

No. 08-101161-A

IN THE
COURT OF APPEALS OF THE STATE
OF KANSAS

CITY OF MISSION

Plaintiff-Appellee,

vs.

NANCY COATES,

Defendant-Appellant.

BRIEF OF APPELLANT

Appeal from the District Court of Johnson County, Kansas
Honorable Peter V. Ruddick, District Judge
District Court Case No. 08 CR 868

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NATURE OF THE CASE

On July 30, 2008 the Defendant, Nancy Coates, appeal of her conviction in the Municipal Court of the City of Mission, Kansas was tried to the Honorable Peter V. Ruddick. After presentation of the City's witnesses the Defendant moved to dismiss and for acquittal. The Court took the Defendant's motion under advisement and recessed to review the law cited by the parties. The Court returned and sustained the Defendant's motion for acquittal regarding the dog at large charge, but found her guilty of harboring more than the two dogs allowed by the City of Mission. The Defendant brings this appeal.

ISSUES ON APPEAL

I. Whether the City of Mission produced sufficient evidence to support the conviction of the Defendant for the offense of harboring a third dog which exceeded the two dog limitation contained in the City of Mission's Domestic Animals Ordinance.

II. Whether the definition of owner and or harborer meet constitutional muster.

STATEMENT OF FACTS

The Defendant, Dr. Nancy Coates, was charged with allowing her dog to run at large in violation of Section 210.130 of the Code of the City of Mission and of harboring too many dogs in violation of Section 210.090. The Defendant was found guilty of both offences in Municipal Court and appealed same to Johnson County District Court.

The case was a bench trial before the Honorable Peter V. Ruddick.

The first witness called by the City of Mission was Michael Kelly. (II. p. 5). Officer Kelly stated that he found a yellow lab at 5343 Reeds in Mission, Johnson County Kansas. (II. p. 5, l. 25). Officer Kelly took the dog to Animal Haven (II. p.7, l. 5-7).

Officer Kelly, upon cross examination, stated that he had no evidence that the Defendant, Nancy Coates, let the yellow lab run free. (II. p. 8, l. 21). Officer Kelly, when asked whether he had made any determination as to whether the Defendant had done anything to allow the dog to run loose, answered “No, I do not.” (II. p.10 l. 10).

The second witness, Brenda Bettis, testified that she worked at Animal Haven and was present when the yellow lab was brought in. (II. p.12 l. 17-25). Ms. Bettis testified that Nancy Coates claimed the yellow Labrador. (II. p.13 l. 4). She further testified that the Defendant signed papers for the yellow Labrador, and the document reflecting the release of the dog was marked as Exhibit 1, and was admitted into evidence. (II, p.13 l. 14-p. 16-l. 15).

The City rested and the Defendant moved for acquittal based on the failure to establish a willful intent to allow her dog to run free. (II. p.17, l. 2-4).

The Court denied the Defendant’s motion, and Defendant’s counsel conducted cross-examination of Brenda Bettis. The City rested in the dog running at large charge and the Defendant moved to dismiss and for acquittal. (II. p.18, l. 15-24, p.19, l. 19-p.20, l. 25).

The Court took the Defendant’s motion under advisement to review the case law cited by the parties. (II. p. 22, l. 3-9).

The City put on evidence concerning the Defendant’s alleged ownership of more than two dogs. The City called Brandon Loomis. (II. p. 23, l. 24). His testimony

regarding the case indicated that he went to the Defendant's residence pursuant to the call of a neighbor. (II., p.25, l. 13-14).

BY MR. MARTIN:

- Q. And did you look into her backyard?
A. Yes, I did.
Q. Okay. How many dogs were there?
A. There were three.
Q. And are you acquainted with each of those dogs?
A. Yes, we have dealt with them several times.
Q. Do you know the names of the dogs?
A. Dotty, Happy, and the brown and white one, I can't remember. I am terrible with names.
Q. But these are the three dogs you have seen over there before?
A. Yes.

