

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

ROBERT E. BURGETT,

APPELLATE CASE NO: 2019-CV-000007-A-O

Appellant,

vs.

ORANGE COUNTY, FLORIDA,

Appellee.

_____ /

Appeal from a Final Administrative Order
from the Orange County, Florida
Code Enforcement Division

Robert E. Burgett, pro se
Appellant

Adolphus A. Thompson, Esq.
Assistant Orange County Attorney
Orange County Attorney's Office
Attorney for Appellee

Before DOHERTY, O'KANE, WEISS, JJ.

PER CURIAM.

Robert E. Burgett ("Appellant") appeals the Final Administrative Order, entered on January 7, 2019, at a Code Enforcement Hearing by the Special Magistrate for Orange County ("Appellee"), finding that he violated several Chapters of the Orange County Code. We have jurisdiction. *See* § 162.11, Fla. Stat. (2019); Fla. R. App. P. 9.030(c)(3). For the reasons discussed herein, we affirm.

BACKGROUND

On or about October 12, 2018, Orange County Code Enforcement Officer Jemoral Jackson ("OCEO Jackson") first went to the Appellant's property located at 2229 Hiawasse Rd., Orlando, Florida, 32818, and observed multiple vehicles in the driveway, most of which did not have license

plates to identify the vehicles. OCEO Jackson also observed that the Appellant was using the property for a commercial use in connection with the multiple different vehicles that were being serviced at the property. The Appellant was cited for using the property to fix vehicles and the Appellee presented photographs at the hearing which depicted vehicles with their hoods up and equipment to assist in the repair of vehicles.

The notice of violation was written as a repeat violation against the property because the Appellant had been previously cited for this same exact violation within a year. On October 12, 2018, the repeat notice of violation and notice of hearing was sent certified mail to the Appellant pursuant to section 162.06(3), Florida Statutes (2019).¹ The specific violations were cited and the compliance date of October 29, 2018, was set for the Appellant to come into compliance or be subject to a fine. The Appellee contends that the notice of hearing set forth the date and time for the hearing before the Special Magistrate: January 7, 2019, at 9:00a.m.; however, the Appellant contends that the hearing date and time was omitted from the notice of hearing.²

Subsequently, the Appellant did not appear for the January 7, 2019 Special Magistrate Code Enforcement hearing. The hearing was held and the Special Magistrate found that the Appellant violated Chapter 38-3, 38-74 and 38-77 of the Orange County Code for having abandoned, inoperative or discarded motor vehicles that are not a permitted or an ancillary use on a residential and or agricultural zoned property. The Special Magistrate also found that the Appellant violated Chapter 38 for conducting a business or commercial activity in a residential district.

¹ The Appellant does not dispute receiving the notice of violation and notice of hearing.

² There are two notices of hearing in the record: the Appellant's submission, which does not show the date and time for the hearing before the Special Magistrate, and the Appellee's submission, which was presented to the Special Magistrate and sets forth the date and time for the hearing in bold in the first paragraph.

The Appellant was ordered to come into compliance on or before January 22, 2019, and to refrain from repeating the violation. His failure to comply would result in a fine of \$300 per day for each day the violation is repeated after January 22, 2019. A re-inspection of the property was made on January 23, 2019 by OCEO Jackson and he determined the property was still not in compliance with the Special Magistrate's Order. An affidavit of non-compliance was completed on January 23, 2019. The Appellant timely seeks review of the Final Administrative Order.

STANDARD OF REVIEW

Under section 162.11, an appeal of the Special Magistrate's order to the circuit court "shall not be a hearing de novo but shall be limited to appellate review of the record created before the [Special Magistrate]." When the circuit court in its appellate capacity reviews local government administrative action, it must determine: (1) whether procedural due process was accorded; (2) whether the essential requirements of the law were observed; and (3) whether the administrative findings and judgment were supported by competent substantial evidence. *Broward Cnty. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 843 (Fla. 2001); *Bencivenga v. Osceola Cnty.*, 140 So. 3d 1035 (Fla. 5th DCA 2014). This Court may not reweigh the evidence or substitute its judgment for that of the agency, for it is the hearing officer's responsibility as trier of fact to weigh the record evidence, assess the credibility of the witnesses, resolve any conflicts in the evidence, and make findings of fact. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). Instead, this Court's function is to review the record to determine whether the decision is supported by competent substantial evidence. *Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1273-75 (Fla. 2001); *see also Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1093-94 (Fla. 2003). Competent substantial evidence is defined as such relevant evidence as a reasonable person would accept as adequate to support the findings and decision made. *DeGroot v. Sheffield*, 95 So.

