IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR COUNTY, FLORIDA

Case No. 2018 CA 000292

Petitioner

DOTTYE BENTON

v.

CITY OF PALM COAST

Respondent

_____/

PETITION FOR WRIT OF CERTIORARI

The Petitioner, by and through undersigned counsel, hereby files this Petition for Writ of Certiorari seeking to quash a final "ORDER ON FINAL HEARING" of City of Palm Coast Special Magistrate order upholding a death sentence imposed upon Petitioner's dog "Cooper."

BASIS FOR INVOKING THE JURISDICTION OF THIS COURT

This is an action for writ of certiorari bought pursuant to Article V, § (5)(b), of the Florida Constitution and Rule 9.100 (c) Florida Rules of Appellate Procedure. The Order sought to be reviewed by this Petition is a final order directing that Petitioner's dog Cooper be killed. The final order in this matter is reviewable by petition for writ of certiorari pursuant to 767.12(4), Fla. Stat. and

Rule 9.100 (c), Florida Rules of Appellate Procedure.

FACTS UPON WHICH PETITIONER RELIES

On February 24, 2018 Petitioner's dog Cooper, a mixed breed black and tan dog, bit Terry Sandt on the face, hand and leg. Sandt was at Petitioner's home to clean her carpets. It is undisputed that Sandt was severely injured. Petitioner took Sandt to the hospital, where it was determined that the bite to his face would require reconstructive surgery. (VOL I: 1-8)[1]

On February 27, 2018 Petitioner took Cooper to the Flagler County Humane Society for quarantine, where he remains as of the time of this filing. On March 6, 2018 Petitioner was sent a letter by the City of Palm Coast informing her that the City of Palm Coast would kill Cooper ten business days after the notice, "[a]s the severe injury was inflicted by a dangerous dog." The March 6, 2018 letter did not advise Petitioner of her right to an appeal or how to request an appeal, but indicates "Should you waive your right to an appeal, the animal may be destroyed sooner than 10 days from this written notification, minimizing expenses." (VOL I: 9)

On April 5th, 2018 Petitioner and her counsel were provided a "NOTICE OF HEARING." The Notice of hearing was silent as to what procedures if any would be followed during the hearing. (VOL I: 10)

The hearing was held on April 16, 2018. After 5 pm on April 13, 2018, the

[1] References to the appendix will be made by volume followed by the page number.

last business day before the hearing, counsel for the City of Palm Coast sent Petitioner's counsel various hearsay documents, along with copies of the relevant portions of the Florida Statutes and the City of Palm Coast Ordinance. (Vol 1: 19) These documents were apparently also provided to the hearing officer, although they were never authenticated or admitted into evidence. (The transcript of that hearing has been ordered but as of the time of filing not received. It will be filed immediately upon receipt.)

At the hearing Petitioner produced the testimony of Jason Moreland, the kennel worker that had been caring for Cooper since his impoundment, who attested that during his impoundment, Cooper had shown no aggression to anyone and interacted well with strangers and other animals. Another witness for Petitioner, Joseph Pimental, testified that he has experience with dogs, directs a dog rescue, and was willing and able to take Cooper subject to a "dangerous dog" determination and safely confine Cooper for the rest of the dog's life. (Vol 1:4)

On April 18, 2018 the hearing officer entered an order upholding the City of Palm Coast's determination that Cooper shall be killed. Central to her determination was that "Cooper" had been declared "dangerous" by the City of Port Orange. (Vol 1: 1-8) However, there was no non-hearsay testimony establishing that Cooper had been declared a dangerous dog, and it is undisputed that Cooper was no longer in the City of Port Orange when the declaration was

made.

THE NATURE OF THE RELIEF SOUGHT

This Petition seeks an order from the Court quashing the April 18, 2018 final order rendered by a City of Palm Coast Hearing Officer that Petitioner's dog Cooper be destroyed.

STANDARD OF REVIEW

Review of administrative decisions of county boards is by writ of certiorari. In conducting certiorari review, a circuit court must determine (1) whether due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings and judgment were supported by competent, substantial evidence. *Wiggins v. Fla. Dep't of High. Saf. & Motor Vehs.*, 209 So. 3d 1165, 1170 (Fla. 2017) In this case all three questions are answered in the negative.

ARGUMENT IN SUPPORT OF PETITION

I. PETITIONER WAS NOT AFFORDED DUE PROCESS

A. Petitioner was not afforded due process because the procedure does not establish a burden of proof or contain a standard of proof.

Although dogs are more than "property" to most dog owners, at the very least, dog owners have legal property interests in their dogs within the meaning of the Fifth and Fourteenth Amendments. *Cty. of Pasco v. Riehl*, 620 So. 2d 229 (Fla. 2d DCA 1993), affirmed *Cty. of Pasco v. Riehl*, 635 So. 2d 17 (Fla. 1994). (a dangerous dog classification may be imposed only after the dog's owner has been provided adequate due process) Property rights are among the basic substantive rights expressly protected by the Florida Constitution. D*ep't of Law Enf't v. Real Prop.*, 588 So. 2d 957, 960 (Fla. 1991), accord *In re Forfeiture of 1976 Kenworth Tractor Trailer Truck*, 576 So. 2d 261 (Fla. 1990), (constitutional provisions apply equally to real and personal property)

In *Cty. of Pasco v. Riehl,* Id., the County sought to subject the Appelle's dog to more stringent manner of keeping requirements; in contrast, in the case at hand, the City of Palm Coast seeks to completely and permanently extinguish Petitioner's property interest in her dog by killing Cooper. Killing Cooper constitutes a forfeiture, forfeitures are considered "harsh extractions," D*ep't of Law Enf't v. Real Prop.*, 588 So. 2d 957, 960 (Fla. 1991), and may be upheld only when the government proves its case by clear and convincing evidence. See *S. Fla. Water Mgmt. v. RLI Live Oak, LLC,* 139 So. 3d 869 (Fla. 2014).

The Notice of Hearing provided to Petitioner contained no information regarding how the proceeding would be conducted. The only guidance provided in

the applicable City ordinance is found in Section 8-40(c)(3) of the city code and states:

> *All hearings shall be open to the public. At the hearing, the owner or his or her representative and any other interested persons may present any evidence relevant to a determination of whether said animal is dangerous. Formal rules of evidence shall not apply but fundamental due process shall be observed and shall govern all proceedings.*

The ordinance does not indicate which party has the burden of proof, or provide a standard of proof to be applied by the hearing officer. Petitioner's due process rights were violated when the hearing was held in the absence of established rules placing upon the City the burden to justify by clear and convincing evidence extinguishing Petitioner's property rights. Petitioner's due process rights were also violated when a hearing officer upheld the initial determination that Cooper is subject to destruction without holding the City to any particular standard of proof. See generally *Dep't of Law Enf't v. Real Prop.*, Id. found fault with a civil forfeiture statute that did not:

> *"address any requirements for filing the petition; which procedural rules should apply to control the litigation; what standard and burden of proof is "due" for issuance of the rule; whether a trial--with or without a jury--is required to decide the merits of the action once the rule has been issued; what*

standard and burden of proof apply in deciding the ultimate issue, including defenses; and whether and how property is to be divided or partitioned to ensure that only the "guilty" property is forfeited."

In D*ep't of Law Enf't v. Real Prop,* Id. the Florida Supreme Court held that in forfeiture proceedings the burden of proof is on the government, the standard "shall be no less than clear and convincing," and rejected the state's argument for a lesser standard because a lower standard failed "to recognize the significance of the constitutionally protected rights at issue and the impact forfeiture has on those rights." Id. at 967. Accord *Brinkley v. County of Flagler*, 769 So. 2d 468 (5th DCA 2000) (County's effort to gain custody of animals amounted to a forfeiture requiring a clear and convincing standard of proof.)

In another case involving a local government's regulation of a "dangerous dog," *Mansour v. King*, 128 P. 3d 1241 (Wash. App. 2006), the court held:

"An adequate standard of proof is a mandatory safeguard... Neither the King County Code nor the Board rules require a particular standard of proof. Nor does the record indicate what standard the Board applied here... (The Board) simply issued findings of fact and then stated it "upheld" Animal Control's Removal Order... The lack of a clearly ascertainable adequate standard of proof violated Mansour's procedural due process rights."

