

City of Toledo v. Paul Tellings
TOLEDO MUNICIPAL COURT, LUCAS COUNTY, OHIO
Trial Court No. CRB-02-15267
Judge Francis X. Gorman
July 8, 2004

On July 30, 2002, the defendant was charged by the City of Toledo with violating Toledo Municipal Code Section 505.13(a). It is alleged that he possessed three vicious dogs in violation of that Ordinance, which prohibits a citizen from owning more than one vicious dog. The Defendant was also charged with three additional counts of failure to obtain liability insurance on those dogs.

Section 505.14(a) states as follows: "No person or organization or corporation shall own, keep, harbor or provide sustenance for more than one vicious dog, as defined by Ohio R.C. 955.11, or a dog commonly known as a Pit Bull or Pit Bull mixed breed..."

The relevant portion of Ohio Revised Code Section 955.11 provides:

""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."

The Defendant has filed a Motion to Dismiss these charges. The Defendant claims that the Toledo Municipal Code and the definition provided by Section 956.11 is in violation of the Constitution of the State of Ohio and the Fourteenth Amendment to the United States Constitution.

In short, the Defendant claims that defining the Pit Bull as a vicious dog, known as a breed specific legislation, violates the Fourteenth Amendment of the United States Constitution and the Equal Protection Clause in that there is no conclusive evidence that the breed itself is dangerous;' and, further, that the legislation is overly broad and

constitutionally impermissible.

As can be seen, this case has had a long and tortuous history culminating in five days of evidentiary hearings during the end of July, 2003 and the end of November, 2003. Dozens of exhibits were admitted and over one thousand pages of testimony were received in evidence.

The City of Toledo and the Defendant produced eighteen witnesses. These witnesses included at least eight witnesses whose academic credentials were at the doctorate level or beyond. The area of expertise of these witnesses and other experts included veterinary medicine, genetics, animal behavior, dog anatomy, enforcement of laws regarding animals and, dog legislation. Geographically, these experts came from South Carolina, Nebraska, Oregon, Washington, Michigan, Ohio and New York, and represented a national view of the species. Counsel for both the City and the Defendant have supplied the Court with extensive briefs, including both relevant decisions by courts in the State of Ohio and throughout the United States.

Initially, the Court would express its appreciation to both counsel for their excellent presentation of this case, their extensive briefs and shared knowledge in the subject matter, their patience with the Court in trying to enlighten the Court in a complicated scientific area, and the court regrets its length in time in reaching this decision; however, as the Court indicated at the close of the evidentiary hearing, it would be necessary to re-read all of the testimony because of the length of time incurred in receiving it. In addition, much of the evidence is of a scientific nature, for example, the study of genetics; heritability versus inheritability is a topic previously foreign to this court.

Before reaching the ultimate conclusion in this case, the Court would like to share with the parties in some general observations of the evidence, particularly as it relates to other decisions submitted to the Court.

Of course, it is clear that each court, in dealing with these type of cases, must base its decision on the evidence presented to it in that particular case. It is interesting that in reviewing those cases and listening to the expert testimony provided in this cases that startling differences in the evidence are apparent. For example, the Court in STATE v. PETERS (Fla. App. {1990, 1980} 534 So, 2d 760, found that the Pit Bull was a dog with "massive canine jaws which can crush a victim with up to

2000 pounds of pressure per square inch, three times that of a German Shepard or Doberman Pincher, making the Pit Bull's jaws the strongest of any animal per pound".... at 746. Similarly, the American Kennel Club expert in *State of OHIO v. ANDERSON*, 57 O.St. 3d 168 described the Pit Bull as having a "punishing bite.

