IN THE SUPREME COURT OF OHIO

CITY OF COLUMBUS,	:	
	:	**CASE NO. 2007-0391**
Plaintiff-Appellee,	:	
	:	**On appeal from the Franklin County**
-vs-	:	**Court of Appeals,**
	:	**Tenth Appellate District**
REBECCA KIM,	:	
	:	**Court of Appeals Case No. 05AP-1334**
Defendant-Appellant.	:	
	:	

MERIT BRIEF OF APPELLANT REBECCA KIM

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORTIES	iii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
ARGUMENT	2
Proposition of Law	
An ordinance that prohibits a person from keeping or harboring an animal which "howls, barks, or emits audible sounds that are unreasonably loud or disturbing which are of such character, intensity, and duration as to disturb the peace and quiet of the neighborhood or to be detrimental to life and health of any individual" is unconstitutionally vague on its face and as applied to Appellant	6
CONCLUSION	7
CERTIFICATE OF SERVICE	8

APPENDIX	Appx. Page
Judgment Entry of the Court of Appeals of Ohio, Tenth Appellate District Certifying Conflict (February 22, 2007)	1
Opinion of the Court of Appeals of Ohio, Tenth Appellate District Certifying Conflict (February 22, 2007)	2
Judgment Entry of the Court of Appeals of Ohio, Tenth Appellate District (December 29, 2006)	5
Opinion of the Court of Appeals of Ohio, Tenth Appellate District (December 29, 2006)	6

Appellant's Notice of Certified Conflict
Supreme Court of Ohio
(March 5, 2007)..... 16

Columbus City Code § 2327.14..... 34

TABLE OF AUTHORTIES

CASES **Page(s)**

City of Columbus v. Kendall **(2003), 154 Ohio App.3d 639..... 4**

City of Columbus v. Kim**, 2006-Ohio-6985..... 1**

City of Spokane v. Fischer**, 754 P.2d 1241 (1988)..... 5, 6**

New York v. Donato**, 179 Misc. 2d 192 (1998)..... 4, 5**

State v. Ferraiolo**, 140 Ohio App.3d 585 (11th Dist. 2000)..... 1-4**

United States v. Harriss **(1954), 347 U.S. 612, 98 L.Ed.2d 989, 74 S.Ct. 808..... 4**

Whitehall v. Zageris**, No. 83-AP-805, 1985 Ohio App. Lexis 6583..... 1, 2**

CONSTITUTIONAL PROVISIONS; STATUTES

Columbus City Code ("C.C.C.") 2327.14..... 1-6

Howland Township Resolution..... 3

New Rochelle Code, art II, § 213-5[E]..... 4, 5

Spokane Municipal Code § 10.03.030..... 5, 6

I. STATEMENT OF THE CASE

This case arises from an appeal of Appellant's conviction of one count of harboring an unreasonably loud or disturbing animal in violation of Columbus City Code ("C.C.C.") 2327.14. In her Appellate Brief filed with the Tenth District Court of Appeals, Appellant asserted in her first assignment of error that C.C.C. 2327.14 is unconstitutionally vague on its face and as applied and that the trial court erred when it denied her motion to dismiss on these grounds.

On or about December 29, 2006, the Tenth District overruled Appellant's assignments of error and sustained the trial court's decision. *City of Columbus v. Kim*, 2006-Ohio-6985. The Court relied on its prior decision in *Whitehall v. Zageris*, No. 83 Ap 805, 1985 Ohio App. Lexis 6583, and held that C.C.C. 2327.14 was constitutional and not void for vagueness on its face or as applied to the facts in Appellant's case.

As further explained below, the *Zageris* decision and the Tenth District's recent holding are in direct conflict with *State v. Ferraiolo*, 140 Ohio App.3d 585 (11th Dist. 2000). Appellant asks this Court to consider and ultimately adopt the view announced in *Ferraiolo*.

II. STATEMENT OF THE FACTS

The initial complaint against Appellant was brought in the Franklin County Municipal Court pursuant to Columbus City Code Section 2327.14. This ordinance prohibits any person from harboring an unreasonably loud or disturbing animal. The original complainant Joseph Berardi testified that on May 13, 2004 he came home from work and mowed his lawn. Tr., p. 8. While Mr. Berardi was mowing, the Appellant's one dog (named Lucky) was allegedly barking; however, Berardi was able to finish mowing his lawn and then greeted Dr. George Urhman, who arrived to treat Berardi's dogs. Tr., pp. 9-10. Berardi and Dr. Urhman went inside Berardi's house so that Dr. Urhman could vaccinate Berardi's dogs. Tr., p. 11. While Dr. Urhman

testified that he heard Appellant's dog barking, he was able to carry on a conversation and had no problems treating Berardi's dogs. Tr., p. 51.

Linda Clem and Karen Maier, two neighbors of the Appellant, could not hear the Appellant's dog barking on May 13, 2004. Tr., pp. 75-76, 90-91. Jeongah Kim (a non-relative of the Appellant) was present at the Appellant's home on the day in question and also did not hear the dog barking. Tr., pp. 136-137. Other than Berardi, no other neighbors testified about the alleged barking.

Following her conviction, on the one count involving the above facts, Appellant appealed to the Tenth District Court of Appeals, citing several assignments of error including that C.C.C. 2327.14 is unconstitutionally vague. In support of her argument, Appellant asked the court to consider the Eleventh District decision in *State v. Ferraiolo*, 140 Ohio App.3d 585 (11th Dist. 2000). In *Ferraiolo*, the Eleventh District ruled that the same ordinance was unconstitutionally vague. Ultimately the Tenth District, based on its previous decision in *Whitehall v. Zageris*, upheld C.C.C. 2327.14 as constitutional.

Appellant's conviction was affirmed, and she now seeks relief from this Court. Appellant asks the Court to adopt the holding expressed in *Ferriaolo*: that such an ordinance is void for vagueness and thus unconstitutional.

III. ARGUMENT

PROPOSITION OF LAW

> An ordinance that prohibits a person from keeping or harboring an animal which "howls, barks, or emits audible sounds that are unreasonably loud or disturbing which are of such character, intensity, and duration as to disturb the peace and quiet of the neighborhood or to be detrimental to life and health of any individual" is unconstitutionally vague on its face and as applied to Appellant.

