[Cite as *State v. Smith*, 2017-Ohio-359.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

STATE OF OHIO	C.A. No. 15AP0001
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JANE SMITH	WAYNE COUNTY MUNICIPAL COURT COUNTY OF WAYNE, OHIO
Appellant	CASE No. 2014 CR-B 00894

DECISION AND JOURNAL ENTRY

Dated: January 31, 2017

WHITMORE, Judge.

{¶1} Defendant-Appellant, Jane Smith, appeals from her convictions in the Wayne County Municipal Court. This Court affirms.

I

{¶2} In early May 2014, a couple from Trumbull County lost their dog and engaged in a comprehensive search to find him. On May 12, 2014, the wife spotted a dog that strongly resembled theirs on a pet rescue website operated by Smith. She and her husband, Robert Gibson, then attempted to contact Smith by email and phone to ask about their dog. When their repeated attempts at contact failed, the couple decided to drive to the address that Smith had listed as the location of her pet rescue operation. That location was Smith's personal residence in Wayne County.

{¶3} Gibson ultimately made two trips to Smith's residence; one on May 12, 2014, and one on May 14, 2014. Smith was not present on either occasion, but Gibson walked around her

property and took photographs of the dogs that he saw there. He also completed two voluntary statements for the Wayne County Humane Society ("the Humane Society"), describing the conditions he observed at Smith's residence. After receiving Gibson's statements, the Humane Society secured a warrant for Smith's residence. They executed the warrant on May 19, 2014, and seized 47 dogs and other animals from Smith's residence.

{¶4} Nine days later, the trial court conducted a hearing to determine whether the Humane Society had probable cause to impound Smith's dogs. The court heard conflicting testimony, but ultimately found that probable cause for the seizure existed. Pursuant to statute, the court then set a bond for the care of the dogs while they remained in the care of the Humane Society. The court set the bond amount at $17,400, which was intended to cover a period of 30 days.

{¶5} Subsequently, a complaint was filed against Smith, charging her with 47 counts of animal cruelty in violation of R.C. 959.131(E)(2). The parties then engaged in discovery and filed numerous motions, including a motion to suppress, motions in limine, and motions related to the bond that Smith continued to post for the care of her dogs. The matter ultimately went to trial in November 2014. At the conclusion of trial, the jury found Smith guilty of 44 counts of animal cruelty. The court then sentenced her to jail time and community control. It also ordered her to compensate the Humane Society for the amount it expended caring for her dogs.

{¶6} Smith now appeals from her convictions and raises five assignments of error for our review.

II

Assignment of Error Number One

> THE TRIAL COURT ERRED AS A MATTER OF LAW IN NOT SUPPRESSING FRUITS OF THE ILLEGAL SEARCH[.]

{¶7} In her first assignment of error, Smith argues that the trial court erred when it denied her motion to suppress. Specifically, she argues that the Humane Society's warrant to enter her property was invalid because it was premised upon evidence illegally obtained by an agent of the State. We disagree.

{¶8} The Ohio Supreme Court has held that:

> [a]ppellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills*, 62 Ohio St.3d 357, 366 (1992). Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Fanning*, 1 Ohio St.3d 19 (1982). Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard. *State v. McNamara*, 124 Ohio App.3d 706 (4th Dist.1997).

State v. Burnside, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8. Accordingly, this Court reviews the trial court's factual findings for competent, credible evidence and considers the court's legal conclusions de novo. *State v. Conley*, 9th Dist. Lorain No. 08CA009454, 2009-Ohio-910, ¶ 6, citing *Burnside* at ¶ 8.

{¶9} "It is well settled that the Fourth Amendment applies only to searches made by governmental officials or those acting on behalf of the government." *State v. Hayes*, 9th Dist. Summit No. 8039, 1976 WL 188866, *2 (Aug. 4, 1976). "The unlawful acts of private individuals in conducting illegal searches and seizures are not subject to constitutional proscription." *State v. Morris*, 42 Ohio St.2d 307, 316 (1975). *Accord State v. Knapp*, 9th Dist. Wayne No. 00CA0073, 2001 WL 773230, *2 (July 11, 2001). When the circumstances surrounding a search evidence that it was "an essentially private undertaking involving minimal police participation in the pursuance of a legitimate community function and without intent to evade constitutional protections," no Fourth Amendment violation occurs. *Morris* at 322.

