

IN THE
SUPREME COURT OF OHIO

NIKKI NOVAK
c/o Attorney Michela Huth
PO Box 17
Bolivar, Ohio 44612

Relator,

v.

THE HON. KENNETH R. SPANAGEL
Parma Municipal Court
5555 Powers Blvd.
Parma, Ohio 44129

Respondent.

CASE NO.

**ORIGINAL ACTION FOR A WRIT
OF PROHIBITION**

**COMPLAINT FOR EXPEDITED ALTERNATIVE WRIT AND
WRIT OF PROHIBITION**

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For her Complaint for Expedited Alternative Writ and Writ of Prohibition, Relator Nikki Novak, state as follows:

I. INTRODUCTION¹

1. This original actions seeks an expedited alternative writ and a peremptory writ of prohibition from this Court forbidding Respondent Honorable Kenneth R. Spanagel, Judge of the Parma Municipal Court, from exercising jurisdiction in *State v. Nikki Novak, Case Number 19CRB00192* (Parma Municipal Court, Ohio).

II. JURISDICTION

2. Ohio Constitution, Article IV, Section 2(B)(1)(d) and the Rules of Practice of the Supreme Court of Ohio, Rule X, vest this Court with original jurisdiction to grant a writ of mandamus, a writ of prohibition, and other writs.

III. PARTIES

1. Relator, Nikki Novak is a resident of the State of Ohio, County of Portage.

2. Respondent Judge Kenneth R. Spanagel is a duly elected judge of the Parma Municipal Court. The Parma Municipal Court is the judicial body for crimes alleged to have been committed in the City of Parma, Ohio. Respondent is empowered to decide only those cases and controversies over which the Parma Municipal Court has proper subject matter jurisdiction.

IV. FACTS

¹ Attached as Exhibit A, is the supporting Affidavit of Nikki Novak, as required by S.Ct.Prac.R. 12.02(B)(1).

3. In the above captioned case, Relator Nikki Novak was criminally charged with violating Parma Ordinance 618.05(A), which is the City of Parma's 'Dog at Large' law.

4. On July 3, 2019 Relator plead 'No Contest with an Assertion of Innocence' to a violation of Parma Ordinance 618.05.

5. On July 11, 2019 Relator filed, with the Trial Court, a Motion to Dismiss asserting Parma's Ordinance is unconstitutional.

6. Respondent denied this Motion on July 29, 2019 stating in relevant part, "[t]hat motion was [] filed well beyond the time frames for filings of such motions. Additionally, Defendant's argument as to O.R.C. 955.22 fails. The Ordinance on which Defendant was charged is not the same as 955.22."²

7. Tomorrow, August 7, 2019 Respondent will sentence Relator under the second degree misdemeanor provisions.

V. RESPONDENT LACKS SUBJECT MATTER JURISDICTION

3. The Court patently and unambiguously lacks subject matter jurisdiction.

4. Relator was criminally charged with violating Parma Ordinance 618.05(A).

5. On July 3, 2019 she plead "no contest with an assertion of innocence" to a violation of Ordinance 618.05(A).

6. Ohio's Home Rule Amendment, Section 3, Article XVIII, Ohio Constitution, bars Parma's codified Ordinance 618.05.

7. Because Parma Ordinance 618.05 conflicts with general law, and therefore the Parma Municipal Court never obtained subject matter jurisdiction.

² Ex. B.

8. A violation of City of Parma Ordinance 618.05 (dog at large), is a misdemeanor of the second degree,

**618.05 RUNNING AT LARGE PROHIBITED,
EXEMPTIONS.**

(a) No owner/guardian of any animal, including, but not limited to, dogs and cats, shall permit such an animal to run at large within the City at any time. Any animal shall be deemed running at large when such an animal is not inside a resident structure, secure fence or pen; on a leash and held by a person capable of controlling such animal; or tethered in such a manner as to prevent its getting on the public right-of-way or another's property. This provision shall not apply to dogs being obedience trained by a certified trainer.

