STATE OF NEW JERSEY, Plaintiff-Respondent,

v.

MOHAMMAD AZMAT, Defendant-Appellant.

No. A-0296-14T3

Superior Court of New Jersey, Appellate Division

June 13, 2016

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Submitted February 29, 2016

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Municipal Appeal No. 13-14-A.

Law Offices of Susheela Verma, attorneys for appellant (Cathlene Y. Banker and Ms. Verma, on the brief).

Tangerla Mitchell Thomas, Franklin Township Municipal Prosecutor, attorney for respondent.

Before Judges Messano and Sumners.

PER CURIAM

Defendant Mohammad Azmat appeals from a July 30, 2 014 Law Division order, following de novo review of his municipal court conviction for failure to maintain trees in violation of Franklin Township, Maintenance of Trees and Shrubs Ordinance § 222.17 (Ordinance § 222.17). After careful review of the record in light of the issues raised, we affirm defendant's conviction and remand for resentencing.

I.

We derive the following facts from the record. On January 5, 2012, Anthony Gaylord filed a complaint in the Franklin Township Municipal Court against defendant, his neighbor, alleging violation of Ordinance § 222.17 for failure to maintain the trees along their shared property line. Ordinance § 222.17 provides: "The owner or tenant of any lands lying within the Township shall keep all trees . . . maintained in a safe manner so they shall not create a hazard to the general public . . . ." Gaylord contended that trees on defendant's property had fallen onto his property causing harm to his property and power lines, and feared that, in the near future, other trees that he deemed dangerous could also fall as a result of a serious windstorm, hurricane, or snow storm.

An attempt to resolve the dispute was unsuccessful when the parties could not agree on which trees should be removed, so the matter proceeded to trial on June 27, 2013. At trial, the State presented testimony from Gaylord and its expert, Robert Wells, an International Society of Arboriculture certified master arborist.

Gaylord generally testified about the hazardous conditions he claimed existed on defendant's property that resulted in the filing of his complaint against defendant. Wells testified consistent with the report he authored regarding his April 22, 2013 visual inspection of the trees on defendant's property. He identified two white Ash trees within proximity of the power lines to Gaylord's property which he testified had "significant cavities" or holes within the bodies of the trees. Wells opined that these trees were "hazard trees" that posed a non-imminent threat of "tree failure" and could possibly fall on the power lines.

Wells also identified two Locust trees on defendant's property, leaning over the power lines connected to Gaylord's property, which he opined were "hazardous" to the power lines. He explained that removal of the trees was the only appropriate remedy available to overcome their structural deficiencies. Additionally, while he could not predict with certainty when in the future these trees would fail, he testified that the probability of them failing was very high. Wells also identified as "hazardous" a Sweet Gum and Red Oak tree, both of which had dead, detached limbs or "hangers" directly over Gaylord's power lines. However, Wells did not recommend their removal but suggested that these trees be "pruned out" to alleviate their structural defects. On cross-examination, Wells further admitted that the trees he identified as hazardous did survive two major storms: Hurricane Irene in August 2011, and Hurricane Sandy in October 2012.

In his defense, defendant presented the testimony of Judith Bailey, a health inspector with the Somerset County Department of Health. She stated that upon inspection of defendant's trees- prompted by a separate complaint filed by Gaylord against defendant four months before the complaint in dispute was filed-she could not determine whether the trees at issue were dead or dying, and thus, did not issue a summons against defendant for a violation of Franklin Township, Conditions for Required Removal Ordinance § 88-1 (Ordinance § 88-1). The ordinance provides:

The owner, tenant or occupant of lands lying within the Township, where it shall be determined by the Department of Health to be necessary and expedient for the preservation

of public health, safety and general welfare or to eliminate a fire hazard, *shall remove from such lands* brush, weeds, *dead and dying trees*, stumps, roots, obnoxious growths, filth, garbage, trash, and debris with 10 days after notice to remove the same, which shall be conspicuously posted on said property and sent by regular mail to the last known address of the tenant, owner or occupant.

[Ordinance § 88-1 (emphasis added).]