"[C]ourts must look to the facts surrounding the search in order to determine whether it is an unreasonable police search or an excepted private search." *Id.* at 316.

{¶10} The trial court found that the Humane Society did not participate in the two searches[1] that Gibson conducted at Smith's residence. The court found that the Humane Society "never requested, suggested, urged, or even knew that Gibson would return to [Smith's] home [a second time] to obtain additional evidence." The court acknowledged that Gibson was a retired police officer and, as a result, was better prepared to look for evidence when he went to Smith's home. The court determined, however, that Gibson was acting as a private citizen when he obtained the evidence against Smith. Accordingly, it concluded that he had engaged in a private undertaking such that the Humane Society could rely upon his evidence in obtaining its warrant.

{¶11} Gibson testified that he had been retired from the Portage County Sheriff's Department for five years and resided with his wife in Trumbull County. When he and his wife lost their dog at the beginning of May 2014, they engaged in an extensive search for him. Gibson testified that his wife eventually found a picture of a dog they believed to be theirs on a website for a pet rescue operation in Wayne County. He and his wife then emailed the pet rescue and called several times to no avail. Gibson testified that they ultimately decided to drive to the location of the pet rescue to inquire about their dog.

{¶12} When Gibson and his wife arrived at the property, he instructed her to stay in the car and he walked around the property. Gibson testified that the property had a barn, a main house, and an in-law suite, but that no one answered when he knocked on several doors. While there, he observed a dog running loose and dogs in cages around the barn. He also was able to

[1] This Court will assume for purposes of its analysis that the investigations Gibson conducted at Smith's residence were, in fact, searches.

see through an unobstructed window in the in-law suite that there were "dogs in cages stacked three to four high." After making the foregoing observations, Gibson decided to drive to the Humane Society.

{¶13} Although the Humane Society was closed, Gibson was able to make contact with Stuart Mykrantz, the Executive Director of the Humane Society and acting dog warden. Gibson told Mykrantz what he had seen at the pet rescue property and that he believed his dog was being held there. Although Mykrantz was familiar with Smith and her pet rescue operation due to prior investigations there, Mykrantz did not inform Gibson of that fact. Instead, he informed Gibson that he would not be able to help him find his dog because the Humane Society could not enter the property without probable cause and a search warrant. Mykrantz asked Gibson if he would like to complete a voluntary statement about the things he had observed at Smith's property, and Gibson agreed to do so. Gibson testified that he took the voluntary statement form with him and completed it at home that same day. He denied that Mykrantz ever instructed him to return to Smith's home or to collect additional evidence. Likewise, Mykrantz denied that he ever told Gibson to do those things. Mykrantz testified that he only expected Gibson to return to the Humane Society with his voluntary statement.

{¶14} Gibson testified that he decided to return to Smith's property two days later. He once again found the property unattended, but decided to get more evidence to take to Mykrantz. Gibson used a cell phone to take pictures of the inside of Smith's residence, to the extent that he could observe it through the windows. While doing so, he noted a "foul odor" coming from inside that "smelled like * * * skunk or chlorine or something." He testified that the odor "burnt [his] eyes" and "took [his] breath away." After taking pictures of the property, Gibson returned to the Humane Society to speak with Mykrantz.

{¶15} Gibson testified that he completed a second voluntary statement for Mykrantz that day and gave him copies of the pictures that he took at Smith's residence. After reviewing Gibson's second voluntary statement, Mykrantz asked Gibson to complete a supplement to the statement, further describing the odor that he had noted at Smith's residence. Gibson did so, and then Mykrantz used Gibson's statements, two of his pictures, and other background information he knew about Smith's pet rescue operation to secure a search warrant.