Due process considerations attendant to dog death penalty cases such

as the one involving Cooper, which effectively exacts an permanent and uncompensated forfeiture, mandate that the clear and convincing standard must be articulated and applied to ensure that killing a beloved pet is truly warranted. The City's procedure does not provide a burden of proof or the applicable standard of proof, and the hearing officer's order states only that "The City has presented evidence more than sufficient it carry its burden of proof" without revealing what burden she had considered to apply to make that determination. (Vol 1:6)

B. Petitioner was not afforded due process because there is a less drastic alternative to killing Cooper

Petitioner does not dispute that the government has a legitimate interest in protecting citizens from dogs that genuinely pose a risk to public safety. However, it is not necessary that Cooper be destroyed in order to protect public health and safety. A dog rescuer with a proven track record of caring for dogs that have a history of aggression stands ready to provide Cooper a loving home, and provided uncontroverted testimony that he had a secure enclosure in which to house Cooper that would provide Cooper a humane existence, where the dog would not be exposed to the public. The Florida Supreme Court noted in *Shriners Hospital v. Zrillic*, 563 So2d 64 (Fla. 1990):

> *Article I, section 2, protects all incidents of property ownership from infringement by the state unless regulations are "reasonably necessary" to secure public welfare....the* ***state***

> ***must employ the "least restrictive alternative" to achieve its legitimate objectives*** *where such rights are at stake;*

Accord *In re Forfeiture of 1969 Piper Navajo*, 592 So.2d 233, 236 (Fla. 1992)(invalidating statute because it was not narrowly tailored to the state's objectives; "(S)o long as the public welfare is protected, every person in Florida enjoys the right to possess property free from unreasonable government influence.") *Rae v. Flynn*, 690 So 2d 1341 (3rd DCA 1997), illustrates this principle. There, a litigant complained that his neighbor's dogs constant barking was a nuisance. The trial court issued an injunction permanently enjoining the dogs' owner from housing her pets outdoors. On appeal, the higher court upheld the injunction stating:

> *(B)ecause the trial court correctly exercised judicial restraint in crafting a remedy to accomplish the reduction of neighborhood hostilities by the least restrictive means, we affirm the order below. Id. at 1343.*

The Florida Supreme Court has also emphasized the need for the government to utilize the least restrictive alternative when private property rights are at stake.

> *"Substantive due process under the Florida Constitution protects the full panoply of individual rights from unwarranted encroachment by the government. To ascertain whether the encroachment can be justified, courts have considered the propriety of the state's purpose; the nature of the party being subjected to state action; the substance of that individual's right*

being infringed upon; the nexus between the means chosen by the state and the goal it intended to achieve; ***whether less restrictive alternatives were available****; and whether individuals are ultimately being treated in a fundamentally unfair manner in derogation of their substantive rights.* "(emphasis added) *Dep't of Law Enforcement v. Real Property*, at 960.

Accord *Massey v. Charlotte County*, 842 So.2d 142 (2nd DCA 2003):

(P)roperty rights are among the basic substantive rights expressly protected by the Florida Constitution....As Such, the means by which the state can protects its interest must be narrowly tailored to achieve its objective through the least restrictive alternative when such basic rights are at stake.

Here, the Petitioner proved that there is a less restrictive alternative to executing Cooper that will serve the public safety.

II. The Essential Requirements of the Law Were Not Observed

The Special Magistrate failed to observe the essential requirements of law when she ruled Cooper must be destroyed because he severely injured a person after another municipality had declared him "dangerous."

Florida law, Section 767.12 (5)(b), Fla. Stat. provides:

If a dog is classified as a dangerous dog due to an incident that causes severe injury to a human being, based upon

the nature and circumstances of the injury and the likelihood of a future threat to the public safety, health, and welfare, the dog may be destroyed in an expeditious and humane manner.

The hearing officer asserts she does not have any authority to spare Cooper's life, based upon this provision or otherwise, because Cooper had been already declared dangerous by another municipality. First, no competent and substantial evidence was presented that Cooper was previously declared dangerous. The only evidence presented consisted of unauthenticated hearsay documents, specifically a power point presentation, an agenda of the Port Orange Dangerous Dog Board, and a document entitled "Classification of Dangerous Dog Upheld." (Vol 1:11-18) No witness with firsthand knowledge of the proceeding testified, and no witness established that the dog that was subject of the proceeding in Port Orange was the same dog that bit Mr. Sandt on February 24, 2018.