The ordinance at issue is C.C.C. 2327.14 which states:

> No person shall keep or harbor any animal which howls, barks, or emits audible sounds that are unreasonably loud or disturbing and which are of such character, intensity, and duration as to disturb the peace and quiet of the neighborhood or to be detrimental to the life and health of any individual.

The present case presents a unique conflict of law on an issue of general public interest. The Tenth District has found C.C.C. 2327.14 to be constitutional while the Eleventh District ruled that an ordinance with the exact same language as C.C.C. 2327.14 is unconstitutionally vague on its face.

In *State v. Ferraiolo*, 140 Ohio App.3d 585, 748 N.E.2d 584 (2000), the Eleventh District interpreted Howland Township Resolution 95-148, which states:

> No person shall keep or harbor any dog which howls or barks or emits audible sounds which are unreasonably loud or disturbing and which are of such a character, intensity and duration so as to disturb the peach and quiet of the neighborhood or to be detrimental to the life and health of any individual.

In *Ferraiolo*, the defendant owned three dogs and a neighbor complained that the dogs barked constantly. The complainant made an audio recording of the barking from her bedroom window. The case proceeded to a bench trial, where Ferraiolo was found guilty of violating the ordinance.

Ferraiolo appealed to the Eleventh District with two assignments of error, the first of which being the trial court erred when it denied her motion to dismiss on the grounds that the ordinance was unconstitutionally vague. The Eleventh District ultimately found the trial court erred in denying Ferraiolo's motion to dismiss. The court stated:

> [w]e conclude that in individual of ordinary intelligence would not understand his responsibilities under the law. Almost all dogs bark or emit audible sounds at one time or another. Who is to say what constitutes an "unreasonably loud" sound? Everyone has different sensitivities. Reasonableness is a subjective term that offers virtually no guidance to the dog owner who must comply with this legislation. A single bark, howl, or yelp may be considered unreasonable if it occurs at an inopportune time.

Ferraiolo, 140 Ohio App.3d at 586-87.

Here, Appellant argues that because C.C.C. 2327.14 is so similarly constructed as the above ordinance, the reasoning applied by the Eleventh District should be applied to her case. The term 'unreasonable' does not provide enough explanation to allow the average person to know what behavior is permissible, and thus, the ordinance should be struck down.

In determining whether an ordinance violates the constitutional requirement of definiteness, the question is whether the ordinance gives a person of ordinary intelligence fair notice that contemplated conduct is forbidden by the ordinance. *City of Columbus v. Kendall* (2003), 154 Ohio App.3d 639, citing *United States v. Harriss* (1954), 347 U.S. 612, 98 L.Ed.2d 989, 74 S.Ct. 808. In the case at bar, Appellant submits that a person of ordinary intelligence would not be able to understand what exactly is prohibited under the Columbus City ordinance.

In *New York v. Donato*, 179 Misc. 2d 192 (1998), a New York City court found a similar dog-barking ordinance unconstitutionally vague. This statute read, "[n]o person shall keep, permit or maintain any animal under his/her control to cause unnecessary noise across a residential real property boundary." New Rochelle Code, art II, § 213-5[E]. The term 'unnecessary noise' was further defined in section 213-4 of the statute:

> An unnecessary noise shall mean any excessive or unusually loud sound or any sound which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a considerable number of persons . . . standards to be considered in determining whether unnecessary noise exists include but are not limited to the following:
>
> (1) The volume of the noise.
> (2) The intensity of the noise.
> (3) Whether the nature of the noise is usual or unusual . . .
> (5) The volume and intensity of the background noise, if any.
> (6) The proximity of the noise to residential sleeping facilities.
> (7) The nature and the zoning district of the area within which the noise emanates.
> (8) The time of day or night the noise occurs.

(9) The time duration of the noise.
(10) Whether the sound source is temporary.
(11) Whether the noise is continuous or impulsive.
(12) The presence of discrete tones.

New Rochelle Code, art II, § 213-4[E]. The defendant in *Donato* was charged with multiple violations of this Code based on private complaints lodged by his neighbor. The issuing officer was dispatched to investigate one such complaint regarding the dog. After arriving at the house, he heard the dog barking while he sat about 250 feet away from the property for about 15 or 20 minutes after which time he issued the citation to the defendant. *Donato*, 179 Misc. 2d at 192.

The court held this ordinance to be unconstitutionally vague because the terms used to define 'unnecessary noise' were not explicit enough and capable of subjective measurement. "Likewise, the statute fails to objectify what volume or intensity of noise, for example, or what duration of the noise would constitute the kind of noise disturbance that would annoy, disturb, etc., a reasonable person of normal sensibilities." *Donato*, 179 Misc. 2d at 196. Furthermore, while the court noted that a specific time limitation is not required for a noise ordinance to withstand scrutiny, "some objective measure such as time, decibel or volume reading, or minimum number of persons who would constitute a 'considerable number' should be set forth in order to further clarify the standard." *Id.* at 197.

While the statute in *Donato* is dissimilar in form, the language, implications, and effects remain the same as C.C.C. § 2327.14. The character, intensity, and duration of the noise are all things to be considered along with the characteristics of the surrounding area. However, because of the wording of both statutes and lack of objective measurement, they are both unconstitutionally vague.

Finally, in *City of Spokane v. Fischer*, 754 P.2d 1241 (1988) the Supreme Court of Washington held a similar dog-barking statute unconstitutional. That statute read,

> No owner of a dog or owner or occupant of premises upon which a dog is kept or harbored may allow such a dog to disturb or annoy any other person or neighborhood by frequent or habitual howling, yelping or barking. Whoever harbors such a dog maintains a nuisance.

Spokane Municipal Code § 10.03.030. The court maintained that this ordinance neither provided adequate notice to citizens of what constitutes unlawful conduct nor adequate standards to prevent arbitrary enforcement. In holding the statute void for vagueness, the court noted that,

> [t]he crux of the ordinance is that it gives to *any* person who feels a dog's frequent or habitual barking is annoying or disturbing the power to make a subjective determination a crime has been committed. While under most circumstances, 'frequent or habitual' may be understood by ordinary persons of common intelligence, it is impossible to know whether this barking 'disturbs or annoys' another person or neighborhood. Rather than owners being able to determine readily their compliance with the ordinance, it is any person or neighbor's threshold tolerance for barking which determines lawful conduct by the owner or harborer of a dog.

