

[Cite as *Olmsted Falls v. Bowman*, 2010-Ohio-5767.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94000

CITY OF OLMSTED FALLS

PLAINTIFF-APPELLEE

VS.

TED BOWMAN

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART, REVERSED
IN PART AND REMANDED**

Criminal Appeal from the
Berea Municipal Court
Case No. 07 CRB 01486

BEFORE: Stewart, P.J., Sweeney, J., and Sweeney, J.*

RELEASED AND JOURNALIZED: November 24, 2010

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MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Ted Bowman, appeals from his first degree misdemeanor conviction under Olmsted Falls Codified Ordinances No. 1210.03(b): failing to bring a zoning violation into compliance. He complains that the court erred by refusing to dismiss the citation filed against him on grounds that the ordinance did not charge a criminal offense. He also complains that the court failed to comply with Crim.R. 11 when taking his no contest plea by informing him of the potential penalties that could be imposed upon conviction.

{¶ 2} Bowman's first and second assignments of error argue that the court erred by refusing to grant his motion to dismiss because the citation issued to him did not charge a criminal offense.

{¶ 3} All crimes are statutory and "the elements necessary to constitute a crime must be gathered from the statute." *State v. Crimpritz* (1953), 158 Ohio St. 490, 110 N.E.2d 416, paragraphs one and two of the syllabus.

{¶ 4} Olmsted Falls Codified Ordinances No. 1210.03(b) states:

{¶ 5} "Violator to Comply. Any person so notified of a violation of this Planning and Zoning Code or of work performed contrary to approvals by any City Commission or Board shall immediately initiate necessary action to bring such violation into compliance with this Planning and Zoning Code and shall be in full compliance by the compliance date stated in the Zoning Administrator's notification of violation. In addition to pursuing criminal citations under Section 1210.99 hereof, if such violation is not brought into conformity within the time provided in this subsection, the Zoning Administrator may inform Council of the violation and request appropriate civil action, as provided in subsection (c) hereof." (Emphasis sic.)

{¶ 6} Examining the plain language of Ordinance No. 1210.03(b) and applying it as written, *MedCorp, Inc. v. Ohio Dept. of Job & Family Servs.*, 121 Ohio St.3d 622, 2009-Ohio-2058, 906 N.E.2d 1125, at ¶9, we find its

elements are: (1) a zoning administrator's finding of zoning violation, (2) a notice of that zoning violation, and (3) a failure to take immediate action to bring the violation into compliance by the stated date in the notice of violation. The ordinance does not specifically state that a failure to bring a zoning violation into compliance constitutes a criminal violation, but the reference to the punishment provisions contained in Olmsted Falls Codified Ordinances No. 1210.99¹ unmistakably gives notice that a failure of compliance is a criminal act.

{¶ 7} The citation issued to Bowman charged him with a violation of Olmsted Falls Codified Ordinances No. 1210.03(b): "Failed to comply with a notice to discontinue unapproved use of the site and restore same to an approved condition (6 of 6 violations/letter dated 2/24/06.)" The citation properly charged a criminal offense as it referenced the existence of a prior violation, notice of that violation, and a failure to bring the violation into compliance.

¹Olmsted Falls Codified Ordinances No. 1210.99 states:

"Except as herein otherwise provided, whoever violates or fails to comply with any of the provisions with this Planning and Zoning Code is guilty of a misdemeanor of the first degree and shall be fined not more than one thousand dollars (\$1,000) or imprisoned not more than six months, or both, for each offense. A separate offense shall be deemed committed each day during or on which a violation or noncompliance occurs or continue."

{¶ 8} Bowman argues that the “notice” referenced in the citation is nowhere to be found in the record and thus fails to inform him of any facts constituting a criminal offense.

{¶ 9} “The Ohio Constitution guarantees that every defendant has the right to know ‘the nature and cause of the accusation against him.’ Section 10, Article I, Constitution.” *Cleveland v. Austin* (1978), 55 Ohio App.2d 215, 217, 380 N.E.2d 1357. This constitutional right leads to the requirement that a criminal defendant be notified “as to the offense and its elements” through the charging instrument. *State v. Culp* (1971), 32 Ohio App.2d 39, 41-42, 288 N.E.2d 308; see, also, Crim.R. 7(B). This rule does not, however, strictly apply to misdemeanor offenses. See *State v. Marcinski* (1921), 103 Ohio St. 613, 618, 134 N.E. 438. A charging instrument for a misdemeanor offense need only advise the defendant of “the nature and cause of the accusation” against the defendant. *Id.*, see, also, *Village of Strongsville v. McPhee* (1944), 142 Ohio St. 534, 538, 53 N.E.2d 524.

{¶ 10} As previously addressed, the citation issued to Bowman advised him of the nature and cause of the offense — his failure to bring a noticed zoning violation into compliance. The citation did not have to specifically incorporate the notice of zoning violation that the city sent Bowman; it merely had to reference that notice as an element of the offense. We agree with the city that Section 1210.03(b) is similar to the offense of failure to comply with

an order of a police officer under R.C. 2921.331 for which there is no requirement that the indictment set forth in detail the nature of the order pertaining to the noncompliance. It follows that the court did not err by refusing to dismiss the citation.

II

{¶ 11} Bowman's third assignment of error complains that his no contest plea was invalid because he was not informed of the penalty that could be imposed. The city concedes that the court failed to inform Bowman of the possible penalties that could be imposed if found guilty. Our review of the record confirms the city's concession — the court failed to advise Bowman of the "effect" of his no contest plea, in violation of Crim.R. 11(D). We therefore sustain this assignment of error.

III

{¶ 12} Finally, Bowman complains that the court erred by failing to consider his selective enforcement defense.

{¶ 13} Bowman raised his selective enforcement defense in his motion to dismiss. The court denied the motion to dismiss, so we must presume that when ruling on the motion, the court considered the selective enforcement argument but found no merit to it.

{¶ 14} We note, moreover, that Bowman failed to support his selective enforcement argument with any documentary evidence. The person claiming

selective enforcement has a “heavy burden” of establishing “prima facie that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government’s discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.” *State v. Flynt* (1980), 63 Ohio St.2d 132, 134, 407 N.E.2d 15. Absent evidence, Bowman could not meet the heavy burden required of him.

{¶ 15} Bowman now argues that the city blocked his subpoenas for discovery and argues that he did, in any event, proffer evidence into the record after his motion to dismiss. He claims this evidence shows the city’s selective enforcement of its zoning laws.

{¶ 16} Bowman’s proffer came too late. If he had grounds to believe that the city had been abusing the discovery process and denying him access to evidence, he should have filed appropriate motions to compel discovery *before* he filed his motion to dismiss. Had he done so, the evidence or materials that he sought could have been submitted with the motion to dismiss. As it is, the proffered material consists primarily of undated photographs of other properties. It is unclear when these photographs were taken, so they may not necessarily show existing violations, much less

violations that have not been remedied despite notice. So the photographs do not establish the city's bad faith in selectively prosecuting Bowman.

{¶ 17} This cause is affirmed in part, reversed in part and remanded for proceedings consistent with this opinion.

It is ordered that the parties bear their own costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Berea Municipal 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.

MELODY J. STEWART, PRESIDING JUDGE

JAMES J. SWEENEY, J., and
JAMES D. SWEENEY, J.,* CONCUR

(*Sitting by assignment: Retired Judge of the Eighth District Court of Appeals)