Wells explained that her sole criteria for determining whether a tree was dead was to assess whether the tree had any leaves; specifically, she stated, "[i]f it's the middle of summer, and there aren't any leaves, [then] I think it could be dead." For that reason, she believed there were no violations concerning the trees in dispute when she inspected defendant's property. Notably, however, she admitted that she was not a tree expert and did not investigate or enforce complaints in violation of Ordinance § 222.17.

On September 9, 2013, the municipal court judge - in a letter that was not in the form of an order or decision but with the judge's signature affixed - found that "[c]ertain trees of defendant's property pose a clear and present danger to complainant . . ., his house and to utility lines that transverse both parties['] property." Thus, in crediting Wells' and Gaylord's testimony, the municipal court ordered defendant to cut down and remove the trees identified in Wells' report within sixty days, or be fined and/or incarcerated.

Thereafter, defendant appealed to the Law Division, and a trial de novo was held on May 7, 2014. Defendant argued that Ordinance § 222.17 was unconstitutionally vague as it contained "no clear definition for what constitute[d] maintaining a tree . . . in a safe manner." He also asserted that the complaint was improperly pled, in violation of *Rule* 7:2-1, as it "fail[ed] to inform [him] which specific tree[s], the location of the tree[s], or the manner in which he has failed to maintain the tree[s]." Moreover, defendant alleged the State prosecuted the complaint against him with evidence that did not exist on the date of the alleged violation, and thus, was subject to spoliation. In particular, defendant pointed out that the complaint was filed on January 5, 2012, but the evidence used against him arose from Wells' inspection of the trees on April 22, 2013. Therefore, he contended, "the expert report and testimony cannot be relied upon to support a condition that existed [fifteen] months ago and was subject to naturally occurring changes." Lastly, defendant argued the State failed to prove he violated Ordinance § 222.17 beyond a reasonable doubt, and so his conviction should be overturned.

Following trial, the Law Division judge issued a written decision rejecting all of defendant's arguments and affirming the municipal court's conviction. With respect to defendant's contention that Ordinance § 222.17 was unconstitutionally vague, the court found "that in light of a plain reading of the statute coupled with the expert's testimony, there has been a clear violation of the ordinance." The court further found that "the impetus [sic] of the ordinance at issue was satisfied by the testimony of expert arborist, [] Wells[,]" as he "clearly identified six trees that he believed to be hazardous, and opined that they should be cut down." The court further explained that Bailey's testimony should not be afforded as much weight as Wells' testimony since by her "own admission . . . she is not an expert in the area, and merely sees no dead trees which are within her jurisdiction." The court indicated that, though defendant "would have this [c]ourt believe that the State has failed to set forth sufficient evidence to meet its evidentiary burden, " defendant was "misguided." In conclusion the Law Division held that, "[i]n light of this [c]ourt's findings based upon a [de novo] review of the evidence before it[,]" a violation of . . . Ordinance [§] 222.17 has been proven by the State beyond a reasonable doubt, " and "the tangential arguments set forth by [d]efendant [were] clearly and fundamentally without merit." A corresponding order was issued on July 30, 2014, which provided for a stay pending the instant appeal. The present appeal followed.

II.

On an appeal from municipal court to the Law Division, the review is de novo on the record. R. 3:23-8(a). The Law Division judge must make independent findings of fact and conclusions of law based upon the evidentiary record of the municipal court, and must give due regard to the opportunity of the municipal court judge to assess the witnesses' credibility. *State v. Johnson*, 42 N.J. 146, 157 (1964) (citing *State v. Ronnie*, 41 N.J.Super. 339, 343 (Law Div. 1956)). In reviewing a trial court's decision on a municipal appeal, we determine whether sufficient credible evidence in the record supports the Law Division's decision. *Id.* at 162. Unlike the Law Division, which conducts a trial de novo on the record, we do not independently assess the evidence. *State v. Locurto*, 157 N.J. 463, 471 (1999). In addition, under the two-court rule, only "a very obvious and exceptional showing of error" will support setting aside the Law Division and municipal court's "concurrent findings of facts." *Id.* at 474 (citing *Midler v. Heinowitz*, 10 N.J. 123, 128-29 (1952)). However, where issues on appeal turn on purely legal determinations, our review is plenary. *State v.* Adubato, 420 N.J.Super. 167, 176 (App. Div. 2011) (citing *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995)), *certif. denied*, 209 N.J. 430 (2012).

