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VICIOUS DOG LAWS UNCONSTITUTIONAL IN OHIO

Barbara J. Gislason & Joan E. Schaffner

On March 3, 2006, an Ohio appeals court issued a landmark decision in *City of Toledo v. Tellings*, 2006 WL 513946 (Ohio App. 6 Dist), which may affect pit bulls and pit bull “look-alikes” and their owners nationwide. In this case, one of Tellings’ three law-abiding pit bulls was euthanized by a dog warden. Also, Tellings was criminally charged with two violations of the local Toledo ordinance limiting ownership to one pit bull per household and two violations of the state statute requiring liability insurance with ownership of a pit bull. The vicious dog laws on Ohio include pit bulls in the definition of “vicious dogs.”

The targeting of pit bulls as “per se” vicious is not unique to Toledo. In fact, the number of communities enacting some form of breed-specific legislation (BSL) that target pit bulls has increased by an estimated fifty percent in recent years. Mike Pulfer, *Clamping Down on Vicious Dogs*, CIN ENQUIRER, Feb 26, 2001. Hollywood, Florida, Tijeras, New Mexico, Akron, Ohio, San Francisco, California, Denver, Colorado, and Prince George’s County, Maryland are just a few of the communities with some form of BSL. BSL take various forms—from defining pit bulls as dangerous in otherwise breed-neutral legislation, similar to the laws at issue in *Tellings*, to outright bans on the ownership of pit bulls. See e.g., Prince George’s County, Md. County Code § 3-185.01 (banning pit bulls from the county since 1996). Pit bulls are discriminated against by the business community as well. For example, for many years, the airline industry banned pit bulls on flights; see *Restrictions*, Continental Airlines Animal Policy, <http://www.continental.com/travel/policies/animals/restrictions.asp> (last visited Nov. 21, 2005); and some insurance companies refuse to insure owners of pit bulls. See generally Larry Cunningham, *The Case Against Dog Breed Discrimination by Homeowners’ Insurance Companies*, 11 CONN. INS. L.J. 1 (2004-05).

BSL is quite controversial. Those who support it claim public health and safety are “compelling” justifications for these laws. Humane organizations, including the ASPCA, the HSUS, the National Animal Control Association, the AVMA and even the Centers for Disease Control (CDC), oppose BSL because dangerous dogs should be identified by their behavior not their breed. Because any animal may exhibit aggressive, dangerous behavior, and identifying a specific animal’s breed is very difficult, BSL laws creates an undue burden on responsible owners/guardians of a breed of dog. See e.g. HSUS, *HSUS Statement on Dangerous Dogs and Breed-Specific Legislation*, http://www.hsus.org/pets/issues_affecting_our_pets/dangerous_dogs.html.

Constitutional challenges have been leveled against BSL for decades with little success. Challenges based on substantive due process or equal protection have generally failed. The laws must meet only the minimum rational basis review because neither a fundamental right is at stake nor discrimination targeting a suspect class. As a result, most courts find that limiting ownership of, or even banning, breeds that have a reputation of being “dangerous,” rationally relates to the legitimate, and even compelling, government purpose of public health and safety. See e.g. *Garcia v. Village of Tijeras*, 767 P.2d 355 (N.M. Ct. App. 1988); *Colorado Dog Fanciers v. City and County of Denver*, 820 P.2d 644 (Colo. 1991). Challenges based on overly vague procedural due process; have faired slightly better. The Supreme Court of Massachusetts

held its pit bull ban unconstitutionally vague in *American Dog Owners Association v. City of Lynn*, 533 N.E.2d 642 (MA 1989), stating: “Unlike an ordinance which generally prohibits the keeping of a vicious dog, enforcement of which involves questions of fact whether the particular dog is vicious or known by its owner to be vicious, . . . the pit bull ban ordinance depends for enforcement on the subjective understanding of dog officers . . . [and] leaves dog owners to guess at what conduct or dog “look” is prohibited Such a law gives unleashed discretion to dog officers charged with its enforcement [and is thus unconstitutional].” *Id.* at 647.

In this context of escalating BSL, Tellings challenged the constitutionality of the Ohio laws on appeal. Nevertheless, the Ohio Court of Appeals in Lucas County held the laws unconstitutional as irrational. The appellate court, in reaching its decision, considered the transcript of the trial court, which reflected five days of testimony by sixteen witnesses, many of them experts. *Tellings*, 2006 WL 513946, *1-2. In the process of reviewing this record, the court learned that many of the “beliefs and ‘myths’ about pit bulls [were] simply untrue and unsupported by now accepted scientific, genetic, medical, or canine behavior principles.” *Id.* at *10.

Although the court concluded that since pit bulls, which are either an American Staffordshire Terrier or American Pit Bull Terrier, have qualities like gameness, or stick-to-it-ness, as well as an affinity to “bite and hold,” most public opinions about this highly obedient, eager-to-please breed are not based on facts. For example, the court found the pit bull has neither a locking jaw, nor more strength than other dogs of its size and build. *Id.* at *3. The court noted that the assertion that pit bulls have a bite force of 2,000 pounds per square inch is not supported by scientific evidence. The court also discussed at length how ten breeds of non-pit bull dogs are easily confused with a pit bull. The court noted that although some pit bulls are the victims of abuse at the hands of unsavory owners, many are “highly obedient, eager-to-please, good family pets.” *Id.* at *10.

Further, the court berated reliance upon “bare statistics” of dog breeds involved in human fatalities. Without referencing the total number of dogs in each breed population, the statistics have “no real relevance or meaning.” *Id.* at *4.

Turning to the constitutional analysis, the court found that the state laws denied Tellings’ his constitutional procedural due process rights, which include the meaningful opportunity to be heard before a determination of vicious dog is made. The court relied in part on a 2004 Ohio Supreme Court decision, *State v. Cowen*, 103 Ohio St.3d 144 (2004), in which the court found the state statute unconstitutional because “the only way to challenge the initial ‘vicious’ dog designation was to break the law by non-compliance with the statute.” *Id.* at *7.

The court expressed disdain for the “regulation and limitation on a specific breed for reasons unrelated to that breed, but related to human misconduct or negligence in ownership of the breed.” *Id.* at *11. The court determined that these kinds of laws, based upon mere ownership, were “arbitrary, unreasonable, and discriminatory.” *Id.* Thus, the court found R.C. 955.11(A)(4)(a)(iii) unconstitutional as the law bore no real or substantive relationship to a state interest.

For similar reasons, the court struck down T.M.C. Section 505.14, which limited a person to own only one vicious dog. Laws which “relied on the now disproved presumption that pit

bulls, as a breed, are inherently dangerous, are unconstitutional since they lack a rational or real and substantial relationship to a legitimate government interest.” *Id.* at *12.

And, finally, the court determined that the “statutes violate the defendant’s rights to due process because there is no rational basis to positively identify a pit bull.” *Id.* Essentially, this is a void for vagueness challenge since so many dogs look like pit bulls.

In summary, this decision may provide a basis for others to challenge BSL in their jurisdictions. While this decision will not be binding on other jurisdictions, the court struck down the breed-specific statutes based upon lengthy legal consideration of fact and fiction about pit bulls. The factual findings of this court, after hearing extensive testimony from experts of all kinds, provides sound evidence that BSL is not only ineffective and inefficient, but irrational.

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