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NO. 72622-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

KING COUNTY, ET AL.,

Respondents,

v.

CLORRISSA ESTRELLA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN CHUN

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

NANCY A. BALIN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W400 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 477-1120

ORIGINAL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Washington State:

Other Jurisdictions:

Statutes

Other Authorities

A. ISSUES PRESENTED

1. HAS APPELLANT FAILED TO SHOW THAT HER DUE PROCESS RIGHTS WERE VIOLATED DURING HER HEARING BEFORE THE BOARD OF APPEALS?

2. HAS APPELLANT FAILED TO PROVE ANY ERROR BELOW WITH REGARD TO THE LOWER BODIES' INTERPRETATION OF KING COUNTY CODE 11.04.230?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

On the afternoon of December 23, 2013, Mr. Ron Weston, a retired active-duty United States Coast Guard officer, left his house on his Vashon Island acreage to go feed his goats. VRP 13:22-25, 7:13. The goat area is enclosed by a 5' foot wire fence. VRP 7:18.

When he got there, he saw a dead goose and, instead of seeing his beloved goats, he saw two dogs inside the goats' enclosure - and he got a "very sinking feeling." VRP 7:14-16. The demeanor of the dogs did nothing to allay his fears – they were "junkyard dog ballistic, pogo-sticking like they wanted to get me." VRP 7:18-20, 7:25-8:1. They were vicious and aggressive. VRP 23:1.

Also, to his horror, Mr. Weston saw the body of a goat near the fence. VRP 7:22-24.

Fearfully searching for any living members of his herd of goats, Mr. Weston finally found four or five of them huddled in a corner, watching the dogs, clearly terrified. VRP 8:4-6.

Mr. Weston found a second dead goat, and then, after continued searching, a badly-injured goat under the stoop. VRP 8:10, 13; VRP 8:14-16.

Mr. Weston watched as one of the two invading dogs squeezed back under the gate and started up his driveway. VRP 8:20-25. He then returned to his house, where he described the scene to his son as like a "war zone." VRP 24:15.

All Mr. Weston could think of was trying to stop the threat to the rest of his animals; he was not even conscious whether the remaining dog, still roaming in the goat enclosure, was barking or growling. He feared that that dog would find his way back to where the terrified surviving goats huddled. VRP 9:11-14. So he leveled the shotgun at the remaining intruder and killed the dog instantly and cleanly with his second shot. VRP 9:20-21. And then he started trying to locate the dogs' owner, whereupon he learned that she, Appellant, had been searching for her dogs for two hours. VRP 10:21-11:9.

The Westons, devastated by their losses, were able to identify the dogs which had slaughtered their animals when they saw pictures of them online, posted by plaintiff. VRP 12:8-13, 25:23–26:3. Moreover, Mr. Weston recognized these dogs as the same ones which, the previous summer, had chased his geese and actually caught one by the tail, pulling out a mouthful of feathers before the bird scooted under the fence to safety. VRP 15:6-18.

Meanwhile, plaintiff was already aware that both of her dogs were missing. In fact, that was the second time *that day* her dogs had escaped. First, she arrived home from a job around 1:45 to learn from her roommate that the dogs had gotten to but he had recovered them. VRP 37:15-18. When she went to where they should have been, it became immediately apparent that they had gotten out yet again, and Appellant then "panicked." VRP 37:18-19.

When Mrs. Weston received a return call from Appellant at 4:17 p.m., after earlier leaving her a message about her dogs, Appellant told her that she had been *driving around looking for her dogs for two and a half hours*. CP 23, "Exhibit R-2, Statement of Walter Weston." A few minutes later at 4:26 p.m., while Mrs. Weston was speaking to Appellant's boyfriend (at Appellant's request), she learned that Cortana had <u>just</u> returned home. <u>Id.</u>

C. ARGUMENT

1. THE BOARD OF APPEALS PROVIDED SUFFICIENT TIME FOR THE HEARING OF THIS CASE.

Appellant complains that she was unable to put on her case in only 15 minutes, despite the fact that she did not carry the burden of proof at the hearing. Under the circumstances of this case, that would have been sufficient time, if Appellant had more wisely and succinctly focused her defense.

The cases she cites do not constitute mandatory authority in Washington, and they present such different facts that they are not even instructive, let alone persuasive.

