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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
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THE STATE OF ARIZONA, Appellee, v. JOHN CIESLINSKI, Appellant.	)	2 CA-CR 2011-0223 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20111915001

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Appellee

Lori J. Lefferts, Pima County Public Defender
By David J. Euchner and Stephen R. Elzinga,
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K E L L Y, Judge.

¶1 John Cieslinski was charged with violating Marana Town Code (M.C.) § 6-3-1(A), prohibiting unrestrained dogs on public property[1] and M.C. § 6-5-1 prohibiting keeping a vicious or destructive animal. Because Cieslinkski has multiple sclerosis, he owns a service dog that helps him with various tasks. The charges stemmed from an incident on public property near Cieslinski's home where Cieslinksi's service dog, which was not on a leash, allegedly charged at a child while barking and baring his teeth.

¶2 After a bench trial in justice court, Cieslinski was found guilty of violating M.C. § 6-3-1(A) but acquitted of the vicious animal charge. He asserted in the justice court that M.C. § 6-3-1(A) violated the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12300, because it did not contain an exception for service animals for disabled persons. The justice court rejected that argument, and Cieslinski appealed to the superior court, again asserting that M.C. § 6-3-1(A) violated the ADA. The superior court concluded the provision violated neither the ADA nor the equal protection clause of the Fourteenth Amendment to the United States Constitution and affirmed his conviction. Cieslinski then appealed to this court pursuant to A.R.S. § 22-375.

¶3 On appeal, Cieslinski again argues that M.C. § 6-3-1 violates the ADA because it does not contain an exception for service animals. Thus, he contends, the

[1]Section 6-3-1(A) requires that "[a]ny dog owned, possessed, harbored, kept or maintained on public streets, sidewalks, alleys, parks or other public property shall be restrained by a leash, chain, rope, cord or similar device." Section 6-3-1(C) enumerates exceptions to that requirement. At the time of Cieslinksi's offense, these exceptions included occasions when the animal is participating in sporting events or legal hunting, assisting law enforcement, or is being confined in a "dog run located within a park." The provision has since been amended to include a limited exception for service animals.

provision is facially invalid because it violates the Supremacy Clause of the United States Constitution.[2] Because Cieslinski challenges the facial validity of a statute, we have jurisdiction pursuant to § 22-375(A). Our jurisdiction, however, is limited to that question, and we do not consider whether the statute is invalid as applied to him. *See State v. McDermott*, 208 Ariz. 332, ¶ 5, 93 P.3d 532, 534 (App. 2004). We review the validity of the ordinance de novo. *Id.*

¶4 The ADA was enacted to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Under the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. It is undisputed that Cieslinski is a "qualified individual with a disability" under the ADA, *see* 42 U.S.C. § 12131(2); 28 C.F.R. § 35.104 (defining disability), and that the Town of Marana is a public entity, *see* 42 U.S.C. § 12131(1)(A). And, denial of the use of a service animal may violate the ADA. *See Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996) (quarantine of guide dogs for visually impaired "discriminates against the plaintiffs by reason of their disability").

[2]Cieslinski never before expressly tied his argument to a constitutional claim, arguing below only that the provision violated the ADA. But, because we determine he has not demonstrated the provision is facially invalid, we need not determine whether he has forfeited his argument based on the Supremacy Clause by failing to raise it below. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error).

¶5 Cieslinski's facial challenge to M.C. § 6-3-1(A), however, can succeed only if he establishes "'that no set of circumstances exists under which the [provision] would be valid.'" *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008), *quoting United States v. Salerno*, 481 U.S 739, 745 (1987); *Hernandez v. Lynch*, 216 Ariz. 469, ¶ 8, 167 P.3d 1264, 1267 (2007). Cieslinski has not met that burden here. He has not demonstrated that complying with M.C. § 6-3-1(A) limits his use of his service animal on public property, much less that any disabled person's use of a service animal would be limited by compliance with § 6-3-1(A). Accordingly, his claim of facial invalidity fails.

¶6 The superior court's ruling is affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge