IN THE COURT OF APPEALS OF THE STATE OF ALASKA

CENTRAL MONOFILL SERVICES, INC., and SHANE DURAND, Appellants, v. MATANUSKA-SUSITNA BOROUGH, Appellee.	Court of Appeals No. A-11651 Trial Court No. 3PA-13-3601 MO 3PA-13-3602 MO, 3PA-13-3603 MO 3PA-13-3604 MO, 3PA-13-3623 MO & 3PA-13-3624 MO MEMORANDUM OPINION No. 6178 — April 29, 2015

Appeal from the District Court, Third Judicial District, Palmer, John Wolfe, Judge.

Appearances: William H. Ingaldson, Ingaldson Fitzgerald, P.C., Anchorage, for the Appellant. Lisa Richard, Assistant Borough Attorney, and Nicholas Spiropoulos, Borough Attorney, Palmer, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.[*]

Judge ALLARD.

Central Monofill Services, Inc. and its part-owner Shane Durand were convicted at a bench trial of three violations of the Matanuska-Susitna Borough Code:

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

(1) operating a "junkyard/refuse area" without a permit,[1] (2) creating a public nuisance by maintaining junk or trash on their property in Palmer, Alaska,[2] and (3) failing to comply with a Borough enforcement order to clean up their property.[3]

Central Monofill Services and Durand appeal their convictions. For the reasons explained here, we affirm the district court's judgment.

Underlying facts and prior proceedings

Central Monofill Services is one of a family of companies that own recycling and monofill[4] operations in several locations in Alaska.

In April 2013, Central Monofill Services was in the process of applying for a permit to operate a junkyard on property it owned in Palmer. Around the same time, Matanuska-Susitna Borough began receiving complaints about trash at the Palmer property blowing onto neighboring properties.

In response to these complaints, Borough Code Compliance Officer Mark Whisenhunt undertook an investigation. Officer Whisenhunt conducted four separate site visits to the Palmer property — on April 26, April 29, May 2, and May 9. During these visits, Officer Whisenhunt observed a pile of tires, a pile of wood chips and wooden pallets, and a mass of shredded material scattered on the south side of the property. The company told the officer that the shredded material was "topper material" — a repurposed product that could be used as an alternative fill material for road bases or embankments, or to cover waste on a landfill.

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[1] Former Matanuska-Susitna Borough Code (MSB) 17.60.030 (2013).

[2] MSB 8.50.020(B)(4)(a); former MSB 8.50.005(A)(3) (2013).

[3] MSB 1.45.050(C).

[4] *Cf.* 18 AAC 60.990(80) (defining a "monofill" as "a landfill or drilling waste disposal facility that receives primarily one type of solid waste ...").

On May 2, Officer Whisenhunt issued an enforcement order to Central Monofill Services requiring the company to remove the shredded "topper material" from the property and abate the public nuisance caused by "[l]oose trash ... [that] has been blown to the south side of the parcel and the adjacent parcels." The enforcement order required these actions to be taken "within 5 calendar days."

Officer Whisenhunt visited the property seven days later, on May 9, to see if the company had complied with the enforcement order. Officer Whisenhunt observed that some trash was still strewn about the property and that some of the material had been pushed into standing water. Officer Whisenhunt also observed that some of the shredded material had been buried rather than removed from the property as ordered. Based on these observations, Officer Whisenhunt cited Central Monofill Services and part-owner Shane Durand with three infractions of the Matanuska-Susitna Borough Code: (1) operating a junkyard or refuse area without a permit; (2) creating a public nuisance by maintaining trash or junk on the property; and (3) violating an enforcement order.

Central Monofill Services and Durand waived their right to a jury trial and proceeded to trial before District Court Judge John Wolfe. After hearing testimony and argument from the parties, and reviewing the photographic evidence submitted by the Borough, Judge Wolfe found Central Monofill Services and Durand guilty of the infractions and imposed a $325 fine on each defendant.

This appeal followed.

Why we affirm the district court's verdict on the charge of operating a junkyard and refuse area without a permit

Chapter 17.60 of the Matanuska-Susitna Borough Code prohibits operating junkyards and refuse areas without first obtaining a conditional use permit.[5] The Borough's code defines a "junkyard/refuse area" as:

> a location which is commercially used for the purpose of the outdoor storage, handling, dismantling, wrecking, keeping or sale of used, discarded, wrecked or abandoned airplanes, appliances, vehicles, boats, building and building materials, machinery, equipment, or parts thereof, including but not limited to, scrap metals, wood, lumber, plastic, fiber, or other tangible materials.[6]

Central Monofill Services and Durand argue that they should not have been convicted of operating a junkyard or refuse area without a conditional use permit because they were not engaged in "commercial" activity. They point out that there was no evidence that they were selling the shredded material or offering it for sale.

