

BEFORE THE SUPREME COURT OF OHIO

STATE OF OHIO)
CITY OF YOUNGSTOWN)
)
 PLAINTIFF-APPELLANT)
)
 -vs.-)
)
 JAMMIE TRAYLOR)
)
 DEFENDANT-APPELLEE)

CASE NOS. 08-**08-1460**

AN APPEAL FROM CASE NO.
07 MA 102 BEFORE THE COURT
OF APPEALS, SEVENTH DISTR.,
MAHONING COUNTY

MEMORANDUM IN SUPPORT OF JURISDICTION

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FOR MR. JAMMIE TRAYLOR

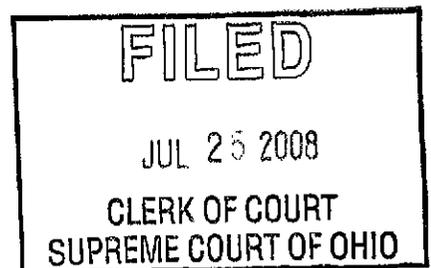


TABLE OF CONTENTS

Page No.:

Statement of why this is a Case of Great Public or General Interest that Involves
a Substantial Constitutional Question.....3

Statements of the Case, Facts, and Introduction.....3

Law and Discussion.....6

Proposition of Law No. 1: Youngstown Codified Ordinance 505.19 is not
unconstitutional as it does not violate a person's procedural due process
rights.

Conclusion.....13

Proof of Service.....14

Appendices:

- A: Judgment Entry (June 13, 2008), 07 MA 102, *State of Ohio v. Jammie Traylor*.
- B: Opinion (June 13, 2008), 07 MA 102, *State of Ohio v. Jammie Traylor*.
- C: Youngstown Codified Ordinance 505.19, Vicious Dogs,

**Statement of why this is a Case of Great Public or General Interest
that Involves a Substantial Constitutional Question**

On June 13, 2008, the Seventh district Court of appeals struck down a twenty-six year old ordinance designed to protect the citizens of Youngstown from dog attacks. In an incredibly myopic opinion based upon a faulty premise, the appellate court lost its way along the path of cases involving the various ordinances and statutes of this State that address the obligations and ramifications of owning or harboring certain breeds of dog or a dog(s) that attack a person or domestic animal.

In reaching its conclusion, the Seventh District failed to appreciate the distinctions between this Court's decisions in *State v. Cowan (2004), 103 Ohio St.3d 144* and *Toledo v. Tellings (2007), 114 Ohio St.3d 278*. This fundamental misunderstanding of the holdings and misapplication of the principles have operated to leave anyone living in or visiting the City of Youngstown without criminal recourse should they or their animal be attacked by a dog(s), regardless of the breed of the dog. In this urban environment, such attacks by large or inherently aggressive dogs are commonplace and matters of grave concern.

Counsel of Record urges, indeed begs, that this Court will accept this appeal to once and for all clarify the status of Ohio's dog laws and their interaction with the Constitutional principles of due process. This case presents the Court with that opportunity. The State prays that this Court take jurisdiction over this case, hear it on its full merits, and overrule the Seventh District's June 13, 2008 entry and opinion.

Statement of the Case, Facts, and Introduction

On April 18, 2007, David Roch was walking his dog "Maggie" near the intersection of Canfield Road and Old Mill Drive in Youngstown, Ohio. This area is a

tranquil spot of Mill Creek Park that is commonly known as the Lanterman Mill area due to the presence of an historic flourmill on the creek. It is an area that is very popular with walkers, joggers, bikers, and anyone seeking some type of peaceful outdoor recreation.

At approximately 8:00 AM, Mr. Roch and "Maggie" were approached by two Cane Corso dogs, one male and one female. The dogs were not accompanied by anyone. Later estimates put the weight of each dog at approximately one hundred and fifty pounds. Mr. Roch restrained "Maggie" and attempted to calm the Corsos. One of the dogs attacked "Maggie" and when Mr. Roch attempted to extricate his dog from the attack, he sustained a gaping wound to his hand. Both dogs began jumping on him in an attempt to continue the attack on "Maggie."