MR. McMAHON: Object, that is leading.

THE COURT: Sustained. (II, p. 26, l. 12-25).

On cross examination the following questions were asked and answered by Mr. Loomis.

BY MR. McMAHON:

- Q. Had you been there the day immediately proceeding the 12th of January to Dr. Coates' house?
A. No.
Q. Were you there the day -- within three days of the 12th?
A. No.
Q. Were you there three days prior to the 12th?
A. No, I hadn't had any calls.
Q. And you are aware that one of the dogs you saw is licensed in the City of Roeland Park?
A. Mm-hmm.
Q. Correct?
A. Yes, I am sorry.
Q. And that the dog is licensed in someone other than Nancy Coates' name; correct?
A. Yes, sir.

(II, p. 27, l. 6-21).

Thereafter, the City rested. (II, p.28, l. 2). The Defendant presented no evidence.

(II, p. 28, l. 3-4). The City's argument was the following:

MR. MARTIN: Judge, in the ordinance -- you have got my copy there -- is a definition of owning and definition of harbor. And one of -- I think it is the own -- it is the longer ordinance on the front page. The definitions under own includes a variety of words which includes harbor, but it also includes the word "possess." So our position here and our position in front of Judge Vano was that she possessed three dogs at the time and date alleged and that clearly the ordinance allows only two dogs to be possessed. (II, p.27, l. 6-21).

MR. McMAHON: Your Honor, we believe that the ordinance is overly broad in the sense that if you just provide water or shelter to a dog at any point in time, it consists of harboring. The statute under section 210.27.270 (sic) requires that for three consecutive days or more you would be considered the owner of the animal. The fact that somebody has an animal that may be somebody else's over at her property does not mean you harbor it within the statute, and there is no evidence that this is more than on the one occasion of this event that she had these dogs. Based on Officer Loomis' testimony, I'm not disputing that he counts three dogs, but I don't know that that meets the fact there is enough evidence to show they're harbored, and I don't think it meets the statutory requirement beyond a reasonable doubt to find somebody guilty, or specifically to find the defendant guilty, Your Honor. (II, p. 28, l. 17- p. 29, l. 9).

The Court found Dr. Coates not guilty of allowing her dog to run at large. (II, p.30, l. 1-13). The Court found Dr. Coates guilty of harboring more than two dogs. (II, p.30, l. 14-18). The Court stated the following:

But having looked at the cases and looked at the ordinance, I am going to sustain Mr. McMahan's position on it. I think some intent is required to find somebody guilty beyond a reasonable doubt of allowing a dog to be at large. It is obvious that this isn't the first time Ms. Coates has been charged in the City, and I suppose if the City wanted

to go to the trouble of bringing on multiple prior other incidents, the City could probably build a pretty good case that there was intentional conduct involved. But the City chose to not do that which frankly I appreciate, but the evidence being what it is, I find the defendant not guilty on the charge of dog at large. On the other hand, the harboring statute is quite specific. The definitions are quite inclusive, and as to owning, harboring, keeping or sheltering multiple dogs, I find the defendant guilty of violating that ordinance. (II, p.30, l. 1-18).

After sentencing, the Defendant filed her Notice of Appeal. The Defendant seeks a determination as to whether there was sufficient evidence to find the Defendant guilty of the offence of harboring more than two dogs. The Defendant further requests that the Court of Appeals review the statutory language contained in the applicable ordinances. The Defendant believes that the definitions contained in the municipal ordinance are impermissibly vague, and therefore should be declared unconstitutional.

ARGUMENTS AND AUTHORITIES

I. The City of Mission failed to produce substantial competent evidence to support the conviction of the Defendant for the offense of harboring a third dog which exceed the two dog limitation contained in the City of Mission's Domestic Animals Ordinance.

The standard of review in a criminal case, when the sufficiency of evidence is challenged, is whether after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational fact finder could have found the defendant guilty beyond a reasonable doubt. See *State v. Gutierrez*, 285 Kan. 332, 336, 172 P. 3d 18 (2007).

The City of Mission Ordinances Article I. Domestic Animals contains a section setting out the definitions of various terms as used in the ordinance. The Definitions provision is contained in Section 210.010.

At-Large is defined as:

AT-LARGE: To be outside the actual border or actual property lines of any privately-owned property or outside of a fence or other enclosure which restrains an animal to a particular premises or an animal that is not under the control by way of a muzzle, harness or lead which is securely attached to a leash of sufficient strength to hold the animal and that the owner or other authorized person is capable of maintaining full and immediate physical control and restraint of this animal. Any animal which is tethered to a stationary object within the range of any public access, sidewalk, thoroughfares, or to the private property not owned by the keeper, harborer or owner of the animal will be deemed at large.

Harboring or Keeper is defined as:

HARBORER OR KEEPER: Any person who shall allow any animals to habitually remain or lodge or to be fed within his/her home, store, yard, enclosure or place of business or any other premises where he/she resides or controls.

Own is defined as:

OWN: Includes own, keep, harbor, shelter, manage, possess or have a part interest in any animal. If a minor owns any such animal subject to the provisions of this Chapter, the head of the household of which such minor is a member shall be deemed to own such animal for the purposes of this Chapter.

Owner is defined as:

OWNER: Any person, firm, corporation, employee, agent, or guardian who keeps, harbors, shelters, feeds, waters, offers refuge or asylum to or for any animal or who permits same for any animal.

The applicable ordinance on January 12, 2008, regarding the limit on canines was Section 210.090. Subsections A and C were amended as of 4-24-02. Subsection B was amended on 3-24-07 and subsection D was amended on 6-20-07. The following is the ordinance as applied to the Defendant on January 12, 2008.

Section 210.090: LIMIT ON CANINES AND FELINES – PERMIT REQUIRED

A. *Limit On Canines And Felines In A Single-Family Dwelling.* No single-family dwelling or any person or resident therein shall be allowed to own, harbor, keep, shelter or license:

1. More than two (2) canines over the age of six (6) months and more than two (2) felines over the age of six (6) months; and
2. Have more than one (1) litter of pups and one (1) litter of kittens at the swelling under the age of six (6) months.
3. Individual pups or kittens between birth and age six (6) months old are not required to be licensed.

B. *Limit on Canines and Felines in Multi-Family Dwelling.* No multi-family dwelling or any person or resident therein shall be allowed to own, harbor, keep, shelter or license:

1. More than two (2) canines over the age of six (6) months and more than two (2) felines over the age of six (6) months; and
2. Shall not own, harbor, keep or shelter any litter of pups or kittens.
3. Multi-Family dwelling includes apartments, condominiums, townhouses, duplexes, jointly-owned dwelling and tenements.

C. *Exceeding Limit On Animals, Illegal.* No resident, person, firm, corporation or organization shall own, harbor, keep, shelter or license any additional number

of animals other than the number allowed in this Section, except by permit as defined in Subsection (D).

D. Any person owning, keeping or harboring a work dog shall be exempt from the license fee payment upon submittal of adequate proof that the dog has a rabies vaccine inoculation, is fully trained as a work dog and is used regularly as a work dog.

Running at large is defined in Section 210.130:

Section 210.130: Running at Large Unlawful:

A. It shall be unlawful for the owner, keeper or harborer of any animal or fowl to allow same to run or be at large within the City limits or on the private property of any other person or firm.

