2013 IL App (3d) 120494-U

Order filed July 15, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

VILLAGE OF MONEE,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-12-0494
	)	Circuit No. 11-OV-4012
KENNETH N. THOMPSON,	)	
	)	Honorable Domenica Osterberger,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff proved by a preponderance of the evidence that defendant violated village ordinance for disorderly conduct. Ordinance, which language mirrors that of 720 ILCS 5/26-1 (West 2012), is neither unconstitutionally vague nor offensive to due process.

¶ 2 Following a bench trial in the Will County circuit court, defendant, Kenneth N.

Thompson, was found guilty of disorderly conduct pursuant to Village of Monee Ordinance No. 860, § 41(A) (eff. April 1995) and fined $500.

¶ 3 Defendant appeals, claiming evidence presented at trial was insufficient to support his conviction and that the local disorderly conduct ordinance was vague, and thus unconstitutional.

¶ 4 We affirm.

¶ 5 BACKGROUND

¶ 6 On August 18, 2011, Martin Bachand filed a criminal complaint against defendant, Kenneth N. Thompson, for disorderly conduct pursuant to Village of Monee Ordinance No. 860, § 41(A) (eff. April 1995). The complaint alleged that on July 17, 2011, defendant caused a disturbance by "knowingly playing music at such a loud volume, containing lewd/vulgar wording in such an unreasonable manner as to alarm and disturb Martin Bachand, and provoke a breach of the peace."

¶ 7 While the date of the incident is clearly denoted within the complaint as July 17, 2011, there is some confusion, as defendant alludes throughout his brief to an event that occurred at his residence on July 9, 2011. Defendant stated that on Saturday, July 9, 2011, he hosted an "annual business and networking luau" at his three-acre estate in Monee, Illinois. This was the fourth year of the event, and the luau started at approximately 1 p.m. and lasted until approximately 10 p.m. Defendant alleged that throughout the day on July 9, the Monee police constantly visited his residence and informed him that neighbors were complaining of loud music with foul and obscene lyrics.

¶ 8 According to defendant, one week later on July 17, 2011, a single Monee police officer, identified as Officer Crescenti, arrived at his residence. At that visit, Officer Crescenti indicated that he had come to arrest defendant for disorderly conduct and that a neighbor had signed a complaint for "loud and obscene noise." Defendant cooperated with police, was placed in handcuffs, and taken to the station for processing. He was released on bond and given a court date of August 18, 2011. Defendant vehemently points out that at no time prior to his arrest had he been issued either a written warning or municipal ticket for loud and obscene noise.

¶ 9 The details of the incident as retold by the State's witnesses vary significantly from the defendant's version of events. Martin and Phyllis Bachand filed the criminal complaint against defendant. Defendant is their neighbor, and his home is located in the next cul-de-sac over, clearly visible from the Bachand's home and approximately 600 to 800 feet away. Martin testified that on the morning of July 17, he could clearly hear music with heavy bass and indiscernible lyrics. As he went to take the garbage to the curb, he could hear offensive lyrics; the source of the music was defendant's residence. Martin further testified that he could even hear the music over the noise of his electric trimmer while he worked in his yard.

¶ 10 Phyllis's testimony was similar, in that she recalled the lyrics of the music were distinguishable and offensive. She also reported to Officer Crescenti that the windows in her home vibrated from the music. Phyllis further testified that there had been other incidents where she and her husband had complained about the music at defendant's residence, including an incident on July 9. None of the previous calls led to the filing of a formal complaint.

¶ 11 Officer Stephen Crescenti testified that he was on duty in the Village of Monee (Village) on the afternoon of July 17, 2011, when he and Officer Brent Cash were dispatched to interview the Bachands on a loud noise complaint. Officer Crescenti testified that upon their arrival, he heard music coming from another residence containing "racial slurs and derogatory slurs loud enough where I could feel the bass vibrating through my body." He stated that he had no difficulty in determining the source of the music as the defendant's residence. He estimated the length between the two residences as "two football fields." While at the Bachand residence, Officer Crescenti also testified to observing the windows vibrate due to the bass of the music. He and Officer Cash went to defendant's residence, where they found a large party in the backyard with four, 4-foot "professional speakers."

¶ 12 Officer Cash's testimony corroborated that of Officer Crescenti's insofar as Officer Cash could also clearly distinguish the lyrics and feel "the heavy beat." Officer Cash testified he had no doubt that the source of the music was defendant's residence.

¶ 13 Defendant called four witnesses, none of whom testified that they were present at defendant's residence on July 17, 2011. Willie Mae and Wesley Thompson testified to being present at defendant's residence on July 9, 2011, for the luau; neither one recalled vulgar language nor excessively loud music at that time.