Mr. Roch was saved from the attack when a nearby samaritan allowed him into her garage. He compressed the wound in an effort to curb the bleeding and the police were summoned. "Maggie" ran from the attack sustaining only a gash to her back. Once removed from the scene by Rural-Metro Ambulance, Mr. Roch underwent surgery that morning to repair his left hand and wrist.

Officer Carolyn Grimaldi of the Mill Creek Park Police Department (MCPD) was the first officer on scene. She observed the large gray dogs upon her arrival and exited her cruiser with her shotgun. Both dogs turned towards her and approached her position. One dog charged her and she shot it twice, killing it. The second dog turned and ran. Officer Matt Willis of the Youngstown Police Department (YPD) was the second officer on scene. He began tracking the second dog and located it approximately thirty yard away from his position. The dog began moving towards him. He shot the dog three times, killing it.

A joint investigation involving MCPD, YPD, and the Mahoning County Dog Warden's Office began immediately. Investigators obtained witness statements from the samaritan, the officers involved in the destruction of the dogs, homeowners in the neighborhood, and individuals who were passing by the area in their vehicles who had witnessed the attack. Investigators learned that the owner of the dogs was Jammie Traylor. Mr. Traylor lived on Canfield Road just up the street from the intersection where the attacks occurred.

On May 1, 2007, complaints were filed against Jammie Traylor charging him with two counts of Vicious Dogs, violations of Youngstown Codified Ordinance (YCO) 505.19(b), misdemeanors of the first degree. He was arrested on May 3, 2007 and arraigned that same day under municipal case number 07 CRB 1372. Counsel for Mr. Traylor filed the ordinary array of pre-trial discovery motion and filed a jury demand. On May 18, 2007 counsel filed a motion to dismiss. That motion was heard on May 24, 2007.

At that motion hearing, counsel for Mr. Traylor relied primarily on this Court's decision in *Cowan* and the Sixth District's decision in *Toledo v. Tellings, 2006-Ohio-975*¹ in an attempt to argue that YCO 505.19 was unconstitutional. Specifically, they argued that the ordinance operated to deprive Mr. Traylor of his procedural due process rights as he had no pre-trial opportunity to contest the determination that his dogs were vicious. In rejecting the defense arguments, the trial judge ruled:

... In the case at bar, the defendant is charged under the vicious dog ordinance not because of the breed of the dogs but, rather, because his dogs allegedly attacked someone without provocation. Here, there is no presumption that the dogs are vicious, rather their viciousness is an element of the crime, which the state has the burden of proving beyond a

¹ At the time of the hearing, this Court had not yet issued its decision in *Tellings*.

reasonable doubt. ... Hence, the facts of this case are distinguishable from *Cowan* and its progeny. ... Wherefore, the motion to dismiss is denied. Defendant will have every opportunity to challenge whatever evidence the state will offer, at trial, as with any other criminal case. ...

The matter proceeded to trial by jury on May 25, 2007. The jury returned a verdict of guilty on the lesser-included offense to count one and to the offense as charged in count two. The trial court ordered a pre-sentence investigation and set the matter for sentencing on June 15, 2007. On that day, the defendant was fined, sentenced to ninety days in jail, ordered to pay restitution to Mr. Roch, and ordered to complete two years of intensive probation upon his release. A condition of his probation was that he was to “own nothing bigger than a Chihuahua.” Counsel filed a notice of appeal that same day.

On June 20, 2007, Mr. Traylor was granted a stay by the trial court pending appeal. On June 13, 2008, the Seventh District Court of Appeals issued a Judgment Entry and Opinion finding that YCO 505.19 was unconstitutional. The conviction was vacated and Mr. Traylor was discharged.

Law and Discussion

Proposition of Law No. 1: Youngstown Codified Ordinance 505.19 is not unconstitutional as it does not violate a person’s procedural due process rights.

A. RELEVANT STATUTES AND THE ORDINANCE AT ISSUE.

The pertinent portions of the provisions of the Revised Code are as follows:

R.C. 955.11, Transfer of ownership or possession of dog.

