

IN THE SUPREME COURT OF OHIO

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

MERIT BRIEF OF APPELLEE, JAMMIE TRAYLOR

Joseph R. Macejko (0070222) (COUNSEL OF RECORD),
 City of Youngstown Prosecutor' Office
 26 S. Phelps Street, 4th Floor
 Youngstown, Ohio 44503.
 Tel. (330) 742-8791
 Fax No. (330)742-8794

COUNSEL FOR APPELLANT, City of Youngstown

James E. Lanzo (0069530) (COUNSEL OF RECORD)
 4126 Youngstown-Poland Road
 Youngstown, Ohio 44514
 Tel. (330) 782-8283
 Fax No. (330) 782-8433

COUNSEL FOR APPELLEE, JAMMIE TRAYLOR

FILED
 APR 01 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

STATEMENT OF AND FACTS AND OF THE CASE.....1

LAW & ARGUMENT3

RESPONSE TO PROPOSITION OF LAW3

A local ordinance that fails to give notice to a person of ordinary intelligence the particular breed of dog that one is keeping will be considered vicious for the purposes of criminal prosecution, or in the alternative fails to allow for a meaningful opportunity to be heard on the non-breed specific classification of a dog prior to criminal prosecution, violates due process of law under both the State and Federal Constitutions.

CONCLUSION11

CERTIFICATE OF SERVICE12

APPENDIX

 A. Ohio St. Const. Article I Section 1

TABLE OF AUTHORITIES

Cases	Pages
<i>State v. Cowan</i> , (2004) 103 Ohio St.3d 144.....	1,3,4,5,6,7
<i>Highland Heights v. Manos</i> (Eighth Dist. Ct. App. No. 84238, decided November 10, 2004).....	2
<i>Beavercreek v. Ride</i> , 2007-Ohio-6898.....	8,9
<i>Akron v. Rowland</i> (1993), 67 Ohio St.3d 374.....	3
<i>Toledo v. Tellings</i> , (Sixth Dist. Ct. App. No. L-04-1224, decided March 3, 2006).....	1
<i>Toledo v. Tellings</i> , 114 Ohio St.3d 278.....	7,8
Constitutional Provisions & Statutes	
Ohio St. Const. Article I Section 1.....	4
R.C. 955.11.....	5,7,9
R.C. 955.22.....	3,5,6,7,8,9
Other Authorities	
Youngstown Codified Ordinance 505.19.....	4

STATEMENT OF AND FACTS AND OF THE CASE

The case at bar involves the attack of a pedestrian and his dog by at least one of two dogs belonging to the Appellee on or about April 18, 2007. (Trial Transcript, May 25, 2007, at 14-15; 38-39) (Hereinafter, "Tr. ") On that date a Mr. David Roch was walking his dog Maggie through the Mill Creek Park area of the City of Youngstown when he was approached by two unaccompanied dogs. (Tr. 14; 41) The dogs were initially playful with Mr. Roch's dog but the situation escalated and one of the two unaccompanied dogs attacked Mr. Roach and or his dog. (Tr. 17; 43) It was subsequently discovered that the dogs belonged to the Appellee. (Tr. 83-94)

The Appellee was subsequently charged with two violations of Youngstown Ordinance 505.19 titled Vicious Dogs which reads "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...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." (Appendix B attached to Appellant's Merit Brief)

Appellee entered a not guilty plea and subsequently challenged the Ordinance on constitutional grounds. The Trial Judge held:

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.

(Appendix C attached to Appellant's Merit Brief)

After a hearing the motion was denied and the case proceeded to jury trial. The only evidence of the dogs attacking anyone or anything was the April 18th incident. (Tr. Generally) After trial the Defendant was found guilty and timely filed an appeal. The Seventh district court of appeals reversed the decision of the trial court regarding Appellee's motion to dismiss.

(Appendix D attached to Appellant's Merit Brief) The City of Youngstown filed a Notice of Appeal and Memorandum in Support of Jurisdiction to this Court on July 25, 2008. 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.

