ORIGINAL 20080257

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

MAR 2009

State of North Dakota,

Plaintiff-Appellee,

Supreme Court No. 20080257

vs.

District Court No. 09-07-K-5124

Lori Lee Brown,

Defendant-Appellant.

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

MAR 02 2009

STATE OF NORTH DAKOTA

REPLY 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
HONORABLE DOUGLAS R. HERMAN

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ISSUES ON APPEAL

Without expressing dissatisfaction with the issues presented by Lori Lee Brown ["BROWN"], Cass County, purporting to represent the State of North Dakota ["CASS COUNTY"], sets forth different issue(s) as if also aggrieved and appealing from the decision of the lower court. N.D.R.App.P. 28(c).

STATEMENT OF THE CASE

Without expressing dissatisfaction with the Statement of the Case presented by BROWN, CASS COUNTY abbreviates the nature of the case and the course of the proceedings so as to diminish significant procedural violations, some violations having constitutional dimension. N.D.R.App.P. 28(c). For instance, CASS COUNTY does not address, nor dispute. BROWN'S observation that no legal process was followed so as to allow for substitution of the prosecuting entity – the County became the State by merely filing a defective "information". Brief of Appellant, page 2.

Disregarding the difference between stating "facts", as compared to stating the nature/course of the "case". CASS COUNTY failed to mention that BROWN was charged by allegation #0297 dated December 18, 2007. Brief of Appellant, page 2, citing Appendix, page 3. When the "citation" was later referenced by CASS COUNTY [Appellee's Brief, ¶ 15] it alludes to a document that does not exist.

CASS COUNTY failed to mention as part of its "case" discussion, among other things. BROWN'S January 3, 2008, initial appearance replete with substantial legal objections and demands, some having constitutional dimension, followed by BROWN'S Motion to Dismiss/Notice of Demand for Due Process of Law and Jury Trial, which are

coupled with repetitive objections. in court proceedings or by way of filed documents, including: (I) BROWN'S immediate objection when first learning of a new charging document further criminalizing the process, as well as CASS COUNTY'S oppressive bail concepts, sanctioned by judicial action; (ii) BROWN'S written requests for judicial relief which prompted prosecutorial retaliation attempting to impose additional bail bond conditions; (iii) BROWN'S continued request that her constitutional right to trial by jury be honored: (iv) BROWN'S objections as to the nature. scope, overbroad and vague standards of the criminal charge: (v) BROWN'S objections as to the witnesses/evidence presented, as well as clear violations of due process of law; and (vi) BROWN'S objections to CASS COUNTY failing to meet its burden of proof. Brief of Appellant. pages 2-7.

Otherwise, CASS COUNTY presumptively accepts BROWN'S account.

STATEMENT OF FACTS

Without expressing dissatisfaction with the Statement of the Facts presented by BROWN. CASS COUNTY presents "facts" so as to attempt to substantiate the judicial decision. N.D.R.App.P. 28(c).

Where evidence will admit of two constructions or interpretations, each of which appears reasonable and one of which points to the guilt of the defendant while the other points to his innocence. the fact-finder must adopt the interpretation which will admit of the defendant's innocence and reject that which points to his guilt. State v. Voeller. 356 N.W.2d 115. 121 (N.D. 1984); State v. Johnson. 231 N.W.2d 180. 187 (N.D. 1975).

Nor did CASS COUNTY dispute the prosecutorial role displayed by the District Judge with respect to introduction/receipt of evidence. Brief of Appellant, page 8.

LAW AND ARGUMENT

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

CASS COUNTY ignores the significant implication(s) arising out of the amendment of N.D.C.C. § 11-09.1-05(5) in S.L. 2003, ch. 87, § 1, which inserts three words, "civil and criminal" in front of "penalties". Brief of Appellant, pages 10-11. CASS COUNTY also overlooks N.D.C.C. § 1-02-10 which provides "(n)o part of this code is retroactive unless it is expressly declared to be so." If legislative power can be delegated to another political subdivision – which it cannot [Point 1(A) of the Brief of Appellant, pages 12-13], it should be remembered Cass County's Home Rule Charter was adopted under the old law – before the attempted, and invalid, delegation of legislative power in 2003.