{¶16} Having reviewed the record, we must conclude that it contains competent, credible evidence in support of the trial court's factual findings. Gibson testified that he initially went to Smith's property because he was looking for his missing dog. At that point, he had not yet had any contact with the Humane Society, and there was no evidence that he was acting at their behest. Although Gibson returned to Smith's residence after he spoke with Mykrantz, both he and Mykrantz testified that Mykrantz never instructed him to return to the property or to secure additional evidence. Mykrantz merely told Gibson that he would not be able to help him find his dog because he could not enter the property in the absence of a search warrant. To the extent Smith claims that Mykrantz's intention was to encourage Gibson to return to her property, the trial court was in the best position to evaluate their credibility at the suppression hearing. *See Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶ 8. The record supports the court's findings that the Humane Society did not participate in Gibson's two searches and "never requested, suggested, urged, or even knew that Gibson would return to [Smith's] home [a second time] to obtain additional evidence."

{¶17} Upon review, we further determine that the trial court reached the correct legal result in this matter. *See id.* "The unlawful acts of private individuals in conducting illegal searches and seizures are not subject to constitutional proscription." *Morris*, 42 Ohio St.2d at

316. The record evinces that Gibson, a private citizen, conducted the two searches at Smith's residence for the purpose of finding his lost dog. The evidence is such that both searches were conducted in the absence of any police participation. Accordingly, under these facts and circumstances, the trial court did not err when it concluded that no Fourth Amendment violation occurred. *See id.* Smith's first assignment of error is overruled.

Assignment of Error Number Two

> THE TRIAL COURT ERRED AND DENIED JANE SMITH DUE PROCESS OF LAW THROUGH ITS EVIDENTIARY RULINGS PREVENTING JANE SMITH FROM A FAIR OPPORTUNITY TO DEFEND AGAINST THE ACCUSATIONS OF THE STATE[.]

{¶18} In her second assignment of error, Smith argues that the court violated her due process rights when it made multiple, erroneous evidentiary rulings that deprived her of her ability to meaningfully defend herself at trial. For the reasons outlined below, we reject her argument.

{¶19} "The trial court has broad discretion in the admission or exclusion of relevant evidence." *State v. Rafferty*, 9th Dist. Summit No. 26724, 2015-Ohio-1629, ¶ 104. "[A] reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice." *State v. Spy*, 9th Dist. Summit No. 27450, 2016-Ohio-2821, ¶ 14, quoting *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶ 43. Yet, "'[a] court's ruling on a motion in limine does not preserve issues related to evidentiary rulings for appeal.'" *State v. Martinez*, 9th Dist. Summit No. 27243, 2015-Ohio-1123, ¶ 12, quoting *State v. Garfield*, 9th Dist. Lorain No. 09CA009741, 2011-Ohio-2606, ¶ 55. To preserve a challenge to the court's admission of evidence, a party must "contemporaneously object during the identification of [the evidence] and testimony regarding it * * *." *State v. Cross*, 9th Dist. Summit No. 25487, 2011-Ohio-3250, ¶ 49. When the court's ruling is one excluding evidence, a party must proffer the

evidence at trial to preserve the issue for appeal. *See State v. Huffman*, 9th Dist. Wayne No. 14AP0052, 2016-Ohio-8093, ¶ 9-12. *See also State v. Barrios*, 9th Dist. Lorain No. 06CA009065, 2007-Ohio-7025, ¶ 8, quoting Evid.R. 103(A)(2).

{¶20} In the argument portion of her appellate brief, Smith argues that she was prejudiced when the trial court "made rulings, before, during, and after trial, that either specifically prevented, or severely limited, [her] ability to defend against [the State's] allegations * * *." With the exception of one ruling, however, she has not identified any of the court's specific evidentiary rulings. Instead, she asserts that the court's rulings "are set forth in the Statement of facts and are incorporated by reference as if fully rewritten herein."

