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ARKANSAS COURT OF APPEALS

DIVISIONS IV & I

No. CR-17-578

NOAH STEFFY APPELLANT V. CITY OF FORT SMITH APPELLEE	**Opinion Delivered:** March 7, 2018 APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT, FORT SMITH DISTRICT [NO. 66FCR-16-1014] HONORABLE J. MICHAEL FITZHUGH, JUDGE AFFIRMED

RITA W. GRUBER, Chief Judge

At issue in this case is the constitutionality of several nuisance ordinances adopted by the City of Fort Smith. Appellant Noah Steffy appeals from a jury's verdict finding him guilty of violating the ordinances by failing to maintain his premises. He does not challenge the sufficiency of the evidence on appeal but argues that the circuit court erred in denying his motion to dismiss the case based on its determination that the ordinances are not unconstitutional. We affirm his conviction.

I. *Facts*

In March 2016, the neighborhood-services department of the City of Fort Smith received several complaints from appellant's neighbors about his property at 2405 High Street in Fort Smith. One of the neighbors testified at trial that the front of the house looked like a "junk yard"; there was trash everywhere; and the grass was up to your knees, at times

"up to 18 inches." According to this neighbor, the junk included car parts, tires, wheels, wood, bicycles, old swing sets—"you name it, it was there." In response to the complaints, Brandon Haynes, the property-maintenance inspector at the time, visited the property on March 22, 2016, to inspect the property and take photos. He testified that there were numerous violations of the city ordinances, including trash, debris, open storage of building materials, lumber, tires, dead limbs, and overgrowth in the yard; sections of fencing down; mattress bedsprings and a refrigerator in the yard; and indoor furniture, including a desk, on the front porch. He testified that the pile of dead limbs was a good place for rodents, mosquitos, and snakes.

Rick Ruth, the property-maintenance supervisor for the neighborhood-services department, testified that he inspected appellant's property on March 31, 2016, and observed trash and debris; dead limbs on the ground; car tires and a refrigerator in the backyard; and "just overgrown conditions." He testified that when it rains or snows, moisture collects in the tires. He said that it takes very little for mosquitos to breed in the collected water and that mosquitos carry the West Nile virus and the Zika virus and that mosquitos are responsible for causing heartworms in dogs and other animals. He stated that because tires hold water, they are a health issue and should be put up and stored away. Regarding dead limbs, trash, and debris in the yard, Mr. Ruth testified that they hold moisture and rot; draw termites and other insects; and create breeding and nesting grounds for snakes, rodents, and vermin.

Mr. Ruth testified that he had spoken with appellant and attempted to work with him to correct the problem, even bringing him a lawn mower when appellant indicated he

did not own one. Mr. Ruth offered to meet appellant to walk around the property and advise him what needed to be done to comply with the ordinances. He testified that he visited the property again on May 3, 2016, and saw very little change from his visit on March 31, 2016. He testified that the property remained in violation of the nuisance ordinances when he visited on May 17, 2016, which prompted him to fill out an affidavit for criminal summons regarding the violations.

On August 17, 2016, appellant was found guilty in district court of failing to care for the premises. He appealed to the circuit court, where a jury found him guilty and fined him $510. Before his trial, he filed a motion to dismiss, asserting that the ordinances he was accused of violating are unconstitutional because they are vague, arbitrary, and do not further a compelling, important state interest. The circuit court found that the vague-and-arbitrary challenge had no merit. The court's order then stated that appellant had argued that the ordinance did not "further a compelling intent" and that the City of Fort Smith pointed out the interest in the health, safety, and welfare of its residents. The court found that "the City is correct," and it denied appellant's motion.

Appellant's sole point on appeal is that the ordinances are unconstitutional because they violate due process and are void for vagueness. We disagree and affirm appellant's conviction.