In Hernandez-Canton v. Miami City Com'n, 971 So. 2d 829 (2008), plaintiff complained that the defendant municipality provided only eight minutes per side during public hearings of its nine Design Review Criteria. Some of the criteria comprised multiple subdivisions, and the commission was called upon make 25 separate findings relating to the criteria and their various subdivisions. The court held that "under the circumstances of this case," the eight minutes allotted was not sufficient time for the objectors to argue their positions.

Appellant claims that this case stands for the proposition that imposing a time allotment violates due process. That is a much too simplistic description of that court's holding.

In this case, the burden of proof was upon the respondent County, which easily fit its case in chief into its fifteen minutes, proving the correctness of their actions to the Board of Appeals through concise witness testimony and the use of exhibits, which latter the Board of Appeals was free to peruse at its leisure after the hearing.

Importantly, before the Board of Appeals hearing, Appellant filed a detailed, fully-researched and –argued brief. As such, she could have chosen to expend her time during the hearing to highlight just the parts of the brief she wanted to emphasize.

Additionally, it is clear from the record below that Appellant spent part of her time to reiterate information contained in the declarations that she also had filed, along with the brief. While this was her strategic decision to make, it took time away from other things, such as live witness testimony.

In another out-of-jurisdiction case cited, Maloney v. Brassfield, 251 P.3d 1097 (2010), the Colorado Court of Appeals discussed what it called "clock trials," where the trial court actually

kept some sort of stopwatch to exactly track the time each party had taken toward its pre-announced limit, a method that is condoned in the federal courts and which is subject to an abuse of discretion standard of review. Maloney at 1102.

The Colorado court found that the complaining party would have been able to try its case within its time limit, but for the "unusually high degree of repetition" and "overlap and duplication among witnesses." Maloney at 1101 (cits. om.).

Notably, Appellant quoted only two short paragraphs from Maloney, omitting the specific factors considered by other courts when considering whether time limits in a case are adequate, including:

> • Whether the court's imposition of time limits or adjustment of time limits resulted in unfair surprise;
>
> • Whether the court allowed the parties to make their own strategic decisions;
>
> • Whether the court adequately communicated the elapsed or remaining time;
>
> • Whether the time limits became impractical because of unexpected developments;
>
> • Whether the court demonstrated flexibility in response to unexpected developments; and
>
> • Whether the complaining party made a sufficiently detailed proffer in requesting extra time.

Maloney at 1103.

The Maloney court did not find any abuse of discretion. The trial court had made an informed analysis, after reviewing the witness lists and proffered testimony, and noted that it had in front of it two experienced, skilled advocates. In this case as well, both parties filed detailed briefs before their hearing in front of the Board of Appeals, and both attorneys were very experienced and, certainly on behalf of Appellant, quite skilled.

Here, all of the factors weigh in favor of affirmance of the Board's decision. The parties were aware that there would be time limits on this case, and in fact the time limits set were more expansive than normal. VRP 4:17-20, 5:16-18; 5:1-3. The Board of Appeals did not interfere with the parties' strategic decisions regarding whom to call or what exhibits to offer. There were no "unexpected developments" as might occur in a trial, at least none that were stated, and hence there was no flexibility to be tested. Finally, while Appellant did make a proffer about the additional testimony she wished to offer, she already had spent much of her time on matters not necessary to defend her dogs.

Appellant also cites a University of San Francisco Law Review article, The Hourglass and Due Process: The Propriety of

Time Limits on Civil Trials, 26 U.S.F. L. Rev. 237 (1992). Notably, the cases the article discussed either comprised very complicated civil trials (i.e., antitrust actions, bankruptcies, personal injury and civil rights cases) or complex criminal cases (i.e., criminal tax fraud). What these cases had in common was a "vast quantity of evidence" and great complexity, or they comprised criminal trials with their attendant high stakes – and most of those *with juries*.

And even in those cases, the article described judges' "repeated cautions to exercise 'self-restraint'" and exhortations to not "save the best [evidence] for last," as well as their frustration with the "excessive extent of details." The Hourglass and Due Process at 242. And this was an *antitrust* case. Judges also have cited their heavy caseloads, lack of additional judges, and their obligations to other litigants waiting for their day in court. The Hourglass and Due Process at 243.

Importantly, the article discussed the findings that parties objecting to the time limits had failed to show that they had been prejudiced by the limitations. The Hourglass and Due Process at 248. Appellant complained that her allotted time was insufficient, but she failed to show that being granted additional time would have altered the Board's decision.