{¶21} The parties here asked the court to address numerous evidentiary issues both before and during trial. For example, a few days before trial, the court issued a journal entry disposing of 18 issues that the parties raised by way of motions in limine. Smith's brief does not explain why any of the court's individual rulings were incorrect or prejudicial in light of the charges against her. *See* App.R. 16(A)(7). Her brief is also devoid of any citations to objections or proffers that she made at trial to preserve her objections to any of the court's rulings.[2] *See Cross* at ¶ 49; *Huffman* at ¶ 9-12. The transcript in this matter is over 800 pages long. Moreover, upon review, it contains numerous instances where the court conducted sidebars following either a request for the same or an objection. Those sidebars were not recorded, so any discussions that took place therein are not a part of the record.

{¶22} It is not this Court's duty to search the record to determine whether Smith preserved any evidentiary issues for appellate review. *See State v. Horne*, 9th Dist. Summit No.

[2] We would note that Smith did not file a reply brief to contest the State's assertion on appeal that she failed to preserve, through objection or proffer, an argument with respect to any of the court's evidentiary rulings.

24348, 2009-Ohio-841, ¶ 6. Nor is it our duty to create an argument on her behalf. *See* App.R. 16(A)(7); *Cardone v. Cardone*, 9th Dist. Summit No. 18349, 1998 WL 224934, *8 (May 6, 1998) ("If an argument exists that can support this assignment of error, it is not this [C]ourt's duty to root it out."). "An appellant has the burden of demonstrating error on appeal." *State v. Mastice*, 9th Dist. Wayne No. 06CA0050, 2007-Ohio-4107, ¶ 7. Because Smith has not shown that she preserved her argument in the court below and has not supported her argument with citations to the record and legal authority, we reject her argument regarding the court's evidentiary rulings. Her second assignment of error is overruled.

Assignment of Error Number Three

> THE PROSECUTOR'S FAILURE TO PROVIDE ALL EVIDENCE ROSE TO THE LEVEL OF PROSECUTORIAL MISCONDUCT WHICH DEPRIVED JANE SMITH OF HER RIGHT TO A FAIR TRIAL IN VIOLATION OF [HER] 5TH, 6TH, AND 14TH AMENDMENT RIGHTS UNDER THE U.S. CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

{¶23} In her third assignment of error, Smith argues that the prosecutor engaged in misconduct when she failed to disclose certain information, in violation of Crim.R. 16. Because Smith has not preserved this issue for appeal, we decline to address it.

{¶24} In deciding whether a prosecutor's conduct rises to the level of prosecutorial misconduct, a court determines if the prosecutor's actions were improper, and, if so, whether the defendant's substantial rights were actually prejudiced. *State v. Smith*, 14 Ohio St.3d 13, 14 (1984). "Prosecutorial violations of Crim.R. 16 are reversible only when there is a showing that: (1) the prosecution's failure to disclose was a willful violation of the rule; (2) knowledge of the information would have benefited the accused in the preparation of the defense; and (3) the accused suffered some prejudicial effect." *State v. Sadeghi*, 9th Dist. Wayne No. 14AP0051, 2016-Ohio-744, ¶ 16, citing *State v. Joseph*, 73 Ohio St.3d 450, 458 (1995). A defendant forfeits

any error regarding an alleged violation of Crim.R. 16 if he or she neglects to bring the alleged discovery violation to the trial court's attention. *See State v. Stembridge*, 9th Dist. Summit No. 23812, 2008-Ohio-1054, ¶ 12.

{¶25} Smith's prosecutorial misconduct argument concerns a report and supplemental report completed by Dr. Brian Wennerstrom, a veterinarian who testified as an expert on behalf of the State. Smith does not dispute that she received a copy of Dr. Wennerstrom's reports in discovery. Instead, she argues that the prosecutor committed a discovery violation when she failed to disclose that, in completing his reports, Dr. Wennerstrom relied upon "animal examination reports prepared by an unidentified third party" and conversations he had with the prosecutor and another attorney. According to Smith, the prosecutor never (1) revealed the identity of the third party who compiled the animal examination reports, or (2) identified herself or the other attorney "as authors of the second Dr. Wennerstrom report."