(A) As used in this section:

(4)(a) “Vicious dog” means a dog that, without provocation and subject to division (A)(4)(b) of this section, meets any of the following:

- (i) Has killed or caused serious injury to any person;
- (ii) Has caused injury, other than killing or serious injury, to any person, or has killed another dog.

- (iii) Belongs to a breed that is commonly known as a pit bull dog. The owning, keeping, or harboring of such a breed of dog shall be prima-facie evidence of the ownership, keeping, or harboring of a vicious dog.

R.C. 955.22, Confinement or restrain of dog; liability insurance; debarking or surgically silencing dog.

(D) Except when a dangerous or vicious dog is lawfully engaged in hunting or training for the purpose of hunting and is accompanied by the owner, keeper, or harborer, or handler of the dog, no owner, keeper, or harborer or a dangerous or vicious dog shall fail to do either of the following:

- (1) While that dog is on the premises of the owner, keeper, or harborer, securely confine it at all times in a locked pen that has a top, locked fenced yard, or other locked enclosure that has a top, except that a dangerous dog may, in the alternative, be tied with a leash or tether so that the dog is adequately restrained.
- (2) While the dog is off the premises of the owner, keeper, or harborer, keep that dog on a chain-link leash or tether that is not more than six feet in length and additionally do at least one of the following:
 - (a) Keep that dog in a locked pen that has a top, locked fenced yard, or other locked enclosure that has a top;
 - (b) Have the leash or tether controlled by a person who is of suitable age and discretion or securely attach, tie, or affix the leash or tether to the ground or a stationary object or fixture so that the dog is adequately restrained and station such a person in close enough proximity to that dog so as to prevent it from causing injury to any person;
 - (c) Muzzle that dog.

(E) No owner, keeper, or harborer of a vicious dog shall fail to obtain liability insurance with an insurer authorized to write liability insurance in this state providing coverage in each occurrence, subject to a limit, exclusive of interest and costs, of not less than one hundred thousand dollars because of damage or bodily injury to or death of a person caused by the vicious dog.

YCO 505.19, Vicious Dogs, provides, in pertinent part:

- (b) No person owning or harboring or having the care of a vicious dog shall suffer or permit such dog to go beyond the premises of such person unless such dog is securely leashed or otherwise securely restrained.
- (c) Definitions.

- (1) A vicious dog is “unconfined” as the term is used in this section, if such dog is not restrained by a secure fence, other secure enclosure or any other security device which effectively prevents such dog from going beyond the premises of the person described in subsection (a) hereof.
- (2) “Vicious dog” as used in this section means:
 - (A.) Any dog with a propensity, tendency or disposition to attack, to cause injury to or otherwise endanger the safety of human beings or other domestic animals; and
 - (B.) Any dog which attacks a human being or another animal without provocation.

B. LEGAL FRAMEWORK

In 2004, this Court rendered the aforementioned decision in *Cowan*. In that case, the court was confronted with a situation where a deputy dog warden classified Janice Cowan’s dogs as “vicious” following the complaint of an attack. (The specific breed of the dogs at issue was not clear from the decision.) The deputy dog warden attempted to speak with Ms. Cowan after the alleged attack upon learning of additional complaints that the dogs were continually roaming the neighborhood and that, when restrained, were done so in a manner not approved by the statute. Prior to filing charges, the deputy dog warden attempted to counsel Ms. Cowan and provide her with paperwork explaining her responsibilities. When these efforts failed, Ms. Cowan was formally charged under various sections of R.C. 955.22.

