IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

WILLIAM KUNTZ, III :

Plaintiff-Appellant :

v. : C.A. Case No. 16429

DIRECTOR OF OHIO, EPA :

Defendant-Appellee :

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OPINION

Rendered on the 21st day of August, 1998.

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WILLIAM KUNTZ, III, P.O. Box 461, Lake Placid, New York 12946-0461
Plaintiff-Appellant, Pro Se

BETTY D. MONTGOMERY, Attorney General, By: DAVID G. COX, Atty. Reg. #0042724 and ROBERT KARL, Atty. Reg. #0042292, Assistant Attorneys General, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3428
Attorneys for Defendant-Appellee

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BROGAN, J.

Appellant *pro se*, William Kuntz, III, appeals from an judgment of the Environmental Review Appeals Commission (ERAC), affirming an action of the Director of the Ohio Environmental Protection Agency (OEPA) that had found Mr. Kuntz in violation of environmental law and regulations and ordered him to remedy the

violation. We find that the ERAC's judgment was supported by reliable, probative, and substantial evidence. Therefore, we affirm.

I.

We draw the factual background of the instant case from the findings of fact issued by the ERAC with its final order. On December 21, 1989, appellant, together with a corporation under his control, Wolfpack Electronics Company, Inc., entered into a settlement agreement with John C. Van Dyke and Development Ventures, Inc. According to the terms of the agreement, appellant payed $500 to Development Ventures and Van Dyke and delivered to them "one (1) gallon of unnamed elixir." In return, he and Wolfpack received ownership in "all tangible and intangible non-real estate, non-fixture assets" located at 221 Crane Street in Dayton, Ohio. The settlement agreement further provided that appellant and Wolfpack would remove the property from the Crane Street property at their expense.

The various materials that appellant had purchased were loaded into three semi-tractor trailers. One of the trailers eventually was moved to property located at 601 East Third in Dayton. The deed to the property was listed in the name of 601 Properties, Inc. Appellant is chief executive officer and sole stockholder of 601 Properties, Inc.

On July 31, 1990, the City of Dayton Fire Department received a call concerning the storage of chemicals in the trailer at the 601 East Third Street property. The fire department and its Hazardous Materials Unit responded and conducted an investigation. The investigation revealed the presence of nine fifty-five gallon drums

and a number of one-to-five gallon drums, all containing various chemicals. Tests on samples taken from these containers by the OEPA revealed the presence of the following hazardous waste materials: trichloroethane, in a one-gallon drum; an acid of pH 0.7, in a five-gallon drum; and xylene, in a fifty-five-gallon drum. During the course of the various investigations, appellant denied owning the chemicals.

On July 19, 1994, the Director of the OEPA issued Final Findings and Orders, that found appellant in violation of a number of different laws and regulations controlling the storage of hazardous wastes. Appellant was ordered to evaluate all the wastes at 601 East Third Street within forty-five days, and properly dispose of those found hazardous within seventy-five days. Appellant then sought reversal of this determination by appealing to the ERAC.

The ERAC conducted a *de novo* hearing of appellant's case between October 3 and October 5 of 1995. On January 30, 1997, the ERAC issued its Findings of Fact, Conclusions of Law, and Final Order affirming the action of the director. Appellant then filed a timely notice of appeal pursuant to R.C. 3745.06 bringing the matter before this court.

II.

Appellant raises twenty assignments of error on appeal. In the interests of logic and efficiency we will take some of them out of order. First, we will consider a number of assignments that relate to the location and ownership of the trailer containing the various chemicals. These are as follows:

> 1. That the Appellee, Ohio EPA failed to establish the required the ownership of the Trailer in Question.

2. That the Appellee, Ohio EPA failed to establish the location of the trailer in question.

3. That the decision of the Board is Contrary to the Case Law with regards to 601 East Third Street, Dayton, Ohio as to Appellant's ownership of the land underlying the trailer.

