

IN THE SUPREME COURT OF OHIO

STATE OF OHIO / :
CITY OF YOUNGSTOWN, : Case No. 2008-1460
 :
Plaintiff-Appellant, : On Appeal from the Seventh District
 : Court of Appeals, Mahoning County,
-vs.- : Case No. 07 MA 102
 :
JAMMIE TRAYLOR, :
 :
Defendant-Appellee. :

MERIT BRIEF OF APPELLANT, CITY OF YOUNGSTOWN

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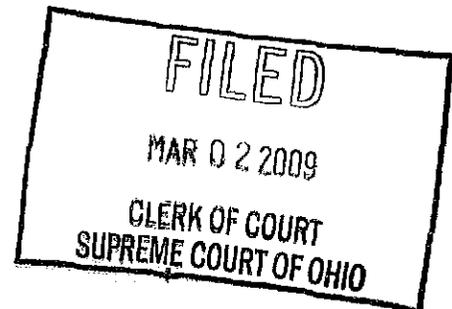


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STATEMENT OF FACTS, THE CASE, AND INTRODUCTION

On April 18, 2007, David Roch was walking his dog "Maggie" near the intersection of Canfield Road and Old Mill Drive in Youngstown, Ohio. (Trial Transcript, May 25, 2007, at 14-15; 38-39) (Hereinafter, "Tr. ____") This area is a tranquil spot of the Mill Creek Metro 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 Italian Mastiff/Cane Corso dogs, one male and one female. (Tr. 14; 41) The dogs were not accompanied by anyone. Later estimates put the weight of the male at approximately 170 to 185 pounds. (Tr. 96) The female was slightly smaller but was still estimated at approximately one hundred and forty pounds. "Maggie" is a wire fox terrier that weights sixteen pounds. (Tr. 38)

Mr. Roch restrained "Maggie" and attempted to calm the larger dogs. The larger dogs were becoming increasingly agitated and aggressive. (Tr. 17; 43) One of the dogs attacked "Maggie" and when Mr. Roch attempted to extricate his dog from the attack, he was attacked. He sustained a gaping wound to his hand. (Tr. 19-20; 44; 48) Both dogs were jumping on him in an attempt to continue the attack on "Maggie." (Tr. 19-20)

Mr. Roch was saved from the attack when a nearby samaritan allowed him into her garage. She compressed the wound in an effort to curb the bleeding and the police were summoned. (Tr. 52) "Maggie" ran from the attack sustaining a cut to her ear that required stitches and a minor bite wound to her back. (Tr. 50) Once removed from the

scene by Rural-Metro Ambulance, Mr. Roch underwent surgery that morning to repair his left hand and wrist. (Tr. 48)

Officer Carolyn Grimaldi of the Mill Creek Park Police Department (MCPD) was the first officer on scene. She observed the large dogs upon her arrival and exited her cruiser with her shotgun. (Tr. 75-76) One dog turned towards her and approached her position. (Tr. 78) The dog charged her and she shot it twice, killing it. (Tr. 78-79) She testified that she felt she had no choice but to shoot the dog knowing that it had already attacked someone. (Tr. 78-79) The second dog turned and ran after the female was shot and killed. (Tr. 80)

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 yards away from his position. The dog began moving towards him at a fast pace. (Tr. 105) He shot the dog three times, killing it. (Tr. 106) He testified that he harbored concerns for public safety and his own safety at the time he had to shoot the dog. (Tr. 105-106)

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 east of the intersection where the attacks occurred.

The officers proceeded to 919 Canfield Road and made contact with Mr. Traylor. (Tr. 83-84) Mr. Traylor confirmed that he had two dogs that were missing. (Tr. 94) When shown the remains of the dogs, he admitted to owning the female but did not admit to owning the male.¹ (Tr. 84)

On May 1, 2007, complaints were filed against Mr. 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 *State v. Cowan (2004)*, 103 Ohio St.3d 144 and the Sixth District's decision in *Toledo v. Tellings, 2006-Ohio-975*² in an attempt to argue that YCO 505.19 was unconstitutional. Mr. Traylor presented no evidence of the temperament or disposition of the dogs at this hearing. The motion was denied.

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

¹ Witnesses testified that they had seen Mr. Traylor with both dogs several weeks before the attack. (Tr. 10-13; 84) Mr. Traylor admitted at his sentencing hearing that he owned the female and the male was present at his home for breeding purposes. (Tr. 170)

² At the time of the hearing, this Court had not yet issued its decision in *Tellings*. On August 1, 2007, this Court issued *Toledo v. Tellings (2007)*, 114 Ohio St.3d 278. That decision reversed the appellate court's

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 to the Seventh District 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.

