sup>14</sup> Indeed, the Whitefords claim that these 2004 photos prove that no grading or excavating defects were present.

place and whether they are required to obtain a grading permit, but *they may not do so*.<sup>15</sup>

Finally, Penn Hills requests that this Court impose attorney's fees because the Whitefords' appeal is frivolous. Under PA. R.A.P. 2744, an appellate court is permitted to award a reasonable counsel fee "if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious." Penn Hills points out that the Whitefords raised the same issues here that have already been decided; that Penn Hills has been forced to litigate this matter through numerous appeals; and that this Court, in two prior opinions, has awarded attorney's fees due to the continuing frivolous nature of the appeals.

We agree that the appeal is frivolous because it is based on issues of law and fact that have been determined in the past and may not be revisited. As a result, we conclude that Penn Hills is entitled to attorney's fees, despite the fact that the Whitefords are proceeding *pro se*, and remand the case to the trial court to determine the amount.

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<sup>15</sup> The Whitefords raise several other arguments at the end of their brief arguing that the trial court erred by refusing to allow several defense exhibits into evidence; by quashing a subpoena for a witness who could prove there have been no defects on the well site since May 2004; and by misleading the Whitefords into believing they were not entitled to a jury trial. There is no evidence that the trial court abused its discretion with respect to its rulings concerning evidence and the subpoena and, at any rate, the evidence and subpoenaed witness are not relevant to this case because they concern issues that were previously litigated. With respect to the jury trial issue, it is not the trial court's responsibility to provide *pro se* litigants with legal advice. The Whitefords voluntarily agreed to drop their request for a jury trial in exchange for Penn Hills' agreement not to seek any type of incarceration under the Code. At any rate, because the Whitefords admit they have not applied for a grading permit and their defense is based on issues that have been litigated, a jury could not have decided in their favor.

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**PER CURIAM**

**ORDER**

AND NOW, this 5<sup>th</sup> day of December, 2008, the orders of the Court of Common Pleas of Allegheny County in the above-captioned case, dated February 15, 2008, are AFFIRMED and this case is remanded to the Court of Common Pleas of Allegheny County to calculate the award of attorney's fees.

Jurisdiction relinquished.