



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 13-0936

ESTELLA ROBINSON,
Petitioner,

V.)

Appeal from a Final Order of the Circuit
Court of Mercer County (13-M-AP-7-WS)

CITY OF BLUEFIELD,
Respondent

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

1. The Circuit Court of Mercer County, the Honorable William Sadler presiding, committed error by incorrectly interpreting West Virginia statutory law and concluding that a municipal court judge has the authority to order an animal be destroyed.

2. The Circuit Court of Mercer County, the Honorable William Sadler presiding, committed error by denying Petitioner Estella Robinson's appeal from a municipal court decision without deciding whether the municipal court judge's factual decision was proper. The Circuit Court's decision deprived Petitioner Estella Robinson an opportunity to have an expert's opinion considered by a fact-finder.

STATEMENT OF THE CASE

Estella Robinson was charged with having a dangerous animal in violation of the Municipal Code of the City of Bluefield, and with the failure to confine an animal (a different animal than the one involved in the first charge). Estella Robinson, represented by an attorney pled guilty and in the plea agreement agreed to pay fines, but did not agree to having her dog destroyed. *The issue of the destruction of the dog was not a part of the plea agreement.*

At the time the Municipal Court ordered the dog to be destroyed, Estella Robinson, through counsel, requested time to either have the dog examined to determine whether the dog was indeed a vicious dog or to locate a placement for the dog outside of the city limits of the City of Bluefield.

The Municipal Judge granted Estella Robinson time to obtain an expert's opinion *and* to locate a placement outside the city limits of the City of Bluefield. Both Estella Robinson and her counsel believed Estella Robinson had the option of obtaining *either* an evaluation of the dog *or* a placement for the dog outside the city limits of Bluefield. When Estella Robinson and her

counsel presented the Municipal Court with a placement outside the city limits of the City of Bluefield, said placement being with an adult son of Estella Robinson who lives in the Charleston area, the Municipal Court refused to let the dog be released to the adult son because there was no expert opinion stating the dog was not vicious. An expert's opinion was obtained, and the expert deemed the dog not to be vicious, but recommended the dog be placed with someone other than Estella Robinson due to Estella Robinson residing in a location not suitable for a dog. The opinion was submitted to the Circuit Court of Mercer County as part of a Motion filed with the Circuit Court, and the Motion and the expert opinion attachment is a part of the record and the appendix in this matter.

Upon appeal to the Circuit Court of Mercer County, the Circuit Court Judge, the Honorable William Sadler, on July 24, 2013, ruled that a municipal court judge did indeed possess the authority to order an animal be destroyed, but did not conduct a hearing as to the facts of the viciousness of the dog. Therefore, Estella Robinson was denied an opportunity to have the expert's opinion concerning the dog considered by a fact-finder during a hearing.

The Circuit Court denied Estella Robinson's appeal, and upheld the Municipal Court's order to destroy the dog. Estella Robinson timely filed a Notice of Intent to Appeal with the Supreme Court of Appeals, and the Order to destroy the dog has been stayed for the duration of this appeal. The dog is currently impounded at the Mercer County Animal Shelter.

Estella Robinson now appeals the Circuit Court of Mercer County's decision upholding the Order of the Municipal Court of the City of Bluefield that Estella Robinson's dog be destroyed.

SUMMARY OF ARGUMENT

The Circuit Court of Mercer County, the Honorable William Sadler, erred when said Judge ruled that municipal judges have the authority to order dogs be destroyed, and erred when the Court refused to conduct a hearing for the court to make a determination of whether the facts warrant the destruction of the dog in question.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner asserts that oral argument pursuant to Rule 18(a) is necessary.

Petitioner also asserts that this matter should be set for Rule 19 Argument, because this case involves assignments of error in the application of settled law. A memorandum decision is not appropriate.

The minimum time limit is sufficient.

ARGUMENT

1. The Circuit Court of Mercer County, the Honorable William Sadler presiding, erred by ruling that a municipal court judge has the authority to order a dog be destroyed pursuant to a vicious animal ordinance.

The Supreme Court of Appeals of West Virginia, in *State v. Cavallaro*, 210 W. Va. 237, 557 S.E.2d 291 (2001), stated the appropriate standard of review for this issue:

“We have held that “[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).” 557 S.E.2d at 292-93.

Estella Robinson was charged in the Municipal Court of the City of Bluefield with having violated what is now codified as Section 4-49 of the Municipal Code of the City of Bluefield., said section being entitled “Dangerous Animals”

Section 4-49 of the Municipal Code of the City of Bluefield reads:

“No person shall own, keep or harbor any dangerous animal known by him to be vicious, dangerous, or in the habit of biting or attacking persons, whether or not such dog wears a tag or muzzle, and upon satisfactory proof that such animal is vicious,

dangerous, or in the habit of biting or attacking person, municipal judge may order any police officer or the animal control officer to cause such animal to be killed. Vicious or dangerous animals are declared to be a public nuisance and a menace to the public safety.”

Estella Robinson pled guilty, and was ordered to pay a fine. The municipal judge also ordered the dog to be destroyed, which was not part of the plea agreement.

Defendant Estella Robinson timely appealed the Order to destroy the dog, and the matter was assigned to the Circuit Court of Mercer County, the Honorable William Sadler presiding.

The Circuit Court held a status hearing on July 1, 2013, in this matter, and ordered another hearing on July 24, 2013. The Circuit Court stated the Court would consider at that time whether the Municipal Judge of the Municipal Court of the City of Bluefield possessed the authority to order a dog to be destroyed.

Section 58 of the Municipal Code of the City of Bluefield reads:

“The board of directors shall have authority to pass all ordinances not in conflict with the Constitution and laws of the United States, or of this State, which shall be necessary and proper to carry into effect any power, authority, capacity or jurisdiction which is or shall be granted to, or vested in, the said city, or in the board of directors or any officer of said city; and to provide for the enforcement of any and all of their ordinances by reasonable fines and penalties, or by imprisoning the offender or offenders violating such ordinances and by compelling them to labor without compensation, at any public works or improvements undertaken by said city, or by any or all of the said modes; provided, however, that no person shall be imprisoned or compelled to labor as aforesaid more than thirty days or fined more than a fine authorized for a similar offense by the West Virginia Code, or fined more than five hundred dollars for any offense not appearing in the West Virginia Code.”

Section 19-20-20 of the West Virginia Code reads:

“Except as provided in section twenty-one of this article, no person shall own, keep or harbor any dog known by him to be vicious, dangerous, or in the habit of biting or attacking other persons, whether or not such dog wears a tag or muzzle. Upon satisfactory proof before a circuit court or magistrate that such dog is vicious, dangerous, or in the habit of biting or attacking other persons or other dogs or animals, the judge may authorize the humane officer to cause such dog to be killed.”

It is clear that Section 4-49 of the Municipal Code of the City of Bluefield conflicts with the Section 19-20-20 of the West Virginia Code.

The City of Bluefield is not without a remedy. If the City of Bluefield has a “vicious animal” case in which the City of Bluefield wants the animal destroyed, the City of Bluefield should simply file the case in Magistrate Court, as the City already does when the City wants to see a Defendant incarcerated for over thirty (30) days.

The City of Bluefield argued in it’s response to Estella Robinson that West Virginia Code Section 8-12-5(26) authorizes municipal courts to destroy vicious animals. The pertinent portions of 8-12-5 and subsection (26) reads:

“In addition to the powers and authority granted by: (i) The Constitution of this state; (ii) other provisions of this chapter; (iii) other general law; and (iv) any charter, and to the extent not inconsistent or in conflict with any of the foregoing except special legislative charters, every municipality and the governing body thereof shall have plenary power and authority therein by ordinance or resolution, as the case may require, and by appropriate action based thereon:

(26) To regulate or prohibit the keeping of animals or fowls and to provide for the impounding, sale or destruction of animals or fowls kept contrary to law or found running at large;”

But the above section merely gives the City of Bluefield and its governing body, i.e. City Council, the ability to pass an ordinance concerning a vicious dog that is not “inconsistent or in conflict with any law of the State of West Virginia. The section does not mention a municipal court.

