

IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

City of Belfield,)	
)	
)	
Plaintiff - Appellee,)	Supreme Court No. 20060176
)	
)	
-vs-)	
)	
Fred Kilkenny,)	
)	
Defendant - Appellant.)	

APPEAL FROM THE DISTRICT COURT OF STARK COUNTY
THE HONORABLE RONALD L. HILDEN, DISTRICT JUDGE

APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS..... 2

STATEMENT OF JURISDICTION 4

STATEMENT OF THE ISSUES 4

STATEMENT OF THE CASE..... 5

STATEMENT OF FACTS 5

ARGUMENT..... 7

 A. The standard of review is de novo.8

 B. The Constitution of the State of North Dakota prohibits laws which create a criminal offence too indefinite for an ordinary person to understand, and which encourage arbitrary and discriminatory enforcement8

 C. The Constitution of the United States prohibits laws which creates a criminal offence too indefinite for an ordinary person to understand, and which encourage arbitrary and discriminatory enforcement.12

CONCLUSION..... 15

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Cases

<u>City of Bismarck v. Fetting</u> , 1999 ND 193, ¶7, 601 N.W.2d 247	9
<u>In re Garrison Diversion Conservancy Dist.</u> , 144 N.W.2d 82, 93, (N.D. 1966).....	9
<u>Jordan v. DeGeorge</u> , 341 U.S. 223, 231-232, 71 S.Ct. 703 (1951)	13, 14
<u>Kolender v. Lawson</u> , 461 U.S. 352, 357-358, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903, 909 (1983).....	10, 12, 13, 14
<u>Larson v. Larson</u> , 2005 ND 67, ¶27, 694 N.W.2d 13	14
<u>Schwalk</u> , 430 N.W.2d at 319	12
<u>State v. Hagge</u> , 211 N.W.2d 395 (N.D. 1973)	10
<u>State v. Hilgers</u> , 2004 ND 160, ¶25, 685 N.W.2d 109	8
<u>State v. Julson</u> , 202 N.W.2d 145 (N.D. 1972)	10
<u>State v. Schwalk</u> , 430 N.W.2d 317, 319 (N.D. 1988).....	10
<u>State v. Treis</u> , 1999 ND 136, ¶11, 597 N.W.2d 664	8
<u>State v. Woodworth</u> , 234 N.W.2d 243, 245 (N.D. 1975)	9, 10
<u>Woodworth</u> , 234 N.W.2d at 246	11

Constitutional Provisions

North Dakota State Constitution	8
North Dakota State Constitution, Article I, Section 12	8, 9, 10, 12, 15, 16
United States Constitution	8, 9, 10, 12
United States Constitution, Fourteenth Amendment	9, 12, 13, 15, 16

Dictionaries

<u>Black's Law Dictionary</u> , 7 th Ed.....	9, 12
---	-------

Ordinances

Belfield City Ordinance 11.0201	7
Belfield City Ordinance 11.0204	4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16
Belfield City Ordinance 11.0210	7
Belfield City Ordinance 11.0301	7

Other Authorities

<u>21 Am.Jur.2d Criminal Laws s 17</u>	10
--	----

Rules

N.D.C.C. §29-28-03	4
N.D.C.C. §40-18-19	3
N.D.Const. Art. VI, 6	4
N.D.R.Crim.P. 37	3

STATEMENT OF JURISDICTION

This matter was originally heard by the Municipal Court for the City of Belfield, North Dakota. Upon appeal, the District Court tried the matter anew pursuant to N.D.C.C. §40-18-19 and N.D.R.Crim.P. 37. This appeal has been filed pursuant to the North Dakota Rules of Appellate Procedure. The Supreme Court of North Dakota has appellate jurisdiction with respect to the proceedings of the District Court pursuant to N.D.Const. Art. VI, 6, and N.D.C.C. §29-28-03 and §29-28-06.

