

New Jersey State Law Relating to Municipal Ordinances Requiring Kennel Licenses

NOTE: This unpublished New Jersey case explains the state law definition of kennels and licensing requirement when included in municipal ordinances. Unpublished cases cannot be cited as legal precedent in other cases in New Jersey or elsewhere, but are useful for educational purposes.

<http://law.justia.com/cases/new-jersey/appellate-division-unpublished/2014/a3722-12.html>

STATE OF NEW JERSEY v. DANIELLE WEITZ

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DANIELLE WEITZ,

Defendant-Appellant.

June 25, 2014

Argued February 10, 2014 Decided

Before Judges St. John and Leone.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Municipal Appeal No. 001-86-12.

Gregg D. Trautmann argued the cause for appellant (Trautmann and Associates, attorneys; Mr. Trautmann, on the brief).

Mark R. DiMaria, Municipal Prosecutor, argued the cause for respondent (DiMaria & DiMaria, attorneys; Mr. DiMaria, on the brief).

PER CURIAM

Defendant Danielle Weitz appeals the affirmance by the Law Division of her Municipal Court sentence for operating a kennel without a license in violation of an ordinance of the Borough of Franklin Lakes (Borough). We vacate in part, and remand.

I.

Borough Board of Health Municipal Ordinance 505-1 provides:

No person shall operate a kennel or pet shop without having first obtained a license from the Board of Health. All such kennels or pet shops shall be operated in accordance with, and comply with, N.J.A.C. 8:23A-1.1 et seq., as same may be amended from time to time. Said regulations are hereby adopted by reference in their entirety, and will be enforced within the Borough by the Board of Health.

The parties agree that, for purposes of 505-1, "[k]ennel" means any establishment wherein or whereupon the business of boarding or selling dogs or breeding dogs for sale is carried on, except a pet shop." N.J.A.C. 8:23A-1.1. N.J.S.A. 4:19-15.1 identically defines "kennel," and N.J.S.A. 4:19-15.8(a) similarly provides that "[a]ny person who keeps or operates or proposes to establish a kennel . . . shall apply to . . . the municipality . . . for a license entitling him [or her] to keep or operate such establishment."¹

In November 2010, the Borough's animal control officer, Carol Tyler, received a complaint about the number of dogs at defendant's house. When Tyler visited defendant's house, defendant explained that she bred, raised, trained, and showed German Shepherds. Within the house, defendant used bedrooms for female dogs with newborn puppies, and had an area for puppies. She also had several cages on the ground floor, and approximately two dozen cages in her basement. At least fifteen of the cages were occupied by dogs, including at least two unneutered male stud dogs and about seven unneutered females available for breeding. Tyler later testified that a German Shepherd female could breed up to twice a year, producing a litter of one to twelve puppies in about sixty-three days.

Defendant told Tyler she was breeding the dogs, and would keep the best one or two puppies for showing, but would sell the other puppies. Defendant explained that she had "a following" of people who come to her for puppies, and that she advertised on the Internet.

Tyler and Majorie Vanacore, a Bergen County Environmental Health Specialist, found that defendant was advertising on the Internet, including the websites of the American Kennel Club (AKC), and the German Shepherd Dog Club (GSDC). Tyler later testified that defendant must have registered herself on the AKC website to advertise her available puppies. On the GSDC website, defendant invited viewers to contact her by phone and email for information on litters and the availability of older puppies.

The AKC's "Online Breeder Classifieds" website listed defendant as one of the "breeders [who] are members of AKC-licensed or member clubs who have AKC-registerable puppies available." That website indicated that defendant had three male and eight female German Shepherds as of February 18, 2011. The AKC website also contained a "Breeder's Profile" for defendant, in which defendant stated that she had been breeding for six to ten years, and would "provide a written bill of sale detailing responsibilities for the buyer and the seller." Defendant also stated that she provides a health guarantee for "the puppies I sell," that she provides the "puppy buyer" with AKC registration applications and other information, and that she would take a puppy back if "the puppy buyer cannot keep a puppy purchased from" her.

On February 20, 2011, Tyler and Vanacore had an appointment to inspect the house. Defendant told Vanacore that she had fifteen adult dogs and eleven puppies in the house. Tyler observed approximately eighteen dogs, not including puppies. Defendant mentioned that two dogs were pregnant, and that she was planning on breeding again. Defendant told Vanacore that she sold dogs.