But the defendants did not need to be engaged in selling the shredded material in order for their activities to qualify as "commercial" under the Code. "Commercial" activity is defined under the code as "any activity where goods *or services* are offered or provided for sale or profit."[7] Here, the district court found that the defendants were storing the shredded material on their property as a service provided for profit, *i.e.*, "as part of [Central Monofill Services's] business of receiving and disposing of [discarded building] material." This finding is well-supported by the record.

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[5] Former MSB 17.60.030 (2013); MSB 1.45.080(C) ("Every act in violation of a provision of this code is a borough infraction unless specifically classified as a borough misdemeanor.").

[6] MSB 17.60.010(A).

[7] MSB 17.60.010(A) (emphasis added).

Central Monofill Services and Durand also argue that the shredded material did not qualify as "junk" as that term was defined under former MSB 17.60.010(A). But the statutory scheme does not require the material to qualify as "junk" as that term is defined in Chapter 17.60 in order for the defendants to be guilty of operating a "junkyard/refuse area" without a conditional use permit.[8] The two terms are defined separately in the chapter and do not overlap. We therefore reject this claim as without merit.

Why we affirm Central Monofill Services's and Durand's convictions for maintaining junk or trash on their property

Central Monofill Services and Durand were also convicted, pursuant to MSB 8.50.020, of allowing, maintaining, or permitting a public nuisance by maintaining "[p]roperty where junk or trash, as defined in MSB 8.50.005, is disposed of[,] scattered upon, or kept in plain view from any public right of way."[9]

In 2013, MSB 8.50.005 defined "trash" as:

> garbage, damaged, spoiled discarded or waste tangible material including, but not limited to, food, containers, paper products, cloth, fabric, plastics, wood or metal, household items, waste by-products, manure, liquids or other effluent, which are not intended for reuse or are no longer suitable for their original use without major repair or reprocessing. Any tangible material that is, by evidence of its location and disposition, discarded or treated as waste.[10]

(Chapter 8.50 also contains its own definition of "junk" — a definition that is different from the definition of "junk" contained in Chapter 17.60. Because Central Monofill

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[8] *Compare* former MSB 17.60.030 (2013), *with* former MSB 17.60.010(A) (2013).

[9] MSB 8.50.020(B)(4)(a); MSB 8.50.020(A); MSB 1.45.080(C).

[10] Former MSB 8.50.005(A)(3) (2013).

Services's and Durand's convictions under Chapter 8.50 were for storing "trash," we do not address this chapter's separate definition of "junk".)

Central Monofill Services and Durand argue that the shredded material being stored on the property was not "trash" because the material had "already been reprocessed into a product that does not need additional processing."

But at trial, Stuart Jacques, one of Central Monofill Services's co-owners, admitted that the material on the Palmer property contained trash. Officer Whisenhunt likewise testified that the shredded material contained discarded bottles, milk jugs, rubber gloves, food packages, and broken metal. Officer Whisenhunt also testified that the material at the Palmer property had been pushed into standing water and later buried — testimony which supported the district court's conclusion that the material was "by evidence of its location and disposition, discarded or treated as waste."[11]

"The 'substantial evidence' test governs appellate review of verdicts in judge-tried cases."[12] Under this test, an appellate court "must uphold [the trial court's] verdict if the record contains evidence that 'a reasonable mind might accept as adequate to support the challenged conclusion'."[13] In applying this test, the appellate court "do[es] not re-weigh the evidence or choose between competing inferences; [it] only determine[s] whether evidence exists to support the judge's conclusion."[14]

Viewed under this deferential standard, we conclude that the district court's determination that the material qualified as "trash" is supported by substantial evidence.

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[11] *Id.*

[12] *Y.J.*, 130 P.3d at 957 (citing *Helmer v. State*, 608 P.2d 38, 39 (Alaska 1980)).

[13] *Id.* (quoting *Smith v. Sampson*, 816 P.2d 902, 904 (Alaska 1991)).

[14] *Id.*

Central Monofill Services and Durand also argue, based on MSB 8.50-.020(C), that the Borough was required to prove that either (1) the trash had been on the property for at least three months, or (2) it covered a significant area of the property in plain view of a public right-of-way.