CASS COUNTY attempts to trivialize BROWN'S Article I freedoms [Point 1(A) of the Brief of Appellant, pages 12-13] suggesting "(o)wnership of dogs is not a freedom protected by the constitution as held in City of Belfield v. Kilkenny, 2007 ND 44, 729 N.W.2d 120, where Kilkenny did not have constitutionally protected conduct in his failure to stop his dogs from barking." Appellee's Brief, ¶ 30. The Kilkenny does not hold "ownership of dogs" is not a freedom protected by the constitution:[1] rather, the opinion suggests that Kilkenny's "conduct" ["failure to prevent his dogs from barking excessively, continuously, or at the wrong time"] does not reach a substantial amount of constitutionally protected conduct. The importance of such determination has been overlooked; rather than using the first rule ["facial invalidation of laws" under certain circumstances: *Broadrick v.*

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[1] Nor does such assertion square with North Dakota law, made clear in Kautzman v. McDonald, 2001 ND 20, ¶ 27-28, 621 N.W.2d 871, that dogs are property and the owner can recover from third persons for suffered loss.

Oklahoma, 413 U.S. 601, 612-615 (1973)]. the Court must use the second rule: "(E)ven if an enactment does not reach a substantial amount of constitutionally protected conduct. it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Kolander v. Lawson*. 461 U.S. 352, 358 (1983).

Kilkenny [*Id.*, ¶ 9] merely recognizes the City of Belfield's ordinance "regulates citizens' control over their dogs and cats, (so the Supreme Court) appl(ied) the test set forth in *Kolender* and its progeny":

> "All laws must meet two requirements to survive a void-for-vagueness challenge: (1) the law must create minimum guidelines for the reasonable police officer, judge. or jury charged with enforcement of the statute: and (2) the law must provide a reasonable persons with adequate and fair warning of the proscribed conduct." [citing *Kolander*, page 357] *Id.*, ¶ 10.

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

CASS COUNTY does not appear to quarrel with BROWN'S legal assertion that North Dakota's legislative power cannot be delegated to other political subdivisions, instead asserting that it is merely exercising the "power for a home rule county to adopt and enforce ordinances". Appellee's Brief, ¶ 31. CASS COUNTY fails to understand that 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 any county. This single issue was the crux prompting the notice to the Attorney General under N.D.C.C. § 32-23-11.

The Attorney General. and CASS COUNTY, fail to understand that any county, attempting to usurp the legislative power of the State of North Dakota by seeking to define

and prosecute "crimes". has overstepped all legal bounds. The Legislative Assembly constitutionally errs if it attempts to delegate to any county commission any administrative act while also delegating the substantive power to determine a crime. "The legislative power to create an offense may not be so delegated." People v. Grant, 242 A.D. 310, 313-314 (New York Appellate Division 1934), also proclaiming, at page 312:

> While the Legislature may delegate the power to make rules and regulations and give them the force and effect of law, it may not delegate the power to create crimes and prescribe the penalties therefor. The declaration of the crime and the prescription of the penalty for the violation rest in the ultimate discretion of the Legislature.

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

CASS COUNTY argues that the last sentence of N.D.C.C. § 11-09.1-05(5) does not mean what it says: "However, this section does not confer any authority to regulate any industry or activity which is regulated by state laws or by rules adopted by a state agency."

CASS COUNTY apparently argues that Attorney General Spaeth's persuasive opinion [N.D.Op.Att'y. Gen. 90-20. at 82; Appellee's Brief. ¶ 33] has somehow amended the plain words of the statute so that the "activity or industry" must be "subject to substantial state control, management, or supervision" before the statutory words of limitation have significance. If improper to delegate legislative power, the undersigned feels comfortable stating that Attorney General Spaeth's attempt to insert words into a North Dakota statute is also impermissible.[2]

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[2] Nor does CASS COUNTY address its clumsy attempt to insert a requirement of "exclusive regulation by state or federal laws". See, Brief of Appellant, pages 14-15.

If North Dakota Attorney General opinions have relevance, perhaps CASS COUNTY will explain why it did not honor Attorney General Stenehjem's Letter Opinion 2002-L-38, a copy of which is attached as an Addendum:[3]

> Therefore, it is my opinion that the Legislature has not granted home rule counties the authority to provide a criminal punishment for violation of county ordinances. A grant of this authority must be explicit and include relevant limitations on the scope of any fine or imprisonment allowed under a county ordinance. If this authority is desired, the Legislature would need to provide a clear grant of authority and address numerous issues such as the maximum term of imprisonment or fine that could be imposed against an individual.

It is also disingenuous for CASS COUNTY to argue that dog barking is only a local issue. North Dakota adopted N.D.C.C. Chap. 42-03 in 1959 – with *state-wide application.* N.D.C.C. Chap. 42-04 was adopted in 1981 – also with *state-wide application*, making void any ordinance or resolution of any unit of government making the operation of any agricultural operation a nuisance. In other words, people will be treated differently when living in agricultural areas than those dwelling in the city. CASS COUNTY may have the largest city in the state, but Lori Lee Brown does not live in the city – this is county home property surrounded by farmland: this is an agricultural area. State law is clear, a dog will be a public nuisance only when the dog (a) habitually (b) molests (c) a person (d) traveling (e) peaceably (f)(1) on the public road or (f)(2) on the public street. A dog *off the public street* never would meet the state-wide definition of a nuisance dog.