LAW & ARGUMENT

Response to Proposition of Law: A local ordinance that fails to give notice to a person of ordinary intelligence the particular breed of dog that one is keeping will be considered vicious for the purposes of criminal prosecution, or in the alternative fails to allow for a meaningful opportunity to be heard on the non-breed specific classification of a dog prior to criminal prosecution, violates due process of law under both the State and Federal Constitutions.

In the case at bar that Appellant argues that procedural due process is afforded to persons in the Appellee's position by allowing them to challenge the classification of vicious dog at trial as an element of the offense. This argument is flawed and is the same argument that this Court rejected in *State v. Cowan*, 103 Ohio St.3d 144:

[A]ppellant argues that R.C. 955.22 is constitutional because appellee was afforded the right to challenge her dogs' classification at her criminal trial. Appellee responds that the ability to challenge this label at a later criminal trial does not offer her a meaningful opportunity to be heard before her property rights have been infringed by official state action. We agree with appellee.

Id at 148.

One need only look to the Ordinance to discover that if this reading and application of such an Ordinance were to stand it would fly in the face of one of the gravamen of due process i.e. that people should be free to choose not to violate the law. *Akron v. Rowland* (1993), 67 Ohio St.3d 374, 381. The Ordinance reads 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 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.

Youngstown Codified Ordinance 505.19.

The City Ordinance as applied makes it impossible for dog owners to make an affirmative choice not to violate the law. This is because without a specified breed or prior hearing to determine the animal in question to be vicious, a dog owner could never choose not to have a vicious animal. Indeed in cases such as the one at bar where there is no prior incident to point to that would tell a person that a dog was vicious let alone an opportunity to be heard on the matter of viciousness no owner could ever know that they were owning or harboring or having the care of a vicious dog. The dog owner would be forced to either choose not to have a dog at all or simply to wait until charged with a criminal complaint and according to the Appellants reasoning be found guilty in order to determine that the dog was vicious. This is inherently unfair and creates a chilling effect on the ownership of dogs. While dog ownership as the Appellant points out is clearly subject to the state's police power this Court has previously recognized that people do indeed have a right to own dogs. *State v. Cowan* 103 Ohio St3d 144, 146. This Court has further recognized that this relationship is a special one. *Id.* Indeed the right to acquire, possess, and protect property is protected by the State Constitution. Ohio St. Const. Article I Section 1.

This Court has stated that

"Although the concept is flexible, at its core, procedural due process under both the Ohio and United States Constitutions requires, at a minimum, an

opportunity to be heard when the state seeks to infringe a protected liberty or property right. Further, the opportunity to be heard must occur at a meaningful time and in a meaningful manner. The right to procedural due process is conferred not by legislative grace, but by constitutional guarantee. Thus, while the legislature may elect not to confer a particular property right, it may not constitutionally authorize the deprivation of a property interest, once conferred, without appropriate procedural safeguards.”

State v. Cowan 103 Ohio St3d 144, 146. (citations omitted). This Court in *Cowan* applied these

tests for procedural due process to R.C. 955.22 (D) and R.C. 955.11(A)(1)(a) and (A)(4)(a)

which are nearly identical to the above quoted Youngstown City Ordinance. Note R.C.

955.22(D):

(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, harbinger, or handler of the dog, no owner, keeper, or harbinger of 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 harbinger, 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 that dog is off the premises of the owner, keeper, or harbinger, 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.

Note R.C. 955.11(A)(1)(a) and (A)(4)(a):

...(1)(a) "Dangerous dog" means a dog that, without provocation, and subject to division (A)(1)(b) of this section, has chased or approached in either a menacing fashion or an apparent attitude of attack, or has attempted to bite or otherwise endanger any person, while that dog is off the premises of its owner, keeper, or harbinger and not under the reasonable control of its owner, keeper, harbinger, or some other responsible person, or not physically restrained or confined in a locked pen which has a top, locked fenced yard, or other locked enclosure which has a top...

(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 ownership, keeping, or harboring of such a breed of dog shall be prima-facie evidence of the ownership, keeping, or harboring of a vicious dog...

