

[Cite as *Bd. of Health of Cuyahoga Cty. v. Petro*, 2019-Ohio-545.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107256

**BOARD OF HEALTH OF CUYAHOGA
COUNTY, OHIO**

PLAINTIFF-APPELLEE

vs.

TERESA MARIE PETRO

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-12-785400

BEFORE: Kilbane, A.J., E.T. Gallagher, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: February 14, 2019

APPELLANT

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MARY EILEEN KILBANE, A.J.:

{¶1} Defendant-appellant, Teresa Petro (“Petro”), pro se, appeals from the trial court’s decisions granting plaintiff-appellee the Board of Health of Cuyahoga County’s (“BOH”) computation of contempt fine and motion to record judgment lien, and denying her motion to reopen the case because of new evidence and motion to deny the BOH’s request for tax, fines, and costs. For the reasons set forth below, we affirm.

{¶2} The underlying facts of this case were previously set forth by this court in Petro’s first appeal, *Bd. of Health v. Petro*, 8th Dist. Cuyahoga No. 104882, 2017-Ohio-1164 (“*Petro I*”):

In August 2010, Petro was notified of the requirement to abandon the use of her septic tank and connect to the public sanitary sewerage system that was now accessible to Petro’s residence in Strongsville, Ohio. She did not comply with this notification.

In June 2012, the [BOH], filed a complaint for injunctive relief against Petro seeking a permanent injunction, mandating that she abandon the use of the septic sewer system and connect to the sanitary sewerage system that was now accessible to her dwelling. In September 2012, Petro, pro se, filed an answer, admitting that

(1) her property is currently using a septic system, and (2) she has been notified about the existence of the sanitary sewerage system. However, Petro denied that she is not in compliance with law or that she is operating the existing septic system to the detriment of the health and safety of the surrounding area. She further stated that requiring her to connect to the public sanitary sewerage system will place an undue and unbearable financial burden on her.

On April 22, 2013, the parties entered into a consent judgment entry and order. The order stated: “d. [Petro] has voluntarily entered into and consented to the terms and conditions of this Judgment and Order.” The order further provided that Petro was (1) permanently enjoined and ordered to discontinue all use of the household sewage disposal system that services the property and connect the home to the publicly available sanitary sewer system, and (2) required to take all steps necessary to cause the property to conform to the regulations and orders of the Board of Health. These actions were required to be completed within 12 months from the date of the order. The consent judgment entry acknowledged that Petro was currently unemployed, which constituted a bona fide hardship. However, the entry warned that “if the work is not completed as agreed, the Board may, after notice and a hearing before the court, order the Property to be vacated until such time as the private sewer system is abandoned and connection to the publicly available sanitary sewer system is made.” No appeal was taken from this order.

Three years later, in March 2016, the BOH filed a motion to show cause why Petro should not be held in contempt for failing to comply with the April 22, 2013 consent judgment entry and order. Petro opposed the motion but admitted that she failed to comply with the court order due to ongoing financial hardship. Additionally, she challenged the necessity of compliance, contending that her septic system is not toxic or harmful, and that other homes in her area have not been required to connect to the public sanitary sewerage system.

Id. at ¶ 2-5.

{¶3} The trial court ultimately found Petro in contempt, but did not hold a formal hearing on the BOH’s motion before making its finding. On appeal, Petro argued that the trial court erred when “it ruled against her and deprived her of her property without a proper hearing or due process.” Specifically, Petro contended that “the trial judge did not conduct any of the hearings and proceedings in this matter.” *Id.* at ¶ 14. We agreed with Petro and remanded the matter for

the trial court to conduct a hearing in open court. *Id.* at ¶ 21. In reaching our decision, we stated:

In this case, the trial court's judgment entries dated April 21, 2016 and June 30, 2016 are each signed by the trial judge and affirmatively state that a hearing was conducted and that all parties were present. Thus, based on the original papers filed, it appears that Petro was afforded a hearing on the show cause motion on April 19, 2016, and the subsequent status conference on June 21, 2016. However, this court cannot ignore that both Petro and counsel for the BOH affirmatively state that no formal hearing was conducted before the trial court on those days. In fact, the BOH states in its appellate brief that the trial court conducted a "paper hearing." In the context of finding someone in contempt, the lack of an oral hearing in open court violated Petro's due process rights.

* * *

Accordingly, based on the concessions by the BOH at oral argument and in its appellate brief, we find that the trial court did not conduct an oral hearing as required by R.C. 2705.03 and 2705.05, thus depriving Petro due process of law.

Id. at ¶17, 20.

{¶4} Following our remand, the trial court held an oral hearing on the BOH's contempt motion. In June 2017, the trial court granted the BOH's motion and found the following:

In August 2010, [Petro] was notified of the requirement to abandon the use of her septic tank and connect to public sanitary sewerage system.

In June 2012, the [BOH] filed for injunctive relief against [Petro] mandating that she connect to the sanitary sewerage system.

In September 2012, [Petro] filed an answer admitting that (1) she was currently using a septic system, and (2) she had been notified about the existence of the sanitary sewerage system.

On April 22, 2013[,] the parties entered into a consent judgment entry and order. The consent judgment entry and order stated in pertinent part: "[Petro] has voluntarily entered into and consented to the terms and conditions of this judgment and order" and "[Petro] is permanently enjoined and ordered to discontinue all use of the household sewage disposal system that services the property/home and connect said property/home to the publicly available sanitary sewer system within twelve (12) months from the date of this judgment entry and order[.]"

In March 2016, three years later, the [BOH] filed the motion to show cause why [Petro] should not be held in contempt for failing to comply with the April 22, 2013 consent judgment entry and order[.]

On April 21, 2016[,] this court held a status hearing with all parties present. At this conference, the court again attempted to assist [Petro] in meeting her obligations as part of her consent judgment entry and order, by revising the original order to include [Petro's] ability to (1) apply for a loan to complete the work on the septic system, or (2) begin work on the property, and obtain proper permits, to complete the agreed upon work, or (3) seek bids for the sale of the property. This court ordered compliance within 60 days, otherwise [Petro] would be found in contempt.

Accordingly, based upon [Petro's] failure to comply with the consent judgment entry and order, and in light of the fact that [Petro] still has not connected to the public sewage system as required almost 7 years ago, this court hereby finds [Petro] in contempt, pursuant to [Civ.R. 2705.02].

It is therefore ordered that

1. [Petro] shall list the property for sale on or before August 1, 2017;
2. [Petro] shall enter and execute an escrow agreement with the buyer in such terms satisfactory to the [BOH] which will at minimum cause the escrow agent to withhold from sale a sufficient amount of the sale proceeds to pay for the cost of connection to the sanitary system, and to require said connection prior to occupancy by the buyer of the property;
3. [Petro] shall execute any other necessary documents to complete compliance with the consent judgment entry and order;
4. [Petro] is fined \$100 per day from date of this order until compliance is verified to the satisfaction of the [BOH] and this court or until the property is vacated, whichever shall occur first;
5. If the property has not sold on or before October 1, 2017, then the property shall be vacated;
6. If the property remains occupied on October 2, 2017, then upon filing of a writ of restitution by [the BOH], the sheriff shall remove [Petro] and her possessions from the property;
7. [Petro] to pay costs of these proceedings, including the move-out, if necessary;

8. [Petro] may purge herself of contempt sanctions accruing by virtue of this order by (1) complying with the terms of the consent judgment entry and order, or (2) vacating the property, or (3) selling the property and complying with this order. If [Petro] avails herself to any of these purge conditions she shall file a notification with this court supported by affidavit.

The contempt hearing was the only matter upon which the court was directed to rule by the Eighth District Court of Appeals. Accordingly, this matter is hereby dismissed with prejudice pursuant to the consent judgment entry and order.

