

IN THE MUNICIPAL COURT
OHIO

State of Ohio)	
)	Case No.
Plaintiff)	
)	Judge
v.)	
)	<u>MOTION TO DISMISS</u>
John Doe)	
)	(Hearing Requested)
Defendant)	

Now comes the Defendant, by and through the undersigned counsel, and hereby respectfully requests that the case against him be dismissed. For cause, Defendant states that on its face the complaint against him is flawed and cannot be adequately proven. Further, that Youngstown Codified Ordinance 505.19 is in direct conflict with a superseding Ohio Revised Code section and therefore is invalid. Further, that Defendant's right to a speedy trial has been violated pursuant to ORC § 2945.71 and therefore this matter must be dismissed. Defendant further incorporates the following memorandum in support of his position. Based on the foregoing, Defendant requests that the case against him be dismissed.

Respectfully Submitted,

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I. FACTS/PROCEDURAL HISTORY

On or about May 18, 2008 a minor child (hereinafter "Child") and neighbor of Defendant entered onto Defendant's property without Defendant's knowledge, without invitation and without parental supervision. The Child proceeded to open the screen door of Defendant's home and knock in the inner door. When Defendant answered the door, Defendant's dog allegedly bit the Child causing injury. It should be noted here that at no time during the alleged attack did Defendant's dog leave Defendant's property. Further, that Defendant's yard was secured by a fence.

As a result of the incident the Dog Warden was contacted and Defendant was cited for a violation of YCO § 505.19(a). Following arraignment on said charge, Defendant, through counsel, filed a motion to dismiss. In response, the State moved to dismiss this case and said case was dismissed, without prejudice, on September 15, 2009, without Defendant's motion being ruled on.

One full year after dismissal, the State refiled this matter on September 16, 2009. Now comes Defendant seeking to have this matter, again, dismissed through the instant motion.

II. THE COMPLAINT AGAINST DEFENDANT FAILS ON ITS FACE AS ALL ELEMENTS OF THAT COMPLAINT CANNOT BE PROVEN AGAINST DEFENDANT AND THEREFORE THIS MATTER MUST BE DISMISSED

The charge against Defendant is for a violation of YCO § 505.19(a) which reads in full: “No person owning or harboring or having the care of a vicious dog shall suffer or permit such animal to go unconfined on the premises of such person.” The statute goes on to define the term “unconfined” as follows:

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.
YCO § 505.19(c)(1).

Therefore, in order for a defendant to be guilty under YCO § 505.19(a) it is a prerequisite that the defendant’s dog be able to, and for the dog to indeed, leave the premises of its owner.

It should be noted here that the term “premises” is not defined by YCO § 505.19. Further, that it has long been held that when a word is used in a statute but not defined therein, the word should be given its usual meaning in the English language. *See Hughes v. Ohio Dept. of Commerce* (2007) 114 Ohio St.3d 47. The word “premises” is defined as “a tract of land with buildings thereon.” *See Miriam-Webster’s Online Dictionary.* Therefore, in order for a defendant to be guilty under YCO § 505.19(a), the defendant’s dog must be able to and to indeed leave the land of the defendant.

In the instant matter, it is not alleged that Defendant’s dog was “unconfined” within the meaning of YCO § 505.19(a). As a review of the police reports and statements reveals, the alleged incident occurred on the porch of Defendant’s home only after the alleged victim entered onto Defendant’s yard by passing around a fence surrounding that

yard and opened Defendant's screen door. As a result, the charge against Defendant is unsupported by the complaint as at no time was Defendant's dog "unconfined." Consequently, the case against Defendant must be dismissed.

III. YCO § 505.19 IS AN UNCONSTITUTIONAL EXERCISE OF YOUNGSTOWN'S HOME-RULE POWER PURSUANT TO SECTION 3 ARTICLE 18 OF THE OHIO CONSTITUTION AS IT IS IN CONFLICT WITH OHIO REVISED CODE SECTION 955

Section three article eighteen of the Ohio Constitution reads:

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, **as are not in conflict with general laws.** *emphasis added*

This portion of the constitution allows for municipalities, such as the City of Youngstown, to draft, pass and enforce codified ordinances. However, it also prevents municipalities, such as Youngstown, from passing ordinances which are an enforcement of police powers when such ordinances are in conflict with any portion of the Ohio Revised Code. In the instant case, YCO § 505.19 is in direct conflict with ORC § 955 and under home-rule analysis through Section 3 Article 18 of the Ohio Constitution, YCO § 505.19 is unconstitutional; therefore, the same cannot be used to prosecute Defendant.