II. *City Ordinances & Authority*

Municipal corporations derive their legislative powers from the general laws of the State. Ark. Const. art 12 § 4; *Phillips v. Town of Oak Grove*, 333 Ark. 183, 189, 968 S.W.2d 600, 603 (1998). The State has authorized cities to legislate under the police power in

Arkansas Code Annotated section 14-55-102 (Repl. 1998). That section gives cities the general power to enact ordinances that "shall seem necessary to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof." Ark. Code Ann. § 14-55-102 (Repl. 1998). Under the State's grant of power, cities and incorporated towns can "[p]revent injury or annoyance within the limits of the municipal corporation from anything dangerous, offensive, or unhealthy and cause any nuisance to be abated within the jurisdiction given the board of health in § 14-262-102[.]" Ark. Code Ann. § 14-54-103. In addition, and specifically relevant here, Arkansas Code Annotated section 14-54-901 provides as follows:

> Incorporated towns and cities of the first and second class are empowered to order the owner of lots and other real property within their towns or cities to cut weeds; to remove garbage, rubbish, and other unsightly and unsanitary articles and things upon the property; and to eliminate, fill up, or remove stagnant pools of water or any other unsanitary thing, place, or condition which might become a breeding place for mosquitoes, flies, and germs harmful to the health of the community, after the town or city has provided therefor by an ordinance to that effect.

We have long recognized a city's plenary duty to exercise its police powers in the interest of the public health and safety of its inhabitants. *Phillips*, 333 Ark. at 189, 968 S.W.2d at 603 (citing *Springfield v. City of Little Rock*, 226 Ark. 462, 290 S.W.2d 620 (1956)).

The underlying nuisance ordinances that appellant was charged with violating concern the care of premises and provide that it is unlawful for the owner or occupier of a residential building, structure, or property

> to utilize the premises of such property for the open storage of any . . . household appliances or household furniture (regardless of working condition), glass, building material, building rubbish or similar items. Additionally, it shall be the duty and responsibility of every such owner and occupant to keep the premises of such

> property clean and to remove from such premises all such items as listed above, including but not limited to weeds, dead trees, trash and garbage upon written notice from a building official.

Fort Smith, Ark., Ordinance ch. 16, art. 1, § 4 (1991). The pertinent ordinances also require lands to be maintained so that weeds and grasses on the property do not exceed six inches and require the owner to remove "all dead or dying trees and dead parts of living trees" when they constitute a hazard to personal safety or constitute a nuisance because of disease or decay. We turn now to whether the City of Fort Smith has acted in excess of the authority conferred.

III. *Constitutionality of Ordinances*

Appellant first contends that the City engaged in an arbitrary and capricious exercise of its authority in adopting the ordinances because they are not narrowly tailored to achieve a compelling state interest. He argues that we must use a "strict scrutiny" test in determining whether the ordinances are constitutional.

We reject appellant's argument that we must use a "strict scrutiny" standard in reviewing his constitutional challenge. Strict scrutiny analysis applies only when a fundamental right has been affected. *Jegley v. Picado*, 349 Ark. 600, 632, 80 S.W.3d 332, 350 (2002). Appellant does not contend that the use and enjoyment of one's property is such a fundamental right. Absent a fundamental right, judicial review of a legislative enactment is limited to determining whether the legislation is arbitrary, capricious, and unreasonable. *City of Lowell v. M & N Mobile Home Park*, 323 Ark. 332, 916 S.W.2d 95 (1996). This is a limited power; we cannot take away the discretion that is constitutionally vested in a city's legislative body. The legislation is not arbitrary if there is any reasonable basis for its

enactment. *Id*. at 339, 916 S.W.2d at 98. The party alleging that legislation is arbitrary has the burden of proving that there is no rational basis for the legislative act, and regardless of the evidence introduced by the moving party, the legislation is presumed to be valid and is to be upheld if the judicial branch finds a rational basis for it. *Id*. It is not for the judicial branch to decide from evidence introduced by the moving party whether the legislative branch acted wisely. *Id*. at 340, 916 S.W.2d at 99; *see also Feland v. State*, 355 Ark. 573, 142 S.W.3d 631 (2004). We review both the circuit court's interpretation of the constitution and issues of statutory interpretation de novo, because it is for this court to determine the meaning of a statute. *Kimbrell v. State*, 2017 Ark. App. 555, at 4, 533 S.W.3d 114, 117.

The ordinances in this case address the very issues set forth in Ark. Code Ann. § 14-54-901, and the testimony of the city employees demonstrated that the purpose behind the ordinances was to prevent conditions that might become a breeding place for mosquitoes, snakes, vermin, and other things harmful to the health of the community. The General Assembly specifically authorized ordinances regulating these particular items, and the testimony demonstrated a reasonable basis for the ordinances. Appellant argues simply that the city employees failed to prove that mosquitos and other insects were actually spreading disease in Fort Smith or that the tires and other debris were actually collecting water or attracting vermin. The law does not require such proof. We hold that the city presented a rational basis for the ordinances and that they are not arbitrary or capricious.