Although Central Monofill Services and Durand made a similar statutory interpretation argument below, they did not receive a ruling on this question.[15] We therefore review this issue only for plain error and decline to find it here.[16]

Matanuska-Susitna Borough Code 8.50.020(C) provides that "[t]he borough *shall have met* its burden of proof for a public nuisance if the items constituting a public nuisance have been maintained on the property for a period in excess of three months or cover a significant area of the property which is in plain view from the public right-of-way."[17] We interpret this subsection as establishing two methods through which the Borough can establish a *prima facie* case that the conditions on the property constitute a public nuisance. But we do not interpret this subsection as representing the exclusive means through which the Borough can establish a public nuisance. We note that this subsection applies to *all* of the conditions that can constitute a public nuisance under the code, including conditions that create a public health hazard.[18] It seems unlikely that the Borough intended to require public health hazards to last for over three months or to

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[15] *Hollstein v. State*, 175 P.3d 1288, 1290 (Alaska App. 2008) ("[U]nder Alaska law, a litigant who wishes to raise an issue on appeal must show that the issue was adequately preserved in the lower court — which means not only that the litigant presented the issue to the lower court, but also that the lower court *ruled on that issue*." (citations omitted)).

[16] *See Adams v. State*, 261 P.3d 758, 764 (Alaska 2011) ("[P]lain error ... involv[es] such egregious conduct as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." (internal quotation marks omitted)).

[17] MSB 8.50.020(C) (emphasis added).

[18] MSB 8.50.020(B)(4)(c).

cover a significant area of the property before they could be recognized as a public nuisance.

Why we affirm Central Monofill Services' and Durand's convictions for violating the enforcement order

The district court convicted Central Monofill Services and Durand of violating the Borough's enforcement order giving them five days to remove the shredded material.

On appeal, Central Monofill Services and Durand argue that they were not in violation of the enforcement order because it was not yet "final" under the Borough Code. In support of this claim, the defendants point to MSB 1.45.050(D), which provides that an enforcement order "is final ... if not appealed within 15 calendar days of its service or posting." Based on this provision, the defendants argue that, despite the enforcement order's reference to "5 days," the order had no legal effect until fifteen days had elapsed.

We agree with the Borough that the defendants are misreading this provision of the Code. The provision declares that after fifteen calendar days, an enforcement order becomes "final" in the sense that it becomes non-appealable.[19] In essence, this provision of the Code establishes a fifteen-day time limit for filing an appeal of an enforcement order. But the provision does not say that an order is unenforceable until fifteen days have elapsed.

We interpret this provision of the Borough Code as similar to the state rules governing appeals of court judgments. Unless the court directs otherwise, a judgment issued by a court takes effect on the day it is issued.[20] Litigants normally have a set

[19] MSB 1.45.050(D).

[20] *See, e.g.*, Alaska R. Civ. P. 58.1(a); Alaska R. Crim. P. 32.3(a).

amount of time to file an appeal (*e.g.*, thirty days to appeal a judgment issued by the superior court[21]), and the filing of the appeal stays the effect of the judgment under certain circumstances.[22] But the court's judgment remains in force unless and until it is stayed.

An analogous rule applies to the enforcement order in this case. The enforcement order took effect when it was issued, and thus the defendants began violating it when (1) they failed to comply with its terms within five days and (2) they failed to appeal the order (which, under the Borough Code at that time, would have triggered an automatic stay of the order).[23]

We recognize, as did the district court, that requiring defendants to comply with an enforcement order before they have time to institute an appeal or request a stay could potentially violate due process in some circumstances. But Central Monofill Services and Durand have not shown that this was the case here. There is nothing in the record to suggest that the order's five-day deadline was unreasonable or that the defendants' ability to appeal and obtain a stay prior to this deadline was impaired.

Central Monofill Services and Durand also separately argue that the district court erred in finding that they violated MSB 1.45.050(C), which provides that "activity contrary to the terms of the [enforcement] order shall cease until the order is rescinded or removed ... ." They assert that they did not violate this provision because they did not engage in any "activity" contrary to the terms of the order — they simply failed to remove the material as required by the order.

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[21] *See* Alaska R. App. P. 204(a)(1).

[22] *See* Alaska R. App. P. 205; Alaska R. App. P. 206.

[23] Former MSB 15.39.120 (2013).

But the district court rejected this argument below, finding that the act of burying the material constituted "activity" in violation of the enforcement order. We agree with the district court. We note that the record shows that Officer Whisenhunt told Central Monofill Services and Durand that they needed to remove the material, and that burying it was not sufficient.[24]

Conclusion

The judgment of the district court is AFFIRMED.

[24] MSB 1.45.010(B) provides that "[e]very act or condition that is not in compliance with a term, condition, or requirement of an ... enforcement order issued in accordance with this code, is a violation."