

MASON MUNICIPAL COURT  
WARREN COUNTY, OHIO

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STATE OF OHIO

Case No. 11CRB0025 MUNICIPAL COURT  
MASON, OHIO

Plaintiff,

Vs

DECISION AND ENTRY  
OVERRULING DEFENDANT'S  
MOTION TO  
DISMISS/SUPPRESS

RYAN STEPHENS

Defendant.

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This matter came before the court on June 9, 2011 for a hearing on the Defendant's Motion to Dismiss/Suppress filed May 6, 2011. Jim Hardin appeared on behalf of the Defendant and Bethany Bennett appeared on behalf of the State. Testifying for the State was Mason Police Officer Brad Walker.

Facts

On April 3, 2011, Mason Police Officer Brad Walker responded with his K-9, Timber, to the Mason Pub to investigate a traffic crash. During the course of the investigation, Officer Walker heard Timber "barking uncontrollably" and observed Defendant Ryan Stephens near his police cruiser. Although the windows were down, the vehicle is equipped with a steel cage. The Defendant, only a few inches from the window, was making barking and hissing noises toward Timber. Timber responded with aggressive barking, scratching at the door, attempting to nudge his nose between the steel gate and the window, and moving energetically in the backseat. Due to Timber's stressful and agitated response, the police cruiser was noticeably rocking back and forth. Officer Walker began walking towards the cruiser when he yelled to the Defendant. The Defendant put his cell phone to his ear and walked away.

Once Officer Walker initiated contact with the Defendant, Officer Walker observed a strong odor of alcohol, slurred speech, and body movements consistent with intoxication. The Defendant informed Officer Walker that “the dog started it.” Officer Walker then arrested the Defendant for Teasing a Police Dog, in violation of Mason Municipal Code (MMC) §505.15, a misdemeanor of the third degree.

#### Standard of Review

In *State v. Baker*, the Court reached a standard of review in cases involving the constitutionality of a statute:

“It is well established that all legislative enactments enjoy a presumption of constitutionality. *State v. Dorso* (1983), 4 Ohio St.3d 60, 61, 4 OBR 150, 446 N.E.2d 449. Courts must apply “all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional.” *Id.* Therefore, when considering the constitutionality of an ordinance, a court should not declare it unconstitutional if there is a rational way, through liberal construction, to preserve its constitutionality. *State v. Sinito* (1975), 43 Ohio St.2d 98, 101, 72 O.O.2d 54, 330 N.E.2d 896. It is not a court's function to pass judgment on the wisdom of the legislation, for that is the task of the legislative body that enacted the legislation. *Sebastian v. Georgetown* (2001), 146 Ohio App.3d 227, 231, 765 N.E.2d 925, citing *Arnold v. Cleveland* (1993), 67 Ohio St.3d 35, 616 N.E.2d 163. Local authorities are presumed to be familiar with local conditions and to know the needs of the community. *Id.*” *State v. Baker*, 157 Ohio App.3d 87 (2004).

#### Vagueness

MMC §505.15 states:

(a) No person shall maliciously or willfully tease or strike dogs used by the Police Department.

(b) A person commits the offense of teasing or striking dogs used by the Police Department if he willfully and maliciously taunts, torments, teases, beats, or strikes any dog used by the Police Department in the performance of the functions or duties of such Department, or interferes with or meddles with any such dog used by such Department or any member thereof in the performance or the functions or duties of such Department or of such officer or member.

A statute is not necessarily void for vagueness merely because it could have been written with greater precision. *State v. Dorso*, 4 Ohio St.3d 60, 61(1983) *citing Roth v. United States*, 354 U.S. 476, 491 (1957). In order to establish that a criminal statute is void for vagueness, the challenging party must show that, upon examining the statute, a person of ordinary intelligence would not understand what conduct is prohibited by the law. *City of Akron*, 105 Ohio App.3d 164 (1995) *citing State v. Collier*, 62 Ohio St.3d 267 (1991). Although the test for vagueness is stated in simple and succinct terms, the proper constitutional analysis requires the evaluation of three different elements. *City of Akron*, 105 Ohio App.3d 164 (1995).