It is so ordered[.]

Court cost assessed to [Petro].

{¶5} Petro appealed from this order in *Bd. of Health v. Petro*, 8th Dist. Cuyahoga No. 106061 (“*Petro II*”). This court dismissed the appeal, finding that “[t]he appeal is confined to the contempt order, however, [Petro] argues the underlying issues. [Petro] has exceeded the scope of the appeal.” Following our dismissal in *Petro II*, the BOH moved for taxation of the contempt fines and costs incurred in connection with the litigation. The BOH asked the trial court to record a judgment lien in favor of the BOH in the amount of \$19,139.32 and \$5,750 in favor of the Cuyahoga County Prosecutor Law Enforcement Trust Fund. Petro, pro se, opposed the BOH’s motion and asked the trial court to reopen her case. The trial court denied Petro’s motion and granted the BOH’s motion. The court also awarded the BOH \$1,488.82 in expenses, court costs in the amount of \$290.50 for the lower court case, and \$110 for *Petro II*.

{¶6} Pursuant to the contempt order entered in June 2017, the court awarded the clerk of court \$23,000, with 75 percent paid to the BOH (\$17,250) for the fines accrued between June 30, 2017, and February 15, 2018. In the interest of justice, and because of the extraordinary amount of the fine accrued, the court required Petro to only pay a fine of \$2,300, which was \$10 per day for the 230 days she was not in compliance after the contempt was granted. As a result, the

court awarded the BOH \$1,725, which is 75 percent of \$2,300.

{¶7} Petro now appeals, raising the following three assignments of error for review:

Assignment of Error One

The trial court erred when it ruled against [Petro] and deprived [Petro] of her property without reopening the case to consider new material evidence.

Assignment of Error Two

The trial court erred when it did not take into consideration the continued deception and unauthorized actions of the [prosecutor] and the BOH when making its final decision.

Assignment of Error Three

The trial court erred when it ruled against [Petro] because the fines, fees and taxes requested by the BOH constitute cruel and unusual punishment.

{¶8} As an initial matter, we note that the BOH, in its appellate brief, asks this court to dismiss Petro's appeal. This motion is denied. We now review Petro's assigned errors.

{¶9} In the first and second assignments of error, Petro is attempting to use the trial court's 2018 judgment recording the lien for fines and costs to obtain appellate review of the 2013 consent judgment entry between Petro and the BOH. Petro argues new evidence establishes that the consent agreement would not be in existence if an unnecessary legal action had not been filed by the BOH. Petro additionally argues the prosecutor and the BOH acted in a deceptive manner. While we are sympathetic to the loss of Petro's home, we cannot disregard the fact that Petro is again attacking a judgment entry that was entered almost six years ago. As we stated in *Petro I*:

This court has consistently declined to "address assignments of error from an order that was not the subject of a timely notice of appeal when those arguments are raised as an otherwise timely appeal — an act we call 'bootstrapping.'" *Basit v. Chapman*, 8th Dist. Cuyahoga No. 103425, 2016-Ohio-4562, ¶ 4], citing *State v. Church*, 8th Dist. Cuyahoga No. 68590, 1995 Ohio App. LEXIS 4838 (Nov. 2,

1995); *see also* *Lundy v. Lundy*, 11th Dist. Trumbull No. 2012-T-0100, 2013-Ohio-3571, ¶ 34 (“when considering an appeal from a trial court’s finding of contempt, the appellant cannot raise as a defense challenges to the merits of the underlying order from which the appellant did not directly appeal”). “The reason why we prohibit bootstrapping in cases like this is that a Civ.R. 60(B) motion for relief from judgment is not a substitution for an appeal.” *Basit* at *id.*, citing *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128, 502 N.E.2d 605 (1986), paragraph two of the syllabus.

Id. at ¶ 12.

{¶10} Accordingly, Petro’s first and second assignments of error — each challenging the underlying basis for the BOH’s complaint and the consent judgment entry — will not be considered. *Petro I* at ¶ 13.

