ORIGINAL

IN THE SUPREME COURT

20080257

STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff-Appellee,

Supreme Court No. 20080257

vs.

District Court No. 09-07-K-5124

Lori Lee Brown,

Defendant-Appellant.

BRIEF OF APPELLANT

APPEAL FROM MEMORANDUM OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER FOR JUDGMENT OF THE DISTRICT COURT ENTERED ON THE 29TH DAY OF SEPTEMBER, 2008, AND CRIMINAL JUDGMENT DATED THE 8TH DAY OF DECEMBER, 2008

CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT
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   A. The North Dakota Legislative Assembly has unconstitutionally delegated its law-making powers to county commissioners;

   B. The North Dakota Legislative Assembly has statutorily prohibited the county from attempting to regulate dogs as a public nuisance?

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7. Was the Appellant improperly denied her right to a trial by jury?

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STATEMENT OF THE CASE

This is an appeal from the Criminal Judgment of the District Court entered on December 8, 2008, and an earlier Memorandum Opinion, Findings of Fact, Conclusions of Law & Order for Judgment entered on the 29th day of September, 2008, following a bench trial before the Honorable Douglas R. Herman, District Judge. While the State of North Dakota appears as Plaintiff in the Judgment [Appendix, 71], this is a **Cass County** prosecution. If the State of North Dakota is the prosecuting party, it is prosecuting under *county ordinances* and there was no process followed so as to allow for substitution of the prosecuting entity – County became State by merely filing a defective "information".

Lori Lee Brown [hereinafter "BROWN"] was charged by allegation #0297 dated December 18, 2007, apparently issued by Deputy Kuppich [Unit #3517] alleging an offense of "Animal Ordinance Violation" at "Location 15791 31st St SE". Appendix, page 3.

BROWN, accompanied by legal counsel, appeared before the District Court of Cass County, North Dakota, on January 3, 2008. BROWN, verbally and in writing, objected to the proceedings for multiple reasons, including, a violation of N.D.R.Crim.P. 3 [missing elements of a complaint], the existence of an ordinance created by an entity without appropriate authority, county intrusion into an activity regulated by state law or by rules adopted by a state agency, and an invalid exercise of police power that takes away property rights. After serving Assistant Cass County State's Attorney Brady, BROWN filed a Motion to Dismiss/Notice of Demand for Due Process of Law and Jury Trial. Transcript of January 3, 2008; Appendix, page 5. That matter was continued by the District Judge.

On March 4, 2008, District Judge Herman issued a Memorandum Opinion & Order

addressing the issues raised by BROWN'S written submission of January 3, 2008. Appendix, page 13. District Judge Herman denied BROWN'S Motion to Dismiss. BROWN'S demand for a jury trial was also denied. BROWN was ordered to appear for an Initial Appearance on March 25, 2008. Appendix, page 20.

On March 25, 2008, BROWN was first advised, along with others, that she had "been charged with a crime." BROWN was then advised of her legal rights. Transcript of March 25, 2008, pages 3-8. When BROWN'S case was specifically called, Assistant Cass County State's Attorney Boening referenced an "Information in lieu of Cass County Animal Control Ordinance violation citation 0297. Transcript of March 25, 2008, page 8. Legal counsel for BROWN posed an immediate objection, the referenced document had the same infirmities as the original complaint, and noted that the District Judge had already chosen to disregard the subsequent document ["Brown's assertion that the Citation is defective is without merit"; the Information In Lieu of Cass County Animal Control Ordinance Violation Citation 30297 is "unnecessary". Appendix, page 14]. Transcript of March 25, 2008, pages 9-10. BROWN, through legal counsel, brought to the District Court's attention North Dakota statutes regulating agricultural operations, and the excessive and inappropriate nature of the void ordinance in light of such regulations. Transcript of March 25, 2008, pages 12-14. The District Court directed the entry of a "not guilty plea being entered for Ms. Brown." Transcript of March 25, 2008, page 16. Further criminalizing the matter, the Assistant State's Attorney requested "bail be set at $4,000 personal recognizance", but the District Judge gave BROWN "a choice of $1,000 PR, or $50 cash." Transcript of March 25, 2008, pages 17.

On June 4, 2008, BROWN filed a Supplemental Motion to Dismiss/Notice of Demand for Due Process of Law and Jury Trial. Appendix, page 21.

On June 17, 2008, at the scheduled pretrial hearing, BROWN again requested a jury trial, and noted the county ordinance should be regarded as void as a matter of law. Transcript of June 17, 2008, pages 3-7. District Judge Herman refused to dismiss the infraction complaint. Transcript of June 17, 2008, page 9. Furthering the criminalization of the process, Assistant Cass County State's Attorney Schmitz Olson requested the Court impose additional bail bond conditions – that BROWN "place barking collars on the dogs in question at her property, so as to avoid this problem during the pendency of this case", threatened additional prosecutions. Transcript of June 17, 2008, pages 9-11.

On September 9, 2008, at time of the misdemeanor pretrial conference, BROWN again requested a jury trial and filed a Second Supplemental Motion to Dismiss/Notice of Demand for Due Process of Law and Jury Trial attaching supporting decisions of the North Dakota Supreme Court. Transcript of September 9, 2008, page 3; Appendix, page 30. Assistant Cass County State's Attorney Van de Streek appeared in opposition, and the District Judge set the matter for bench trial. Transcript of September 9, 2008, pages 3-6.

On September 10, 2008, District Judge Herman issued a letter memorandum opining that BROWN had "no right to a jury trial in this matter" and setting a bench trial for September 22, 2008. Appendix, page 62.

