[Cite as *Toledo v. VanLandingham*, 2013-Ohio-2368.]

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

City of Toledo — Court of Appeals No. L-12-1042

Appelle — Trial Court No. CRB-11-06718

v.

Rick B. Vanlandingham, III — **DECISION AND JUDGMENT**

Appellant — Decided: June 7, 2013

* * * * *

David L. Toska, Chief Prosecuting Attorney, and
Joseph Howe, Assistant Prosecuting Attorney, for appellee.

Tim A. Dugan, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Toledo Municipal Court that ordered the demolition of a property owned by appellant Richard VanLandingham

following appellant's plea of no contest to one count of failing to obey an order to abate a public nuisance. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} On November 30, 2010, the city of Toledo issued a "Determination of a Public Nuisance – Emergency Conditions Existing" notifying appellant, pursuant to Toledo Municipal Code 1726.02, that a residential property appellant owns at 1326 Paxton Street in Toledo was declared a public nuisance and that nuisance conditions existing at the property were an immediate threat to the health, safety or welfare of the public. Appellant was ordered to "remove all junk, debris & litter from entire property including brick & blocks piled in front yard. Maintain property in a nuisance free conditions at all times * * *" within 72 hours after service of the notice. Additionally, on that date, the city issued a second "Determination of a Public Notice" as to the same property, ordering appellant to "Repair/replace roofing, windows, railing, siding & gutters & spouts [on the] house. Repair porches. Scrape & paint all exposed wood on house. Rehab or demolish." Appellant was notified that unless he caused the abatement of the public nuisance within 30 days of the notice he would be in violation of T.M.C. § 1726.08.

{¶ 3} On May 6, 2011, two complaints were filed in the trial court by the city against appellant alleging two violations for failure or neglect to obey or abide with an order to abate a public nuisance, a misdemeanor of the third degree in violation of T.M.C. § 1726.08. Both counts referenced conditions at the property located at 1326 Paxton Street ("the property"). The case was set for trial but on August 31, 2011, appellant

appeared in court and entered a plea of no contest to the second count in exchange for dismissal of the first count. The plea was accepted and the trial court made a finding of guilt. The trial court thereupon referred the matter to a housing specialist with the housing court's community control program and delayed sentencing so that appellant could seek the services of the community control program. The matter was set for a review hearing/sentencing on November 4, 2011, which was continued to December 8, 2011.

{¶ 4} At the sentencing hearing, the city articulated its position that appellant's property was so far beyond repair that the only means of abatement would be demolition. The city presented testimony from city inspector Guerrero and Bob Mossing, the city's manager of code enforcement. Guerrero testified that she has inspected the property approximately 12 times since the orders of abatement were issued. She first identified photographs of the house taken on November 24, 2010, which showed "much in the need of repair," including roofing, siding side walls, windows and painting. Guerrero further testified that there were parts of the house that had no roof; some portions were covered with tarp and other areas were exposed. Guerrero then identified photographs of the house which she took two days before the hearing and indicated that those photographs depicted no noticeable rehabilitation since the orders were issued one year earlier. Several more areas were open to the elements on the side walls and roof areas, and cement blocks and pieces of wood on the property created safety concerns, according to Guerrero. In her words, there was "more deterioration than rehab or repair." Further,

Guerrero testified that the location had no utility hook-ups, which renders it uninhabitable, and that the city had received multiple complaints regarding the property.

{¶ 5} Bob Mossing testified that the property was "blighted" and not in compliance with standard building codes. He stated that the house did not have a proper roof and that he was concerned with the effect of the nuisance on the rest of the neighborhood. He further testified that the property had deteriorated since the orders were filed and that appellant had not submitted any specific plans to the city for rehab of the property. Additionally, the tarps covering the roof were not in compliance with the housing code, some windows were not secure and others were missing, and loose pieces of wood and bricks were left in the yard. He further testified that electrical poles on the property had not been approved at the time of the hearing. Mossing testified as to his opinion that the best solution in this case would be demolition of the property.

{¶ 6} Finally, appellant testified as to his efforts to abate the nuisance on his property, asserting that he wants to abate the nuisance and asking for additional time to do so. Appellant offered numerous explanations for the building's current condition. In part, he stated that: the roofers he had hired were unreliable; some of the wood in the front yard consisted of beams he had ordered for the roof; he had done some interior work; he was working on acquiring electrical service, but admitted that no inspection had taken place; the truck containing all of his tools and one of his ladders was impounded by the city for reasons appellant professed not to know; his lawn mower and the two-story ladder outside the house were stolen; he was unable to secure water service due to the

city's claims, which he contested, that he owed several thousand dollars for previous water bills, and he had hired a remodeling business to assist in the planned rehabilitation of the property.

{¶ 7} Appellant, however, offered no documentary evidence to support any of his assertions of progress at the property. He also admitted that financial hardship was impeding his work on the house.

{¶ 8} By judgment entry journalized on January 17, 2012, the trial court ordered demolition of the property. The trial court then denied appellant's request for a stay of sentence pending appeal. Upon motion by appellant, this court granted appellant's motion for stay on June 15, 2012.

