STATE OF MICHIGAN

COURT OF APPEALS

CHARTER TOWNSHIP OF YPSILANTI,

Plaintiff-Appellant,

v

DAVID LEE MILLER, individually, and d/b/a as DAVE'S DIAMONDS AND GOLD,

Defendant-Appellee.

UNPUBLISHED
June 15, 2004

No. 243879
Washtenaw Circuit Court
LC No. 02-131-CZ

Before: O'Connell, P.J., and Jansen and Murray, JJ.

JANSEN, J. *(dissenting).*

I respectfully dissent because I believe the majority opinion is constitutionally unsound. I would affirm.

I

I agree with the trial court that the ordinance in question is unconstitutionally vague, although based on somewhat different reasoning. The ordinance at issue, Ypsilanti Township Ordinance § 22-100, provides, in pertinent part, the following:

> (a) Any applicant for a license pursuant to these provisions shall present to the township clerk the application containing the required information. The application shall then be referred to the county sheriff who shall have 30 days from the date of receipt of the application in which to investigate the application and the background of the applicant. Based on such investigation, the county sheriff or his representative, shall render a recommendation as to the approval or denial of the permit to the township clerk.
>
> (b) In making his determination, the county sheriff shall consider:
>
> (1) *Penal History*. All the applicant's convictions, the reasons therefore, and the criminal history of the applicant subsequent to his release if the applicant was ever incarcerated or jailed.

"The 'void for vagueness' doctrine is a derivative of the constitutional guarantee that a state may not deprive a person of life, liberty, or property without due process of law." *STC, Inc*

v Dep't Treasury, 257 Mich App 528, 539; 669 NW2d 594 (2003); see also US Const, Am XIV; Const 1963, art 1, § 17. This Court reviews de novo a claim that a statute is void for vagueness. *Id*. In *Detroit Edison Co v MPSC*, __ Mich App __; __ NW2d __ (Docket Nos. 237872, 237873, 237874, issued March 2, 2004) slip op, p 8, this Court provided the following with regard to a vagueness claim:

> A statute may be challenged for vagueness on the grounds that it: (1) is overbroad and impinges on First Amendment freedoms; (2) does not provide fair notice of what conduct is proscribed; or (3) is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been committed. *Dep't of Social Services v Emmanuel Baptist Preschool*, 434 Mich 380, 419-420; 455 NW2d 1 (1990) (Cavanagh, J.). Vagueness challenges not involving First Amendment freedoms are analyzed in light of the facts of the particular case. *In re Gosnell*, 234 Mich App 326, 333; 594 NW2d 90 (1999). . . . To provide fair notice of the conduct proscribed, a statute must give a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited. *Id.*

The language must be "reasonably precise," so that individuals are not held responsible for conduct that they could not reasonably understand to be proscribed. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 259 Mich App 315, 345-346; 675 NW2d 271 (2003). In a vagueness challenge we review the entire ordinance, giving its words their ordinary meanings that may be discerned by reference to dictionaries, treatises and the like. *Van Buren Charter Twp v Garter Belt*, 258 Mich App 594, 631; 673 NW2d 111 (2003).

Ypsilanti Township Ordinance § 22-100 requires that the sheriff consider the applicant's convictions and "criminal history" subsequent to his or her release if the applicant has ever been incarcerated or jailed. For purposes of this ordinance the use of the term "criminal history" renders that statute void for vagueness. The term "criminal history" without further definition could have different meanings, one of which (the one applied by the majority) allows the sheriff and the Ypsilanti Township Board (hereinafter "board") unfettered discretion in determining whether the applicant has committed an offense that will deny the applicant a second hand dealer's license. See *Detroit Edison Co*, *supra* at slip op, p 8. Here, there was a criminal investigation and various marijuana charges brought against defendant, which were later, apparently, dropped. On the basis of the marijuana charges and the investigation, defendant was denied in his attempt to renew his second hand dealer license.

