

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio

Appellant

v.

Whites Landing Fisheries

Appellee

Court of Appeals Nos. E-10-035
E-10-036

Trial Court Nos. CRB 0804651
CRB 084494A, B, and C

DECISION AND JUDGMENT

Decided: July 15, 2011

* * * * *

Mike DeWine, Attorney General of Ohio, and Daniel J. Martin,
Assistant Attorney General, for appellant.

William H. Smith, Jr., for appellee.

* * * * *

OSOWIK, P.J.

{¶ 1} This is a consolidated appeal from the Sandusky Municipal Court, which on July 2, 2010, granted defendant's motion to dismiss four misdemeanor charges in violation of R.C. 1533.343 and further found that this section of the Ohio Revised Code as applied in the fall of 2008 was void for vagueness. On September 29, 2008, an Ohio Wildlife Officer filed three separate misdemeanor charges against Whites Landing

Fisheries. On October 7, 2008, a fourth misdemeanor charge was filed stemming from the activity on September 28, 2008.

{¶ 2} On February 17, 2009, Whites Landing Fisheries, Inc. filed a motion to dismiss the misdemeanor charges. The state of Ohio filed a response to that motion on January 27, 2010. Subsequently, the trial court granted defendant's motion to dismiss. A timely notice of appeal was filed on July 29, 2010.

{¶ 3} From that judgment, appellant sets forth the following assignments of error:

{¶ 4} "1. THE TRIAL COURT ERRED HOLDING THAT THE DIVISION OF WILDLIFE ENGAGED IN SELECTIVE ENFORCEMENT AND VIOLATED WHITES FISHERIES' CONSTITUTIONAL RIGHTS.

{¶ 5} "2. THE TRIAL COURT ERRED IN CONCLUDING THAT OFFICER RAMSEY'S DEPOSITION TESTIMONY BOUND THE STATE AND ESTOPPED THE STATE FROM ENFORCING ITS COMMERCIAL FISHING LAWS.

{¶ 6} "3. THE TRIAL COURT ERRED IN HOLDING THAT R.C. 1533.343 WAS VOID FOR VAGUENESS, AND VIOLATED WHITES' CONSTITUTIONAL RIGHTS."

{¶ 7} The following undisputed facts are relevant to the appeal before us. Whites Landing Fisheries ("appellee") is a company engaged in the commercial fishing industry on Lake Erie. The business is owned and operated by Dean Koch. He is licensed to conduct commercial fishing by the Ohio Department of Natural Resources ("ODNR").

{¶ 8} The state of Ohio ("appellant") filed four misdemeanor charges against appellee for violations of Ohio's commercial fishing laws in Lake Erie, Ohio, on September 29, 2008, and October 7, 2008. All four charges were from activity, in violation of R.C. 1533.343, on September 29, 2008. The activity is managed by the Chief of the Division of Wildlife through the issuance of licenses. Appellee unlawfully operated his vessel without having the statutorily mandated vessel monitoring system and electronic catch reporting system on a vessel engaged in trap net fishing.

{¶ 9} Appellee submitted testimony of Officer Kevin Ramsey, the Law Enforcement Supervisor of the Lake Erie Unit. The testimony was taken from *Great Lakes Commercial Fisherman, LLC v. Sean Logan, Director*, in case No. CI08-6023 in the Court of Common Pleas, Lucas County, Ohio. Based on this deposition testimony, the trial court granted appellee's motion to dismiss.

{¶ 10} The first and second assignments of error are prefaced on the same assumption. As such, we will address them simultaneously. R.C. 1533.343, titled "Commercial fishing without monitoring devices prohibited," states:

{¶ 11} "On and after March 1, 2008, no commercial fishing licensee shall use or engage in fishing with commercial gear unless the licensee uses vessel and catch monitoring devices in accordance with requirements and procedures established by the chief of the division of wildlife. The chief shall establish requirements and procedures concerning vessel and catch monitoring devices by division rule. A licensee shall pay the costs of purchasing, installing, and maintaining the devices."

{¶ 12} Appellant contends the misdemeanor charges were proper and that there was not selective enforcement. Appellee simply did not comply with R.C. 1533.343. Appellant maintains that, because appellee did not possess and use the required devices on the vessel while engaging in commercial fishing, enforcement was not selective. We concur. The conscious exercise of some selectivity in enforcement is not in itself, however, a violation of the United States Constitution. *State v. Flynt* (1980), 63 Ohio St.2d 132, 134; quoting *Oyler v. Boles* (1962), 368 U.S. 448, 456.

{¶ 13} In order for selective enforcement to reach the level of unconstitutional discrimination, the discrimination must be "intentional or purposeful." *Snowden v. Hughes* (1944), 321 U.S. 1, 8. See *United States v. Berrios* (C.A.2, 1974), 501 F.2d 1207, 1211. In order for selective enforcement to amount to a denial of equal protection, an element of purposeful or intentional discrimination must be shown, and this is not satisfied by a mere showing that others similarly situated have not been prosecuted. *W. Chester Twp. Bd. of Trustees v. Speedway Superamerica, LLC* (2007), 2007-Ohio-2844, ¶ 49.