Within days of the inspection, the Borough issued a complaint-summons to defendant because she had "failed to obtain a license to operate a kennel." On November 30, 2011, apparently waiting to see if the Borough would enact an ordinance limiting the number of dogs in a residence, the Municipal Court held the matter in abeyance for six months, on the condition that defendant was to notify Tyler when two pregnant dogs produced litters so Tyler could count the total number of dogs. Defendant gave oral notice when the litters were produced, but refused to allow Tyler to enter her house to count the dogs.

On July 26, 2012, the Municipal Court clarified that its condition had meant that Tyler could enter defendant's house to count the dogs. The court reserved the Borough's request to hold defendant in contempt, scheduled the matter for trial, and warned that if she was found guilty the sentence would "include an inspection" and, if necessary, "another host of inspections."

At the two-day trial in Municipal Court, Tyler and Vanacore testified and were credited by the court. On October 23, 2012, the court found that "defendant admitted unequivocally that she does sell dogs," and that "she's not breeding to keep dogs," but "to show them [and] to sell them." The court found the evidence was "overwhelming that this is a kennel operation," and imposed a \$250 fine and \$30 in court costs. The court ordered an inspection to inventory the dogs, ensure they were properly licensed, and determine if any were pregnant.

The Municipal Court additionally ordered that defendant could not "breed dogs until you get a kennel license," and gave defendant ninety days to get the license. When defendant said she might decline to get the license, the court responded that if defendant failed to get a license within ninety days, "then every 30 days thereafter I'm going to have the inspections continue to make sure that you're not breeding [dogs]."

And this can go on forever and ever[.]" The court added that it did not need a report on the inspections unless there was a violation.

Defendant sought a trial de novo in the Law Division, Criminal Part, which heard argument on February 25, 2013. Defense counsel stated that defendant would not apply for a kennel license, and objected to the no-breeding order and monthly inspections. The court agreed that defendant was guilty of operating a kennel without a license, and reimposed the sentence. In particular, the court's February 25 order stated: "Defendant is to cease breeding dogs unless she first obtains a license to operate the kennel. If Defendant fails to obtain a license to operate a kennel within ninety days, the Board of Health shall inspect Defendant's residence every thirty days to make sure she is not breeding dogs."

Defendant appeals, challenging the quoted no-breeding and monthly-inspections portions of the order. She raises the following argument:

MUNICIPAL COURT SENTENCES THAT EXCEED THE AUTHORITY GIVEN TO THE COURT BY THE PENALTY PROVISIONS OF THE MUNICIPAL ORDINANCE DEEMED TO HAVE BEEN VIOLATED ARE AN ABUSE OF DISCRETION AND SHOULD BE REVERSED.

II.

"A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Manalapan Realty v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995). Therefore, our review of defendant's claim "is de novo." *State v. Clarksburg Inn*, 375 N.J. Super. 624, 631 (App. Div. 2005). We must hew to that standard of review.

To determine the penalty for violating 505-1, we look to Borough Board of Health Ordinance 505-20, which provides that "[t]he penalties for the violation of any of the provisions of this chapter . . . shall be the same as recited and set forth in Chapter 500, Article IV." In that Article, Borough Board of Health Ordinance 500-20 provides:

Any person violating any of the provisions of any chapter adopted by the Board of Health of the Borough of Franklin Lakes shall, upon conviction thereof, pay a penalty not to exceed \$500 nor less than \$5 for each offense as provided by N.J.S.A. 26:3-70. A term of 90 days in jail may be imposed at the discretion of the court as provided in N.J.S.A. 26:3-77 and 26:3-78.

Those provisions do not authorize the no-breeding and monthly-inspections portions of the order. Nor are such sanctions mentioned in the statutes authorizing local boards of health to prescribe penalties for such ordinances. N.J.S.A. 26:3-70 to -82; see N.J.S.A. 2A:58-11; N.J.S.A. 40:49-5.

The Criminal Part believed that the Municipal Court "went one step further, and found that this Municipality, under its police power, has the right to subject this kennel to an inspection by the Board of Health, under their Municipal Ordinance 500-23[]." Borough Board of Health Ordinance 500-23 provides that "[t]he granting of any license, permit or certificate may be withheld, at the direction of the Board, pending examination, investigation or inspection of the person who, or the premises which, may be the subject matter of the license, permit or certificate under consideration." *Id.* at 500-23(A). The ordinance also provides: "At least once every six months the Health Officer shall inspect all licensed establishments. In case the Health Officer discovers the violation of any item of sanitation, he shall make a second inspection after such lapse of time as he deems necessary for the defect to be remedied[.]" *Id.* at 500-23(B)(1).

