[Cite as *State v. Beck*, 2015-Ohio-1069.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**MEMORANDUM OPINION**
Plaintiff-Appellee,	:	**CASE NO. 2014-P-0050**
- vs -	:	
KEITH BECK, et al.,	:	
Defendants-Appellants.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. R 2014 MS 038.

Judgment: Appeal dismissed.

Victor V. Vigluicci, Portage County Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266, and *J. Jeffrey Holland,* Holland & Muirden, 1343 Sharon-Copley Road, P.O. Box 345, Sharon Center, OH 44274 (For Plaintiff-Appellee).

Keith Beck and *Kathy Beck,* pro se, 1594 State Route 14, Deerfield, OH 44411 (Defendants-Appellants).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants, Keith E. Beck and Kathy D. Beck, appeal the judgment of the Portage County Municipal Court, Ravenna Division, finding probable cause to believe that their animals were subjected to animal cruelty and deeming them to be abandoned. Appellants also appeal the court's judgment denying their motion for reconsideration of said judgment. Because we hold that neither judgment is a final appealable order, the appeal is dismissed.

{¶2} After the state filed the return for a search warrant regarding appellants' property and a notice of seizure of appellants' companion animals, the trial court held a probable cause hearing as required by law on May 12, 2014. Appellants failed to file the transcript of that hearing. The statement of facts that follows is based on the affidavit for search warrant signed by Kathy Cordaro, Humane Officer with the Portage County Animal Protective League ("APL"), which was also filed with the court.

{¶3} On March 1, 2014, Officer Cordaro responded to appellants' property at 1594 State Route 14 in Deerfield, Portage County on a complaint received by the APL regarding the conditions of 15 to 20 Husky breed dogs being kept on the premises.

{¶4} Upon arrival, Officer Cordaro observed 15 dogs in a pen that was full of mud and feces. The dogs did not have clean or adequate water and there was no food for them. Officer Cordaro noted that three Husky breed dogs were subjected to suspected animal cruelty. These dogs were in need of immediate veterinary care due to their weakened condition, having a low body condition score of one out of nine, with five being normal weight.

{¶5} On March 6, 2014, Officer Cordaro returned to appellants' property to execute a search warrant. The property is located on a wooded lot with a trailer used by appellants as their residence, a camper, and a wooden store front. At that time, she saw 12 Husky breed dogs on the property that were being subjected to suspected animal cruelty. The dogs were underweight, dehydrated, infested with whipworms, and some had wounds requiring veterinary treatment. Officer Cordaro saw three other Huskies in appellants' trailer and five small dogs in the store front. She also saw two cats in the camper. She saw piles of trash and animal waste covering the floors of

these structures. The doors of each were locked. No one answered so Officer Cordaro was unable to remove the animals.

{¶6} On March 7, 2014, appellants' attorney called Officer Cordaro and said that appellant Kathy Beck, the dog owner, would surrender the Huskies to the APL.

{¶7} One month later, on April 7, 2014, appellant Kathy Beck agreed to surrender ownership of the Huskies to the APL. She agreed to meet Officer Cordaro later that afternoon to exchange the three dogs in the trailer, but she failed to appear as agreed. On that date, Officer Cordaro saw the three Huskies in the trailer, which was littered with trash that was about 18 inches deep. The three Huskies were bounding from one pile of trash to another to avoid sinking into the trash. The smell of ammonia inside the trailer was overwhelming. The odor burned the officer's eyes, nose, and throat, even though she was wearing a mask at the time.

{¶8} Between April 7, 2014 and May 1, 2014, Officer Cordaro and the APL's special prosecutor attempted to gain permission to enter appellants' premises to retrieve the dogs, but appellants failed to respond. As of May 1, 2014, the dogs continued to live in filthy conditions and had not received any veterinary treatment. Officer Cordaro said the animals on appellants' property were being subjected to animal cruelty and/or have been abandoned.

{¶9} On April 28, 2014, the APL advised appellants' counsel via telephone that the APL would seek a warrant unless appellants promptly responded, but appellants did not respond. On May 1, 2014, upon Officer Cordaro's affidavit, the trial court issued a search warrant.

{¶10} On May 3, 2014, Officer Cordaro executed the warrant. She searched the premises and buildings on appellants' property and impounded three Husky breed dogs,

ten other dogs, and seven cats due to suspected animal cruelty. She left a copy of the warrant with appellants together with a copy of the receipt and inventory listing the 20 seized animals.

{¶11} The May 1, 2014 search warrant, Officer Cordaro's affidavit for search warrant, return, receipt, inventory of search warrant, and notice of impoundment were filed with the court on May 5, 2014.

{¶12} On May 8, 2014, the state filed a notice of seizure of the subject animals, alleging that the humane officer had probable cause to believe the animals were the subject of a violation of R.C. 959.131, animal cruelty.

{¶13} On May 9, 2014, Officer Cordaro posted notice on appellants' property of a probable cause hearing to be held by the trial court on May 12, 2014, at 9:00 a.m., in compliance with the notice requirements of R.C. 959.132(C). Also on May 9, 2014, the court mailed notice of the May 12, 2014 hearing to appellants at their residence.

{¶14} The case came before the court on May 12, 2014, at 9:00 a.m. for a hearing pursuant to R.C. 959.132(E) to determine probable cause and to set bond for the animals' care during the pendency of appellants' animal cruelty case. The court waited until 9:45 a.m. for appellants to arrive, but they failed to appear. The court took evidence and testimony; however, as noted above, appellants have not filed the transcript of that hearing. Following the hearing, the court entered judgment on May 14, 2014, finding that, based on the evidence presented, Officer Cordaro impounded 13 dogs and seven cats on May 3, 2014, and that she had probable cause to believe the animals were subjected to animal cruelty, in violation of R.C. 959.131. Further, the court found that Officer Cordaro posted proper notice on the premises on May 9, 2014 regarding the probable cause hearing to be held on May 12, 2014, at 9:00 a.m. The

court found that no one was present to claim ownership or possession of the animals, as a result of which they were deemed abandoned, and that the APL may put them up for adoption or otherwise dispose of them as it deemed appropriate.

{¶15} Two weeks later, on May 30, 2014, appellants filed a motion to reconsider the court's May 14, 2014 judgment. The court held a hearing on this motion on June 23, 2014, at which all parties were present with their counsel. Appellants also failed to file the transcript of this hearing. Following the hearing, the court entered judgment on July 10, 2014, denying appellants' motion for reconsideration. The court reiterated its findings as set forth in its May 14, 2014 judgment and also found that the bond issue could not be addressed at the probable cause hearing because appellants did not appear at that time.

{¶16} Appellants appeal the trial court's judgment denying their motion for reconsideration. However, in their brief they do not assert any assignments of error, in violation of App.R. 16(A)(3). Curiously, the state in its brief argues that appellants presented two assignments of error and, to add to the confusion, even quotes them, although, as noted, there are no assignments of error. The state apparently drafted these assignments of error for appellants, loosely basing them on appellants' arguments. However, the state cannot properly draft assignments of error for appellants because it is appellants' duty, not that of the state, to frame their assigned errors.

{¶17} In any event, appellants argue in their brief that the court should not have found the animals to be abandoned in its May 14, 2014 judgment because appellants did not receive notice of the May 12, 2014 hearing. They also argue the court's finding in that judgment that the animals were abandoned is not authorized by R.C. 595.132(E).

Thus, appellants are not only appealing the court's judgment denying their motion for reconsideration; they are also appealing the May 14, 2014 entry.

{¶18} Before addressing appellants' arguments, we must first address the state's argument in its brief and separate motion to dismiss that we lack jurisdiction to hear this appeal because the trial court's May 14, 2014 judgment is a provisional remedy that is not a final appealable order. Appellants do not address this argument in their brief and did not respond to the state's motion to dismiss.

{¶19} According to Section 3(B)(2), Article IV of the Ohio Constitution, a judgment of a trial court can be reviewed by an appellate court only if it constitutes a "final order" in the action. *Germ v. Fuerst*, 11th Dist. Lake No. 2003-L-116, 2003-Ohio-6241, ¶3. If a lower court's order is not final, then an appellate court does not have jurisdiction to review the matter and the appeal must be dismissed. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20 (1989).

{¶20} R.C. 2505.02(B) states, in pertinent part:

> **{¶21}** An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:
>
> **{¶22}** * * *
>
> **{¶23}** (4) An order that grants or denies a provisional remedy and to which both of the following apply:
>
> **{¶24}** (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

{¶25} (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

{¶26} Pursuant to R.C. 2505.02(B)(4), the Ohio Supreme Court in *State v. Muncie*, 91 Ohio St.3d 440, 446 (2001), held that an order granting or denying a provisional remedy is a final appealable order if it satisfies the following three-part test:

{¶27} (1) the order must either grant or deny * * * a "provisional remedy," (2) the order must both determine the action with respect to the provisional remedy and prevent a judgment in favor of the appealing party with respect to the provisional remedy, and (3) the reviewing court must decide that the party appealing from the order would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action. (Emphasis deleted.)

{¶28} Pursuant to R.C 2505.02(A)(3), "'[p]rovisional remedy' means "a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, *attachment*, discovery of privileged matter, [or] suppression of evidence." (Emphasis added.) A "proceeding ancillary to an action" is "'one that is attendant upon or aids another proceeding.'" *Muncie, supra*, at 449, quoting *Bishop v. Dresser Indus., Inc*., 134 Ohio App.3d 321, 324 (3d Dist.1999).

{¶29} R.C. 595.131 defines the various criminal offenses that can be committed against companion animals. Further, R.C. 595.132 sets forth the statutory procedure for the seizure and impoundment of companion animals while a defendant's criminal case is pending. That procedure is summarized as follows:

{¶30} An officer may seize a companion animal when he has probable cause to believe the animal has been subjected to cruelty or neglect. R.C. 959.132(B).

{¶31} The officer then gives the owner or keeper of the animal, or posts on the premises, written notice of the seizure of the animal, advising that there will be a probable cause/bond hearing within ten days. R.C. 959.132(C).

{¶32} The court then holds a hearing, at which the court will determine if there was probable cause to seize the animal. If probable cause exists, the criminal case shall continue and the court will determine the amount of bond necessary for the animal's care pending resolution of the case. R.C. 959.132(E)(1). If probable cause does not exist, the court shall order the impounding agency to return the animal to its owner. R.C. 959.132(E)(2)(3).

{¶33} If no bond is posted, the impounding agency may determine the disposition of the companion animal while the case is pending, unless the court issues an order that specifies otherwise. R.C. 595.132(E)(3).

{¶34} If the person charged with animal cruelty is acquitted, the court shall immediately order the agency to return the animal to its owner. R.C. 959.132(G).

{¶35} If, after a finding of no probable cause or an acquittal, the animal cannot be returned, the court shall order the agency to pay to the owner the fair market value of the animal. R.C. 959.132(E)(2); R.C. 959.132(G).

{¶36} The law in Ohio classifies animals as personal property. *Sokolovic v. Hamilton*, 195 Ohio App.3d 406, 2011-Ohio-4638, ¶14 (8th Dist.). Market value is a standard to guide the court in the valuation of personal property loss. *Bishop v. E. Ohio Gas Co*., 143 Ohio St. 541, 546 (1944). Additionally, R.C. 955.03 provides that dogs "shall be considered as personal property * * *." This court in *Davison v. Parker*, 11th

Dist. Lake No. 2013-L-098, 2014-Ohio-3277, stated that dogs are considered personal property under Ohio law, and, as a result, market value is generally the standard applied when assessing damages. *Id*. at ¶12.

{¶37} With respect to the first prong of the test concerning whether a provisional remedy is a final order, the trial court's May 14, 2014 judgment is a provisional remedy. This is because it determined the preliminary issue of probable cause and deemed the animals abandoned while appellants' criminal case was pending. The judgment was essentially a pre-judgment attachment, which is a provisional remedy. R.C. 2505.02(A)(3); *See State v. Clayton*, 8th Dist. Cuyahoga No. 98795, 2013-Ohio-2198, ¶7 (trial court's order denying defendant's motion for return of seized property was a provisional remedy because the motion created an ancillary proceeding to the underlying criminal case). Since the May 14, 2014 judgment is a provisional remedy, the first prong of the test is satisfied.

{¶38} With respect to the second prong of the test, the trial court's May 14, 2014 judgment did *not* determine the action with respect to the provisional remedy or prevent a judgment in favor of appellants with respect to the provisional remedy. This is because, if appellants are acquitted, the trial court will be required to immediately order that the animals be returned to them (R.C. 595.132(G)) or, if they cannot be returned, the court will be required to order the agency to pay appellants the fair market value of the animals (R.C. 595.132(E)(2)). As a result, the court's judgment does not meet the second prong of the test.

{¶39} With respect to the third and final prong of the test, appellants *would be afforded* a meaningful or effective remedy via appeal as to the May 14, 2014 ancillary judgment following final judgment, i.e., appellants' conviction. This is because, if

appellants are successful in an appeal following their conviction, they would be entitled to have their animals returned to them or, if they could not be returned, judgment in their favor for their fair market value. Thus, the judgment does not meet the third prong.

{¶40} We therefore hold that the court's May 14, 2014 judgment is not a final appealable order.

{¶41} Appellants apparently believed that the May 14, 2014 judgment was a final order and that they could not challenge it on appeal because they did not appeal it within 30 days of its entry. Thus, their notice of appeal was expressly limited to the court's denial of their motion for reconsideration. As noted above, their appeal was obviously an attempt to also appeal the May 14, 2014 judgment because their arguments on appeal are directed solely to that earlier judgment. However, this legal maneuvering was not effective to save appellants' appeal because a judgment denying a motion for reconsideration of a non-final order is itself not appealable as it fails to dispose of any claims. *Crestmont Cadillac Corp. v. United Resources Recovery, Inc.,* 8th Dist. Cuyahoga No. 56796, 1990 Ohio App. LEXIS 1302, *3 (Mar. 29, 1990). Since the May 14, 2014 judgment is not a final order, the July 10, 2014 judgment denying appellants' motion for reconsideration is likewise not a final order.

{¶42} In view of the foregoing analysis, the state's motion to dismiss is granted, and this appeal is hereby dismissed for lack of a final appealable order.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.