We turn next to appellant's argument that the ordinances at issue are void for vagueness and thus violate due process. An ordinance is presumed constitutional, and the burden of proving otherwise is upon the challenging party. *Craft v. City of Fort Smith*, 335

Ark. 417, 424, 984 S.W.2d 22, 26 (1998). If it is possible to construe a statute as constitutional, we must do so. *Reinert v. State*, 348 Ark. 1, 4, 71 S.W.3d 52, 54 (2002). A law is unconstitutionally vague if it does not give a person of ordinary intelligence fair notice of what is prohibited—that is, such a person must guess at its meaning—and it is so vague and standardless that it allows for arbitrary and discriminatory enforcement. *Id.* Stated another way, a statute must not be so vague and standardless that it leaves judges free to decide, without any legally fixed standards, what is prohibited and what is not on a case-by-case basis. *Ark. Tobacco Control Bd. v. Sitton*, 357 Ark. 357, 166 S.W.3d 550 (2004).

As a general rule, the constitutionality of a statutory provision that is being attacked as void for vagueness "is determined by the statute's applicability to the facts at issue." *Reinert*, 348 Ark. at 4, 71 S.W.3d at 54 (citing *United States v. Powell*, 423 U.S. 87 (1975)). When challenging the constitutionality of a statute on grounds of vagueness, the individual challenging the statute must be one of the "entrapped innocent" who has not received fair warning; if, by his action, that individual clearly falls within the conduct proscribed by the statute, he cannot be heard to complain. *Ross v. State*, 347 Ark. 334, 64 S.W.3d 272 (2002); *Vickers v. State*, 313 Ark. 64, 852 S.W.2d 787 (1993). "That a statutory provision may be of questionable applicability in speculative situations is usually immaterial if the challenged provision applies to the conduct of the defendant in the case at issue." *Reinert*, 348 Ark. at 5, 71 S.W.3d at 54 (citing *United States v. Petrillo*, 332 U.S. 1 (1947); *Holt v. City of Maumelle*, 307 Ark. 115, 817 S.W.2d 208 (1991)).

The ordinances at issue in this case state that a property owner may not store household appliances and furniture, building material, building rubbish, or similar items on

his or her property and also specifically require him or her to remove all weeds, dead trees, trash, and garbage upon written notice from a building official. They also require property to be maintained so that weeds and grasses on the property do not exceed six inches. Indeed, the ordinances are more specific than the presumably constitutional statutes pursuant to which they were enacted, which authorize cities to "[p]revent injury or annoyance within the limits of the municipal corporation from anything dangerous, offensive, or unhealthy" and "to remove garbage, rubbish, and other unsightly and unsanitary articles and things upon the property." Our task is to look at the facts of this case, and if it is possible to construe these ordinances as constitutional, we must do so.

It is clear in this case that appellant's conduct falls within the ordinances' ambit. There was testimony that there was trash everywhere; the grass was knee high; there was open storage of building materials, lumber, tires, dead limbs, and overgrowth in the yard; sections of fencing were down; there were mattress bedsprings and a refrigerator in the yard; and there was indoor furniture, including a desk, on the front porch. The photos accurately depicted the testimony. The city notified appellant about the violations, offered him assistance in complying, and gave him several months to remedy the situation before filing a criminal summons. We hold that these ordinances provided appellant fair notice of what was prohibited and that they are not unconstitutionally vague.

Affirmed.

HARRISON, KLAPPENBACH, and WHITEAKER, JJ., agree.

HIXSON and BROWN, JJ., dissent.

KENNETH S. HIXSON, Judge, dissenting. I respectfully dissent from the majority opinion. Although I agree with the majority that the ordinances at issue are rationally related to a legitimate state interest, in my view they are void for vagueness. Because the ordinances do not meet constitutional due-process requirements, I would reverse the judgment against Noah Steffy.

