

57 Ohio App.3d 1

JSINGER et al., Appellants,

v.

CITY OF CINCINNATI et al.,
Appellees.

No. C-890060.

Court of Appeals of Ohio,
Hamilton County.

April 25, 1990.

Owners of dogs specifically banned by a city ordinance brought action seeking a declaratory judgment and permanent injunction, and challenging the constitutionality of the ordinance. The Court of Common Pleas, Hamilton County, upheld the constitutionality of the ordinance, and owners appealed. The Court of Appeals held that: (1) under a "rational basis" test, the ordinance did not violate equal protection or due process, and (2) owners lacked standing to challenge the law for vagueness.

Affirmed.

1. Constitutional Law ⇨48(1)

Any discussion of constitutionality of legislative enactment must begin with premise that all legislative enactments enjoy strong presumption of constitutional validity.

2. Constitutional Law ⇨48(5)

Party challenging public-safety law must prove by clear and convincing evidence that legislative enactment is unconstitutional.

3. Animals ⇨4**Constitutional Law** ⇨237, 293

Ordinance prohibiting owning, keeping or harboring of "pit bull terriers" within municipal limits did not violate equal protection or due process guarantees under "rational basis" test; ordinance was reasonably related to city's interest in protecting health and safety of its residents, and city's previous attempt to protect its citizens against dog attacks through legisla-

tion which regulated and constrained possession of such dogs was ineffective. U.S. C.A. Const.Amend. 5, 14.

4. Constitutional Law ⇨251.4

Essence of vagueness doctrine is notice.

5. Municipal Corporations ⇨594(2)

Ordinance must be sufficiently clear in defining activity proscribed so that it informs those who are subject to it what conduct on their part will render them liable to its penalties.

6. Constitutional Law ⇨43(1)**Municipal Corporations** ⇨121

Owners who stipulated to ownership of dogs which were of breed explicitly banned by ordinance had notice that their possession of those dogs was proscribed by ordinance; thus, owners lacked standing to challenge ordinance for vagueness.

Syllabus by the Court

1. An ordinance prohibiting the owning, keeping or harboring of "pit bull terriers" within municipal limits is a valid exercise of a city's police powers.

2. Where a police-power regulation does not affect a fundamental right or classify people based on suspect categories, the test to determine its constitutionality, under both equal protection and due process analysis, is whether the statute bears a rational relationship to a legitimate state interest.

3. An ordinance prohibiting the owning, keeping or harboring of "pit bull terriers" within municipal limits does not violate equal protection or due process guarantees under a "rational basis" test when the city's previous attempt to protect its citizens against pit bull attacks through legislation which regulated and constrained the possession of these dogs was ineffective.

4. One to whose conduct a law clearly applies does not have standing to challenge the law for vagueness.

Allen Brown, Cincinnati, for appellants.

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Richard A. Castellini, City Sol., and William Gustavson, Cincinnati, for appellees.

PER CURIAM.

This cause came on to be heard upon an appeal from the Hamilton County Court of Common Pleas.

In January 1987, council members for defendant-appellee, the city of Cincinnati ("city"), enacted an ordinance forbidding the "owning," "keeping," or "harboring" of pit bull terriers in Cincinnati. Plaintiffs-appellants, Rochelle Singer and Richard Foreman, owners and breeders of registered American Staffordshire Terriers, a type of bull specifically banned by the ordinance, sought a declaratory judgment and a permanent injunction against the named defendants and challenged the constitutionality of the ordinance.

A hearing ensued. On the basis of the evidence and the testimony and arguments presented by both sides, the trial court upheld the constitutionality of the ordinance.

The ordinance at issue, Cincinnati Municipal Code Section 701-24, states:

"No person shall own, keep, or harbor a pit bull terrier, as defined herein, within the municipal limits of Cincinnati.

"'Pit bull terrier' as used herein is hereby defined as any Staffordshire Bull Terrier or American Staffordshire Terrier breed of dog, or any mixed breed of dog which contains as an element of its breeding the breed of Staffordshire Bull Terrier or American Staffordshire Terrier as to be identifiable as partially of the breed of Staffordshire Bull Terrier or American Staffordshire Terrier.