STATEMENT OF THE ISSUES

- I. Whether the Belfield, North Dakota “Barking Dog” ordinance is unconstitutionally vague under the Constitution of North Dakota because it creates a criminal offence too indefinite for an ordinary person to understand.
- II. Whether the Belfield, North Dakota “Barking Dog” ordinance is unconstitutionally vague under the Constitution of North Dakota because it encourages arbitrary and discriminatory enforcement?
- III. Whether the Belfield, North Dakota “Barking Dog” ordinance is unconstitutionally vague under the Constitution of the United States because it creates a criminal offence too indefinite for an ordinary person to understand.
- IV. Whether the Belfield, North Dakota “Barking Dog” ordinance is unconstitutionally vague under the Constitution of the United States because it encourages arbitrary and discriminatory enforcement?

STATEMENT OF THE CASE

On October 24, 2005, Belfield police officer Larry N. Johnson charged Fred Kilkenny with a criminal violation of Belfield, North Dakota City Ordinance 11.0204. (T. 11) The Summons stated the charge of “Nuisance Dogs (Barking) 2 Dogs .” (Summons, App. 1.) Officer Johnson served the summons by leaving it in the screen door of Fred Kilkenny’s residence, as Mr. Kilkenny was out of town and had arranged for Melissa Gjermundson to care for his dogs. (T. 11, 12)

The Belfield City Court heard the matter on October 26, 2005. This Court found Fred Kilkenny guilty. Fred Kilkenny appealed to Stark County District Court in Dickinson, North Dakota, for trial anew pursuant to N.D.C.C 40-18-19. This trial was held on May 17, 2006. Despite the fact that Fred Kilkenny alerted the Court that the ordinance was unconstitutionally vague, this Court determined that Fred Kilkenny was guilty of a violation of Ordinance 11.0204.

On June 8, 2006, Fred Kilkenny filed his Notice of Appeal, bringing this matter before the Supreme Court of North Dakota. He now asks this Court to overturn his conviction for a violation of this ordinance because the ordinance is unconstitutionally vague.

STATEMENT OF FACTS

Officer Larry N. Johnson is a police officer in the City of Belfield, North Dakota. (T. 8) On October 24, 2005, Officer Johnson received a telephone complaint about a pair of barking dogs. (T. 8) Fred Kilkenny was not in Belfield. (T.10) He was not even in the state of North Dakota. (T. 25) The complaint, made by a neighbor, alleged that Fred Kilkenny’s dogs were “barking after hours.”(T. 4) The dogs had only been barking a for a

few minutes. (T. 5) Officer Johnson received the call some time between 8:00 and 9:00 p.m. (T. 4)

In response to this call, Officer Johnson went to the Kilkenny residence, and observed a pair of dogs in the yard. The dogs barked as Officer Johnson arrived. (T. 9) The residence was not occupied, and Officer Johnson knew Fred Kilkenny was not at home. (T. 10.) In fact, Mr. Kilkenny was out of state and had hired Melissa Gjermundson to take care of the dogs. (T. 12) Officer Johnson took his flashlight and walked along the property line to see if he could find anything that would cause the dogs to bark. (T.10) In the dark, Officer Johnson did not find anything, so he left. Officer Johnson could not hear the dogs barking as he left. (T. 10)

Officer Johnson received a second telephone complaint, roughly thirty minutes later, from the same neighbor. (T. 10) Officer Johnson returned to the Kilkenny residence. The dogs began to bark again. (T. 11) Officer Johnson was not sure what to do at this point. (T. 11) Still unable to see anything that might cause them to bark, Officer Johnson decided to charge Fred Kilkenny with a crime. Officer Johnson prepared a Summons, and left it in the screen door of the residence. (T. 11) The Summons alleged that Fred Kilkenny had violated Belfield City Ordinance 11.0204, and stated the charge, "Nuisance Dogs (Barking) 2 Dogs." (Summons, App.1)

At around 9:20 p.m. Officer Johnson received a third telephone call. This call came from Melissa Gjermundson. (T. 12) Gjermundson indicated to Officer Johnson that she had been taking care of Fred Kilkenny's dogs. Ms. Gjermundson further indicated that she would take the dogs from the Kilkenny residence and move them to her own home. At about 9:45 p.m. Gjermundson did so. (T. 20).

As mentioned above, Fred Kilkenny was not in Belfield when he allegedly committed this crime. (T. 10) Fred Kilkenny was not in Belfield when he was charged. (T. 11) He was not even in the state of North Dakota. (T. 25) Fred Kilkenny came home from helping the citizens Mississippi recover after hurricane Katrina, to find himself charged with criminally violating a vague law during his own absence, his own attempts to ensure the care and supervision of his dogs notwithstanding. (T. 25, 11)

ARGUMENT

At issue in this case is the vagueness of Belfield, North Dakota City Ordinance 11.0204. This ordinance is two sentences long. In a single clause of the first sentence, it attempts to define when, where, and how a dog may bark within the city. The full text of the ordinance is as follows:

“11.0204 NUISANCE – WHEN: Excessive, continuous, or untimely barking, molesting passers by, chasing vehicles, habitually attacking other domestic animals, trespassing upon school grounds, or trespassing upon private property or damaging property by a dog or cat is hereby declared to be a nuisance. Further, any dog or cat without a valid license and collar is a nuisance.”

The Ordinance contains no point of reference or definition, such as “after sunset” or “for more than five minutes,” by which such barking could be measured, however. Adjacent Belfield City Ordinances, 11.0201 through 11.0210 set out an extensive system of regulation and licensure for such pets, but give no further guidance as to what kind of barking is permissible. (See gen. Article 2. Dogs And Cats, App. 6.) All the reader can tell from the entire section is that some level of barking, at some point in time may constitute a nuisance. In Belfield, a nuisance is punishable by a fine of up to \$100 and imprisonment of up to 30 days. Belfield City Ordinance 11.0301.

This appeal arises from the fact that the “barking dog” ordinance, particularly when applied to the circumstances and times described above, is too vague as to meet constitutional muster. A reasonable reader cannot tell what kind of barking is permitted, or when. Neither can give instructions to others and be sure he complies. The underlying problem is not limited to the events of October 24, 2005. Fred Kilkenny still lives in Belfield. Fred Kilkenny still owns his dogs, and he still has the same neighbor. Other people in Belfield also own dogs, and as a general rule, dogs bark. The people of Belfield and Fred Kilkenny in particular, enjoy due process rights to clear, definite criminal statutes by which they can conduct their affairs. This is particularly important in cases where the law creates criminal offences which can be committed when the actor is a thousand miles away. Belfield City Ordinance 11.0204 simply does not measure up.

A. The standard of review is de novo.

Fred Kilkenny asks the Court to determine the constitutional merits of Belfield City Ordinance 11.0204. Fred Kilkenny asks the Court to do so under the Constitution of the State of North Dakota and under the Constitution of the United States. The question Fred Kilkenny poses is whether this ordinance violates either his state or federal due process rights. “[O]ur standard of review for acclaimed violation of a constitutional right is de novo.” State v. Hilgers, 2004 ND 160, ¶25, 685 N.W.2d 109; State v. Treis, 1999 ND 136, ¶11, 597 N.W.2d 664.

B. The Constitution of the State of North Dakota prohibits laws which create a criminal offence too indefinite for an ordinary person to understand, and which encourage arbitrary and discriminatory enforcement.

Article I, Section 12 of the Constitution of North Dakota enumerates a number of rights enjoyed by defendants such as Fred Kilkenny. It provides,

“In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses on his behalf; and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property without due process of law.*” (Emphasis added.)