2d 912, 916 (Fla. 1957). As long as the administrative hearing officer's findings of fact are supported by competent and substantial evidence, then the reviewing Court must accept them. *Kany v. Fla. Eng'rs Mgmt. Corp.*, 948 So. 2d 948, 953 (Fla. 5th DCA 2007).

STATUTORY BACKGROUND

There are Florida Statutory and Orange County Code provisions that come into play in the instant case and it is prudent to briefly set forth the relevant provisions. Chapter 162 of the Florida Statutes and Orange County Code Sections 11 and 38 provisions explicitly allow for Code Enforcement of a local governing body to cite violators of the code provisions and allow them to have a hearing before a neutral body to determine whether a violation exists and whether to impose an appropriate fine based on the evidence presented at the hearing. The intent of section 162.02, Florida Statutes (2019), is set forth as follows:

“It is the intent of this part to promote, protect and improve the health, safety, and welfare of the citizens of the counties and municipalities of this state by authorizing the creation of administrative boards with authority to impose administrative fines and other noncriminal penalties to provide equitable, expeditious, effective, and inexpensive method of enforcing any coeds and ordinances in force in counties and municipalities, where a pending or repeated violation continues to exist.”

Additionally, section 162.03(2) states that: “A special magistrate shall have the same status as an enforcement board under this chapter. References in this chapter to an enforcement board, except in s. 162.05, shall include a special magistrate if the context permits.” Further, section 162.06, Florida Statutes (2019), provides the relevant enforcement procedure:

(3) If a repeat violation is found, the code inspector shall notify the violator but is not required to give the violator a reasonable time to correct the violation. The code inspector, upon notifying the violator of a repeat violation, shall notify an enforcement board and request a hearing. The code enforcement board, through its clerical staff, shall schedule a hearing and shall provide notice pursuant to s. 162.12. The case may be presented to the enforcement board even if the repeat violation has been corrected prior to the board hearing, and the notice shall so state. If the repeat violation has been corrected, the code enforcement board retains the right to schedule a hearing to determine costs and impose the payment of reasonable

enforcement fees upon the repeat violator. The repeat violator may choose to waive his or her rights to this hearing and pay said costs as determined by the code enforcement board.

Moreover, section 162.07, Florida Statutes (2019), sets forth the conduct of the hearing:

“(1) Upon request of the code inspector . . . the [special magistrate] may call a hearing . . . (2) Each case before an enforcement board shall be presented by a . . . member of the administrative staff of the local governing body . . . (3) A [special magistrate] shall proceed to hear the cases on the agenda for the day. All testimony shall be under oath and shall be recorded. The [special magistrate] shall take testimony from the code inspector and alleged violator. Formal rules of evidence shall not apply, but fundamental due process shall be observed and shall govern proceedings . . . (4) At the conclusion of the hearing, the [special magistrate] shall issue findings of fact, based on evidence of record and conclusions of law, and shall issue an order affording the proper relief consistent with powers granted therein . . . the order may include a notice that it must be complied with by a specified date and that a fine may be imposed and, under the conditions specified in s. 162.09(1)”

Lastly, section 162.12, Florida Statutes (2019), provides the relevant notice requirements:

(1) All notices required by this part shall be provided to the alleged violator by:

(a) Certified mail, return receipt requested, provided if such notice is sent under this paragraph to the owner of the property in question at the address listed in the tax collector's office for tax notices, and at any other address provided to the local government by such owner and is returned as unclaimed or refused, notice may be provided by posting . . . and by first class mail directed to the addresses furnished to the local government with a properly executed proof of mailing or affidavit confirming the first class mailing . . .

The applicable Orange County Code Sections are 38-3 General Restrictions on land

use:

(a) Land use and/or building permits. No building . . . land, structure or premises[shall] be used . . . for any purpose or in any manner other than a use designated in this chapter, or amendments thereto, as permitted in the district in which such land [or premises] is located, without obtaining the necessary land use and/or building permits.

Orange County Code Section 38-74- Permitted uses, special exceptions and

prohibited uses:

(a) “Use of buildings, structures, lands and premises. Except as provided otherwise . . . lands and premises shall be used only in accordance with the uses and conditions contained in the “Use Table” set forth in section 38-77 . . . ”

Orange County Code Section 38-77 sets forth the table used to show what specific uses are allowed in different zoned areas throughout the County. The applicable table and section relevant to this case is labeled as Junk, sales and storage of wrecked or inoperable vehicles SIC# 5093, and shows this type of storage is not a permitted use in A1 zone property.