"This section is a necessary control to eliminate the risk of attack by pit bulls, as defined herein, on human beings in the city which has become a threat to the health, safety and welfare of the public in all areas of the city; and the lack of knowledge or

1. The determination of whether a classification has a rational basis under an equal protection analysis depends upon whether any state of facts, either known or which can reasonably be assumed, supports the classification. If the

lack of intent is not a defense to any violation thereof."

Under the first assignment of error, appellants assert equal protection and due process violations, alleging that the ordinance is an arbitrary, capricious, and unreasonable exercise of the police power and is intrinsically overbroad. Appellants specifically contend that the ordinance is arbitrary because it provides for "total banning" as opposed to constraint or regulation, and because it deprives owners of their dogs based solely upon the dog's breed rather than upon proof of a vicious propensity. Appellants also urge that the ordinance is unreasonable because it violates procedural due process guarantees by denying the owners a hearing in connection with what amounts to the deprivation of their property right in the ownership of the dogs.

Where, as here, a police-power regulation does not affect a fundamental right or classify people based on suspect categories, the test to determine its constitutionality, under both an equal protection and due process analysis, is whether the statute bears a rational relationship to a legitimate state interest. *Ohio Bureau of Employment Services v. Hodory* (1977), 431 U.S. 471, 97 S.Ct. 1898, 52 L.Ed.2d 513; *Holloway v. Brown* (1980), 62 Ohio St.2d 65, 16 O.O.3d 47, 403 N.E.2d 191; *Vanater v. South Point* (S.D. Ohio 1989), 717 F.Supp. 1236.

[1-3] Any discussion of the constitutionality of a legislative enactment must begin with the premise that all legislative enactments enjoy a strong presumption of constitutional validity. *South Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 28 OBR 250, 503 N.E.2d 136; *State v. Robinson* (1989), 44 Ohio App.3d 128, 541 N.E.2d 1092. A party challenging a public-safety law must prove by clear and convincing evidence that the legislative enactment is unconstitutional. *Hilton v. Toledo* (1980), 62 Ohio St.2d 394, 16 O.O.3d 430, 405 N.E.2d 1047.¹

question is at least debatable the decision legislative and the classification will be upheld. *United States v. Carolene Products Co.* (1938), 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234. Only where it is clear beyond doubt that a legislative

The record indicates that prior to the enactment of the ordinance in question the city had several laws in effect which regulated pit bull ownership. One regulation required owners of pit bulls and other vicious dogs to 1confine their dogs indoors or to secure them outdoors in an enclosed pen.² Another ordinance banned the sale of pit bulls within the city limits.³ In 1984, a resolution to ban pit bulls was defeated by city council. However, in May 1986, the resolution was reintroduced, and ultimately passed, in response to a pit bull's attack on a nine-year-old boy, and to the allegedly numerous complaints council received regarding the ineffectiveness of the regulation of pit bulls under the existing vicious-dog ordinance.

At the hearing regarding the ordinance's constitutionality, the trial court was presented with evidence which established that the specific breeds targeted by the ordinance possess inherent characteristics of aggression, strength, viciousness and unpredictability not found in other dog breeds. The evidence indicated that, unlike other breeds that retreat if they are injured in a fight or an attack, a pit bull will often bite, clamp down with its powerful jaw, and maintain its hold until separated from its victim. The evidence also indicated that the pit bull is an exceptionally strong and athletic dog which requires extraordinary measures for confinement (*e.g.*, six-foot-high enclosed fences). Pit bulls have exceptionally strong bites and have been known to destroy sheetmetal panels by ripping them apart with their teeth. Moreover, the evidence submitted by the city illustrated numerous cases of severe maulings and deaths that have occurred in Cincinnati as a result of pit bull attacks, and attributed the majority of fatal dog attacks nationwide to pit bulls.

Plaintiffs-appellants offered evidence to the effect that training and human intervention are more significant than genetics in determining the behavioral propensities of a dog, and that pit bulls are affectionate,

classification is without any rational basis will a court reject the classification.

2. Cincinnati Municipal Code Section 3701-25.

loyal, and gentle dogs. Other testimony and data attempting to refute the city's evidence was likewise introduced.

