[Cite as *Gaver v. Miller*, 2010-Ohio-4275.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CHAMPAIGN COUNTY

JENE GAVER, Wayne Township Zoning Inspector (now Phillip Hisnay)	:	Appellate Case No. 09-CA-46
Plaintiff-Appellee	:	Trial Court Case No. 01-CV-236
v.	:	
MARCUS MILLER	:	(Civil Appeal from Common Pleas Court)
Defendant-Appellant	:	

. . . . . .

O P I N I O N

Rendered on the 10th day of September, 2010.

. . . . . .

JANE A. NAPIER, Champaign County Prosecutor's Office, 200 North Main Street, Urbana, Ohio 43078
Attorney for Plaintiff-Appellee

WILFRED L. POTTER, Atty. Reg. #0029121, 234 North Limestone Street, Springfield, Ohio 45503
Attorney for Defendant-Appellant

. . . . . .

FAIN, J.

{¶ 1} Defendant-appellant Marcus Miller appeals from a judgment overruling Miller's motion for contempt, motion for damages, and motion to void a contract between OMAC Hauling and the Wayne Township Trustees. Miller contends that the trial court abused its discretion by failing to find plaintiff-appellee Wayne

Township Zoning Inspector in contempt of court. In addition, Miller contends that the trial court's contempt decision is against the manifest weight of the evidence. Miller further contends that the trial court abused its discretion by failing to find that the contract between OMAC Hauling and the Wayne Township Trustees is illegal. Finally, Miller contends that the trial court abused its discretion when it failed to award him damages for contempt.

{¶ 2} We conclude that the trial court did not abuse its discretion by failing to hold the Zoning Inspector in contempt, because no violation of a court order occurred. Miller also failed to provide the trial court with evidence disputing the Zoning Inspector's testimony, which indicated that Miller received a list of property subject to disposal and was permitted to keep the property that he wished to retain. The trial court's decision, therefore, was not against the manifest weight of the evidence.

{¶ 3} We further conclude that the trial court did not err in refusing to void the contract for the cleanup. The Zoning Inspector was not required by law to obtain competitive bids.

{¶ 4} Finally, we conclude that the trial court did not abuse its discretion in failing to award Miller damages for contempt, because the Zoning Inspector did not violate the court's orders. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 5} The case before us involves cleanup proceedings that occurred in connection with a property owned by Marcus Miller. The Wayne Township Zoning

Inspector originally filed suit against Miller in 2001, but cleanup of the premises did not begin until April 2008. The record currently before us consists of pleadings beginning in June 2008, when Miller filed a motion for protective order, a motion for contempt, and a motion for a damages hearing. Miller claimed in the motions that a prior court order in the case had only authorized the removal of "junk" from Miller's premises, as ascertained by collaboration between Miller and the designated zoning inspector. Miller alleged that representatives of the zoning inspector had improperly removed items from his premises, and had damaged him in an amount in excess of $30,000.

{¶ 6} The trial court held evidentiary hearings in August and September 2008, and the transcripts of the hearings are part of the record. According to the evidence presented at these hearings, the Wayne Township Trustees received several complaints about debris and junk that had accumulated on property located at 6558 State Route 245. The zoning inspector at the time, Richard Tillman, viewed the premises and found debris, unlicensed vehicles, and several pieces of unusable junk. Tillman attempted to talk to the owner, Marcus Miller, but Miller would not talk to him. Tillman then filed the current action in common pleas court in 2001, to attempt to get the property cleaned up.

{¶ 7} A default judgment was issued against Miller in July 2003. In the journal entry, the trial court granted default judgment to Tillman (the then-current zoning inspector), and awarded injunctive relief. The court permanently enjoined Miller from maintaining infractions listed in the complaint for injunctive relief. In addition, the court ordered Miller to bring his property into full compliance with zoning

regulations, and to remove junk and unlicensed vehicles from the property. Finally, the court stated that if Miller failed to bring his property into compliance by early September 2003, Tillman, through the Trustees, and with the aid of the Champaign County Sheriff, could abate the violations by removing any unlicensed vehicles that were not in a completely enclosed building, and by removing junk visible from the public highway or neighboring property, at Miller's cost. The court authorized the costs to be assessed to the Champaign County Auditor, for collection as taxes, if Miller failed to pay.