{¶ 14} Based on the record and seminal case law, the four misdemeanor charges were proper, pursuant to R.C. 1533.343. Discretionary enforcement would temporarily apply for those who actually had equipment on their vessel. In the case before us, appellee did not have any vessel and catch monitoring devices to begin with before engaging in commercial fishing. The fact that enforcement was discretionary for other

vessels, which had vessel and catch monitoring devices present on board, is irrelevant. Thus, appellant's point is well-taken.

{¶ 15} In conjunction with this, appellant contends the deposition testimony from Ramsey does not bar the state from enforcing its commercial fishing laws. We concur. In testimony from the deposition which appellee relies on, Ramsey clearly explains that discretionary enforcement would apply to those with vessel and catch monitoring devices in order to address preliminary glitches and facilitate compliance with R.C. 1533.343:

{¶ 16} "Q: I'm talking about the ECRS system, the Electronic Catch Reporting System. The data sent from the vessel, and how long before the information is sent that someone is going to look at that data just like the paper reporting system you had in place where the data just like the paper reporting system you had in place where the data would be, the reports would be submitted, someone would review those.

{¶ 17} "A: I mean, I'm not sure exactly, we don't have protocol for that right now. I mean it's a new system, everything is new: and - -

{¶ 18} "Q: Right

{¶ 19} "A: - before we started the system up, we had a meeting with the commercial fishermen, with any of them that wanted to come. We basically told them because the system is new, there will be a few glitches.

{¶ 20} "Q: Sure.

{¶ 21} "A: But we will do, what we want to do is work with you; and if you have glitches, call us this year. Just call us up, tell us what you did, tell us what happened, there will be no enforcement action whatsoever.

{¶ 22} "Q: That was in 2008, right?

{¶ 23} "A: Sure.

{¶ 24} "Q: Yeah.

{¶ 25} "A: We didn't start until late, we didn't start until late. And we did, we actually got some phone calls came in, hey, I did this by mistake. Even a couple, hey, I forgot the handheld when I went out. So basically we just told them, hey, make sure you remember it. There was no enforcement action taken.

{¶ 26} "A: So we're trying to work through these steps with folks and we're trying to get everyone acclimated to it so they can become familiar with it, you know, and there would be no enforcement action taken because it's a new system for both of us.

{¶ 27} "Q: Is there going to be an enforcement action in 2009 as you work out the kinks?

{¶ 28} "A: No, we need to keep working until everyone is comfortable."

{¶ 29} The Supreme Court of Ohio has refused to apply principles of estoppel against the state, its agencies or its agents. *Griffith v. JC Penny Co.* (1986), 20 Ohio St.3d 112. There is no reason to depart from precedent and apply the doctrine of equitable estoppel under the circumstances of this case. If a government agency is not permitted to enforce the law because the conduct of its agents has given rise to an

estoppel, the interest of all citizens in obedience to the rule is undermined. *Ohio State Board of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145-146.

{¶ 30} Appellant cites and relies on *Great Lakes Commercial Fisherman LLC v. Sean Logan, Director* (Mar. 31, 2010), 6th Dist. No. L-09-1180. This court affirmed the trial court, which granted the state's motion for summary judgment when the deposition of Officer Ramsey was submitted by counsel for defendant. Appellee maintains the matter before us is somehow distinguishable because it is an exceptional case, such that the private rights of individuals are of more persuasive force in a particular case than the right of the public. We do not concur. Estoppel does not arise if the act done is in violation of law.

{¶ 31} As previously indicated, Ramsey's deposition testimony applied to vessels which have and use vessel and catch monitoring devices. Regardless of whether his testimony was taken completely out of context, estoppel does not prevent an Ohio Wildlife Officer from enforcing R.C. 1533.343. Therefore, appellant's first and second assignments of error are well-taken.

{¶ 32} In the third assignment of error, appellant contends R.C. 1533.343, as applied in 2008, is not void for vagueness. We concur. As enshrined in the United States Constitution under the Fourteenth Amendment, it is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. A law must give the person of ordinary intelligence a reasonable opportunity to know what is

prohibited, so that he may act accordingly. *Grayned v. Rockford* (1972), 408 U.S. 104, 108.

{¶ 33} Pursuant to R.C. 1533.343 it is clearly unlawful to engage in commercial fishing without monitoring devices. R.C. 1533.343 is plainly and unambiguously captioned, "Commercial fishing without monitoring devices prohibited." As such, a commercially licensed fisherman should know that after March 1, 2008, vessel and catch monitoring devices are required. After reading the plain language, a person of ordinary intelligence is certainly given a reasonable opportunity to know what is prohibited. Violating the law at the outset does not make it void for vagueness. This court previously affirmed the constitutionality of the disputed legislation, S.B. 77, in *Great Lakes*, supra. Appellant's third assignment of error is well-taken.

{¶ 34} After careful review of the record, we hold that the trial court erred in the arbitrary dismissal of the underlying charges. Granting appellee's motion to dismiss was unreasonable. Appellee's constitutional rights were clearly not violated. R.C. 1533.343 was not void for vagueness.

{¶ 35} On consideration whereof, the judgment of the Sandusky Municipal Court is reversed. This case is remanded to the Sandusky Municipal Court for further proceedings consistent with this decision. Appellee is ordered to pay the costs pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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