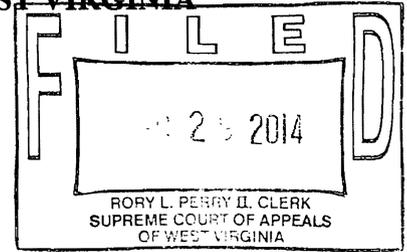


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0757



STATE OF WEST VIRGINIA,

Respondent,

v.

MICHAEL BLATT and KIM BLATT,

Petitioners.

RESPONDENT'S BRIEF

**PATRICK MORRISEY
ATTORNEY GENERAL**

**DEREK A. KNOPP
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
State Bar No. 12294
Email: derek.a.knopp@wvago.gov
*Counsel for Respondent***

TABLE OF CONTENTS

STATEMENT OF THE CASE..... 1

SUMMARY OF THE ARGUMENT 2

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 3

ARGUMENT 4

 I. Standard of Review..... 4

 II. The Circuit Court Did Not Err in Denying Petitioners’ Motion to Dismiss..... 4

 III. The Circuit Court Properly Found That Petitioners’ Dog Bit A Child, Caused Severe Injuries to the Child, and That One Unprovoked Attack of a Child is Sufficient Evidence That Petitioners’ Dog is Vicious.8

 IV. The Hearings Held on June 17, 2014, and June 30, 2014, Did Not Subject Petitioners to Double Jeopardy.10

CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases

<i>Durham v. Jenkins</i> , 229 W. Va. 669, 735 S.E.2d 266 (2012).....	passim
<i>Hardwick v. Town of Ceredo</i> , No. 11-1048, 2013 WL 149628, (W. Va. Jan. 14, 2013).....	9, 10
<i>Hill v. Stowers</i> , 224 W.Va. 51, 680 S.E.2d 66 (2009).....	5, 9, 10
<i>Hurley v. Allied Chemical Corp.</i> , 164 W.Va. 268, 262 S.E.2d 757 (1980).....	5
<i>State ex rel. Holbert v. Robinson</i> , 134 W.Va. 524, 59 S.E.2d 884 (1950).....	6
<i>State v. Vance</i> , 207 W.Va. 640, 535 S.E.2d 484 (2000).....	4

Statutes

W. Va. Code § 19-20-20	2, 4
W. Va. Code § 19-20-12	7
W. Va. Code § 19-20-12(a).....	7
W. Va. Code § 19-20-18	5
W. Va. Code § 19-20-20	passim

STATEMENT OF THE CASE

On June 17, 2014, a bench trial was held in the Circuit Court of Wayne County, West Virginia regarding whether Michael and Kim Blatt (“Petitioners”) violated W. Va. Code § 19-20-20 which provides that 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. At the conclusion of the testimony and evidence, the circuit court entered an order adjudging Petitioners not guilty of the “criminal offense of knowingly owning and keeping a vicious dog.” (App. at 68.) The circuit court found that the State had not proved beyond a reasonable doubt that Petitioners knew the dog to be vicious. (*Id.* at 67.) Subsequently, the circuit court ordered that a hearing take place with regard to the destruction of the dog on June 30, 2014.

After this hearing, the circuit court entered an order finding that Petitioners’ dog, Tinkerbelle, did bite a child causing the child severe injuries and that one unprovoked attack of a child is sufficient evidence that the dog is vicious, dangerous, and in the habit of biting people. (*Id.* at 71.) The order also reflected that the dog was a pit bull and that such a breed is generally more dangerous, more aggressive, and unpredictable in nature. (*Id.* at 70.) The court found that Petitioners’ dog was indeed vicious, dangerous, and in the habit of biting people and subsequently ordered the Cabell-Huntington-Wayne Animal Shelter to euthanize Petitioners’ dog. (*Id.* at 71.) Petitioners now appeal this order.

SUMMARY OF THE ARGUMENT

The Circuit Court of Wayne County, West Virginia properly rejected Petitioners' claims that (1) W. Va. Code § 19-20-20 requires a criminal conviction before a dog is found vicious and ordered euthanized, (2) that there was insufficient evidence for a finding that Petitioners' dog was vicious, dangerous, or in the habit of attacking or biting people, and (3) that Petitioners' rights against double jeopardy have been violated.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Though the facts and legal arguments are adequately presented in the briefs and record on appeal, this matter appears to be appropriate for oral argument if so determined by this Honorable Court. This matter would appear not to be appropriate for a memorandum decision.

ARGUMENT

I. Standard of Review

This Court employs the following general standard of review to circuit court rulings:

“In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.”

Syl. pt. 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).

II. The Circuit Court Did Not Err in Denying Petitioners’ Motion to Dismiss.

Relying on this Court’s decision in *Durham v. Jenkins*, 229 W. Va. 669, 735 S.E.2d 266 (2012), Petitioners argue that the circuit court erred in denying their motion to dismiss the destruction hearing because a dog may only be ordered to be killed when it is first found that the dog’s owner committed a crime described in the first sentence of W. Va. Code § 19-20-20. (Pet’r’s Br. at 8-11.) W. Va. Code § 19-20-20 provides:

“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.”

W. Va. Code § 19-20-20.

In *Durham*, this Court addressed the issue of whether a civil suit may be brought pursuant to W. Va. Code § 19–20–20. *Durham* at 671, 735 S.E.2d at 268. This Court found that it may not, holding that “[t]he authority to order a dog killed pursuant to W. Va. Code § 19–20–20 (1981), stems solely from a criminal proceeding, and a private cause of action may not be brought for the destruction of a dog under this section.” *Id.*, Syl. Pt. 4. *Durham* used a four-

prong test to determine that W. Va. Code § 19-20-20 did not give rise to an *implied* private cause of action. *Id.* at 671, 735 S.E.2d at 268. (citing Syl. pt. 3, *Hill v. Stowers*, 224 W.Va. 51, 680 S.E.2d 66 (2009)).

“The following is the appropriate test to determine when a State statute gives rise by implication to a private cause of action: (1) the plaintiff must be a member of the class for whose benefit the statute was enacted; (2) consideration must be given to legislative intent, express or implied, to determine whether a private cause of action was intended; (3) an analysis must be made of whether a private cause of action is consistent with the underlying purposes of the legislative scheme; and (4) such private cause of action must not intrude into an area delegated exclusively to the federal government.’ Syllabus Point 1, *Hurley v. Allied Chemical Corp.*, 164 W.Va. 268, 262 S.E.2d 757 (1980).”

Id. (citation omitted.)

Durham found that the first and fourth prongs were easily met as § 19-20-20 acts to protect the public from dangerous dogs and does not intrude into an area delegated exclusively to the federal government. *Id.* However, *Durham* found that the second and third prongs were not satisfied. In regard to the second prong, it found that the first sentence of § 19-20-20 is plainly criminal in nature and that the second sentence is linked to the established criminal nature of the first. *Id.* at 672, 735 S.E.2d at 269. “Thus, absent explicit direction from the Legislature to the contrary, the construction of § 19–20–20 evidences the Legislature’s intent that the entire section is criminal in nature, giving rise to only criminal proceedings.” *Id.* *Durham* found that the third prong was also unsatisfied, reasoning that the circuit court’s dependence on W. Va. Code § 19-20-18 was misplaced as that section expressly provided a civil remedy and did not contain a criminal component. *Id.* at 673, 735 S.E.2d at 270. *Durham* then went on to state that “[s]ection § 19-20-20 . . . only provides for the killing of a dog when it is first found that the dog’s owner committed a crime described in the first sentence of the section.” *Id.* *Durham* then finally stated, “This Court holds that the authority to order a dog killed pursuant to W. Va. Code § 19–

20–20 (1981), stems solely from a criminal *proceeding*, and a private cause of action may not be brought for the destruction of a dog under this section. *Id.* (emphasis added.)

Relying on the dicta in *Durham*, Petitioners argue that before the circuit court had the authority to order the dog killed, they must first have been convicted of the crime set out in the first sentence of § 19-20-20. (Pet’r’s Br. at 8-11.) *Durham* holds that a private action may not be brought under § 19-20-20 as the authority to order a dog killed stems solely from a criminal proceeding. Syl. Pt. 4, *Durham*. The circuit court’s authority in this case did, in fact, stem from a criminal proceeding, and therefore, the circuit court had the authority to order the dog killed provided that the dog was found to be vicious, dangerous, or in the habit of biting or attacking other persons or other dogs or animals. A plain reading of the statute as well as the underlying legislative purpose and scheme support this conclusion.

“A statute is enacted as a whole with a general purpose and intent, and each part should be considered in connection with every other part to produce a harmonious whole. Words and clauses should be given a meaning which harmonizes with the subject matter and the general purpose of the statute. The general intention is the key to the whole and the interpretation of the whole controls the interpretation of its parts.”

Syl. pt. 1, *State ex rel. Holbert v. Robinson*, 134 W.Va. 524, 59 S.E.2d 884 (1950).

The plain language of § 19-20-20 contains no requirement that an owner of a dog must first be convicted of the crime defined in the first sentence of § 19-20-20 before the court may have the authority to euthanize a dangerous dog. *Id.* at 677, 735 S.E.2d at 274 (Workman, dissenting) (“The plain language of the statute reveals that neither of the two provisions in the statute is dependent upon the other for operation.”). Additionally, as recognized in *Durham*, the general purpose of § 19-20-20 is “to protect the public from dogs that are vicious, dangerous, or in the habit of biting or attacking people.” *Id.* at 671, 735 S.E.2d at 268. As a part of carrying out this purpose, § 19-20-20 prohibits a person from owning a dog he/she knows to be dangerous

or vicious, except as provided in § 19-20-21. However, it defies the legislative purpose of protecting the public from dangerous dogs to first require an owner to be found guilty of owning a dog known by him/her to be vicious before the court may order a dangerous dog to be killed. It is not hard to imagine scenarios where an owner would have no reason to know that a dog (especially where a dog has been recently acquired) may indeed be dangerous. “[I]t is entirely nonsensical that a vicious or dangerous dog may be free to remain a menace to the public if the already overburdened prosecuting attorney . . . realizes he cannot prove that the owner was aware of the dog’s propensity for violence.” *Id.* at 677, 735 S.E.2d at 274 (Workman, dissenting). Reading § 19-20-20 to first require a dog owner to be convicted of a crime defined in its first sentence is also out of line with the legislative scheme as found within other sections of Article 20, Chapter 19.

W. Va. Code § 19-20-12 provides that it is unlawful for a person to kill or injure any dog kept as a companion animal by another person. However, this section expressly states that it “does not apply to a dog who is killed while attacking a person.” W. Va. Code § 19-20-12(a). Accordingly, § 19-20-12 permits killing a dog owned by another if that dog is attacking a person, immaterial of whether the owner of the dog knew that it was vicious or dangerous. It is illogical to conclude under West Virginia law that a dog may be killed while it is attacking a person, but if that same dog were spared, the authority to order the dog killed then must turn on whether the owner of the dog knew such dog was, in fact, dangerous. Such a result is neither evinced from the plain language of § 19-20-20 or from its purpose of protecting the public from dangerous dogs.

Syllabus Point 4 of *Durham* states that “[t]he authority to order a dog killed pursuant to W. Va. Code § 19-20-20 (1981), stems solely from a criminal proceeding” Syl. Pt. 4, in

part, *Durham* at 670, 735 S.E.2d at 267. The circuit court that *Durham* stands for the proposition “that there [is] not a private cause of action to have a dog killed. . . . It [is] contingent upon filing a criminal charge[.]” (Destruction Hr’g Tr. June 30, 2014, at 7-8.) “It does [not] say that it [is] contingent upon a conviction.” (*Id.*) The circuit court’s authority stemmed solely from a criminal proceeding in this case. While Petitioners were ultimately found to not have known that the dog in this case was vicious, or dangerous, or in the habit of biting or attacking people, the finding of not guilty did not foreclose the circuit court from considering whether the dog was vicious in order to determine whether it may authorize the dog to be killed. Accordingly Petitioners’ claims asserting otherwise in their first two assignments of error must be rejected.

III. The Circuit Court Properly Found That Petitioners’ Dog Bit A Child, Caused Severe Injuries to the Child, and That One Unprovoked Attack of a Child is Sufficient Evidence That Petitioners’ Dog is Vicious.

On March 31, 2014, Tara S., the mother of L.L., testified that she was home talking with her husband when Mr. Blatt knocked on their door and stated, “[L.L.] would like one of you guys to come over. He was playing ball with my sons, and the dog [“(Tinkerbell)”] got out and knocked into him, and he’s bleeding a little bit.” (Trial Tr., June 17, 2014 at 34-35.) L.L. was permitted to play at Petitioners’ house and had played there before. (*Id.* at 42.) Tara testified that she was aware that Petitioners owned a dog and had no concerns about the dog though she had never met Tinkerbell before. (*Id.* at 42-43.) Tara S. testified that when she arrived at Petitioners’ residence, her daughter told her that L.L. had been bitten in the face by a dog and that it was really bad. (*Id.* at 35.) Tara testified that L.L.’s lips were ripped open, that he had a bloody nose, a wound on his eye, and that he was crying. (*Id.*) L.L. was subsequently taken to the hospital where he received multiple stitches for the wounds he received. (*Id.* at 37-38.) Importantly, Petitioners stipulated that the dog had, in fact, bit L.L. and that the bite caused L.L.’s injuries. (*Id.* at 40.)

The Assistant Director of the Huntington-Cabell-Wayne Animal Shelter, Gregory Scott Iseli, identified Tinkerbelle as a pit bull. (*Id.* at 60-61.) Iseli testified that he has experience with indentifying pit bulls through training he received with the National Animal Control Association and the Texas Academy of Animal Control. (*Id.* at 59-60.) While Iseli testified that he had not specifically dealt with Tinkerbelle, but testified that generally pit bulls are more aggressive than other breeds. (*Id.* at 59, 62.) Phillip Hickey of the Huntington-Cabell-Wayne Animal Shelter picked Tinkerbelle up. Hickey received similar training as that of Iseli, and testified that Tinkerbelle is a pit bull or mostly pit bull. (*Id.* at 68-69, 71.) Hickey testified that pit bulls are typically a gaming dog bred to fight. (*Id.* at 70.) Hickey further testified that the breed is aggressive. (*Id.* at 70-71.) Hickey testified that the dog had a mild demeanor when he picked it up and was surprised that it had shown aggression. (*Id.* at 70.) Hickey testified, however, that it is not unusual to find that “[a] dog can be family-friendly and turn in an instant[,]” and furthermore that one incident is sufficient for a dog to be human-aggressive. (*Id.* at 70, 72.)

The State called no further witnesses, but asked the court to take judicial notice of *Hardwick v. Town of Ceredo*, No. 11-1048, 2013 WL 149628, (W. Va. Jan. 14, 2013). (*Id.* at 79.) The circuit court asserted that the case was offered “for the judicial notice of the fact that the breed has been accepted by this [c]ourt as being a vicious dog.” (*Id.* at 81.) *Hardwick* affirmed a decision from the Circuit Court of Wayne County that upheld a town ordinance prohibiting ownership of pit bulls as “dogs of this type have a propensity to be aggressive and attack without provocation.” *Hardwick*, 2013 WL 149628, at *2. The circuit court subsequently took judicial notice of the decision. (*Id.* at 82.)

After hearing testimony from Petitioners regarding how they acquired the dog as well as their previous experiences with the dog, the circuit court determined that it could not find beyond

a reasonable doubt that Petitioners were keeping a dog they knew to be dangerous. (*Id.* at 121.) A destruction hearing was subsequently held to determine whether the dog was in fact vicious for purposes.

At this hearing, Nicholas Blake testified that Tinkerbelle was his dog. (Destruction Hr'g June 30, 2014, at 17.) Nicholas testified that he observed the incident with L.L. and that L.L. was playing with a ball and dropped it. (*Id.* at 26.) Before L.L. got the ball, the dog grabbed the ball, popped it, and subsequently tried to bury the ball. (*Id.*) Nicholas testified that L.L. subsequently grabbed the ball from the dog, and the dog accidentally nipped L.L. when it tried to get the ball back. (*Id.* at 26.) However, Nicholas testified that his parents told him to use the word "nip," and furthermore that his dad had talked to him about how they might lose the dog. (*Id.* at 23.)

Based upon the foregoing evidence, the circuit court did not clearly err when it found that Petitioners' dog in fact bit a child and that the bite was unprovoked. The circuit court also did not err in finding that the bite caused severe injuries to the child, and that one unprovoked attack of a child is sufficient evidence that the dog is vicious. Accordingly, the circuit court did not err in finding that the dog in this case was vicious, dangerous, or in the habit of biting people, and Petitioners' claim to the contrary must be rejected.

IV. The Hearings Held on June 17, 2014, and June 30, 2014, Did Not Subject Petitioners to Double Jeopardy.

Petitioner argues that the circuit court violated the prohibition against double jeopardy under both the United States and West Virginia Constitutions when the circuit court held a second "destruction" hearing in regard to determining whether Petitioners' dog was vicious. Petitioners' claim in this regard must be rejected. Petitioners were quite simply not subject to repeated prosecutions for the same offense. Petitioners were acquitted of the misdemeanor

offense within W. Va. Code § 19-20-20 regarding keeping or harboring a dog *known to them* to be a dangerous or vicious dog. The second hearing was held in regard to whether such dog was in fact vicious, dangerous or in the habit of biting or attacking other persons. Petitioners were not again subject to prosecution for the offense of keeping or harboring a dog *known to them* to be a dangerous or vicious dog. Accordingly, this claim must also be rejected..

CONCLUSION

For the reasons stated above, the judgment of the Circuit Court of Kanawha County must be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA
Respondent,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



DEREK A. KNOPP
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
State Bar No. 12294
Email: derek.a.knopp@wvago.gov
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Derek A. Knopp, Assistant Attorney General and counsel for the State of West Virginia, hereby verify that I have served a true copy of "Respondent's Brief" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 29th day of December, 2014, addressed as follows:

Charles K. Garnes, Jr., Esq.
Campbell Woods, PLLC
1002 3rd Avenue
PO Box 1835
Huntington, WV 25719


DEREK A. KNOFF