It is the “due process of law” clause which gives rise to this appeal. “It has been said that due process of law must be understood to mean law in the regular course of administration through courts of justice according to those rules and forms which have been established for the protection of private rights.” In re Garrison Diversion Conservancy Dist., 144 N.W.2d 82, 93, (N.D. 1966). It has also been defined as “the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights.” Black’s Law Dictionary, 7th Ed.

The language of our state constitution is similar to that found in the Fourteenth Amendment to the Constitution of the United States, discussed at length *infra*, but requires its own separate analysis. “The North Dakota Constitution may provide more protection to its citizens than the Federal Constitution.” City of Bismarck v. Fettig, 1999 ND 193, ¶7, 601 N.W.2d 247. For purposes of Fred Kilkenny’s state due process right, the question becomes whether or not this “barking dog” ordinance meets the “established rules and principles for the protection and enforcement of private rights” that we have developed for our state.

In order to meet the requirements of Fred Kilkenny’s state due process right, the ordinance must not be too vague. The general rule, for both the state and federal due process rights, has been stated and restated in many cases. Generally, both rights require “definiteness of criminal statutes so that the language, when measured by the common

understanding and practices, gives adequate warning to the conduct proscribed and marks boundaries sufficiently distinct for judges and juries to fairly administer the law.” State v. Woodworth, 234 N.W.2d 243, 245 (N.D. 1975). Further, “[i]n determining whether adequate warning is given, the court should view the statute from the standpoint of a reasonable man who might be subject to its terms.” Id., *citing* State v. Julson, 202 N.W.2d 145 (N.D. 1972); State v. Hagge, 211 N.W.2d 395 (N.D. 1973); 21 Am.Jur.2d Criminal Laws s 17, page 99.

Applied, this Court has also held, that for both the state and the federal right, this standard establishes two specific requirements that a statute must meet in order to survive a vagueness challenge. First, “it must provide adequate warning as to the conduct proscribed.” State v. Schwalk, 430 N.W.2d 317, 319 (N.D. 1988). Second, “it must establish minimum guidelines to govern law enforcement.” Id., *citing* Kolender v. Lawson, 461 U.S. 352, 357-358, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903, 909 (1983).

For purposes of assessing the vagueness of this ordinance under the provisions of the Article I, Section 12 of the North Dakota Constitution, we must measure it according to the common understanding and practice of the citizens of North Dakota. That is, according to the common understanding and practice of the citizens of North Dakota, does the phrase “excessive, continuous, or untimely barking,” with nothing more, provide adequate warning as to the conduct proscribed, and establish minimum guidelines to govern law enforcement? A review of the facts in the instant case, and the facts about North Dakota indicates that it does not. The ordinance allows dogs to bark, however such barking cannot be excessive, continuous, or untimely. The problem is that no one can ascertain what excessive, continuous, or untimely barking would be.

North Dakota, and Belfield in particular, is not a metropolitan jurisdiction where contact with animal life can be avoided. The animals we own are not ordinarily kept indoors and are rarely silent. We expect them to make noise. We are a state of ranchers, farmers, hunters, fishermen, and outdoorsmen. The practical experience of life in North Dakota includes exposure to animals and the sounds they make. In short, we expect dogs to bark sometimes. This is the lens of common understanding and practice through which we must examine the Belfield Ordinance.

Belfield Ordinance 11.0204 may have been applied by Officer Johnson to the best of his ability, but it simply did not give him a clear standard to use. The Ordinance prohibits “excessive” barking. By Officer Johnson’s best guess, this term prohibited any barking at all, unless perhaps something was disturbing a particular dog. (T. 13-14.) Further, according to Officer Johnson, the “untimely” and “continuous” provisions meant exactly the same thing: no barking without a good reason. This reading, however, is not supported by the actual words of the ordinance.