This Court in *Cowan* determined that R.C. 955.22 was unconstitutional in as much as dog owners had to become criminal defendants in order to challenge a viciousness determination:

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 appellee 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).

State v. Cowan 103 Ohio St3d 144, 146. Thus a meaningful time and opportunity to challenge the designation of a dog as vicious is prior to becoming a criminal defendant not after a charge is filed and liberty and property are placed at risk. This goes back to the basic premise of American law mentioned supra i.e. that people should be free to choose not to violate the law.

By way of example the designation of persons convicted of certain sexual offenses as being sexual predators or offenders subjects them to laws and offenses that can only be perpetrated by those designated sexual predators or offenders i.e. failing to report as a sexually oriented offender. In those cases the trial for the underlying sexual offense affords a hearing prior to becoming charged with failing to report. Further one convicted of a sexually oriented offense is not simultaneously convicted with failing to report as a sexually oriented offender

because there exists no prior designation that would require reporting. Certainly dog owners could and should be afforded the same due process as those accused of sexually oriented offenses.

In *Toledo v. Tellings*, 114 Ohio St.3d 278 this Court further refined the *Cowan* ruling. In that case Tellings, a resident of the city of Toledo, owned three dogs identified as pit bulls. Tellings was charged by the city for violating Toledo Municipal Code 505.14(a) and R.C. 955.22. The Toledo Municipal Code limits ownership of vicious dogs, as defined in R.C. 955.11, or dogs commonly known as pit bulls or pit bull mixed breeds, to one in each household, and the Ohio Revised Code requires an owner of a pit bull to obtain liability insurance for damages, injuries, or death that might be caused by the dog. Tellings challenged the constitutionality of Toledo Municipal Code 505.14(a) and R.C. 955.22 and 955.11(A)(4)(a)(iii), which included pit bull in the definition of "vicious dog." This Court rejected Tellings arguments, reversed the Court of Appeals and contrasted *Tellings* and *Cowan*:

First, the court of appeals declared that the laws violated procedural due process pursuant to *State v. Cowan*, 103 Ohio St.3d 144, 2004-Ohio-4777, 814 N.E.2d 846. In *Cowan*, 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 because of the alleged attack, not because they were pit bulls. We held that when a dog is determined to be "vicious" under R.C. 955.11(A)(4)(a), procedural due process requires that the owner have notice and an opportunity to be heard before the owner is charged with a crime. *Id.* at ¶ 13.

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.

As this Court pointed out in *Tellings* no hearing prior to criminal charges being filed was necessary as the plain language of the statute defines pit bulls as vicious. Thus placing all owners of pit bulls on notice "that failure to abide by the laws related to vicious dogs and pit bulls is a crime." Thus the owner of a pit bull knows that his dog is defined as vicious and thus can choose affirmatively to abide by the law.

The Appellant cites *Beavercreek v. Ride*, 2007-Ohio-6898 at page 11 of its merit brief in support of its argument that procedural due process can be afforded in a trial where viciousness is alleged as an element for the state to prove and the defense to rebut, however a careful reading of *Ride* shows that it supports Appellee's position. In *Ride* the Fairborn Municipal Court finding her guilty of failure to keep a dog confined or restrained, in violation of R.C. 955.22(C), a minor misdemeanor. *Beavercreek v. Ride*, 2007-Ohio-6898 at ¶1. R.C. 955.22(C) reads:

- (C) Except when a dog is lawfully engaged in hunting and accompanied by the owner, keeper, harborer, or handler of the dog, no owner, keeper, or harborer of any dog shall fail at any time to do either of the following:
 - (1) Keep the dog physically confined or restrained upon the premises of the owner, keeper, or harborer by a leash, tether, adequate fence, supervision, or secure enclosure to prevent escape;
 - (2) Keep the dog under the reasonable control of some person.