17. That the location of the trailer as ascribed in the Hazmat Repost is rebutted by the testimony.

Appellant disputes certain factual findings of the ERAC contained in its order affirming the actions of the Director. The ERAC's review of actions of the Director is limited to a determination of whether those actions were lawful and reasonable R.C. 3745.05. On appeal to this court from an order of the ERAC, we review the commission's determination only to see if it was "supported by reliable, probative, and substantial evidence and is in accordance with law." R.C. 3745.06.

With any order of the ERAC made under R.C. 3745.05, the commission must issue written findings of the facts supporting its determination. In this case, the ERAC found that appellant owned the property at 601 East Third Street, the trailer located on that property, and its contents. The commission identified the following items of evidence supporting its determination of ownership: the contract through which appellant took ownership of the contents of the trailer, the testimony of the towing serviceman who moved the two of the three trailers purchased by appellant, and the deed establishing ownership of the land in a corporation wholly owned by appellant. This evidence was reliable, credible, and substantial evidence that appellant was responsible for illegally storing hazardous waste contrary to R.C. 3734.02(F).

Nevertheless, appellant claims that proof of ownership for the storage trailer

cannot be established except by certificate of title, because, he claims, the trailer was a motor vehicle. Observing that no such evidence was introduced into the record, he claims that appellee failed to prove its case. Although appellant cites no authority for this proposition, we presume that he relies on R.C. 4505.04(B) which forbids courts from recognizing claims of ownership unless evidenced by certificate of title or stipulation. See also 4505.01(A)(2)("'Motor vehicle' includes manufactured homes and recreational vehicles, and trailers and semitrailers whose weight exceeds four thousand pounds.") R.C. 4505.04 has been construed to apply only in civil cases in which the parties were asserting adverse interests pertaining to a motor vehicle. *State v. Rhodes* (1982), 2 Ohio St.3d 74, 75. The reason for applying the statute "ceases when the defendant's defense is not based upon some claimed right, title or interest in the same automobile." *Id.* at 75-76 (citing *Grogan Chrysler-Plymouth, Inc. v. Gottfried* (1978), 59 Ohio App.2d 91, 95, fn. 4). We see no cause to apply the statute in this instance. Appellant does not actually claim that some other person owned the trailer, only that appellee failed to prove that he owned it. Given the other evidence establishing appellant's ownership of the trailer, we see no error in the ERAC's findings on this question.

Appellant also claims that the trailer might have been located on a railroad "spur" owned by a different party. Thus, he claims that appellee failed to prove appellant's responsibility for the waste. Appellee, however, fails to point to any evidence indicating that the trailer was actually located on the spur. Furthermore, we fail to understand how the trailer's location on the railroad spur would absolve

appellant of responsibility for storing hazardous waste in violation of R.C. 3734.01(F). We see no evidence suggesting that the spur's owner had any connection with the chemicals or the trailer. Conversely, there was convincing evidence that appellant owned the waste chemicals.

We must affirm the commission's decision if it was supported by "reliable, probative, and substantial evidence." R.C. 3745.06. Notwithstanding all obfuscating conjecture, the evidence indicating that the trailer was located on appellant's property at 601 East Third Street was more than sufficient to support the commission's findings.

For these reasons we overrule appellant's first three assignments of error.

III.

Appellant's fourth, fifth, and nineteenth assignments of error are as follows:

> 4. That the Decision of the Board in seeking to interpret the Order of the United States Bankruptcy Court was beyond the jurisdiction of the Board.
>
> 5. That the Decision of the Board interpreting the order of the Bankruptcy Court and Record was incorrect.
>
> 19. That the Appellee failed to amend and join the Chapter 7 Trustee of 601 Properties, Inc.