{¶11} In the third assignment of error, Petro challenges the court’s order recording the fees and costs as a result of the contempt entry. Petro alleges the excessive fines and costs assessed constitute cruel and unusual punishment and are based on a legal action that was brought without merit.

{¶12} In this assigned error, Petro raises the same arguments as in the first and second assignments of error. We decline to address these arguments for the same reasons stated above. With regard to her cruel and unusual punishment argument, we note that “‘Eighth Amendment violations are rare, and instances of cruel and unusual punishment are limited to those punishments, which, under the circumstances, would be considered shocking to any reasonable person.’ (Citations omitted.)” *State v. Fannon*, 2d Dist. Montgomery No. 25957, 2014-Ohio-2673, ¶ 25, quoting *State v. Harding*, 2d Dist. Montgomery No. 20801, 2006-Ohio-481, ¶ 77. Moreover, this court has previously stated:

The Ohio Supreme Court has held that the power to punish for contempt is an inherent power of a court, which is not subject to legislative control. *Cincinnati v. Cincinnati District Council 51* (1973), 35 Ohio St.2d 197, 299 N.E.2d 686 (upholding fines totaling \$37,000 imposed upon defendants found to have

violated a permanent injunction); *Call v. G.M. Sader Excavating Paving, Inc.* (1980), 68 Ohio App.2d 41, 426 N.E.2d 798 (upholding a fine of \$10,000 despite defendants' claims that this fine exceeded R.C. 2705.05); *Olmsted Twp v. Riolo* (June 9, 1988), Cuyahoga App. No. 54004, 49 Ohio App.3d 114, 550 N.E.2d 507, (upholding fines totaling \$26,500 for violating an injunction that prohibited the defendant from maintaining a junk yard on his property). *See, generally, State v. Kilbane* (1980), 61 Ohio St.2d 201, 400 N.E.2d 386 (dicta reaffirming court's holding in *Cincinnati v. Cincinnati Dist. Council 51*, supra); *State v. Local Union 5760* (1961), 172 Ohio St. 75, 173 N.E.2d 331 (holding that the inherent power of a court to punish for contempt generally may not be limited by legislative authority). Consequently, we cannot conclude that the trial court erred in imposing the fine at issue here.

* * *

The excessive fines clause of the Eighth Amendment does not apply to civil contempt sanctions. *Ohio Elections Comm. v. Ohio Chamber of Commerce & Citizens for a Strong Ohio*, 158 Ohio App.3d 557, 2004-Ohio-5253, 817 N.E.2d 447, citing *In re Grand Jury Proceedings* (C.A.7, 2002), 280 F.3d 1103, 1110 ("a fine assessed for civil contempt does not implicate the Excessive Fines Clause"). *See, also, United States v. Mongelli* (C.A.2, 1993), 2 F.3d 29, 30; *Spallone v. United States* (1988), 487 U.S. 1251, 1257, 109 S.Ct. 14, 109 S.Ct. 20, 101 L.Ed.2d 964.

Cleveland v. Paramount Land Holdings, L.L.C., 8th Dist. Cuyahoga Nos. 96180-83, 2011-Ohio-5382, ¶ 21, 23.

{¶13} Here, R.C. 3718.18, provides for a contempt fine of \$100 per day, with 75 percent apportioned to the BOH and 25 percent apportioned to the prosecuting attorney of the municipal entity that brought forth the action. In the interest of justice, and because of the extraordinary amount of the fine accrued, the court required Petro to only pay a total fine of \$2,300, which was \$10 per day for the 230 days instead of \$23,000. In light of the foregoing, we decline to find that the assessed court costs and fines constitute cruel and unusual punishment.

{¶14} Accordingly, the third assignment of error is overruled.

{¶15} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

EILEEN T. GALLAGHER, J., and
SEAN C. GALLAGHER, J., CONCUR