DISCUSSION

The Appellant argues for reversal and presents three main points: 1) he was not afforded procedural due process from the improper statutory notice under section 162.12 because the notice of hearing did not include the hearing date and time; 2) no competent and substantial evidence supports the Special Magistrate’s findings because the documents and notices presented contain inconsistencies and the photographs presented fail to demonstrate any violations, show that they could only have been taken from locations on the Appellant’s property and on his neighbor’s property, and show that OCEO Jackson trespassed on both the Appellant’s and his neighbor’s properties; and 3) OCEO Jackson trespassed on the Appellant’s property which constituted a violation of his Fourth Amendment rights against improper search and seizure.³

The Appellee asks this Court to affirm and argues four main points: 1) the Appellant was afforded procedural due process because the notice of hearing presented to the Special Magistrate, sent a couple months in advance of the January 7, 2019 hearing which the Appellant signed for, included the appropriate date and time, and had he been present at the hearing, there was more than enough time and opportunity for him to ask OCEO Jackson any questions and present his case to defend against the violations; 2) the Special Magistrate’s Final Order observed the essential

³ Notably, the Appellant does not address whether the essential requirements of the law were observed in either his Initial Brief or his Reply Brief.

requirements of law because the notice of hearing and the actual code enforcement hearing were conducted in conformity with the relevant Florida Statutes and Orange County Code Sections; 3) there was competent and substantial evidence to support the Special Magistrate's findings because the record shows that OCEO Jackson presented the case by entering photographs, testimony, and the previous case showing the instant offense was a repeat offense, as well as a description of the conversation he had with the Appellant; and 4) the alleged Fourth Amendment violation claim is procedurally barred because it was not raised at the lower administrative level and may not be raised for the first time on appeal.

I. The Appellant was afforded procedural due process because he received adequate notice of the hearing under section 162.12 and an opportunity to be heard.

It is well established that procedural due process is afforded in a quasi-judicial proceeding if the party is provided with notice of the hearing and a fair opportunity to be heard. *Seminole Entm't, Inc. v. City of Casselberry*, 811 So. 2d 693, 696 (Fla. 5th DCA 2001). Regarding the required notice, the record shows and the Special Magistrate found that the Appellee sent a proper copy of the notice of hearing, with the hearing date and time, via certified mail with the return receipt requested to the Appellant's address, which was signed and received from the Appellant. We again note that the Appellant admits in his Initial Brief that he received the notice of hearing. Regardless of his allegation that the hearing date and time was omitted from his copy, we will not second guess the Appellee's copy that was provided to the Special Magistrate because we are not permitted to reweigh or question the credibility of the evidence presented to the Special Magistrate. If the Appellant was concerned about when the hearing was that he was sent notice about, he could have reached out to Code Enforcement to verify the hearing date and time. *See generally Neder v. Greyhound Financial Corp.*, 592 So. 2d 1218 (Fla. 1st DCA 1992) ("For a party to sit back, do nothing and then seek relief, asserting that he lacked notice of the consequences of his actions, is

repugnant to us.”); *Sunstream Jet Center, Inc. v. Lisa Leasing Corp.*, 423 So. 2d 1005, 1007 (Fla. 4th DCA 1982) (same). Regarding his opportunity to be heard, he was given a fair opportunity because he was sent the notice almost three months before the hearing. Had he been present, there was more than enough time and opportunity for him to present his case and ask OCEO Jackson any questions. There is nothing in the record that leads this Court to believe that the Special Magistrate would not have allowed him to present his case had he attended the hearing. In light of the uncontested evidence presented at the hearing and the Appellant’s own admission that he was absent, we find that his argument that he was denied an opportunity to be heard is without merit.

Accordingly, based on the record, we find that the Appellant received adequate notice of the hearing under section 162. 12 with ample time and opportunity to retrieve any alleged missing information from the notice and the opportunity to be heard at the hearing; however the Appellant failed to avail himself of that opportunity.

II. The Special Magistrate’s Final Order observed the essential requirements of law.

A ruling constitutes a departure from the essential requirements of law when it amounts to “a violation of a clearly established principle of law resulting in a miscarriage of justice.” *Miami-Dade Cnty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003). Application of the correct law is synonymous with observing the essential requirements of law and a departure from observing the essential requirements of law means something far beyond legal error: it means an “inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice.” *Heggs*, 658 So. 2d at 527, 530.

Our function in evaluating this case requires that we peruse the record to find evidence which supports the local government’s decision. *G.B.V.*, 787 So. 2d at 843. We can only make a

determination regarding the hearing itself based on the record and it would be improper to make a determination on information that is not a part of the record. The only appropriate action is to quash a decision of the local government that amounts to a miscarriage of justice. *Id.* Based on the record here, we cannot say that the Special Magistrate's final order amounted to such an abuse of judicial power that it constitutes a miscarriage of justice. We find that the steps required by the aforementioned statutory and code provisions were followed in order to set the hearing before the Special Magistrate, and the manner in which the hearing was conducted was also in conformity. The Appellant's absence does not automatically mean that the procedures followed were invalid. The record indicates that the hearing was held in conformity with the applicable statutory and code provisions and that the Special Magistrate made the final determination of whether a violations occurred based on the evidence presented. Thus, we find that the Special Magistrate's determination was based on a complete and thorough reading of the applicable statutes and county ordinance, and the essential requirements of law were observed.