With these assignments of error, appellant refers to two separate bankruptcy proceedings. The first involved the owners of the Crane Street building in which the chemicals were originally stored. John C. Van Dyke and Development Ventures purchased the building and its contents from the trustee with the approval of the bankruptcy court. Appellant claims that Van Dyke violated some clauses in his agreement purchasing the building. Thus, appellant's argument now seems to be that

either Van Dyke did not own the chemicals and could not sell them to appellant or ownership would have to be determined in the bankruptcy court.

We find this argument unpersuasive. We see no way in which appellant could disclaim ownership of the chemicals by enforcing contractual rights that once belonged to a bankruptcy trustee. Furthermore, the idea that a federal court would exercise exclusive and continuing jurisdiction over any property that once passed through a bankruptcy proceeding is absurd.

The second bankruptcy proceeding to which appellant refers was one involving 601 Properties, Inc, appellant's corporation that owned the Third Street Property. It appears that the corporation filed for bankruptcy some months after the director found appellant in violation of environmental laws. That proceeding could have no relevance to the propriety of the director's actions that were the subject of this appeal.

In any event, with regard to both bankruptcy cases, there is no copy of any bankruptcy court order in the record from below. Appellant points to no place in the record indicating that the board ever attempted to interpret any order of a bankruptcy court. It is the appellant's duty to identify in the record any error that he is asserting on appeal. See App.R. 12(A)(2) and 16(A)(7). If an appellant fails in this duty, this court may overrule the unsupported assignment of error. *Hawley v. Ritley* (1988), 35 Ohio St.3d 157, 159. Even reviewing the record independently, we are unable to find error relating to any such order. Accordingly, appellant's fourth, fifth, and nineteenth assignments of error are overruled.

IV.

In his tenth and twentieth assignments of error, appellant asserts:

> 10. That the Board failed to Dismiss the Proceedings in favor of Appellant at the Close of Appellee's Case upon the Motion of Appellant.
>
> 20. That Appellee failed to establish the ownership of the chemicals as being appellant's.

As we have already noted, the appellee proved his case against the appellant through a contract giving appellant ownership of the chemicals, through the testimony of the towing serviceman, and through the deed establishing appellant's interest in the property. This was sufficient to prove that appellant violated R.C. 3734.02(F). Thus, the trial court did not err by failing to dismiss the proceedings at the close of appellee's case.

Furthermore, on cross examination, appellant admitted to purchasing chemicals that were stored in the Crane Street building. Then, by his own admission, he entered into the settlement agreement that gave him the ownership of all the chemicals located in the Crane Street building. This was credible evidence of ownership. We see no merit in the assigned errors.

V.

Appellant's sixth assignment of error asserts:

> 6. That the Procedures set forth for the Ordering of a Transcript at the Board Level were not complied which effectively denying Appellant Due Process by failing to develop the record before the board.

Prior decisions of this court have fully treated the matters that appellant raises as error with this assignment. In our order of February 19, 1998, we ordered the commission to transmit a transcript of the hearings held before it as part of the full record on a

appeal. Under R.C. 3745.06, the commission bears the initial cost of preparing the full record. The commission may then pass on the expense to be taxed as part of the costs of the appeal. We also noted in our decision that, under R.C. 3745.06, an appellant must advance the costs of reproduction if he requires his own copy of the transcript.

In our order of June 30, 1998, we granted appellant's motion to supplement the existing record with certain exhibits that were incorrectly omitted. As a consequence of these decisions, appellant's sixth assignment of error has been rendered moot and is now overruled.

VI.

Appellant raises the following as his eighth assignment of error:

8. That the proceedings are now moot.

Here appellant reasserts an argument that this court earlier rejected. In a previous motion to this court, appellant contended that subsequent remedy of the environmental hazard giving rise to the Director's action has rendered the case moot. In a decision entered June 27, 1997, this court denied appellant's motion because the OEPA may still seek civil penalties based on his non-compliance. See R.C. 3734.13(C) and 3734.11(A). We also noted that appellant controls his own appeal and could have sought voluntary dismissal under App.R. 28. For these same reasons, we overrule appellant's eighth assignment of error.

VII.

With his ninth assignment of error appellant claims:

> 9. That the Board rendered it's [sic] Decision on Exhibits not admitted into Evidence, nor did it adopt Appellant's Exhibits as its own.

Appellant forgot to introduce his exhibits at the close of his case. During closing arguments, appellant was given the opportunity to move his exhibits into evidence, and he refused to do. Appellant now claims that the commission relied on his exhibits in making factual findings, and that it erred by doing so. However, appellant points to no place in the record where the commission committed such an error. Accordingly, this assignment of error is overruled.

VIII.

Appellant's eleventh and twelfth assignments of error are:

> 11. That the Board improperly withdrew a Subpoena issued at Appellant's Request to the United States Trustee in Columbus, Ohio.
>
> 12 That the Board refused to authorize enforcement of a Subpoena to the City of Dayton, Ohio.

Ohio Adm.Code 3746-7-07(B)(1)(a) states:

> (a) The Board shall revoke the subpoena if in their opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or for any other reason sufficient in law the subpoena is otherwise invalid.

Ohio Adm.Code 3746-7-08(A) adds that "subpoenae shall only issue for witnesses or for documents and records relevant or material to the inquiry before the Board."

The ERAC quashed the subpoena issued to the U.S. Trustee on the authority of Section 16.21 et sub, Title 28, C.F.R. (Tr. III, 16.) Section 16.22 of that title forbids employees of the Department of Justice from testifying under order in proceedings in

which the United States is not a party, without the approval of the department. A party seeking that testimony must furnish a demand and an affidavit to a responsible U.S. attorney. Section 16.21(b) specifically includes U.S. Trustees among the individuals to whom this restriction applies. Apparently, appellant failed to obtain the authorization of the Justice Department. Because this regulation provided a reason sufficient in law, the ERAC did not abuse its discretion in quashing the subpoena.

The other subpoena to which appellant refers was quashed for lack of relevance. (Tr. II-A, 6) Under, 3746-7-07(B)(1)(a), the commission had the power to do so, "if in their opinion the evidence whose production is required does not relate to any matter under investigation." Appellant asserts nothing that would indicate the board abused its discretion in finding the information irrelevant.

Accordingly, appellant's eleventh and twelfth assignments of error are overruled.

IX.

Appellant's seventh assignment of error is as follows:

> 7. That the Decision of the Board Denying the Production of Video Tapes from the Director was in error.

Our review of the record reveals no instance in which appellant made a pre-trial discovery request for production of a video by the director, nor does it reveal that any such requests were denied. It appears instead that appellant waited until the third day of the hearing to demand production of a video tape from the Director, although he himself owned a copy of the tape. The commission's decision not to issue a subpoena, therefore, was justified by the lack of timeliness. Furthermore, Ohio Adm.Code 3746-7-08(B) provides that:

> (B) (1) Subpoenae shall not issue against the Director, or his delegate, or any local board of health, or any hearing officer appointed in a cause appealed to the Board, except upon an allegation of the incompleteness of the record for the appeal to the Board, or an allegation of insufficiency in any determination as contained in the record which would prevent the Board's properly considering an allegation of arbitrariness, capriciousness, abuse of discretion or other actions not in accordance with the law in the action from which the appeal has been taken, or an initial showing at the time of the motion for subpoenae of strong evidence of bad faith or improper behavior by any person involved in the decision-making process leading to the action appealed to the Board.
>
> (2) In the absence of such allegations, no subpoena shall issue against any person involved in the decision-making process leading to any action appealed to the Board.

Appellant does not now allege that the videotape would show "arbitrariness, capriciousness, abuse of discretion or other actions not in accordance with the law" on the part of the Director. Nor did he make such an allegation at the hearing. Thus, the commission did not err in refusing the demand for a subpoena, and appellants seventh assignment of error is overruled.

X.

Appellant's thirteenth assignment of error alleges:

> 13. That the Board improperly sought to interpret a Contact and its interpretation was flawed.