{¶26} Smith has not shown that she raised either of the foregoing issues at trial. Her brief contains a single citation to Dr. Wennerstrom's trial testimony. On that page of the transcript, Dr. Wennerstrom testifies that he spoke with several individuals before completing his supplemental report and that one of those individuals was an attorney. Dr. Wennerstrom then testifies that the attorney advised him to be truthful and to complete his report based on his opinion, evaluation, and analysis as a veterinarian. The transcript is devoid of any objection on behalf of Smith or any claim by her that the prosecutor committed misconduct by not providing her with the foregoing information in discovery. Because Smith failed to notify the trial court of any alleged discovery violation, she has forfeited this issue for review. *Id.* Moreover, because she has not argued plain error on appeal, we will not undertake a plain error review on her

behalf. *See State v. Glunt*, 9th Dist. Medina No. 13CA0050-M, 2014-Ohio-3533, ¶ 26. Smith's third assignment of error is overruled.

Assignment of Error Number Four

> THE TRIAL COURT ERRED AS A MATTER OF LAW IN APPLYING THREE UNCONSTITUTIONAL STATUTORY FRAMEWORKS UPON THE FACTS OF THIS CASE.

{¶27} In her fourth assignment of error, Smith argues that three statutes the trial court applied in the instant action are either facially unconstitutional or unconstitutional as applied to her. She asserts that: (1) R.C. 959.131(E)(2) is void for vagueness; (2) R.C. 959.132, as applied, offends her due process rights; and (3) R.C. 959.131 violates the Equal Protection Clause. For the reasons set forth below, we reject each of her arguments.

{¶28} Legislative enactments are afforded a strong presumption of constitutionality. *State v. Collier*, 62 Ohio St.3d 267, 269 (1991). A party asserting that a statute is unconstitutional must prove that the statute is unconstitutional beyond a reasonable doubt. *Id.* "The failure to challenge the constitutionality of a statute in the trial court forfeits all but plain error on appeal, and the burden of demonstrating plain error is on the party asserting it." *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, ¶ 2.

{¶29} The record reflects that Smith only made an extremely generalized and limited attempt to challenge the constitutionality of any of the foregoing statutes in the lower court. On a single day some three months before trial, Smith filed three separate motions that reference the foregoing statutes. The first motion, entitled "Demand for Probable Cause Hearing," simply asked the court to conduct a probable cause hearing to determine whether, in seizing her animals, the State had complied with R.C. 959.132. The second motion, entitled "Objections to Assessment of Bond Denial of Due Process, Taking of Property Without Procedure Denial of

Equal Protection," claimed that R.C. 959.131 was unconstitutional because it allowed the State to seize Smith's animals in the absence of an opportunity for her to be heard on the allegations of animal cruelty. In that same motion, Smith reasserted that her motion to suppress should be granted, briefly alleged a § 1983 claim based on the unlawful taking of her property, and made a blanket statement that the "statutes at issue in the instant case appear[ed] to deny [her] equal protection of the laws." The third motion, entitled "Additional Objections to Assessment of Bond Denial of Due Process, Taking of Property Without Procedure Denial of Equal Protection and Other Constitutional Deprivations," contains 15 "additional objections" to the bond the court imposed on Smith pursuant to R.C. 959.132 to pay for the care of her 47 dogs following their seizure. In that motion, Smith set forth a list of 15 ways in which R.C. 959.131 and 959.132 were allegedly unconstitutional, including that they were void-for-vagueness, unduly restrained free trade, subjected her to Double Jeopardy, imposed an unconstitutional form of punishment, denied her equal protection and due process, and permitted usurious and arbitrary charges. Smith never raised any of her particular statutory claims at trial. Instead, she stated that she was renewing all of her previously denied motions, of which there were a substantial number.