As the law review article cited by Appellate quoted District Judge Bertelsman as saying in United States v. Reaves, 636 F. Supp. 1575 (E.D. Ky. 1986), "Somehow the unfortunate trend has arisen among attorneys to make almost every case a BIG CASE." Reaves at 246 (emphasis in original).

While the Board of Appeals is a quasi-judicial body, what it decides in these cases is whether a civil citation and/or its attendant fine should be upheld. Under its own rules, the Board of Appeals allows for legal representation, direct and cross-examination, briefing, exhibits and legal argument. Attachment to Appellant's Brief.

As important as it is to her owner whether Cortana gets to roam the island unconfined, the amount of time allowed Appellant to present her objection to King County's decisions about the dog, after the Weston' livestock and poultry were killed, was sufficient. The amount of process due here has no comparison to that required either in a civil trial or, most certainly, a criminal trial, where the interests at issue respectively are so much greater.

Even Appellant's cited cases within this Court's jurisdiction do not support her argument.

In General Signal Corp. v. MCI Telecommunications Corp., 66 F.3d 1500 (1995), the 9th Circuit held that a trial court may impose reasonable time limits on presentations at a trial. While the court acknowledged that rigid hour limits are disfavored, the court looked more kindly upon them when the amount of the time given was reasonable, the parties regularly were informed how much time they had left, and the court was willing to add a little bit more time at the end if necessary. General Signal Corp. at 1508. Importantly, in that case, the court found that one of the lawyers put on duplicative evidence and moved at a "leisurely" pace, and he repeatedly was warned by the court to save time for cross-examination. General Signal Corp. at 1509. In other words, GSX "mismanaged" its case in chief. General Signal Corp. The other lawyer, in contrast, condensed his case to fit within the time constraints. General Signal Corp.

2. THE COURT PROPERLY INTERPRETED KCC 11.04.230(H)

Appellant claims that the one incident (the killing of the livestock in their own enclosure) does not suffice b/c of the wording of the ordinance, which ostensibly uses both past tense ("has

exhibited") and present tense ("constitutes"). A plain reading of the ordinance indicates otherwise.

Addressing first subsection (H), it is obvious that any animal which has exhibited vicious propensities at some time before the moment that the owner was cited, and still constitutes a danger to the safety of persons or property because of that behavior as shown at some time in the past, is a nuisance. In contrast, any animal which once exhibited vicious propensities but does not still constitute a danger would not qualify as a nuisance, such as an animal which before the citation has been rendered lame, for instance, or has been moved out of the jurisdiction. Appellant's dogs were neither.

At the time the elder Mr. Weston discovered his dead animals, both of Appellant's dogs were inside the enclosed scene, on the Weston property, of the carnage. Godric continued to be a danger until he was shot by Mr. Weston. Cortana continues to constitute a danger because she is still alive and could be involved in another such attack.

Some time passed between Godric and Cortana killing the Westons' livestock and Godric being shot by Mr. Weston. Throughout that time period, no matter how short it was, Godric

constituted a danger, right up until the moment of his death. Cortana still does. The reviewing court did not err.

Appellant also claims that the rule of lenity applies here, because the civil violation also is a crime, citing State v. Ankney, 53 Wn. App. 393 (Div. I 1989). In Ankney, this Court reversed the trial court's finding that King County had violated due process by permitting animal control authorities to punish violations by either imposing civil fines or filing cases charging criminal misdemeanors. Interestingly, this 25-year-old case cited to the exact language in the exact ordinance that Appellant now claims is ambiguous, but no allegation of ambiguity was made in Ankney and this Court made no such finding.

Moreover, the holding in that case does not support Appellant's argument. This Court actually held that a municipality does not violate due process when it imposes a civil penalty based on a properly-proved violation of KCC 11.04.230(H), even though (i.e., "notwithstanding the fact that") the proven conduct also has been criminalized, citing the holding in Yakima Cy. Clean Air Authority v. Glascam Bldrs., 85 Wn.2d 255, 260, 534 P.2d 33 (1975). Ankney at 397.

Moreover, this Court analyzed the exact phrase Appellant takes issue with here, definitively stating that "the ordinance is sufficiently definite." Ankney at 400.

There is no cause for applying the rule of lenity here because the statute is not ambiguous; there is not another reasonable interpretation that that explained above. Additionally, there is no authority for appellant's contention that the rule of lenity is intended to be a "tie-breaker." Brief at 17.

