

[Cite as *Cuyahoga Cty. Bd. of Health v. Petro*, 2017-Ohio-1164.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104882

BOARD OF HEALTH OF CUYAHOGA COUNTY, OHIO

PLAINTIFF-APPELLEE

vs.

TERESA MARIA PETRO

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-12-785400

BEFORE: Keough, A.J., E.A. Gallagher, J., and McCormack, J.

RELEASED AND JOURNALIZED: March 30, 2017

APPELLANT

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KATHLEEN ANN KEOUGH, A.J.:

{¶1} Plaintiff-appellant, Teresa Petro, appeals from the trial court's order finding her in contempt of court. For the reasons that follow, we reverse the contempt order and remand to the trial court to conduct a contempt hearing in open court.

{¶2} In August 2010, Petro was notified of the requirement to abandon the use of her septic tank and connect to the public sanitary sewerage system that was now accessible to Petro's residence in Strongsville, Ohio. She did not comply with this notification.

{¶3} In June 2012, the Board of Health of Cuyahoga County ("BOH"), filed a complaint for injunctive relief against Petro seeking a permanent injunction, mandating that she abandon the use of the septic sewer system and connect to the sanitary sewerage system that was now accessible to her dwelling. In September 2012, Petro, pro se, filed an answer, admitting that (1) her property is currently using a septic system, and (2) she has been notified about the existence of the sanitary sewerage system. However, Petro denied that she is not in compliance with law or that she is operating the existing septic system to the detriment of the health and safety of the surrounding area. She further stated that requiring her to connect to the public sanitary sewerage system will place an undue and unbearable financial burden on her.

{¶4} On April 22, 2013, the parties entered into a consent judgment entry and order. The order stated: "d. [Petro] has voluntarily entered into and consented to the terms and conditions of this Judgment and Order." The order further provided that Petro

was (1) permanently enjoined and ordered to discontinue all use of the household sewage disposal system that services the property and connect the home to the publicly available sanitary sewer system, and (2) required to take all steps necessary to cause the property to conform to the regulations and orders of the Board of Health. These actions were required to be completed within 12 months from the date of the order. The consent judgment entry acknowledged that Petro was currently unemployed, which constituted a bona fide hardship. However, the entry warned that “if the work is not completed as agreed, the Board may, after notice and a hearing before the court, order the Property to be vacated until such time as the private sewer system is abandoned and connection to the publicly available sanitary sewer system is made.” No appeal was taken from this order.

{¶5} Three years later, in March 2016, the BOH filed a motion to show cause why Petro should not be held in contempt for failing to comply with the April 22, 2013 consent judgment entry and order. Petro opposed the motion but admitted that she failed to comply with the court order due to ongoing financial hardship. Additionally, she challenged the necessity of compliance, contending that her septic system is not toxic or harmful, and that other homes in her area have not been required to connect to the public sanitary sewerage system.

{¶6} On April 21, 2016, the trial court issued an order that stated: “Contempt hearing held 4/19/16. All parties were present.” In that order, the court scheduled the matter for a status conference for June 21, 2016, and provided that prior to the date of the status conference, Petro was ordered to either (1) apply for a loan to complete the work

on the septic system, or (2) begin work on the property, and obtain proper permits, to complete the agreed upon work. The court also granted Petro the authority to seek bids for the sale of the property or take out a loan on the property to facilitate the resolution of the matter. The order further warned Petro that if she “fails to find an appropriate resolution within the 60 days before the status conference, she will be found in contempt of court and sanctions may apply.”

{¶7} On June 30, 2016, the trial court issued an order that stated: “Contempt hearing held 6/21/16. All parties were present.” In its June 30, 2016 order, the trial court noted that Petro did not comply with the court’s April 22, 2016 written order; thus, Petro was found in contempt. The court’s order stated “See separate entry.”

