

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio/City of Toledo

Court of Appeals No. L-12-1290

Appellee

Trial Court No. CRB12-01379
CRB12-07994

v.

Hugh Smith

DECISION AND JUDGMENT

Appellant

Decided: May 17, 2013

* * * * *

Daniel R. Haude and Kristi L. Haude, for appellant.

* * * * *

JENSEN, J.

{¶1} Appellant, Hugh Smith, was charged with several dog related offenses in Toledo Municipal Court in case Nos. CRB 12-01379 and CRB 12-07994. Pursuant to a negotiated plea agreement, Smith entered no contest pleas to two misdemeanor offenses. All other charges were dismissed. Smith appeals the portion of the judgments ordering him to pay restitution to the Lucas County Dog Warden for expenses incurred in caring for four dogs confined by the warden.

{¶2} On January 12, 2012, a Lucas County Deputy Dog Warden issued a citation to Hugh Smith for failing to restrain two of his dogs. Thereafter, in Toledo Municipal Court case No. CRB 12-01379, Smith was charged with two counts of failure to restrain in violation of R.C. 955.22(C)(1), and two counts of failure to immunize in violation Toledo Municipal Code Section 1705.09. Upon proof of immunization, the latter charges were dismissed.

{¶3} On April 1, 2012, four of Smith's dogs escaped from his back yard and engaged in an altercation with a dog owned by Mattie Gauldin. Later that month, the Lucas County Dog Warden seized and confined the four dogs.

{¶4} Mattie Gauldin filed an affidavit in the Toledo Municipal Court on May 9, 2012, asserting that Smith had allowed his four dogs to trespass upon her property and attack her dog. Thereafter, in case No. CRB 12-07994, appellant was charged with seven counts of public nuisance under Toledo Municipal Code Chapter 1706: one count of keeping of a dog which has been determined to pose a threat to the public safety in violation of Section 1706.02 (b)(3); two counts of permitting a dog to trespass upon the property of another in violation of Section 1706.02 (b)(2); and four counts of permitting a dog to run at large in violation of Section 1706.02 (b)(1).

{¶5} On July 3, 2012, one of the confined dogs became ill and was transported to a veterinarian. For two days, the city was unable to contact Smith or his trial counsel. In

the meantime, veterinary expenses were incurred. Pursuant to the request of the prosecutor, the court ordered the three remaining dogs released on August 3, 2012.

{¶6} A plea and sentencing hearing was held September 6, 2012. Under a negotiated agreement, Smith entered pleas of no contest to two misdemeanor charges. The court found Smith guilty. In sentencing Smith, the trial court ordered Smith, among other things, to “reimburse” the Lucas County Dog Warden in the amount of \$1,967.80 for veterinary expenses and costs of confinement. Smith’s trial counsel objected to the orders of restitution.

ASSIGNMENT OF ERROR

{¶7} In his sole assignment of error, Smith argues:

The Trial court erred by ordering the Defendant, as part of his criminal sentence, to pay restitution to non-party and non-victim Lucas County Dog Warden.

{¶8} We review misdemeanor sentences for an abuse of discretion. *State v. Ostrander*, 6th Dist. No. F-10-011, 2011-Ohio-3495, ¶ 28. An abuse of discretion connotes that the trial court’s attitude is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶9} In case No. CRB 12-01379, Smith entered a no contest plea to a charge of failure to confine a dog in violation of R.C. 955.22(C)(1). Whoever violates R.C. 955.22(C) that involves a dog that is not a dangerous dog “shall be fined not less than

twenty-five dollars or more than one hundred dollars on a first offense, and on each subsequent offense shall be fined not less than seventy-five dollars or more than two hundred fifty dollars and may be imprisoned for not more than thirty days.” R.C. 955.99(E)(1). The trial court sentenced Smith to pay a fine in the amount of \$75, plus costs. The trial court sentenced Smith to thirty days in jail. The jail term was suspended, however, conditioned upon the successful completion of a one year term of “active” probation. The trial court ordered Smith to “reimburse” the Lucas County Dog Warden in the amount of \$1,967.80.

{¶10} While R.C. 955.99(G) does allow the county dog pound to confine a dog at the owner’s expense “until the court makes a final determination and during the pendency of any appeal of a violation” of R.C. 955.22(C), such provision only applies to violations involving “dangerous” dogs. A “dangerous dog” is

a dog that, without provocation, * * * has done any of the following:

- (i) Caused injury, other than killing or serious injury, to any person;
- (ii) Killed another dog;
- (iii) Been the subject of a third or subsequent violation of division (C) of section 955.22 of the Revised Code.” R.C. 955.11(A)(1)(a).

{¶11} Here, the parties stipulated that the dog that was the subject of the plea was also the subject of Smith’s second violation of R.C. 955.22(C). There is no evidence or indication on the record that the dog that was the subject of the plea ever caused injury to

any person or killed another dog. Therefore, the dog that was the subject of the plea is not a “dangerous” dog. Accordingly, the trial court was without authority and abused its discretion in granting restitution to the Lucas County Dog Warden in case No. CRB 12-01379.

{¶12} In case No. CRB 12-07994, Smith entered a no contest plea to an amended charge of permitting a dog to trespass upon the property of another in violation of Toledo Municipal Code Section 1706.02(B)(2). The parties stipulated the offense constituted a misdemeanor of the fourth degree. All other charges were dismissed. The trial court sentenced Smith to pay a fine in the amount of \$25, plus costs. The trial court sentenced Smith to thirty days in jail. The jail term was suspended, however, conditioned upon the successful completion of a one year term of “active” probation. The trial court again ordered Smith to “reimburse” the Lucas County Dog Warden in the amount of \$1,967.80.

{¶13} Appellant argues that the trial court erred in awarding the Lucas County Dog Warden restitution for three reasons. One, the Lucas County Dog Warden was not the victim of the offenses. Two, restitution can only be awarded for those acts which constitute the crime for which the appellant was convicted. Three, restitution is limited to the economic loss suffered by the victim. We agree.

{¶14} Ohio’s misdemeanor restitution statute provides, in relevant part, as follows:

If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. R.C. 2929.28(A)(1).

{¶15} Here, the Lucas County Dog Warden was not the “victim” of the trespass offense. Further, there is no evidence in the record that the dog’s trespass caused any property damage. The victim of the April 1, 2012, trespass offense, Mattie Gauldin, presented no evidence that she suffered any economic loss. Accordingly, the trial court was without authority and abused its discretion in granting restitution to the Lucas County Dog Warden in case No. CRB 12-07994.

{¶16} For the foregoing reasons, appellant’s sole assignment of error is found well-taken. Pursuant to our authority in App.R. 12(A)(1)(a), the orders of restitution imposed upon the appellant in Toledo Municipal Court case Nos. CRB 12-01379 and CRB 12-07994 are reversed. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

James D. Jensen, J
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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