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2011 IL App (3d) 090981-U

Order filed November 16, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

COUNTY OF WILL,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-09-0981
)	Circuit No. 07-OV-9059
TOM ZDANEWICZ,)	
)	Honorable
Defendant-Appellant.)	Bennett J. Braun
)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Carter concurred in the judgment.
Justice Schmidt dissented.

ORDER

- ¶ 1 *Held:* County proved by preponderance of the evidence that defendant violated County permit ordinance and stop-work order issued by the County.
- ¶ 2 Defendant Thomas Zdanciewicz was convicted following a bench trial of two violations of the Will County ordinance, and assessed fines. He appealed, presenting a variety of lack of proof arguments. We affirm.

¶ 3

FACTS

¶ 4 In November 2007, plaintiff the County of Will brought this complaint for ordinance violation and injunctive relief against defendant Thomas Zdanciewicz. Count I alleged that Zdanciewicz violated section 9.4-1 of the Will County Soil Erosion and Sedimentation Control Ordinance (Ordinance) by failing to obtain a site development permit before adding fill to his property in Frankfort. Will County Code of Ordinances §165.10 (passed 2-19-98). Count II alleged Zdanciewicz violated section 9.6-2 of the Ordinance by continuing to put fill on the property after he was issued a stop-work order. Both counts sought that Zdanciewicz be fined, enjoined, and required to restore the property to the condition it was in before the violations. Will County Code of Ordinances §165.46 (passed 2-19-98). Count III alleged Zdanciewicz failed to obtain a site development permit for lowlands. Count IV alleged Zdanciewicz's violated the county's minimum setback for development activity. Counts III and IV are not part of this appeal.

¶ 5 A hearing took place. Greg Ratajczak testified for the County. He was a Will County inspector with the land use and engineering division. His responsibilities included responding to drainage complaints. He began his investigation of Zdanciewicz after a neighbor called in a complaint. He visited the property in January 2007 but did not issue a complaint. He returned in Spring 2007, after a co-worker informed him that Zdanciewicz was bringing fill onto his property. At this visit, he noticed piles of dirt, and that dirt was being spread throughout the property. He took photographs of the property that were admitted into evidence. He spoke with Zdanciewicz's wife and issued a cease and desist or stop-work order to her. He determined that Zdanciewicz had brought fill onto the property by viewing the fresh dirt piles and comparing the property height to the neighboring property. Ratajczak noticed fill within 20 feet of the property line and that the

parcel included a depression and a wetland. He could not specifically identify the property line but could estimate it within a five-foot margin. He did not see any trucks dumping fill, did not know how many trucks brought fill, what type of trucks they were or what volume they could carry. He did not measure the dirt mounds or take samples of the dirt. He sent two violation letters to Zdanciewicz. Ratajczak returned to the property again to speak with Zdanciewicz but could not tell at that time whether additional work had been done. He did notice extra fill on a lowland area. After he issued the stop-work order, he had several telephone conversations with Zdanciewicz, who told him he was trying to stop the water from encroaching on his property. No permit was issued for the property. Part of Zdanciewicz's property is designated wetland, and part of the property and that of his neighbor, James Gallagani, is designated depressional area.

¶ 6 James Gallagani testified for Will County. A landscaper by trade, he lived next door to Zdanciewicz. His property had been 2-1/2 to 3 feet higher than Zdanciewicz's property, which always held water. Zdanciewicz's property became elevated when Zdanciewicz backfilled the lot. He had seen "six-wheeler semi loads" being brought onto Zdanciewicz's property. He saw a berm being built across Zdanciewicz's 10-acre parcel and estimated that at least 20 "semi loads" were brought in to build the berm. He also estimated that the fill added around Zdanciewicz's house would amount to 20 to 25 truckloads of fill. He estimated that six-wheelers hold 14 yards of soil and semi trucks hold 20 yards. He did not measure the trucks that brought the fill onto Zdanciewicz's property or analyze the soil, although he stated it was a black dirt and clay mix. He did not see any trucks bringing fill after the stop-work order but he did see Zdanciewicz move dirt. After the stop-work order was issued, dirt on the Zdanciewicz parcel had been tapered to his property. He notified the police to make a record. Prior to Zdanciewicz altering the topography of

his property, Gallagani had not experienced flooding in the 13 years he owned his property. He, too, had been cited by the county for building a berm on the property line and was required to destroy the berm and remove the dirt.

¶ 7 After Will County presented its case, Zdanciewicz moved for a directed verdict. His motion was granted as to count IV but denied as to the other counts. He did not offer a defense. The trial court found Zdanciewicz guilty of counts I and II and not guilty of count III. The trial court ordered Zdanciewicz to pay \$2,500 for the count I violation and \$1,250 for the count II violation. Zdanciewicz filed a motion for reconsideration which was heard and denied. He appealed.

¶ 8 **ANALYSIS**

¶ 9 The issues on appeal are whether the trial court erred in finding Zdanciewicz violated the county ordinance, requiring that he obtain a permit before moving fill on his property and in finding Zdanciewicz violated the stop-work order.