{¶8} On August 2, 2016, the trial court issued the “separate entry” finding Petro in contempt of court pursuant to R.C. 2705.02 for failing and refusing to comply with the consent entry. The court ordered the following sanctions:

1. Defendant shall list the property for sale on or before August 1, 2016;
2. Defendant shall enter and execute an escrow agreement with the buyer in such terms satisfactory to the plaintiff which will at minimum cause the escrow agent to withhold from sale a sufficient amount of the sale proceeds to pay for the cost of connection to the sanitary system, to require said connection prior to occupancy by the buyer of the property;
3. Defendant shall execute any other necessary documents to complete compliance with the consent order;
4. Defendant is fined \$100 per day from date of this order until compliance is verified to the satisfaction of the plaintiff and this court or until the property is vacated, whichever shall first occur;

5. If the property has not sold on or before October 1, 2016, then the property shall be vacated;

6. If the property remains occupied on October 2, 2016, then upon filing of a writ of restitution by plaintiff, the sheriff shall remove defendant and her possessions from the property.

7. Defendant to pay costs of these proceedings, including the move-out, if necessary.

The court also noted the following purge conditions:

8. Defendant may purge herself of the contempt sanctions accruing by virtue of this order by (1) complying with the terms of the consent entry, or; (2) vacating the property, or; (3) selling the property and complying with this order. If defendant avails herself [of] any of these purge conditions she shall file a notification with this court supported by affidavit.

{¶9} Petro now appeals, raising six assignments of error for our review.

{¶10} As an initial matter, Petro has only appealed from the trial court's order finding her in contempt, and has only attached the final contempt order to her notice of appeal as required by App.R. 3(D). However, Petro's second, third, fourth, fifth, and sixth assignments of error challenge the underlying basis for the BOH complaint and the consent judgment entry.

{¶11} This court has discretion to consider any argument on appeal that does not arise from the judgment or order attached to the notice of appeal. *Midland Funding L.L.C. v. Hottenroth*, 2014-Ohio-5680, 26 N.E.3d 269, ¶ 3 (8th Dist.) (*en banc*). However, even if this court exercised its discretion to consider Petro's arguments pertaining to the consent judgment entry, a jurisdictional impediment would prevent this court from reviewing those assignments of error challenging the consent judgment order.

Pursuant to App.R. 4(A), a party wishing to appeal from an order that is final upon its entry has 30 days from the date of that order to file a notice of appeal. As this court has previously noted, App.R. 4(A) is jurisdictional. *Basit v. Chapman*, 8th Dist. Cuyahoga No. 103425, 2016-Ohio-4562, ¶ 3, citing *State ex rel. Pendell v. Adams Cty. Bd. of Elections*, 40 Ohio St.3d 58, 60, 531 N.E.2d 713 (1988). In this case, the consent judgment order was filed in April 2013; Petro did not file her notice of appeal until August 26, 2016.

{¶12} This court has consistently declined to “address assignments of error from an order that was not the subject of a timely notice of appeal when those arguments are raised as an otherwise timely appeal — an act we call ‘bootstrapping.’” *Basit* at ¶ 4, citing *State v. Church*, 8th Dist. Cuyahoga No. 68590, 1995 Ohio App. LEXIS 4838 (Nov. 2, 1995); *see also Lundy v. Lundy*, 11th Dist. Trumbull No. 2012-T-0100, 2013-Ohio-3571, ¶ 34 (“when considering an appeal from a trial court’s finding of contempt, the appellant cannot raise as a defense challenges to the merits of the underlying order from which the appellant did not directly appeal”). “The reason why we prohibit bootstrapping in cases like this is that a Civ.R. 60(B) motion for relief from judgment is not a substitution for an appeal.” *Basit* at *id.*, citing *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128, 502 N.E.2d 605 (1986), paragraph two of the syllabus.

{¶13} Accordingly, Petro’s second, third, fourth, fifth, and sixth assignments of error — each challenging the underlying basis for the BOH complaint and the consent

judgment entry and order — will not be considered. Those assignments of error are summarily dismissed.

{¶14} In her first assignment of error, Petro contends that the trial court erred when it ruled against her and deprived her of her property without a proper hearing or due process. Specifically, Petro contends that the trial judge did not conduct any of the hearings and proceedings in this matter. Because this assignment of error touches on the contempt hearings and proceedings, it will be addressed.