In upholding the appellate court’s reversal of the conviction, this Court reasoned and held:

Once the dog warden made the unilateral decision to classify appellee’s dogs as vicious, R.C. 955.22 was put into effect and restrictions were placed upon the appellee and her dogs. No safeguards, such as the right to appeal or an administrative hearing, were triggered by the determination to challenge the viciousness label or its ramifications. In fact, it was not until appellee was formally charged as a criminal defendant that she could conceivably challenge the viciousness designation under R.C. 955.22. We find it inherently unfair that a dog owner must defy the statutory regulations and become a criminal defendant,

thereby risking going to jail and losing her property, in order to challenge a dog warden's unilateral decision to classify her property. The statute does not provide a right to be heard in a meaningful time and in a meaningful manner on the issue of whether her dogs were vicious or dangerous. Accordingly, we find that R.C. 955.22 violates procedural due process insofar as it fails to provide dog owners a meaningful opportunity to be heard on the issue of whether a dog is "vicious" or "dangerous" as defined in R.C. 955.11(A)(1)(a) and (A)(4)(a).

Id. at 148 (*Emphasis added.*)

This Court closed the opinion in *Cowan* by noting that "the determination that these dogs were vicious had already been made prior to trial" and "this element of the crime was removed from [the jury's] consideration." *Id.*

Nearly three years later, this Court issued its decision in *Tellings*. In that case, Paul Tellings owned three Pit Bull dogs. The ownership of multiple dogs of this breed violated Toledo's limit of one such dog per household and the liability insurance provisions of R.C. 955.22. The Court was called upon to address the appellate court's determination that provisions of R.C. 955.11 and 955.22, and Toledo Municipal Ordinance 505.14 were unconstitutional pursuant to *Cowan*. In reversing that decision and finding no violation of procedural due process, this Court distinguished *Cowan* and noted that "the General Assembly has classified pit bulls generally as vicious; there is no concern about unilateral administrative decision-making on a case-by-case basis." *Id.* at 284.

C. THE SEVENTH DISTRICT TRAYLOR DECISION.

Following a brief recitation of the facts and procedural history, the appellate court attempts to narrow and define Mr. Traylor's primary issue on appeal. The Seventh District identifies the central problem with the ordinance as placing obligations on the owners relating to the harboring and care of these dogs absent notice or a hearing before

the limitations take effect. *Traylor* at ¶5. “Significantly,” the appellate court notes, “it appears that [505.19] was modeled after R.C. 955.22.” *Id.* at ¶14. The Seventh District conducted a review of *Cowan*, found it controlling, and called the facts of the case at bar “virtually identical.” *Id.* at ¶24. It reached its holding and conclusion that YCO 505.19 deprived a person of procedural due process by focusing upon the “imposition of additional legal duties and restrictions on the dog owner.” *Id.* at ¶23.

A multitude of problems exists in the Seventh District’s flawed and fallacious reasoning. First and foremost, the appellate court’s reliance upon *Cowan* is severely misplaced. That case involved the application of R.C. 955.22. The language of R.C. 955.22 and YCO 505.19, while similar in some respects, is significantly different in others. So, while YCO 505.19 may be “modeled” after R.C. 955.22, this does not make them identical and, certainly, the applicable analysis is not identical. The Seventh District quickly loses grasp of the argument because they allow themselves to read-in provisions of R.C. 955.22 that are simply not present in YCO 505.19.

A cursory review of YCO 505.19 will immediately reveal to any reader that it does not contain specific requirements for a pen or fenced yard. It does not contain leash-length or muzzle requirements. And, it does not require liability insurance. All that YCO 505.19 requires is that do not permit your dog of any breed to be roaming the neighborhood so that it might harm someone.

So, the Seventh District truly missed the crux of *Cowan* and, for that matter, *Tellings*. Obligations and restrictions placed upon the owner of a “vicious” dog are repugnant to principles of due process when the owner, keeper, or harbinger has no opportunity to contest the determination that causes them to incur the obligations and

restrictions. Before *Cowan*, someone could, under R.C. 955.22, be required to utilize a locked pen or fenced yard, have a special leash, and spend money on a liability insurance policy just because a deputy dog warden said that you had a vicious dog. That was never the case under YCO 505.19. *Cowan* and, to a lesser extent, *Tellings*, are limited to those situations where unilateral decision making causes someone to incur obligations and restrictions or expend money without the chance to challenge it. Such is not the case here.

