[Cite as *Dawson v. Richmond Hts.*, 2018-Ohio-1301.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 105938

JAMES G. DAWSON, ET AL.

PLAINTIFFS-APPELLANTS

vs.

CITY OF RICHMOND HEIGHTS, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-827596

BEFORE: Kilbane, P.J., Laster Mays, J., and Keough, J.

RELEASED AND JOURNALIZED: April 5, 2018

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MARY EILEEN KILBANE, P.J.:

{¶1} Plaintiffs-appellants, James and Carol Dawson (collectively referred to as "Dawsons"), pro se, appeal from the trial court's decision granting summary judgment to defendants-appellees, the city of Richmond Heights and Philip Seyboldt ("Seyboldt") (collectively referred to as the "City"). For the reasons set forth below, we affirm.

{¶2} This appeal arises out of the parties' dispute regarding a search warrant obtained by the City to permit dye testing of the sanitary and storm sewer systems located on the Dawsons' property in Richmond Heights, Ohio. "Dye testing" is a process used to determine whether roof water, surface or subsoil drainage or other clean waste, which is generally disposed of through the storm system, is "cross-contaminating" or entering a sanitary sewer system.

{¶3} Beginning in 2011, the City and the Cuyahoga County Department of Public Works started performing dye tests in the Dawsons' neighborhood to determine the cause of sanitary sewer backups and drainage problems occurring in the city. According to the City, it sent letters to the residents, including the Dawsons, explaining why testing was necessary, the manner of testing to be used, common causes for backups to the sewer system, and contact information for financial assistance if testing found that repairs were necessary.

{¶4} After nearly two years of testing neighboring properties, Seyboldt mailed a certified letter to the Dawsons in January 2013. The letter informed the Dawsons that

only a few properties remained to be tested, and the problem causing backups had been identified as storm water infiltrating the sanitary sewer, which was causing it to backup. The letter advised the Dawsons that if they did not schedule a test, the City may obtain a search warrant to conduct the dye testing.

{¶5} In September 2013, Seyboldt appeared before a judge of the Lyndhurst Municipal Court and provided a five-page typewritten "Affidavit for Search Warrant" along with accompanying documents, including the City's letter sent to the Dawsons. The court issued the search warrant based upon the affidavit, documents, and Seyboldt's representations that the Dawsons' property is not in compliance with the City's requirements of the streets and public service code and the building code.

{¶6} Subsequently, the search warrant was served on James by a Richmond Heights police sergeant and Seyboldt. Upon executing the search warrant, the City and the County Department of Public Works performed testing that revealed clean waste water on the Dawson's property was discharging into the sanitary system. The next day, Seyboldt returned an "Inventory of Property Seized" to the court noting that no property was seized.

{¶7} As a result of the search warrant and testing, the Dawsons filed a nine-count complaint against the City and the Cuyahoga County Department of Public Works in May 2014.[1] In the complaint, the Dawsons seek declaratory judgment, injunctive relief, and

[1]The Cuyahoga County Department of Public Works was dismissed as a party from the case.

equitable restitution arising out of their challenges to an administrative search warrant executed by the city of Richmond Heights and its building commissioner, Seyboldt.[2] The Dawsons allege that the search warrant, issued by the Lyndhurst Municipal Court, violated the Fourth Amendment of the United States Constitution and Article I, Section 14 of the Ohio Constitution. They further allege that Richmond Heights Codified Ordinances Sections 931.03 and 931.99 are unconstitutional ("R.H.C.O. 931.03 and 931.99").[3]

{¶8} Following discovery, both parties moved for summary judgment. In a thorough 12-page opinion, the trial court concluded that no genuine issues of material fact were in dispute and granted the City summary judgment as a matter of law. The trial court denied the Dawsons' motion for summary judgment. In its opinion, the trial court found that the search warrant was based on probable cause and in compliance with R.C. Chapter 2933, and even if probable cause was lacking, the court has no justiciable controversy to grant relief. The appropriate relief would be suppression of the evidence at a criminal proceeding brought against the Dawsons. The court further found that R.H.C.O. 931.03 is not void for vagueness and the Dawsons' challenge to R.H.C.O. 931.99 is not ripe for judicial review because the Dawsons have not been charged with

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[2]In June 2014, the case was removed to the United States District Court for the Northern District of Ohio. The district court determined that federal subject matter was lacking and remanded the case to the trial court in August 2015.