The ordinances we must examine are nuisance Ordinances 16-4 and 16-5. Ordinance 16-4 provides:

> *Care of premises*. It shall be unlawful for either the owner or occupant of a residential or nonresidential building, structure or property to utilize the premises of such property for the open storage of *any* abandoned motor vehicle, household appliance or household furniture (regardless of working condition), glass, building material, building rubbish or similar items. Additionally, it shall be the duty and responsibility of every such owner and occupant to keep the premises of such property clean and to remove from such premises all such items as listed above, including but not limited to, weeds, dead trees, trash and garbage upon written notice from a building official. [emphasis added].

Ordinance 16-5 provides, in pertinent part, that property "shall be maintained so that weeds and grasses thereon shall not exceed six inches in height." Ordinance 16-5 further provides:

> The owners and occupants of all lands shall remove or cause to be removed all dead or dying trees and dead parts of living trees from such lands when such dead or dying trees or dead parts of trees shall constitute a hazard to personal safety or personal property due to the imminent possibility of their falling upon or being blown upon public property or property of other owners, or when such trees because of disease or decay constitute a nuisance and/or imminent health threat to other trees located on public property or property of other owners.

Noah owns a house in Fort Smith. In March 2016 the city received calls from neighbors about Noah's property being overgrown and littered with limbs and other items. On March 22, 2016, the city issued a written notice to Noah advising him that he was in violation of city ordinances. Noah was told that he needed to correct the problems, which

included cutting his grass to lower than six inches and removing dead limbs, appliances, indoor furniture, building materials, and trash and debris from his property within seven days. Noah did not comply with the city's request. On May 20, 2016, the city cited Noah for these alleged violations, and a criminal summons was issued.

Several witnesses testified at the jury trial. Two of Noah's neighbors described his property. One neighbor testified that it was overgrown, that you could not see the house because of the brush, and that the yard was full of debris, bales of hay, piled-up wood, tires, toys, and a refrigerator. Another neighbor described the property as "trashy."

City officer Brandon Hayes testified that he was called to inspect Noah's property. Mr. Hayes observed building materials, indoor furniture on the porch, a desk, and a pile of dead limbs. He also saw an untagged vehicle in the yard that appeared to be inoperable.

Noah called his two daughters to testify on his behalf. These witnesses testified that they grew fruit on the property, such as apples, peaches, and blackberries, and that they grew grass for their horse, Dreamer.

After the jury trial, the jury found Noah guilty of failing to maintain his premises and fined him $10 a day for each violation between March 29 and May 19, 2016. A judgment of $510 was entered on the jury verdict.

On appeal, Noah does not challenge the sufficiency of the evidence supporting the violations. Instead, he raises constitutional arguments. He argues that the ordinances he was found to have violated are unconstitutionally vague, arbitrary, and do not further any

compelling state interest.[1] Noah raised these arguments below in a motion to dismiss, so they are preserved for review.

In my view, as stated in footnote one, the ordinances at issue pass constitutional muster because they are tailored toward a legitimate state interest. In *Carter & Burkhead v. State*, 255 Ark. 225, 500 S.W.2d 368 (1973), the supreme court held that the legislature may, within constitutional limits, prohibit things hurtful to the comfort, safety, and welfare of the people and prescribe regulations to promote the public health. The ordinances here are designed to protect the health and safety of the community, as well as to promote aesthetics and preserve property values. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). However, I would hold that these ordinances are unconstitutionally vague.

The void-for-vagueness doctrine applies to laws with both criminal and civil penalties. *Madison Park N. Apartments, L.P. v. Comm'r of Housing and Cmty. Dev.*, 66 A.3d 93 (Md. App. 2013). However, when a statute imposes criminal penalties, the standard is certainly higher than the standard applicable to statutes imposing only civil penalties. *Id.* In this case, the ordinances imposed a criminal penalty against Noah as opposed to only a civil penalty.

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[1]As pointed out in the majority opinion, Noah actually argues the incorrect standard of constitutionality in his first point. Noah argues that the ordinances are unconstitutional because they do not promote a "compelling state interest." Compelling state interest is the standard to determine the constitutionality of statutes or laws that attempt to infringe on a fundamental right, such as free speech, religion, etc. *See Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002). The correct standard is whether the ordinance is rationally related to a legitimate government interest. *See Ark. State Hosp. Ass'n v. Ark. State Bd. of Pharmacy*, 297 Ark. 454, 763 S.W.2d 73 (1989). I agree with the majority that the ordinances are rationally related to the public health and safety. The second inquiry is whether the ordinances are void for vagueness.

