

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

State of Ohio

Court of Appeals No. E-13-021

Appellee

Trial Court No. 11 CRB 2729

v.

Whites Landing Fisheries

DECISION AND JUDGMENT

Appellant

Decided: March 28, 2014

* * * * *

Michael DeWine, Ohio Attorney General, Robert W. Cheugh, II,
and Kenneth H. Egbert, Jr., Assistant Attorneys General, for appellee.

William H. Smith, Jr., for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Whites Landing Fisheries, appeals the April 1, 2013 judgment of the Sandusky Municipal Court which, following a no contest plea to engaging in commercial fishing without the approved operational vessel monitoring system, was

fined \$2,000, all of which was suspended, and its commercial fishing license was suspended for 30 days (20 days had already been served.) Because we find that Ohio Adm.Code 1501:31-3-06 was not unconstitutionally vague and appellant was not selectively targeted, we affirm.

{¶ 2} The history of this case will be set forth as concisely as possible. Appellant is a licensed commercial fishing company operating on Lake Erie and owned by Dean Koch. Based on incidents occurring on September 28, 2008, appellant was charged with four counts of violating R.C. 1533.343, operating a commercial fishing vessel without an approved, operational monitoring system. The misdemeanor counts were ultimately dismissed after the court agreed that the statute was void for vagueness.

{¶ 3} On appeal, this court reversed the dismissal finding that R.C. 1533.343 clearly set forth the prohibited conduct of operating a commercial fishing vessel without the approved monitoring system; thus, it was not vague. *State v. Whites Landing Fisheries*, 6th Dist. Erie Nos. E-10-035, E-10-036, 2011-Ohio-3497, ¶ 33. We further found that the state's enforcement was not unconstitutionally discriminatory. *Id.* at ¶ 14. The case was then remanded.

{¶ 4} On August 12, 2011, appellant was charged in Sandusky Municipal Court with nine additional cases under R.C. 1533.343 and its regulatory companion Ohio Adm.Code 1501:31-3-06. The cases were consolidated with the four cases from 2008.

{¶ 5} On September 12, 2012, appellant filed a motion to suppress “any further proceeding” until the state provided evidence that its monitoring system was operational

on the dates of the charges. Appellant filed a memorandum in support of the motion further arguing that in order to sustain a conviction, the state must be required to present evidence as to the operability and reliability of the device similar to radar and laser speed-measuring devices. The state opposed the motion. On October 1, 2012, the court denied the motion without conducting a hearing.

{¶ 6} Also during this time period, the state filed a motion in limine requesting that appellant be prevented from introducing, at trial, evidence or argument relating to notice of enforcement or selective enforcement, the void for vagueness argument, and the mitigation argument that the device was broken and, thus, he was forced to use his own, unapproved, monitoring device. The court granted the motion finding that the only issue for jury determination was the question of whether or not appellant operated a commercial fishing vessel without the approved monitoring system.

{¶ 7} Following the adverse rulings, on October 2, 2012, appellant withdrew its not guilty plea and entered a plea of no contest to the charge in case No. CRB 1102729, the case which is the basis of the instant appeal. The remaining cases were stayed pending the outcome of the appeal.

{¶ 8} On January 25, 2013, this court dismissed the appeal on the basis that it was not a final and appealable order due to the remaining cases. On remand, the trial court, in its April 1, 2013 judgment entry, resentenced appellant on case No. CRB 1102729. The court, with the agreement of the parties, severed the case from the companion cases in order to facilitate an appeal. This appeal then followed.

{¶ 9} Appellant raises four assignments of error for our consideration:

Assignment of Error No. 1: Ohio Administrative Code §1501:31-3-06 is void for vagueness and enforcement of said administrative rule violated Whites Landing Fisheries' constitutional rights.

Assignment of Error No. 2: The trial court's failure to hold a hearing on defendant's motion to suppress and state's motion in limine denies the defendant the opportunity to examine witnesses as to the status of the alleged vessel monitoring system approved by the chief of wildlife and availability of the equipment violates its constitutional right to confront its accusers.