The City of Youngstown filed a Notice of Appeal and Memorandum in Support of Jurisdiction to this Court on July 25, 2008. (The Notice of Appeal is attached hereto as Appendix A.) This Court accepted jurisdiction on December 3, 2008. The record on appeal was transmitted from the Mahoning County Clerk of Court on December 16, 2008 and filed with this Court on January 2, 2009. Appellant submitted a Stipulated Extension of Time on February 10, 2009.

decision and found no violation of procedural due process as related to dogs classified specifically as pit bulls.

LAW AND ARGUMENT

APPELLANT'S PROPOSITION OF LAW

A local ordinance related to the regulation of unrestrained dogs that harm persons or domestic animals that does not permit an unreviewable, unilateral decision by a state actor does not violate procedural due process where the state must prove the viciousness of the dog as an element of the offense.

At the core of this appeal is the concept of procedural due process. The right to procedural due process is required by the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution. *State ex rel. Plain Dealer Publishing Co. v. Floyd* (2006), 111 Ohio St.3d 56, ¶ 45. Procedural due process requires the government to give reasonable notice and a meaningful opportunity to be heard to those whose interests in life, liberty, or property are adversely affected by a governmental action. *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 85; *Crist v. Battle Run Fire Dist.* (1996), 115 Ohio App.3d 191, 197. The opportunity to be heard must occur at a meaningful time and in a meaningful manner. *Floyd* at ¶ 45. "Procedural due process also embodies the concept of fundamental fairness." *Sohi v. Ohio State Dental Bd.* (1998), 130 Ohio App.3d 414, 422. If any question of fact or liability be conclusively presumed against him, such is not due process of law. *Williams v. Dollison* (1980), 62 Ohio St.2d 297, 299.

The legal framework that led to the instant appeal began in 2004 with this Court's decision in *Cowan*. In that case, this 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 and convicted under various sections of R.C. 955.22.

In upholding the appellate court's reversal of the conviction, this Court in a 4-3 decision 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*. 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. In that case, this 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.

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.

From the inception of this prosecution, the City of Youngstown (Hereinafter, "Appellant") has taken the position that Youngstown Codified Ordinance (YCO) 505.19 fell outside the purview of the ruling in *Cowan* and its progeny as it was sufficiently

dissimilar to R.C. 955.11 and R.C. 955.22. (A copy of the full text of the Ordinance is attached hereto as Appendix B.) In the pre-trial motion to dismiss, Mr. Traylor's (Hereinafter, "Appellee") defense attorneys primarily looked to *Cowan* and argued that the ordinance operated to deprive Appellee of his procedural due process rights as he had no pre-trial opportunity to contest the determination that his dogs were vicious. In recognizing Appellant's position and rejecting Appellee's 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 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. ...

(A copy of that Entry in its entirety is attached hereto as Appendix C.)

Appellee presented no evidence at that hearing as to the temperament or disposition of the dogs.³ Likewise, Appellee presented no such evidence at the trial itself.

Following his conviction in the municipal court, Appellee pursued his case in the Seventh District Court of Appeals. On June 13, 2008, that court rendered a decision reversing the conviction and discharging Appellee. *State v. Traylor (June 13, 2008), 07 MA 102, 2008-Ohio-2971*. (A copy of that Journal Entry and Opinion is attached hereto as Appendix D.) The Seventh District engaged in a brief recitation of the facts and procedural history of the underlying case, then attempted to narrow and define Appellee's primary issue on appeal. The Seventh District identified the central problem with the

³ Counsel for Mr. Traylor did not include the transcript of the hearing on the motion to dismiss in the record on appeal to the Seventh District.

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.

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 you do not permit your dog of any breed to be roaming the neighborhood so that it might harm someone or something.

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 harborer has no

opportunity to contest the determination that causes them to incur the obligations and restrictions in the statute. Before *Cowan*, someone could, under R.C. 955.22, be required to utilize a locked pen or fenced yard, have a special leash or muzzle, and spend money on a liability insurance policy just because a deputy dog warden said that you had a vicious dog. *Cowan* and, to a lesser extent, *Tellings*, are limited to those situations where such unilateral decision making causes someone to incur obligations and restrictions or expend money without the chance to challenge it. That was never the case under YCO 505.19.