Other Belfield ordinances conflict with Officer Johnson’s reading as well. They set forth a complete regulatory structure for the keeping and licensure of dogs. Implicit in the creation of such a structure is the principle that keeping dogs in Belfield is an acceptable practice. If it is acceptable to keep dogs, and it is uniformly known that dogs bark, it reasonably follows that dogs are allowed to bark when kept in Belfield.

This conflict with Officer Johnson’s reading of the same statute, and illustrates the inherent vagueness in the Ordinance as to what is or is not permitted. This is the problem our due process protection against vague laws exists to prevent.

The very words of the Ordinance are defective. While flexible terms are permitted in the law, they may be used only where “over the years [the term] has acquired an understandable meaning, and as such constitutes a standard.” Woodworth, 234 N.W.2d at 246. Ordinance 11.0204 provides no definition for the terms “excessive, untimely, or continuous.” Although these terms may appear elsewhere in the law, they are given no uniform definition to aid the reader in this case. Thus, they lack any useful meaning in this case, and as such, do not create a measurable standard. Even Black’s Law Dictionary, 7th Ed. does not define “excessive” or “continuous,” and it defines “untimely” as simply “not timely.” How much barking constitutes excessive barking? How early or late in the day is considered untimely? How many successive barks constitute continuous? What specific arrangements could Fred Kilkenny have with his caretaker made to ensure his dogs would not bark incorrectly in his absence?

In this case, the dogs were barking for a few minutes at two different points in time between 8:00 p.m. and 9:00 p.m. From the Ordinance, we cannot determine whether this is declare this untimely, continuous, or excessive. Has Fred Kilkenny violated the law, or should this entire matter have been resolved civilly, between neighbors?

C. The Constitution of the United States prohibits laws which creates a criminal offence too indefinite for an ordinary person to understand, and which encourage arbitrary and discriminatory enforcement.

In addition to his state due process right, Fred Kilkenny also enjoys a due process right under the Fourteenth Amendment to the Constitution of the United States. This Amendment also prohibits the application of vague laws. In relevant part, the Amendment states, “[n]o state shall abridge the privileges or immunities of citizens of the

United States, nor shall any state deprive any person of life, liberty or property, without due process of law.” As noted above, to survive the rigors of the federal due process right, a statute must “provide adequate warning as to the conduct proscribed,” and, “establish minimum guidelines to govern law enforcement.” Schwalk, 430 N.W.2d at 319. In Kolender v. Lawson, 461 U.S. 352, 357-358, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903, 909 (1983), the Supreme Court of the United States examined the issue at length with respect to the federal right, stating as follows:

“As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. [Citations omitted.] Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine ‘is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.’ [Citation omitted.] Where the legislature fails to provide such minimal guidelines, a criminal statute may permit ‘a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections. [Citation omitted.]”

Essentially, while the issue of whether or not a citizen can reasonably understand what is prohibited is still a vital element under the federal right, the burden of providing adequate guidance to law enforcement is even more severe. Thus, the Court’s constitution of the federal right must heavily weigh the question of whether a statute gives law enforcement sufficient guidance. Again, the Belfield Ordinance fails on both points.

On the threshold issue of whether a person might reasonably understand what is proscribed by Ordinance 11.0204, for purposes of the federal right, the measure now must be “the common understanding and practices” of the citizens of the United States. Jordan v. DeGeorge, 341 U.S. 223, 231-232, 71 S.Ct. 703 (1951). (Holding that, while “impossible standards of specificity are not required,” the law must convey sufficiently

definite warning as to the conduct proscribed.) Even from the less agrarian national perspective, the common understanding and practices of the citizens of the United States help little in clearing up exactly what the “barking dog” ordinance prohibits. Terms like “excessive, untimely, or continuous” vary from usage to usage, and have no generally accepted “national” definition.