Fischer, 754 P.2d at 1242-43.

The same reasoning applies to the case at bar. C.C.C. § 2327.14 allows for any individual to make a subjective determination that a violation has occurred. Furthermore, as the *Fischer* court also illustrated, many people who purchase dogs for protection and security could be penalized when those dogs bark at strangers or postal workers walking past the house. As the court in *Fischer* stated, "[c]onceivably, strangers walking by the same residence every day could file a complaint if the dog always barks at them." *Id.* at 1243.

Appellant asserts that she nor a person of ordinary intelligence could possibly know what behaviors were prohibited by C.C.C. 2327.14. As such, the ordinance is unconstitutionally vague and should be struck down.

IV. CONCLUSION

Based on the foregoing, Appellant respectfully requests this court to overturn her conviction and find C.C.C. 2327.14 unconstitutional.

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Fax: (614) 227-0001
Counsel for Appellant Rebecca Kim.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellant Rebecca Kim was served upon Richard C. Pfeifer, counsel of record, 375 South High Street, 7th Floor, Columbus, Ohio, 43215, via hand delivery, this 9th day of July 2007.

MARK J. MILLER (0076300)

APPENDIX

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
v.	:	No. 05AP-1334 (M.C. No.2004ERB-72941)
Rebecca Kim,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on February 22, 2007, it is the order of this court that the motion to certify the judgment of this court as being in conflict with the judgment of the Eleventh District Appellate District in *State v. Ferraiolo* (2000), 140 Ohio App.3d 585, 748 N.E.2d 584, is granted pursuant to Section 3(B)(4), Article IV, Ohio Constitution.

SADLER, P.J., PETREE & McGRATH, JJ.

Lisa L. Sadler, Presiding Judge

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
v.	:	No. 05AP-1334 (M.C. No.2004ERB-72941)
Rebecca Kim,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

MEMORANDUM DECISION

Rendered on February 22, 2007

Richard C. Pfeiffer, Jr., City Attorney, *Tannisha D. Bell*, and *Matthew A. Kanai*, for appellee.

Shaw & Miller, and *Mark J. Miller*, for appellant.

ON MOTION TO CERTIFY

SADLER, J.

ON COMPUTER 12

{¶1} Appellant, Rebecca Kim ("appellant"), filed a motion requesting this court to certify the record of this case to the Supreme Court of Ohio pursuant to Section 3(B)(4), Article IV, of the Ohio Constitution. Appellant argues that our decision rendered on December 29, 2006 conflicts with the decision rendered by the Eleventh District Court of Appeals in *State v. Ferraiolo* (2000), 140 Ohio App.3d 585, 748 N.E.2d 584. Appellee, City of Columbus, did not file any response to this motion.

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detrimental to the life and health of any individual." The Eleventh District concluded that this language was not sufficient to place a person of average intelligence on notice of what was required by the ordinance, and therefore struck the ordinance down as unconstitutionally vague.

{¶5} It appears that our decision is in conflict on the same issue of law not distinguishable on its facts. Thus, we certify the present case as being in conflict with the decision of the Eleventh District Court of Appeals in *State v. Ferraiolo* (2000), 140 Ohio App.3d 585, 748 N.E.2d 584, on the following question:

> Whether an ordinance that prohibits a person from keeping or harboring an animal which "howls, barks, or emits audible sounds that are unreasonably loud or disturbing which are of such character, intensity, and duration as to disturb the peace and quiet of the neighborhood or to be detrimental to the life and health of any individual" is unconstitutionally vague on its face and as applied.

{¶6} The motion to certify is granted and the above question is certified to the Supreme Court of Ohio for resolution of the conflict pursuant to Section 3(B)(4), Article IV, Ohio Constitution.

Motion to certify conflict granted.

PETREE and McGRATH, JJ., concur.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
v.	:	No. 05AP-1334 (M.C. No.2004ERB-72941)
Rebecca Kim,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on December 29, 2006, appellant's assignments of error are overruled, and it is the order and judgment of this court that the judgment of the Franklin County Municipal Court, Environment Division, is affirmed. Costs to be assessed to appellant.

SADLER, PETREE & MCGRATH, JJ.

Judge Lisa L. Sadler

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
v.	:	No. 05AP-1334 (M.C. No.2004ERB-72941)
Rebecca Kim,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

OPINION

Rendered on December 29, 2006

Richard C. Pfeiffer, Jr., City Attorney, *Tannisha D. Bell*, and *Matthew A. Kanai,* for appellee.

Shaw & Miller, and *Mark J. Miller*, for appellant.

APPEAL from the Franklin County Municipal Court, Environmental Division.

SADLER, J.

ON COMPUTER 12

{¶1} Appellant, Rebecca Kim ("appellant") filed the instant appeal seeking reversal of her conviction on a single count of harboring an unreasonably loud or disturbing animal in violation of Columbus City Code ("C.C.C".) 2327.14.

{¶2} C.C.C. 2327.14 provides, in relevant part, that "No person shall keep or harbor any animal which howls, barks, or emits audible sounds that are unreasonably loud or disturbing which are of such character, intensity, and duration as to disturb the

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Lucky was barking constantly from the time she arrived home until shortly before 6:00 p.m.

{¶5} Dr. Urham testified that he first noticed Lucky's barking when he arrived at Berardi's house, and that the barking could be heard along with the sound of Berardi's lawnmower. (Tr. at 45.) Dr. Urham characterized the barking as that of a dog that was over-excited. (Tr. at 48.) He stated that "the dog, I guess in human terms, didn't take a breath" during the time he was at Berardi's house. (Tr. at 49.) Dr. Urham further stated that "I witnessed a dog that was over excited, stuck in the excitement mode." (Tr. at 54.)

{¶6} Appellant testified that she was out of town on May 13, 2004, and therefore cannot address the specific allegations that Lucky was outside and barking constantly between 4:30 and 6:00 p.m. on that date. However, she did testify that in her experience, Lucky has never barked constantly for that extended a period of time. Appellant also offered testimony from Linda Clem and Karen Maier, who are other residents of the neighborhood. Both testified that they were at their respective homes during at least parts of the day on May 13, 2004, and that at no time were they aware of any persistent barking from Lucky, although neither could testify with any certainty regarding the time period between 4:30 and 6:00 p.m. Appellant also offered the testimony of Jeongah Kim (no relation to appellant), who testified that she was at appellant's house some time around the relevant time period on May 13, 2004, and that she had no recollection of hearing Lucky barking at that time.