¶ 10 We first determine whether the trial court erred in finding Zdanciewicz violated the county permit ordinance. Zdanciewicz argues that the evidence was insufficient to sustain his conviction and that the trial court erred in finding him guilty of violating the county ordinance. He contends that the county did not establish jurisdiction or venue, identify him as the offender, or offer any evidence regarding the amount or location of improper fill on his property.

¶ 11 The Will County Code of Ordinances provides that the county may guide, regulate, and control any activity “which disturbs or breaks the topsoil or otherwise results in the movement of earth on land situated in unincorporated portions of the County.” Will County Code of Ordinances §165.01 (passed Feb. 19, 1998). A permit is required before a “person shall commence or perform any clearing, grading, stripping, excavating, or filling of land without having first obtained a site

development permit ***. Failure to obtain a site development permit is a violation of this Ordinance.” Will County Code of Ordinances §165.10 (passed Feb. 19, 1998). Exceptions to the permit requirement include:

“Excavation, fill, or any combination thereof which is equal to or less than two hundred (200) cubic yards in volume on a site equal to or greater than two and one half (2.5) acres when structures are not involved and the proposed construction activity is not within twenty (20) feet of the property line.” Will County Code of Ordinances §165.11(D) (passed Feb. 19, 1998).

A violator of the ordinance “shall be deemed guilty of a misdemeanor” and upon conviction, is subject to fines and penalties as set forth in the ordinance.” Will County Code of Ordinances §165.99 (passed Feb. 19, 1998).

¶ 12 An ordinance violation must be proven by a clear preponderance of the evidence. *City of Creve Coeur v. Pelletier*, 45 Ill. App. 3d 59, 61 (1977). The enforcement of an ordinance is not a criminal prosecution, and prosecution for a violation to recover a fine or penalty, while quasi-criminal in nature, is civil in form and tried as a civil proceeding. *Pelletier*, 45 Ill. App. 3d at 61. A trial court’s determination that an ordinance was violated is reviewed for an abuse of discretion. *Village of Barrington Hills v. Life Changers International Church*, 354 Ill. App. 3d 415, 420 (2004).

¶ 13 Zdanciewicz submits that the county failed to prove the property was in Will County, that he owned it, or that he committed the offenses. He maintains that he was not identified in court and that the county failed to offer documents establishing property ownership. According to Zdanciewicz, the county failed to prove that he violated an applicable ordinance on property he

owned in Will County and the trial court's findings were unsupported by the evidence.

¶ 14 The Illinois Municipal Code (Municipal Code) (65 ILCS 5/1-2-1.1 (West 2006)) grants municipal authorities the power to pass penal ordinances and prosecute their violation according to the rules of criminal procedure and to establish guilt beyond a reasonable doubt. Venue and jurisdiction are material elements of criminal offenses and must be proven by the State beyond a reasonable doubt. *People v. Adams*, 161 Ill. 2d 333, 340 (1994); *People v. Young*, 312 Ill. App. 3d 428, 430 (2000).

¶ 15 Zdanciewicz relies on section 1-2-1.1 of the Municipal Code) and criminal cases in support of his argument that the county failed to establish venue, jurisdiction, or his identity. His reliance is misplaced. The ordinance at issue calls for fines as a penalty for its violation and does not constitute a penal ordinance. *Village of Mundelein v. Aaron*, 112 Ill. App. 3d 134, 135 (1983) (section 1-2-1.1 of Municipal Code does not apply to an ordinance that imposes a fine, not imprisonment, for its violation). The proceeding for Zdanciewicz's ordinance violation was civil in form, and the rules of criminal procedure do not apply. The county was required to prove its case by a preponderance of the evidence. The complaint for ordinance violation stated that the property at issue was owned by Zdanciewicz and was within Will County.

¶ 16 Zdanciewicz complains that the evidence was insufficient to establish that if he brought fill onto his property, it exceeded the 200-yard limit allowed under the exceptions of the Will County Code of Ordinances. Will County Code of Ordinances §165.11 (passed Feb. 19, 1998). He asserts that the evidence presented through the testimonies of Ratajczak, the county inspector, and Gallagani, his neighbor, were inadequate to sustain his conviction. He says that Ratajczak admitted he did not know where the lot line was between the Zdanciewicz and Gallagani properties and that

Gallagani's testimony was imprecise.

¶ 17 If less than 200 cubic yards of fill is brought onto property within Will County, on a site greater than 2.5 acres and the construction activity is not within 20 feet of a property line, it is exempted from the county code's permit requirement. Will County Code of Ordinances §165.11(D) (passed 2-19-98).