Even in cases where flexible clauses are required, however, such clauses must include a standard by which they can be measured. The Court in DeGeorge, *supra*, provided a number of examples of acceptable yet flexible clauses, such as “any offensive, derisive, or annoying word,” or “range usually occupied by any cattle grower.” *Id.* In each of these (and in the others provided by the Court,) there is some term which gives the clause a measurable object. Prohibited words must be offensive, derisive, or annoying *to the recipient*. Land governed by the a statute must be related *to a cattle grower*. The “barking dog” ordinance, however, provides no such frame of reference to guide the reader. We do not know *to whom* or *to what* the barking cannot be excessive, continuous or untimely.

Turning to the issue of guidance for law enforcement, as has been noted, dogs are permitted in Belfield, and dogs bark. If dogs are permitted, at least some level of barking must also be permitted. So, we must determine whether the “barking dog” ordinance gives law enforcement, or the Courts, enough guidance to determine how much barking is too much. Unfortunately, the Ordinance provides none.

Officer Johnson took the Ordinance to mean that any barking at all is prohibited, unless perhaps there is something disturbing the dog. The Ordinance does not state this. Officer Johnson took the terms “excessive, untimely, or continuous” to mean the same

thing. The Ordinance contains these words, but our rules of construction would disfavor such surplusage. Larson v. Larson, 2005 ND 67, ¶27, 694 N.W.2d 13.

By way of comparison, in Kolender v. Lawson, 461 U.S. 352, *supra*, the Supreme Court of the United States held that the terms like “credible and reliable,” with respect to identification given to a law enforcement officer, were unconstitutionally vague. They did not provide an adequate standard for the officer to determine what was or was not “credible and reliable.” The Belfield “barking dog” Ordinance suffers the same fatal defect. The Ordinance does not provide a standard for the officer to determine what the barking is “excessive, untimely, or continuous” in relation to.

The reality of the case is plain. This should have been a civil dispute between neighbors, but one of those neighbors pressured law enforcement to take sides. Objectively, the dogs were not behaving abnormally. Officer Johnson, the police officer charged with the unfortunate task of “doing something,” had only one tool with which to work, the “barking dog” Ordinance. The Ordinance however, provided him no real standard with respect to the level of barking which is permitted in Belfield. He looked around, and found no obvious reason for the dogs to bark, so he simply cited Fred Kilkenny for a violation, appeased the neighbor, and washed his hands of the matter. In short, though perhaps without intent, Officer Johnson engaged in the same sort of arbitrary enforcement of a vague ordinance that Fred Kilkenny’s due process right exists to prevent.

CONCLUSION

Two of Fred Kilkenny’s rights have been violated in this matter. He enjoys a right under the North Dakota Constitution to due process of law, which protects him from

being subject to vague laws. He also enjoys a right, under the Constitution of the United States, to due process of law, which also protects him from being subject to vague laws. For these two rights, the test is the same. The law must be understandable to the reader, and must provide standards by which law enforcement can apply it. Between the state and federal rights, however, the focus of the test and units of measure are different.

For the state right, the measure of understandability must be the common understanding of a citizen of North Dakota, and the heavier factor to consider is whether the ordinance is sufficiently clear. For the federal right, the measure for understandability is the common understanding of a citizen of the United States. The heavier factor for consideration, however, is whether the ordinance adequately guides law enforcement and prevents arbitrary application.

Belfield City Ordinance 11.0204 must meet all of these standards to survive a challenge for vagueness. It meets none. Both the officer and the dog owner need to know how much barking is too much. The Ordinance does not tell them. Because the Ordinance does not provide the guidance required to citizens or law enforcement officers by which to measure whether specific conduct violates the law, Belfield City Ordinance 11.0204 is unconstitutionally vague. Fred Kilkenny was arbitrarily charged with criminally violating an ordinance which he could not understand, and which could not take steps to avoid. He was not even in North Dakota at the time. Fred Kilkenny's conviction should be reversed accordingly.

Dated this 28th day of July, 2006



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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July 2006, a true and correct copy of the foregoing Appellant Brief was electronically mailed to the following parties:

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