The facts of *Ride* are as follows two mixed-breed Husky dogs owned by Ride escaped from their backyard confinement. One of the two dogs attacked and killed a Yorkshire terrier owned by her next-door neighbor. *Id* at ¶2. The matter proceeded to trial, with the trial court finding Ride guilty of the offense and fining her \$100. The trial court also found Ride's dog to be a "vicious dog," pursuant to R.C. 955.11(A)(4)(a)(ii) and ordered her to obtain liability insurance as required by R.C. 955.22(E). *Id*. This finding of viciousness however had nothing to do with the crime of which ride was convicted and was merely a finding that affected the future status of

Ride's dogs and not their present status at the time of the attack on the other dog. *Beavercreek v. Ride*, 2007-Ohio-6898 at ¶42. Note the *Ride* Court's careful distinction from *Cowan*:

Ride cites *State v. Cowan*, 103 Ohio St.3d 144, 2005-Ohio-715, in support of a claim that the vicious dog provisions of R.C. 955.22 are unconstitutional. Her reliance on that ruling is misplaced. 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 procedural 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.

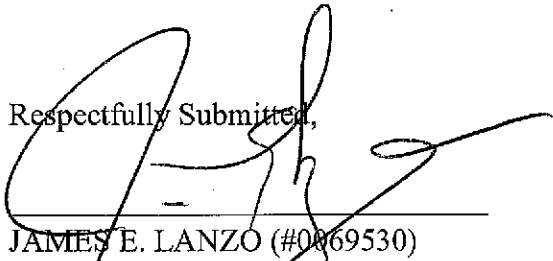
Thus it would be possible for Ride to be charged in the future with failing to confine a vicious dog but the determination did not apply to the charge of which she was convicted because at the time of the attack on which a viciousness determination was made the dog could not be vicious by statutory definition.

CONCLUSION

In the case at bar the Appellee was initially convicted of owning or harboring or having the care of a vicious dog and suffering or permitting such dog to go beyond the premises of such person unrestrained. The Youngstown City ordinance was applied in such a manner so as to allow the event that would cause the dog to be defined as vicious to occur after the actual allegation of the violation. Further the only hearing allowed on the issue of viciousness was in fact at the trial of the Appellee. Thus the only time the Appellee could have become aware that he was harboring a vicious dog would have been after he was convicted. This type of determination at trial does not provide appellee a right to be heard in a meaningful time and in a meaningful manner on the issue of whether his dog was vicious. Further in such a scenario deprives the Appellee of the ability to be free to choose not to violate the law.

Based upon the fore going Appellee prays that this Honorable Court Affirm the decision of the Court of Appeals.

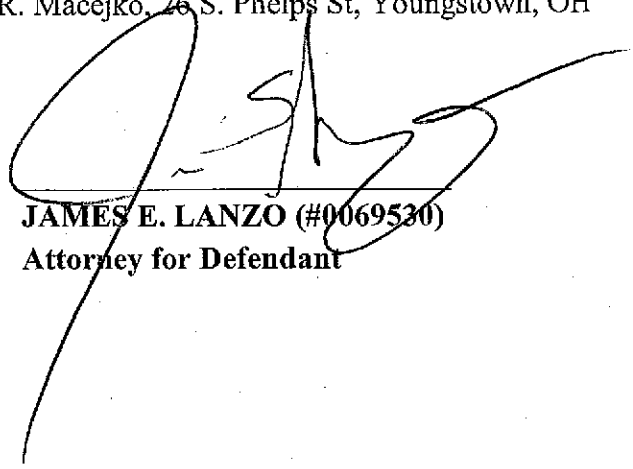
Respectfully Submitted,



JAMES E. LANZO (#0069530)
Attorney for Appellee
4126 Youngstown-Poland Road
Youngstown, OH 44514
Phone: (330) 782-8283
Fax: (330)782-8433

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent via U.S. Regular Mail this April 1, 2009 to the Counsel for Appellant Joseph R. Macejko, 26 S. Phelps St, Youngstown, OH 44503.

A large, stylized handwritten signature in black ink, appearing to read 'J. Lanzo', is written over a horizontal line. The signature is fluid and extends above and below the line.

JAMES E. LANZO (#0069530)
Attorney for Defendant

§ 1.01 Inalienable Rights (1851)

[\[View Article Table of Contents \]](#)

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.