B. It shall be unlawful for the owner, keeper or harborer of any animal or fowl to allow same to run or be at large within the actual property lines of any private property which has public access or use. (Ord. No. 814 Sec. 5, 11-13-91; CC 2000 Sec. 2-114)

In the body of the Ordinance there is a provision entitled Designation of Animal Ownership. Section 210.270 (b) states:

Section 210.270: Designation of Animal Ownership

A. Any person who signs a receipt for the return of an animal from any City designated animal shelter facility, animal holding facility, humane shelter or licensed veterinarian shall be considered the animal's owner.

B. Any person who provides food, water, shelter or who keeps, harbors or offers refuge or asylum to or for any animal at-large or who professes to be providing food, water, shelter or keeping, harboring or offering refuge or asylum to or for any animal at-large or, as a resident permits same, for three (3) consecutive days or more shall be considered the animal's owner.

C. Any person who provides food, water, shelter, or who keeps, harbors or offers refuge or asylum to

or for any animal at-large or who professes to be providing food, water, shelter or keeping, harboring or offering refuge or asylum to or for any animal at-large or, as a resident permits same three (3) consecutive days or more shall be considered the animals owner.

Exception to Subsections (B) and (C): Any person who provides food, water, or shelter to any at-large or feral animal for immediate humane purposes and only long enough to notify Animal Control for the capture and removal of the at-large or feral animal shall not be considered the animal's owner. (Ord. No. 1033 Sec. 2-129, 4-24-02)

Defendant's sufficiency argument also requires the Court to interpret the statutory requirements in the City of Mission's ordinances. Interpretation of a statute is a question of law over which the appellate court exercises unlimited review. See, *State v. Storey*, 286 Kan. 7, 9-10, 179 P. 3d 1137 (2008). The most fundamental rule of statutory construction is that the intent of the legislature governs, if that intent can be ascertained. *Winnebago Tribe of Nebraska v. Kline*, 283 Kan. 64, 77, 150 P. 3d 892 (2007). This intent should be ascertained first through the statute's language while "giving ordinary words their ordinary meaning. *State v. Stallings*, 284 Kan. 741, 742, 163 P. 3d 1232 (2007). If a statute is plain and unambiguous, a court should not speculate as to the legislative intent behind it and add meaning "not readily found in it. . . . It is only if the statute's language or text is unclear or ambiguous, that we move to the next analytical step, applying canons of construction or relying on legislative history construing the statute to affect the legislature's intent." *In re K.M.H.*, 285 Kan. 53, 79, 169 P.3d 1025 (2007).

Within the criminal context, statutes must be strictly construed in favor of the accused. Any reasonable doubt as to the meaning of the statute is decided in favor of the

accused. Nonetheless, this rule of strict construction is subordinate to the rule that judicial interpretation must be reasonable and sensible to affect legislative design and intent. *State v. Paul*, 285 Kan. 658, 662, 175 P. 3d 840 (2008).

By analyzing the language contained in Subsections B and C, it is clear that it requires a resident to have permitted the animal to have been in violation of the ordinance for three (3) consecutive days before taking effect. The City of Mission did not provide any evidence that the Defendant had three dogs for three consecutive days. In fact, the evidence clearly established that the dogs which were observed by Officer Loomis, were not seen at the Defendant's residence other than the one time he looked over the fence. The City of Mission's failure to provide evidence that the three dogs observed by Officer Loomis, were harbored by the Defendant for three consecutive days, is fatal to the City's case.

Subsections B and C require that the Defendant, to be considered an owner, required that she provide food, water, or shelter to be deemed an owner. There was no evidence introduced at the trial that the Defendant provided food, water, or shelter to the third dog. The Defendant believes that merely looking over the fence and seeing three dogs in the yard, without more, does not meet the definition as a person who provides food, water, or shelter.

The next portion of Subsection C states that if a person keeps, harbors or offers refuge or asylum to or for any animal at-large or who professes to be providing food, water, shelter or keeping, harboring or offering refuge or asylum to or for any animal at-large the person so defined can be considered an owner. The ordinance requires a

showing that animal involved is an “at-large animal.” There was no evidence introduced that the third dog was an at-large animal.

The ordinance requires that the Defendant be caring for an “at-large” animal. The evidence at trial refutes a finding that the Defendant had an “at-large” animal. In fact, Officer Loomis testified that he knew that one of the three dogs he observed was owned by a resident of Roeland Park, who had licensed the third dog in the City of Roeland Park. Additionally, the third dog does not meet the statutory definition of “at-large”.

The use of a Designation of Animal Ownership clause was inappropriately used to find the Defendant was an owner of the third dog, which was admittedly not owned by the Defendant. There was no evidence introduced at trial that indicated that there were three dogs on the premises for three consecutive days. Therefore there was no evidence that Dr. Coates was the owner of the third dog. In fact, the evidence was that the third dog was owned by a resident of Roeland Park, who had licensed the dog in the City of Roeland Park.

There was no evidence presented at trial that the Defendant habitually harbored the third dog, the one registered in Roeland Park. The ordinance as written allows that any person who had a friend come over with three dogs, and provided them water, that they would be guilty of harboring more than two dogs, a violation of the ordinance or she would have harbored the dogs within the meaning of the ordinance.

Despite the lack of evidence and the problems related to the definitions and interpretation of the Mission ordinance in question, the Defendant was found guilty.

II. The definition of owner and or harborer do not meet constitutional muster.

The standard of review in a criminal case, when a statute or ordinance is alleged to be unconstitutionally vague is a question of law, and appellate review is unlimited. See *State v. Dorsey*, 13 Kan. App. 2d 286, 287, 769 P 2d 38 *rev. denied* 244 Kan. 739 (1989).

The Defendant believes that the definitions contained in the various sections of *Article I. Domestic Animals*, is vague, ambiguous and subject to uneven application. The Defendant therefore believes that said ordinance should be declared unconstitutional and unenforceable under the facts presented here where the Defendant was not the owner of the third dog which was owned by another individual who lived in Roeland Park, and who had duly licensed the dog with the City of Roeland Park.

The Definitions provision is contained in Section 210.010 define own and owner:

Own is defined as:

OWN: Includes own, keep, harbor, shelter, manage, possess or have a part interest in any animal. If a minor owns any such animal subject to the provisions of this Chapter, the head of the household of which such minor is a member shall be deemed to own such animal for the purposes of this Chapter.

Owner is defined as:

OWNER: Any person, firm, corporation, employee, agent, or guardian who keeps, harbors, shelters, feeds, waters, offers refuge or asylum to or for any animal or who permits same for any animal.

Section 210.090: Limit on Canines... uses the following language to infer ownership:

C. *Exceeding Limit On Animals, Illegal*. No resident, person, firm, corporation or organization shall own, harbor, keep, shelter or license any additional number of animals other than the number allowed in this Section, except by permit as defined in Subsection (D).

Section 210.270: Designation of Animal Ownership, defines ownership as:

B. Any person who provides food, water, shelter or who keeps, harbors or offers refuge or asylum to or for any animal at-large or who professes to be providing food, water, shelter or keeping, harboring or offering refuge or asylum to or for any animal at-large or, as a resident permits same, for three (3) consecutive days or more shall be considered the animal's owner.

The terms own and owner, as well as the Designation of Animal Ownership provisions, does not include the third dog which is clearly owned by another individual, as confirmed by Officer Loomis.

The Defendant contends that the ordinances fail to give adequate notice as to what is meant by "own," "owner," "harbor," "keep," "shelter," "manage," "posses," "provide refuge," "provide asylum," and the ownership implied by the acts of or by one who professes to "feeds," or "waters," an animal. What constitutes ownership within the meaning of the provisions of the ordinance that are used to designate ownership is unclear, vague and ambiguous. The Defendant would have to own, harbor, keep or shelter three animals to be convicted of violating Section 210.090(C) exceeding Limit on Animals. The definitions used to define owner in Section 210.090(C), does not include posses. The Court's finding that Dr. Coates met the definition of "posses" with respect to a third dog and therefore convicting her when the word possess is not used in Section 210.090(C) of the ordinance was error.