D. DISTINCTIONS WITH A DIFFERENCE.

In *Beavercreek v. Ride*, 2007-Ohio-6898, the Second District Court of appeals addressed the issue at bar post-*Tellings*. In that case, one of two mixed-breed Huskies attacked and killed the neighbors Yorkshire Terrier. The Husky was deemed “vicious” because it had “killed another dog.” R.C. 955.11(A)(4)(a)(ii). Ms. Ride claimed on appeal, among other things, that she was denied due process and relied upon *Cowan*.

The Second District rejected her arguments and ruled:

In that case, the statute was deemed unconstitutional “as applied” because the defendant, who was convicted of a charge of 955.22(D), failing to confine a vicious dog, had not been afforded procedural due process prior to the determination, by the dog warden, that the dog was a vicious dog. In this instance, Ride was afforded her due process rights, because the determination as to the future status of the dog was made in a judicial proceeding and she was not being punished without notice.

Id. at ¶42.

Similarly, in *State v. Conte*, 2007-Ohio-5924, the Tenth district Court of Appeals rejected a due process argument under *Cowan* after a German Shepherd attacked a dog on a leash. There, the owner was charged under the local ordinance. The Tenth District

made two key determinations in that decision. First, the Tenth District ruled that the city ordinance

“does not involve an unreviewable, unilateral determination that the animal is ‘vicious or dangerous.’ Rather, appellant must prove at trial that appellee’s dog is vicious or dangerous as an element of the offense. Appellee has the opportunity to contest that allegation.”

Id. at ¶15.

Second, and perhaps more crucial to this analysis, the city ordinance “does not impose any additional obligations on a dog owner.” *Id. at* ¶17.

The facts at the case at bar are much more comparable to *Ride* and, particularly, *Conte* than they are to *Cowan*. Especially when you do not read-in requirements that are not there. Moreover, this is exactly the line of reasoning utilized by the trial judge that was completely ignored by the Seventh District.

Mr. Traylor was afforded his due process rights by way of a trial in which the City of Youngstown bore the burden of proof beyond a reasonable doubt as to each and every element of the crime, including the issue of “viciousness.” No conclusive presumption was forced upon the jury². It was only after the jury rendered its verdict of guilty that the future status of the dogs was affected and only then that Mr. Traylor could have been required to incur additional obligations had the dogs lived.

² Indeed, the trial court instructed the jury as to both counts in the following manner:

Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the 18th day of April, 2007, and in the City of Youngstown, Mahoning County, Ohio, the defendant owned, harbored or had the care of a vicious dog...and that he permitted said dog to go beyond his premises while not being securely restrained and that said dog caused injury to any person.

Vicious dog means any dog which attacks a human being or another domestic animal without provocation.

The problems with the Seventh District's decision become crystal clear when one asks one's self this hypothetical question – What would Mr. Traylor's additional obligations and restrictions as to the dogs been under YCO 505.19 had this attack not happened? The answer is simple, "Nothing." Accordingly, YCO 505.19 does not violate procedural due process in the manner expressly rejected in *Cowan*.

Conclusion

Counsel renews his request that this Court exercise its discretion in favor of jurisdiction as the City of Youngstown is left with no alternative for review. With one unfortunate decision, the Seventh District has struck down a valid ordinance that was aimed at preserving "the safety and pleasantness of streets, parks, sidewalks, yards and all areas of the City" from the unrestrained activity of vicious animals.

Wherefore, counsel prays that this Court accept jurisdiction over this discretionary issue, review all issues presented, and entertain oral arguments. Upon doing so, this Court should overrule the Seventh District's decision, reinstate the jury's conviction and allow the lawful sentence of the trial judge to be carried out.

Respectfully submitted,

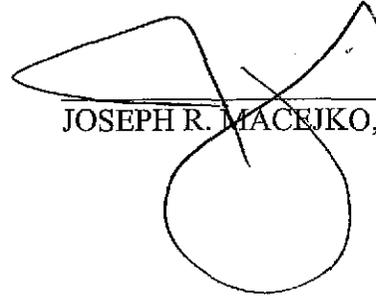


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PROOF OF SERVICE

I hereby certify that on this 22nd day of July 2008, a copy of this Memorandum was sent to opposing counsel via regular U.S. mail.



