[Cite as *State v. Brundage*, 2002-Ohio-1541.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	**CASE NO. 01 CA 07**
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	**OPINION**
	)	
WILLIAM D. BRUNDAGE,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	**Criminal Appeal from Struthers Municipal Court, Case No. CRB0000615.**
JUDGMENT:	**Affirmed.**
APPEARANCES:	
For Plaintiff-Appellee:	**Atty. Carol Clemente Wagner Struthers City Law Director 6 Elm Street Struthers, OH 44471**
For Defendant-Appellant:	**Attorney James Vivo 8255 South Avenue, Suite A Youngstown, OH 44512-6416**

JUDGES:
Hon. Joseph J. Vukovich

Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: March 20, 2002

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court and the parties' briefs. Defendant-Appellant, William Brundage (hereinafter "Brundage"), appeals the trial court's decision which found him guilty of violating Poland Township Resolution 95.32.1 governing barking and noisy animals. For the following reasons, we conclude that resolution is not unconstitutionally vague and affirm the trial court's decision.

{¶2} On November 30, 2000, Brundage was cited for negligently allowing his dog to bark, thus disturbing the peace in violation of Poland Township Resolution 95.32.1. He pled not guilty at his December 20, 2000 arraignment and, on December 22, 2000, his attorney filed a notice of appearance and a motion to dismiss, arguing the resolution was unconstitutionally vague. On December 29, 2000, the trial court overruled that motion to dismiss and Brundage subsequently pled no contest to the charge. The trial court found Brundage guilty of violating the resolution and fined him accordingly.

{¶3} Brundage's sole assignment of error argues:

{¶4} "The trial court committed reversible error in overruling Appellant's motion to dismiss and finding Poland Township Resolution 95.32.1 to be constitutional."

{¶5} Because we find the resolution provides sufficient notice of its proscriptions and contains reasonably clear guidelines that a person of ordinary intelligence will be able to understand what the law requires of him or her, we affirm the trial court's decision.

{¶6} As an initial matter, we note the State has failed to file an appellee's brief. When an appellee files no brief with an appellate court, "the court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action." App.R. 18(C). In the present case, all relevant facts can be gleaned from the record before this Court. Thus, there is no need to take Brundage's statement of facts and issues as true.

{¶7} Brundage argues the resolution is unconstitutionally vague. There is a strong presumption in favor of the constitutionality of statutes and the party must prove that unconstitutionality beyond a reasonable doubt. *State v. Anderson* (1991), 57 Ohio St.3d 168, 566 N.E.2d 1224, certiorari denied (1991), 501 U.S. 1257, 111 S.Ct. 2904, 115 L.Ed.2d 1067. When an resolution is challenged as unconstitutionally vague, the reviewing court must determine whether the statute provides sufficient notice of its proscriptions and contains reasonably clear guidelines to prevent official arbitrariness or discrimination in its enforcement. *Perez v. Cleveland* (1997), 78 Ohio St.3d 376, 378, 678 N.E.2d 537, 540. In order to establish a statute as unconstitutionally vague, the challenging party must show that an examination of the statute would not enable a person of ordinary intelligence to understand what the law requires him to do or that the acts he committed were prohibited. *Anderson* at 171, 566 N.E.2d at 1226; *Chicago v. Morales* (1999), 527 U.S. 41, 56-57, 119 S.Ct. 1849, 1859, 144 L.Ed.2d 67, 80.

{¶8} Barking dog ordinances have repeatedly been challenged in the various courts of appeal in Ohio for being unconstitutionally void for vagueness. Most courts have found the challenged ordinances constitutional. The Ninth District was faced with one of the first such challenges in *Wadsworth v. Brunk* (May 26, 1982),

Medina App. Nos. 1106, 1007, and 1136, unreported. In *Wadsworth*, the challenged ordinance stated:

> {¶9} "No owner, keeper or harborer of a dog shall permit or allow such dog to annoy or disturb any person by frequent or habitual howling, yelping, barking or making of other noises by such dog." *Id.*

{¶10} In holding the ordinance was not unconstitutionally vague, the court found that, rather than being vague, the ordinance's provisions were "all to *[sic]* clear." *Id.*

{¶11} The next challenge to this type of ordinance occurred in *Whitehall v. Zageris* (April 25, 1985), Franklin App. No. 83AP-805, unreported. The ordinance in that case provided:

> {¶12} "No person shall keep or harbor any animal or fowl which howls or barks or emits audible sounds which are unreasonably loud or disturbing and which are of such a character, intensity and duration as to disturb the peace and quiet of the neighborhood or to be detrimental to the life and health of any individual." *Id.*

{¶13} The Tenth District found this ordinance was not vague because it was

> {¶14} "addressed to the specific neighborhood in which the noise occurs. In addition, the Whitehall ordinance incorporates an objective standard, prohibiting only noises which are 'unreasonably loud or disturbing,' and also gives specific factors to measure the disturbance by the 'character, intensity and duration' of the noise. These additional elements bring the Whitehall ordinance within the category of those approved by the court in *State v. Dorso* (1983), 4 Ohio St. 3d 60, [4 OBR 150, 446 N.E.2d 449,] as an ordinance which is unlikely to confuse persons of ordinary intelligence regarding which conduct is prohibited by

the law." *Id.* at 3.