"A home-rule analysis presents a three step process." Ohioans for Concealed Carry, Inc. v. Clyde (2008) 120 Ohio St.3d 96, 896 N.E.2d 967, *quoting* Am. Fin. Servs. Assn. v. Cleveland (2006) 112 Ohio St.3d 170, 858 N.E.2d 776. "The first step is to determine whether the ordinance at issue 'involves' an exercise of local self government or an exercise of local police power" Id *quoting* Twinsburg v. State Emp. Relations Bd. (1989) 43 Ohio St.3d 1, 20, 539 N.E.2d 103. If the ordinance is an exercise of local self government then the analysis stops and the ordinance remains valid. Id. However, if the

ordinance is an exercise of local police power, the analysis continues to the remaining steps. Id.

The second step requires a review of the revised code section that is allegedly in conflict with the local ordinance to determine if the revised code section is a “general law.” Id. at ¶ 25 citing Canton v. State (2002) 95 Ohio St.3d 149, 766 N.E.2d 963. If the revised code section is a “general law” under this test, the ordinance must yield to the code if the two are in conflict. Id.

The final step then is to determine if the two laws conflict. Id. at ¶ 26. More specifically, “whether the ordinance permits or licenses that which the statute forbids ***, and vice versa.” Id. quoting Struthers v. Sokol (1923) 108 Ohio St. 263, 140 N.E. 519 at paragraph two of the syllabus. Through the application of the above, home-rule analysis, YCO § 505.19 must be invalidated as an unconstitutional conflict with the Ohio Revised Code.

A. YCO § 505.19 IS AN EXERCISE OF LOCAL POLICE POWER AND NOT AND EXERCISE OF LOCAL SELF-GOVERNMENT PURSUANT TO HOME-RULE ANALYSIS

In determining if an ordinance is an exercise of local self government or police power, the Supreme Court has noted, “an ordinance created under the power of local self-government must relate ‘solely to the government and administration of the internal affairs of the municipality.’” Id. quoting Marich v. Bob Bennett Constr. Co. (2008) 116 Ohio St.3d 553, 880 N.E.2d 906. “Police power ordinances, however, ‘protect the public health, safety, or morals or the general welfare of the public’” Id. quoting Downing v. Cook (1982) 69 Ohio St.2d 149, 150, 23 O.O. 3d 186, 431 N.E.2d 995.

A review of YCO § 505.19 reveals that this ordinance is an exercise of local police power. YCO § 505.19(d) reads in full:

Subsections (a) and (b) hereof are necessary controls on the unrestrained activity of vicious animals which threaten the safety and pleasantness of the streets, parks, sidewalks, yards and all areas of the City and lack of knowledge or lack of intent is not a defense to a violation thereof. *emphasis added*

From the above, it is clear that the language used by the City to express its intention in enacting YCO § 505.19 is nearly identical to the definition of an exercise of local police powers. Again, an exercise of local police powers serves to “protect the public health, safety...” *Id.* YCO § 505.19 is a “necessary control... of vicious animals... which threaten the safety...” YCO § 505.19(d). Therefore, this Court can only conclude that YCO § 505.19 was enacted as an exercise of Youngstown’s local police power pursuant to home-rule analysis and therefore, the Court must proceed to examine the remaining two steps as outlined above.

B. REVISED CODE SECTION 955 IS A GENERAL LAW PURSUANT TO HOME-RULE ANALYSIS

It has been long held that in order for a law to be a “general law” pursuant to home-rule analysis, it must:

- 1) be part of a statewide and comprehensive legislative enactment,
- 2) apply to all parts of the state alike and operate uniformly throughout the state,
- 3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and
- 4) prescribe a rule of conduct upon citizens generally. *Id. quoting Am. Fin. Servs. Assn. supra* and *Canton supra* at syllabus.