JOSEPH R. MACEJKO, 0070222

STATE OF OHIO) IN THE COURT OF APPEALS OF OHIO
MAHONING COUNTY) SS: SEVENTH DISTRICT

CITY OF YOUNGSTOWN,)
PLAINTIFF-APPELLEE,) CASE NO. 07 MA 102
- VS -) JOURNAL ENTRY
JAMMIE TRAYLOR)
DEFENDANT-APPELLANT.)

For the reasons stated in the opinion rendered herein, Appellant's first assignment of error is with merit and Appellant's second and third assignments of error are rendered moot. It is the final judgment and order of this Court that the judgment of the Youngstown Municipal Court, Mahoning County, Ohio, is reversed. Appellant's conviction is vacated and Appellant is discharged. Costs taxed against Appellee.

Mary DeGenaro
Joseph W. ...
Clyde ...

CLERK OF COURTS
MAHONING COUNTY, OHIO
JUN 13 2008
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STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

CITY OF YOUNGSTOWN,)
)
 PLAINTIFF-APPELLEE,)
)
 - VS -)
)
 JAMMIE TRAYLOR,)
)
 DEFENDANT-APPELLANT.)

CASE NO. 07 MA 102

OPINION

CHARACTER OF PROCEEDINGS:

Criminal Appeal from Youngstown
Municipal Court,
Case No. ~~04~~ CRB 1372.

JUDGMENT:

Reversed. Conviction Vacated.
Appellant Discharged.

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JUDGES:

Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

FILED
JUN 13 2008
ANTHONY VIVO, CLERK

Dated: June 13, 2008

DeGenaro, P.J.

{¶1} This matter comes for consideration upon the record in the trial court and the parties' briefs. Appellant, Jammie Traylor, appeals the decision of the Youngstown Municipal Court finding him guilty of failing to restrain his vicious dogs in violation of Youngstown Codified Ordinance 505.19. With this appeal, Traylor challenges the constitutionality of the ordinance under which he was charged. Because the ordinance did not provide Traylor, or other dog owners, with a meaningful opportunity to challenge the labeling of the dogs as vicious, the decision of the trial court is reversed and Traylor's conviction is vacated.

{¶2} On April 18, 2007, David Roch was walking his dog in the City of Youngstown when he was approached by two unaccompanied dogs that were later determined to be owned by Traylor. The dogs were initially playful. However, at some point the dogs attacked Roch and his dog. As a result, Traylor was charged with violating Y.C.O. 505.19. After entering a plea of not guilty, Traylor moved to dismiss the charge based on the unconstitutionality of the ordinance. The trial court denied the motion and the matter proceeded to a jury trial which resulted a conviction.

{¶3} As his first of three assignments of error, Traylor states:

{¶4} "Youngstown Codified Ordinance 505.19 is unconstitutional on its face and or as it applies in the case at bar."

{¶5} Traylor challenges the municipal ordinance claiming that it violated his right to due process as it does not allow for a meaningful opportunity to challenge the labeling of one's dog as "vicious." This is significant in that the ordinance places obligations on the owners relating to the harboring and care of these dogs. Notably, the owners are not given notice or a hearing before these limitations take effect resulting in what Traylor claims is a due process violation. The ordinance in question, Y.C.O. 505.19, provides:

{¶6} "(a) No person owning or harboring or having the care of a vicious dog shall suffer or permit such animal to go unconfined on the premises of such person.

{¶7} (b) No person owning or harboring or having the care of a vicious dog shall suffer or permit such dog to go beyond the premises of such person unless such dog is securely leashed or otherwise securely restrained.

{¶8} (c) Definitions.

{¶9} A vicious dog is 'unconfined' as the term is used in this section. If such dog is not restrained by a secure fence, other secure enclosure or any other security device which effectively prevents such dog from going beyond the premises of the person described in subsection (a) hereof.

{¶10} 'Vicious dog' as used in this section means:

{¶11} (A) Any dog with a propensity, tendency or disposition to attack, to cause injury to or to otherwise endanger the safety of human beings or other domestic animals; and

{¶12} (B) Any dog which attacks a human being or another domestic animal without provocation.