{¶7} The overall tenor of the testimony shows that the relationship between Berardi and appellant has become quite strained over the years. At one point, Berardi called the Humane Society to have them look into the dogs' condition, although he denied

III. THE DEFENDANT WAS DEPRIVED OF HER RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND DENIED HER RIGHT TO A FAIR TRIAL.

{¶10} All legislative enactments enjoy a strong presumption in favor of their constitutionality, and a party seeking to have such an enactment declared unconstitutional must prove the enactment's unconstitutionality beyond a reasonable doubt. *State v. Anderson* (1991), 57 Ohio St.3d 168, 566 N.E.2d 1224. If an ordinance is challenged as being unconstitutional due to vagueness, courts must apply all presumptions and rules of construction so as to uphold the ordinance if at all possible. *City of Columbus v. Kendall* (2003), 154 Ohio App.3d 639, 2003-Ohio-5207, 798 N.E.2d 652. In determining whether an ordinance violates the constitutional requirement of definiteness, the question is whether the ordinance gives a person of ordinary intelligence fair notice that contemplated conduct is forbidden by the ordinance. Id., citing *United States v. Harriss* (1954), 347 U.S. 612, 98 L.Ed.2d 989, 74 S.Ct. 808.

{¶11} We have previously considered whether an ordinance that is substantially identical to C.C.C. 2327.14 was unconstitutionally vague. *Whitehall v. Zageris*, Franklin App. No. 83AP-805. In that case, we held Whitehall's barking dog ordinance did include standards sufficient to place an ordinary person on notice of what conduct the ordinance prohibited because the ordinance was limited in application to the specific neighborhood in which the noise occurred, incorporated an objective standard by prohibiting only those noises which were unreasonably loud or disturbing, and gave specific factors to be considered to measure the level of disturbance by the character, intensity, and duration of the noise.

{¶14} This test raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717. Rather, the sufficiency of the evidence test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, supra, at 319. Accordingly, the reviewing court does not substitute its judgment for that of the fact finder. *Jenks*, supra, at 279.

{¶15} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a "thirteenth juror." Under this standard of review, the appellate court weighs the evidence in order to determine whether the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. However, in engaging in this weighing, the appellate court must bear in mind the fact finder's superior, first-hand perspective in judging the demeanor and credibility of witnesses. See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, at paragraph one of the syllabus. The power to reverse on "manifest weight" grounds should only be used in exceptional circumstances, when "the evidence weighs heavily against the conviction." *Thompkins*, supra, at 387.

{¶16} As previously stated, C.C.C. 2327.14 prohibits keeping an animal that "howls, barks, or emits audible sounds that are unreasonably loud or disturbing which are of such character, intensity, and duration as to disturb the peace and quiet of the neighborhood or to be detrimental to life and health of any individual." In this case, Berardi and Dr. Urham both testified that Lucky was barking without any letup at all for

{¶20} In her third assignment of error, appellant argues that she was deprived of her right to effective assistance of counsel and to a fair trial. Appellant points to three alleged deficiencies in her trial counsel's conduct to support this contention. First, appellant argues that trial counsel failed to request an order separating the witnesses. Second, appellant argues that counsel failed to make a motion for acquittal pursuant to Crim.R. 29 at the conclusion of the state's case. Finally, appellant argues that counsel failed to ensure that her father's videotaped deposition was properly entered into evidence for consideration by the trial court.

{¶21} In order to prevail on a claim of ineffective assistance of counsel, appellant must show that her counsel's performance fell below an objective standard of reasonableness, and that she suffered prejudice as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. In evaluating trial counsel's performance, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. In order to show prejudice, it must be shown that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶22} In this case, even assuming trial counsel's performance was somehow deficient, appellant has not demonstrated that the result of the trial would have been different but for those deficiencies. There is nothing in the record to demonstrate that failing to request separation of the witnesses affected any of the testimony that was offered. As outlined in our discussion of appellant's second assignment of error regarding sufficiency and weight of the evidence, there is no reason to believe that a motion for

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IN THE SUPREME COURT OF OHIO

CITY OF COLUMBUS,	:	**CASE NO. 07-0391**
Plaintiff-Appellee,	:	
	:	**On appeal from the Franklin County Court of Appeals, Tenth Appellate District**
-vs-	:	
REBECCA KIM,	:	**Court of Appeals Case No. 05AP-1334**
Defendant-Appellant.	:	

APPELLANT'S NOTICE OF CERTIFIED CONFLICT

Now comes Appellant Rebecca Kim, by and through undersigned counsel, and hereby provides notice of the order by the Tenth District Court of Appeals certifying a conflict to this Court. Pursuant to Supreme Court Rule IV, Section 1, the Appellant has attached a copy of the Court of Appeals order certifying a conflict and copies of the conflicting Court of Appeals opinions.

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Phone: (614) 227-0007
Fax: (614) 227-2001
Attorney for Defendant-Appellant

FILED
MAR 05 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the forgoing was served upon Mr. Richard C. Pfeiffer, Jr., Counsel of record for Appellee, 373 South High Street, 13th Floor, Columbus, Ohio 43215, via hand-delivery, this 1 day of March, 2007.

MARK J. MILLER (0076300)

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[Cite as *Columbus v. Kim*, 2006-Ohio-6985.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
v.	:	No. 05AP-1334 (M.C. No.2004ERB-72941)
Rebecca Kim,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

OPINION

Rendered on December 29, 2006

Richard C. Pfeiffer, Jr., City Attorney, *Tannisha D. Bell*, and *Matthew A. Kanai*, for appellee.

Shaw & Miller, and *Mark J. Miller*, for appellant.

APPEAL from the Franklin County Municipal Court, Environmental Division.

SADLER, J.

{¶1} Appellant, Rebecca Kim ("appellant") filed the instant appeal seeking reversal of her conviction on a single count of harboring an unreasonably loud or disturbing animal in violation of Columbus City Code ("C.C.C".) 2327.14.