A review of each of these four parts reveals that ORC § 955 is a general law pursuant to home-rule analysis.

The Legislature meant ORC § 955 to be a statewide comprehensive legislative enactment. More specifically, ORC § 955 imposes criminal liability on dog owners for certain acts of their “vicious dog.” In other words, ORC § 955 is used to impose liability on dog owners for how they keep and register their dogs statewide. Clearly, the state legislature could not enact a criminal statute that applies only to a certain portion of the state. Further, ORC § 955 requires the use of dog wardens and regulates kennels throughout the state. Further, it imposes criminal liability for violations thereof which are applicable to all persons within the state of Ohio. Clearly, the Legislature could not impose criminal liability, or the other restrictions and procedures discussed above, if not done in a statewide manner. As such, ORC § 955 passes the first prong of this test to be determined a “general law.”

The second part to a determination of whether or not ORC § 955 is a “general law” requires an examination for uniformity and statewide application. Again, as ORC § 955 deals with state licensing and regulation of the ownership of dogs as well as containing a statewide criminal statute; it can only be determined that ORC § 955 is applicable throughout Ohio and uniformly applied. In other words, a criminal violation under this statute would be the same in every county and city in Ohio and therefore, ORC § 955 passes the second part of this test to determine if the same is a “general law” for the purposes of home-rule analysis.

The third part to a determination of “general law” asks if the statute sets forth police power or other powers, or, if the statute effects municipal legislative power. If a statute does the former, then it passes this part of the test to be a “general law” for home-rule analysis. Id.

In making this determination, the Supreme Court has directed that a statute is an exercise of police power if it “relates to public health and safety as well as the general welfare of the public.” *Id quoting Marich supra*. Here, ORC § 955 fits this definition as the law was created to regulate dogs to preserve public health and safety. Moreover, the inclusion of a criminal offense in the statute by way of ORC § 955.22 furthers a determination of an exercise of police power as all criminal statutes are meant further public health and safety. As a result, it must be determined that ORC § 955 is an exercise of police power and therefore does pass this part of the test to be a “general law.”

The final portion of this test asks if the statute prescribes a rule of conduct for the citizenry. Again, this question is answered in the affirmative by the text of ORC § 955. A review of the statute as described above indicates that ORC § 955 prescribes a number of rules for the citizens of Ohio including, but not limited to; licensure of dogs, transfer of ownership of dogs, operation of kennels and rules regarding keeping/harboring “vicious dogs.” As such, ORC § 955 passes the final test for determination to be a “general law.” Therefore, the second prong of home-rule analysis is satisfied and this Court must proceed to the final prong.

C. THE TWO LAWS ARE IN CONFLICT PURSUANT TO HOME RULE ANALYSIS AND THEREFORE THE YOUNGSTOWN ORDINANCE MUST YIELD TO THE OHIO REVISED CODE SECTION

As Justice Pfeifer points out in his dissent, “According to R.C. 955.22, the owner of a dog cannot be criminally liable for acts of that dog unless the dog has already been determined to be ‘vicious’”. *City of Youngstown v. Traylor* (2009) 123 Ohio St.3d 132, at *dissent*. Further, “unlike YCO 505.19, R.C. 955.22 and related statutes do not allow a dog to be labeled vicious and its owner to be criminally liable based on the same act.” *Id.*

The language used above by Justice Pfeifer points out the conflict between the ordinance and statutes here at issue. More simply, the ordinance makes criminal that which is not criminal under the revised code. As such, a conflict does exist between the two laws. Furthermore, based on the law noted above, due to such conflict, the ordinance must yield to the revised code statute. Therefore, the instant matter must be dismissed.