[3]Under these ordinances, it is a first-degree misdemeanor "to discharge into the sanitary sewers of the City any roof water, surface or subsoil drainage or other clean waste water, or discharge into the storm sewers or drains of or within the City

any violations of R.H.C.O. 931.03. With regard to the Dawsons' request for an injunction and equitable relief, the court found that the Dawsons cannot satisfy the first requirement for an injunction and rejected the equitable restitution claim.

{¶9} The Dawsons now appeal, raising the following three assignments of error for review:

Assignment of Error One

> The trial court erred to the prejudice of the Dawsons and abused its discretion by denying their motion for summary judgment where the criminal search warrant issued by the Lyndhurst Municipal Court was not based on probable cause, failed to comply with the mandates of [R.C. 2933.01,] et seq. and Crim.R. 41(C) and was therefore illegal, unconstitutional and void.

Assignment of Error Two

> The trial court erred to the prejudice of the Dawsons and abused its discretion by denying their motion for summary judgment and ruling that [R.H.C.O. 931.03] is constitutional under the void-for-vagueness doctrine.

Assignment of Error Three

> The trial court erred to the prejudice of the Dawsons and abused its discretion by ruling that the "separate offense clause" of [R.H.C.O. 931.99] is legal and constitutional and not in violation of the due process clause and double jeopardy clause of the United States Constitution and related provisions of the Ohio Constitution.

Summary Judgment

{¶10} We review an appeal from summary judgment under a de novo standard of review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Zemcik v. LaPine Truck Sales & Equip. Co.*, 124 Ohio App.3d 581, 585, 706

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any sanitary sewage or industrial wastes." R.H.C.O. 931.03 and 931.99.

N.E.2d 860 (8th Dist.1998). In *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 1998-Ohio-389, 696 N.E.2d 201, the Ohio Supreme Court set forth the appropriate test as follows:

> Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 1995-Ohio-286, 653 N.E.2d 1196, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264.

{¶11} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389, 667 N.E.2d 1197. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95, 604 N.E.2d 138.

{¶12} We note that the purpose of a declaratory judgment action is "'to serve the useful end of disposing of uncertain or disputed obligations quickly and conclusively.'" *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 46, quoting *Ohio Farmers Indem. Co. v. Chames*, 170 Ohio St. 209, 213, 163 N.E.2d 367 (1959). Declaratory judgment actions are governed by R.C. Chapter 2721, which

provides that courts may declare "rights, status, and legal relations," including when "a judgment or decision will terminate the controversy." R.C. 2721.02 and 2721.06.

{¶13} With these principles in mind, we now turn to the issues the Dawsons raise in their assigned errors. The Dawsons first argue the search warrant was illegal and void because it did not comply with R.C. 2933.01, et seq. and Crim.R. 41.

Search Warrant

{¶14} The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures and requires that no warrant shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. Article I, Section 14 of the Ohio Constitution provides the same protections.

{¶15} Probable cause exists when there are reasonable grounds for a belief of guilt that is particularized with respect to the person, place, or items to be seized. *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S.Ct. 795, 157 L.Ed.2d 769 (2003). The existence of probable cause is determined by analyzing the totality of the circumstances surrounding the governmental intrusion and involves a practical, common-sense review of the facts available to the government actor at the time of the search or seizure. *Illinois v. Gates*, 462 U.S. 213, 230, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

{¶16} The Fourth Amendment protections extend to administrative searches. *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 534, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). The need for an administrative search warrant arises where a search must be

undertaken as part of an effort "aimed at securing city-wide compliance with minimum physical standards for private property" or where "[t]he primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety." *Id.* at 535.

{¶17} These types of search warrants, however, are not subject to the same stringent probable cause requirement as criminal search warrants. *Id.* at 534-535. Rather, the evidence of a specific violation required to establish administrative probable cause must "show that the proposed inspection is based upon a reasonable belief that a violation has been or is being committed." *W. Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 958 (11th Cir.1982). Probable cause with respect to the issuance of an administrative warrant to enter and inspect premises is subject to a flexible standard of reasonableness involving the agency's particular demand for access and the public need for effective enforcement of the regulation involved. *State v. Finnell*, 115 Ohio App.3d 583, 589, 685 N.E.2d 1267 (1st Dist.1996), citing *See v. Seattle*, 387 U.S. 541, 18 L.Ed.2d 943, 87 S.Ct. 1737 (1967).