A law is unconstitutionally vague under due-process standards if it does not give a person of ordinary intelligence notice of what is prohibited and is so vague and standardless that it allows for arbitrary enforcement. *Craft v. City of Fort Smith*, 335 Ark. 417, 984 S.W.2d 22 (1998). There must be ascertainable standards of guilt in a statute so that a person of average intelligence does not have to guess at its meaning. *Booker v. State*, 335 Ark. 316, 984 S.W.2d 16 (1998). Stated another way, a statute must not be so vague and standardless that it leaves judges or jurors free to decide, without any legally fixed standards, what is prohibited and what is not on a case-by-case basis. *Ark. Tobacco Control Bd. v. Sitton*, 357 Ark. 357, 166 S.W.3d 550 (2004). A law which, due to vagueness, leaves basic policy matters in the criminal law field to either policemen or judges on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory application, is impermissible. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). In contrast, a statute is constitutional if its language conveys sufficient warning when measured by common understanding and practice. *Landmark Novelties, Inc. v. Ark. State Bd. of Pharmacy*, 2010 Ark. 40, 358 S.W.3d 890.

Applying these standards to this case, I would hold that these ordinances do not give adequate notice of what is prohibited and that they present the danger for arbitrary enforcement by the city. Ordinance 16-4 prohibits the open storage of various items. But what is meant by open storage? Storage for a day, a week, a month? The ordinance contains no written standard by which this question can be answered. And even if we deemed the term "storage" sufficiently clear, many of the prohibited items are open to reasonable interpretation. For instance, the ordinance prohibited abandoned vehicles with no

explanation of what constitutes "abandoned." Here, the vehicle in question "appeared inoperable.") The ordinance prohibits household furniture, which is also vague. Many people have furniture items on their porches or decks, and who is to decide which of these are proscribed by the ordinance and which are not? The ordinance prohibits glass, but how much glass? The ordinance prohibits building material with no further explanation of what that encompasses or how much is prohibited. Finally, "similar items" are prohibited, which could mean almost anything to a prospective judge or juror.

These types of questions were specifically enumerated in *Trice v. City of Pine Bluff*, 279 Ark. 125, 129–30, 649 S.W.2d 179, 181 (1983), a case in which the supreme court held a city ordinance too vague to be enforced through criminal law:

> The city's argument tacitly recognizes that there was no warning in definite language but it contends that the ordinance is an exclusive zoning ordinance and therefore all uses other than proper residential uses are criminally excluded. . . . [T]he following questions demonstrate the fallacy in this interpretation of the ordinance. For example, how tall is grass which is too tall? How much lumber, if any, can be stored? What, besides lumber is prohibited from being stored? May an automobile be parked on one's land? If so, why may an automobile be parked when a pickup truck may not? Quite obviously, the ordinance contains no written standard by which the questions can be answered. Logic dictates only one conclusion: that a zoning administrator and a judge decide what constitutes an offense without written standards.

In my view, Ordinance 16-4 fails to articulate sufficiently fixed standards to satisfy due process.

Ordinance 16-5 is sufficiently clear in its directives on the narrow issue maintaining grass and weeds. However, it is vague as to other aspects of the ordinance, including that a property owner must remove dead or dying trees, or dead parts of living trees, that constitute a hazard to personal safety or property. According to the statute, a property owner must

also remove trees that constitute a nuisance or that pose an imminent health threat to trees on adjacent property. When does a tree become a "dying tree," and when does a tree or part of a tree constitute a nuisance or threat to other trees? These are questions unanswered by any written standards and do not give adequate notice of what is prohibited.

In addition to failing to provide sufficient warning to property owners as to what is and is not prohibited, I think these ordinances also lead to arbitrary enforcement by the city. A stack of neat glass is likely to go unchallenged, but a stack of glass in disarray will likely result in a citation. A wicker chair brought from inside the house and placed on a porch is likely permissible for an elected official or prominent citizen, but not for another citizen. Particularly in light of the vague aspects of the ordinances, one could easily envision all sorts of ways in which the ordinances would present a danger of arbitrary and discriminatory application.

For these reasons, I would hold that the ordinances are void for vagueness. Because the ordinances resulted in a denial of Noah's due process, I would reverse the judgment against him.

BROWN, J., joins.

Lisa-Marie Norris, for appellant.

John Settle, for appellee.