Even ignoring the lack of competent substantial evidence regarding the Port Orange determination, it is undisputed that as of the date the City of Port Orange Dog Board voted, Cooper was permanently located outside of the City of Port Orange, thus depriving the Board of jurisdiction. Accordingly any such determination was *ultra vires* and therefore void. It is axiomatic that a municipal board does not have jurisdiction or authority over an animal that is not within the boundaries of the municipality, hence the provision in Florida law that "A dog that

is the subject of a dangerous dog investigation may not be relocated or its ownership transferred pending the outcome of the investigation and any hearings or appeals related to the dangerous dog classification or any penalty imposed under this section." Section 767.12(1)(b), Fla. Stat.

The hearing officer failed to observe the essential requirements of law when she based Cooper's death sentence upon an *ultra vires* determination by the City of Port Orange based solely upon unsubstantiated hearsay. While Cooper inarguably inflicted a severe injury, there is uncontroverted evidence that there is an alternative for Cooper that allows him to live while substantially eliminating the likelihood of any future threat to the public safety, health, and welfare. Accordingly his life and Petitioner's property interest in Cooper should not be permanently extinguished.

III. No competent, substantial evidence supports the administrative findings and judgment.

Finally, on a related note, much of the Hearing Officer's decision to uphold Cooper's death sentence without considering less drastic alternatives was based upon a finding that Cooper was declared "dangerous" in another jurisdiction. Assuming arguendo that Port Orange had authority to declare a dog no longer in its jurisdiction "dangerous," there is no non-hearsay evidence in the record that

Cooper was declared dangerous as no witness with firsthand knowledge regarding the proceeding or determination testified and no witness with firsthand knowledge identified Cooper as the same dog declared dangerous by Port Orange. Quasi-judicial proceedings before local governments are administrative proceedings in which hearsay evidence may be considered to supplement or explain other evidence, *De Groot v. Sheffield*, 95 So. 2d 912 (Fla. 1957) ("In administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed."), but it is clear that something more than hearsay is necessary to sustain a finding of fact. See *G.T. v. Dep't of Child. & Fam. Servs.*, 935 So. 2d 1245, 1252 (Fla. 1st DCA 2006) ("Even when hearsay can be considered over objection, hearsay (outside of the recognized exceptions to the rule excluding hearsay) is not deemed competent, substantial evidence sufficient to support a factual finding."), accord *Spicer v. Metro. Dade Cnty.*, 458 So. 2d 792, 794 (Fla. 3d DCA 1984) (relaxation of technical rules of evidence not intended to discard protections of hearsay rules).

REQUEST FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Honorable Court:

(a) Assert jurisdiction over the parties to and the subject matter of these proceedings; and

(b) Declare that Petitioner was not afforded due process and that the Hearing Officer's decision constituted a departure from the essential requirements of law was not based upon substantial competent evidence; and

(c) Determine that this Petition demonstrates a preliminary basis for relief; and

(e) Issue a Summons in Certiorari directed to Respondent requiring that it respond to this Petition; and

(f) After receiving the Respondents' response and conducting oral argument, issue a Writ of Certiorari quashing the "Order on Final Hearing."

Respectfully submitted this 18th day of May, 2018.

Marcy I. LaHart, PA

s/ Marcy I. LaHart
Marcy I. LaHart, Esquire
Florida Bar No. 0967009
207 SE Tuscawilla Rd
Micanopy, FL 32667
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by email to Jennifer B. Nix, Senior Attorney, Garganese, Weiss, D'Agresta, & Salzman, P.A.111 N. Orange Ave., Suite 2000. P.O. Box 2873, Orlando, Florida 32802-2873 on this 18th day of May, 2018.

s/ Marcy LaHart
MARCY LAHART

CERTIFICATE OF FONT AND TYPE SIZE

Counsel hereby certifies this Petition for Certiorari is formatted to print in Times New Roman 14-point font and complies with the requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure .

By:

s/ Marcy LaHart
MARCY LAHART