{¶ 8} Miller failed to appeal from the June 2003 court order. He also did not clean up his property, which became progressively worse. Wayne Township did not take action for some time to enforce the court order, because engaging in the type of cleanup operation involved would be a huge undertaking for a small rural township.

{¶ 9} The record of proceedings between 2005 and June 2008 is not before us. Both parties agree that the Zoning Inspector filed a show cause order in May 2005, asking that Miller be held in contempt for failing to comply with the judgment and injunction that had been entered. The parties agree that the trial court entered a further order in June 2005, setting a timetable for compliance with its order. That order is not part of the record before us, but the parties agree that the court ordered Miller to allow access to his property for identification of items to be removed. Miller was also ordered to remove all identified items by late October 2005. Miller failed to appeal from this order, as well.

{¶ 10} Tillman resigned in 2005, and the new Zoning Inspector, Jene Gaver, was substituted as party plaintiff. The parties agree that the Zoning Inspector filed a

motion to reaffirm the judgment in February 2006, and that Miller failed to attend the hearing held on this motion. In addition, the parties agree that the trial court issued an order in March 2006, reaffirming its 2003 order. Miller again failed to appeal.

{¶ 11} In May or June 2007, Phillip Hisnay was appointed as the Wayne Township Zoning Inspector. The Trustees subsequently sent Miller a letter indicating that the Trustees, in conjunction with the Champaign County Health Department, would begin cleaning up the property on April 28, 2008, at 8:00 a.m. The township retained OMAC Hauling (OMAC) to clean up the property. Due to magnitude of the job, the Trustees appointed Tillman as an alternate zoning inspector.

{¶ 12} The cleanup began as scheduled. Because of the amount of waste and materials in the apron just off the road, the first day was spent trying to clear off a work area and a path so that OMAC could get its equipment on the property. Hisnay, Tillman, and John Doty, one of the Trustees, then compiled a list and pictures of 142 items of unused, junk equipment scattered over 100 acres. The list did not include general junk, trash, batteries, tire, and debris, but did include unused equipment and property in view of adjoining residential areas and the public roadway.

{¶ 13} Hisnay, Tillman, and Doty jointly decided what items should be on the list Each item was spray-painted with a number, and a picture was taken. The directive was that if the item was not operable and did not pertain to Miller's operation, it would be considered junk. If any item was deemed questionable, or was an item for which Miller might have a use, Miller was given the benefit of the

doubt, and the item was not marked as scrap. Miller was allowed to keep anything he wanted to keep and that he identified.

{¶ 14} Miller arrived at the cleanup site at around 3:00 p.m. on the first day. Miller began removing things himself from the property on the second or third day. Miller and his people began at the back of the property and started working forward, while OMAC was cleaning up solid waste around the house that was located on the site. OMAC had about five or six people working, and it took four weeks for the cleanup to be completed. Miller also hauled items away during the four-week period. OMAC's total charge for the work was $39,838.75, and $16,913.95 was credited against that for steel that was salvaged and sold. OMAC's owner did indicate at the hearings that one of Miller's licensed vehicles was being stored at OMAC's premises and had not yet been removed by Miller.

{¶ 15} As was noted, Miller filed motions for contempt, for a protective order, and for damages in June 2008. After meeting with the parties, the trial court filed a journal entry in June 2009, setting an evidentiary hearing in July 2009. The court noted that the purpose of the hearing would be to determine what items had been removed and whether any removal exceeded court orders. The court also referred to its prior entries, and noted that nothing in the orders required "collaboration" by the parties.

{¶ 16} In a further entry filed after the July 2009 hearing, the trial court noted that the parties had appeared with counsel. After counsel made statements, the court determined that the request for protective order was moot, because no personal property had been removed from Miller's house. The court then scheduled

a further hearing for early August 2009.