On September 22, 2008, the District Judge called "State of North Dakota versus Lori Lee Brown. Mr. Sheeley and Ms. Johnson Martinez are here for the State. Mr. Garaas is here with Ms. Brown. We don't see too many cases involving infractions or even

misdemeanors under either county or city home rule ordinances, but this is one of those, as I understand it." Transcript of September 22, 2008, page 4. Assistant Cass County State's Attorney Sheeley confirmed that he was proceeding on an infraction basis, seeking a fine with a criminal-type burden of proof beyond a reasonable doubt." " Transcript of September 22, 2008, page 6. BROWN'S legal counsel again posed objections based upon (a) North Dakota statutes that preclude prosecution attempts based upon county home rule charters, (b) overbroad and vague standards under State v. Tibor, 373 N.W.2d 877 (N.D. 1985), (c) a county attempt to create a violation of law different than state law, and requested recognition that BROWN had not waived any rights by proceeding to bench trial. Transcript of September 22, 2008, pages 6-9.

After ordering sequestration of witness under N.D.R.Ev. 615, Assistant Cass County State's Attorney Sheeley identified a "homeowner" [Frances Mayer] as being the only witness, and also, the "complainant." Transcript of September 22, 2008, pages 9-10. When BROWN attempted to identify the incongruous assertion because the possible witness would be named Kuppich based upon an underlying "charge that is presently against (BROWN) relat(ing) to Citation number 0297, dated December 18, 2007, at 17:46, which would be p.m., 5:46 p.m., against Lori Brown, for an animal ordinance violation." Transcript of September 22, 2008, page 11. BROWN also objected to Assistant Cass County State's Attorney Sheeley's attempt to use the Information in lieu of citation as the charging document because of the Court's prior determination [Appendix, page 14], legal infirmities identical to the Citations's legal infirmities [not subscribed and sworn to; does not meet definition of a complaint; lack of preliminary hearing; missing statutory elements; and lack

of due process for amendment of the complaint; among others]. Transcript of September 22, 2008, pages 11-14. District Judge Herman ruled that the "Information in lieu of Cass County Animal Control Ordinance violation citation 0297, dated January 18 and filed the 25th (of January, 2008) is sufficient for purposes of our proceeding." Transcript of September 22, 2008, page 14. BROWN "claim(ed) surprise and a violation of due process of law" because (a) the dates of the alleged offense were changed from "December 18(, 2007, in the Citation)" to "October 20 and October 24(, 2007 in the Information in lieu of citation)", (b) the Citation contained "not even a reference to a barking dog. There is not reference to a dog going off onto a public highway. There is not reference to anything, except the Cass County Animal Control Ordinance 1998-3. So that citation didn't put us on notice of anything, and that's when the Court ruled that the citation was sufficient, that the information wasn't appropriate." Transcript of September 22, 2008, pages 14-15. District Judge Herman rejected BROWN'S arguments, and proceeded to trial. Transcript of September 22, 2008, pages 15-16.

During the bench trial, BROWN also objected to the introduction of "State's Exhibit #1", and also, judicial prosecution, among other things. Transcript of September 22, 2008, pages 19-25.

When Assistant Cass County State's Attorney Sheeley stated, "The State rests.", BROWN moved for a dismissal for "failure to prove all of the essential elements of the offense, if in fact an offense is possible." District Judge Herman considered and denied the motion. Transcript of September 22, 2008, pages 49-50.

BROWN rested. Transcript of September 22, 2008, page 50.

District Judge Herman issued a Memorandum Opinion, Findings of Fact, Conclusions of Law & Order for Judgment dated September 29, 2008. Appendix, page 63. BROWN timely filed a Notice of Appeal from the Memorandum Opinion, Findings of Fact, Conclusions of Law & Order for Judgment on October 10, 2008.

A Criminal Judgment dated December 8, 2008, on "a verdict of guilty to the charge of ANIMAL CONTROL ORDINANCE-PUBLIC NUISANCE/IN, a Class INFRACTION, in violation of N.D.C.C. 1998-08 (cass) City" and imposing a "fine in the amount of $50.00" was docketed on the same date. Appendix, page 71. BROWN timely filed an Amended Notice of Appeal from the Memorandum Opinion, Findings of Fact, Conclusions of Law & Order for Judgment of the said District Court entered on the 29th day of September, 2008, and the Criminal Judgment dated December 8, 2008. Appendix, page 72.

On January 5, 2009, BROWN gave notice to the North Dakota Attorney General pursuant to N.D.C.C. § 32-23-11 because a statute, ordinance, or franchise is alleged to be unconstitutional for reasons hereinafter advanced. Said document was filed with the Supreme Court; a copy of said notice, and proof of service, is attached as an Addendum.

STATEMENT OF FACTS

First witness Fran Mayer was allowed to testify that she recognized Lori Brown whose "place is right beside (her) place, with just a thin row of trees in between our two properties." Fran Mayer also testified that BROWN had borrowed a tool, "but other than that, I haven't really had any connection with her at all." Transcript of September 22, 2008, pages 16-17.

Mayer testified the distance from her house to the property line was "under 100 feet,

maybe 80 feet would be (her) guess." Transcript of September 22, 2008, page 17.

During cross-examination, Mayer was asked, "Would it be a fair statement that dogs are intended to be protective of their property?" Witness Mayer was unequivocal, "Absolutely." Witness Mayer further recognized that such was the one of the natures of dogs. Witness Mayer knew of no reason why dogs would not be in agricultural areas. Transcript of September 22, 2008, page 37.

Mayer testified that her property is a "country home property", not in a city, with crop farmland to the north and east; when asked on cross-examination, "So it's farmland all the way around you, isn't it?" Mayer responded, "Yep." Transcript of September 22, 2008, pages 31-32.