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

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[3] The opinion may have prompted the Legislative Assembly's 2003 actions to amend N.D.C.C. § 11-09.1-05(5), but only *after* approving its home rule charter in 1994.

A. The State has acted precluding county action.

See prior discussion under Point 1(B).

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

CASS COUNTY erroneously asserts that Kilkenny [*Id.*] required an inhibition upon "the exercise of First Amendment rights" to be considered possibly "overbroad". Appellee's Brief. ¶ 37; the citation to Kilkenny should have been ¶ 9, and the decision did not so hold.

There are "protected freedoms" other than the First Amendment that can be, and have been, implicated in judicial attacks on the "overbroad" basis. See specifically, *Zwickler v. Koota*, 389 U.S. 241, 249-250 (1967). CASS COUNTY'S attempt to trivialize and equate BROWN'S argument involving "protected freedoms" with "free speech for barking dogs" should be rejected.

CASS COUNTY attempts to invoke an argument that "(a)n officer using common sense will be able to determine if a dog is barking in an excessive or continuous manner" and that certain words have "common every day meanings that are easy to understand." Appellee's Brief, ¶ 39. If the delegation of legislative power was invalid, a whole host of words having every day meanings that are easy to understand, coupled together under the guise of an ordinance, will still result in a "void" act. Is common sense attributed to the county commissioners creating a crime so ill-defined that the sensibilities of a passing police officer dictate which dog-owner will be a considered a criminal – out in the country?

Interestingly, CASS COUNTY ignores the missing element of all crimes – the necessary mens rea – and a whole series of innocent acts capable of being deemed criminal

by mere county fiat. Brief of Appellant, pages 18-20.

POINT 3. The complaint is fatally defective.

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

CASS COUNTY does not attempt to address the defects of constitutional dimension set forth in the Brief of Appellants. pages 21-25. Instead. CASS COUNTY asserted its "authority" to act, recited some of its actions, and interesting. concluded: "The Information in Lieu of Citation contained all of the information required by statute. N.D.R.Crim.P. 7(c)(1)." Appellee's Brief, ¶s 42-43. The reference to the *rule* was inappropriate. and erroneous. N.D.C.C. § 29-01-13(4) is the proper citation. but sadly, CASS COUNTY'S "Information in Lieu of Citation" does not adhere to the statute's legal standards, nor the Rules of Criminal Procedure. Brief of Appellant, pages 21-25.

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

See prior discussion under Point 1(A).

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

CASS COUNTY made no attempt to justify its position.

POINT 4. BROWN was improperly denied a jury trial.

Asserting "infractions" as being lesser losses of liberty thereby excusing the right to a jury trial in North Dakota, CASS COUNTY relies on Mitchell v. Superior Court, 49 Cal. 3d 1230 (1989). The Mitchell decision outright rejects the notion that classification of the

offense determines the existence of the right to trial by jury in three (3) different references to historical debate. *Id.*, pages 1243-1244. The Mitchell case does not support CASS COUNTY'S argument; at time of adoption of the 1879 California Constitution, California merely did it differently than North Dakota. In 1889 North Dakota, our common law also ignored ephemeral classifications and defined loss of liberty whereby "(t)he right of trial by jury shall be secured to all. and remain inviolate" [Constitution, Article I. § 13] at a fine of $20 or 10 days imprisonment [or, in Justice of the Peace Court, any fine, penalty or forfeiture, not exceeding one hundred dollars]. Brief of Appellant, pages 26-28, references numerous North Dakota decisions so recognizing.

POINT 5. BROWN was not guilty.

CASS COUNTY also ignores this portion of the present appeal.

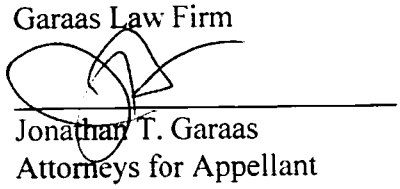
The laws of the State of North Dakota forbid classifying any possible agricultural operation as a nuisance. N.D.C.C. § 42-04-04 makes any local ordinance capable of interfering with any agricultural operation "void" [except inside city limits]. If it is a "void" local ordinance, BROWN need not prove its applicability to her individual agricultural operations – it is "void" as to all. Dogs have been part of our agricultural past for thousands of years. BROWN should have no obligation to prove anything – the burden is always upon the government. 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 2nd day of March, 2009.

Garaas Law Firm



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