It is not sufficiently clear and definite as to what the prohibited conduct is, and it is also unclear as applied to this applicant and provides the sheriff and board unlimited discretion to determine whether defendant should be denied a second hand dealer's license based on a criminal investigation. Is the proscribed conduct being charged with a crime? Or, is it being charged with certain crimes? Does "criminal history" mean criminal convictions or criminal charges? The majority's application of the ordinance allows for a license denial based on criminal charges and criminal investigations; rather than criminal convictions. Although it is noted that the applicant did have a conviction, the record, including plaintiff's complaint for preliminary injunction and order to show cause, clearly indicates the denial was based on the criminal charges for which defendant was not convicted. In plaintiff's complaint for preliminary injunction and order to show cause it provided that "The Ypsilanti Township Board of Trustees'

decision to deny renewal of Defendant's second hand dealers license was predicated upon Defendant's commission of the following criminal acts . . . [listing the criminal charges for marijuana possession and delivery for which defendant was not convicted of]." Thus, the sheriff, and subsequently the board, decided that defendant possessed and delivered marijuana even though these charges were dropped; and defendant was denied in his attempt to renew his second hand dealer's license. This application and interpretation of the ordinance renders the ordinance unlike typical Michigan licensure and employment statutes, which base "criminal history" reviews on certain criminal *convictions*.[1]

A review of Michigan licensure statutes and statutes requiring a criminal history check for employment also support a finding that the challenged ordinance is unconstitutionally vague. Under MCL 28.241a(c), "'Criminal history record information' means name; date of birth; fingerprints; photographs, if available; personal descriptions including identifying marks, scars, amputations, and tattoos; aliases and prior names; social security number, driver's license number and other identifying numbers; and information on misdemeanor arrests and convictions and felony arrests and convictions." Thus, the term "criminal history record information" as defined for criminal identification purposes includes arrests. But a review of several licensure and employment statutes in Michigan reveals that a "criminal history" review, typically, is for criminal convictions; and even more specifically for certain criminal convictions. For example, for a driver to be licensed as a driver training instructor he or she must submit to a criminal history and may not have certain restricted convictions. See MCL 256.604; MCL 256.605; MCL 256.605b; MCL 256.605c, MCL 256.606; see also MCL 333.20173 (requiring individuals who provide services to a nursing home or certain care facilities to undergo a criminal history check for certain prohibited felony and misdemeanor convictions); MCL 333.7408a (for licensing sanctions purposes "the court shall consider all prior *convictions* currently entered upon the criminal history record and Michigan driving record of the person, except those convictions which, upon motion of the defendant, are determined by the court to be constitutionally invalid"); MCL 400.734a (hiring restriction for foster care facility based on certain convictions); and MCL 600.949 (the State Bar of Michigan applicants must submit for criminal history check "to determine whether the applicant has a record of *criminal convictions* in this state or in other states"). Clearly, in Michigan, typically, when "criminal history" is reviewed for purposes of licensure or employment, review is limited to certain types of convictions and the purpose of the limitation is to limit discretionary actions by reviewers.[2]

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[1] It is noted that Ypsilanti Township Ordinance § 22-99(11) provides that an applicant for a license should provide "All criminal convictions other than traffic violations and the reasons therefore."

[2] Furthermore, other states define "criminal history" as only including convictions, such as Kansas, where the term "means and includes adult felony, class A misdemeanor, class B person misdemeanor, or select misdemeanor convictions and comparable juvenile adjudications possessed by an offender at the time such offender is sentenced." Kan Stat Ann 21-4703(c). And, in Washington "criminal history" is defined as "the list of a defendant's prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere." Wash Rev Code