Mayer testified that she had seen three large-breed dogs at BROWN'S residence, and that she heard barking on October 20, 2007, at "10:35 in the morning, a.m., and they barked until about 11:45 in the morning. Like one hour, non-stop, continuous barking, all three of the dogs." The District Judge anticipated the actual presentation of the prosecutor, and injected himself into the questioning. Transcript of September 22, 2008, pages 17-20.

Mayer recorded the dogs barking on a digital camera. After the witness was unable to identify a green Verbatim DVD which had been marked as "State's Exhibit #1" – and was not the DVD prepared by the witness, and also, contained unidentified handwriting not known to the witness – the District Judge, over BROWN'S specific objection(s), undertook the role of prosecutor so as to allow its receipt into evidence. Transcript of September 22, 2008, pages 21-25.

Witness Mayer explained the process by which five (5) separate video segments were

created was necessitated by a camera with limited memory. The video process required taping near the property line, returning to Mayer's house to download/empty the memory card, and then returning to the property line to tape again – five (5) separate times. Transcript of September 22, 2008, pages 28-29; 34-36. The five (5) separate videotaping events required Mayer to make ten (10) trips from her house to the point near the property line. Transcript of September 22, 2008, page 37. Each of the ten (10) trips, back and forth, involved witness Mayer seeing the dogs from her yard [the dogs could also see her] and "mov(ing) to an area where (the dogs) could not see (her) while (she) was recording", upon the advise of the Casselton Police Department. Transcript of September 22, 2008, pages 38-39.

Mayer testified that the dogs were barking at approximately 8:40 until about 9:00 a.m. on October 24, 2007. Transcript of September 22, 2008, page 30. Cass County Deputy Sheriff Greg Dawkins received a call from Frances Mayer at approximately 9:00 in the morning, drove to the Mayer residence, and while parked on a township road, "heard the dogs barking." Transcript of September 22, 2008, pages 42; 46. According to the deputy, his written report dated October 25, 2007, was inaccurate – "(t)he complainant's house is not approximately 400 yards away", but rather, something less than "100 yards away, to be honest with you." In addition, his report does not include indication that he was at the Mayer residence for 30 minutes listening to the dogs. Transcript of September 22, 2007, pages 44-45; 47.

Cass County Deputy Sheriff Dawkins could not hear any barking dogs when inside the Mayer residence; the dogs could have quit barking. Transcript of September 22, 2007,

page 46.

BROWN, in an effort to make efficient use of trial time rather than listen to what is referred to as a video "show(ing) the bushes between (the) two properties" and "does not show the dogs, because they are beyond a board in front of (BROWN'S) house at the time" which was "24 minutes long", noted that DVD's content related to a time not referenced in the citation and actually includes "five different file documents. So when there was a representation of 23 or 24 minutes of dog barking, it isn't an accurate recital. There is actually five different tapes or five different times that there was turning on and off of the machine." Simply put, "five different segments .. within an hour, at different times. And the tape is, in fact, at (Fran Mayer's) leisure when she's turning it on and off. And at all times, she is right there, running that machine. You can even hear the little clicks and stuff like that of movement, and stuff like that, which in fact would be on the property line where these dogs are theoretically at, and they would have an absolute right to be guarding their property from an intruder and we don't care. Obviously (Fran Mayer) is not a friend of Ms. Brown. This witness is not a friend, she has only met her one time. And somebody who is an intruder would in fact cause a do, who is by nature protective and territorial, to bark against all intruders." Transcript of September 22, 2008, pages 27-28.

LAW AND ARGUMENT

POINT 1. Cass County's Animal Control Ordinance #1998-3 is unconstitutional.

On August 15, 1994, Cass County, North Dakota adopted a Home Rule Charter [Addendum] pursuant to N.D.C.C. Chap. 11-09.1. At that time, N.D.C.C. § 11-09.1-05 provided, in pertinent part:

11-09.1-05. Powers.

After the filing with the secretary of state of a charter approved in reasonable conformity with this chapter, the county and its citizens may, if included in the charter and implemented with ordinances:

..

5. Provide for the adoption, amendment, repeal, initiative, referral, enforcement, and penalties for violation of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare. However, this subsection does not confer any authority to regulate any industry or activity which is regulated by state law or by rules adopted by a state agency.

..

Subsection 5 has been subsequently amended. The current version [pursuant to S.L. 2003, ch. 87, § 1; with changes *italicized*] follows:

5. Provide for the adoption, amendment, repeal, initiative, referral, enforcement, and *civil and criminal* penalties for violation of ordinances, resolutions, and regulations to carry out its governmental and proprietary powers and to provide for public health, safety, morals, and welfare. However, this subsection does not confer any authority to regulate any industry or activity which is regulated by state law or by rules adopted by a state agency.

The Legislative Assembly's 2003 action, whereby § 1 was enacted delegating the right to create county crimes having "civil and criminal penalties", does not legitimate the prior improper actions of Cass County, North Dakota, attempting to criminalize aspects of animal ownership by passage of the Animal Control Ordinance #1998-3 [Addendum].

Standard of Review

"The standard of review for a claimed violation of a constitutional right is de nova." City of Belfield v. Kilkenny, 2007 ND 44, ¶ 8, 729 N.W.2d 120.