{¶ 9} Appellant sets forth the following assignments of error:

> Appellee violated the plea agreement with Appellant.
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> Appellant received ineffective assistance of counsel.
>
> The Trial Court's decision ordering the demolition of the property was an abuse of discretion.

{¶ 10} In support of his first assignment of error, appellant asserts that his plea agreement included a requirement that he be screened for financial assistance from the city's housing program. Appellant argues that he entered into the plea agreement with the understanding that he would be referred to the special program. However, while that may have been appellant's understanding, it clearly was not part of the plea agreement. The plea agreement that was ultimately accepted by the trial court in this matter provided

for dismissal of one of the counts against appellant in exchange for a no contest plea to the other count.

{¶ 11} At the August 31, 2011 hearing the following dialog occurred in relevant part:

> MR. HOWE: * * * City would recommend off docketing Count 1 in exchange for a plea to Count 2. Specifically, Count 1 deals with items regarding a vacant lot and clean-up of the lot. Count 2 actually deals with the structure. At that point, Judge, if a plea is accepted, and after a finding, I would ask the Court to defer sentencing and refer the matter to our community control program and the housing specialists, Judge. At that point, Judge, the housing specialists can potentially see if there are grants available, monies or funds, supplies. * * * Now, all this depends on if everybody qualifies; and I think Defendant and Counsel understand that. We're not promising; but we're hoping, Judge, that with assistance, he'll be able to get some funds and/or supplies. * * *
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> * * *
>
> THE COURT: * * * What is the plea?
>
> MR. NEUMEYER: Judge, we would withdraw all former not guilty pleas and enter a no contest plea to the charge, consent to a finding of guilt.
>
> THE COURT: A no contest plea is entered. A finding is made.

> * * * Then the matter is sent to Housing Court community control; and specifically, I'm going to put it – write in the order to Housing Specialist Gwen Wyse. However, I know that there is no – it's to her call. (Emphasis added.)

{¶ 12} The language set forth above clearly indicates that the plea agreement involved a dismissal of Count 1 in exchange to a plea to Count 2. Appellee and the trial court both emphasized that no promises were being made with regard to any assistance from the housing court community control program. Appellee recommended a referral to the program to increase appellant's chances of receiving some assistance. For reasons not evident in the trial court record, appellant ultimately did not receive any such assistance. That, however, did not constitute a breach of the plea agreement.

{¶ 13} Accordingly, appellant's first assignment of error is not well-taken.

{¶ 14} In support of his second assignment of error, appellant asserts that trial counsel was ineffective for failing to adequately defend him at the sentencing hearing. First, appellant claims that counsel led him to believe that the hearing would probably be continued, which is why appellant did not have with him any photographs of the current condition of the property to offer into evidence. Appellant further asserts that trial counsel allowed Inspector Guerrero to continuously speculate as to the condition of the interior of the house after testifying that she had not been inside the premises.

{¶ 15} To demonstrate ineffective assistance of counsel, one must show both that counsel's performance was deficient and that counsel's errors were so serious as to

deprive the appellant of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 670, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Appellant has failed to establish that he was prejudiced by counsel's performance. We are unable to find any support for appellant's assertions. We have reviewed the trial record and there is no evidence that, but for any of counsel's perceived missteps, the result of the proceeding would have been different. Accordingly, appellant's second assignment of error is not well-taken.

{¶ 16} In support of his third assignment of error, appellant asserts that the trial court's order to demolish the property was an abuse of discretion because the prosecutor's case was based on mere speculation and conjecture without any showing that the property presented an immediate danger and could not be rehabilitated within a reasonable time. Appellant again discusses the work he had done to improve the property in an attempt to bring it up to code.

{¶ 17} An abuse of discretion connotes more than a mere error or law or judgment; rather, it requires a finding that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219,450 N.E.2d 1140 (1983). "When an appellate court applies this standard, it must not substitute its judgment for that of the trial court." *State v. Ruppen*, 4th Dist. No. 11CA22, 2012-Ohio-4234, ¶ 12, citing *State v. Jeffers*, 4th Dist. No. 08CA7, 2009-Ohio-1672, ¶ 12.

{¶ 18} The record reflects that appellant had an additional 98 days between the plea deal and his sentencing hearing in which to make progress on the property. This court has thoroughly reviewed the trial court record, including the testimony given by

both parties at the sentencing hearing. Based on the evidence presented, we find that appellee presented sufficient evidence to support the trial court's finding that appellant had failed to abate the nuisance and that the only remedy was demolition of the property. Appellant was simply unable to produce any evidence that he had made significant progress in bringing the house into compliance with the city building code. Accordingly, the trial court's order was not unreasonable, arbitrary or unconscionable and appellant's third assignment of error is not well-taken.

{¶ 19} On consideration whereof, the judgment of the Toledo Municipal Court is affirmed. The stay of sentence granted by this court on June 15, 2012, is vacated. Costs of this appeal are assessed to appellant pursuant to App.R. 24.

Judgment affirmed.

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

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE