

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio

Court of Appeals Nos. H-08-006
H-08-008

Appellee

Trial Court Nos. 07-CRB-2482A
CRB 0702478

v.

April L. Smith

DECISION AND JUDGMENT

Appellant

Decided: December 18, 2009

* * * * *

G. Stuart O'Hara, Jr., Law Director, and T. Douglas Clifford,
Assistant Law Director, for appellee.

K. Ronald Bailey, for appellant.

* * * * *

HANDWORK, P.J.

{¶ 1} This case is before the court on appeal from the judgment of the Norwalk Municipal Court wherein, following a jury trial, conducted on January 25 and 26, 2008, appellant, April L. Smith, was found guilty of two counts of failure to confine a dog in violation of R.C. 955.22(C)(1), both misdemeanors of the fourth degree. Appellant was

sentenced on each count to pay a fine of \$200, plus court costs, and ordered to serve 30 days in jail, to be served consecutively. Her jail time was ordered suspended and appellant was placed on probation for a period of five years on the following conditions: (1) appellant shall be law abiding and have no convictions for five years from the date of her sentencing; (2) appellant shall pay restitution as directed by the probation officer; (3) appellant shall provide proof to the court that the Rottweiler involved in the incident is euthanized by January 29, 2008; and (4) appellant shall pay fines and costs within 120 days. The jury also found appellant guilty of one count of failure to register for dog license, in violation of R.C. 955.21, a misdemeanor of the fourth degree. Appellant was sentenced to serve 30 days in jail and fined \$100, plus court costs. Her jail time was ordered suspended and appellant was placed on probation for a period of five years on the following conditions: (1) appellant shall be law abiding and have no convictions for five years from the date of her sentencing; (2) appellant shall not own or possess any dog or reside in a residence where a dog is present for five years; and (3) appellant shall pay fines and costs within 60 days of the date of her sentencing.

{¶ 2} On January 29, 2008, this court issued a temporary stay as to the trial court's order that the Rottweiler involved in this case be euthanized. Appellant appealed the verdict of the trial court and raises the following assignments of error on appeal:

{¶ 3} 1. "The trial court erred in imposing a sentence contrary to and in excess of Ohio law in ordering the execution of a dog."

{¶ 4} 2. "The trial court erred in imposing a sentence contrary to and in excess of Ohio law in ordering that appellant cannot live in home where a dog resides."

{¶ 5} 3. "The trial court erred in finding against the manifest weight of the evidence that appellant owned a dog."

{¶ 6} In this case, two Rottweilers and an English Bulldog lived with appellant, her husband, Asa Smith, and their three children. In 2006 and 2007, both Rottweilers were registered as being owned by Asa Smith. The English Bulldog was born in June or July 2007, and had not been registered with the auditor's office or the dog warden as of the date of the incident in this case, December 3, 2007. Asa Smith worked 60 hours per week away from home, but appellant was typically at home with the children and the dogs, as she did not work outside of the home. The Smiths had been married approximately 15 years at the time of trial. Both Rottweilers were kept in a fenced enclosure and the male was tethered with a chain that was connected to a stake in the ground.

{¶ 7} On December 3, 2007, appellant's neighbor, Morris Van Vlerah, was attacked by the two Rottweilers. One bit his arm while the other bit the heel of his boot. Mr. Van Vlerah was unable to identify which dog broke the skin on his arm. He escaped into his home and the dogs continued to bark, growl, scratch, and paw at the sliding back door leading from the Van Vlerahs' back deck into the house. Crystal Van Vlerah and her son arrived home and entered through the front door, having been told the dogs were at the back sliding door. Mrs. Van Vlerah saw the dogs running around the side of the

house, but was able to enter without coming into direct contact with the dogs. Mrs. Van Vlerah called 9-1-1 and the dispatcher contacted the dog warden's office and the Huron County Sheriff's Office.

{¶ 8} Sergeant Dane Howard, who was a detective with the Huron County Sheriff's Office, was the first to arrive on the scene. He saw the dogs on the deck, pawing at the sliding door. When he opened his car door, the dogs ran toward him. Howard described the dogs as being aggressive and testified that he felt threatened. Major Greg Englund, patrol division commander with the Huron County Sheriff's Office, arrived next. The dogs began to come toward Englund, who fired his gun toward them. The dogs retreated to a corner of the deck, but were positioned near a propane tank, which interfered with the officers' ability to shoot at the dogs a second time. Because of the positioning of the dogs, Englund decided to use a taser on the dogs. Howard directed his taser toward the male and Englund shot his toward the female. After being shocked, the male Rottweiler ran toward the front of the house and hid under a vehicle. The female Rottweiler, however, did not receive an initial shock because the taser failed to fully connect. Englund fired the taser connections at the dog again. When the initial shock wore off, she kept coming toward Englund, who shocked her a second time. When the female had cleared the area of the propane tank, upon Englund's command, Howard shot the female. Given the severity of her wound, she was euthanized with a shot to her head.

{¶ 9} The Rottweilers were in their enclosure when the Smiths left on the evening of December 3, 2007. They were gone approximately one and one-half hours. They

were not at home during the incident at the Van Vlerahs'. After the incident, the Smiths found that the gate to the fence enclosure was latched, but that the chain tether which held the male had been severed. It is unknown how the dogs escaped their enclosure. Based upon this incident, appellant was charged with two counts of failing to confine a dog, in violation of R.C. 955.22(C)(1), which states:

{¶ 10} "(C) Except when a dog is lawfully engaged in hunting and accompanied by the owner, keeper, harbinger, or handler of the dog, no owner, keeper, or harbinger of any dog shall fail at any time to do either of the following:

{¶ 11} "(1) Keep the dog physically confined or restrained upon the premises of the owner, keeper, or harbinger by a leash, tether, adequate fence, supervision, or secure enclosure to prevent escape * * *."

{¶ 12} Additionally, when appellant appeared at the dog warden's office to retrieve the male Rottweiler on December 4, 2007, appellant presented veterinarian information regarding the English Bulldog. Although appellant believed her husband had sent in the registration for all three dogs at the beginning of December, those registrations were only effective in 2008. Appellant did not produce evidence that she had registered the English Bulldog, who had been with the Smiths since August 2007, and was more than three months old on December 4, 2007, for the months they had the dog in 2007. Accordingly, appellant was also charged with violating R.C. 955.21, which states:

{¶ 13} "No owner, keeper, or harbinger of a dog more than three months of age, nor owner of a dog kennel, shall fail to file the application for registration required by section 955.01 of the Revised Code, nor shall he fail to pay the legal fee therefor."

{¶ 14} Because appellant was believed to have been convicted of previous violations of R.C. 955.21 and 955.22, concerning a May 2006 incident when the Rottweilers killed a neighbor's goats, appellant was charged with fourth degree misdemeanors, rather than minor misdemeanors. See R.C. 955.99(E).

{¶ 15} We will initially address appellant's third assignment of error, wherein appellant argues that the jury verdict was against the manifest weight of the evidence. In particular, appellant argues that the state failed to establish that appellant was an owner of the dogs because the dogs were each registered to Asa Smith, not appellant; within the two years prior to the incident, the house where the Smiths lived and the dogs were housed was owned solely by Asa Smith; and the American Kennel Club registration demonstrated that Asa Smith was the owner.

{¶ 16} Upon our review of the record, we find that the state needed to prove that appellant was an "owner, keeper, or harbinger" of the dogs and was not required to establish actual ownership. "An owner is the person to whom a dog belongs, while a keeper has physical control over the dog." *Flint v. Holbrook* (1992), 80 Ohio App.3d 21, 25, citing *Garrard v. McComas* (1982), 5 Ohio App.3d 79, 182. "In determining whether a person is a "harbinger" * * * the focus shifts from possession and control over the dog to possession and control of the premises where the dog lives." *Id.*, citing

Godsey v. Franz (Mar. 13, 1992), 6th Dist. No. 91-WM-008. "[A] harbinger is one who has *possession and control* of the premises where the dog lives, and silently acquiesces to the dog's presence." (Emphasis in original.) *Id.* We find that the trial court's jury instructions defining the terms "keeper" and "harborer" were in accordance with the law.

{¶ 17} In this case, the Rottweilers were kept in an enclosure in the backyard where appellant lived and the English Bulldog was housed indoors. Appellant's husband worked 60 hours per week, Tuesday through Saturday, whereas appellant was typically at home during the day. If Asa Smith was not available, the Smiths' oldest son typically would feed and water the Rottweilers and appellant would take the dogs to the veterinarian. In May 2006, when the Rottweilers escaped their enclosure and killed the neighbor's goats, while they were still in their pen on the neighbor's property, appellant came over to the neighbor's and ordered the dogs to return to their enclosure, which they did. Appellant also attempted to retrieve the male Rottweiler from the dog warden's office on December 4, 2007, but was unable to do so because of the need to keep him there extra days for rabies testing.

{¶ 18} Based upon the testimony presented at trial, we find that the state established beyond a reasonable doubt that appellant was the owner, keeper, or harbinger of the dogs, and that the jury did not lose its way in this regard. See *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. As such, because the Rottweilers were not confined upon appellant's premises and the English Bulldog was not registered in 2007, even though it was older than three-months, we find that there was sufficient evidence

presented to find that the state proved beyond a reasonable doubt that appellant violated R.C. 955.22(C)(1) and 955.21, in this case. Accordingly, we find appellant's third assignment of error not well-taken.

{¶ 19} Appellant argues in her first and second assignments of error that the trial court erred in ordering a sentence that was contrary to law. We agree with appellant, albeit for reasons other than those argued by appellant.

{¶ 20} If appellant had been convicted of previous violations of R.C. 955.21 and 955.22(C), she would be subjected to greater penalties in this case. See R.C. 955.99(E)(1), which states that whoever violates R.C. 955.21 or 955.22(C) "shall be fined not less than twenty-five dollars or more than one hundred dollars on a first offense, and on each subsequent offense shall be fined not less than seventy-five dollars or more than two hundred fifty dollars and may be imprisoned for not more than thirty days." However, in order to increase appellant's convictions from minor misdemeanors to fourth degree misdemeanors, with the resultant increase in penalties, the state had to prove the existence of a prior conviction.

{¶ 21} R.C. 2945.75(B)(1) states that "[w]henver in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction." As such, the state offered three citations issued to April L. Smith, and dated May 12, 2006, alleging two violations of R.C. 955.22 and one violation of R.C. 955.21. Additionally,

Sergeant William Duncan, with the Huron County Dog Warden's Office, testified that April Smith had signed a waiver on the back of the citations, admitting guilt, and paid the fines and costs.

{¶ 22} The citations each informed the defendant that she could enter a plea of guilty by signing the citation, and paying the fine, or she could appear in court to contest the charges. The following paragraph appeared on each of the citations issued to appellant:

{¶ 23} "GUILTY PLEA, WAIVER OF TRIAL, PAYMENT OF FINE AND COSTS

{¶ 24} "I, the undersigned defendant, do hereby enter my written plea of guilty to the offense charged in this citation. I realize that by signing this guilty plea I admit my guilt of the offense charged and waive my right to contest the offense in a trial before the court. I plead guilty to the offense charged in the citation."

{¶ 25} Appellant, however, did not sign any of the citations. Rather, appellant's husband, Asa Smith, who was not the named defendant, signed his name to the guilty plea and waiver of trial section and paid the fines. Because appellant did not sign the back of the citations, we find that she neither waived her right to trial nor admitted guilt to the May 2006 charges. Accordingly, we find that the state failed to offer an entry of judgment establishing that appellant previously violated R.C. 955.21 and 955.22.

{¶ 26} Having found that the state failed to prove that appellant had previously been convicted of violations of R.C. 955.21 and 955.22(C), we find that, as a first

offense, appellant "shall be fined not less than twenty-five dollars or more than one hundred dollars," for her violations in this case. R.C. 955.99(E)(1). Additionally, based upon appellant's conviction of R.C. 955.22(C) in this case, the trial court can order appellant "to personally supervise the dog that [she] owns, keeps, or harbors, to cause that dog to complete dog obedience training, or to do both." R.C. 955.99(E)(2). Due to the state's failure to establish prior convictions for the same offenses, the trial court is limited by the above stated penalties, as set forth in R.C. 955.99(E), and cannot imprison appellant or impose additional penalties not permitted by R.C. 955.99(E) for a first offense. Appellant's first and second assignments of error, therefore, are found well-taken.

{¶ 27} On consideration whereof, this court finds that appellant's convictions regarding violations of R.C. 955.21 and 955.22(C) were supported by sufficient evidence, were not against the manifest weight of the evidence, and are affirmed. However, based upon the state's failure to establish prior convictions of R.C. 955.21 and 955.22(C), we additionally find that appellant's sentences were contrary to law and are reversed and vacated. This case is remanded to the trial court only for resentencing in accordance with this decision. Appellant and appellee are ordered to split the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.