The use of conflicting, confusing and not generally understood words in reference to the definitions listed above seems to meet the requirement that a person of ordinary intelligence would be unsure of what conduct is prohibited by the statute, which renders it void for vagueness.

In *State v. Mitchell*, 23 Kan. App. 2d 413, 932 P.2d 1012 (1997), the Kansas Court of Appeals when considering the Kansas depraved heart murder statute and the defendant's assertion that K.S.A. 21-3402(b) was unconstitutionally vague stated the standard of review as follows:

The constitutionality of a statute is a question of law, and appellate review is unlimited. See *State v. Dorsey*, 13 Kan. App. 2d 286, 287, 769 P.2d 38 *rev. denied* 244 Kan. 739 (1989).

The Court goes on to state the test for determining whether a statute is void for vagueness:

The test to determine whether a statute is void for vagueness is "whether [the statute's] language conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice. A statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process." *State v. Adams*, 254 Kan. 436, 439, 866 P. 2d 1017 (1994) (quoting *State v. Dunn*, 233 Kan. 411, 418, 662 P. 2d 1286 [1983]).

The *Adams* court noted that another appropriate inquiry is "whether the [statute] adequately guards against arbitrary and discriminatory enforcement." 254 Kan. at 439 (quoting *City of Wichita v. Wallace*, 246 Kan. 253, 259, 788 P. 2d 270 [1990]).

A statute is presumed constitutional, and all doubts must be resolved in favor of its validity. If there is any reasonable way to construe a statute as constitutionally valid, the appellate court must do so. *Boatright v. Kansas Racing Comm'n*, 251 Kan. 240, 243, 834 P. 2d 368 (1992). An appellate court has a duty to construe a statute in such a manner that it is constitutional if the same can be done within the apparent intent of the legislature in passing the statute. *State v. Durrant*, 244 Kan. 522, 534, 769 P. 2d 1174, *cert. denied* 492 U.S. 923 (1989).

The Defendant asserts that while the meanings of the words may be deemed understandable, the interplay between the words and the illegal conduct the Defendant was charged with do not seem to be clear or understandable.

In the recent case of *State v. Richardson*, 100,445 (Kan. 6-19-2009), the Supreme Court of Kansas stated:

The constitutionality of a criminal statute is a legal question over which this court exercises unlimited review. *State v. Moore*, 274 Kan. 639, 652, 55 P. 3d 903 (2002). A statute is generally "presumed constitutional and all doubts must be resolved in favor of its validity." *Martin v. Kansas Dept. of Revenue*, 285 Kan. 625, 629, 176 P. 3d 938 (2008). Appellate courts have both the authority and the responsibility to "construe a statute in such a manner that it is constitutional," if such an interpretation can be achieved without contorting the legislature's intent for enacting it. (Citation omitted.)

A claim that a statute is void for vagueness necessarily requires a court to interpret the language of the statute in question to determine whether it gives adequate warning as to the proscribed conduct. See *State v. Adams*, 254 Kan. 436, 444-45, 866 P. 2d 1017 (1994) (considering the meaning of the term "misconduct" as employed by a statute prohibiting official misconduct). Courts in this state have long recognized that under the constitutional guarantee of due process of law, a criminal statute must "convey[] a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice." *State v. Dunn*, 233 Kan. 411, 418, 662 P. 2d 1286 (1983); see *City of Wichita v. Wallace*, 246 Kan. 253, 258, 788 P. 2d 270 (1990). A statute that "either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application" violates the Fourteenth Amendment to the United States Constitution and is thus void for vagueness. *Dunn*, 233 Kan. At 418. "At its heart the test for vagueness is a commonsense determination of fundamental fairness." *State v. Kirby*, 222 Kan. 1, 4, 563 P. 2d 408 (1977).