A. North Dakota's legislative power cannot be delegated to other political subdivisions.

The Supreme Court spoke, without equivocation, in Anderson v. Peterson, 54 N.W.2d 542, 548 (N.D. 1952): "This court has repeatedly held that the legislative power cannot be delegated. State ex rel. Rusk v. Budge, 14 N.D. 532, 105 N.W. 724; State ex rel. Miller v. Taylor, 27 N.D. 77, 145 N.W. 425; State ex rel. City of Fargo v. Wetz, 40 N.D. 299, 168 N.W. 835, 5 A.L.R. 731." See also, Kelsh v. Jaeger, 2002 N.D. 53, ¶ 21, 641 N.W.2d 100, citing MCI Telecommunications Corp. V. Heitkamp, 523 N.W.2d 548, 554 (N.D. 1994) ["The distinction between delegable and non-delegable powers is 'whether the power granted gives the authority to make a law or whether that power pertains only to the execution of a law which was enacted by the Legislature'", citing County of Stutsman v. State Historical Society, 371 N.W.2d 321, 327 (N.D. 1985).]; Montana-Dakota Utilities Co. v. Johanneson, 143 N.W.2d 414, 421 (N.D. 1967). The Constitution of North Dakota [Article III, § 1] provides that "the legislative power of this state shall be vested in a legislative assembly" – such vested legislative power cannot be delegated to other political subdivision(s).

The violation of this constitutional principle also constitutes a "transgression of the high powers which (the people) have delegated (and) declare(d) .. excepted out of the general powers of government (which) shall forever remain inviolate." Constitution of North Dakota, Article I, § 20. BROWN'S Article I freedoms, forever remaining inviolate [among others hereafter discussed] include (a) the right to "acquir(e), possess() and protect() property" [Article I, § 1], (b) the right not to "be deprived of life, liberty or property without

due process of law" [Article I, § 12], and (c) the right to be free of laws that are without "uniform operation" throughout North Dakota [Article I, § 22].

The Constitution of North Dakota prohibits any level of government determining the legal use and possession of property – a protected freedom – a nuisance. "The State and Federal constitutions require all laws to have uniform operation, and the granting of any special privilege or immunity as to any class of citizens is expressly prohibited." Montana-Dakota Utilities Co., v. Johanneson, 153 N.W.2d 414, 423 (N.D. 1967).

Only the State of North Dakota, through its legislative process, can create a crime. The Legislative Assembly's authority to create a "crime" cannot be delegated to the county. For further discussion, see Points 1 and 2.

B. North Dakota's Legislative Assembly has statutorily prohibited the county from attempting to regulate dogs as public nuisances.

Clearly, the Legislative Assembly has statutorily limited the authority of any county seeking to exercise home rule authority, with specific words of limitation: "However, this subsection does not confer any authority to regulate any industry or activity which is regulated by state law or by rules adopted by a state agency." N.D.C.C. § 11-09.1-05(5) [either version contains identical words of limitation]. By so stating, North Dakota has usurped the subject area, having previously created state law or regulations regarding dog activities. See specifically, N.D.C.C. Chap. 42-03, entitled "Dogs as Public Nuisance" [originating by way of enactment of S.L. 1959, ch. 314, § 1], and specifically, N.D.C.C. § 42-03-01 which defines which dog activities will constitute a "public nuisance" – thereby precluding any attempt to legislate by way of a home rule charter creating a crime or public

offense.[1] Simply put, North Dakota has legislatively acted; so therefore, the county is precluded from creating a crime [all legislative power reside in the Legislative Assembly; Constitution of North Dakota, Article III, § 1], and the duly enacted statute [N.D.C.C. § 11-09.1-05(5)] forbids the county from acting.

See also, City of Dickinson v. Gresz, 450 N.W.2d 216, 220 (N.D. 1989), wherein, relying upon N.D.C.C. § 12.1-01-05, the North Dakota Supreme Court held that a political subdivision must not attempt to prohibit any conduct other than that prohibited by the state statute. Put another way, political subdivisions do not have the right to create crimes.

BROWN also notes that Cass County has attempted to wrongfully expand the limited authority possibly granted under N.D.C.C. Chap. 11-09.1. Cass County's Home Rule Charter, as adopted, includes Article 2(5) [Addendum] which improperly asserted that the words of limitation established by the State required *exclusive regulation by state or federal laws* [or rules adopted by a state or federal agency]. *Exclusivity* is not set forth in the actual State statute. Cass County improperly attempts to usurp the authority of the Legislative Assembly. This clumsy attempt by Cass County, North Dakota, to include the word, "exclusively" acts as an impermissible expansion of the extremely limited authority granted to any county attempting to create a home rule charter. Due process of law [Constitution of

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[1] Other North Dakota statutes possibly establishing state preemption involving dog-related activities include N.D.C.C. Chap. 25-13 ["Blind and Disabled Persons' Activities"], N.D.C.C. Chap. 36-21 ["General Provisions" relating to livestock], N.D.C.C. Chap. 36-21.1 ["Humane Treatment of Animals"]; N.D.C.C. Chap. 20.1-01 ["General Provisions" relating to game, fish, predators, and boating]; N.D.C.C. Chap. 20.1-04 ["Birds, Regulations]; N.D.C.C. Chap. 20.1-05 ["Big Game Animals, Regulations]; N.D.C.C. § 40-05-02(22) and N.D.C.C. § 40-05-01(47); N.D.C.C. Chap. 36-01 ["State Board of Animal Health"].

North Dakota, Article I, § 12], and the requirement that "(a)ll laws (be) of a general nature (and) shall have a uniform operation" [Constitution of North Dakota, Article I, § 22] would not allow for Cass County, North Dakota, to assert authority over actions of dogs/dog owners different than that set forth by state law – nor does the State of North Dakota have the power to allow Cass County so to do.

POINT 2. Cass County's Animal Control Ordinance #1998-3 is unconstitutional because it is "overbroad" or "vague".