The City of Bluefield has provided “for the destruction of animals” with an ordinance that is inconsistent and in conflict with the West Virginia Code, which says, under Section 19-20-20 of the West Virginia Code that only circuit court judges or magistrates have the jurisdiction to order the destruction of a vicious dog.

To read City of Bluefield Municipal Code Section 4-49, and West Virginia Code Sections 8-12-5(26) and 19-20-20 any other way violates at least two axioms of statutory construction recognized and followed by the West Virginia Supreme Court of Appeals.

The Supreme Court of Appeals of West Virginia, in *State Ex Rel. Graney v. Sims*, 105 S.E.2d 886, 144 W.Va. 72 (1958), applied the statutory interpretation doctrine of *pari materia* by stating:

“All statutes in *pari materia* should be read and construed together, as if they formed parts of the same statute and were enacted at the same time, and where there is a discrepancy or disagreement among them such interpretation should be given as that all may, if possible, stand together.’ 17 M.J., Statutes, § 40. Many decisions of this Court are cited in support of this statement. The provisions in Section (13a) ‘Provided, that all officials and employees shall be paid at least once every thirty-one days.’, and Code, 6-7-1, relate to the same subject matter, and are not in substance inconsistent with each other. Therefore, they are in *pari materia*.” 144 W.Va. 72, 80-81, 105 S.E.2d 886, 892.

The Supreme Court of Appeals of West Virginia applied the same doctrine again, as it has many times, in *Fruehauf Corp. v. Huntington Moving and Storage Co.*, 217 S.E.2d 907, 159 W.Va. 14 (1975):

“This Court has consistently held that statutes relating to the same subject matter must be read and applied together regardless of whether reference is made by one to the other. *State ex rel. West Virginia Board of Education v. Miller*, 153 W.Va. 414, 168 S.E.2d 820 (1969); *State v. Condry*, 139 W.Va. 827, 83 S.E.2d 470 (1954). Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *Pari materia* to assure recognition and implementation of the legislative intent. *State ex rel. Slatton v. Boles*, 147 W.Va. 674, 130 S.E.2d 192 (1963); *State ex rel. Graney & Ford v. Sims*, 144 W.Va. 72, 105 S.E.2d 886 (1958).” 217 S.E.2d at 911-12 (1975).

In the matter at hand, there is a statute that allows municipalities to pass ordinances regulating vicious animals and a statute that says only magistrates and circuit court judge may order a dog or animal destroyed. Reading the two statutes together creates two scenarios: 1) the two statutes are in conflict or 2) municipalities that want an animal destroyed for violation of an ordinance must go to magistrate or circuit court to have the animal destroyed.

A second rule of statutory interpretation should also be applied here. The maxim *expressio unius est exclusio alterius* is pertinent here. The Supreme Court of Appeals of West Virginia, in *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 492, 647 S.E.2d 920, 928 (2007) applied said rule:

“W.Va.Code, 55–7B–2(c) defines “health care provider” as one who is licensed to provide “health care or professional health care services,” and gives a list of professionals and businesses intended to be covered by the MPLA. The list does not include pharmacies, and this Court has previously recognized that “[i]n the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies.” Syllabus Point 3, *Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984). See also, *State ex rel. Riffle v. Ranson*, 195 W.Va. 121, 128, 464 S.E.2d 763, 770 (1995) (“*Expressio unius est exclusio alterius* (express mention of one thing implies exclusion of all others) is a well-accepted canon of statutory construction.”) (citing *Brockway Glass Co. Inc., Glassware Div. v. Caryl*, 183 W.Va. 122, 394 S.E.2d 524 (1990); *Dotts v. Taressa J.A.*, 182 W.Va. 586, 591, 390 S.E.2d 568, 573 (1990)). The *expressio unius* maxim is premised upon an assumption that certain omissions from a statute by the Legislature are intentional. As the Court explained in *Riffle*, “[i]f the Legislature explicitly limits application of a doctrine or rule to one specific factual situation and omits to apply the doctrine to any other situation, courts should assume the omission was intentional; courts should infer the Legislature intended the limited rule would not apply to any other situation.” 195 W.Va. at 128, 464 S.E.2d at 770.” 647 S.E.2d at 928 (2007).