Defendant contends Ordinance § 222-17 is unconstitutionally vague with respect to the standard for determining when a "hazard" triggers a violation. He asserts

this leads to several plausible interpretations, including the one employed by the Somerset County Department of Health for its enforcement of Ordinance § 88-1. As such, defendant relies on Bailey's testimony that he did not violate Ordinance § 88-1 as the trees on his property were not dead. This raises the question, asserts defendant, "as to why there should be differing standards for determining when it is necessary for a tree to be removed 'for the preservation of public health, safety and general welfare or to eliminate a fire hazard[,]'" as required by Ordinance § 88-1, and "for determining when the failure to maintain a tree has 'create[d] a hazard to the general public[,]'" as required by Ordinance § 222-17. Thus, defendant maintains that the ordinance's ambiguity subjects citizens to "arbitrary and discriminatory enforcement." We disagree.

To determine the constitutionality of a municipal ordinance we look to this court's decisions in *Guidi v. Atlantic City*, 2 86 N.J.Super. 243 (App. Div. 1996), and *State v. Golin*, 363 N.J.Super. 474 (App. Div. 2003). Guidi was charged with violating Atlantic City Code 190-1 for feeding pigeons, causing an accumulation of bird feces on building roof tops and amassing of vehicles on a residential street. *Guidi*, *supra*, 286 N.J.Super. at 244. In response, she filed a complaint against the municipality challenging the constitutionally of Sections 2.1(a) and 2.1(b) of Ordinance 190-1, which provided:

The following matters, things, conditions or acts and each of them are hereby declared to be a nuisance and injurious to the health of the inhabitants of this municipality:

(a) Any matter, thing, condition or act which is or may become detrimental or a menace to the health of the inhabitants of this municipality.

(b) Any matter, thing, condition or act which is or may become an annoyance, or interfere with the comfort or general well-being of the inhabitants of this municipality.

[id, at 245.]

On appeal, Guidi limited her challenge to Section 2.1(b). *Ibid.*

In analyzing the ordinance in *Guidi,* we were concerned that an enforcement officer would not be able to point to objective facts that would lead a reasonable person to realize his or her conduct was a violation. *Id.* at 246 (citing *State v. Lashinsky*, 81 N.J. 1 (1979)). We concluded that a municipality acting through its police power must direct ordinances with "reasonable specificity toward the conduct to be prohibited." *Ibid.* (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214, 217 (1971)). Applying that standard to the municipal ordinance, we struck down the ordinance, concluding that pigeons were a "common enough problem" in a coastal town for Atlantic City to address with an ordinance specifically directed at prohibiting that conduct. *Ibid.*

In *Golin,* we struck down as unconstitutionally vague, the same Sections 2.1(a) and (b) at issue in *Guidi,* that were adopted by the East Windsor municipal code. *Golin, supra,* 363 N.J.Super. at 477, 480, 484-85. The defendant was fined for violating the ordinance by allowing tree branches on her property to become overgrown and hang over a public sidewalk. *Id.* at 479. We applied *Guidi,* and found the ordinance was "unconstitutionally vague and unenforceable." *Id.* at 484. We determined there was no "discernable difference" between Sections 2.1(a) and 2.1(b). *Ibid.* Again, we noted there was "no reason that the municipality cannot enact a more specific ordinance to proscribe the objectionable conduct. Sidewalks and tree branches are at least as common in East Windsor as pigeons are in Atlantic City." *Ibid.*

Applying the principles of *Guidi* and *Golin,* the ordinance here passes constitutional muster largely because it is more tailored and satisfies the concerns we identified there. Unlike in those cases, where the Code sections referenced "[a]ny matter, thing, condition or act, " the ordinance here is more specific; Ordinance § 222-17 plainly states that "all *trees* . [shall be] maintained in a safe manner so they shall not create a hazard to the general public." (Emphasis added). Thus, the Law Division was correct in finding that the ordinance is clear that a tree that is dying or likely to fall must be removed by its owner if it can cause a hazard to others.