The rationale behind prohibiting vague statutes is twofold:

"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. Second, 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 the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972).

Moreover, the need for clarity of definition and the prevention of arbitrary and discriminatory enforcement is heightened for criminal statutes because criminal violations result in the loss of personal liberty. "The standards of certainty in a statute punishing criminal offenses are higher than in those depending primarily upon civil sanctions for enforcement." *City of Wichita*, 246 Kan. 253, Syl. ¶ 3. Still, the determinative question in such cases is "whether a person of ordinary intelligence understands what conduct is prohibited by" the statutory language at issue. *Adams*, 254 Kan. at 445.

We review a sufficiency of the evidence challenge in a criminal case to determine "whether, after review of all of the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational fact finder could have found the defendant guilty beyond a reasonable doubt." *State v. Gutierrez*, 285 Kan. 332, 336, 172 P. 3d 18 (2007).

A conviction of even the gravest offense may be sustained by circumstantial evidence. *State v. Garcia*, 285 Kan. 1, 22, 169 P. 3d 1069 (2007). Accordingly, if there is evidence to support a finding that each of the elements of a crime has been met, this court should uphold a defendant's convictions even when the evidence was entirely circumstantial. *State v. Scott*, 271 Kan. 103, 107, 21 P. 3d 516, *cert.denied* 534 U.S. 1047 (2001). However,

"[c]onvictions based upon circumstantial evidence . . . can present a special challenge to the appellate court" because "the circumstances in question must themselves be proved and cannot be inferred or presumed from other circumstances."

State v. Williams, 229 Kan. 646,649-49, 630 P. 2d 694 (1981) (quoting 1 Wharton's Criminal Evidence § 91, pp. 150-51 [13th ed. 1972]).

In conclusion, the record reveals that, at trial, the State failed to prove circumstances from which a rational fact finder could reasonably infer that the defendant had the specific intent to expose either M.K. or E.Z. to HIV. Instead, the State has asked us to infer or presume the requisite circumstantial evidence of specific intent from other circumstances or inferences. Such a presumption upon a presumption is insufficient to carry the State's burden. Accordingly, we find the evidence was insufficient to support the convictions and reverse in both cases.

The use of the words many different words to infer ownership and criminal liability cannot meet constitutional challenge. It is unclear what acts will subject a party to criminal prosecution. Additionally the ordinance is subject to uneven application. Officer Loomis testified that he received a phone call from Dr. Coates' neighbor, and therefore went and looked into Dr. Coates' backyard by looking over her privacy fence. He charged Dr. Coates without further investigation and knowing that the "third dog" was owned by a resident of Roeland Park, that the "third dog" was registered in the City of Roeland Park, but still charged Dr. Coates with a violation of the Limit on Canines, despite knowing Dr. Coates was not the owner of the "third dog."

CONCLUSION

The Appellant believes that based on the language contained in the Limit on Canines ordinance that the "third dog" observed on one occasion is insufficient to establish the guilt of Dr. Coates to a violation of having a "third dog" ordinance. The Appellant further believes that the language contained in the Domestic Animal ordinance

is unconstitutionally vague, and should be stricken. For the reasons stated above, the Appellant requests the Court of Appeals set aside the verdict of guilty and enter a judgment of acquittal.

Submitted by

McCONNELL & McMAHON



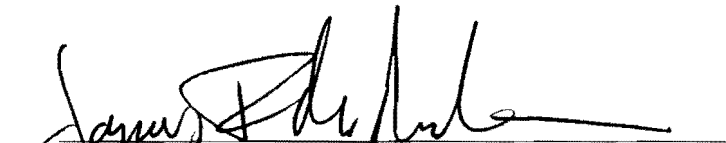
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CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 10th day of August, 2009, the original and two copies of Appellant's brief was mailed, postage prepaid, to

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