

IN THE SUPERIOR COURT OF EMANUEL COUNTY
STATE OF GEORGIA

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APR 27 2010

IN RE: 18 DOGS SEIZED
FROM WILLIAM PANICK

- * CASE NO.10-CV-132
- * MOTION TO DISPOSE OF THE
- * ANIMALS PURSUANT TO CODE
- * SECTION 4-11-9.3
- * MOTION TO DISMISS STATE'S
- * MOTION FOR DISPOSITION OF
- * ANIMALS

DISTRICT ATTORNEY'S OFFICE
SWAINSBORO

ORDER

Search warrants for the property and residence of William Ernest Panick (Respondent) issued on December 14th, 15th and 16th based on probable cause to believe officials would find evidence thereon related to the crimes of Dogfighting (O.C.G.A. § 16-12-37), Cruelty to Animals (O.C.G.A. § 16-12-4) and Violations of the GA Controlled Substances Act (O.C.G.A. § 16-13-30). Emanuel County Sheriff's Office ("ECSO"), aided by the Georgia Bureau of Investigation, the East Central Georgia Task Force and the Atlanta Humane Society, executed the first of three search warrants on December 14, 2009, and impounded the dogs that are the subject of this action after a veterinarian examined and determined the condition or treatment of each animal, as per O.C.G.A. § 4-11-9.2(d). The Atlanta Humane Society assumed care and control of the dogs, on behalf of the ECSO.

ECSO arrested Respondent on December 15, 2009, for Cruelty to Animals (O.C.G.A. § 16-12-4) and Dogfighting (O.C.G.A. § 16-12-37). Respondent posted bond on December 30, 2009. To the Court's knowledge, no indictment has yet to issue against Respondent on these charges.

PROCEDURAL BACKGROUND

The State of Georgia, by and through the Middle Judicial Circuit District Attorney, filed a "Motion to Dispose of the Animals Pursuant to Code Section 4-11-9.3" on February 8, 2010,

averring eighteen dogs were seized from Respondent as evidence of violations of O.C.G.A. § 16-12-4 and pursuant to O.C.G.A. § 4-11-9.3(a). The State further avers the animals are dangerous to human life and to each other. These dogs were impounded to the custody of ECSO with an arrangement for the dogs to be housed by the Atlanta Humane Society.¹ Thereafter, Respondent filed his objection and moved to dismiss the State's motion. This Court heard from both parties on these motions on March 5, 2010.

Seeking the benefit of thorough analysis from both parties and positions, this Court issued a Briefing Schedule to the parties and invited the Prosecuting Attorneys Council as well as the Public Defender Standards Counsel to submit Amicus Briefs addressing the constitutional issues raised by Respondent. This Court has carefully considered the motions, evidence adduced at the hearing on these motions, the State's briefs, Respondent's briefs and an Amicus Brief of the Prosecuting Attorneys' Counsel of Georgia. For the reasons set forth in this Order, Petitioner's motion is GRANTED and Respondent's motion is DENIED.

FINDINGS OF FACT

Dr. Gloria Jean Dorsey, veterinarian and Vice President of Medical Services of the Atlanta Humane Society, testified at the hearing on these motions. Dr. Dorsey was onsite when authorities seized Respondent's dogs. She personally observed the conditions in which the dogs were maintained and evaluated each dog prior to impound. Water was unavailable or soiled. She saw no food made available to the dogs. Each dog was confined by a chain to a small circumference of space, separate and apart from all other dogs.

¹ It is this Court's appreciation that since the time of the proceedings, Respondent and the State entered into an arrangement transferring the dogs from the Atlanta Humane Society to a boarding facility in Lyons, GA.

Dr. Dorsey testified about each of eighteen reports she prepared titled "Medical Evaluation of Neglect/Abuse Case," prepared one per dog impounded and attached to Petitioner's motion as "Attachment A." According to Dr. Dorsey's testimony and reports, half of the dogs exhibited collar burn, seven dogs had recent wounds or lesions on their extremities, three dogs had recent wounds or lesions on their ears, and three dogs had recent wounds or lesions on their faces. Six of the eighteen dogs evaluated had scars on their bodies.