The contradictory evidence notwithstanding, we conclude that the ordinance at issue does not violate equal protection or due process guarantees under a "rational basis" test. The city's previous attempt to protect its citizens against pit bull attacks through legislation which regulated and constrained the possession of these dogs was ineffective, resulting in council's ultimate decision to ban pit bulls entirely in Cincinnati. The trial court's finding that pit bulls posed a special danger to humans was supported by competent evidence, and it correctly concluded that the ordinance *sub judice* was not an arbitrary or irrational act of legislation, but was instead reasonably related to the city's interest in protecting the health and safety of its residents. The first assignment of error is overruled.

Appellants' second assignment of error contends that the trial court erred by finding that they lacked standing to assert a "void for vagueness" argument. We disagree.

[4, 5] The essence of the vagueness doctrine is notice. See *Garcia v. Tijeras* (App. 1988), 108 N.M. 116, 767 P.2d 355. An ordinance must be sufficiently clear in defining the activity proscribed so that it informs those who are subject to it what conduct on their part will render them liable to its penalties. *Columbus v. Thompson* (1971), 25 Ohio St.2d 26, 54 O.O.2d 162, 266 N.E.2d 571; *State v. Artis* (1989), 46 Ohio App.3d 25, 545 N.E.2d 925. A law which forbids the doing of an act in terms so vague that people of ordinary intelligence must guess at its meaning 1violates that person's right to due process of law. *Connally v. General Constr. Co.* (1926), 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322; *South Euclid v. Richardson* (1990), 49 Ohio St.3d 147, 551 N.E.2d 606.

3. Cincinnati Municipal Code Section 3701-45.

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[6] In the case *sub judice*, appellants stipulated to ownership of registered American Staffordshire Terriers, a pit bull breed explicitly banned by the ordinance. It is clear, then, that appellants had notice that their possession of these dogs was proscribed by the ordinance. One to whose conduct a law clearly applies does not have standing to challenge the law for vagueness. *Parker v. Levy* (1974), 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439.

Moreover, appellants' argument that the statute is vague as applied to owners of mixed-breed dogs and/or to those who do not possess knowledge that their dogs may be identified as a type of pit bull explicitly banned by the ordinance must likewise fail. " * * * A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.* (1982), 455 U.S. 489, 495, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362. Appellants' second assignment of error is overruled.

The judgment of the trial court is affirmed.

Judgment affirmed.

DOAN, P.J., and UTZ and GORMAN, JJ., concur.



57 Ohio App.3d 18

118 SHAFFER et al., Appellants,

v.

FRONTRUNNER, INC. et al., Appellees.

No. 4-88-22.

Court of Appeals of Ohio,
Defiance County.

Sept. 25, 1990.

Employees brought suit alleging wrongful discharge. The Court of Com-

mon Pleas for Defiance County granted summary judgment in favor of employer, and employees appealed. The Court of Appeals, Shaw, P.J., held that: (1) employees had cause of action for wrongful discharge, and (2) when corporate officer commits a tort while in performance of his duties, he is individually liable for the wrongful act.

Reversed and remanded.

Bryant, J., concurred in part and dissented in part and filed opinion.

1. Courts ⇐100(1)

State Supreme Court decision overruling former decision is retrospective in its operation.

2. Master and Servant ⇐30(1.20)

There is exception to employment-at-will doctrine, creating cause of action for wrongful discharge in violation of public policy as articulated in statute governing jury duty. R.C. § 2313.18.

3. Master and Servant ⇐30(1.20)

Employee who was discharged in retaliation for her daughter, who was also an employee, serving on jury duty had cause of action for wrongful discharge in violation of public policy. R.C. § 2313.18.

4. Master and Servant ⇐30(1.10)

There is exception to employment-at-will doctrine creating cause of action for wrongful discharge in violation of public policy where discharge is of equally serious import as violation of statute, even though no specific statute was violated by employer's actions.

5. Corporations ⇐306

When corporate officer commits a tort while in performance of his duties, he is individually liable for the wrongful act.

Syllabus by the Court

1. An exception to the employment-at-will doctrine exists in Ohio creating a cause of action for wrongful discharge in violation of public policy as articulated in a specific statute, *e.g.*, R.C. 2313.18, jury