

COURT OF APPEALS
COLUMBIANA COUNTY, OHIO
SEVENTH APPELLATE DISTRICT

CITY OF COLUMBIANA

Plaintiff-Appellant

-VS-

AMANDA RENEE FROST

Defendant-Appellee

JUDGES:

Hon. Marie Hoover, J.

Hon. William H. Harsha, J.

Hon. Patricia A. Delaney, J.

: SITTING BY ASSIGNMENT
:
:
: Case No. 14-CO-38

: OPINION

CHARACTER OF PROCEEDING:

Appeal from the Columbiana County
Municipal Court, Case No.
2013CRB1256

JUDGMENT:

REVERSED AND REMANDED

DATE OF JUDGMENT ENTRY:

March 9, 2016

APPEARANCES:

For Plaintiff-Appellant:

DANIEL A. BLASDELL
154 Stonehaven Dr.
Columbiana, OH 44408

For Defendant-Appellee:

AMANDA R. FROST, Pro Se
143 North Elm Street
Columbiana, OH 44408

Delaney, J.

{¶1} Plaintiff-Appellee City of Columbiana appeals the September 2, 2014 judgment entry of the Columbiana County Municipal Court dismissing its criminal complaint against Defendant-Appellee Amanda R. Frost.

FACTS AND PROCEDURAL HISTORY

{¶2} On April 17, 2012, Defendant-Appellee Amanda R. Frost filed her 2011 Columbiana City Income Tax Return. Frost owed \$332.00 in city income taxes, but she did not remit payment when she filed her city income tax return.

{¶3} At a date and for reasons not evidenced in the record, Frost entered into a payment arrangement for the unpaid city income tax with the City Administrator pursuant to Columbiana City Income Tax Code § 880.08(b). § 880.08(b) states:

The Administrator is hereby charged with the enforcement of the provisions of this chapter, and is hereby empowered, subject to the approval of the Board of Review, to adopt and promulgate and to enforce rules and regulations relating to any matter or thing pertaining to the collection of taxes and the administration and enforcement of the provisions of this chapter, including provisions for the re-examination and correction of returns. The Administrator is authorized to arrange for the payment of unpaid taxes, interest and penalties on a schedule of installment payments, when the taxpayer has proved to the Administrator that, due to certain hardship conditions, he or she is unable to pay the full amount of the tax due. Such authorization shall not be granted until proper returns are filed by the taxpayer for all amounts owed by him or her under

this chapter. Failure to make any deferred payment when due, shall cause the total unpaid amount, including penalty and interest, to become payable on demand and the provisions of §§ 880.11 and 880.12 shall apply.

{¶4} Frost was to make monthly payments and the City Income Tax Department accepted the payments without imposing interests or penalties pursuant to § 880.10. § 880.10 is entitled “Interest and penalties.” It states as follows:

(a) All taxes imposed and all monies withheld or required to be withheld by employers under the provisions of this chapter and remaining unpaid after they become due shall bear interest at the rate of one-half of 1% per month or fraction thereof.

(b) In addition to interest as provided in division (a) hereof, penalties based on the unpaid tax are hereby imposed as follows:

(1) For failure to pay taxes due other than taxes withheld: 1-1/2% per month or fraction thereof.

(2) For failure to remit taxes withheld from employees: 5% per month or fraction thereof.

(c) A penalty shall not be assessed on an additional tax assessment made by the Administrator when a return has been filed in good faith and the tax paid thereon within the time prescribed by the Administrator, and, provided, further, that, in the absence of fraud, neither penalty nor interest shall be assessed on any additional tax assessment resulting from a federal audit, provided that an amended return is filed and the additional

tax is paid within three months after final determination of the federal tax liability. Interest, penalty or other similar assessment or charge against a taxpayer for the late payment or nonpayment of estimated tax liability shall not be imposed in either of the following circumstances.