However, in the case at bar, testimony was received from Dr. Lehr Brisbin, a doctor of Zoology and Animal Ecology, who has spent a lifetime working in the environment, with the Pit Bull as a tool in his work. Along with Dr. Bonnie Dalzell, Professor of Veterinary Medicine at the University of Pennsylvania School of Veterinary Medicine, he did extensive work in the study of the physiology of Pit Bulls, dissecting them and comparing their bone and muscular structure with other dogs of varying sized and shapes. Their study found that despite these claims of exceedingly powerful jaws there was absolutely no scientific evidence to confirm the existence of such a powerful bite. Their research indicated that the jaw and muscle structure of the American Pit Bull was essentially the same as other dogs of comparable size and shape and that there was no scientific evidence to suggest that their bite is any more powerful than any other dog. See transcript Dr. Brisbin, page 13-14.

Dr. Brisbin's testimony was bolstered by Dr. L.W. Stinson, Professor Emeritus with the Department of Veterinary Medicine School of Michigan State University whose area of expertise included muscular structure in animals, including Pit Bulls. Dr. Stinson taught muscle structure for many years at Michigan State University and has dissected many dogs. He also concluded that there is no scientific evidence to suggest that a Pit Bull bite is any different than any other dog of its size when comparing the dog's muscles with other canines. (Dr. Stinson's testimony, page 132) In addition Dr. Brisbin, who reviewed studies involving the pressure of alligator bites, noted the results of these studies are questionable. In as much as the jaw muscle is a voluntary muscle as opposed, for instance, the heart muscle, which is involuntary, it is difficult to determine the sincerity of the animal's effort.

Similarly, an while not relevant or determinant in any way here, the Court in *Anderson*, supra apparently relied on testimony from a representative of the American Kennel Club who indicated that the group refused to recognize the Pit Bull as a registered breed because of its "unsavory" past. (footnote at page 175 supra) The Court notes that it is this same elite or,

perhaps elitist group, that regularly declined to recognize the Border Collie as a breed despite the fact that the Border Collie is generally recognized as the most intelligent breed of the dog world. (see footnote: 1)

Space will permit this Court to summarize each individual's testimony in this case. Surprisingly enough, with the exception of the few of the more passionate advocates testifying in this case, the testimony elicited from both sides is surprisingly not as divergent as one might expect. Therefore, the Court can make some general observations regarding the breed, and, where necessary, refer to specific testimony of certain witnesses.

First of all, it is clear that there exists a breed of dog commonly known as the American Pit Bull. And because it is a breed, it is clearly different than other breeds that obviously have different characteristics from the Pit Bull. Each breed of dog possesses common canine qualities and each breed possesses individual characteristics which characterize that particular breed. It is uncontroverted that the Pit Bull is a medium sized dog with short hair, with a powerful body and, as noted by Dr. Brisbin with an unusually large pectoral muscle and possesses, for its size, great strength. It is also uncontroverted that Pit Bulls, in their aggressive state and in their predatory state, tend to bite and not release their victims. This is called a characteristic of "bite and hold." In comparison, other canines when aroused also tend to bite but tend to bite and release.

It is also not disputed that Pit Bulls historically were used in dog fighting, first in England and then in the United States. While it may be disputed as to why the Pit Bull was the dog of choice in these fights, it is more or less agreed that one of the characteristics of the Pit Bull is in its "gameness." It is generally recognized that Pit Bulls possess this characteristic which is described as the ability to continue its aggressiveness despite suffering massive physical injury.

A core issue of this case is whether or not there are characteristics of the Pit Bull which are unique which renders the breed to be dangerous to society.

Initially, testimony was admitted in an attempt to show statistically that the Pit Bull or is not a more dangerous breed than other breeds of dogs.

Statistics were received from the Center for Disease control showing the number of dog bites and fatalities of different breeds of dogs. Similarly, much evidence was elicited from Glen Bui, from the American Canine Foundation, the major sponsoring group of the American Pit Bull, who attempted to refute these statistics by the use of circumstantial evidence to establish the number of Pit Bulls in the United States. Obviously, the ratio of bites per dog versus dog population seemingly would be relevant in this case. However, as pointed out by Dr. Peter Borchelt, the number of dog bites, "the numerator" as he called it, is irrelevant without having exact statistics as to "the denominator," the number of dogs in existence. Candidly, this Court feels that much of this statistical information, as will be seen, is irrelevant.