¶ 14 At the close of evidence, the trial court found that "the loudness and pounding nature of music can be construed to provide the basis for a disorderly conduct" offense, and accordingly entered a finding of guilty on the ordinance violation. The trial court then entered a judgment of conviction and a $500 fine pursuant to the Village's recommendation and as allowed by the ordinance.

¶ 15 This timely appeal followed.

¶ 16 ANALYSIS

¶ 17 I. Sufficiency of the Evidence

¶ 18 Defendant initially makes a sufficiency of the evidence argument, contending that the Village failed to establish the necessary elements of disorderly conduct. Defendant was charged and convicted under the Village's ordinance for disorderly conduct, Ordinance No. 860, § 41 (eff. April 1995). That ordinance reads, in pertinent part, as follows:

> "A person commits disorderly conduct when he knowingly,
>
> (A) does any act in such unreasonable manner as to alarm or disturb another or to provoke a breach of the peace ***."

Admittedly, this ordinance language mirrors that of section 26-1(a)(1) of the Criminal Code of 2012 (the Code) (720 ILCS 5/26-1(a)(1) (West 2012)) for disorderly conduct. The distinction, however, lies in the burden of proof.

¶ 19 Violations of municipal ordinances have for many years been characterized by the courts as "quasi-criminal" in nature; hybrids presenting aspects of both civil and criminal nature, but not creating a third, distinct class of action. *Village of Beckmeyer v. Wheelan*, 212 Ill. App. 3d 287, 289 (1991) (citing *Johnston v. City of Bloomington*, 77 Ill. 2d 108, 111-12 (1979)). The burden of proof in these cases is that of the civil standard, a preponderance of the evidence, occasionally described as "a clear preponderance of the evidence" (see *City of Chicago v. Joyce*, 38 Ill. 2d 368 (1967)), rather than the criminal standard of "beyond a reasonable doubt." *Wheelan*, 212 Ill. App. 3d at 290. "When a trial court makes a finding by a preponderance of the evidence, [the appellate court] will reverse that finding only if it is against the manifest weight of the evidence. *Best v. Best*, 223 Ill. 2d 342, 349 (2006).

¶ 20 Turning now to the substance of defendant's arguments, we find that the Village did prove, by a preponderance of the evidence, all of the necessary elements of disorderly conduct pursuant to Ordinance No. 860, § 41 (eff. April 1995) and the trial court's finding was not against the manifest weight of the evidence.

¶ 21 Defendant offered testimony regarding only the events of July 9, 2011, and then compared those events with that of the July 17, 2011, incident that ultimately led to the filing of a complaint. Defendant, in essence, asserts that since the July 9 event did not lead to an arrest, neither should the July 17 event have led to an arrest. This argument is without merit. What happened at the July 9 "luau" in no way informs the trial court's (or this court's) conclusions as to the events of July 17. Defendant maintains that because his witnesses testified that there was no loud music that contained vulgar lyrics on July 9, and the Bachands testified that the music and/or noise level on July 9 was the same as it was on July 17, it therefore stands to reason that the Village did not meet its burden in proving that the music on July 17 was loud enough to warrant a conviction for disorderly conduct.

¶ 22 The evidence presented by the Village clearly contradicts that theory. On July 17, Officers Crescenti and Cash visited the Bachands about a complaint they had made regarding loud music. Upon arriving at the scene, both officers testified to hearing the loud music with lewd lyrics, feeling the heavy bass, and seeing the windows in the Bachands' residence vibrate. This testimony only served to corroborate the Bachands' complaint. The Bachands testified that they could hear the music in the morning before they left the house, and while they could not make out the lyrics from within the house, Mr. Bachand could distinguish them when he took out the garbage. When the Bachands returned home that afternoon, the music was still playing loudly. Mr. Bachand could hear the music over the noise of his electric hedge trimmer.

¶ 23 Furthermore, defendant effectively harpooned his own "knowingly" argument by comparing the two dates. Again, his argument is essentially that the two complaining witnesses testified that the music and lyrics were the same on July 9 as they were on July 17. Since defendant's witnesses testified that they did not hear loud or vulgar music on July 9, it therefore follows that the music and lyrics were the same on July 17. Yet, if the Monee police showed up at defendant's home at least twice on July 9 for noise complaints, and defendant asserts that the music of July 9 and 17 was the same, then defendant was surely on notice that his music and party had caused some disturbances within the subdivision on July 9 as well.

¶ 24 We similarly find defendant's other arguments with regard to the elements of disorderly conduct to be without merit. Specifically, defendant contends that his actions were not unreasonable in that the events were held outside during a hot summer afternoon. In support, he cites to *City of Chicago v. Wender*, 46 Ill. 2d 20, 23-4 (1970), where our supreme court held that "[t]he creation and maintenance of loud and raucous noises has always been thought to be within the common-law definition [of disorderly conduct], but it is not the decibel level of the utterance or the type of conduct alone that is determinative." *Wender* goes on to rely on *People v. Raby*, 40 Ill. 2d 392, 396 (1968), in which the court recognized that "culpability is equally dependent upon the surrounding circumstances. *** What is reasonable must always depend upon the particular case and therefore must be left to determination on the facts and circumstances of each situation as it arises." *Wender*, 46 Ill. 2d at 24.