(1) The taxpayer is an individual who resides in the municipal corporation but was not domiciled there on the first day of January of the current calendar year;

(2) The taxpayer has remitted an amount at least equal to 100% of the taxpayer's liability for the preceding year provided that the return for the preceding year reflected a 12-month period and the taxpayer filed a return for the preceding year.

(d) Upon recommendation of the Administrator, the Board of Review may abate penalty or interest, or both, or upon an appeal from the refusal of the Administrator to recommend abatement of penalty and/or interest, the Board may nevertheless abate penalty or interest, or both.

{¶5} Frost made a payment on August 24, 2012. Frost made another payment in December 2012. In 2013, the City Income Tax Department notified Frost by mail approximately six times that the balance of her 2011 income tax was due and owing.

{¶6} On November 25, 2013, the City of Columbiana filed a criminal complaint against Frost alleging a violation of § 880.12(a)(3) for Frost's failure to pay her 2011 city income tax. § 880.12(a)(3) states that "[n]o person * * * subject to the provisions of Chapter 880 shall: willfully fail, neglect, or refuse to pay the tax, penalties or interest imposed by this chapter * * *."

{¶7} On November 28, 2013, Frost paid the \$332.00 owing on her 2011 city income tax obligation. City of Columbia deposited Frost's check.

{¶8} On February 14, 2014, Frost issued a personal check made payable to the City of Columbiana in the amount of \$132.80 "for 2011 Interest and Penalty." The City of Columbiana refused the payment because interest and penalty were not part of the deferred payment arrangement between Frost and the City of Columbiana.

{¶9} Frost filed a motion to dismiss the criminal complaint on July 7, 2014. Frost argued that pursuant to the language of Chapter 880, the exclusive remedy for failure to pay city income tax under a payment arrangement is a civil penalty under § 880.10(b)(1). The City of Columbiana responded, arguing it was permitted to pursue a civil penalty or criminal penalty pursuant to the terms of Chapter 880.

{¶10} On September 2, 2014, the trial court issued its judgment entry. It found that under the language of Chapter 880, the imposition of a financial civil penalty did not generally negate the potential criminal sanction imposed by § 880.12(a)(3). In this case, however, the trial court found that Frost had entered into a deferred payment agreement with the City Administrator pursuant to § 880.08(b). The trial court likened this agreement to a contract. When Frost failed to meet the terms of the deferred payment agreement, the trial court determined the remedy of the City of Columbiana was to first pursue a civil action under § 880.11(a). § 880.11(a) states, "[a]ll taxes imposed by this chapter shall be collectible, together with any interest and penalties thereon, by a civil action at law. All additional assessments shall be made and all civil actions to recover municipal income taxes and penalties and interest thereon shall be brought within three years after the tax was due or the return was filed, whichever is later." The trial court

next found that if it was determined that Frost willfully failed to pay the owed taxes, the City could pursue a criminal remedy under § 880.12(a)(3).

{¶11} The trial court finally found the criminal charge was moot because the City of Columbiana accepted payment in full of the amount previously agreed upon between the Administrator and Frost.

{¶12} It is from this judgment the City of Columbiana now appeals.

ASSIGNMENTS OF ERROR

{¶13} City of Columbiana raises two Assignments of Error:

{¶14} “I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE’S MOTION TO DISMISS BY FINDING THAT COLUMBIANA CITY INCOME TAX CODE SECTION 880.08(B) REQUIRES THE PURSUIT OF A CIVIL ACTION TO COLLECT DELINQUENT INCOME TAXES BEFORE A CRIMINAL COMPLAINT MAY BE FILED FOR THE FAILURE TO PAY THOSE TAXES.

{¶15} “II. THE TRIAL COURT ERRED IN GRANTING DEFENDANT-APPELLEE’S MOTION TO DISMISS BY FINDING THAT THE ACCEPTANCE OF HER DELINQUENT TAX PAYMENT BY THE CITY RENDERED THE CRIMINAL CHARGE MOOT.”

{¶16} Frost filed a cross-appeal and raises a cross-assignment of error. She states: “The trial court erred to the prejudice of Defendant-Appellee by failing to find that the clear language of Chapter 880 of the Columbiana City Codified Ordinances provides only a civil penalty for failing to pay income tax.” App.R. 3(C) provides:

Cross appeal.

(1) Cross appeal required.

A person who intends to defend a judgment * * * against an appeal taken by an appellant and *who also seeks to change the judgment* * * *, shall file a notice of cross appeal within the time allowed by App.R. 4.

(2) *Cross appeal and cross-assignment of error not required.*

A person who intends to defend a judgment * * * appealed by an appellant on a ground other than that relied on by the trial court but *who does not seek to change the judgment* * * * *is not required to file a notice of cross appeal or to raise a cross-assignment of error.*

{¶17} Frost asserts her argument on appeal, not to change the trial court's judgment, but to prevent reversal of the judgment under review. Thus, according to the amendment of App.R. 3(C)(2), Frost is not required to assert her argument by way of a cross-assignment of error. We therefore construe Frost's cross-assignment of error as an additional argument presented in opposition to the City of Columbiana's appeal. See *Orwell Natural Gas Co. v. Fredon Corp.*, 2015-Ohio-1212, 30 N.E.3d 977, 985-86, 2015 WL 1446051, ¶¶ 49-58 (11th Dist.).

ANALYSIS

I. Civil and Criminal Penalties under Chapter 880

{¶18} The City of Columbiana argues in its first Assignment of Error that the trial court erred when it granted Frost's motion to dismiss because Chapter 880 required the City to pursue a civil action before filing a criminal complaint. We agree.

{¶19} We review a trial court's decision on a motion to dismiss pursuant to a de novo standard of review. *State v. Rode*, 11th Dist. Portage No. 2010-P-0015, 2011-Ohio-2455, citing *State v. Wendel*, 11th Dist. Geauga No. 97-G-2116, 1999 WL

1332193 (Dec. 23, 1999). A de novo standard of review affords no deference to the trial court's decision, and the appellate court independently reviews the record. *Gilchrist v. Gonsor*, 8th Dist. Cuyahoga No. 88609, 2007-Ohio-3903, ¶ 16.

{¶20} A motion to dismiss challenges the sufficiency of the indictment or complaint. *Cleveland v. Olivares*, 197 Ohio App.3d 78, 80, 2011-Ohio-5271, 966 N.E.2d 285, 287, ¶ 8 (8th Dist.). “A motion to dismiss tests the sufficiency of the indictment, without regard to the quantity or quality of evidence that may be produced at trial. * * * A pretrial motion must not involve a determination of the sufficiency of the evidence to support the indictment. If the indictment is valid on its face, a motion to dismiss should not be granted.” *Cleveland v. Olivares*, 2011-Ohio-5271 at ¶ 8 quoting *State v. Caldwell*, 8th Dist. Cuyahoga No. 92219, 2009-Ohio-4881, ¶ 3, quoting *State v. Preztak*, 181 Ohio App.3d 106, 2009-Ohio-621, 907 N.E.2d 1254, ¶ 12.

{¶21} Frost's motion to dismiss challenges the interpretation of the City of Columbiana Income Tax Code. When interpreting a statute, a court's principal concern is the legislative intent in enacting the statute. *White v. Bergman*, 5th Dist. Ashland No. 15-COA-010, 2015-Ohio-4137, ¶ 15 citing *State v. S.R.*, 63 Ohio St.3d 590, 589 N.E.2d 1319 (1992). It is a fundamental rule under Ohio law that a court must first look to the statute's language itself to determine the legislative intent. *Id.* In interpreting a statute, “words and phrases shall be read in context and construed according to the rules of grammar and common usage * * *.” *Independent Insurance Agents of Ohio, Inc. v. Fabe*, 63 Ohio St.3d 310, 587 N.E.2d 814 (1992). Courts do not have the authority to ignore the plain language of a statute under the guise of statutory interpretation, but

must give effect to the words used. *State ex rel. Fenley v. Ohio Historical Society*, 64 Ohio St.3d 509, 597 N.E.2d 120 (1992).

{¶22} There is no dispute in this case that the City Administrator arranged for the payment of Frost's unpaid taxes on a schedule of installment payments pursuant to § 880.08(b). § 880.08(b) states:

* * * The Administrator is authorized to arrange for the payment of unpaid taxes, interest and penalties on a schedule of installment payments, when the taxpayer has proved to the Administrator that, due to certain hardship conditions, he or she is unable to pay the full amount of the tax due. Such authorization shall not be granted until proper returns are filed by the taxpayer for all amounts owed by him or her under this chapter. * * *

{¶23} Frost failed to make payments pursuant to the schedule. § 880.08(b) outlines the City's available remedies if the taxpayer fails to make a deferred payment pursuant to the schedule of payments: “* * * Failure to make any deferred payment when due, shall cause the total unpaid amount, including penalty and interest, to become payable on demand and the provisions of §§ 880.11 and 880.12 shall apply.”

{¶24} § 880.11 is entitled, “Collection of Unpaid Taxes and Refunds of Overpayments.” § 880.11(a) states, “[a]ll taxes imposed by this chapter shall be collectible, together with any interest and penalties thereon, by a civil action at law. All additional assessments shall be made and all civil actions to recover municipal income taxes and penalties and interest thereon shall be brought within three years after the tax was due or the return was filed, whichever is later.”

{¶25} § 880.12 states the violations of Chapter 880 for which the City may pursue criminal prosecution. In this case, the City accused Frost of violating § 880.12(a)(3), which states no person shall “[w]illfully fail, neglect or refuse to pay the tax, penalties or interest imposed by this chapter.”

{¶26} In its judgment entry granting Frost’s motion to dismiss, the trial court interpreted the language of Chapter 880 in relation to the facts of the case. The trial court found that by entering into a payment arrangement with Frost for the unpaid taxes, the City made a contract with Frost. When Frost failed to meet the terms of the contract, the total unpaid amount became payable on demand under § 880.11(b). The trial court held the demand permitted the City of Columbiana to collect the unpaid amount through a civil action under § 880.11(a) and then through debt collection procedures, to determine whether there were hardship conditions that prevented Frost from paying the unpaid amount or whether Frost was willfully failing, neglecting, or refusing to pay the taxes. If it was determined that Frost was willfully failing, neglecting, or refusing to pay the taxes, the City would have probable cause to file a criminal action under § 880.12(a)(3).

{¶27} We find the trial court’s interpretation of the facts and the language of Chapter 880 goes beyond the court’s duty to give effect to the plain language of the tax code. The plain language of § 880.08(b) states the failure to make any deferred payment when due shall cause the total unpaid amount, including penalty and interest, to become payable on demand and the provisions of §§ 880.11 *and* 880.12 shall apply (emphasis added). The use of the word “and” in the tax code indicates the City of Columbiana can apply both §§ 880.11 and 880.12 in the event there is a failure to make

any deferred payment when due. The plain language of § 880.08(b) does not state the City of Columbiana must first pursue a civil action under § 880.11 and then if necessary, a criminal action under § 880.12.

{¶28} Upon our de novo review, we find the trial court erred in its interpretation of § 880.08(b). The plain language of the tax code allows the City of Columbiana to pursue both a civil and a criminal action for failure to make any deferred payment when due.

{¶29} The first Assignment of Error of the City of Columbiana is sustained.

II. Mootness

{¶30} The City of Columbiana argues in its second Assignment of Error that the trial court erred when it found the criminal action was moot because the City of Columbiana accepted Frost's payment of her unpaid income taxes.

{¶31} In her responsive appellate brief, Frost stated she "does not contest the position of Plaintiff-Appellant on this Assignment of Error. The acceptance of payment of taxes by the City would not, in a true case of willful failure to pay, mean that the charge must be dismissed."