Standard of Review

"The standard of review for a claimed violation of a constitutional right is de nova. *State v. Campbell,* 2005 ND 168, ¶ 6, 719 N.W.2d 374. 'Generally, the rules of construction applicable to state statutes apply in the construction of municipal ordinances.' *Mini Mart, Inc. v. City of Minot*, 347 N.W.2d 131, 141 (N.D.1984)." City of Belfield v. Kilkenny, 2007 ND 44, ¶ 8, 729 N.W.2d 120.

The standard of review for issues of law is de novo. Preference Personnel, Inc. v. Peterson, 2006 ND 35, ¶ 6, 710 N.W.2d 383. In re T.E., 2008 ND 86, ¶ 6, 748 N.W.2d 677, provides, "The interpretation of a statute is a question of law, which is fully reviewable on appeal." *Interest of P.F.,* 2008 ND 37, ¶ 11, 744 N.W.2d 724 (citing *Estate of Elken,* 2007 ND 107, ¶ 7, 735 N.W.2d 842).

A. The State has acted precluding county action.

With respect to dogs, the Legislative Assembly has enacted statutes) regulating certain dog activities as a "nuisance". See specifically, N.D.C.C. § 42-03-01. The statute's title, "(w)hen dogs are a public nuisance" is instructive. It statutorily establishes the

following essential elements before there is a "public nuisance": (a) a dog; (b) habitual molestation, (c) of a person, (d) traveling peaceably, and (e) on the public road or street. The same statute also identifies elements of due process of law [*preliminary requirements*: (a) written complaint to district or municipal court; (b) description of the dog; (c) the name of the dog; (d) the name of the dog's owner if known, and, if not, so stating; and (e) an allegation the dog is a public nuisance; *secondary requirements*: a **warning** – without further judicial possible until a "further complaint regarding the dog after notice has been given under this section, (when) the judge shall issue a summons ..].

If N.D.C.C. § 42-03-01 is not the exclusive statute for comparison, State law defines a "nuisance" at N.D.C.C. § 42-01-01 – with other essential elements of the offensive behavior:

> **42-01-01. Nuisance – Definition.** A nuisance consists in unlawfully doing an act or omitting to perform a duty, which act or omission:
> 1. Annoys, injures, or endangers the comfort, repose, health, or safety of others;
> 2. Offends decency;
> 3. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake, navigable river, bay, stream, canal, basin, public park, square, street, or highway; or
> 4. In any way renders other persons insecure in life or in the use of property.

As noted above, Cass County, North Dakota, has no legal right to change certain laws of the State of North Dakota,[2] made clear in City of Fargo v. Malme, 2007 ND 137, ¶ 10, 737 N.W.2d 390, and recently re-affirmed in City of Fargo v. Sauby, 2008 ND 60, ¶ 6, 747

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[2] Moreover, the Home Rule Charter of Cass County makes clear that it is "(s)ubject to the limitations imposed by the North Dakota Constitution, state law, and this charter .." Article I of the Home Rule Charter of Cass County, North Dakota. *See*, Addendum.

N.W.2d 65.

The North Dakota Legislative Assembly did not authorize any home rule county to change the laws relating to nuisances as set forth in N.D.C.C. Title 42.

B. If allowed to act, the county's ordinance is void for vagueness and overbreath.

Constitutional concepts made clear in State v. Tibor, 373 N.W.2d 877, 880 (N.D. 1985) have also been ignored by Cass County, and even the District Court:

> A law is void for vagueness if it lacks "ascertainable standards of guilt," *Winters v. New York,* 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1948), such that it either forbids or requires "the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926); *see also State v. Carpenter, supra; State v. Woodworth,* 234 N.W.2d 243 (N.D.1975). Vague laws offend due process because they violate the two essential values of fair warning and nondiscriminatory enforcement:
>
> > "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Secondly, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford,* 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222 (1972). [Footnotes omitted.]
>
> *See also Kolender v. Lawson,* 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).
>
> The doctrine of overbreadth, on the other hand, prohibits the law from criminalizing constitutionally protected activity:
>
> > "A governmental purpose to control or prevent activities constitutionally subject to state regulations may not be

> achieved by means which sweep unnecessarily broad and thereby invade the area of protected freedoms." *Zwickler v. Koota,* 389 U.S. 241, 250, 88 S.Ct. 391, 396, 19 L.Ed.2d 444 (1967).
>
> *See also, Village of Hoffman Estates v. Flipside,* 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); *State v. Carpenter, supra.*

Ignoring the essential elements of State law, Cass County defines "Public Nuisance" in any one (1) of seven (7) different ways. Animal Control Ordinance #1998-3(E). Addendum. Presumptively, Subsection F, and 38.08's "Public Nuisance" [page 4 of 5] formed the basis for the complaint:

> "Public Nuisance:
>
> ..
>
> F. Any animal which barks, whines, howls or makes other sounds common to its species in an excessive or continuous manner." &
>
> "Public Nuisance
>
> A. No person shall own or harbor within the boundaries of Cass County a public nuisance as defined in this ordinance. Violators of this section shall be fined in accordance with the penalties section."

Something is missing – no mention of a mens rea element exists. "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis v. United States*, 341 U.S. 494 (1951), citing *American Communications Ass'n v. Douds*, 339 U.S. 382, 411 (1950). See also, *Staples v. United States*, 511 U.S. 600, 605 (1994). State v. Kraft, 413 N.W.2d 303, 306 (N.D. 1987) ["Fundamental in any proceeding finding criminal liability is the idea that one accused of a crime must have possessed a guilty mind as well as performed the proscribed act. *State v. McDowell,* 312 N.W.2d 301, 303 (N.D.1981), *cert. denied*, 459 U.S. 981, 103 S.Ct. 318, 74 L.Ed.2d 294 (1982)." See also, State v. Hersch, 445 N.W.2d 626, 631 (N.D. 1989):

> A crime is committed when all of its essential elements are present and complete. *Pendergast v. United States*, 317 U.S. 412, 63 S.Ct. 268, 87 L.Ed. 368 (1943); *Griffin v. State*, 352 So.2d 847 (Ala.1977). Both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur. *State v. Kraft*, 413 N.W.2d 303 (N.D.1987); *United States v. Apfelbaum*, 445 U.S. 115, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980).