{¶18} R.C. 2933.21(F) permits a judge to issue warrants permitting a search for existing or potential physical conditions hazardous to the public health, safety, or welfare. Therefore, the municipal court judge could properly consider the conditions of the Dawsons' property, as well as the conditions of surrounding neighborhood properties, to determine whether probable cause existed to believe that conditions on their property were or could become hazardous to the public health, safety, or welfare.

{¶19} Here, the trial court found, and we agree, that the search warrant was based on probable cause and in compliance with R.C. Chapter 2933. Seyboldt's affidavit and accompanying documents provided the court with information about testing performed in the area, results of those tests, general information explaining the cause for backups in the area, evidence that the backups continued to persist from May 2011 through January 2013, and evidence that the Dawsons' property was one of the few remaining properties in the area that had not been tested. Additionally, the record demonstrates that Seyboldt kept on file with the Building Department a copy of the report of the conditions of the Dawsons' property, as required by R.C. 2933.24(B).[4]

{¶20} The Dawsons also argue that the search warrant failed to comply with Crim.R. 41(C) because it was stale when it was served upon James. The trial court found that this argument failed as a matter of law because the warrant complies with Crim.R. 41(C)(2). We agree.

{¶21} Crim.R. 41(C)(2) requires that a search warrant "shall command the officer to search within three days, the person or place named for the property specified." Crim.R. 45(A), which applies to computing time for execution of search warrants,

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[4]R.C. 2933.24(B) provides that

> [w]hen a search warrant commands a[n]* * * authorized individual to inspect physical conditions relating to public health, safety, or welfare, such * * * individual, upon completion of the search, shall complete a report of the conditions and file a copy of such report with the * * * individual's agency headquarters.

instructs how to calculate the three-day requirement found in Crim.R. 41(C)(2). It provides:

> In computing any period of time prescribed * * * by these rules * * * the date of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not Saturday, Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in computation.

Crim.R. 45(A).

{¶22} Applying the foregoing to the instant case, the warrant was not stale when it was executed on Tuesday, September 17, 2013. The three-day period within which the warrant had to be executed included Friday, September 13 (day one), Monday, September 16 (day two), and Tuesday, September 17 (day three).

R.H.C.O. 931.03 and 931.99

{¶23} The Dawsons also argue the trial court erroneously found that R.H.C.O. 931.03 and 931.99 are constitutional. With regard to R.H.C.O. 931.03, the Dawsons argue it is unconstitutional and vague because a resident is precluded from knowing whether he or she has violated the ordinance unless the resident digs up his front lawn to approximately 8½ feet down and tests the sanitary and storm sewer pipes.

{¶24} We recognize "[d]ue process demands that the state provide meaningful standards in its laws. A law must give fair notice to the citizenry of the conduct proscribed and the penalty to be affixed if that law is breached." *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 81, citing *Kolender v. Lawson*,

461 U.S. 352, 357-358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *Colten v. Kentucky*, 407 U.S. 104, 110, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972).

> When a statute is challenged under the due-process doctrine prohibiting vagueness, the court must determine whether the enactment (1) provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence and (2) is specific enough to prevent official arbitrariness or discrimination in its enforcement.

Norwood at ¶ 84, citing *Kolender*.

{¶25} "The void-for-vagueness doctrine does not require statutes to be drafted with scientific precision." *Perez v. Cleveland*, 78 Ohio St.3d 376, 378, 1997-Ohio-33, 678 N.E.2d 537, citing *State v. Anderson*, 57 Ohio St.3d 168, 566 N.E.2d 1224 (1991). "Instead, it permits a statute's certainty to be ascertained by application of commonly accepted tools of judicial construction, with courts indulging every reasonable interpretation in favor of finding the statute constitutional." *Id.* at 378-379, citing *State v. Dorso*, 4 Ohio St.3d 60, 446 N.E.2d 449 (1983).