Pit Bulls do not cause the most animal bites in the United States. Certainly the bites of mixed breed dogs far exceed those of the Pit Bull because there are many more mixed dogs than Pit Bulls. Moreover, even local statistics indicate that, for example, the Chow bites more frequently than the Pit Bull. However, it is equally true that both nationally and within the State of Ohio, Pit Bull bites would seem to cause a disproportionate number of fatalities amongst the population. Frankly, as will be seen, it would appear that the reason for this has little to do with the breed itself, but rather the environment in which many Pit Bull exist.

The Court was struck by the apparent disparity in testimony between the City's witnesses and the Defendant's witnesses, and their respective witnesses experiences with Pit Bulls. It was as if they were talking about two different breeds of dogs and, perhaps, that is as telling as evidence as was received throughout the trial. Clearly, the Dog Warden, the Dog Warden's Veterinarian, and the Assistant Dog Warden's experiences with Pit Bulls they have picked up off the street or taken from owners of fighting dogs, drug dealers and gang members seem to describe a far different animal than were seen by animal behaviorists who train dogs, including Pit Bulls, as well as those who exhibit Pit Bulls at Show Trials and veterinarians who have treated Pit Bulls whose owners have them as family pets. In the latter case, the existence of aggressive biting behavior amongst Pit Bulls would seem to be no different than other breeds according to the testimony received by this court.

Conversely, those animals which were utilized by their owners to fight, to guard, to protect or who were abandoned by them because of their multiplicity,

clearly tended to present a danger in the urban context of which they were seen. The testimony of Dog Warden Skeldon indicated that where these dogs were present in urban, crowded, residential areas where small children were present, a danger to that community existed. Much testimony was elicited as to the genetics of the canine world, including the Pit Bull, and the ability of the breed to pass on characteristics of a certain type from generation to generation. Obviously, there are Pit Bulls which have been trained and bred to be aggressive and much testimony was elicited as to whether or not animals can be bred for aggressiveness. While this matter was much an issue, it can be concluded that the answer is in the affirmative although the efficiency of such an attempt is, perhaps, marginal.

There was disagreement amongst the experts as to the success rate of breeding for certain characteristics such as aggression; the disparity of agreement seemed to center on the value of heritability, i.e., whether it is high or low. Further, that disagreement seems to be centered on how one measures, in layman's terms, the level of the playing field. It would appear that as a particular breed of dog is bred for a common characteristic, such as aggression in the Pit Bull or herding in the Border collie, the heritability value tends to run at a lower scale because of the high existing presence of that characteristic in the breed. As, for example, the Border Collie continues to be bred for its herding instincts, its heritability value is lower because that characteristic is already present in those dogs. The inheritability value is high in that breed because of the presence of those characteristics or traits. Conversely, in the breeding of mixed breed dogs which have little common characteristics, the heritability value will run much higher because of the absence of common traits and characteristics. The heritability value, of course, then runs at a lower rate.

While the environment plays an important part of the temperament of an animal, the environment will have a lesser impact on animals who possess a low heritability value and a high inheritability value because of the presence of those characteristics for which they were bred. For example, as Border Collies have been bred over a long period of time for their herding characteristics, the environment will play a very little role in trying to modify their herding instincts, because of the high inheritability characteristics of the herding trait. On the other hand, where that common characteristic is not present, environment plays a far greater role in behavior modification. Therefore, a statement such as

"temperament is 70% hereditary" such as that made by an official at the American Kennel Club, is not only wildly inaccurate, it is misleading in terms of genetic research. (see footnote #2)

All of the animal behaviorists who testified found that the Pit Bull, trained and disciplined, would not seem to exhibit any more dangerous characteristics than any other dog. This evidence in and of itself, of course, is not dispositive of the issue.