{¶ 17} In early August 2009, the court filed another journal entry indicating that both parties appeared with counsel, and that plaintiff had moved to substitute the current Zoning Inspector, Phillip Hisnay, as party plaintiff. The court noted that Miller did not object and that Hisnay was, therefore, substituted as plaintiff. Finally, the court noted that defendant had presented testimony and evidence, and that the hearing would be continued until early September 2009, to receive further testimony. Two more hearings were held in September, and the trial court then issued a decision. The court held that Miller's contempt motion was without merit, and that the Zoning Inspector had not violated prior court orders. The court specifically stated that it found the Zoning Inspector's witnesses more credible than Miller's witnesses. The court gave Miller thirty days to remove his truck from the OMAC lot or to make other arrangements. In addition, the court declined to void the contract with OMAC, and concluded that Miller's request for damages was moot.

{¶ 18} Miller appeals from the trial court's judgment.

II

{¶ 19} Miller's First Assignment of Error is as follows:

{¶ 20} "THE DECISION OF THE TRIAL COURT ABUSED ITS DISCRETION AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 21} Under this assignment of error, Miller contends that there was clear and convincing evidence that the Zoning Inspector violated the court's June 28, 2005 court order, by taking his property without proper notice, and by relying on the

Trustee's vague, arbitrary, and capricious standards as to the definition of "junk." Miller also challenges the fact that he never received a list of items to be removed, pursuant to the trial court's order of June 28, 2005.

{¶ 22} Orders in contempt proceedings are reviewed for abuse of discretion. *State ex rel. Ventrone v. Birkel* (1981), 65 Ohio St.2d 10, 11 (citation omitted). An abuse of discretion " 'connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (citation omitted). After reviewing the evidence and record, we find no evidence of abuse of discretion.

{¶ 23} "Contempt is defined in general terms as disobedience of a court order. ' "It is conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede or obstruct a court in the performance of its functions ." ' " *State ex rel. Corn v. Russo,* 90 Ohio St.3d 551, 554-55, 2001-Ohio-15 (citations omitted). The contempt power is "inherent in a court, such power being necessary to the exercise of judicial functions." Denovchek v. Board of Trumbull County Commrs., (1988), 36 Ohio St.3d 14, 15.

{¶ 24} In order to show a contempt, "it is necessary to establish a valid court order, knowledge of the order, and violation of it." * * * "In civil contempt, intent to violate the order need not be proved." *State v. Chavez-Juarez*, 185 Ohio App.3d 189, 2009-Ohio-6130, ¶ 42 (citation omitted).

{¶ 25} The record before us fails to demonstrate violation of a court order. Assuming for purposes of argument that the court ordered the Zoning Inspector in 2005, to provide Miller with a list of property to be removed, the relevance of this to

events that occurred three years later, in 2008, is unclear. Furthermore, that order was followed by a March 2006 order that reaffirmed the original 2003 order, which did not require the Zoning Inspector to produce a list of property. The 2003 order, as reaffirmed in 2006, allowed the Zoning Inspector to remove unlicensed vehicles and junk, at Miller's cost. Miller did not appeal from the 2006 order.

{¶ 26} In addition, the undisputed testimony at the three hearings held in 2009, is that Miller received a list of 142 items in April 2008, and was given an opportunity to keep any items that he identified. Miller failed to provide the trial court with testimony disputing these facts. Accordingly, the trial court did not act unreasonably, arbitrarily, or unconscionably in overruling the motion for contempt.

{¶ 27} For the same reasons, the trial court's decision is not against the manifest weight of the evidence. In reviewing a trial court judgment after a bench trial, we are " 'guided by the presumption' that the trial court's findings are correct." *Patterson v. Patterson*, Shelby App. No. 17-04-07, 2005-Ohio-2254, ¶ 26, quoting from *Seasons Coal Co. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 79-80. We also may not substitute our judgment for that of the trial court where there is "competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge." 10 Ohio St.3d at 80. " 'A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not.' " *Gevedon v. Ivey*, 172 Ohio App.3d 567, 2007-Ohio-2970, ¶ 54, quoting from *State v. Wilson*, 113 Ohio St.3d 382,

2007-Ohio-2202.