Dr. Dorsey assessed six of the dogs as thin and five of the dogs as very thin, by either assigning a body condition number or noting prominent ribs and/or vertebral columns. Five of the dogs had teeth that were either filed down, worn or missing. Dog #4 had dried blood on his coat, but no broken skin. Dog #5 had fresh wounds as well as scarring which indicated to Dr. Dorsey past trauma which resolved with little to no medical care. Dog #6 had eighteen open wounds on her back with no evidence of treatment. Dogs #3 and #11, both approximately eight weeks of age showing signs of illness (nasal discharge, pale gums) at impound, perished at Atlanta Humane Society from Parvo, despite administration of supportive care by staff. Dog #16 bit a caretaker at the Atlanta Humane Society.

Respondent took the stand and testified he had plenty of dog food on the premises when authorities seized his dogs. He testified he also had medication on site to treat his animals. According to Respondent, local veterinarian Dr. Raymond Mason would have records on only one of his dogs. Respondent testified each dog had the benefit of its own shelter and that any injuries observed by Dr. Dorsey were self-inflicted. Respondent gave the example of Dog #2, who exhibited a wound on his nose, having sustained said wound by pushing his concrete food bowl around with

his face. On cross-examination, Respondent denied knowing whether the pedigree of his dogs was linked to dog fighters.

CONCLUSIONS OF LAW

The Court finds Petitioner has shown, by a preponderance of the evidence, the dogs did not receive humane care as that notion is defined by O.C.G.A. § 4-11-2(4). Further, the Court finds Petitioner has shown, by a preponderance of the evidence, the dogs were the objects of the crime of Cruelty to Animals and Respondent caused unjustifiable suffering to all of these dogs through his acts, omissions and willful neglect. The Court finds Petitioner did not meet its burden in proving the dogs are dangerous to human life and to each other, but based upon the findings with respect to humane care and objects of crime, the Court holds the impound was proper and the humane disposal by the State of the surviving dogs pursuant to O.C.G.A. § 4-11-9.6 is warranted.

This Court has jurisdiction over this proceeding.

Respondent challenges the jurisdiction of this Court over this proceeding. Specifically, in his motion to dismiss, Respondent states, “[t]his being a civil action, the Court has no jurisdiction over the animals nor the respondent.” In his brief, Respondent states, “[t]his is not a criminal forfeiture...[n]or is it legitimately a civil action.”

Petitioner brings this motion pursuant to O.C.G.A. § 4-11-9.3(d), which provides, in part:

An agency having custody of an animal that was seized as an object or instrumentality of a crime may, with the consent of the prosecuting attorney, apply to the court having jurisdiction over the offense for an order authorizing such agency to dispose of the animal prior to trial of the criminal case as provided by law.

Contrary to Respondent’s assertions, this proceeding is best characterized as a civil *in rem* forfeiture, more narrowly described as a special statutory proceeding. See Hubbard v. State, 201 Ga. App. 213, 411 S.E.2d 44 (1991).

The dogs at issue were seized from property located in Emanuel County and Respondent was arrested in Emanuel County for the felony offenses of Cruelty to Animals (O.C.G.A. § 16-12-4) and Dogfighting (O.C.G.A. § 16-12-37). Because this Court has exclusive jurisdiction over said offenses, Petitioner properly applied to this Court for an order authorizing the State to dispose of the eighteen dogs prior to trial of the criminal case against Respondent. *See* O.C.G.A. § 4-11-9.3(d), GA CONST Art. 6 § 4, ¶ I. Accordingly, this Court has jurisdiction.

The State lawfully seized the dogs.

Respondent challenges the search warrant leading to the seizure of the subject dogs by ECSO as “lacking probable cause.” According to the Affidavit in support of the December 14, 2009, search warrant, Rocky Davis of the ECSO verified findings of an investigation made by an identified and licensed private investigator. In addition to his affidavit, Davis presented to the issuing Judge, also the undersigned, video footage of the dogs on the property which satisfied the undersigned that there existed “a fair probability that contraband or evidence of [Cruelty to Animals or Dogfighting would] be found [at Respondent’s residence].” *State v. Stephens*, 252 Ga.181 (1984). Accordingly, the search and seizure of the dogs was proper.²

This proceeding does not offend Respondent’s Constitutional rights.

Respondent argues the State may not deprive him of his dogs before he has been convicted of Cruelty to Animals or Dogfighting. Whether Respondent is indicted or convicted for the crimes of his arrest is not relevant to this proceeding because this proceeding is based upon the unlawful use of the property, regardless of whether the owner has violated the law. *Pimper v. State ex rel.*

² Even if the State did not first obtain a warrant, the Georgia Court of Appeals opinion in *Morgan v. State*, 289 Ga. App. 209 (2008) indicates a warrantless search and seizure would have been justified by the exigent circumstances that existed.