The finding by this court that the Pit Bull, as a breed, is not necessarily dangerous, does not necessarily lead to the conclusion that there is not a problem with Pit Bulls, particularly those Pit Bulls who are trained and bred to be aggressive in a crowded, urban setting. Clearly, this problem exists. Testimony from Dog Warden Skeldon and this court's own experiences of many years on the bench confirms that those who choose to use the Pit Bull as a threatening tool have created a problem within urban areas of the United States. The Pit Bull is the dog of choice among dog fighters, drug dealers and gang members. Is every Pit Bull in an urban area a danger? Clearly not. But, having said that, it is equally clear that there are dangerous Pit Bulls in urban areas where there are crowded conditions and large numbers of persons, including small children, who seem to be most susceptible to all dog bites, including those of Pit Bulls. See *GARCIA v. TIJERAS* (1988, APP) 108 NM 116, 767 P2nd 355.

The Defendant contends that this legislation is constitutionally impermissible. The court would agree that the is seemingly unfair because it punishes responsible owners of Pit Bulls. The court would certainly agree with the Defendant that this legislation is, perhaps, not the best legislation that the Legislature could enact in the regulation of dangerous dogs. Indeed, the City's own witness, Dr Borchelt, testified that breed specific legislation was "not the best approach to the problem" but indicated that other approaches may be cost prohibitive.

The right to own an animal is not a fundamental constitutional right involving personal liberty. It is a property right and as such, property rights are subject to the police powers and regulations of the State. See *PORTER v. OBERLIN* (1965) 1 Oh. St. 2d 143, 205 N.E. 2d 363. As the court noted in *BENJAMIN V. COLUMBUS* (1957) 167 Oh. St. 103 (1957), this power will be valid "if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and it is not

unreasonable or arbitrary."

Defendant claims that Toledo Municipal Code Section 505.14 is arbitrary and unreasonable. As noted, this legislation clearly has an adverse effect upon responsible Pit bull owners. It limits the ownership of a Pit Bull to one dog and severely restricts the freedom of that dog. But the fact that innocent Pit Bull owners may be affected by this legislation merely makes the legislation imperfect and, perhaps, unfair. It does not necessarily make it unconstitutional. An excellent rebuttal of this argument is found in the University of Dayton Law Review...

"Although opponents of a total ban on pit bulls argue that it is "unfair" to take someone's dog away before the dog has done anything wrong, such a law is not inherently unconstitutional. Constitutionality is not determined by a "fairness" standard. Legislatures are permitted to act to protect the public from the debilitating or possibly fatal attacks by pit bulls, even if it means taking steps that sweep more broadly than that which would be sufficient to accomplish this important goal. Arguably, some families own docile pit bulls who have never threatened anybody; possibly their violent instincts have been effectively diluted over succeeding generations. The undeniable fact remains, however, that a disproportionate number of pit bulls have been involved in very serious attacks. Clearly, a ban on ownership of pit bulls, whether underinclusive or overinclusive, bears a rational relation to the legitimate legislative goal of public safety."

University of Dayton Law Review, Vol. 13.2 (1988) p. 290, 291

Moreover, although neither party raised the issue in this case, the ordinance in question, which incorporates the definitions of Ohio Revised Code Section 955.11, does not prohibit a Pit Bull owner from challenging the City's claim that his dog is a vicious animal. Under the aforementioned section of the Ohio Revised Code, "an owner of a Pit Bull shall be prima facie evidence...of a vicious dog." (emphasis supplied) (see footnote No. 3) Therefore, an owner of a Pit Bull can challenge the law by rebutting the prima facie showing that his Pit Bull was a vicious animal with evidence that his Pit Bull has not exhibited dangerous characteristics. While each case must be decided on a "dog-by-dog" basis, presumably if a Pit Bull has never exhibited violent or threatening behavior, a court can conclude that it is not a vicious animal. Such a

finding would relieve the Pit Bull owner from obtaining liability insurance, would eliminate the requirement of restrictive accommodations for the dog and , perhaps most important, would allow a Pit Bull owner to own more than one Pit Bull if none were found to be vicious. See STATE v. FERGUSON 76 Oh.App. 3d 747 (1991), reversed on other grounds 57 Oh. St 3d 176 (1991)

Thus, the Toledo Municipal Ordinance does not ban Pit Bulls, it restricts ownership of them; however, it does provide an opportunity for the owner of a Pit Bull to refute the allegation that his dog is a vicious dog and provides an opportunity for the owner to avoid criminal liability under the Ordinance.