Assignment of Error No. 3: The office of the Ohio Department of Natural Resources exercised discriminatory enforcement actions against defendant by filing 28 similar charges in four different courts for the same violations only after this court established the constitutionality of R.C. 1533.341.

Assignment of Error No. 4: The Sandusky Municipal Court violated the defendant's right to speedy trial by delaying the trial of the case to October 2, 2012.

{¶ 10} The statute and rule at issue in this case involve the regulation of commercial fishing; specifically, the S.B. 77 enactments effective October 10, 2007. R.C. 1533.343 prohibits commercial fishing without monitoring devices and provides:

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.

{¶ 11} In conjunction, Ohio Adm.Code 1501:31-3-06 states:

(A) It shall be unlawful for a licensed commercial fyke net or trap net fishermen to engage in setting, pulling or maintaining commercial fishing gear without having a vessel monitoring system and electronic catch reporting system that is provided and administered by a mobile data service provider approved by the chief of the ODNR division of wildlife.

(B) It shall be unlawful for a licensed commercial fyke net or trap net fishermen to engage in setting, pulling or maintaining commercial fishing gear without having the approved vessel monitoring system and electronic catch reporting system turned on and fully operational on the vessel from the time it leaves port until its return to any port.

{¶ 12} A “vessel monitoring system” is defined as “a system or mobile transceiver unit for use on vessels through the installation of a satellite-tracking device to automatically receive and transmit vessel information to include vessel location and

speed.” Ohio Adm.Code 1501:31-1-02 (KKKKK). Further, an “‘Electronic Catch Reporting System’ means a computerized electronic database system for the capture, transmission and management of commercial fishing data.” Ohio Adm.Code 1501:31-1-02 (FF).

{¶ 13} Appellant’s first assignment of error contends that Ohio Adm.Code 1501:31-3-06 is void for vagueness because it does not specifically name the device and service provider that appellant was required to utilize. The analysis for determining whether a statute or administrative regulation is unconstitutionally void was set forth in our prior decision and analysis of R.C. 1533.343, where we stated 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.” (Citations omitted.) *Whites Landing Fisheries*, 6th Dist. Erie Nos. E-10-035, E-10-036, 2011-Ohio-3497 at ¶ 32. Where applicable, the relevant statute and regulation must be read in *pari materia* to determine whether they provide reasonable notice of the prohibited conduct. *State v. Disbennett*, 4th Dist. Hocking No. 408, 1985 WL 11156, *3 (Sept. 23, 1985). Further, the determination of a statute’s or regulation’s constitutionality is a question of law to be reviewed *de novo*. *Thorp v. Strigari*, 155 Ohio App.3d 245, 2003-Ohio-5954, 800 N.E.2d 392, ¶ 10 (1st Dist.).

{¶ 14} Reviewing the plain language of the statute and regulation and our 2011 decision, we conclude that the provisions’ failure to name a specific device is not fatal. Initially we note that as a commercial fishing licensee, appellant was subject to strict

regulatory oversight in order to further the purpose of the division of wildlife, to protect and preserve wild animals for the benefit of the citizens of the state. (Citations omitted.) *State v. Bowersmith*, 3d Dist. Union No. 14-02-02, 2002-Ohio-3386, ¶ 18. In addition, this court has specifically held that the issuance commercial fishing licenses, subject to the S.B. 77 provisions, is not violative of a licensee's procedural or substantive due process rights, and did not violate a licensee's right to equal protection or the prohibition against unreasonable searches and seizures. *See Great Lakes Commercial Fishermen, LLC v. Logan*, 6th Dist. Lucas No. L-09-1180 (Mar. 31, 2010)

{¶ 15} The statute and code sections at issue refer to vessel and catch monitoring devices which are required to be on commercial vessels, operational, and in-operation. As we stated in our prior decision, "a commercially licensed fisherman should know that after March 1, 2008, vessel and catch monitoring devices are required." *Whites Landing Fisheries* at ¶ 33. Appellant was, in fact, aware of the approved system. At the October 2, 2012 plea hearing the state provided its basis for the charge as follows:

[Appellant] did operate a vessel * * * without having the approved operation – approved operational vessel monitoring device. The approved vessel monitoring device being the Fieldworker and the successor vendor Safe Freight VMS vessel monitoring device, being transmitter and antenna that is put on a boat that's the Fieldworker Safe Freight operating system which would include the hardware and the software for purposes of the GPS system transmitting signal to a website concerning this boat's location

and speed in particular areas in the waters here within the jurisdiction of the Sandusky Municipal Court. And that this was failed to be done in compliance with the requirements and procedures established by the Chief of the Division of Wildlife, then Chief Graham, having selected the Fieldworker and successor vendor, being Safe Freight System as being the approved vessel monitoring device.