In the matter now before the Court, since the Legislature did not include municipal judges in Code Section 19-20-20, when the Legislature authored said Code Section, the Legislature intended to limit the authorities who had jurisdiction or authority to order an animal be destroyed to circuit court judges and magistrates.

If the Supreme Court of Appeals affirms the Circuit Court’s decision that Municipal Judges have the authority to order a dog be destroyed, a group of individuals will be given the power to deprive West Virginia citizens that live within municipal boundaries of not merely personal property, but of beloved pets. And among this group of individuals are many who have no real legal training but instead have been hired by a city or town to conduct traffic ticket hearings.

This Court needs to consider that Municipal Court Judges are almost always employees of the cities or towns wherein the judge's employer is a party to the action before the municipal judge, and the municipal judges are not really accountable to any electorate body. In some West Virginia towns and hamlets the municipal judge is still the mayor or an otherwise city-employed individual.

Clearly, when the Legislature mandated that decisions to destroy animals should be made by Circuit Court Judges or Magistrates, the Legislature did not intend for such decisions to also be made by Municipal Court Judges.

The Circuit Court also stated the Court wanted the parties to brief the question whether the Circuit Court could modify a sentence imposed by a municipal court as a result of a plea.

However, in this case the portion of the sentence Estella Robinson is now appealing, the plea agreement did not address the issue of the destruction of the animal.

At the status hearing conducted by the Circuit Court on July 1, 2013, the City Attorney for the City of Bluefield, acknowledged that *appealing* the order of the destruction of the dog was contemplated by the plea agreement:

“THE COURT: The first...first question is whether or not I have the authority to modify the order from...from City Court. And the second is if so be ready uh, be prepared to address any request for modification.

MR. LINKOUS: Because the...I mean, the... the City agree to let her appeal the destruction of the dog. That's why it was stayed and why we got...were allowed to get an opinion and all of that stuff.

MR. COCHRAN: Your Honor, I don't want to put the Court in the position of providing an advisory opinion here but honestly between the issues involved between the City and the County on some new issues, uh I wouldn't object at all to let this Court here [sic] whether or not the City has the jurisdiction to order that the dog be destroyed and that the County be the one to destroy it.” Status Hearing Transcript, July 1, 2013, pages 6 and 7.

The Circuit Court then asked:

“THE COURT: But is the...is the County taking the position that they don’t have to put down animals that you all –

MR. COCHRAN: The County is taking the position that City Court doesn’t have authority to order destruction of the dog.” Status Hearing Transcript, July 1, 2013, page 8.

To place the above discussion in context, the City of Bluefield passed an ordinance addressing the type of dog commonly called “pit bulls”, after Estella Robinson was charged as she was is in this case, and there is an ongoing issue between the City of Bluefield and the Mercer County Commission concerning the ordinance. Estella Robinson’s case does not involve the new ordinance.

Nevertheless, generally Section 8-34-1 of the West Virginia Code addresses a Defendant’s right to appeal a decision from a municipal court. And Section 8-34-1(h) of the West Virginia Code appears to be the only statute section that addresses the appeal of a plea in municipal court. Said statute reads:

“(h) Notwithstanding any other provision of this code to the contrary, there shall be no appeal from a plea of guilty where the defendant was represented by counsel at the time the plea was entered: Provided, That the defendant shall have an appeal from a plea of guilty where an extraordinary remedy would lie or where the mayor or municipal court judge lacked jurisdiction.”