3. APPELLANT WAS NOT CITED FOR HER DOGS' VICIOUS DESTRUCTION BECAUSE OF "GUILT BY ASSOCIATION."

Appellant claims that there is no direct evidence of viciousness, because there was no eyewitness to the maulings while they were occurring. She alleges that the County's findings constitute "guilt by mere association!" She is incorrect. There was direct evidence of the dogs' viciousness, right in that goat enclosure.

Cortana and Godric were not just "associated" with each other or with the dead animals. They both were inside that same enclosure at the same time with both the dead and the petrified still-living goats on the Westons' property; they were pets in the same household; and they were owned by the same person: Appellant.

Additionally, Appellant concedes that there is no mandatory authority for this argument, citing New York and Delaware cases. Those cases do not support her argument.

In People v. Noga, 168 Misc.2d 131 (N.Y.App.1996), at issue was an order to destroy the dog in question, and there much more was at stake than here, where Cortana is very much alive and there is no order to the contrary. Additionally and more important, there was eyewitness testimony in Noga that the owner had been seen with that dog and a second one, that same day, so there was some question as to which dog was responsible. Such is not the case here. Both of Appellant's dogs were in the same enclosure as the dead goats.

In Hobbs v. Kent Cy. SPCA, Inc., 2011 WL 773448 (No. CPU5-10-001252), an unpublished Delaware case[1], the order at issue similarly was to have the dog destroyed. During trial, the victim never testified. More importantly, at no point had the victim *ever identified the subject dog* as the one which caused the attack; instead the animal control officers did, based solely on the location the reporting party said a dog had exited from. This may have been enough, except that a guest in the home had been seen

[1] Despite argument and posited authority to the contrary, there was no authority provided allowing for its citation here.

walking three dogs, and there was no indication that any of those was the dog "fingered" as the attacker. As such, the case was reversed for insufficient evidence.

Here, there are multiple eyewitnesses who saw Appellant's dogs inside the enclosure with the Westons' dead animals. While the elder Mr. Weston, in the time period close to his shocking discovery of his dead animals, first posited that this was the same dog that had killed a neighborhood cat some years ago, he later realized that he had been mistaken and admitted that, several times, including during the hearing.

Moreover, the elder Mr. Weston recognized the dog he had seen with his own eyes (not to mention shot, and then moved to his driveway) in the photograph Appellant posted. Appellant concedes that both of those dogs were hers, and there is no plausible evidence of any other dogs the killers could have been, and nothing but speculation about what other dogs it could have been (including a completely unfounded and speculative attempt to blame the Westons' own livestock-protection dog).

4. THE NOVEL THEORY OF A SUGGESTIVE CROSS-SPECIES LINEUP IS NOT PERSUASIVE.

Appellant claims that her dogs were misidentified as the culprits in this livestock massacre because a suggestible cross-species lineup. While novel, there is no authority for this proposition in an animal control or any non-human-suspect case, as Appellant concedes.

The only cases that exist (let alone constitute mandatory authority) for this sort of proposition are those involving humans on trial for crimes, i.e., cases with the highest possible stakes: human liberty. And some of those have been recognized as abrogated[2].

Wade was a case about the Sixth Amendment's guarantee of the assistance of counsel to a defendant, and whether that inheres during a line-up. State v. Burrell, 28 Wn. App. 606 (1981). This related to the photographic identification procedure as presented by police, not on social media.

With regard to State v. Jaime, 168 Wn.2d 857 (2010), Appellant cited the concurring opinion for the proposition that cross-species identification is even more problematic than cross-racial. In Jaime, the issues with eyewitness identification included dim lighting inside the house and darkness outside, the witness's

[2] "*Wade and Gilbert* are has-beens; they are yesterday's stars. ... *Wade* and *Gilbert* [are] largely relegated to the sidelines." Wood v. State, 7 A.3d 1115, 1122 (Md. App. 2010).

(understandable) focus on the gun rather than the perpetrator, the witness's stress after being told that everyone at the scene was going to be killed and, finally, cross-racial identification compounding the only-vague descriptions of the shooter. Jaime at 869-70.

In this case, Walter Weston did not just see Appellant's dogs on the website she publicized (with pictures). He saw Cortana herself running from the goat enclosure, while Godric stayed inside. And Regional Animal Services personnel did not "finger" Godric and Cortana, the eyewitness Ron Weston identified them, Godric whom he shot within his animals' enclosure and Cortana who ran out and up his driveway.

