[Cite as *Minges v. Ohio Dept. of Agriculture*, 2013-Ohio-1808.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Zach Minges et al.,	:	
Appellants-Appellees,	:	
		No. 12AP-738
v.	:	(C.P.C. No. 12CVF01-5278)
Ohio Department of Agriculture,	:	(REGULAR CALENDAR)
Appellee-Appellant.	:	

D E C I S I O N

Rendered on May 2, 2013

Law Office of Marc D. Mezibov, *Marc D. Mezibov* and *Susan Butler*, for appellees.

Michael DeWine, Attorney General, and *James R. Patterson*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, P.J.

{¶ 1} Appellant, the Ohio Department of Agriculture ("ODA"), appeals a judgment of the Franklin County Court of Common Pleas that reversed an ODA order disqualifying the market steer exhibited by appellee, Zach Minges, and owned by appellee, Glen Minges, from the 2011 Butler County Fair, and requiring the forfeiture of all awards, prizes, premiums, or proceeds earned from exhibiting the steer. For the following reasons, we affirm.

{¶ 2} Zach Minges won the grand champion prize for market steer at the 2011 Butler County Fair. Prior to exhibiting his steer, Zach Minges completed a drug-use-notification form that indicated that his steer was free from medication. Both Zach

Minges and his father, Glen Minges, signed the form. Glen Minges' signature was necessary because Zach Minges is a minor.

{¶ 3} After the judges named the Mingeses' steer the grand champion, the fair veterinarian and her assistant collected a urine sample from the steer.[1] The urine sample tested positive for flunixin, a non-steroidal anti-inflammatory drug also known by the brand name Benamine. Based on the positive test, the ODA proposed to disqualify the Mingeses' steer and require the forfeiture of the awards, prizes, premiums, or proceeds won at the fair. In the notice of opportunity for hearing, the ODA charged the Mingeses with violating R.C. 901.74(A) and 901.76(A), as well as Ohio Adm.Code 901-19-04(C).

{¶ 4} Both R.C. 901.74 and 901.76 allow the Director of Agriculture ("Director") to take disciplinary action against a person who has tampered with exhibited livestock. The definition of "tamper" includes the "[t]reatment of livestock in such a manner that food derived from the livestock would be considered adulterated" and "[t]he injection, use, or administration of any drug that is prohibited under any federal law or law of this state, or any drug that is used in any manner that is not authorized under any federal law or law of this state." R.C. 901.76(E)(1)(a) and (b). Ohio Adm.Code 901-19-04(C) prohibits a person from "[a]dminister[ing] or caus[ing] or permit[ing] to be administered either a prescription drug or an over the counter drug other than in accordance with the drug's label directions" to exhibited livestock.[2]

{¶ 5} The notice of opportunity for hearing also alluded to Ohio Adm.Code 901-19-21 as an administrative rule implicated by the Mingeses' alleged actions. That rule permits the Director to discipline a person for any violation of R.C. 901.70 through R.C. 901.76 or any provision of Ohio Adm.Code Chapter 901-19.

{¶ 6} The Mingeses requested a hearing. At that hearing, the ODA represented in its opening statement that it would not

> try * * * to prove how the Benamine got into the animal, because there's no way for the [ODA] to be able to do that. No one was present on the Minges farm other than the Minges family during the period of time prior to the fair. No one has made any statement as to when or how or why they

[1] The Mingeses both signed a second drug-use-notification form at the time of collection. This second form also indicated the steer was free from medication.

[2] Ohio Adm.Code 901-19-04(C) contains an exception, but the Mingeses did not invoke that exception.

> administered Benamine to this animal, and it's simply not possible for the [ODA] to prove or to know exactly how the medication, how the drug[,] got into this particular animal.

(Tr. 18.) True to this statement, the ODA did not present any evidence regarding how flunixin was introduced into the Mingeses' steer. Instead, the ODA presented the urine test results, testimony that the presence of flunixin renders steer meat adulterated, and testimony that treating lameness with flunixin is an extra-label use of the drug. The Mingeses testified and both denied administering flunixin to the steer. Neither knew how the steer became contaminated with flunixin. Zach Minges' mother, Layne Minges, testified similarly.

{¶ 7} At the conclusion of the hearing, the hearing examiner expressed concern about the validity of the ODA's theory that it did not have to prove any action on the Mingeses' part in order for the Mingeses to be disciplined. Speaking to the ODA's counsel, the hearing examiner stated:

> I think your position is that you don't really have to show how [the tampering] happened. It's almost like it's if [the flunixin is] there, then that is like ipso facto tampering[.] * * * [I]f the cases say it doesn't matter how it happened, then that's one thing. But if there has to be an affirmative showing that this act, the act of tampering or sabotaging or giving the drug was done by the family itself in order to impact--in order to give their animal undue advantage, that's something else.

(Tr. 216-17.) The parties agreed to address the hearing examiner's concern in their written closing arguments.

{¶ 8} In its closing argument, the ODA argued that the mere existence of flunixin in the Mingeses' steer required disqualification of the steer. The state supported its argument with Ohio Adm.Code 901-19-19(A), which states that "[b]oth the exhibitor and the owner of livestock are absolutely liable to discipline under rule 901-19-21 of the Administrative Code for the presence of an unlawful substance in livestock." In response, the Mingeses pointed out that the provisions cited in the notice of opportunity for hearing required the ODA to prove that the Mingeses took some action, whether it was "treat[ing]" with, "inject[ing], us[ing], or administer[ing]," or "[a]dminister[ing] or caus[ing] or permit[ting] to be administered" a drug. R.C. 901.76(E)(1)(a) and (b); Ohio Adm.Code 901-19-04(C). The Mingeses acknowledged that, unlike the cited provisions, Ohio

Adm.Code 901-19-19(A) allows the Director to discipline without proving the exhibitor or owner engaged in any prohibited action. Pursuant to that rule, liability arises from the result of an action, not the commission of any action. However, the ODA did not list Ohio.Adm.Code 901-19-19(A) among the statutes and rules violated in the notice of opportunity for hearing. Thus, the Mingeses argued the Director could not discipline them under that rule.

{¶ 9} The hearing examiner held that Ohio Adm.Code 901-19-19(A) allowed him to find the Mingeses liable under R.C. 901.76 even though the ODA had failed to demonstrate that the Mingeses tampered with the steer. The hearing examiner also determined that the notice of opportunity for hearing provided the Mingeses with sufficient notice of the statutes and rules that they had allegedly violated. The hearing examiner recommended that the Director issue the Mingeses a letter of reprimand.

{¶ 10} In his order, the Director adopted the hearing examiner's findings of fact and conclusions of law, but overruled the recommended sanction. The Director disqualified the Mingeses' steer from the 2011 Butler County Fair and required the forfeiture of all awards, prizes, premiums, or proceeds earned at that fair.

{¶ 11} The Mingeses appealed the Director's order to the trial court. The trial court found that the ODA had established the existence of flunixin in the Mingeses' steer, but not that the Mingeses had tampered with the steer, or had administered or caused or permitted flunixin to be administered to the steer. Thus, the trial court determined that the ODA had only proven a violation of Ohio Adm.Code 901-19-19(A), not of R.C. 901.74(A), 901.76(A), or Ohio Adm.Code 901-19-04(C). As Ohio Adm.Code 901-19-19(A) was directly involved in the finding of violation, the notice of opportunity for hearing was deficient because it did not include that rule. The trial court, therefore, reversed the ODA's order in its August 2, 2012 judgment.

{¶ 12} The ODA now appeals the August 2, 2012 judgment, and it assigns the following error:

> The Trial Court erred and abused its discretion in finding that the notice of opportunity for hearing issued by Appellant to Appellees failed to comply with the requirements of procedural due process and R.C. 119.07.

{¶ 13} To rule on the ODA's assignment of error, we must construe both statutes and administrative rules. The interpretation of statues and administrative rules presents a question of law. *Lang v. Dir., Ohio Dept. of Job & Family Servs.*, 134 Ohio St.3d 296, 2012-Ohio-5366, ¶ 12 (holding that statutory interpretation presents a question of law); *Burden v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 11AP-8325, 2012-Ohio-1552, ¶ 17 (holding that interpretation of administrative rules presents a question of law). In an R.C. 119.12 appeal, we apply the de novo standard to review questions of law. *Spitznagel v. State Bd. of Edn.*, 126 Ohio St.3d 174, 2010-Ohio-2715, ¶ 14.

{¶ 14} R.C. 119.07 specifies what information must appear in a notice of opportunity for hearing. Along with other information, the notice must include "the law or rule directly involved" in the proposed action. R.C. 119.07. "The failure of an agency to give the notices for any hearing * * * in the manner provided in [R.C. 119.07] shall invalidate any order entered pursuant to the hearing." *Id*.

{¶ 15} Whether Ohio Adm.Code 901-19-19(A) was "directly involved" in the discipline of the Mingeses depends upon the meaning of Ohio Adm.Code 901-19-19(A). The ODA maintains that Ohio Adm.Code 901-19-19(A) clarifies R.C. 901.74(A), 901.76(A), and Ohio Adm.Code 901-19-04(C) by inserting strict liability into those provisions. Thus, the ODA argues, Ohio Adm.Code 901-19-19(A) was only tangentially involved in the discipline of the Mingeses, and it did not need to appear in the notice of opportunity for hearing. On the other hand, the Mingeses contend that Ohio Adm.Code 901-19-19(A) provides a separate basis for liability distinct from R.C. 901.74(A), 901.76(A), or Ohio Adm.Code 901-19-04(C). The Mingeses argue that Ohio Adm.Code 901-19-19(A) served as the sole ground for the imposition of discipline against them, and thus, its absence from the notice of opportunity for hearing rendered the notice invalid.