Simpson, 274 Ga. 624(2001) *citing* Austin v. United States, 509 U.S. 602 (1993). Of course, there must be some statutory authority for the state to seize an individual's property, as neither a court nor the state can simply decide on its own to confiscate an individual's property, without affording the individual due process of law. O.C.G.A. § 4-11-9.3(d) provides for this special statutory proceeding.

Respondent next argues he was denied due process because the State did not provide written notice of impoundment pursuant to O.C.G.A. § 4-11-9.4, which requires the impounding official to "notify the owner of such animal immediately upon impoundment" and, among other things, provide in writing "the reason why the animal was impounded [] and a statement of the time limits for the owner to respond and request a hearing..." This written notice appears to serve one primary purpose, namely, to notify the owner of his right to request a hearing on impoundment. However, where the animal is impounded as "an object or instrumentality of a crime," such a hearing is unavailable to the owner. O.C.G.A. § 4-11-9.5(c). This Court finds the subject animals were impounded as objects or instrumentalities of crime. Therefore Respondent was not entitled to the notice described in O.C.G.A. § 9-11-9.4.

The Court next considers whether O.C.G.A. § 4-11-9.5(c) offends a property owner's right to procedural due process, which serves as a limitation on government action and requires procedural protections tailored to the circumstances of the particular situation so as to ensure fundamental fairness. Mathews v. Eldridge, 424 U.S. 319 (1976). A property owner facing deprivation must receive notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the forfeiture action and afford them an opportunity to present their objections." Brewer v. State, 281 Ga. 283 (2006) *citing* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Fundamental fairness includes (1) consideration of the private interest that will be

affected by the official action; (2) consideration of the risk of an erroneous deprivation; and (3) consideration of the government's interest. Mathews, supra.

Applying the above stated principles, Respondent was not denied due process of law. Respondent's private ownership interest in these dogs is certainly a significant consideration. However, "property in dogs is of an imperfect or qualified nature, the possession of which may be subjected to peculiar and even drastic police regulation by the State without depriving their owners of any constitutionally protected right." Johnston v. Atlanta Humane Society, 173 Ga. App. 416 (1985).

The Georgia Animal Protection Act, by its title, announces its primary purpose, namely, to protect certain animals from certain acts. The impound statutes require animals seized from their owners to be so seized whenever there is probable cause to believe such animals have not received humane care, have been subjected to cruelty or have been used or intended for use in any violation of our State's Dogfighting statute. Both O.C.G.A. § 4-11-9.3(d) and O.C.G.A. § 4-11-9(c) require any party having custody of an animal that is evidence in an ongoing criminal investigation to obtain the consent of the prosecuting attorney before applying for disposal of the animal. There is little ambiguity about why the legislature crafted this provision. The statute seeks to foster prosecutions for violations of the Georgia Animal Protection Act by ensuring the prosecuting attorney plays a roll in disposal of evidence.

The Georgia Animal Protection Act is the expression by our legislature – and ultimately our citizenry – that the people of Georgia will not tolerate Animal Cruelty or Dogfighting. Companion animals are more often than not cherished members of the family, and callous and inhumane treatment of such animals offends the sensibilities of our civil society. As such, the interest of the

government in upholding the humane standards enacted by the people is certainly significant. Balanced against the qualified property interest Respondent has in his dog, the government interest prevails under the circumstances of this case.

As a final consideration of this procedural due process analysis, this Court looks to the risk of erroneous deprivation. Petitioner filed its motion to dispose of the dogs on February 8, 2010, and this Court held a hearing approximately one month later. An impartial body presided over the presentation of evidence and, by entry of this order, issues judicial findings thereon. At this hearing, Respondent was represented by counsel and was given the opportunity to introduce evidence, to cross-examine witnesses and to be heard on questions of law. Respondent's counsel has also filed an objection to these proceedings, a motion to dismiss these proceedings, and two briefs in support of his position. The process and adjudication of Petitioner's motion presents no risk of erroneous deprivation.

The Court next considers whether this proceeding works an excessive penalty upon Respondent. The test to determine whether an *in rem* forfeiture is constitutionally excessive is set forth in Howell v. State, 283 Ga. 24 (2008):

We...frame our excessiveness inquiry in terms of the following considerations: (1) the harshness, or gross disproportionality, of the forfeiture in comparison to the gravity of the offense, giving due regard to (a) the offense committed and its relation to other criminal activity, (b) whether the claimant falls within the class of persons for whom the statute was designed, (c) the punishments available, and (d) the harm caused by the claimant's conduct; (2) the nexus between the property and the criminal offenses, including the deliberate nature of the use and the temporal and spatial extent of the use; and (3) the culpability of each claimant. Howell, *supra*.