Appellant has failed to make a case that the identification of the marauding dogs was faulty in any way. The cases she cited related to humans identifying other humans, and their facts are so attenuated to the facts under review as to not necessitate any further discussion here.

5. THE COUNTY WAS NOT REQUIRED TO PROVE THAT APPELLANT KNEW OF HER DOGS' VICIOUS PROPENSITIES.

Appellant claims that, without a finding that she ordered or intended that her dogs attack the Westons' animals, or that she

knew or should've known that, if she allowed them to get out, they would kill, she cannot be cited under KCC 11.04.230, citing the Atherton doctrine. She is mistaken.

Appellant cites State v. Bash, 130 Wn.2d 594 (1996), for this proposition. The Bash case, which has been disapproved in several instances, is distinguishable for several reasons.

In Bash, the defendant was charged under RCW 16.08.100(3), a criminal statute and a felony, after his two pit bulls attacked and killed an elderly man in a wheelchair, and then seriously injured the neighbor trying to save him. The Supreme Court analyzed whether strict liability should inhere.

Under the scheme described in Bash, the lighter the possible punishment, and the more serious the crime, the more likely the legislature intended to impose criminal liability without the need to prove fault. Bash at 608-09. In Bash, the crime charged was a Class C felony, with imprisonment possible.

In contrast, here there was no crime charged at all, only a civil citation and associated penalty. Appellant concedes those critical distinctions from the Bash case, explaining that strict liability is not favored "where imprisonment is possible." Brief at 24. There was no possibility of imprisonment here. The fact that a

misdemeanor *could have* been charged does not raise this situation to the level of that seen in Bash. Had Appellant's dogs killed Mr. Weston rather than just a bunch of his livestock, she very well may have been charged criminally, as was the owner of the dogs who killed the elderly disabled man. They didn't, thankfully, and she wasn't.

While important, the only constitutional right at issue in the case at bench is money. Finally, if this really was the one and only time Cortana got out of her fenced yard, and Appellant has no plans to allow her to get out again, the confinement order imposes no burden at all.

Additionally, the Washington Supreme Court in Bash said:

> The seriousness of the possible harm to the public arguably weighs in favor of a strict liability offense. Other things being equal, the more serious the consequences to the public, the more likely the legislature meant to impose liability without regard to fault, and vice versa.

Bash at 609-10.

As such, the Board of Appeals was not required to find that Appellant had the appropriate *mens rea* for her dogs' actions. Given the low level of punishment (money sanction and confinement of the dog) and severity of the "charge" (no criminal

charge at all, just civil citation and Notice and Order of Confinement), there is no error in finding that the ordinance at issue constitutes one of strict liability.

6. APPELLANT IS NOT ENTITLED TO ATTORNEYS' FEES.

The general rule is that attorney fees will not be awarded for costs of litigation unless authorized by contract, statute, or recognized ground of equity. City of Seattle v. McCready, 131 Wn.2d 266, 931 P.2d 156, 160–61 (1997). With regard to the last possible exception under the American rule cited above, the Washington Supreme Court has recognized only four major equitable exceptions: (1) the common fund exception; (2) actions by a third person subjecting a party to litigation; (3) bad faith or misconduct of a party; and (4) dissolving wrongfully issued temporary injunctions or restraining orders. McCready at 160. The Court must narrowly construe these exceptions. McCready at 162. See also Microsoft Corp. v. Motorola, Inc., 963 F. Supp. 2d 1176, 1192 (W.D. Wash. 2013).

Appellant's unsupported belief of her "catalytic impact" or not, there has been no constitutional violation here, and Appellant

has not cited any authority that would provide for attorneys' fees, even if she had prevailed. This request should be denied.

D. CONCLUSION

The Superior Court reversed the Board of Appeals and ordered a new hearing with more time allowed. As such, Respondent was prepared to re-present the case, although it respectfully did not agree with the lower court's ruling. In light of Appellant's appeal, however, Respondent asks this Court to find that in fact there was not a due process violation at the Board of Appeals level and that the Superior Court did not err in its interpretation of King County Code or in an of its other rulings.

DATED this 11 day of February, 2015.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By: _____
NANCY A. BALIN, WSBA 21912
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent
Office #91002