III. Competent and substantial evidence supports the Special Magistrate's findings in the Final Order.

The competent and substantial evidence standard cannot be used by the reviewing court as a mechanism for exerting covert control over the policy determinations and factual findings of a local agency. *Dusseau*, 794 So. 2d at 1275. "Where competent and substantial evidence supports the findings and conclusions of the administrative agency and the record discloses neither an abuse of discretion nor a violation of law by the agency, a court should not overturn the agency's determination." *Cohen v. Sch. Bd. of Dade Cnty.*, 450 So. 2d 1238, 1241 (Fla. 3rd DCA 1984). "It is not the role of the appellate court to re-weigh the evidence anew." *Young v. Dep't of Educ., Div of Vocational Rehab.*, 943 So. 2d 901, 902 (Fla. 1st DCA 2006). "When the facts are such as to

give an agency the choice between alternatives, it is up to that agency to make a choice, not the circuit court.” *Miami-Dade Cnty. V. Reyes*, 772 So. 2d 24, 28 (Fla. 3d DCA 2000).

This Court’s review of the record indicates that the Special Magistrate’s findings are supported by competent substantial evidence. The record clearly shows that OCEO Jackson presented the case to the Special magistrate entering photos, testimony, and the previous case showing the offense was a repeat violation, as well as a description of the conversation OCEO Jackson previously had with the Appellant. In his descriptions, OCEO Jackson detailed the inappropriate remedial action taken by the Appellant of enclosing his yard to hide the work he was doing and the possession of vehicles without appropriate license plates. We find that the evidence relied upon at the hearing was sufficiently relevant and material, such that a reasonable mind would accept it to support the conclusion reached. It is the Special Magistrate’s job to determine if there are any inconsistencies in the evidence and to determine credibility of witnesses.

Where competent substantial evidence supports the findings and conclusions of the administrative agency and the record discloses neither an abuse of discretion nor a violation of law by the agency, a court should not overturn the agency’s determination. *Cohen v. Sch. Bd. of Dade Cnty.*, 450 So. 2d 1238, 1241 (Fla. 3d DCA 1984). The hearing officer, as the trier of fact, was responsible for resolving any conflicts in the evidence and was free to weigh and reject any testimony, as long as that decision was based on competent substantial evidence. *Dep’t of Highway Safety & Motor Vehicles v. Wigger*, 152 So. 3d 773, 776 (Fla. 5th DCA 2014). It is not this Court’s task to reweigh evidence presented to the hearing officer, evaluate the pros and cons of conflicting evidence, and reach a conclusion different from that of the agency. *Id.* Accordingly, we find that it is clear from the record that there was enough evidence presented to the Special Magistrate to pass the competent and substantial evidence burden.

IV. The Appellant's Fourth Amendment violation claim is procedurally barred because he failed to preserve the issue during the Code Enforcement Hearing.

It is axiomatic that a specific legal issue, argument or ground must be presented to the trial court in order to preserve the issue for appellate review. *Kokal v. State*, 901 So. 2d 766, 779 (Fla. 2005). The Florida Supreme Court has held that “[e]xcept in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court.” *Williams v. State*, 967 So. 2d 735, 750 (Fla. 2007) (citation omitted). Importantly, constitutional issues are waived unless they are first presented in the trial court. *Thompson v. Napotnik*, 923 So. 2d 537, 540 (Fla. 5th DCA 2006). Accordingly, because the Appellant did not raise the Fourth Amendment issue until he filed his Initial Brief, we find that the claim is procedurally barred.

Accordingly, based on the foregoing, the Special Magistrate’s Final Administrative Order is affirmed.

DONE AND ORDERED in Orlando, Orange County, Florida this ____ day of May, 2020.

PATRICIA A. DOHERTY
Presiding Circuit Judge

O’KANE and WEISS, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order has been furnished to **Robert E. Burgett**, 2229 N. Hiawassee Road, Orlando, Florida 32818; and **Adolphus A. Thompson, Esq.**, Attorney for Appellee, Orange County Attorney’s Office, Orange County Administration Center, 201 S. Rosalind Avenue, Third Floor, P.O. Box 1393, Orlando, Florida 32802-1391, this _____ day of May, 2020.

Judicial Assistant