[Cite as *Highland Hts. v. Manos*, 2004-Ohio-6016.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84238

CITY OF HIGHLAND HEIGHTS :
:
Plaintiff-Appellee :
: JOURNAL ENTRY
:
vs. : and
:
: OPINION
JOHN MANOS :
:
Defendant-Appellant :

DATE OF ANNOUNCEMENT
OF DECISION: November 10, 2004

CHARACTER OF PROCEEDING: Criminal appeal from
Lyndhurst Municipal Court
Case No. CRB-01205

JUDGMENT: REVERSED

DATE OF JOURNALIZATION: ____________________

APPEARANCES:

For Plaintiff-Appellee: DANIEL W. TAYLOR
Daniel W. Taylor Co., L.P.A.
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Cleveland, Ohio 44113

For Defendant-Appellant: JOHN M. MANOS
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739 East 140th Street
Cleveland, Ohio 44110

COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, John Manos ("Manos"), appeals his conviction for harboring or caring for a vicious dog. Finding merit to the appeal, we reverse.

{¶ 2} In 2003, Manos was initially charged with allowing a dog to go unconfined outdoors and to bite the victim without provocation, a violation of Highland Heights Ordinance ("H.H.O.") 505.011(A)(2). The matter was scheduled for trial in December 2003. Prior to trial, however, Manos was also charged with violating H.H.O. 505.011(C), which provides that "no person owning, harboring, or having the care or control of a vicious dog shall suffer or permit such animal to go unconfined on the premises of such person."

{¶ 3} On the day of trial, the prosecutor dismissed the initial charge without prejudice. Manos moved to dismiss the second charge based on double jeopardy, which the court denied. After the court entered a not guilty plea for Manos, trial proceeded on the second charge.

{¶ 4} The court found Manos guilty of H.H.O. 505.011(C), harboring and caring for a vicious dog, and fined him $250 and costs. Manos appeals, raising three assignments of error. We shall first address the final assignment of error because it is dispositive.

<u>Unconstitutionality of Ordinance</u>

{¶ 5} In his third assignment of error, Manos argues that the trial court's interpretation of H.H.O. 505.011(C) renders it unconstitutional.

{¶ 6} The Ohio Supreme Court recently found in *State v. Cowan*, 103 Ohio St.3d 144, 2004-Ohio-4777, that "R.C. 955.22 violates the constitutional right to procedural due process insofar as it fails to provide dog owners with a meaningful opportunity to be heard on the issue of whether the dog is 'vicious' or 'dangerous' as defined in R.C. 955.11(A)(1)(a) and (A)(4)(a)." Id. at syllabus.

{¶ 7} While H.H.O. 505.011 is patterned after R.C. 955.22, we must determine whether it is constitutional, providing dog owners or caretakers with the due process required in determining whether the dog is vicious.

{¶ 8} In *Cowan*, the Court, while recognizing that dogs are subject to the police power, held that R.C. 955.22 denies a person a meaningful opportunity to challenge the classification of "vicious dog" prior to a criminal trial. This inability to challenge the classification denies a person due process under the law. Id.

{¶ 9} In applying the *Cowan* rationale, we find that HHO 505.011 is unconstitutional, because it does not provide dog owners or caretakers, prior to a trial, due process to be heard whether the dog is, in fact, vicious. In the instant case, once the dog bit the city worker, the police unilaterally labeled the dog "vicious" and charged Manos with failure to confine it. Manos could challenge the classification only at trial, which pursuant to *Cowan,* does not provide "meaningful opportunity" to challenge the classification and is thus a violation of due process.

{¶ 10} Accordingly, the final assignment of error is sustained.

{¶ 11} The remaining assignments of error involving alleged errors in the trial are moot.

Judgment reversed and conviction vacated.

It is, therefore, considered that said appellant recover of said appellee the costs herein.

It is ordered that a special mandate be sent to the Lyndhurst Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIMOTHY E. McMONAGLE, J. CONCURS;

ANN DYKE, P.J. CONCURS IN JUDGMENT ONLY (SEE SEPARATE OPINION)

JUDGE COLLEEN CONWAY COONEY

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

ANN DYKE, P.J., CONCURRING:

{¶ 12} I concur with the judgment rendered this day reversing defendant's conviction, however, for different reasons than those outlined by the majority. Rather than addressing the constitutionality of the ordinance for which defendant was convicted, I would conclude that the trial court failed to give defendant fair notice of the second charge, Case No. 03 CRB01205 / HHM03-341 before proceeding to trial.

{¶ 13} The due process clause of the Fourteenth Amendment mandates that whatever charging method the state employs must give the criminal defendant fair notice of the charges against him to permit adequate preparation of his defense. See, e.g., *In Re Ruffalo* (1968), 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117; *Blake v. Morford* (6th Cir. 1977), 563 F.2d 248.

{¶ 14} “It is a basic due process right and indeed essential to a fair trial that a defense counsel be afforded the reasonable opportunity to prepare his case." *State v. Sowders,* 4 Ohio St.3d 143, 144, 447 N.E.2d 118, 120 (citation omitted).

{¶ 15} In this matter, the record demonstrates that when the court called the first charge, case no. 03 CRB 01139 / HHM 2138, for trial, it dismissed that action, then immediately proceeded to trial on the second charge, and did not engage in the colloquy required under Crim.R. 5 and Crim.R. 10. The second charge had been prepared by police less than two weeks earlier, and there is no indication as to when it was actually filed or served upon defendant. Moreover, the second charge accuses defendant of a different offense than set forth in the first charge. I believe that under these circumstances, the trial court did not afford defendant a reasonable opportunity[1] to prepare his defense to the charge.

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[1] Although the prosecuting attorney was concerned that speedy trial considerations required the court to hear the second charge on the date upon which the first charge was scheduled for trial, the Supreme Court has determined that the period between a dismissal of charges without prejudice and the filing of a subsequent indictment premised upon the same facts is not counted for purposes of computing the speedy-trial time period set forth in R.C. 2945.71 et seq. *State v. Broughton* (1991), 62 Ohio St.3d 253, 581 N.E.2d 541, paragraph one of the syllabus.