* * *

(d) Whoever violates any of the provisions of this section is guilty of a misdemeanor of the second degree. A separate offense shall be deemed committed each day during or on which a violation occurs or continues.

9. Ohio Revised Code 955.22(C) "dog at large" statute provides in relevant part, 955.22 Confining, restraining, debarking dogs; dangerous dog registration certificate.

(C) Except when a dog is lawfully engaged in hunting and accompanied by the owner, keeper, harborer, or handler of the dog, no owner, keeper, or harborer of any dog shall fail at any time to do either of the following:

(1) Keep the dog physically confined or restrained upon the premises of the owner, keeper, or harborer by a leash, tether, adequate fence, supervision, or secure enclosure to prevent escape;

(2) Keep the dog under the reasonable control of some person.

10. Under the penalty provisions of Chapter 955, the penalty for a violation of the dog at large statute is a fine of "not less than twenty-five dollars or more than one hundred dollars on a first offense, * * *." R.C. 955.99(E)(1); see also *Gates Mills v. Welsh*, 146 Ohio App.3d 368, 371, 766 N.E.2d 204 (8th Dist. 2001) ("R.C. 955.99(E)(1) says that a violation of R.C. 955.22(C) is punishable by a fine of not less than twenty-five dollars or more than one hundred dollars on a

first offense. Although the statute does not specify a degree for the offense, a one hundred dollar limitation on a fine makes a first offense under R.C. 955.22(C) a minor misdemeanor. See R.C. 2929.21(D).”).

11. Ohio’s Home Rule Amendment is found in Section 3, Article XVIII of the Ohio Constitution, and provides,

Municipalities shall have authority to exercise all powers of local self government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

See also *City of Columbus v. Spingola*, 144 Ohio App.3d 76, 80 (10th Dist. Franklin 2001).

12. “The authority conferred by Section 3, Article XVIII of the state Constitution upon municipalities to adopt and enforce police regulations is limited only by general laws in conflict therewith upon the same subject-matter.”” *Spingola*, 144 Ohio App. at 80, quoting *Akron v. Scalera* (1939), 135 Ohio St. 65, paragraph one of the syllabus; and citing *Columbus v. Barr* (1953), 160 Ohio St. 209, 215.

13. Ohio courts must apply a three-part test to evaluate claims that a municipality has exceeded its powers under the Home Rule Amendment,

A state statute takes precedence over a local Ordinances when (1) the Ordinances is in conflict with the statute, (2) the Ordinances is an exercise of the police power, rather than of local self government, and (3) the statute is a general law.

Canton v. State, 95 Ohio St. 3d 149, 2002-Ohio-2005, 766 N.E.2d 963, ¶9.

14. Ohio Revised Code Chapter 955 is a general law. See *Russ v. City of Reynoldsburg*, 81 N.E.3d 493, 2017-Ohio-1471, ¶ 27 (5th Dist. Licking. 2017) (“we find that Revised Code Chapter 955 is a general law * * *.”).

15. Thus the third part of the three-part test has been satisfied.

16. Parma Ordinance 618.05 is an exercise of police power. See *Russ*, 2017-Ohio-1471, at ¶ 19, quoting *State v. Anderson*, 57 Ohio St.3d 168, 170, 566 N.E.2d 1224, "([a]mong the regulations which have been upheld as legitimate exercises of police power are those regulations addressing the ownership and control of dogs.)".

17. Thus the second part of the three-part test has been satisfied.

18. Having established that Ohio Revised Code Chapter 955 is a general law, and that the Ordinance is an exercise of police power, the remaining determination is whether the Parma Ordinance 618.05 is in conflict with Ohio Revised Code Chapter 955.

19. To determine whether the Ordinance conflicts with the Statute, the Supreme Court of Ohio has set forth three theories "to prove either the presences or absence of a conflict." See *Mendenhall v. Akron* (2008), 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, ¶ 28. Those three approaches are, 1) contrary directives; 2) conflict by implication; and, 3) conflict regarding decriminalization. See *Mendenhall*, 117 Ohio St.3d 33, 2008-Ohio-270, 881 N.E.2d 255, at ¶ 28-37.