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The point is that an applicant with reasonable intelligence would not know what "criminal history" means for purposes of the Ypsilanti Township Ordinance §22-100 and the view taken by the majority confers unstructured and unlimited discretion on the sheriff and the board. See *Detroit Edison Co, supra*. As discussed above "criminal history" often times means just a review of convictions, but as applied to this applicant by the sheriff, the board, and the majority, it means an applicant who is the subject of a criminal investigation and who is charged. Hence, the problem. I believe the ordinance is unconstitutionally vague as it fails to give an applicant with ordinary intelligence notice of what conduct is forbidden and also allows arbitrary unfettered decisions by the sheriff and board; because under the majority's reasoning a criminal investigation or charge, regardless of guilt or innocence, subsequent to prior conviction is enough to deny a second hand dealer's license. See *Papachristou v City of Jacksonville*, 405 US 156, 163; 92 S Ct 839; 31 L Ed 2d 110 (1972). The term "criminal history" as applied to defendant "is so indefinite" that it conferred unstructured and unlimited discretion on the sheriff and the board to decide whether defendant had a sufficient criminal history to support a denial of defendant's application to renew his second hand dealer's license. *Detroit Edison Co, supra*. I cannot agree with the majority's interpretation that allows for the sheriff to make a recommendation based on criminal charges that are dropped and the board's decision based on the same. In essence, this determination deprives defendant his livelihood without due process of the law. *STC, Inc, supra* at 539; US Const, Am XIV; Const 1963, art 1, § 17. For the above reasons, examining the facts in light of the present case, *Detroit Edison Co, supra*, I believe Ypsilanti Township Ordinance § 22-100 is void for vagueness.

II

Alternatively, I also believe that the majority misinterpreted the ordinance. Statutory interpretation is a question of law that is considered de novo on appeal. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003). The rules of statutory construction also apply to ordinances, *Gora v Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998); *Livonia Hotel, LLC v Livonia*, 259 Mich App 116, 131; 673 NW2d 763 (2003). "A court must give the language a valid and reasonable construction that reconciles inconsistencies and gives effect to all the parts." *Wright v Vos Steel Co*, 205 Mich App 679, 684; 517 NW2d 880 (1994). And, "Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire Co. & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

The ordinance in question clearly states that the sheriff shall consider an applicant's convictions "and the criminal history subsequent to his release *if* the applicant was ever incarcerated or jailed." There is nothing on the record indicating the applicant was ever incarcerated or jailed. Presumably the majority is assuming defendant was, but there is nothing in the record supporting this. The majority may point to the defendant's prior conviction as sufficient for denial, but by plaintiff's own allegations the denial was not based on the prior

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9.94A.030(13). I add these statutes as further examples of why an applicant may not have notice of what is prohibited when the term "criminal history" is used without further explanation.

conviction, instead, was based on the criminal charges; i.e., the charges that were dismissed. The plain language of the statute only allows for the use of criminal history subsequent to incarceration or being jailed. The majority states "since the ordinance *requires* the sheriff to conduct an investigation into each applicant's criminal convictions and subsequent 'criminal history,' and requires the sheriff to make recommendations to the board on each application, an average person would realize that the sheriff would be submitting an applicant's 'criminal history' to the board prior to the board's decision." (Emphasis in original; footnote omitted from original which indicated that there was record that defendant had a prior criminal conviction.) In essence, the majority ignored the last part of the sentence limiting the use of criminal history to applicants who have been incarcerated or jailed.

Assuming "criminal history" includes subsequent criminal charges the fact that defendant was criminally charged and subject to a criminal investigation should only be used if defendant was incarcerated or jailed. There is no such showing. Thus, regardless, of the constitutional issue, I believe the majority misinterpreted the statute as its interpretation disregards or renders "nugatory" the requirement that only post incarceration or post jailing criminal history be used.[3]

Based on the above reasoning, I would affirm the trial court because the ordinance in question is unconstitutionally vague as applied to defendant.[4]

/s/ Kathleen Jansen

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[3] It is noted that defendant was likely either jailed or incarcerated based on the fact that he was convicted of felony, but this is not a part of the record (the same record that was before the trial court).

[4] Although I am not in total agreement with the trial court's analysis and determination, I would still affirm as this Court will affirm a trial court that reaches the right result for a wrong reason. *Lakeside Oakland Development, LC v H & J Beef Co*, 249 Mich App 517, 531 n 6; 644 NW2d 765 (2002).