Here, appellant refers to the settlement agreement between Wolfpack Electronics and Development Ventures, Inc. Appellant cites various contractual provisions that, he claims, were breached by Development Ventures. Contrary to appellant's claim, however, the commission did not engage in an interpretation of that contract. Rather, the commission cited the contract as evidence that appellant owned the hazardous

chemicals that were stored on his property. The contract was credible evidence that appellant had purchased the chemicals. Thus, the we could find no error in the commission's judgment on this ground.

Furthermore, any question of whether the parties to the contract failed to perform some obligation or condition precedent under the contract was a matter for resolution by those parties, not by the ERAC. The claimed breaches do not free appellant from ownership of the trailer's contents, because appellant could--and almost certainly did--waive performance by taking possession of the chemicals. For these reasons, we overrule the thirteenth assignment of error.

XI.

Appellant raises the following as his fourteenth and eighteenth assignments of error:

> 14. That the Board failed to suppress the Results of the Search Warrant.
>
> 18. That the Evidence and Testimony of Mr. Ford established that the Event which led to a Report to the Ohio EPA was contrived.

Appellant argues that a search warrant authorizing the OEPA to take samples of the chemicals in the trailer was not issued upon probable cause. Thus, he claims, the ERAC should have suppressed evidence that resulted from the search. The essence of appellant's argument is that the OEPA had an obligation to check property records to determine whether the trailer sat on the railroad spur before requesting the warrant against 601 East Third Street. We, however, are unable to conceive any way in which ownership of the railroad spur would have affected the determination of probable cause to search the trailer.

Appellant further argues that the original call to the fire department that led to the discover of the chemicals was somehow contrived to prompt investigation by the OEPA. Contrary to appellant's claim, we see no evidence in the record "establishing" that the event was contrived. Moreover, appellant fails to explain what relevance the contrivance would have if it had been proven.

Accordingly, appellant's fourteenth and eighteenth assignments of error are overruled.

XII.

In his fifteenth assignment of error, appellant asserts:

> 15. That the standard used by the Director in assessing the Storage of the Chemical is inexact and imprecise.

Appellant argues that the chemicals stored in the trailer were not hazardous wastes because they were not waste materials, but were, instead, pure chemicals sealed in various storage containers. Ohio Adm.Code 3745-51-02(A) provides, however, that material is a waste if it is "abandoned by being * * * accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated." There was evidence showing that the materials remained in the trailer for over four years before the Director's action. Furthermore, appellant's testimony indicated that he wanted somebody else to dispose of the chemicals and that he did not plan to use them. (Tr. II-A, 168-69.) This was competent credible evidence that the material was abandoned in lieu of being disposed of. Appellant does not dispute that the chemicals were hazardous, as that term is defined under Ohio Adm.Code 3745-51-03. Thus, we find no reversible inexactness or imprecision in the Director's

findings. This assignment of error is overruled.

XIII.

In his sixteenth assignment of error, appellant claims:

> 16. That the Appellee and or the City of Dayton, Ohio had or took Custody of the Material from the Time it was at 221 Crane Street to the date of the Hearing.

Appellant argues that either the City of Dayton or the OEPA took possession of the trailer when they padlocked it after the chemicals were found. Thus, appellant argues that he cannot be cited for abandoning the chemicals, because the authorities had taken command of them. Appellant cites no authority to support this argument. Moreover, we do not find the logic of the argument compelling. Padlocking the trailer was not the equivalent of taking possession of the chemicals, nor would it absolve the appellant of responsibility for illegally storing hazardous waste. Appellant's sixteenth assignment of error is overruled.

XIX

Having now overruled all twenty of appellant's assignments of error, we affirm the judgment of the ERAC.

Judgment affirmed.

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FAIN, J., and GRADY, J., concur.

Copies mailed to:

William Kuntz, III
David G. Cox
Robert Karl
Environmental Board of Review