{¶ 28} "The 'rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *In re J.Y.*, Miami App. No. 07-CA-35, 2008-Ohio-3485, ¶ 33, quoting from *Seasons Coal Co.,* 10 Ohio St.3d at 80.

{¶ 29} In the case before us, the trial court made a specific finding that he found the Zoning Inspector's witnesses more credible than Miller's witnesses. Because the trial court was in the best position to assess credibility, we defer to his judgment. We also note that Miller failed to present evidence disputing the Zoning Inspector's position. Miller called only three witnesses: John Doty, who is a Wayne Township Trustee, Dustin Owens, who owns OMAC, and Steve Hunter, who purchased and hauled away some used farm trucks and metal building siding from Miller's premises in May 2007. The first two witnesses directly supported the position of the Zoning Inspector. Hunter's testimony only indicated that he had hauled some items away nearly a year before the cleanup. However, this added nothing to Miller's case in view of other testimony. For example, Doty stated that he did not know if Miller took things off the property or brought in new things between 2001 and 2008. Doty stressed, however that the property visually continued to get worse over the years. Tillman also stated that the property progressively became worse over time.

{¶ 30} Miller further contends that the Zoning Inspector improperly relied on a

subjective opinion of what property would be "junk," and also incorrectly used a broader definition of "junk" from a zoning resolution that was adopted after the original trial court order in 2003. Miller contends that the Zoning Inspector scrapped equipment that had value.

{¶ 31} The validity of the abatement order, injunction, and order of removal was not before the trial court in 2008, because the court's order was originally issued in 2003, and was never appealed. Miller also failed to appeal from any of the other trial court orders prior to the removal of the property in 2008. The 2003 order, which was reaffirmed in 2006, authorized the Trustees to remove "junk" from the premises. Miller did not appeal from that order, and the meaning of "junk" is not properly raised at this time.

{¶ 32} Even if the meaning of "junk" were relevant, we see little difference between the 2001 and 2005 regulations. "Junk," is defined in the earlier zoning regulation as "old scrap copper, brass, rope, rags, trash, waste, batteries, paper, rubber, junk, or wrecked automobiles, or parts thereof. Iron, steel, and other old or scrap perished or non-perished materials." September 15, 2008 Trial Transcript, pp. 27-28. The 2005 regulation states that: "No trash, debris, litter, unused property, discarded materials, junk vehicles, vehicle parts, rags, lumber, building materials, equipment and/or building parts thereof, * * * or any other garbage, refuse, or junk shall be permitted to accumulate on any lot or portion thereof, which creates an eyesore, hazard, or nuisance to the township or general public." Id. at p. 28.

{¶ 33} Hisnay, the current Zoning Inspector, testified that the spirit and intention of the 2005 and 2001 regulations are the same. We agree. Hisnay stated

that a reasonable person would not question that Miller's property was an eyesore, due to the hundreds of pieces of equipment, the tons of trash, garbage and debris removed, the condemned house, the presence of the health department, and the long history of problems between the health department and township, and Miller's property.

{¶ 34} Courts give deference to an agency's reasonable interpretation of a legislative scheme. See, *e.g*., *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St.3d 282, 287-88, 2001-Ohio-190 (statement made in case involving the Ohio Bureau of Worker's Compensation). We observed in *Sherman v. Dayton Bd. of Zoning Appeals* (1992), 84 Ohio App.3d 223, that:

{¶ 35} "Zoning regulations * * * do not exist in a vacuum. Some mechanism of control is usually established, and a city may enact reasonable delegations of authority to its officers and agencies to interpret and apply the regulations. * * *

{¶ 36} " 'It is the function of the legislative body to determine policy and to fix the legal principles which are to govern in given cases. * * * However, it is not possible for the legislature to design a rule to fit every potential circumstance. As such, legislation may be general in nature, and discretion may be given to an administrative body to make subordinate rules, as well as to ascertain the facts to which the legislative policy applies. * * * In order to be valid, however, the legislative enactment must set forth sufficient criteria to guide the administrative body in the exercise of its discretion.' " Id. at 225, quoting from *Hudson v. Albrecht, Inc*. (1984), 9 Ohio St.3d 69, 73-74.