{¶2} C.C.C. 2327.14 provides, in relevant part, that "No person shall keep or harbor any animal which howls, barks, or emits audible sounds that are unreasonably loud or disturbing which are of such character, intensity, and duration as to disturb the

peace and quiet of the neighborhood or to be detrimental to life and health of any individual." This case began with three separate criminal complair ts filed in the Franklin County Municipal Court by Joseph Berardi ("Berardi"). Appellant and Berardi are neighbors living on Charmingfare Street in Columbus. Appellant is the owner of two dogs, one of which is a shitzu named "Lucky."

{¶3} One complaint alleges that on May 13, 2004, Lucky "howled, barked or emitted audible sounds that were unreasonably loud or disturbing and were of such character, intensity and duration as to disturb the peace an (sic) quiet of the neighborhood of Joseph Berardi to wit: by barking so loud he had to go into his house." The other two complaints alleged that on May 22, 2004 and May 23, 2004, Lucky barked loud enough to wake Berardi up.

{¶4} As to the May 13, 2004 incident, the testimony offered during the bench trial showed that after Berardi arrived home from work, he mowed his lawn, which he said took approximately twenty to twenty-five minutes. Lucky was outside in the back yard of appellant's house, and barked during this entire time. As Berardi finished mowing his lawn, George Urham ("Dr. Urham"), a veterinarian who takes care of Berardi's dogs, arrived on a house call. The two talked outside the house for a few minutes, and then went inside so Dr. Urham could administer vaccinations to Berardi's two dogs. Both Berardi and Dr. Urham testified that during the approximately one hour that Dr. Urham was at the house, Lucky never stopped barking. Both also testified that Lucky's barking was clearly audible even inside the house with the windows closed and the air conditioner running. This testimony was further bolstered by the testimony of Berardi's wife, Sachiko, who said she arrived home from work some time between 5:30 and 6:00 p.m., and that

Lucky was barking constantly from the time she arrived home until shortly before 6:00 p.m.

{¶5} Dr. Urham testified that he first noticed Lucky's barking when he arrived at Berardi's house, and that the barking could be heard along with the sound of Berardi's lawnmower. (Tr. at 45.) Dr. Urham characterized the barking as that of a dog that was over-excited. (Tr. at 48.) He stated that "the dog, I guess in human terms, didn't take a breath" during the time he was at Berardi's house. (Tr. at 49.) Dr Urham further stated that "I witnessed a dog that was over excited, stuck in the excitement mode." (Tr. at 54.)

{¶6} Appellant testified that she was out of town on May 13, 2004, and therefore cannot address the specific allegations that Lucky was outside and barking constantly between 4:30 and 6:00 p.m. on that date. However, she did testify that in her experience, Lucky has never barked constantly for that extended a period of time. Appellant also offered testimony from Linda Clem and Karen Maier, who are other residents of the neighborhood. Both testified that they were at their respective homes during at least parts of the day on May 13, 2004, and that at no time were they aware of any persistent barking from Lucky, although neither could testify with any certainty regarding the time period between 4:30 and 6:00 p.m. Appellant also offered the testimony of Jeongah Kim (no relation to appellant), who testified that she was at appellant's house some time around the relevant time period on May 13, 2004, and that she had no recollection of hearing Lucky barking at that time.

{¶7} The overall tenor of the testimony shows that the relationship between Berardi and appellant has become quite strained over the years. At one point, Berardi called the Humane Society to have them look into the dogs' condition, although he denied

making any allegation that appellant was mistreating her dogs. At another time, Berardi called the Columbus Police non-emergency dispatch line for the purpose of ensuring that there would be an official recording of Lucky barking – a copy of that recording was obtained from the Columbus Police Department and entered into evidence in support of one of the other charges. Berardi has taken to using a camcorder and audio recorder to document all of Lucky's activities, and appellant has taken to photographing Berardi as he engages in these activities.

{¶8} The trial court found appellant not guilty of the charges stemming from the May 22 and May 23 incidents, concluding that Lucky's barking was not of sufficient duration in time to support those charges. The trial court convicted appellant on the May 13 charge, concluding that the approximate one and a half hour duration of Lucky's barking on that day was sufficient to establish a violation of C.C.C. 2327.14. As sentence, the trial court imposed a fine of one hundred dollars plus costs.

{¶9} Appellant then filed this appeal, alleging three assignments of error:

> I. THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION TO DISMISS BECAUSE COLUMBUS CITY CODE SECTION 2327.14 IS UNCONSTITUTIONAL IN THAT IT IS IMPERMISSIBLY VAGUE ON ITS FACE AND AS APPLIED, AND VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.
>
> II. THE CITY OF COLUMBUS PRESENTED INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION FOR NOISY ANIMALS AND THE DEFENDANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. THE DEFENDANT WAS DEPRIVED OF HER RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND DENIED HER RIGHT TO A FAIR TRIAL.

{¶10} All legislative enactments enjoy a strong presumption in favor of their constitutionality, and a party seeking to have such an enactment declared unconstitutional must prove the enactment's unconstitutionality beyond a reasonable doubt. *State v. Anderson* (1991), 57 Ohio St.3d 168, 566 N.E.2d 1224. If an ordinance is challenged as being unconstitutional due to vagueness, courts must apply all presumptions and rules of construction so as to uphold the ordinance if at all possible. *City of Columbus v. Kendall* (2003), 154 Ohio App.3d 639, 2003-Ohio-5207, 798 N.E.2d 652. In determining whether an ordinance violates the constitutional requirement of definiteness, the question is whether the ordinance gives a person of ordinary intelligence fair notice that contemplated conduct is forbidden by the ordinance. Id., citing *United States v. Harriss* (1954), 347 U.S. 612, 98 L.Ed.2d 989, 74 S.Ct. 808.

{¶11} We have previously considered whether an ordinance that is substantially identical to C.C.C. 2327.14 was unconstitutionally vague. *Whitehall v. Zageris*, Franklin App. No. 83AP-805. In that case, we held Whitehall's barking dog ordinance did include standards sufficient to place an ordinary person on notice of what conduct the ordinance prohibited because the ordinance was limited in application to the specific neighborhood in which the noise occurred, incorporated an objective standard by prohibiting only those noises which were unreasonably loud or disturbing, and gave specific factors to be considered to measure the level of disturbance by the character, intensity, and duration of the noise.