{¶ 16} In furtherance of the division's purpose to preserve natural resources and prevent illegal harvesting, we conclude that the Chief of the Division of Wildlife had the authority to choose the specific monitoring system in order to effectuate the intent of the legislature. *See generally* R.C. 1501.01. Accordingly we find that Ohio Adm.Code 1501:31-3-06 is not void for vagueness and appellant's first assignment of error is not well-taken.

{¶ 17} Appellant's second assignment of error challenges the trial court's failure to conduct a hearing on its motion to suppress and the state's motion in limine. Appellant argues that evidence regarding the construction and method of the monitoring device was necessary in order to support a conviction. In support, appellant relies on the reasoning of a case involving radar speed units. *East Cleveland v. Ferrell*, 168 Ohio St. 298, 154 N.E.2d 630 (1958). In *Ferrell*, the court concluded that sufficient evidence of the radar's functioning was presented where it was shown that the meter had been properly set up and tested by a technician and, at the time, was functioning properly. *Id.* at syllabus.

{¶ 18} Appellant’s motion to suppress and memorandum in support argued, not what the state could not use as evidence; rather appellant argued that the state be required to prove technical aspects regarding the monitoring equipment and its operability. Appellant’s assertion was legally incorrect. The state was required to only prove that appellant failed to have the required monitoring system while engaged in commercial fishing. The motion in limine filed by the state and granted on October 1, 2012, precluded appellant from presenting the type of evidence it sought from the state in its motion to suppress.

{¶ 19} Based on the foregoing, we find that the trial court did not err in denying appellant’s motion to suppress without first conducting a hearing. Appellant’s second assignment of error is not well-taken.

{¶ 20} In appellant’s third assignment of error, it argues that the Ohio Department of Natural Resources discriminatorily enforced the provisions of R.C. 1533.343 by filing 28 similar charges against appellant after this court determined that the provision was constitutional. We first note that the only charge before this court on appeal is from case No. CRB 112729; thus, the question of the validity of 28 additional charges is not before us. Further, in our 2011 decision, we held that the trial court erred in finding that the state selectively enforced R.C. 1533.343, because Whites Landing did not have the “required devices on the vessel while engaged in commercial fishing.” *Whites Landing Fisheries*, 6th Dist. Erie Nos. E-10-035, E-10-036, 2011-Ohio-3497 at ¶ 12.

Accordingly, we find that appellant’s third assignment of error is not well-taken.

{¶ 21} In appellant's fourth and final assignment of error it contends that its speedy trial rights were violated by the delay from July 15, 2011, when the case was returned from this court, until October 2, 2012, when the court denied appellant's motion to dismiss for lack of a speedy trial. Initially we note that the 2011 remand from this court was from the cases stemming from 2008 (which were severed from this appeal.) In this case, appellant was charged on August 12, 2011. On August 17, appellant entered not guilty pleas and specifically "waives time limitation prescribed by Ohio Criminal Rules in which to have these causes tried." Thereafter, appellant filed a motion to suppress and a motion to recuse the judge. The sentencing judgment entry was filed on October 15, 2012. Based on the fact that the 2008 and 2011 cases were ultimately consolidated, appellant specifically waived the speedy trial limitations, and that various motions were filed tolling the time against appellant, we find that appellant's right to a speedy trial was not violated. Appellant's fourth assignment of error is not well-taken.

{¶ 22} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Sandusky Municipal Court is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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.

Mark L. Pietrykowski, J.

JUDGE

Stephen A. Yarbrough, P.J.

JUDGE

James D. Jensen, 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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