{¶26} When '"the terms of a statute are clear and unambiguous, the statute should be applied without interpretation."' *Barth v. Barth*, 113 Ohio St.3d 27, 2007-Ohio-973, 862 N.E.2d 496, ¶ 10, quoting *Wingate v. Hordge* , 60 Ohio St.2d 55, 58, 396 N.E.2d 770 (1979). """"To construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts."""" *Id.*, quoting *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn.*, 69 Ohio St.3d 521, 524, 1994-Ohio-330, 634 N.E.2d 611 (1994), quoting *Thompson Elec., Inc. v. Bank One, Akron, N.A.*, 37 Ohio St.3d 259, 264,

525 N.E.2d 761 (1988), quoting *Iddings v. Jefferson Cty. School Dist. Bd. of Edn.*, 155 Ohio St. 287, 290, 98 N.E.2d 827 (1951).

{¶27} Here, R.H.C.O. 931.03 is titled "Prohibited Discharges" and provides that "[n]o owner, * * * of any lot or parcel of land located within the City shall discharge into the sanitary sewers of the City any roof water, surface or subsoil drainage or other clean waste water, or discharge into the storm sewers or drains of or within the City any sanitary sewage or industrial wastes."

{¶28} The plain language of this provision provides that no owner may discharge roof water, surface or subsoil drainage or other clean waste water into the city's sanitary sewers or discharge sanitary sewage or industrial waste into the city's storm sewers or drains. Based on a plain reading of this language, the first *Norwood* requirement is satisfied.

{¶29} R.H.C.O. 931.03 also satisfies the second *Norwood* requirement — the ordinance is specific enough to prevent arbitrariness or discrimination in enforcement. The plain language of the ordinance imposes a strict prohibition on discharge of roof water, surface or subsoil drainage or other clean waste water into the sanitary sewers, and a strict prohibition on the discharge of sanitary sewage or industrial wastes into storm sewers or drains. There is no culpable mental state associated with the prohibited acts, and the individuals tasked with enforcement need only ascertain whether the land owner engaged in such a prohibited discharge. As a result, the Dawsons' void-for-vagueness argument is unpersuasive.

{¶30} The Dawsons also argue that the culpable mens rea for R.H.C.O. 931.03 is recklessness because the ordinance does not specify any degree of mental culpability and fails to set forth a purpose to impose strict liability.

{¶31} The rules of construction for criminal statutes that do not include a culpable mental state are set forth in R.C. 2901.21, which essentially provides that an offense is a strict liability offense when the section defining the offense does not specify a mens rea and the section also plainly indicates a purpose to impose strict liability.

{¶32} A review of R.H.C.O. 931.03 plainly indicates an intent to impose strict liability. The ordinance clearly aims to prohibit all discharges, irrespective of mental state — a violation occurs whether a person discharged purposefully, knowingly, recklessly, or negligently. Further, its use of the phrase "no [person] shall," absent any reference to the requisite mental state, indicates the drafter's intent to impose a blanket prohibition on the described activities, irrespective of the mental state of the actor. *See State v. Cheraso*, 43 Ohio App.3d 221, 223, 540 N.E.2d 326 (11th Dist.1988).

{¶33} With regard to R.H.C.O. 931.99, the Dawsons challenge the "separate offense" clause set forth in the ordinance. R.H.C.O. 931.99 is titled "Penalty" and provides that

> [w]hoever violates any of the provisions of this chapter is guilty of a misdemeanor of the first degree for each offense. A separate offense shall be deemed to have been committed each period of twenty-four hours such violation shall continue after a period of thirty days following the original conviction.

{¶34} As the trial court noted, the Dawsons' arguments are not ripe for review

because there is no real controversy directly impacting the parties. *Burger Brewing Co. v. Liquor Control Comm.*, 34 Ohio St.2d 93, 97, 296 N.E.2d 261 (1973). The Dawsons have not been charged nor found guilty of any violations of R.H.C.O. 931.03. Therefore, the Dawsons' argument is unpersuasive.

{¶35} Based on the foregoing, we find no genuine issues of material fact. Therefore, the trial court properly granted summary judgment to the City and properly denied the Dawsons' motion for summary judgment.

{¶36} Accordingly, the first, second, and third assignments of error are overruled.

{¶37} Judgment is affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

ANITA LASTER MAYS, J., and
KATHLEEN ANN KEOUGH, J., CONCUR