{¶15} Likewise, in *Lebanon v. Wergowske* (1991), 70 Ohio App.3d 251, 590 N.E.2d 902, the court found an ordinance which prevented "a dog which by loud and frequent or habitual barking, howling or yelping [from] caus[ing] annoyance or disturbance to the neighborhood" was not unconstitutional. *Id.* at 252, 590 N.E.2d at 903. The Twelfth District held the ordinance was constitutional because it "contains the qualifying words 'loud,' 'frequent' and 'habitual,' which clarify the ordinance and set forth an ascertainable standard of guilt." *Id.* at 254, 590 N.E.2d at 904; see also *City of South Euclid v. Haffey* (July 29, 1993), Cuyahoga App. No. 63283, unreported.

{¶16} Recently, the Eleventh District was faced with another challenge to a barking dog resolution in *State v. Ferraiolo* (2000), 140 Ohio App.3d 585, 748 N.E.2d 584. The resolution in *Ferraiolo* stated:

> {¶17} "No person shall keep or harbor any dog which howls or barks, or emits audible sounds which are unreasonably loud or disturbing and which are of such a character, intensity and duration so as to disturb the peace and quiet of the neighborhood or to be detrimental to the life and health of any individual." *Id.* at 586, 748 N.E.2d at 584-585.

{¶18} The Eleventh District found this resolution unconstitutionally vague.

> {¶19} "As applied to the legislation in question, we conclude that an individual of ordinary intelligence would not understand his responsibilities under the law. Almost all dogs will bark or emit audible sounds at one time or another. Who is to say what constitutes an 'unreasonably loud' sound? Everyone has different sensitivities. Reasonableness is a subjective term that offers virtually no guidance to the dog owner who must comply with this legislation. A single bark, howl, or yelp may be considered unreasonable by some if it occurs at an inopportune time. The ordinance also requires

that the bark not only be unreasonably loud or disturbing but that it be 'of such a character, intensity and duration so as to disturb the peace and quiet of the neighborhood or to be detrimental to the life and health of any individual.' This second clause is an attempt to narrow down the type of noise that would be considered a violation of the ordinance. Once again, however, the legislative body has used a subjective term, 'disturb,' as the key word in the clause. How is a resident of Howland Township supposed to know whether his dog's barks are of such an intensity and duration so as to disturb the peace and quiet of the neighborhood? We do not know the answer to that question nor would any other person of average intelligence.

{¶20} * *

{¶21} "It is simply too vague to withstand a constitutional challenge. Further guidance needs to be included in such a statute. For example, length of time that a dog is barking could be included, as well as certain prohibited hours during a given day. Additionally, perhaps a certain decibel restriction could lend further guidance. In short, an ordinance needs to be crafted so as to provide a person of average intelligence guidelines that could be followed." *Id.* at 586-8, 748 N.E.2d at 585-586.

{¶22} The Poland Township resolution in question in this case is virtually identical to the resolution in *Ferraiolo*. It states:

{¶23} "No owner, keeper or harborer shall keep or harbor any dog which howls or barks, or emits audible sounds which are unreasonably loud or disturbing and which are of such a character, intensity and duration so as to disturb the peace and quiet of the neighborhood or to be detrimental to the life and health of any individual." Poland Township Resolution 95.32.1.

{¶24} We disagree with the Eleventh District's conclusion.

{¶25} A statute need not be drafted with scientific precision in order to be constitutional. *Anderson* at 174, 566 N.E.2d at 1229. Indeed, there are inherent limitations in the precision with which concepts can be conveyed by the English language. *Id.* citing *Ferguson v. Estelle* (C.A.5, 1983), 718 F.2d 730, 734. As the court in *Whitehall* stated, this statute gives an objective

standard by which to judge the offending conduct, *i.e.* "sounds which are unreasonably loud or disturbing", and specific factors to be used in judging the offending conduct, *i.e.* the "character, intensity and duration" of the conduct.

{¶26} Courts could always ask legislative bodies to be more precise when drafting statutes. As the court in *Ferraiolo* points out, the terms "reasonable" and "disturb" are somewhat subjective. However, so are the terms "purposely", "knowingly", "recklessly", "negligently", and "reasonable doubt", terms which have long been a part of our criminal code. To test whether a statute is unconstitutionally void for vagueness, this Court does not ask whether the legislature could have drafted the statute in question more precisely. See *State v. Williams* (2000), 88 Ohio St.3d 513, 532, 728 N.E.2d 342, 361 ("A statute will not be declared void, however, merely because it could have been worded more precisely.") Rather, we ask if the language the legislature chose enables a person of ordinary intelligence to understand what the law requires him to do or that the acts he committed were prohibited. *Anderson, supra*.

{¶27} This resolution provides sufficient notice of its proscriptions and contains reasonably clear guidelines that a person of ordinary intelligence will be able to understand what the law requires of him or her. Accordingly, the resolution is not unconstitutionally vague and the decision of the trial court is affirmed.

Vukovich, P.J., concurs.
Waite, J., concurs.