{¶30} As noted, "[a] party asserting that a statute is unconstitutional must prove that the statute is unconstitutional beyond a reasonable doubt." *Collier* at 269. The statutory arguments that Smith made in the lower court fall far short of any attempt to prove beyond a reasonable doubt that R.C. 959.131, R.C. 959.132, or any particular subsections contained therein are unconstitutional. She neglected to develop any of her arguments in a manner that would permit either the trial court or this Court to conduct a meaningful review. Moreover, even assuming that Smith did not forfeit all of her statutory arguments in the lower court, we cannot conclude that any of them are meritorious.

{¶31} Smith argues that R.C. 959.131(E)(2) is facially void because a person of ordinary intelligence cannot comprehend its meaning. The version of that subdivision in effect at the time of her charges provided as follows: "No owner * * * of a dog kennel who confines or is the custodian or caretaker of a companion animal shall negligently * * * [o]mit any act of care by which unnecessary or unjustifiable pain or suffering is caused, permitted, or allowed to continue, when there is a reasonable remedy or relief, against the companion animal * * *." Former R.C. 959.131(E)(2). Smith argues that the statute is unconstitutionally vague because "it fails to define the terms 'Omit any act of care by which unnecessary or unjustifiable pain or suffering is caused, permitted, or allowed to continue, when there is a reasonable remedy or relief."' She fails, however, to conduct any analysis or offer any citation to legal authority in support of her argument. *See* App.R. 16(A)(7). At least one appellate court has found that the phrase "reasonable remedy or relief" is not unconstitutionally vague. *See State v. Rawson*, 10th Dist. Franklin No. 14AP-1023, 2016-Ohio-1403, ¶ 30-31. Absent a reasoned argument from Smith, supported by appropriate legal authority, this Court will not conclude that former R.C. 959.131(E)(2) is unconstitutionally vague beyond a reasonable doubt. *See* App.R. 16(A)(7); *Cardone*, 1998 WL 224934, at *8. Smith's argument to the contrary is meritless.

{¶32} Next, Smith argues that R.C. 959.132 is unconstitutional because it permitted the taking of her property without due process of law. The statute allows a humane officer to seize a companion animal when he or she has probable cause to believe that the animal is the subject of an offense, such as animal cruelty. R.C. 959.132(B). Following the seizure, a court must conduct a hearing within 10 days to determine if probable cause for the seizure existed. R.C. 959.132(E)(1). If the court finds probable cause existed, the statute instructs the court to determine the amount of bond required for the care of the animal for not less than thirty days

from its impoundment. R.C. 959.132(E)(1). The statute further allows for the owner of the animal to post additional bonds beyond the thirty-day period to prevent the impounding agency from arranging for the disposition of the animal. R.C. 959.132(E)(3). Moreover, if the owner is ultimately found not guilty at trial, the statute requires any bond(s) paid to be returned to the owner, along with the animal or, if the animal has perished, the reasonable market value of the animal. R.C. 959.132(G).

{¶33} The fundamental requirement of due process is an opportunity to be heard "'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Upon review, Smith has not shown that R.C. 959.132 fails to satisfy the foregoing requirement. The record reflects that the trial court conducted a probable cause hearing in this case nine days after Smith's dogs were seized. At that hearing, Smith was able to cross-examine the State's witness, present a witness in her own defense, and introduce multiple exhibits. *Compare State v. Cowan*, 103 Ohio St.3d 144, 2004-Ohio-4777 (R.C. 955.22 unconstitutional because it unilaterally allowed dog warden to classify dogs as vicious without providing owner a meaningful opportunity to challenge that classification before trial). Once the court determined that probable cause for the seizure existed, Smith was able to post bonds and prevent the Humane Society from disposing of her dogs until she was proven guilty at trial. *See* R.C. 959.132(E)(3). Had she been found not guilty, she would have been entitled to both the return of her bonds and her dogs. *See* R.C. 959.132(G). She, therefore, had an opportunity to be heard "'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333, quoting *Armstrong*, 380 U.S. at 552. We reject Smith's argument that R.C. 959.132, as applied here, violated her due process rights.