Lacking any identified scienter element, the county offense should regarded as unconstitutional for vagueness. To the extent the Cass County ordinance requires the incorporation of the State of North Dakota's provision(s) [N.D.C.C. § 12.1-02-02] for legal meaning, it mandates a judicial determination it is void for vagueness – the county ordinance makes no attempt to incorporate such standards by reference, or by implication.

The ordinance is also overbroad – the owner cannot use or possess personal property, in this case, dogs - clearly protected freedom(s) - on her own land zoned for agricultural use – land clearly out in the country. The evidence clearly shows the dogs did what was expected of them – guarded property, and provided a warning when the neighbor skulked ten (10) times, and the deputy sheriff intruded the area – it is in their nature, it is why dogs were domesticated.

The ordinance, as written, makes the owner a criminal for a single act of interference by any animal with a passerby or a passing vehicle [38.08(E)(A)]. If BROWN owned a dog that attacked a mountain lion, it becomes a crime in Cass County [38.08(E)(B)]. What will happen when little Johnny takes his dog to school [38.08(E)(C)]? Any owner of a dog off-leash in Cass County is guilty – what good is a police dog when the officer gets fined the first time, and sits in jail on a misdemeanor the second time [38.08(E)(D)]? Do not let your dog chew on a bone owned by another [38.08(E)(E)]. If you use a "pooper-scooper", avoid using

it twice causing an "accumulation of excrement" – it may be offensive to surrounding residents [38.08(E)(G)]. Particularly offensive under the ordinance – animals making sounds common to its species! Thank goodness it is not possible to criminalize the acts of a "barking" parrot, or a dog taught to "speak" [38.08(E)(F)].

As to the word "excessive", Cass County made no attempt to include in the ordinance the standard set forth in City of Belfield v. Kilkenny, 2007 ND 44, ¶ 20, 729 N.W.2d 120, nor was evidence ever admitted, that, "(w)hen construed in the context of a public nuisance, 'excessive' likely includes noise that affects health, quality of life, or enjoyment of property. *See Lindteigen v. City of Bismarck*, 1997 ND 123, ¶ 8, 565 N.W.2d 47 (concluding that the potential for excessive noise, danger to the public, and depreciation of neighboring properties exceeded the private benefit of allowing a person to build a private airport on his land zoned for agriculture)."

POINT 3. The complaint is fatally defective.

BROWN objected to the Cass County Animal Control Ordinance 1998-3 Violation #0297 dated December 18, 2007. Appendix, page 3. BROWN'S objections were legally based, and BROWN sought a dismissal for failure to comply with Due Process of Law. Appendix, page 5.

Virtually all legal objections posed to said Violation #0297, are equally applicable to the Information In Lieu of Cass County Animal Control Ordinance Violation #0297. Appendix, page 8.

Standard of Review

The standard of review for issues of law is de novo. Preference Personnel, Inc. v.

Peterson, 2006 ND 35, ¶ 6, 710 N.W.2d 383. In re T.E., 2008 ND 86, ¶ 6, 748 N.W.2d 677, provides, "The interpretation of a statute is a question of law, which is fully reviewable on appeal." *Interest of P.F.*, 2008 ND 37, ¶ 11, 744 N.W.2d 724 (citing *Estate of Elken,* 2007 ND 107, ¶ 7, 735 N.W.2d 842).

A. Cass County failed to honor the North Dakota Constitution, North Dakota statutes, and N.D.R.Crim.P. 3.

This prosecution is defective – there exists a defect of constitutional dimension according to State v. Buehler, 125 N.W.2d 155 (N.D. 1963). [See Article I, Section 10, of the Constitution of North Dakota for current authority.] In the *Syllabus provided by the Court* in Buehler, the North Dakota Supreme Court stated:

> 1. Our state constitution requires that every criminal prosecution for a misdemeanor be by indictment or information. A criminal complaint in county court with increased jurisdiction under our present law is the equivalent of an 'information' as contemplated by our state constitution.

After recognizing that a defendant charged with a misdemeanor should only be prosecuted by indictment or information, the Supreme Court recited the Territorial law requiring an allegation in writing, and that a warrant of arrest could only be issued if the information was "verified by oath or affirmation." The Supreme Court went on to recognize that North Dakota statutes existed which defined "information." See, N.D.C.C. § 29-01-13(4) as cited therein [the statutory language has not been thereafter amended]:

> '4. An 'information' is an accusation in writing, in form and substance like an indictment for the same offense, **charging a person with a crime or public offense, signed and verified by some person and presented to the district court** and filed in the office of the clerk of said court. [**bolding** by BROWN]

The Supreme Court also recognized the intent of N.D.C.C. § 29-01-01[which mandated either an information or an indictment except for certain courts not herein relevant; this statute has been subsequently changed] is satisfied because a complaint will sometimes suffice – because the complaint met the constitutional requirements, as further defined by statute [N.D.C.C. § 29-05-01], of being **"subscribed and sworn to by the complainant"** (among other things). When the complaint is the equivalent of an information – which also requires the accusation to be in a writing **"signed and verified by some person** and presented to the district court and filed in the office of the clerk of said court", the constitutional requirements have been met.

Such *constitutional requirements* have not been met in the instant case – by either charging document.