{¶15} Petro has not provided this court with a transcript of the proceedings. It is well established that the duty to provide a transcript for appellate review falls upon the appellant because she has the burden of showing error by referencing to matters in the record. *State v. Conner*, 192 Ohio App.3d 166, 171, 948 N.E.2d 497 (6th Dist.2011). When a transcript is not available, the appellant has the option of providing a narrative statement of the proceedings, as provided for in App.R. 9(C), or an agreed statement as provided for in App.R. 9(D). Petro has not provided a transcript or any statements as permitted by App.R. 9(C) or (D).

{¶16} In the absence of a transcript or appellate statements, the appellate court typically presumes that the proceedings before the trial court were proper. *State v. Brown*, 8th Dist. Cuyahoga No. 95086, 2011-Ohio-345, ¶ 9, citing *State v. Estrada*, 126 Ohio App.3d 553, 556, 710 N.E.2d 1168 (7th Dist.1998).

{¶17} In this case, the trial court's judgment entries dated April 21, 2016 and June 30, 2016 are each signed by the trial judge and affirmatively state that a hearing was

conducted and that all parties were present. Thus, based on the original papers filed, it appears that Petro was afforded a hearing on the show cause motion on April 19, 2016, and the subsequent status conference on June 21, 2016. However, this court cannot ignore that both Petro and counsel for the BOH affirmatively state that no formal hearing was conducted before the trial court on those days. In fact, the BOH states in its appellate brief that the trial court conducted a “paper hearing.” In the context of finding someone in contempt, the lack of an oral hearing in open court violated Petro’s due process rights.

{¶18} The trial court found Petro in contempt pursuant to R.C. 2705.02, which governs indirect contempt. Both R.C. 2705.03 and 2705.05 require a court to hold a hearing. Specifically, R.C. 2705.03, titled “Hearing,” provides:

In cases under section 2705.02 of the Revised Code, a charge in writing shall be filed with the clerk of the court, an entry thereof made upon the journal, *and an opportunity given to the accused to be heard, by himself or counsel*. This section does not prevent the court from issuing process to bring the accused into court, or from holding him in custody, pending such proceedings.

(Emphasis added.) R.C. 2705.05, titled “Hearing, penalties, duty of garnishee under support order,” provides in relevant part,

(A) In all contempt proceedings, *the court shall conduct a hearing. At the hearing, the court shall* investigate the charge and *hear* any answer or testimony that the accused makes or offers and shall determine whether the accused is guilty of the contempt charge.

(Emphasis added.) This court fails to see how a “paper hearing” affords the accused an opportunity to be heard by the court and hear any testimony that the accused makes or

offers. The law contemplates that the trial court hear testimony from the accused during a contempt hearing. *Ohio Patrolmen's Benevolent Assn. v. Cuyahoga County*, 8th Dist. Cuyahoga No. 79391, 2001-Ohio-4260, ¶ 13, citing R.C. 2705.05.

{¶19} Furthermore, at the hearing, if the court finds that the accused should be held in contempt, the trial court shall state the penalty, if any, and any purge conditions. The hearing affords the contemnor the opportunity to present evidence challenging the trial court's purge conditions as unreasonable or impossible for the contemnor to satisfy. *See Burchett v. Miller*, 123 Ohio App.3d 550, 552, 704 N.E.2d 636 (6th Dist.1997); *Schuman v. Cranford*, 4th Dist. Vinton No. 02CA571, 2003-Ohio-2117, ¶ 11.

{¶20} Accordingly, based on the concessions by the BOH at oral argument and in its appellate brief, we find that the trial court did not conduct an oral hearing as required by R.C. 2705.03 and 2705.05, thus depriving Petro due process of law. Petro's first assignment of error is sustained.

{¶21} Judgment reversed and remanded for the trial court to conduct a contempt hearing in open court. If the court finds Petro in contempt, the trial court shall orally advise Petro of the trial court's basis, including its findings, and announce in open court the sanctions imposed and purge conditions.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

KATHLEEN ANN KEOUGH, ADMINISTRATIVE JUDGE _____

EILEEN A. GALLAGHER, J., and
TIM McCORMACK, J., CONCUR