20. To determine whether Ordinance 618.5 is in conflict with Ohio Revised Code Chapter 955, under the contrary directives approach, the test is "whether [an] ordinance permits or licenses that which the statute forbids and prohibits, and vice versa." *Mendenhall v. City of Akron* (2008), 117 Ohio St.3d 33, 2008-Ohio-270, ¶ 29, quoting *Am. Fin. Servs. Assn. v. Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, ¶ 40, 858 N.E.2d 776. (internal citations and quotation marks omitted).

21. Courts must "first examine the actual conduct that both the state statute and the municipal ordinance target * * *." *Id.* at ¶ 30.

22. Ordinance 618.05 and R.C. 955.22(C) both target the act of a dog not being under the control of its handler when off the property of the owner.

23. The only material difference between the state statute and the ordinance regarding prohibited conduct relates to the penalties imposed for violating the offense.

24. Parma Ordinance 618.05 is a second degree misdemeanor, whereas R.C. 955.22(C) is a minor misdemeanor.

25. The City of Parma does not have the power of local self-government over laws related to dogs at large.

26. Chapter 955 sets forth strictures of how an Ordinance can be written, and explicitly and unambiguously requires a municipality to adopt ordinances for controlling dogs that “are not otherwise in conflict with any other provision of the Revised Code.

27. The statute provides a follows,

955.221 Local ordinances or resolutions pertaining to dog control.

(A) For the purposes of this section, ordinances or resolutions to control dogs include, but are not limited to, ordinances or resolutions concerned with the ownership, keeping, or harboring of dogs, the restraint of dogs, dogs as public nuisances, and dogs as a threat to public health, safety, and welfare, except that such ordinances or resolutions as permitted in division (B) of this section shall not prohibit the use of any dog which is lawfully engaged in hunting or training for the purpose of hunting while accompanied by a licensed hunter. However, such dogs at all other times and in all other respects shall be subject to the ordinance or resolution permitted by this section, unless actually in the field and engaged in hunting or in legitimate training for such purpose.

(B)

* * *

(3) A municipal corporation may adopt and enforce ordinances to control dogs within the municipal corporation that are not otherwise in conflict with any other provision of the Revised Code.

(C) No person shall violate any resolution or ordinance adopted under this section.

R.C. 955.221.

28. Therefore, according to R.C. 955.221, as long as the Ordinance does not conflict with any section of the Ohio Revised Code, it is a valid dog control ordinance.

29. Ordinance 618.05 directly conflicts with Chapter 955.

30. Again, under the penalty provisions of Chapter 955, the penalty for a violation of the dog at large statute is a fine of “not less than twenty-five dollars or more than one hundred dollars on a first offense, * * *.” R.C. 955.99(E)(1).

31. Because a municipality is explicitly barred from adopting and enforcing ordinances which conflict with the Ohio Revised Code, Ordinance 618.05 is unconstitutional, and the City of Parma acted outside its home rule authority granted by the Constitution of Ohio.

32. When a municipal ordinance only imposes a greater penalty, the varying of punishment between the state statute and the ordinance does not create a conflict. *Mendenhall*, 117 Ohio St. 3d at 41 (internal citation and quotation marks omitted).

33. However, where “there is a significant discrepancy between the punishments imposed for that behavior” the municipal ordinance will conflict with the state law where *Id.*

34. When a “municipal ordinance does more than simply impose a greater penalty – by changing the character of an offense, for example – the ordinance and statute are in conflict.” *Id.* at 41-42, citing *Cleveland v. Betts* (1958), 168 Ohio St. 386, 389, 7 O.O.2d 151, 154 N.E.2d 917.

35. In *City of Toledo v. State*, 6th Dist. Lucas No. L-18-1168, 2019-Ohio-1681, the court found that the challenged Ordinance did not conflict because “both call for imposition of a civil violation, and there is no significant or notable discrepancy between the punishments the ordinance and statutes impose.” *Id.* at ¶ 109.