The need for a valid complaint is evident as it constitutes the charging document by which the court has jurisdiction over any named defendant. Under N.D.C.C. § 29-01-13(4), the general statute defining terms in N.D.C.C. Title 29 [Judicial Procedure, Criminal], contains the statutory definition for an "information." ["*An 'information' is an accusation in writing*, in form and substance like an indictment for the same offense, charging a person with a crime or public offense, *signed and verified by some person and presented to the district court and filed in the office of the clerk of said court.*"] [*emphasis* by BROWN]

The Buehler decision was elaborated upon in State v. Medearis, 165 N.W.2d 688, 691-692 (N.D. 1969). In the Medearis case, the Supreme Court excused the breach of such constitutional requirements because the violations were waived by not asserting such violations. As is set forth in the *Syllabus by the Court*:

> 1. Where a criminal complaint does not show the signature of the officer administering the oath to the complainant but the court docket states that the complainant made and filed his sworn complaint, and the correctness of the docket entry is not challenged, the complaint is sufficient.

BROWN never waived anything with respect to the deficiencies of the complaint – nor did she waive objections to the proffered Information. There is no docket entry possible showing compliance with the constitution's demands – it did not happen. With more elaboration, the Medearis Court, at pages 691-692, also wrote:

> The complaint used in this action is one provided for by Section 29-05-31, N.D.C.C. This section sets forth the form of a uniform traffic complaint and summons. The form of complaint set forth in this statute provides space for the complainant's signature to be subscribed and sworn to. The complainant's signature appears upon the complaint but the complaint does not carry the signature of an officer entitled to administer the oath. However, the court's docket states that 'complainant made and filed in this Court, his sworn complaint * * *' The correctness of the docket entry is not challenged by the defendant. We must assume, therefore, that the county judge swore the complainant but failed to evidence this fact by affixing his signature to the complaint. The docket entry, we find, is sufficient proof that the complaint was sworn to by the complainant.

In the instant case there exists no doubt – neither the written Citation #0297, nor the Information in Lieu of Cass County Animal Control Ordinance Citation #0297 was "signed and verified by some person some person" [N.D.C.C. § 29-01-13(4); required for any Information] OR "subscribed and sworn to by the complainant" [N.D.C.C. § 29-05-01; required for any complaint].

Such *constitutional requirements as reaffirmed by statutory requirements* have not been met in the instant case.

Without proper charge initiated by Due Process of Law, the District Court does not

have jurisdiction. See also, N.D.R.Crim.P. 3 which requires the existence of an initial charging document for all criminal offenses that "must be sworn to and subscribed before an officer authorized by law to administer oaths within this state and be presented to a magistrate [who may examine on oath the complainant .."]

Such *constitutional requirements as reaffirmed by statutory requirements and reaffirmed by Rules of Criminal Procedure* have not been met in the instant case.

When liberty is at stake, short-cuts are impermissible.

Lest it be forgotten, the North Dakota Rules of Criminal Procedure apply to all criminal proceedings in the district courts, including prosecutions for violations of municipal ordinances. N.D.R.Crim.P. 1. "Every public offense must be prosecuted by information or indictment unless it is .. 3. The offense is a misdemeanor or an infraction. .." N.D.C.C. § 29-01-01 – if so, it is done by way of a complaint meeting due process of law.

Under N.D.R.Crim.P. 3, it is required of a complaint that it be a "written statement of the essential facts constituting the elements of the offense charged and is the initial charging document for all criminal offenses. The complaint must be sworn to and subscribed before an officer authorized by law to administer oaths within this state and be presented to a magistrate." Neither document meets these requirements.

As to the "essential elements", neither document included the essential elements of the state law defining dogs as a public nuisance. N.D.C.C. § 42-03-01. Neither document identified the name of the dog(s), nor even gave a description of the dog(s). Neither document identified the required culpability – the necessary scienter. N.D.C.C. § 12.1-01-03 required that Cass County prove beyond a reasonable doubt "the required culpability", and

also, "(t)he nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue." As to the Citation #0297, little was disclosed – there was no attempt at any description of the essential elements.

Nor did Cass County attempt to comply with N.D.R.Crim.P. 3(b) which provides for a review by a magistrate.

The Violation #0297 dated December 18, 2007, did not even state an offense, and neither document identified all of the essential elements.

B. Cass County exceeds its authority – it may not create a Class B Misdemeanor or infraction.

Cass County's Animal Control Ordinance #1998-3 make "guilty" "(a)ny person who shall violate or assist in the violation of this ordinance" declaring the first offense to be an "infraction" and the "(s)econd offense or subsequent offenses within one year shall be classified as a Class B misdemeanor." Cass County does not have the right to create crimes. See Points 1 and 2. Consistent with this legal observation is N.D.C.C. § 32-01-05 which provides that "(a) criminal action is one prosecuted by the state as a party against a person charged with a public offense for the punishment thereof." Similarly, N.D.C.C. § 29-01-02 provides, "(a) criminal action is prosecuted in the name of the state of North Dakota as a party against the party charged with the offense." Simply put, all criminal actions must be brought in the name of the state of North Dakota. Cass County has clearly overstepped its bounds.

C. The District Court improperly allowed Cass County to proceed on the basis of the Information.

As noted above, the Information contains N.D.R.Crim.P. 3 infirmities. The District Court erred when it allowed, at time of trial, Cass County to proceed on the basis of the Information. Not even N.D.R.Crim.P. 3(c) would allow such amendment at the time of trial because (a) the Information charged an additional or different offense [October 20-24, 2007 as compared to December 18, 2007], and (b) substantial rights of the defendant were prejudiced. Defendant properly claimed surprise – her trial strategy had to change because of the ill-timed amendment.

POINT 4. BROWN was improperly denied a jury trial.