{¶ 16} Ordinarily, courts accord deference to an agency's interpretation of rules that the agency is required to administer. *Frisch's Restaurants, Inc. v. Ryan*, 121 Ohio St.3d 18, 2009-Ohio-2, ¶ 16; *HCMC, Inc. v. Ohio Dept. of Job & Family Servs.*, 179 Ohio App.3d 707, 2008-Ohio-6223, ¶ 24 (10th Dist.). However, if an agency's interpretation is unreasonable, then courts need not defer to that interpretation. *Ryan* at ¶ 16; *HCMC, Inc.* at ¶ 25.

{¶ 17} Here, Ohio Adm.Code 901-19-19(A) states that "[b]oth the exhibitor and the owner of livestock are absolutely liable to discipline under rule 901-19-21 of the Administrative Code for the presence of an unlawful substance in livestock."[3] As we stated above, the ODA asserts that Ohio Adm.Code 901-19-19(A) merely imports strict liability into R.C. 901.74, 901.76, and Ohio Adm.Code 901-19-04. According to the ODA, Ohio Adm.Code 901-19-19(A) does not constitute a stand-alone violation. The ODA, however, unreasonably interprets Ohio Adm.Code 901-19-19(A).

{¶ 18} Strict liability statutes do not include a mens rea requirement, so the mere performance of a prohibited act, regardless of the actor's intent, results in liability. *Cleveland v. Go Invest Wisely, L.L.C.*, 8th Dist. No. 95189, 2011-Ohio-3410, ¶ 13; *State v. Squires*, 108 Ohio App.3d 716, 718 (2d Dist.1996); *State v. Acevedo*, 9th Dist. No. 88CA004423 (May 24, 1989). Here, neither R.C. 901.74(A), 901.76(A), nor Ohio Adm.Code 901-19-04(C) contains a mens rea element. These provisions, therefore, are naturally strict liability provisions.[4] Evidence that a person committed an act prohibited by those provisions, no matter what his or her purpose, is sufficient to establish a violation.

{¶ 19} Ohio Adm.Code 901-19-19(A) adds nothing to R.C. 901.74(A), 901.76(A), or Ohio Adm.Code 901-19-04(C). Instead, Ohio Adm.Code 901-19-19(A) allows penalization of exhibitors and owners for the "presence of an unlawful substance in livestock." Ohio Adm.Code 901-19-19(A), thus, introduces a new basis for discipline. Under Ohio Adm.Code 901-19-19(A), the ODA need only prove a positive drug result in order to impose discipline; it need not prove the alleged offender was involved in the introduction of the drug into the livestock's system. In other words, the ODA only has to show a condition, not that the offender committed any prohibited act.

{¶ 20} Although the ODA has refined its argument on appeal, at core, it construes Ohio Adm.Code 901-19-19(A) as relieving it from the burden of proving that the Mingeses

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[3] Ohio Adm.Code 901-19-19(A) includes a final phrase—"and unacceptable practices done to livestock." This final phrase is not implicated in this case, so we do not include it in our analysis.

[4] If these provisions constituted criminal offenses, R.C. 2901.21(B) would control the degree of culpability required to commit the offenses defined in the provisions. As the provisions at issue are not criminal, R.C. 2901.21(B) has no applicability.

engaged in conduct prohibited by R.C. 901.74(A), 901.76(A), or Ohio Adm.Code 901-19-04(C). The concept of strict liability, however, only negates the need to prove intent; it does not excuse the state from proving that the alleged offender engaged in the prohibited conduct. *Pour House, Inc. v. Ohio Dept. of Health*, 185 Ohio App.3d 680, 2009-Ohio-5475, ¶ 19 (10th Dist.); *State v. Ferguson*, 10th Dist. No. 07AP-999, 2008-Ohio-6677, ¶ 73. Thus, even if Ohio Adm.Code 901-19-19(A) operated as the ODA claims, the ODA would still have the burden of proving that the Mingeses "treat[ed]" the steer with, "inject[ed], us[ed], or administer[ed]," or "caus[ed] or permit[ed] [the steer] to be administered" a drug. R.C. 901.76(E)(1)(a) and (b); Ohio Adm.Code 901-19-04(C). This is a burden that the ODA, admittedly, did not even try to meet.

{¶ 21} The ODA charged the Mingeses with provisions that required the ODA to prove that the Mingeses engaged in certain, specified conduct that resulted in flunixin being in their steer. To find the Mingeses liable for the mere presence of flunixin in its steer, the ODA could not rely on R.C. 901.74(A), 901.76(A), or Ohio Adm.Code 901-19-04(C). Rather, the ODA had to charge the Mingeses under Ohio Adm.Code 901-19-19(A). Consequently, we concur with the trial court that Ohio Adm.Code 901-19-19(A) was "directly involved" in the proposed discipline of the Mingeses. Because the ODA did not include that provision in the notice of opportunity for hearing, it violated R.C. 119.07, and its order is invalid.

{¶ 22} For the foregoing reasons, we overrule the sole assignment of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and VUKOVICH, JJ., concur.

VUKOVICH, J., of the Seventh Appellate District, sitting by assignment in the Tenth Appellate District.