{¶34} Finally, Smith argues that R.C. 959.131 violates the Equal Protection Clause. Her argument is difficult to follow, but appears to be that the statute is unconstitutional because it imposes a harsher punishment than a similar statute. According to Smith, both R.C. 959.131 and 959.13 "require identical proof for a violation," but impose different penalties. She, therefore, argues that R.C. 959.131 is unconstitutional.

{¶35} If two "statutes prohibit identical activity, require identical proof, and yet impose different penalties, then sentencing a person under the statute with the higher penalty violates the Equal Protection Clause." *State v. Wilson*, 58 Ohio St.2d 52, 56 (1979). Upon review, however, R.C. 959.131 and 959.13 do not prohibit identical activity or require identical proof. The former statute governs cruelty against companion animals while the latter applies to other animals such as cattle, poultry, sheep, livestock, and the like. *Compare* R.C. 959.131 *with* R.C. 959.13. Additionally, former R.C. 959.131(E)(2) required the State to prove that the defendant was the owner, manager, or employee of a dog kennel, as defined by statute, whereas R.C. 959.13 applies to all persons. *Compare* former R.C.959.131(E)(2) *with* R.C. 959.13(A). Because former R.C. 959.131(E)(2) required the State to prove additional elements that are not present within R.C. 959.13, Smith has not shown that the court offended her due process rights by sentencing her in accordance with the former statute. *See Wilson* at 55-59 (no equal protection violation where aggravated burglary statute required State to prove additional elements of proof that distinguished the crime from simple burglary). Her equal protection argument lacks merit. Accordingly, her fourth assignment of error is overruled.

Assignment of Error Number Five

> THE TRIAL COURT ERRED AS A MATTER OF LAW BY NOT DISMISSING THE INSTANT PROSECUTION AND HONORING THE NON-PROSECUTION AGREEMENT ENTERED INTO BY THE STATE OF OHIO AND JANE SMITH.

{¶36} In her fifth assignment of error, Smith argues that the court erred when it failed to dismiss this action based on a non-prosecution agreement that she signed with the State. For the reasons set forth below, we reject her argument.

{¶37} Smith never filed a motion to dismiss based on the existence of a non-prosecution agreement. The "non-prosecution agreement" to which she refers is part of a case plan that she mutually established with the Humane Society several months before the charges in this matter arose. When Smith attempted to refer to the case plan as a non-prosecution agreement during her suppression hearing, the trial court specifically sustained the State's objection to that characterization of the plan. Moreover, following the suppression hearing, Smith filed several motions in limine to prohibit the State from introducing evidence about the case plan, as it was "irrelevant to the case at bar * * *."

{¶38} Smith failed to establish the existence of any type of pre-indictment, non-prosecution agreement in the court below. She never requested a hearing to determine the existence of such an agreement or to establish whether there had been a breach of any such agreement on her part. *See State v. Parris*, 6th Dist. Ottawa No. OT-14-015, 2014-Ohio-4863, ¶ 14; *State v. Moore*, 7th Dist. Mahoning No. 06-MA-15, 2008-Ohio-1190, ¶ 63. Indeed, following the suppression hearing, she specifically sought to exclude any reference of her prior dealings with the Humane Society from trial. "We will not address issues that are raised for the first time on appeal if they could have been raised in the trial court." *State v. McNeill*, 9th Dist. Lorain No. 15CA010774, 2016-Ohio-5463, ¶ 12. Smith cannot now seek a dismissal based on the existence of a non-prosecution agreement when she failed to litigate this issue in the court below. Her fifth assignment of error is overruled.

III

{¶39} Smith's assignments of error are overruled. The judgment of the Wayne County Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Wayne County Municipal Court, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
HENSAL, J.
CONCUR.

APPEARANCES:

RUSSELL A. BUZZELLI, Attorney at Law, for Appellant.

DANIEL R. LUTZ, Prosecuting Attorney, and OLIVIA BOYER and NATHAN SHAKER, Assistant Prosecuting Attorney, for Appellee.