IV. DEFENDANT'S RIGHT TO A SPEEDY TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, ARTICLE I SECTION 10 OF THE OHIO CONSTITUTION AND OHIO REVISED CODE SECTION 2945.71(B)(1) HAVE BEEN VIOLATED THEREFORE REQUIRING THAT THIS MATTER BE DISMISSED

As discussed above, this matter is a refiled case from an original action filed in 2008. More specifically, Mr. Doe received the complaint and was booked through the Mahoning County jail on May 10, 2008. He then filed a waiver of speedy trial effective for the 2008 case. Subsequently, the State dismissed that action on September 14, 2008 a total of one-hundred and sixteen (116) days after it was filed. Following dismissal, a full year passed before the State sought to refile the case against Defendant. It should be noted here that in both the original and refiled matters, all of the charges against Defendant were misdemeanors of the first degree. Further, that both the 2008 case and instant case stem from the same facts and circumstances.

Pursuant to ORC § 2945.7(B)(2), the time in which a criminal defendant facing a misdemeanor of the first degree must be brought to trial is ninety (90) days. Failure to comply with this deadline requires immediate dismissal and forecloses the state from refiled the action. Additionally, Defendant's rights pursuant to the Sixth Amendment to the United States Constitution and Article One Section Ten of the Ohio Constitution have also been violated.

Whereas ninety (90) days have not passed since the date that this matter was refiled, the State has nonetheless violated Defendant's right to a speedy trial. This is because a when a case is refiled the original waiver of speedy trial cannot and does apply to the refiled charges and **speedy trial is calculated from the original date of arrest.** *See State v. Hawkins* (1993) 66 Ohio St.3d 339, 612 N.E.2d 1227 *cert denied*; *See also State v. Blauvelt* (12th Dist., 2007) 2007-Ohio-5897, Westlaw # 3243588. That means that on the day that this case was refiled, the State had already violated Defendant's right to a speedy trial as a total of one-hundred and sixteen (116) days had passed since the date of Defendant's original arrest. This violation occurred the moment the case was dismissed against Defendant and cannot be waived. As the courts have noted, once a violation of a defendant's speedy trial right has occurred, it cannot be negated by any subsequent action. *See State v. Blessing* (5th Dist., 2004) 2004-Ohio-190, Westlaw #77872. Further, that even if a second waiver is issued, once a defendant reasserts his right to a speedy trial, time is computed prior to that waiver until the day of the waiver. *See State v. King* (3rd Dist., 2007) 2007-Ohio-335, Westlaw #209990. Further, this computation does not even taken into consideration the amount of time that has passed in the instant, refiled matter.

As a result, it is clear from the case-law above that each of the days that the original action was pending count against the state for purposes of speedy trial. Further, that from the date of Defendant's original arrest until the filing of the second charge, one-hundred and sixteen (116) days had passed; meaning that Defendant's right to a speedy trial had already been violated. These facts coupled with the long-standing principle that once a defendant provides a prima facie case (as done here above) that speedy trial has

been violated, the burden shift to the state to show that speedy trial has not been violated. State v. Baker (1993) 92 Ohio App.3d 516, 525, 636 N.E.2d 363. Based on all of the foregoing, this Court can only find that Defendant's right to a speedy trial has been violated and therefore this matter must be dismissed.

V. CONCLUSION

Given the facts of this case and the allegations made against Defendant, it is clear that at no time during the alleged incident is there any allegation that Defendant's dog was "unconfined" within the meaning of YCO § 505.19. Without this allegation, and/or any facts to back up the same, it is impossible for the case against Defendant to proceed. For this reason, the instant matter must be dismissed.

Further, when YCO § 505.19 is reviewed pursuant to "home-rule analysis" it becomes clear that the same is clearly in conflict with ORC § 955. As the two laws are in conflict, YCO § 505.19 is an unconstitutional exercise of the powers of the City of Youngstown. As such, this matter must be dismissed as the law upon which Defendant is charged is unconstitutional.

Finally, Defendant's right to a speedy trial have been violated. A waiver in the original matter does not protect the state from counting each day that the original matter was pending as the same is inapplicable to the instant case. Further, the moment a violation occurs, the matter must be dismissed. Therefore, the instant matter should never have been refiled to begin with and must now be dismissed.

Based on all of the foregoing, Defendant respectfully requests the Court to dismiss this matter and any and all charges therein.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was hand-delivered to counsel for the State at the City of Youngstown, Prosecutor's Office, 26 S. Phelps St., Youngstown, Ohio 44503 on this ____ day of November, 2009.

Ronald D. Yarwood (0068775)
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