{¶13} (d) Subsections (a) and (b) hereof are necessary controls on the unrestrained activity of vicious animals which threaten the safety and pleasantness of streets, parks, sidewalks, yards and all areas of the City and lack of knowledge or lack of intent is not a defense to a violation thereof."

{¶14} Significantly, it appears that this Youngstown City Ordinance was modeled after R.C. 955.22 which states:

{¶15} "(D) Except when a dangerous or vicious dog is lawfully engaged in hunting or training for the purpose of hunting and is accompanied by the owner, keeper, harborer, or handler of the dog, no owner, keeper, or harborer of a dangerous or vicious dog shall fail to do either of the following:

{¶16} (1) While that dog is on the premises of the owner, keeper, or harborer, securely confine it at all times in a locked pen that has a top, locked fenced yard, or other locked enclosure that has a top, except that a dangerous dog may, in the alternative, be tied with a leash or tether so that the dog is adequately restrained;

{¶17} (2) While that dog is off the premises of the owner, keeper, or harborer, keep that dog on a chain-link leash or tether that is not more than six feet in length and additionally do at least one of the following:

{¶18} (a) Keep that dog in a locked pen that has a top, locked fenced yard, or other locked enclosure that has a top;

{¶19} (b) Have the leash or tether controlled by a person who is of suitable age and discretion or securely attach, tie, or affix the leash or tether to the ground or a stationary object or fixture so that the dog is adequately restrained and station such a person in close enough proximity to that dog so as to prevent it from causing injury to any person;

{¶20} Muzzle that dog."

{¶21} In *State v. Cowan* 103 Ohio St.3d 144, 814 N.E.2d 846, 2004-Ohio-4777, a Portage County deputy dog warden determined two dogs to be vicious following a complaint that the dogs had attacked a woman. *Id.* at ¶ 1. The dogs were determined to be vicious under the first two subsections of R.C. 955.11(A)(4)(a) because they had caused injury to a person. The owner was then charged with failure to confine the dogs pursuant to 955.22(D)(1).

{¶22} The Ohio Supreme Court concluded that "R.C. 955.22 violates the constitutional right to procedural due process insofar as it fails to provide dog owners with a meaningful opportunity to be heard on the issue of whether the dog is 'vicious' or 'dangerous' as defined in R.C. 955.11(A)(1)(a) and (A)(4)(a)." *Id.* at syllabus.

{¶23} The Court explained that R.C. 955.22 required owners of a dangerous or vicious dog to confine the dog in a certain manner and to obtain a certain amount of liability insurance. *Id.* at ¶ 10. Therefore, a determination that a dog was "dangerous or vicious" resulted in the imposition of additional legal duties and restrictions on the dog owner. The court in *Cowan* further noted that the dog warden, prior to citing the defendant for violating the vicious dog law, made a unilateral, unreviewable determination that the defendant's dogs were vicious. *Id.* at ¶ 13.

{¶24} The facts in this case are virtually identical as Traylor was charged with failure to restrain his "vicious" dogs prior to being given any notice or hearing on the classification of his dogs and thus the *Cowan* holding would be controlling in this case.

{¶25} The State would argue, however, that the *Cowan* holding no longer applies, as the Court has recently released an opinion that the State would argue reaches the opposite conclusion. More specifically, in *Toledo v. Tellings*. Ohio St.3d 278, 871 N.E.2d 1152, 2007-Ohio-3724, the Court concluded that R.C. 955.22 was not unconstitutional as

applied to owners of pit bulls. The Court explained:

{¶26} "In *Cowan*, the dogs were determined to be vicious under the first two subsections of R.C. 955.11(A)(4)(a) because they had caused injury to a person. Thus, the case concerned the dog warden's unilateral classification of the dogs as vicious. However, in this case, the 'vicious dogs' at issue are those classified as pit bulls under the third subsection of R.C. 955.11(A)(4)(a). Unlike the situation in *Cowan*, the General Assembly has classified pit bulls generally as vicious; there is no concern about unilateral administrative decision-making on a case-by-case basis. The clear statutory language alerts all owners of pit bulls that failure to abide by the laws related to vicious dogs and pit bulls is a crime. Therefore, the laws do not violate the rights of pit bull owners to procedural due process." *Id.* at ¶ 32.