{¶12} Appellant argues that *Zageris* should be reconsidered in light of the tremendous increase in the number of households with pets since that case was decided. Appellant points to decisions from other courts, including the 11th District Court of Appeals in *State v. Ferraiolo* (2000) 140 Ohio App.3d 585, 748 N.E.2d 584, to support her contention that, given the commonness of dog ownership today, more precisely written statutes and ordinances are needed to place owners on notice of what level of noise is prohibited. However, we find the rationale set forth in *Zageris* is as valid today as it was in 1985, increased dog ownership notwithstanding. The inclusion of identifiable standards defining the geographical application of the ordinance (the neighborhood where the noise occurs), an objective standard of prohibited conduct (unreasonably loud or disturbing noises), and setting forth factors to measure the level of disturbance, in C.C.C. 2327.14 is sufficient to establish that the ordinance is not unconstitutional either on its face or as applied. Consequently appellant's first assignment of error is overruled.

{¶13} In her second assignment of error, appellant argues that her conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. As set forth in *State v. Jenks* (1991), 61 Ohio St.3d 259. 574 N.E.2d 492, when reviewing the sufficiency of the evidence supporting a criminal conviction, an appellate court must examine the evidence submitted at trial to determine whether such evidence, if believed, would convince an average person of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. Id., at paragraph two of the syllabus. See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶14} This test raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717. Rather, the sufficiency of the evidence test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, supra, at 319. Accordingly, the reviewing court does not substitute its judgment for that of the fact finder. *Jenks*, supra, at 279.

{¶15} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a "thirteenth juror." Under this standard of review, the appellate court weighs the evidence in order to determine whether the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. However, in engaging in this weighing, the appellate court must bear in mind the fact finder's superior, first-hand perspective in judging the demeanor and credibility of witnesses. See *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, at paragraph one of the syllabus. The power to reverse on "manifest weight" grounds should only be used in exceptional circumstances, when "the evidence weighs heavily against the conviction." *Thompkins*, supra, at 387.

{¶16} As previously stated, C.C.C. 2327.14 prohibits keeping an animal that "howls, barks, or emits audible sounds that are unreasonably loud or disturbing which are of such character, intensity, and duration as to disturb the peace and quiet of the neighborhood or to be detrimental to life and health of any individual." In this case, Berardi and Dr. Urham both testified that Lucky was barking without any letup at all for

somewhere between one hour and one and one-half hours, and that this barking could be heard even in Berardi's house with the windows closed. Viewed in a light most favorable to the prosecution, a reasonable trier of fact could have concluded that Lucky's barking was unreasonably loud and was of such character, intensity, and duration as to disturb the peace and quiet of the neighborhood.

{¶17} Appellant argues that in his complaint, Berardi alleged that the barking was loud enough to have forced him to go inside the house, an allegation that was not established by the evidence. However, it was not necessary to prove that Berardi was forced to go inside the house – the ordinance only requires a showing that the barking disturbed the peace and quiet of the neighborhood **or** was detrimental to the life and health of an individual.

{¶18} Appellant also argues that the testimony of Linda Clem, Karen Maier, and Jeongah Kim showed that Lucky could not have been barking for the time period and intensity to which Berardi and Dr. Urham testified, because they would have been able to hear it. However, the trial court was in the best position to evaluate the testimony offered and determine whether those witnesses were in a position to say with certainty that they would have heard the barking if it had occurred, and to weigh their testimony against that of Berardi and Dr. Urham claiming it did occur. We cannot say that the trial court lost its way in determining that the incident occurred for the time period and intensity described.

{¶19} Therefore, we conclude that appellant's conviction was supported by sufficient evidence, and was not against the manifest weight of the evidence. Consequently, appellant's second assignment of error is overruled.

{¶20} In her third assignment of error, appellant argues that she was deprived of her right to effective assistance of counsel and to a fair trial. Appellant points to three alleged deficiencies in her trial counsel's conduct to support this contention. First, appellant argues that trial counsel failed to request an order separating the witnesses. Second, appellant argues that counsel failed to make a motion for acquittal pursuant to Crim.R. 29 at the conclusion of the state's case. Finally, appellant argues that counsel failed to ensure that her father's videotaped deposition was properly entered into evidence for consideration by the trial court.

{¶21} In order to prevail on a claim of ineffective assistance of counsel, appellant must show that her counsel's performance fell below an objective standard of reasonableness, and that she suffered prejudice as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. In evaluating trial counsel's performance, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. In order to show prejudice, it must be shown that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶22} In this case, even assuming trial counsel's performance was somehow deficient, appellant has not demonstrated that the result of the trial would have been different but for those deficiencies. There is nothing in the record to demonstrate that failing to request separation of the witnesses affected any of the testimony that was offered. As outlined in our discussion of appellant's second assignment of error regarding sufficiency and weight of the evidence, there is no reason to believe that a motion for

acquittal would have been granted had it been made. Finally, with respect to appellant's father's videotaped deposition, the videotape is not part of the record before us, so we cannot say whether its contents would have altered the outcome of the trial, but the record clearly indicates that counsel took the steps necessary to direct the court's attention to the videotape, and there is nothing in the record that would indicate that the trial court did not watch the videotape.

{¶23} Having overruled appellant's assignments of error, we affirm the decision of the trial court convicting appellant of keeping a noisy animal in violation of C.C.C. 2327.14.

Judgment affirmed.

PETREE and McGRATH, JJ., concur.

State v. FerraioloOhio App. 11 Dist.,2000.
Court of Appeals of Ohio,Eleventh District,
Trumbull County.
STATE of Ohio, Appellee,
v.
FERRAIOLO, Appellant.
No. 99-T-0169.

Decided Nov. 20, 2000.

Defendant was convicted in the Warren Municipal Court of violating ordinance prohibiting the keeping of barking and noisy animals, and defendant appealed. The Court of Appeals, William M. O'Neill , J., held that ordinance was unconstitutionally vague.

Reversed.
West Headnotes
[1] Constitutional Law 92 ⚷293

92 Constitutional Law
92XII Due Process of Law
92k293 k. Regulation of Keeping and Use of Animals. Most Cited Cases

Nuisance 279 ⚷60

279 Nuisance
279II Public Nuisances
279II(A) Nature of Injury, and Liability Therefor
279k60 k. Provisions of Statutes and Ordinances. Most Cited Cases
Ordinance prohibiting keeping of dogs that bark or emit audible sounds that are unreasonably loud or disturbing was unconstitutionally vague, as ordinance contained no guidance such as length of time dog is barking, prohibited hours during given day, or decibel level restriction.