{¶32} Accordingly, we sustain the second Assignment of Error of the City of Columbiana.

III. Multiple Penalties

{¶33} Frost argues in her "cross-assignment of error" that if we determine the trial court erred in dismissing the criminal complaint, this Court should find that the clear language of Chapter 880 of the Columbiana City Codified Ordinances provides only a civil penalty for failing to pay income tax. Frost refers this Court to § 880.99, which is

entitled, "Penalty." § 880.99(a) reads in pertinent part, "[w]hoever violates any of the provisions of this chapter, for which no penalty is otherwise provided, is guilty of a misdemeanor of the first degree and shall be fined not more than one thousand dollars (\$1,000.00) or imprisoned not more than six months, or both, for each offense. A separate offense shall be deemed committed each day during or on which a violation occurs or continues." Frost argues the language of § 880.99(a) prohibits the City of Columbiana from pursuing a criminal penalty because Frost is already subject to a penalty under § 880.10.

{¶34} § 880.10 outlines the interest and financial penalties the City of Columbiana may impose upon the taxpayer for unpaid taxes. It states as follows:

(a) All taxes imposed and all monies withheld or required to be withheld by employers under the provisions of this chapter and remaining unpaid after they become due shall bear interest at the rate of one-half of 1% per month or fraction thereof.

(b) In addition to interest as provided in division (a) hereof, penalties based on the unpaid tax are hereby imposed as follows:

(1) For failure to pay taxes due other than taxes withheld: 1-1/2% per month or fraction thereof.

(2) For failure to remit taxes withheld from employees: 5% per month or fraction thereof.

(c) A penalty shall not be assessed on an additional tax assessment made by the Administrator when a return has been filed in good faith and the tax paid thereon within the time prescribed by the Administrator, and,

provided, further, that, in the absence of fraud, neither penalty nor interest shall be assessed on any additional tax assessment resulting from a federal audit, provided that an amended return is filed and the additional tax is paid within three months after final determination of the federal tax liability. Interest, penalty or other similar assessment or charge against a taxpayer for the late payment or nonpayment of estimated tax liability shall not be imposed in either of the following circumstances.

(1) The taxpayer is an individual who resides in the municipal corporation but was not domiciled there on the first day of January of the current calendar year;

(2) The taxpayer has remitted an amount at least equal to 100% of the taxpayer's liability for the preceding year provided that the return for the preceding year reflected a 12-month period and the taxpayer filed a return for the preceding year.

(d) Upon recommendation of the Administrator, the Board of Review may abate penalty or interest, or both, or upon an appeal from the refusal of the Administrator to recommend abatement of penalty and/or interest, the Board may nevertheless abate penalty or interest, or both.

{¶35} There is no evidence in the record that the City of Columbiana has imposed interest or financial penalties against Frost for the unpaid taxes pursuant to § 880.10. Frost attempted to pay the City of Columbiana \$132.80 for "2011 Interest and Penalty," but the City of Columbiana refused the payment.

{¶36} In reviewing the plain language of Chapter 880, we rely upon our decision in the first Assignment of Error. § 880.08(b) states,

The Administrator is hereby charged with the enforcement of the provisions of this chapter, and is hereby empowered, subject to the approval of the Board of Review, to adopt and promulgate and to enforce rules and regulations relating to any matter or thing pertaining to the collection of taxes and the administration and enforcement of the provisions of this chapter, including provisions for the re-examination and correction of returns. The Administrator is authorized to arrange for the payment of unpaid taxes, interest and penalties on a schedule of installment payments, when the taxpayer has proved to the Administrator that, due to certain hardship conditions, he or she is unable to pay the full amount of the tax due. Such authorization shall not be granted until proper returns are filed by the taxpayer for all amounts owed by him or her under this chapter. Failure to make any deferred payment when due, shall cause the total unpaid amount, including penalty and interest, to become payable on demand and the provisions of §§ 880.11 and 880.12 shall apply.