Even assuming that 500-23 can be invoked by a Municipal Court sentencing a defendant for a violation of 505-1, 500-23 does not itself authorize the challenged portions of the order. First, 500-23(A) applies only if a person applies for a license. Second, 500-23(B)(1) explicitly applies only to licensed establishments. Neither subsection authorizes monthly inspections of a home for which the homeowner has neither applied for nor received a kennel license. Third, 500-23 does not provide for injunctive relief such as the order's no-breeding provision.

The Borough argues that the no-breeding order and monthly inspections requirements are authorized by the Borough's general police power. This misapprehends the nature of the police power. "The central feature of plenary state legislative authority is the "police power," which justifies legislation to further the public health, safety, welfare, and morals." *N.J. Shore Builders Ass'n v. Twp. of Jackson*, 199 N.J. 38, 52 (2009) (quoting Robert F. Williams, *The New Jersey State Constitution* 57-58 (Rutgers Univ. Press, updated ed. 1997)). "The police power of any municipal corporation is limited by the grant of such by the state." 6A Eugene McQuillen, *The Law of Municipal Corporations* 24:47 at 168 (3d ed. rev. 2007). Our Legislature has delegated general police power to municipalities under "the police power statute." *N.J. Shore Builders Ass'n*, *supra*, 199 N.J. at 54; *Hudson Circle Servcenter, Inc. v. Kearny*, 70 N.J. 289, 298 (1976).2

The police power statute, N.J.S.A. 40:48-2, provides:

Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law.

This statute thus "permits municipalities to enact ordinances in support of the police power." *515 Assocs. v. City of Newark*, 132 N.J. 180, 195 (1993); see *Quick Chek Food Stores v. Springfield*, 83 N.J. 438, 448 (1980). Here, we have not been directed to any State legislation or Borough ordinance authorizing the challenged portions of the court's order. Cf. *State v. Smith*, 58 N.J. 202, 210 (1971) (upholding suspension of a driver's

license under N.J.S.A. 2A:170-8, whether the suspension "was considered as part of the punishment for conviction of use of marihuana or as a further or associated exercise of the police power").

We have stated that "[a] municipal body also has a common-law right to abate a public nuisance by summary proceedings." *James v. Arms Tech., Inc.*, 359 N.J. Super. 291, 325 (App. Div. 2003). "A public entity proceeding in public nuisance vindicates the common right and thus pursues either criminal penalties or civil actions to abate the nuisance at the property owner's expense." *In re Lead Paint Litig.*, 191 N.J. 405, 434 (2007). Here, we do not address a civil action to abate a public nuisance by injunctive relief. See N.J.S.A. 2A:54A-1; N.J.S.A. 26:3-45 to -63.3 Rather, we are reviewing a criminal prosecution of an ordinance violation punishable by fines and jail time.

"[A]n ordinance violation, commenced on municipal court summons and in which the State acknowledged its burden beyond a reasonable doubt, is a quasi-criminal matter." *State v. Carlson*, 344 N.J. Super. 521, 527 (App. Div. 2001), certif. denied, 171 N.J. 336, cert. denied, 536 U.S. 960, 122 S. Ct. 2665, 153 L. Ed. 2d 839 (2002). "Because municipal court proceedings to prosecute violations of ordinances are essentially criminal in nature, [the courts] should follow the rule of strict construction, interpreting the terms of the ordinance narrowly." *Twp. of Pennsauken v. Schad*, 160 N.J. 156, 171 (1999) (citation omitted). Further, penalties "must be expressed, and in clear and direct language." *State v. Clay*, 230 N.J. Super. 509, 529 (App. Div. 1989), aff d o.b., 118 N.J. 251 (1990). Again, there is no express authority in either the governing statutes or the specific ordinances involved for imposing the no-breeding and monthly-inspections provisions of the sentence.⁴

Nor have the parties brought to our attention any authority showing that the Municipal Court has the inherent power to enter such an order. "[T]he municipal court is a statutory court and can exercise only the jurisdiction conveyed by statute." *State v. Casalino*, 262 N.J. Super. 166, 168 (App. Div. 1993). The statutes creating the Municipal Court give it jurisdiction over violations of municipal ordinances, N.J.S.A. 2B:12-17(a), and govern its ability to impose imprisonment, fines, and community service, N.J.S.A. 2B:12-22 to -23.1. Sentences imposed by the Municipal Court "must comport with all appropriate constitutional, statutory, and ordinance standards." *Pressler & Verniero*, Current N.J. Court Rules, comment 2.1.1 on R. 7:9-1 to -4 (2014). Thus, in *Casalino*, we ruled that the Municipal Court could not order an elderly defendant convicted of failing to observe a traffic signal to be retested to determine his eligibility for a driver's license, because there was "no express statutory jurisdiction" to do so. *Casalino*, supra, 262 N.J. Super. at 167, 169-70 (permitting only a recommendation). Here, too, "the judicial sentence for a violation of [505-1] must itself be subject to the express provisions of [the governing statutes] or the specific section[s] involved." See *id.* at 170.