Standard of Review

The standard of review for issues of law is de novo. Preference Personnel, Inc. v. Peterson, 2006 ND 35, ¶ 6, 710 N.W.2d 383. In re T.E., 2008 ND 86, ¶ 6, 748 N.W.2d 677, provides, "The interpretation of a statute is a question of law, which is fully reviewable on appeal." *Interest of P.F.,* 2008 ND 37, ¶ 11, 744 N.W.2d 724 (citing *Estate of Elken,* 2007 ND 107, ¶ 7, 735 N.W.2d 842).

BROWN timely, and repeatedly, requested a jury trial. BROWN is entitled to a jury trial for several reasons.

First and foremost, it is her constitutional right to have a jury trial. Article I, § 13, of the Constitution of North Dakota, in pertinent part, makes clear:

The right of trial by jury shall be secured to all, and remain inviolate.

If the prosecution was proper, when Cass County made such an offense an

infraction/Class B misdemeanor, it committed itself to the possibility of a jury trial every time such is timely requested [presuming a county ordinance violation will be treated the same as a municipal ordinance violation under N.D.C.C. § 40-18-15.1; if said statute is only applicable to municipalities, then the jury trial will automatically occur unless validly waived by both parties].

Even if the prosecution is not a criminal matter, BROWN is still entitled to a jury trial because it is a right that existed at time that North Dakota became a state and adopted its constitution in 1889 – it is part of our North Dakota common law, and so declared – repeatedly. Under prior decision(s) of the North Dakota Supreme Court, BROWN was entitled to a jury trial because the penalty exceeds $20 for any public offense. The North Dakota Supreme Court, in City of Bismarck v. Altevogt, 353 N.W.2d 760, 764-765 (N.D. 1984), recited the historical circumstances, and noted that Article I, § 13, of the Constitution of North Dakota, "preserves the right of trial by jury as it existed at the time of the adoption of our state constitution", citing General Electric Credit Corporation v. Richman, 338 N.W.2d 814, 817 (N.D.1983), and Barry v. Truax, 13 N.D. 131, 99 N.W. 769, 771-72 (1904). At time of Statehood, city justices were compelled to provide jury trials if the penalty is greater than $20 or 10 days imprisonment, if demanded. A Justice of the Peace had trial by jury if the action was for a fine, penalty or forfeiture, not exceeding one hundred dollars. Moreover, if it was a civil proceeding, it required that issues of fact be tried by a jury unless a trial by jury was waived. See, City of Bismarck v. Altevogt, 353 N.W.2d 760, 765 (N.D. 1984) for the specifics of the 1887 code requirements, and also, a recognition that N.D.C.C. § 40-18-15, prior to a 1973 amendment, "essentially restated the right to trial by

jury, in cases involving the violation of a municipal ordinance, as it existed under territorial law" – now over 120 years of right to jury trials for ordinance violations.

See also, City of Grand Forks v. Thong, 2002 ND 43, ¶ 10, 727 N.W.2d 276, citing City of Bismarck v. Fettig, 1999 ND 193, ¶ 12, 601 N.W.2d 247. BROWN made repeated requests for a jury trial; such was never waived.

See also, the *civil action* of Landers v. Goetz, 264 N.W.2d 459, 461-462 (N.D. 1978):

> Under the Constitution of North Dakota, Section 7, the right of trial by jury is inviolate, and this right is reiterated in Section 24. The United States Constitution, Article VII, guarantees the right to trial by jury in all matters where the value in controversy exceeds $20. These rights are repeated in Rule 38, N.D.R.Civ.P. [current constitutional provisions are Article I, Sections 13 and 20, respectively]

No matter if a civil action or criminal action, the right of trial by jury is inviolate if more than $20 is in controversy – BROWN faced $50, and thirty days in jail if successfully prosecuted within one year.

POINT 5. BROWN was not guilty.

Standard of Review

A "clearly erroneous" standard should apply to findings of fact. Estate of Thompson, 2008 ND 144, ¶ 10, 752 N.W.2d 624.

The laws of the State of North Dakota forbids any agricultural operations as being a nuisance.

There is no question that the real property owned by BROWN is outside of the city limits, and that it exists within an agricultural area. BROWN, living in an agricultural area has the absolute right to use her property for agricultural purposes – plants and/or animals.

Under N.D.C.C. Chap. 42-04, specifically, N.D.C.C. § 42-04-04, "(a)ny ordinance or resolution of any unit of local government that makes the operation of any agricultural operation a nuisance or provides for the abatement thereof as a nuisance under the circumstances set forth in this chapter is void; except that the provisions of this section shall not apply when a nuisance results from the negligent or improper operation of any such agricultural operation or from an agricultural operation located within the corporate limits of any city as of July 1, 1981."

Moreover, Hood River County V. Mazzara, 89 P.3d 1195 (Court of Appeals of Oregon, 2004), notes the value of dogs, especially when they bark, to protect agricultural pursuits of their owner(s). See also, Hentz v. Elma Township Board of Supervisors, 2007 ND 19, 727 N.W.2d 276, which recognizes unreasonable restraints on agricultural pursuits can be regarded as unreasonable — in essence, beyond the jurisdiction of the governmental entity seeking to restrict agriculture outside of city limits.

The evidence at time of trial noted the agricultural nature of all of the property surrounding the neighbor witnessing against BROWN, including BROWN'S property. Cass County failed to honor its prosecutorial obligation to prove the *nonexistence of this agricultural operation defense*, as no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. N.D.C.C. § 12.1-01-03.

CONCLUSION

The Judgment should be vacated, and the underlying complaint/information should be dismissed as Cass County's ordinance is unconstitutional, and the prosecution flawed.

Respectfully submitted this 5th day of January, 2009.

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