{¶27} Given that this case does not appear to involve pit bulls, and because the ordinance does not contain a classification of this breed as a definition of "vicious" the State's assertion is incorrect and the *Tellings* holding is wholly inapplicable to this case. Traylor's first assignment of error is with merit.

{¶28} Traylor's remaining two assignments of error argue:

{¶29} "Youngstown Codified Ordinance 505.19 is invalid as it violates R.C. 2901.21."

{¶30} "The trial court erred by failing to give a jury instruction on recklessness."

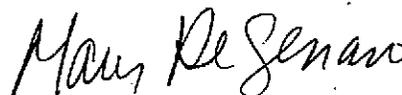
{¶31} We need not address these assignments of error as they are rendered moot by this court's resolution of Traylor's first assignment of error.

{¶32} Accordingly, pursuant to *Cowan*, the judgment of the trial court is reversed, Traylor's conviction is vacated and Traylor is discharged.

Vukovich, J., concurs.

Waite, J., concurs.

APPROVED:



MARY DeGENARO, PRESIDING JUDGE.

STATE OF OHIO
MAHONING COUNTY

) IN THE COURT OF APPEALS OF OHIO
)
) SS: SEVENTH DISTRICT

CITY OF YOUNGSTOWN,
PLAINTIFF-APPELLEE,
- VS -
JAMMIE TRAYLOR
DEFENDANT-APPELLANT.

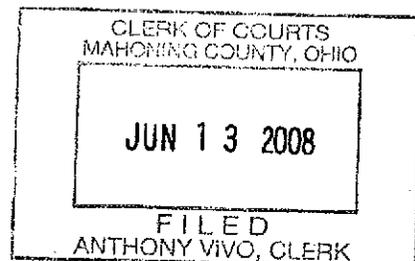
)
) CASE NO. 07 MA 102
)
) JOURNAL ENTRY
)
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)

For the reasons stated in the opinion rendered herein, Appellant's first assignment of error is with merit and Appellant's second and third assignments of error are rendered moot. It is the final judgment and order of this Court that the judgment of the Youngstown Municipal Court, Mahoning County, Ohio, is reversed. Appellant's conviction is vacated and Appellant is discharged. Costs taxed against Appellee.

Mary DeGenaro

Joseph W. Winkler

Clyde White



505.19 VICIOUS DOGS.

(a) No person owning or harboring or having the care of a vicious dog shall suffer or permit such animal to go unconfined on the premises of such person.

(b) No person owning or harboring or having the care of a vicious dog shall suffer or permit such dog to go beyond the premises of such person unless such dog is securely leashed or otherwise securely restrained.

(c) Definitions.

(1) A vicious dog is "unconfined" as the term is used in this section, if such dog is not restrained by a secure fence, other secure enclosure or any other security device which effectively prevents such dog from going beyond the premises of the person described in subsection (a) hereof.

(2) "Vicious dog" as used in this section means:

A. Any dog with a propensity, tendency or disposition to attack, to cause injury to or to otherwise endanger the safety of human beings or other domestic animals; and

B. Any dog which attacks a human being or another domestic animal without provocation.

(d) Subsections (a) and (b) hereof are necessary controls on the unrestrained activity of vicious animals which threaten the safety and pleasantness of streets, parks, sidewalks, yards and all areas of the City and lack of knowledge or lack of intent is not a defense to a violation thereof.

(Ord. 82-196. Passed 6-2-82.)

(e) Whoever violates this section is guilty of one of the following:

(1) Misdemeanor One: If the dog causes injury to any person;

(2) Misdemeanor Four: If the dog does not otherwise cause injury to any persons.

(3) When any person is found guilty of a subsequent offense, such person is guilty of a misdemeanor of the third degree.

(Ord. 01-240. Passed 7-25-01.)