{¶37} The tax code states that the taxpayer's failure to make any deferred payment when due shall cause the total unpaid amount, *including penalty and interest*, to become payable on demand *and* the civil penalties of § 880.11 *and* the criminal penalties of § 880.12 shall apply. (Emphasis added.) We interpret the conjunctive language of § 880.08(b) to mean that the taxpayer's failure to make a deferred payment

allows the City of Columbiana to take three actions: (1) the total unpaid amount including penalty and interest is payable on demand, (2) the City of Columbiana can pursue civil action under § 880.11, and (3) the City of Columbiana can pursue criminal action for violations of § 880.12. § 880.99(a) states the criminal penalties for a violation of the tax code, which are outlined in § 880.12. The language of § 880.08(b) and § 880.99 are not in conflict.

{¶38} Frost's "cross-assignment of error" is overruled.

CONCLUSION

{¶39} The September 2, 2014 judgment entry of the Columbiana County Municipal Court dismissing the criminal complaint is vacated and the matter remanded to the trial court for further proceedings consistent with this opinion and law.

By: Delaney, J., and

Hoover, P.J., concurs.

Harsha, J., concurring separately.

Harsha, J., concurring separately:

{¶40} I concur in Judgment and Opinion. More specifically, I agree with the principal opinion that there is no conflict between § 880.08(b) and 880.99(a), and that the city is free to pursue a criminal complaint against Ms. Frost.

{¶41} In its criminal complaint, § 880.12(a)(3) is the only provision that the city alleges Ms. Frost has violated. The one and only criminal penalty for a violation of § 880.12(a)(3) is provided at § 880.99(a). In other words, the civil penalty that she refers to in § 880.10(b) is not “otherwise provided” as a penalty for a criminal offense proscribed by § 880.12(a)(3).

{¶42} Ms. Frost herself acknowledges that the “penalty” provided for by § 880.10(b)(1) is a civil penalty. However, § 880.99(a) makes a violation of § 880.12(a)(3) a criminal offense. Ms. Frost’s attempt to construe the civil penalty imposed against her tax liability under § 880.10(b)(1) as an additional criminal penalty for her purported violation of § 880.12(a)(3) goes far beyond any requirement imposed by the rule of lenity. See R.C. 2901.04(a), which courts apply to remedy an ambiguity, not create one. *United States v. Wells*, 519 U.S. 482, 499, 117 S.Ct. 921, 137 L.Ed.2d 109 (1997) (Rule of lenity applies only if after seizing everything from which aid can be derived ... we can make no more sense than guess as to what Congress intended). *State v. Erskine*, 4th Dist. Highland No. 14CA17, 2015-Ohio-710, ¶ 32, citing *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, ¶ 20 and *State v. Sway*, 15 Ohio St.3d 112, 472 N.E.2d 1065, 1068 (1984).

{¶43} In essence, Ms. Frost contends that because a civil penalty is already provided, the criminal penalty is not authorized. This interpretation – that the ordinary

definition of penalty is broad enough to encompass both civil and criminal penalties – would lead to conflicting sections of the tax code. However, all legislative provisions that relate to the same general subject matter must be read *in pari materia*, and in construing these provisions together, courts must harmonize and give full application to all provisions “unless they are irreconcilable and in hopeless conflict.” *State v. Cook*, 128 Ohio St.3d 120, 2010-Ohio-6305, 942 N.E.2d 357, ¶ 45.

{¶44} Following the mandate in *Cook*, our decision harmonizes § 880.08(b) and 880.99(a) so as to avoid an outright conflict. Clearly, it is reasonable to construe § 880.99 to be limited to criminal penalties, with the result that § 880.08(b) permits the pursuit of both criminal and civil penalties here. Therefore, § 880.99(a) does not negate imposition of a criminal sanction against Ms. Frost.