Under the first element in the void for vagueness issue, we must determine whether the challenged statutory language provides the average person with adequate notice and fair warning as to the standard of conduct required by the law. *Id.* The City of Mason is not required to define every word in a statute since “[m]any statutes will have some inherent vagueness, for ‘[i]n most English words and phrases there lurk uncertainties.’” *State v. Dorso*, 4 Ohio St.3d 60 (1983) *citing Robinson v. United States*, 324 U.S. 282, 286 (1945). In the case at hand, the statute prohibits “taunts, torments, teases, beats, or strikes” of any police dog in the performance of the duties of the Police Department. The challenged statutory language at hand provides the average person with adequate notice and fair warning as to the expected standard of conduct and what is prohibited.

Under the second element in the void for vagueness issue, we must determine whether the challenged statutory language provides sufficiently explicit standards for those charged with enforcing the law. *Akron, Supra.* pg. 3. The standards in MMC

§505.15(b) not only limit the intent (“willfully and maliciously”) with which the offense must be committed, but also the exact circumstances in which it must be committed (“in the performance of the functions or duties of such Department”) in order to constitute a violation of the statute. These limitations provide sufficiently explicit standards for law enforcement officials to determine whether the statute has been violated.

Under the third and final element in the void for vagueness issue, we must determine whether the challenged statutory language unreasonably infringes upon or inhibits fundamental constitutionally protected freedoms. *Id.* In this case, the Defendant asserts the statute interferes with his First Amendment right to “free speech” guaranteed to him by the United States Constitution. This aspect will be discussed further below.

#### Free Speech

The Defendant relies on *State v. Gilchrist* to support his claim that MMC §505.15(b) violates his free speech as applied. In *State v. Gilchrist* the Ohio Fourth District Court of Appeals took the first and only look at the constitutionality of a “police-dog” statute. In that case, the defendant, standing on the other side of the street, barked at a Police K-9. The Court of Appeals confirmed the trial court’s decision that “the enforcement of [O.]R.C. 2921.321 in response to ‘barking’ with or at a police dog is prohibited where the defendant is at least thirty feet removed from the animal and there is no possibility of any physical contact with the police dog.” *State v. Gilchrist*, WL 21152889 (2003).

The case at hand is different in a key aspect. Unlike *Gilchrist*, the Defendant was only a few inches from the K-9’s snout. Although a steel cage blocked the K-9 from exiting the vehicle, the Defendant’s barking and hissing combined with his proximity to

the vehicle stirred the K-9 to a violent and disruptive level. If the disruption had continued the K-9 could have been seriously injured or could have caused great damage to the police cruiser.

The United States Supreme Court has held “that when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *Texas v. Johnson*, 491 U.S. 397 (1989) citing *U.S. v. O’Brien*, 391 U.S. 367 (1968). In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether “[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.” *Texas v. Johnson*, 491 U.S. 397 (1989) citing *Spence v. State of Wash.*, 418 U.S. 405 (1974). In this case, the Court fails to see any message the Defendant intended to convey, but even if there was a communicative value to the Defendant’s barking and hissing, it is clear that this ordinance is directed toward prohibited conduct and impairment of a First Amendment right is incidental.

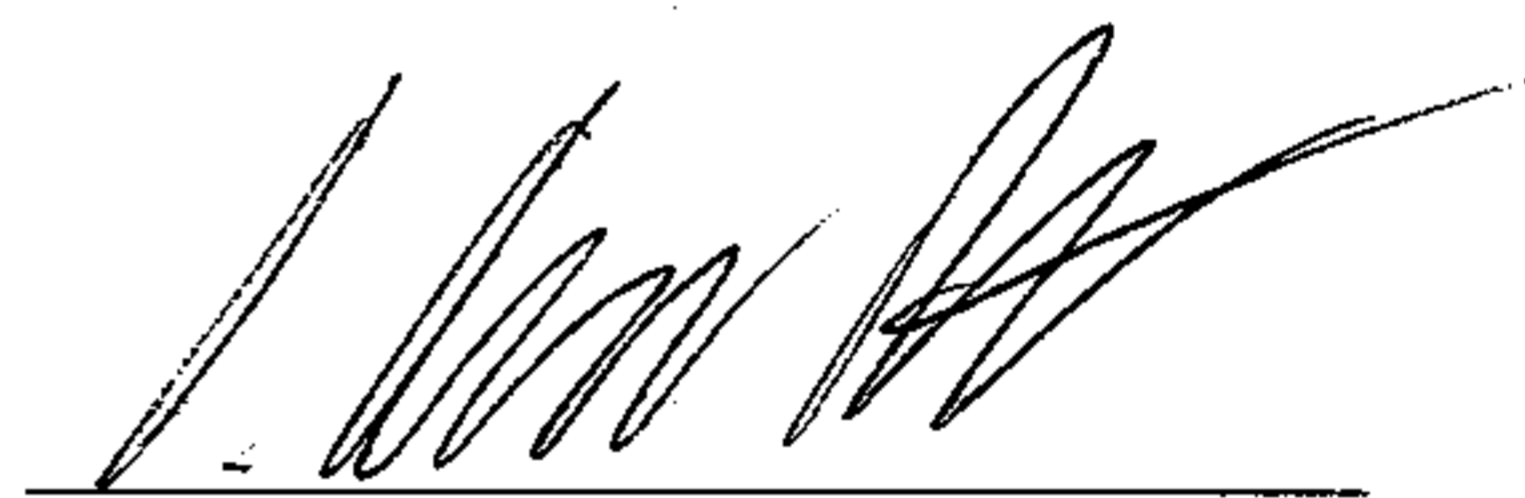
Furthermore, preventing any citizen from taunting, teasing, tormenting, beating, or striking a police K-9 is a “sufficiently important governmental interest.” Not only is the statute enacted to protect the K-9 but also to protect the citizens of the City of Mason. If the City allowed the K-9 to be tormented or beaten, the K-9 could very easily become violent not only during the course of its police duties (when it is necessary) but also during the normal day to day activities of the Officer in charge of the K-9. Police Officers interact on a daily basis with the citizens of the jurisdiction they protect. A violent Police