[2] Constitutional Law 92 ⚷48(1)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k48 Presumptions and Construction in Favor of Constitutionality
92k48(1) k. In General. Most Cited Cases
There is a strong presumption that all legislative enactments are constitutional.

[3] Statutes 361 ⚷47

361 Statutes
361I Enactment, Requisites, and Validity in General
361k45 Validity and Sufficiency of Provisions
361k47 k. Certainty and Definiteness. Most Cited Cases
A party challenging a statute, based upon its being unconstitutionally vague, must show that upon examining the statute, an individual of ordinary intelligence would not understand what he is required to do under the law.

****584*585** David H. McLain, Warren City Prosecutor, Warren, for appellee.
Robert J. Rohrbaugh II and Lou A. D'Apolito, Youngstown, for appellant.
***586** WILLIAM M. O'NEILL, Judge.
This is an accelerated calendar case submitted to this court on the record and the brief of appellant, Rosario Ferraiolo. Appellant appeals his conviction from the Warren Municipal Court on one count of violating Howland Township Resolution 95-148 ("the ordinance"), which prohibits the keeping of barking and noisy animals. It states:

"No person shall keep or harbor any dog which howls or barks or emits audible sounds which are unreasonably loud or disturbing and which are of such a character, intensity and duration so as to

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27

disturb the peace and quiet of the neighborhood or **585 to be detrimental to the life and health of any individual."

The incident in question occurred on May 23, 1999. According to Gloria Oppenheimer, a neighbor of appellant, appellant owns three dogs that bark constantly. On the day in question, Oppenheimer made an audio recording of the barking that she could hear from her bedroom window. Then, on May 25, 1999, Oppenheimer swore out a complaint with the Warren City Prosecutor's Office in which she claimed that appellant had violated the aforementioned portion of the ordinance.

The case proceeded to a bench trial on November 2, 1999. Prior to trial, appellant filed a motion to dismiss the case based upon the unconstitutionality of the ordinance. Argument was heard on the matter just prior to trial, but the trial court overruled the motion. Appellant was found guilty at trial and fined $100 plus court costs.

Appellant timely filed a notice of appeal and has now set forth two assignments of error. In the first assignment of error, appellant contends that the trial court erred in overruling his motion to dismiss after determining that the ordinance was constitutional. In the second assignment of error, appellant asserts that his conviction was against the manifest weight of the evidence.

[1][2][3] Regarding the constitutionality of the ordinance, appellant argues that the resolution is impermissibly vague. It is well established that there is a strong presumption that all legislative enactments are constitutional. *State v. Collier* (1991), 62 Ohio St.3d 267, 269, 581 N.E.2d 552, 553-554. The party challenging the statute, based upon its being unconstitutionally vague, "must show that upon examining the statute, an individual of ordinary intelligence would not understand what he is required to do under the law." *State v. Anderson* (1991), 57 Ohio St.3d 168, 171, 566 N.E.2d 1224, 1226; see, also, *In re Columbus Skyline Securities, Inc.* (1996), 74 Ohio St.3d 495, 498, 660 N.E.2d 427, 429.

As applied to the legislation in question, we conclude that an individual of ordinary intelligence would not understand his responsibilities under the law. *587 Almost all dogs will bark or emit audible sounds at one time or another. Who is to say what constitutes an "unreasonably loud" sound? Everyone has different sensitivities. Reasonableness is a subjective term that offers virtually no guidance to the dog owner who must comply with this legislation. A single bark, howl, or yelp may be considered unreasonable by someone if it occurs at an inopportune time. The ordinance also requires that the bark not only be unreasonably loud or disturbing but that it be "of such a character, intensity and duration so as to disturb the peace and quiet of the neighborhood or to be detrimental to the life and health of any individual." This second clause is an attempt to narrow down the type of noise that would be considered a violation of the ordinance. Once again, however, the legislative body has used a subjective term, "disturb," as the key word in the clause. How is a resident of Howland Township supposed to know whether his dog's barks are of such an intensity and duration so as to disturb the peace and quiet of the neighborhood? We do not know the answer to that question nor would any other person of average intelligence.

The ordinance at issue is similar to one struck down in *Columbus v. Becher* (1961), 115 Ohio App. 239, 20 O.O.2d 315, 184 N.E.2d 617. There, the ordinance stated, "No person shall keep or harbor any animal * * * which howls or barks or emits audible sounds to the annoyance of the **586 inhabitants of this city." The Tenth District Court of Appeals held that the ordinance was unconstitutionally vague. The court stated:

"This ordinance could permit the arrest of any dog owner or keeper, because all dogs bark more or less and one barking of one dog could annoy some of the inhabitants of the city. It could permit the arrest of the owner or keeper of a cat that 'mews'; a parrot or parakeet that talks; or love birds that 'coo '; a canary that 'sings.' In the words of Shakespeare in Hamlet:

" 'Let Hercules himself do what he may, The cat will mew and dog will have his day.'

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28

"Use of the word, 'annoyance,' makes this ordinance so vague, indefinite and uncertain that it is unconstitutional. This penal law offers no standard of guilt. It is impossible for persons of ordinary intelligence to know in advance what it is their duty to avoid.

"The lack of certainty of the challenged ordinance is not limited to the word 'annoyance.' We assume that the clause, 'or emits audible sounds,' means something-but what?" *Id.* at 241, 20 O.O.2d at 316, 184 N.E.2d at 618-619.

The same analysis is applicable to the ordinance in the instant action. It is simply too vague to withstand a constitutional challenge. Further guidance needs to be included in such an ordinance. For example, length of time that a *588 dog is barking could be included, as well as certain prohibited hours during a given day. Additionally, perhaps a certain decibel restriction could lend further guidance. In short, an ordinance needs to be crafted so as to provide a person of average intelligence guidelines that could be followed. We acknowledge that this is not a simple task.