Such is not the case here. Appellee's dogs were never labeled "vicious" by anyone. They were alleged to be vicious in a criminal complaint. Nothing in YCO 505.19 empowers or permits any state actor to make a unilateral decision that could place restrictions upon the owner of a dog or otherwise encumber an individual's property rights without procedural due process. Any determination that could affect an individual or the individual's property rights is made via a charging instrument and brought before a trial court. Even then, YCO 505.19 places no obligations upon the owner of the subject animal. It is not until the prosecuting authority has met its burden of proof beyond a reasonable doubt that the individual's property rights can be affected. All along the way, the individual has been put on notice and the individual has been given a meaningful opportunity to contest any allegation made by the state or an officer acting on behalf of the state. A charged individual has been afforded the right to the assistance of counsel at all stages and received the benefit of every facet of due process, including the opportunity to contest the state's allegation that the dog is a vicious animal. This is exactly what Appellee faced.

Appellant is not alone in this legal conclusion. Almost contemporaneous with the Seventh District's decision in *Traylor*, other appellate districts were preparing to address the very question presented before this Court. In *Beavercreek v. Ride* (Dec. 21, 2007), 2nd Dist. App. 06CA0082, 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* (Nov. 6, 2007), 10th Dist. App. 07AP-33, 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 Tenth District recognized that 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*. Appellee was afforded his due process rights by way of a trial in which Appellant 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 jury.⁴ It was only after the jury rendered its verdict of guilty that the future status of the dogs was affected and only then that Appellee could have been required to incur additional obligations had the dogs lived. Most importantly, however, is the fact that had Appellee’s dogs never attacked someone and had he never been charged, YCO 505.19 imposed no additional obligations upon him. The ordinance, unlike R.C. 955.22, is silent as to these obligations. Accordingly, YCO 505.19 does not violate procedural due process in the manner expressly rejected in *Cowan*.

⁴ 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.

(Tr. 145-148)

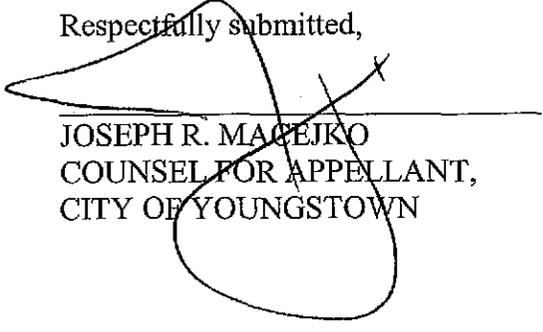
CONCLUSION

The concept of procedural due process ensures fundamental fairness in all legal proceedings and, at a minimum, requires notice and a meaningful opportunity to be heard. There was nothing unfair about the trial court proceedings and, in fact, they comported with every other criminal trial conducted in this State. Appellant did not benefit from any improper presumption or pre-determination as to the issue of “viciousness” and was held to its burden of proof beyond a reasonable doubt throughout the proceedings.

The legal analysis in this case went awry when the Seventh District Court of Appeals issued its opinion overturning the convictions and likening this situation to that presented in *Cowan*. To put it simply, the Seventh District misapplied that decision and lost its way. It is up to this Court to correct that miscarriage of justice and Appellant is grateful that this Court has accepted this case for review.

Based upon the foregoing, Appellant prays that this Court reverse the decision of the Seventh District Court of Appeals, reinstate Appellee’s convictions, and permit the City of Youngstown to once again use its constitutional ordinance to protect the welfare of its citizens and visitors.

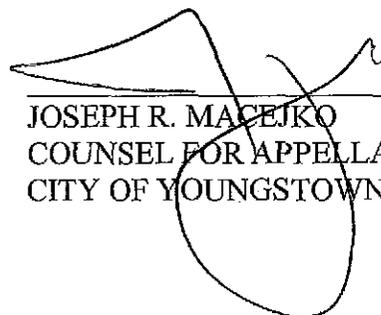
Respectfully submitted,



JOSEPH R. MACEJKO
COUNSEL FOR APPELLANT,
CITY OF YOUNGSTOWN

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March 2009, a copy of the foregoing Merit Brief was served upon Counsel for Appellee, James E. Lanzo, at 4126 Youngstown-Poland Road, Youngstown, Ohio 44514, via regular U.S. mail.



JOSEPH R. MACEJKO
COUNSEL FOR APPELLANT,
CITY OF YOUNGSTOWN

APPENDICES

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- D. Judgment Entry and Opinion (June 13, 2008), 07 MA 102, *State of Ohio v. Jammie Traylor*.

IN THE SUPREME COURT OF OHIO

STATE OF OHIO /)
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DEFENDANT-APPELLEE.)

CASE NO. 08 - 08-1460

An Appeal from Case No. 07 MA 102,
Mahoning County Court of Appeals,
Seventh Appellate District.