¶ 25 Turning to the circumstances of this case, we find defendant's actions unreasonable, despite the day or hour at which they occurred. While there have certainly been cases that have held that loud noises made in the wee hours of the morning were enough to support a conviction for disorderly conduct (see *People v. Albert*, 243 Ill. App. 3d 23 (1993) (holding that using loud language in the middle of the night when most neighbors had a reasonable expectation of peace and quiet was sufficient to support conviction for disorderly conduct)), this certainly does not mean that if such loud noises were made at 2 p.m., they could not similarly support a conviction. Defendant had four, 4-foot professional grade speakers set up in his backyard for a party. Testimony elicited indicated that the volume and bass emanating from those speakers were enough to vibrate the windows on the neighbor's home. Even if, as defendant pointed out, the music did not prevent the Bachands from sleeping that night, it still goes to reason that having the windows throughout their house vibrating caused some disturbance. The only conclusion we can draw from the fact that defendant was not charged on July 9, is that the neighbors did not sign a complaint on that date, even though they called police. It appears that when the loud music reoccurred the next weekend, neighbors decided that they had had enough, and signed a formal complaint.

¶ 26 Accordingly, we find that the Village proved by a preponderance of the evidence that the defendant engaged in disorderly conduct and the trial court's judgment of conviction was not against the manifest weight of the evidence.

¶ 27 II. Constitutionality of Village of Monee Ordinance

¶ 28 The defendant next raises a constitutional challenge to the Village's disorderly conduct ordinance. Defendant first asserts that the Village does not have a residential noise ordinance that would outline what type of noise and/or decibel level that is prohibited. He also maintains that the statute is unconstitutionally vague and fails to delineate the type of conduct that would be improper under the ordinance, thereby denying him due process.

¶ 29 "All statutes are presumed to be constitutional, and the burden of rebutting that presumption is on the party challenging the validity of the statute to demonstrate clearly a constitutional violation." *People v. Greco*, 204 Ill. 2d 400, 406 (2003). "If reasonably possible, a statute must be construed so as to affirm its constitutionality and validity." *Id.* (citing *People v. Fuller*, 187 Ill. 2d 1, 10 (1999)).

¶ 30 We, again, turn to *People v. Raby*, 40 Ill. 2d 392, 396, where it was held that section 26-1(a) was not vague or overbroad where the words of the section qualified the frame of mind of both the actor and of those affected by the actor's conduct; such conduct must be engaged in "knowingly" and "in such unreasonable manner" as to provoke a breach of the peace. The word "knowingly" describes a conscious and deliberate quality which negatives accident or mistake, while the word "unreasonable" is not a term that is impermissibly vague. *Id*. at 396-97.

¶ 31 A number of other cases have addressed defendant's exact complaint in regard to section 26-1 of the Code (720 ILCS 5/26-1 (West 2012)), and have consistently found these constitutional challenges lacking. See, *e.g.*, *U.S. v. Woodard*, 376 F.2d 136, 140 (1967) (the Seventh Circuit Court of Appeals stated that "[t]he Constitution does not require impossible standards of specificity in penal statutes. It requires only that the statute convey 'sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.' [Citation.] When measured by this criterion, section 26-1(a)(1) of the Illinois disorderly conduct statute does not offend due process."); see also *People v. Jackson*, 132 Ill. App. 2d 1059, 1067 (1971); *People v. Crockett*, 41 Ill. 2d 226, 236 (1968).

¶ 32 We accordingly find that the Village of Monee Ordinance No. 860, § 41(A) is not unconstitutionally vague or overbroad, as its language mirrors that of section 26-1(a)(1) (720 ILCS 5/26-1(a)(1) (West 2012)).

¶ 33 III. Probable Cause

¶ 34 Finally, defendant argues that Monee police officers lacked the probable cause to make an arrest. We find that defendant has forfeited this argument on appeal. In order to preserve an issue on appeal, a defendant must both object to it at trial and include it in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Forfeiture applies when the defendant asserts a claim that is completely different from the one raised below. See *People v. Heider*, 231 Ill. 2d 1, 18 (2008). Here, defendant did not raise the issue of lack of probable cause either in a pretrial motion or during the trial itself. There is no posttrial motion in the record on appeal, and thus we assume none was filed. See *People v. Barker*, 403 Ill. App. 3d 515, 523 (2010). Accordingly, defendant has forfeited any probable cause argument on appeal.

¶ 35 CONCLUSION

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

¶ 37 Affirmed.