As Dr. Borchelt pointed out, perhaps the best legislation would be to test every dog who exhibited any sort of aggressive behavior to determine whether or not that behavior could be modified or controlled. However, any such legislation would be cost prohibitive and the Legislature has the right, indeed the obligation, to use taxpayer's money in the most efficient manner possible.

It is perhaps not the best legislation; it may not be the fairest legislation. It is not unconstitutional.

FINDINGS OF FACT

1. There is a breed of dog commonly known in the United States as the American Pit Bull.
2. The Pit Bull, as in all breeds of dogs, possesses individual characteristics unique to that breed.
3. The Pit Bull is a medium size dog, possessing great strength, and has over the years been utilized inter alia, for dog fighting because of its great strength and gameness and its ability to bite and hold.
4. There is little, in any, evidence presented that would indicate that the breed itself is a dangerous breed when trained and adapted in a social situation.
5. There is no statistical evidence which indicates that the Pit Bull

bites more frequently than some other breeds of dogs.

6. There is substantial evidence that the Pit Bull's bites cause a disproportionate number of fatalities amongst dog breeds.

7. The evidence clearly indicates that the Pit Bull has been utilized extensively for dog fighting and for use in protecting property and has been utilized extensively by criminal elements of the population, such as drug dealers, dog fighters and urban gang members.

8. These particular dogs are found largely in urban settings where there are crowded living conditions and a large number of children present. These animals create a substantial and real threat to the safety of the public.

9. This Ordinance is a necessary and useful tool in controlling these undesirable dogs.

CONCLUSIONS OF LAW

The right to own any animal is not a fundamental constitutional right but is a property right. Property rights are subject to the police powers of the relevant jurisdiction so long as the exercise of those powers is not unreasonable or arbitrary, and bears a real and substantial relation to the public health, safety or general welfare of the public.

The fact that such legislation may have an adverse effect on a segment of the dog population not presenting a danger to the public does not make the legislation overbroad. Legislation will only be considered overbroad if it is applicable to conduct protecting a fundamental constitutional right such as the First Amendment and this does not include the category of ownership of dogs.

Moreover, the Toledo Municipal Ordinance, when taken in pari material with Section 955.11 of the Ohio Revised code allows responsible owners to present evidence that their Pit Bull is not vicious, inasmuch as the Ohio Revised Code only codifies a Pit Bull as a "prima facie" vicious dog.

Legislative acts are presumed to be constitutional. Inasmuch as this legislation does not regulate conduct involving a fundamental right, the

burden of proof is upon the Defendant to show that such legislation is unconstitutional "beyond a reasonable doubt." See STATE V. ANDERSON supra

This court cannot conclude that the Defendant has presented evidence beyond a reasonable doubt to show that Toledo Municipal Code Section 505.14 is unconstitutional.

The Defendant's Motion to Dismiss is overruled.

July 8, 2004

Judge Francis X. Gorman

FOOTNOTES:

(1. See for example, *The Intelligence of Dogs*, Stanley Coren The Free Press, New York, 1994) at 181-183)

(2. See Cantu, article "Efforts to Ban Pit Bulls Spark Arguments Residents Safety and Civil Liberties, Wallstreet Journal, July 67, 1987 @ Column 4)

(3. While 505.14(a) of the Toledo Municipal Code refers to ORC 955.11 for its definition of a vicious dog and does not make any reference to a Pit Bull being a "prima facie vicious dog," Section 505.14(b) states as follows. "Any vicious dog, as defined in the Ohio R. C. 955.11 or Pit Bull which is referred to in Ohio R. C. 955.11, which is outside the premises of dog owner, shall be kept on a leash and muzzled until the dog's return to the premises of ownership." This 505.14(b) incorporates the prima facie test of 955.11 O.R.C.