¶ 18 Testimony regarding the amount of fill brought onto Zdanciewicz's property was offered by Ratajczak and Gallagani. Ratajczak testified that he noticed piles of dirt on the property at his May 2007 site visit and that the fill was within 20 feet of the property line. Although he admitted that he did not know the precise location of the property boundary, Ratajczak stated he could identify it within 5 feet. Photos he took of the property at that time were admitted into evidence. He did not measure the mounds of dirt. Gallagani testified that he saw six-wheelers and semi trucks bringing fill onto Zdanciewicz's property in an "ongoing" fashion. He estimated that the six-wheelers carried 14 yards of soil and the semi trucks held 20 yards. He further estimated that the berm on Zdanciewicz's property used at least 20 semi loads and that the fill around the house amounted to 20 to 25 loads. Gallagani also testified that while his property had historically been higher than Zdanciewicz's property, after Zdanciewicz backfilled his land, it tapered to his property. Gallagani's experience as a professional landscaper contributes to his credibility in evaluating the amount of fill brought on Zdanciewicz's property. We hold that the evidence presented by the county was sufficient to enable the trial court to determine by a preponderance of the evidence that Zdanciewicz brought fill onto his property and that it amounted to more than 200 cubic yards and/or was within 20 feet of the property line.

¶ 19 Zdanciewicz challenges as inadequate the county's identification of him as the perpetrator

of the ordinance violation. He asserts that because the county's proof failed to identify him as the offender, the trial court erred in convicting him.

¶ 20 The record establishes that at trial, the following colloquy took place.

“[State's attorney]: Did you come to investigate a man named Tom Zdanciewicz?

[Ratajczak]: Yes.

[State's attorney]: Is he here today in this courtroom?

[Ratajczak]: Yes, sir.”

In closing argument, counsel for the County stated:

“Mr. Ratajczak got up there and pointed to Mr. Zdanciewicz in open court saying that he was the one that he spoke to, he is the one who claimed ownership of the property, and that, in fact, in the records he was the owner of the property.”

¶ 21 In responding to Zdanciewicz's motion for a directed verdict, counsel for Will County stated:

“We all sat here. [Ratajczak] did – in fact, I asked him is [Zdanciewicz] here, and he said yes and pointed to him, looked over at him and identified the defendant clearly for the Court.”

¶ 22 Based on the record, we find that the evidence establishes by a preponderance that Zdanciewicz was identified as the perpetrator of the ordinance violations. While the identification would have been clearer if the record indicated that Ratajczak pointed to Zdanciewicz at trial, the identification was sufficient under the burden of proof. Moreover, Zdanciewicz's identity was not in issue during trial. The trial court did not err in accepting that Zdanciewicz was sufficiently

identified.

¶ 23 The second issue is whether the trial court erred in finding Zdanciewicz violated the stop-work order. Zdanciewicz complains that the evidence did not support the trial court's determination that he violated the stop-work order.

¶ 24 A stop-work order will issue for any person who has not obtained a permit and has initiated work controlled under section 9 of the zoning ordinance. Continuing work after a work stoppage order is a violation of the ordinance. Will County Code of Ordinances §165.46 (passed Feb. 19, 1998). This court will not reverse a trial court's finding regarding an ordinance violation absent an abuse of discretion. *Life Changers International Church*, 354 Ill. App. 3d at 420.

¶ 25 Ratajczak testified that when he visited Zdanciewicz's property after he issued the stop-work order in May 2007 he could not tell whether work had continued. Gallagani testified that he noticed work was done to change the grade after the stop-work order was issued in that the dirt on the Zdanciewicz parcel had been tapered to his property. He filed a police complaint regarding Zdanciewicz's conduct in September 2007. Although he did not see any trucks bringing fill after the stop-work order, he did see Zdanciewicz move dirt. This evidence was sufficient to establish by a preponderance of the evidence that Zdanciewicz continued to move dirt on his property without a permit in violation of the ordinance and the stop-work order. Based on the evidence presented, the trial court's determination that Zdanciewicz violated the stop work order was not an abuse of discretion.

¶ 26 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 27 Affirmed.

¶ 28 JUSTICE SCHMIDT, dissenting:

¶ 29 The majority fails to address the final and dispositive issue raised by Zdanewicz, that the County failed to present any evidence that the property in question is located in unincorporated Will County. The County charged Zdanewicz with violating the Will County Soil Erosion and Sediment Control Ordinance. By its own terms, that ordinance only applies to property in unincorporated Will County. Will County Soil Erosion and Sedimentation Control Ordinance §9.1 (approved Feb. 19, 1998).

¶ 30 The County's response to this argument is that Zdanewicz should have raised it as an affirmative defense, but it fails to cite to any relevant authority in support of this proposition. The County does not put forward any argument that it even attempted to establish the property in question is in unincorporated Will County.

¶ 31 An abuse of discretion occurs when there is no evidence in the record supporting the trial court's ruling. See *In re Marriage of Breitenfeldt*, 362 Ill. App. 3d 668, 674 (2005); *Billerbeck v. Caterpillar Tractor Co.*, 292 Ill. App. 3d 350, 358 (1997). The County charged Zdanewicz with violating an ordinance that only applied in unincorporated Will County, but it presented no evidence to establish that the property in question is located in unincorporated Will County. Therefore, the trial court abused its discretion in finding Zdanewicz guilty. I therefore dissent.