{¶ 37} The regulations in the case before us set forth sufficient criteria to guide

the Zoning Inspector in deciding what materials to remove. Unused or unusable materials properly fit within the meaning of junk, and the procedure followed by the Zoning Inspector was appropriate for the circumstances. In this regard, we note testimony indicating that the Zoning Inspector consulted with his legal advisor, the Champaign County Prosecutor, on proper procedures to be followed. The record indicates that the Zoning Inspector complied with the procedures suggested by the prosecutor.

{¶ 38} More importantly, the issue before the trial court was to determine what items had been removed, and whether the removal violated the court's orders. Again, Miller failed to present any testimony disputing the testimony of the plaintiff's witnesses. Miller also failed to present any testimony indicating that the materials in question were other than "junk," by anyone's definition, or had value.

{¶ 39} Miller's First Assignment of Error is overruled.

III

{¶ 40} Miller's Second Assignment of Error is as follows:

{¶ 41} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DID NOT FIND AN ILLEGAL CONTRACT."

{¶ 42} Under this assignment of error, Miller contends that the trial court erred in failing to void the contract between the Trustees and OMAC. Miller contends that the Trustees should have procured competitive bids, because Wayne Township is a public entity.

{¶ 43} Competitive bidding is intended to "protect the taxpayer, prevent

excessive costs and corrupt practices, and provide open and honest competition in bidding for public contracts." *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991, ¶ 9. In the case before us, the use of public funds was not involved, because the trial court ordered Miller to pay for cleanup costs. Any amount that Miller did not pay would be assessed as property taxes. Wayne Township, therefore, was not obligated to pay for the costs. Miller also could have avoided expenditure of any funds by cleaning up the property himself.

{¶ 44} Our review of laws pertaining to townships additionally indicates that townships are required to obtain competitive bids only in certain situations, like emergency purchases of supplies and equipment over $50,000 in value, or contracts for energy conservation measures. See, *e.g.*, R.C. 505.08 and 505.264. Miller has failed to provide us with authority indicating that the Trustees are required to obtain competitive bids for the clean-up. In fact, the authority Miller cites relates to competitive bidding by county commissioners, not townships. See R.C. 307.86. We are aware of no comparable statutory provision requiring townships to obtain competitive bids for all purposes.

{¶ 45} Miller's Second Assignment of Error is overruled.

IV

{¶ 46} Miller's Third Assignment of Error is as follows:

{¶ 47} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DID NOT AWARD APPELLANT DAMAGES."

{¶ 48} Under this assignment of error, Miller contends that the trial court erred

in failing to award damages for the taking of his property. Miller contends that the Trustees took property that had value and was not "junk."

{¶ 49} The trial court concluded that Miller's motion for damages was moot, because the Zoning Inspector did not violate the court's order to remove the property. Miller had an opportunity to appeal from the 2003 and 2006 orders, which authorized the Zoning Inspector to remove "junk" from the premises. Miller failed to appeal. Even if the meaning of "junk" were properly raised, Miller failed to present evidence that the removed property was other than junk, as defined by either the 2001 or 2005 resolutions. We also note that Miller was given a list of items to be removed and could have retained any items that he wished. Miller failed to present evidence to the contrary.

{¶ 50} As a final matter, Miller has challenged the substitution of Hisnay as a party plaintiff, contending that Hisnay was not properly appointed as Zoning Inspector. The record indicates, however, that Miller appeared in court, through counsel, and agreed to Hisnay's substitution as plaintiff.

{¶ 51} Miller's Third Assignment of Error is overruled.

V

{¶ 52} All of Miller's assignments of error having been overruled, the judgment of the trial court is Affirmed.

. . . . . .

DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

Jane A. Napier
Wilfred L. Potter
Hon. Roger B. Wilson