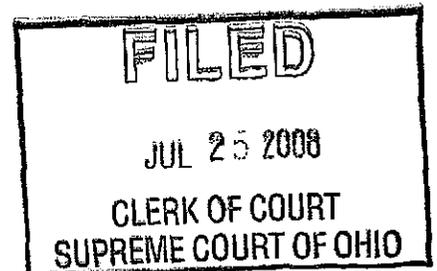
NOTICE OF APPEAL OF APPELLANT, CITY OF YOUNGSTOWN

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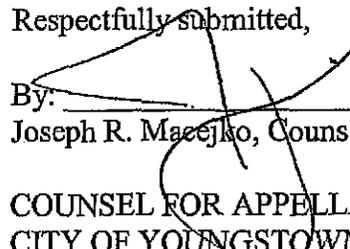


Notice of Appeal of Appellant, City of Youngstown

Appellant, City of Youngstown, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Mahoning County Court of Appeals, Seventh Appellate District, entered in Court of Appeals case number 07 MA 102 on June 13, 2008.

This case raises a substantial constitutional question and is one of public or great general interest.

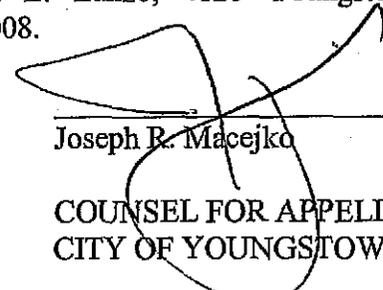
Respectfully submitted,

By: 
Joseph R. Macejko, Counsel of Record

COUNSEL FOR APPELLANT,
CITY OF YOUNGSTOWN

Certificate of Service

I hereby certify that a copy of this Notice of Appeal was sent via ordinary U.S. mail to counsel for appellee, James E. Lanzo, 4126 Youngstown-Poland Road, Youngstown, Ohio 44514 on July 24, 2008.


Joseph R. Macejko

COUNSEL FOR APPELLANT,
CITY OF YOUNGSTOWN

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.)

IN THE YOUNGSTOWN MUNICIPAL COURT
MAHONING COUNTY, OHIO

CITY OF YOUNGSTOWN)
STATE OF OHIO)
PLAINTIFF)

VS.)

JAMMIE TRAYLOR)
DEFENDANT)

CASE NO. 07CRB 1372

JOURNAL ENTRY

SARAH BROWN-CLARK
CLERK OF COURT

2007 MAY 24 PM 12: 05

MUNICIPAL COURT
YOUNGSTOWN OHIO
FILED

This cause is before the Court on defendant's motion to dismiss and the State's response thereto.

The defendant is charged with violating C.O. 505.19, entitled "Vicious Dogs." The defense challenges this ordinance as being unconstitutional.

The defense relies upon *State v. Cowan*, (2004) 103 Ohio St.3d 144 and *Toledo v. Tellings*, (Sixth Dist. Ct. App. No. L-04-1224, decided March 3, 2006) in support of its position that the ordinance at issue is unconstitutional. In those cases, the Courts found the vicious dog statute unconstitutional as applied because it labeled dogs as "vicious" by virtue of the breed of dog, alone. Defendants had no pretrial opportunity to challenge that label or to show that because of training, behavior, or history, the particular dog was not vicious.

In the case at bar, the defendant is charged under the vicious dog ordinance **not** because of the breed of his 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 reasonable doubt, e.g. that the dogs attacked a human being or another domestic animal without provocation. Hence, the facts of this case are distinguishable from *Cowan* and its progenies.

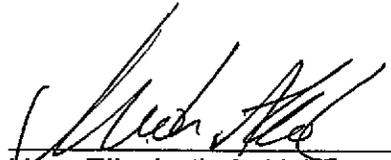
Defendant's reliance on *Highland Heights v. Manos* (Eighth Dist. Ct. App. No. 84238, decided November 10, 2004) is misplaced. There, the Court blindly followed *Cowan*, even though under the facts of that case, *Cowan* did not apply.

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. Due Process does not require or permit a defendant to challenge an element of this offense in a pretrial setting.

IT IS SO ORDERED.

5.24.07
Date



Hon. Elizabeth A. Kobly

cc: Attys. DeFabio, Lanzo, and Hartup

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

CITY OF YOUNGSTOWN,)
&) CASE NO. 07 MA 102
PLAINTIFF-APPELLEE,)
)
- 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 White

CLERK OF COURTS
MAHONING COUNTY, OHIO
JUN 13 2008
FILED
ANTHONY VIVO, CLERK



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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.

APPEARANCES:

For Plaintiff-Appellee:

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City Prosecutor
Attorney Peter C. Klimis
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For Defendant-Appellant:

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JUDGES:

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

JUN 13 2008

FILED
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:

{¶126} "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.

{¶127} 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.

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

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

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

{¶131} 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.

{¶132} 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.