36. In *City of Toledo v. Best*, the sentence imposed under the municipal ordinance was “imprisonment for three days, assessment of the costs of \$81, and suspension of driving rights.”

City of Toledo v. Best (1961), 172 Ohio St. 371, 375, 176 N.E.2d 520.

37. “Had the defendants been charged under the state statute * * * he could have received the identical sentence imposed by the Municipal Court under the municipal ordinance.” *Id.*

38. The *Best* court found that because of the same identical sentence under both the municipal ordinance and statute, there was no conflict. *Id.*

39. In *Columbus v. Kemper*, the court determined there was no conflict between the municipal ordinance, which had a minimum penalty for DUI of thirty days incarceration, and the state statute which had a state minimum of three days’ incarceration under R.C. 4511.99. See *Columbus v. Kemper* (1992), 82 Ohio App.3d 49, 610 N.E.2d 1194 (19th Dist. Franklin 1992).

40. Parma Ordinance 618.05 has changed the character of the offense of having a dog at large.

41. There are significant and notable discrepancies between Parma’s Ordinance and the Statute in terms of sentencing, unlike the insignificant differences set forth in the cases above.

42. Parma Ordinance 618.05 is a second-degree misdemeanor offense.

43. Under Parma Ordinance 698.02, the penalties for a second degree misdemeanor are a) definite jail term of not more than 90 days; b) community control sanctions; c) community residential sanctions; and d) financial sanctions, including restitution and fines of “not more than seven hundred fifty dollars.” See Parma Ordinance 698.02.

44. Ohio Revised Code 955.22(C) is a minor misdemeanor offense, which does not permit imposition of jail time or restitution.

45. "Minor misdemeanors are unique in that they can never result in the imposition of a jail sentence." *State v. Jackson*, 9th Dist. Summit No. 28625, 2018-Ohio-19, ¶11, citing R.C. 2901.02(G).

46. Additionally, in Ohio, a court is not authorized to order restitution for a minor misdemeanor penalty.

(A) In addition to imposing court costs pursuant to section 2947.23 of the Revised Code, the court imposing a sentence upon an offender for a misdemeanor, including a minor misdemeanor, may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section. If the court in its discretion imposes one or more financial sanctions, the financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

(1) Unless the misdemeanor offense is a minor misdemeanor or could be disposed of by the traffic violations bureau serving the court under Traffic Rule 13, restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss."

R.C. 2929.28(A)(1); see also *State v. Danni Yao*, 2nd Dist. Champaign No. 2013-CA-29, 2014-Ohio-852, ¶ 7 ("[A] trial court lacks authority to order restitution as a sanction for a minor misdemeanor."); see also *Id.*, citing *Columbus v. *4 Cardwell*, 176 Ohio App.3d 673, 2008-Ohio-1725, 893 N.E.2d 526, ¶9 (10th Dist.2008) ("recognizing that a trial court cannot order restitution for a minor misdemeanor assured-clear-distance violation"); *State v. Miller*, 2d Dist. Greene No. 09-CA-74, 2012-Ohio-211, ¶ 15 ("opining that "since Miller was charged with a minor misdemeanor, the court could not have ordered her to pay restitution"); *Beavercreek v. Ride*, 2d Dist. Greene No. 06CA0082, 2007-Ohio- 6898, ¶ 46 ("noting that restitution could not be imposed for the appellant's minor misdemeanor conviction").

47. Relator's ability to obtain expungement is detrimentally affected by a conviction under Parma Ordinance 618.05. Under R.C. 2953.32, "a trial court can grant expungement when an

applicant meets all of the statutory requirements,” See *State v. M.E.*, 8th Dist. Cuyahoga No. 106298, 2018-Ohio-4715, ¶7, citing *State v. Hamilton*, 75 Ohio St.3d 636, 640, 665 N.E.2d 669 (1996).