We recognize, however, that a similarly vague barking-dog ordinance was upheld by the Twelfth District Court of Appeals in *Lebanon v. Wergowske* (1991), 70 Ohio App.3d 251, 590 N.E.2d 902. The ordinance at issue provided that "[no] person shall harbor or keep a dog which by loud and frequent or habitual barking, howling or yelping shall cause annoyance or disturbance to the neighborhood." The court upheld the ordinance against a constitutional attack by summarily concluding that " the ordinance is sufficiently definite so that an ordinary person can determine what conduct is prohibited." *Id.* at 254, 590 N.E.2d at 904. See, also, *S. Euclid v. Haffey* (July 29, 1993), Cuyahoga App. No. 63283, unreported, 1993 WL 290148, wherein an equally vague dog-barking ordinance was upheld based on the *Wergowske* decision. We are not, however, bound to follow those decisions.

Based upon the foregoing analysis, the trial court erred in overruling appellant's motion to dismiss. Howland Township Resolution 95-148, which prohibits the keeping of barking or noisy dogs, is unconstitutional. Appellant's first assignment of error is sustained. Thus, appellant's second assignment of error is moot and need not be addressed pursuant to App.R. 12(A)(1)(c).

The decision of the trial court is hereby reversed, and judgment is entered in favor of appellant.

Judgment reversed.

FORD, P.J., and NADER, J., concur.
Ohio App. 11 Dist.,2000.
State v. Ferraiolo
140 Ohio App.3d 585, 748 N.E.2d 584

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
v.	:	No. 05AP-1334 (M.C. No.2004ERB-72941)
Rebecca Kim,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this court rendered herein on February 22, 2007, it is the order of this court that the motion to certify the judgment of this court as being in conflict with the judgment of the Eleventh District Appellate District in *State v. Ferraiolo* (2000), 140 Ohio App.3d 585, 748 N.E.2d 584, is granted pursuant to Section 3(B)(4), Article IV, Ohio Constitution.

SADLER, P.J., PETREE & McGRATH, JJ.

Lisa L. Sadler, Presiding Judge

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
v.	:	No. 05AP-1334 (M.C. No.2004ERB-72941)
Rebecca Kim,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

MEMORANDUM DECISION

Rendered on February 22, 2007

Richard C. Pfeiffer, Jr., City Attorney, *Tannisha D. Bell*, and *Matthew A. Kanai*, for appellee.

Shaw & Miller, and *Mark J. Miller*, for appellant.

ON MOTION TO CERTIFY

SADLER, J.

{¶1} Appellant, Rebecca Kim ("appellant"), filed a motion requesting this court to certify the record of this case to the Supreme Court of Ohio pursuant to Section 3(B)(4), Article IV, of the Ohio Constitution. Appellant argues that our decision rendered on December 29, 2006 conflicts with the decision rendered by the Eleventh District Court of Appeals in *State v. Ferraiolo* (2000), 140 Ohio App.3d 585, 748 N.E.2d 584. Appellee, City of Columbus, did not file any response to this motion.

{¶2} Section 3(B)(4), Article IV, Ohio Constitution, vests in courts of appeals the power to certify a record of a case to the Supreme Court of Ohio for review and final determination "[w]henever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state[.]" Before certification to the Supreme Court of Ohio, there must exist an actual conflict between appellate districts on a rule of law. *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 613 N.E.2d 1032, at paragraph one of the syllabus. This court has held that it will certify a conflict only where the judgments conflict on the same question. *Johnson v. Indus. Comm.* (1939), 61 Ohio App. 535, 28 Ohio L.Abs. 615, 15 O.O. 345, 22 N.E.2d 921, at the syllabus. The question upon which the judgments conflict must be so material to both judgments as to be dispositive of the cases. *Lyons v. Lyons* (Oct. 4, 1983), 10th Dist. No. 82AP-949.

{¶3} Appellant was convicted on one count of violating Columbus City Code 2327.14, which prohibits the keeping of unreasonably noisy animals. In our decision, we overruled appellant's assignment of error alleging that the ordinance was unconstitutionally vague either on its face or as applied. In doing so, we followed the decision we rendered in *Whitehall v. Zageris*, Franklin App. No. 83AP-805, upholding the constitutionality of a nearly identical municipal ordinance.

{¶4} In *Ferraiolo*, the Eleventh District Court of Appeals considered a constitutional challenge to an ordinance identical to Columbus City Code 2327.14 in all material respects. Both ordinances prohibited keeping a dog that howls, barks, or emits audible sounds that are "unreasonably loud or disturbing" and are of such "character, intensity, and duration" as to "disturb the peace and quiet of the neighborhood or to be

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detrimental to the life and health of any individual." The Eleventh District concluded that this language was not sufficient to place a person of average intelligence on notice of what was required by the ordinance, and therefore struck the ordinance down as unconstitutionally vague.

{¶5} It appears that our decision is in conflict on the same issue of law not distinguishable on its facts. Thus, we certify the present case as being in conflict with the decision of the Eleventh District Court of Appeals in *State v. Ferraiolo* (2000), 140 Ohio App.3d 585, 748 N.E.2d 584, on the following question:

> Whether an ordinance that prohibits a person from keeping or harboring an animal which "howls, barks, or emits audible sounds that are unreasonably loud or disturbing which are of such character, intensity, and duration as to disturb the peace and quiet of the neighborhood or to be detrimental to the life and health of any individual" is unconstitutionally vague on its face and as applied.

{¶6} The motion to certify is granted and the above question is certified to the Supreme Court of Ohio for resolution of the conflict pursuant to Section 3(B)(4), Article IV, Ohio Constitution.

Motion to certify conflict granted.

PETREE and McGRATH, JJ., concur.

2327.14 Noisy animals.

(A) No person shall keep or harbor any animal which howls, barks, or emits audible sounds that are unreasonably loud or disturbing and which are of such character, intensity and duration as to disturb the peace and quiet of the neighborhood or to be detrimental to life and health of any individual.
(B) Whoever violates this section is guilty of keeping noisy animals, a minor misdemeanor. If the offender previously has been convicted of a violation of this section, then keeping noisy animals is a misdemeanor of the third degree. If the offender previously has been convicted of two or more violations of this section, then keeping noisy animals is misdemeanor of the first degree.
(C) Strict liability is intended to be imposed for a violation of this section. (Ord. 2535-94; Ord. 2220-2006 § 1 (part).)

34