Enforcement of the no-breeding and monthly-inspections provisions is troubling for additional reasons. First, under 505-1, defendant is barred from operating without a kennel license an establishment where she carries on the business of "breeding dogs

for sale," N.J.A.C. 8:23A-1.1. However, the Criminal Part's order does not merely bar defendant from breeding dogs for sale. Rather, it bars her from breeding dogs for any purpose, including breeding dogs she retains to show or to keep as pets, or to give away without charge. None of these purposes would constitute breeding dogs for sale.

Second, the Criminal Part's order requires that "the Board of Health shall inspect Defendant's residence every thirty days." As our Supreme Court has recently reaffirmed, "[t]he Fourth Amendment and the New Jersey Constitution assure the 'highest degree of protection to privacy interests within the home.'" *State v. Coles*, ___ N.J. ___, No. A-15 (May 19, 2014) (slip op. at 16-17); see U.S. Const. amend. IV; N.J. Const. art. I, 7. "Indeed, physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *State v. Brown*, 216 N.J. 508, 526 (2014) (quotation marks omitted). The Borough argues the finding of guilt establishes probable cause. Even if the finding that defendant had been breeding dogs for sale gave probable cause for the initial inspection ninety days after the court ordered her to stop breeding, it is dubious that the original order would continue to provide probable cause, or satisfy the warrant requirement, for a series of subsequent inspections.

Third, the Criminal Part's order requiring defendant's home to be searched "every thirty days to make sure she is not breeding dogs" authorizes such searches in perpetuity. The Borough asserts that monthly inspections would cease when defendant obtained a kennel license or "stopped operating a kennel." However, as the Municipal Court made clear, the monthly searches "can go on forever and ever" if defendant declines to obtain a kennel license. Nothing in the order stops the monthly inspections if defendant is not "operating a kennel" by breeding dogs for sale, or even if she has stopped breeding dogs entirely. Indeed, the Municipal Court instructed that it did not need to be informed of inspections showing compliance, only an inspection showing a violation.

We recognize the impetus behind the court's order. Defendant set up her home to operate as a substantial dog-breeding facility, which she apparently has conducted for some time. She admitted breeding dogs for sale, and had advertised dogs for sale both by word of mouth and on the Internet. After receiving the complaint, defendant refused to allow Tyler to enter her home to count the dogs, and declined to obtain a kennel license. Although defense counsel represented that defendant would no longer breed dogs for sale, the Borough after lengthy and often bitter litigation was unwilling to take defendant's word that she had ceased selling dogs or breeding dogs for sale. The no-breeding and monthly-inspection provisions of the court's order reflect that lack of trust.

The Borough defends those provisions of the sentence as the only way to ensure that defendant does not breed dogs for sale in violation of the ordinance. We, however, have greater confidence in the Borough's ability to detect and prevent such violations by utilizing civil and administrative remedies, or through the investigatory and prosecutorial tools of criminal law enforcement. Indeed, deterrence of future offenses is one of "the general purposes of sentencing." *State v. Pierce*, 188 N.J. 155, 165 (2006); see N.J.S.A. 2C:1-2(a)(2); N.J.S.A. 2C:44-1(a)(9).

The Municipal Court rejected the Borough's request for a maximum sentence and instead imposed the no-breeding and monthly-inspections provisions as part of the sentence. Because we vacate those provisions, we remand to the Municipal Court for resentencing. We do not retain jurisdiction.

1 We note that Borough Board of Health Ordinance 500-15 currently defines "kennel" as "[a]ny establishment or premises wherein or whereon the business of keeping, raising, breeding or boarding dogs or other animals is carried on, except that this definition shall not include a pet shop." Because neither party has invoked 500-15, we do not address its applicability here.

2 Other statutes authorize municipalities to enact ordinances on specific topics, including animals and pounds, N.J.S.A. 40:48-1, regulation and abatement of harmful conditions in buildings, N.J.S.A. 40:48-2.12a, inspection of buildings, N.J.S.A. 40:48-2.12a1, and abatement of nuisances or conditions not in compliance with other ordinances, N.J.S.A. 40:48-2.12f.

3 We do not decide whether an unlicensed kennel is a public nuisance. We note that Vanacore observed no unsanitary conditions in defendant's house.

4 We need not address whether those provisions could have been imposed as a punishment for contempt, because the Municipal Court did not find defendant in contempt.