48. “An ‘eligible offender’ includes those convicted of ‘not more than one felony conviction, not more than two misdemeanor convictions, or not more than one felony and one misdemeanor conviction.’” *Id.* at ¶8, quoting R.C. 2953.31(A).

49. “A minor misdemeanor and certain other traffic-or vehicle-related offenses are not counted for purposes of determining an applicant's eligibility.” *Id.*, citing R.C. 2953.31(A).

50. Because Ordinance 618.05 is a second-degree misdemeanor offense, the ability for Relator to seek expungement as an eligible offender would be detrimentally affected if she were to be convicted and sentenced under the municipal ordinance.

51. Multiple conflicts exist under the three-part test used to evaluate claims that a municipality has exceeded its powers under the Home Rule Amendment.

52. Respondent therefore lacks subject matter jurisdiction over this case, and it must be dismissed.

53. Relator is also being deprived of equal protection under the Ohio Constitution, because R.C. 955.22(C) treats a dog at large violation as a minor misdemeanor, yet if a person lives in the City of Parma and their dog is found to be at large, the same offense is a second-degree misdemeanor.

54. The differences in the penalties for having a dog at large are significant, as laid-out in the above sections of this Motion.

55. Under Ohio's Equal Protection Clause, all similarly situated individuals [must] be treated in a similar manner. See *Ohio Apt. Assn. v. Levin*, 127 Ohio St.3d 76, 2*010-Ohio-4414, 936 N.E.2d 919, ¶ 33.

56. Relator is not being treated in a similar manner.

VI. FIRST CLAIM FOR RELIEF (EXPEDITED ALTERNATIVE WRIT AND WRIT OF PROHIBITION)

57. Relator incorporates by reference the foregoing paragraphs, as if fully rewritten and set forth herein.

58. “A writ of prohibition is an extraordinary remedy that is granted in limited circumstances with great caution and restraint.” *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 554, 740 N.E.2d 265 (2001). To be entitled to the requested writ of prohibition, Relator must demonstrate that (1) Respondent is about to exercise or has exercised judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ would result in injury for which no other adequate remedy exists in the ordinary course of law. *State ex rel. Bell v. Pfeiffer*, 131 Ohio St.3d 114, 2012-Ohio-54, 961 N.E.2d 181, ¶ 18; *State ex rel. Miller v. Warren Cty. Bd of Elections*, 130 Ohio St.3d 24, 2011-Ohio-4623, 955 N.E.2d 379, ¶ 12.

59. However, the last requirement need not be established if the lack of jurisdiction is patent and unambiguous. *Chesapeake Exploration, L.L.C. v. Oil & Gas Comm.*, 135 Ohio St.3d 204, 2013-Ohio-224, 985 N.E.2d 480, ¶ 11.

60. Further, where a lower court’s lack of jurisdiction is “patent and unambiguous,” the Court will undo past acts by a trial court as well as prevent future ones. *State ex rel. Ohio Dept. of Mental Health v. Nadal*, 98 Ohio St.3d 405, 2003-Ohio-1632, 786 N.E.2d 49, ¶ 19 (citing *State ex rel. Sartini v. Yost*, 96 Ohio St. 3d 37, 2002-Ohio-3317, 770 N.E.2d 584, ¶ 24).

61. This court patently and unambiguously lacks jurisdiction because the Ordinance is unconstitutional.
62. Respondent has exercised jurisdiction over the criminal cases of Relator.
63. The continued exercise by Respondent over the criminal cases against Relator, is wholly inconsistent with the lack of subject matter jurisdiction.
64. Respondent's exercise of judicial power is unauthorized by law.
65. Respondent is patently and unambiguously without jurisdiction.
66. Immediate relief is necessary to prevent Relator from being further subjected to criminal prosecution.

VII. RELIEF REQUESTED

WHEREFORE, Relator prays that the Court grant an alternative writ prohibiting Respondent from further exercising jurisdiction over, and a preemptory writ declaring the Respondent has no jurisdiction over *State v. Nikki Novak, Case Number 19CRB00192* (Parma Municipal Court, Ohio).. Relator also requests such other relief as the court deems just and proper.

Respectfully submitted,



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Attorney for Relator Nikki Novak

IN THE
SUPREME COURT OF OHIO

NIKKI NOVAK :
Relator, : CASE NO.
v. :
THE HON. KENNETH R. SPANAGEL : ORIGINAL ACTION FOR A
Respondent. : WRIT OF PROHIBITION

AFFIDAVIT OF NIKKI NOVAK
Pursuant to S.Ct.Prac.R. 12.02

STATE OF OHIO :
: SS.
COUNTY OF SUMMIT :

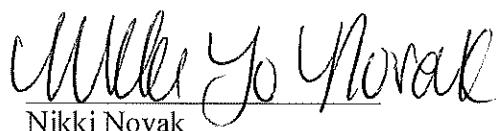
I, Nikki Novak, being first duly sworn and cautioned, depose and state as follows:

1. I have personal knowledge regarding the matters set forth herein.
2. I have reviewed the Complaint for Expedited Alternative Writ and Writ of Prohibition and affirm that the facts set forth therein are true and accurate based on my personal knowledge.

FURTHER AFFIANT SAYETH NAUGHT



Suzann J Thom
Resident Summit County
Notary Public, State of Ohio
My Commission Expires: 12/11/2021


Nikki Novak

Sworn to before me and subscribed in my presence on this 6th day of August, 2019.


Suzann J Thom
Notary Public

19 JUL 29 AM 7:45

PARMA MUNICIPAL COURT
MED

IN THE PARMA MUNICIPAL COURT

CUYAHOGA COUNTY, OHIO

STATE OF OHIO

CITY OF PARMA

CASE NUMBER: 19CRB00192

vs.

JUDGE: KENNETH R. SPANAGEL

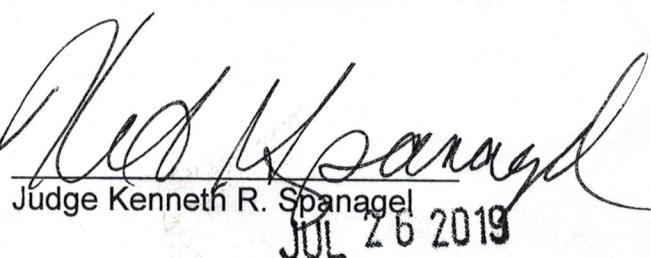
NIKKI J NOVAK

JUDGMENT ENTRY

This matter came before the Court on Defendant's Motions to Dismiss. A review of the file indicates that Defendant filed two separate Motions to Dismiss on July 1, 2019. One related to subject matter jurisdiction and the other claiming that the Complaint violates equal protection. The Court made findings on the record denying the subject matter jurisdiction Motion, but apparently the separate Motion had not been determined. The Court by this Entry addresses both Motions.

On July 3, the Court denied Defendant's Motion to Dismiss with findings on the record, as to subject matter jurisdiction. The Court noted that the Motion was not filed within the time frames of the Criminal Rules, and additionally for the reason that this Court has subject matter jurisdiction, as the Complaint filed with the Court had the appropriate jurat, and the failure to deliver a sworn copy on Defendant is not required, as the Complaint sufficiently described the nature of the crime and the factual circumstances, citing State v. Butler, 2019-Ohio-1585 (1st district).

The Court had not ruled upon the separately filed Motion regarding equal protection rights. The Court also denies that Motion. That Motion was also filed well beyond the time frames for filing of such motions. Additionally, Defendant's argument as to O.R.C. 955.22 fails. The Ordinance on which Defendant was charged is not the same as 955.22. The City has the option of filing an offense under either a state code or local ordinance section, and in this case chose to file a local ordinance charge. The second Motion to Dismiss, based upon equal protection arguments, is also denied.


Judge Kenneth R. Spanagel

JUL 26 2019