Having concluded the ordinance is constitutionally firm, we turn to defendant's attack on the State's evidence relied upon at the trial de novo to uphold the conviction. Defendant argues Wells' expert opinion is an inadmissible net opinion. He asserts Wells' testimony, based upon visually inspecting the trees from twelve to fifteen feet away, is not an acceptable methodology within the arboriculture profession. Defendant also contends that the fact that the "hazardous" trees did not fall during Hurricane Sandy, which occurred after the complaint was filed, further shows that Wells' opinion is unreliable and speculative.

In addition, defendant contends there are three "glaring inconsistencies" between Wells' testimony and his expert report that undermine his credibility. First, defendant notes that at trial, for the first time, Wells testified that there were two Locust trees that threatened Gaylord's property and should be removed. He asserts there was no mention of these trees in his report. Second, defendant contends Wells' report recommended that Sweetgum and Red Oak trees be removed because they were vulnerable from new winds as a result of the County's removal of a large tree nearby; however, at trial Wells testified that the trees are hazardous

because they both have dead, detached limbs, or "hangers." Lastly, defendant points out that in Wells' report he recommended that two white Ash trees be removed as soon as possible, but at trial, he testified that he did not think the threat was imminent. In sum, defendant contends the State failed to prove that he violated Ordinance § 222-17 beyond a reasonable doubt.

Based upon our review of the record, we conclude there was sufficient credible evidence to support the Law Division's decision. We find no merit to defendant's contention that Wells' testimony was inadmissible net opinion. "The net opinion rule is a 'corollary of f N.J.R.E. 703] . . . which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data.'" *Townsend v. Pierre*, 221 N.J. 36, 53-54 (2015) (alteration in original) (quoting *Polzo v. Cnty. of Essex*, 196 N.J. 569, 583 (2008)). N.J.R.E. 703 requires expert opinion to be "grounded in 'facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at the trial, or (3) data relied upon by the expert which is not necessarily admissible in evidence but which is the type of data normally relied upon by experts.'" *Id.* at 53 (citation omitted) (quoting *Polzo, supra*, 196 N.J. at 583) .

Wells based his expert opinion on more than forty years of experience as a certified master arborist that, based upon his personal observations, certain trees on defendant's property were hazardous and should be removed. Moreover, defendant failed to rebut Wells' methodology of citing dead and detached limbs to conclude that the trees were a threat to Gaylord's power lines. Instead, defendant relied upon the testimony of Bailey, who plainly admitted she was not a tree expert and did not investigate or enforce complaints concerning Ordinance § 222.17. Further, the cited inconsistencies between Wells' report and his testimony do not cause us to take issue with the trial court's reliance on Wells' opinion to find that defendant violated the ordinance.

Finally, defendant argues the municipal court lacked the jurisdiction to order defendant to remove the trees from his property. Citing Franklin Township, Violations and Penalties Ordinance § 1-3(A) (Ordinance § 1-3(A)), defendant contends the municipal court only has jurisdiction to impose a penalty in the form of a fine and/or incarceration for violation of Ordinance § 222.17. Ordinance § 1-3 (A) allows for a fine or up to ninety days imprisonment or community service for a violation of any township ordinance. Based upon the record on appeal, the municipal court cannot compel defendant to cut down trees not maintained in a safe manner that create a hazard to the general public in violation of Ordinance § 222.17. Moreover, defendant was not charged with violating Ordinance § 88-1, which permits the court to order a property owner to remove "dead or dying trees." Additionally, the State has not cited provisions of the township municipal code which require the abatement of hazardous trees.

For these reasons, we affirm the Law Division's finding that defendant violated Ordinance § 222.17, but reverse the order compelling defendant to remove specific trees determined to be hazardous and remand for resentencing.

Affirmed and remanded for resentencing, consistent with this opinion. We do not retain jurisdiction.