Therefore, if a municipal court judge lacks the jurisdiction to order an animal destroyed, some type of extraordinary remedy would allow an aggrieved dog owner relief and a Circuit Court could reverse such a decision, even when the decision is part of a plea or results from a plea hearing. In the matter now before this Court, *Estella Robinson never agreed*, as part of her plea, *for her dog to be destroyed*.

2. The Circuit Court erred by not conducting a hearing to determine whether the dog in question is in fact a vicious dog that should be destroyed.

On July 24, 2013, the Circuit Court of Mercer County conducted a hearing to hear arguments whether the Municipal Court Judge for the Municipal Court of Bluefield had the authority to order a dog be destroyed.

The Circuit Court found that the Municipal Court judge did have authority to order a dog be destroyed. But the Circuit Court did not finish the process by conducting a hearing wherein the Circuit Court heard evidence as to whether the dog in question should be destroyed.

In essence, there are two parts to this case, i.e. whether the municipal court had the authority to order the dog be destroyed, and whether the Municipal Court judge's decision to order the dog be destroyed was supported by the proper amount of evidence and whether there was any error made in the decision process.

The Circuit Court of Mercer County only answered the first part of this case, i.e. did the Municipal Court Judge possess the authority and/or the jurisdiction to order the dog be destroyed.

When the Circuit Court only answered the first part of the issue before the Circuit Court, Estella Robinson, through counsel, filed a Motion For Additional Hearing with the Circuit Court, but the Circuit Court denied the Motion without issuing any Order or decision. The Circuit Court basically ignored the Motion for Additional Hearing.

The Motion for Additional Hearing had an attachment, the expert's opinion that the dog in question is not a vicious dog that warrants destruction. As a result of the Circuit Court's denial by silence, the expert opinion has never been considered by any judge or fact-finder.

CONCLUSION

Petitioner Estella Robinson is entitled to relief from this Court for two reasons.

A municipal court judge does not have the authority to order a dog be destroyed. The Municipal Code of the City of Bluefield clearly violates West Virginia statutory law which states that only a magistrate or a Circuit Court judge may order a dog be destroyed. Upholding West Virginia Code Section 19-20-20 in this matter would only require the City of Bluefield to bring actions wherein the destruction of a dog is sought in Mercer County Magistrate Court or the Circuit Court of Mercer County, West Virginia. Such a requirement is not new or novel. The City of Bluefield already files many criminal matters in both the Magistrate Court of Mercer County and the Circuit Court of Mercer County, West Virginia.

Allowing the Municipal Court judge for the City of Bluefield to order the destruction of a dog, on the other hand, opens the door for all municipal court judges, whether said judges sit in the largest or the smallest of West Virginia cities and municipalities, to begin ordering the destruction of dogs and animals. Such a scenario is clearly not the scenario envisioned by the West Virginia Legislature which passed West Virginia Code Section 19-20-20.

Additionally, in the matter now before this Court, allowing Estella Robinson's dog to be destroyed without either the Municipal Court or the Circuit Court conducting a full hearing on the merits denies Estella Robinson the chance to have a trier of fact review and consider the expert opinion of an expert who is of the opinion that the dog in question *is not* a vicious animal that warrants destruction. Therefore, even if this Court decides that municipal court judges generally have the authority to order the destruction of dogs, this Court should remand this matter back to the Municipal Court of Bluefield or the Circuit Court of Mercer County for a full and complete hearing on the merits to determine whether Estella Robinson's dog is vicious and needs to be destroyed.

RESPECTFULLY SUBMITTED,

ESTELLA ROBINSON,
PETITIONER,

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have on this the 26th day of November, 2013,
served a true copy of the foregoing PETITIONER'S BRIEF upon the following Counsel:

Mr. Brian Cochran
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by either placing a true copy thereof in the United States Postal System, addressed to the address
above which is the last known address of the above counsel known to me.



Gerald R. Linkous