The offense underlying Petitioner's forfeiture action is Cruelty to Animals. Respondent was also arrested for Dogfighting, which is a crime often committed in tandem with other crimes, such as illegal gambling and Violations of the GA Controlled Substances Act. Respondent, as a person

alleged to have committed acts of Animal Cruelty or Dogfighting against or with the use of the subject dogs, falls within the class of persons for whom O.C.G.A. § 4-11-9.3(d) was designed. Cruelty to Animals, O.C.G.A. § 16-12-4 includes a felony punishable by imprisonment for not less than one nor more than five years and a fine not to exceed \$ 15,000.00. As to the harm caused, our legislature has prohibited the inhumane treatment of our companion animals and the conditions of Respondent's dogs is evidence of that harm which the Georgia Animal Protection Act seeks to prevent.

The Court next considers the nexus between the property and the criminal offenses. The evidence presented supports a finding that the alleged crimes occurred on, against or by use of the subject property – the dogs-- and had, as a necessary part of the crime, the use of the property itself. As such, the nexus between the crime and the property is a particularly close one. Accordingly, the second factor of the excessiveness inquiry favors a finding of constitutionality under the circumstances of this case.

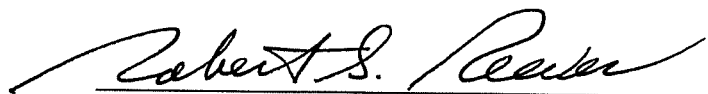
Finally, this Court received evidence about the condition of the dogs at the time of impoundment indicating to this Court that said dogs were not receiving humane care (absent or soiled water, prominent ribs/vertebral columns, wounds/lesions) and that several of the dogs may have been used for dog fighting (filed teeth, scarring, wounds/lesions). In Howell, *supra*, the Court considered the culpability of a landowner who was willfully blind to a marijuana crop grown on her land by her father. The Court in Howell explained, with respect to the culpability factor, that although “[respondent] is not subject to any punishment for permitting the property to be used criminally other than this forfeiture...her willful blindness...makes her culpable, if not in a criminal sense, at least in a moral sense.”

In the instant matter, the Court acknowledges Respondent has not been indicted. However, with respect to culpability, and considering all the evidence presented to this Court at the hearing on these motions, this Court does attribute culpability to Respondent for the unacceptable condition of the dogs seized. This statement of culpability is not to be construed as a statement upon the guilt or innocence of Respondent should he be indicted and tried for Animal Cruelty or Dogfighting. In any event, malice and intent are not elements of the offense of cruelty to animals with regard to the "act" and "omission" portions of the statute. Cotton v. State, 2003, 263 Ga.App. 843 (2004). However, Respondent, as the person who claims to have been the caretaker of these animals-- at the very least --shoulders a moral culpability for his willful blindness to the unacceptable conditions of these dogs.

CONCLUSION

This Court concludes Respondent has received due process and the harshness of the forfeiture (disposal) is not grossly disproportionate to the gravity of the offense on which it is based or to Respondent's own culpability. Wherefore, Petitioner's motion is GRANTED and Respondent's motion to dismiss is DENIED. Accordingly, the State of Georgia is hereby authorized to humanely dispose of the 18 dogs that are the subject of this proceeding, in accordance with O.C.G.A. § 4-11-9.6.

SO ORDERED this 23rd day of April, 2010.



ROBERT S. REEVES, Judge
*Emanuel County Superior Court
Middle Judicial Circuit*

CERTIFICATE OF SERVICE

I, Judi Boatright, Secretary to Judge Robert S. Reeves, hereby certify that I have this day served the within Order granting Petitioner's Motion to Dispose of the Animals and denying Respondent's Motion to Dismiss. on Respondent's Objection to Court's Consultation with Prosecuting Attorneys Counsel upon the individuals listed below by mailing a true copy of same to them in envelopes having sufficient postage thereon to insure delivery and sending via the U. S. Mail addressed as follows:

John A. Fitzner, III
Chief Assistant District Attorney
Middle Judicial Circuit
P. O. Drawer 590
Swainsboro, GA 30401-0590

M. Francis Stubbs
Attorney at Law
P. O. Box 9
Reidsville, GA 30453-0009

This 23rd day of April, 2010.


Judi Boatright

P. O. Box 1347
Swainsboro, GA 30401-1347