K-9 would not only be a threat to itself but also to the citizens of the community in which the K-9 was located. It is also reasonable to think the K-9 may not become violent but rather skittish or afraid of people and unable to perform its duties if they are repeatedly tormented or beaten. If the K-9 is unable to perform its duties, the Officer in charge of the K-9 could become vulnerable or less safe. Since there is a strong likelihood of danger to the K-9, the Officer, and the community, the City of Mason has a "sufficiently important governmental interest" in protecting its K-9's. Therefore, MMC §505.15 does not violate the Defendant's First Amendment right of "free speech."

Conclusion

This Court finds that MMC §505.15 is not vague as written and the Defendant's First Amendment right of "free speech" has not been violated. Accordingly, the Defendant's Motion to Dismiss/Suppress is overruled.

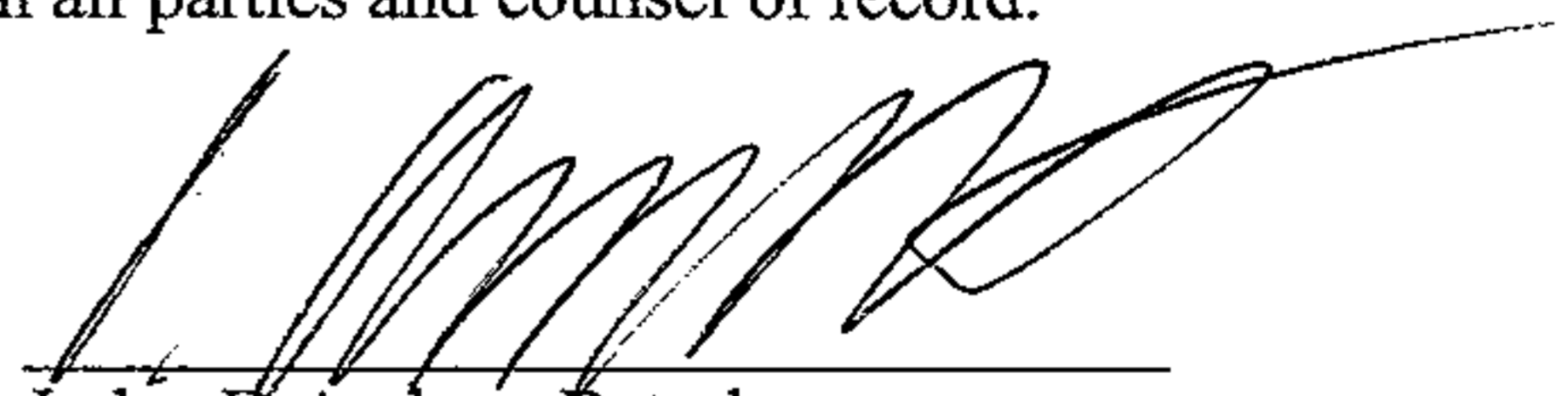
IT IS SO ORDERED.



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Judge D. Andrew Batsche

**To the Clerk:** Please serve a copy of this entry upon all parties and counsel of record.



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Judge D. Andrew Batsche