

Case No. 17-1907
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NIKITA SMITH and KEVIN THOMAS, Plaintiffs-Appellants

v.

CITY OF DETROIT;
POLICE OFFICER BASHAWN GAINES;
POLICE OFFICER WILLIAM MORRISON;
POLICE OFFICER RYAN PAUL;
POLICE OFFICER JEFFREY WAWRZYNIAK;
POLICE OFFICER SADIE HOWELL;
SGT. ROY HARRIS,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

BRIEF OF AMICUS CURIAE

DAVID FAVRE (P37872)
COUNSEL FOR AMICUS CURIAE
Animal Welfare Clinic, MSU College of Law
Attorneys for Animals
Michigan Humane Society
648 N. Shaw Lane, Room 361
East Lansing, MI 48824-1300
(517) 432-6890

**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTERESTS**

Pursuant to 6th Cir. R. 26.1, Amicus Curiae makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

Answer: “No.”

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome of the appeal?

Answer: “No.”

___/S/ David S. Favre___

October _19_, 2017

DAVID S. FAVRE

TABLE OF CONTENTS

CORPORATE DISCLOSURE ii

TABLE OF CONTENTS..... iii

INDEX OF AUTHORITIES..... iv

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE.....4

STATEMENT OF FACTS6

ARGUMENT I7

 THE DISTRICT COURT’S ANALYSIS OF “CONTRABAND” WAS
 INCONSISTENT WITH MICHIGAN AND FEDERAL LAW.....7

 (a) Categorizing of the dogs as “contraband” results in loss of judicial
 review of a practice by government agents which has a significant
 impact on members of the public.7

 i. Plaintiffs were not afforded due process before the seizure of
 the alleged contraband.....7

 ii. Plaintiffs had a possessory interest in their companion animals.9

 (b) The district court’s categorization of unlicensed dogs as
 “contraband” is not supported by an appropriate application of
 Michigan law.11

 (c) The district court’s categorization of unlicensed dogs as
 contraband is a novel position unsupported by Michigan or federal
 case law.....14

 (d) Categorizing of unlicensed dogs as contraband is contrary to public
 expectations and removes the certainty of peaceful possession
 sought to be established by the longstanding property laws of our
 common law heritage.16

CONCLUSION19

CERTIFICATE OF SERVICE21

INDEX OF AUTHORITIES

Cases

<i>Allen v. Pennsylvania S.P.C.A.</i> , 488 F.Supp.2d 450 (D.C. Penn. 2007)	15
<i>Altman v. City of High Point</i> , 330 F.3d 194, 205 (4th Cir. 2003)	10
<i>Leshner v. Reed</i> , 12 F.3d 148 (8 th Cir. 1994).....	15
<i>Moreno v. Hughes</i> , 157 F.Supp.3d 687, 689 (E.D. Mich. 2016).....	10
<i>Pena v. Village of Maywood</i> , No. 14 C 4214 (N.D. Ill. Mar. 15, 2016), 2016 WL 1019487	16
<i>United States v. Jacobsen</i> , 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984).....	15

Statutes

42 U.S.C. § 1983.....	4, 6, 9
Mich. Comp. L. Ann. § § 287.286.....	12
Mich. Comp. L. Ann. § 287.262	11
Mich. Comp. L. Ann. § 287.321	12
Mich. Comp. L. Ann. § 287.322(3)	13
Mich. Comp. L. Ann. § 287.331	13
Mich. Comp. L. Ann. §287.261	11
Mich. Comp. L. Ann. §287.270	17
Mich. Comp. L. Ann. §287.273	17
Mich. Comp. L. Ann. §750.50b(6)	13
Mich. Comp. L. Ann. §750.50b(9)	13
U.S. Const. amend. XIV	8

Other Authorities

Black’s Law Dictionary (Rev. 4th edition, 1968).....7
Mary Randolph, *Dog Law* (4th ed. 2001) 2/4 – 2/5.....12
Merriam-Webster (i-pad app., 2017)7
Michigan Acts of 1919, Act 339.....11
Michigan Department of Corrections, Policy Directive, Number 04.07.112.....8
www.attorneysforanimals.org.....2
www.census.gov/quickfacts/fact/table/MI,US5
www.statista.com/statistics/198100/dogs-in-the-united-states-since-2000/.....5

Rules

6th Cir. R. 26.1 ii
Fed. R. App. P. 32(a)(7)(B)20

Treatises

3 C.J.S. *Animals* §1012

INTEREST OF AMICUS CURIAE

The Michigan Humane Society (MHS), founded in 1877, is the oldest and largest nonprofit animal welfare organization in Michigan. MHS' mission is to improve and save lives through compassionate care, community engagement and advocacy for animals. One of the many programs MHS has created and implemented in support of its mission is a law enforcement training program to teach first responders how to deal with animals encountered in the field. While MHS expresses no opinion regarding whether the killing of the dogs in this case was justified, MHS strenuously objects to the court's decision to grant defendants' motion for summary judgment based on the court's legal conclusion that the plaintiffs did not have a possessory interest in their unlicensed dogs to support a claim for relief under 42 U.S.C. § 1983. MHS is gravely concerned that the decision in this case could negatively impact the human-animal bond by calling into question the fundamental principle of animals as property and an owner's right to a legally-protected interest in that property. The property law protections afforded to animals and their owners are already perceived as insufficient by pet owners who view their pets as family members, and to deny even those most basic

protections as this court did could have unintended consequences that extend far beyond this case.

Attorneys for Animals (AfA) is a Michigan nonprofit corporation (ID no. 896398), incorporated under the nonprofit corporation act in 1992. Its members consist of attorneys and law students, primarily based in Michigan, with an interest in improving the state of the law as it treats animals through advocacy, litigation and legislative efforts. www.attorneysforanimals.org. As a non-profit organization of legal professionals and animal advocates dedicated to advancing protection for animals, AfA works within the legal system by combining advocacy, litigation and legislative efforts with education.

AfA has long been concerned about the growing incidences of police shooting of dogs, and have welcomed the results in the many cases brought under 42 U.S. Code § 1983 that awarded significant damages to families whose companion animals were wrongly killed. AfA was equally discouraged by the results in the referenced case, believing it to be a misreading of the Michigan Dog Law (a statute with which we are familiar and that we have been working to update), and bad public policy.

The Animal Welfare Clinic of Michigan State University College of Law is an educational component of the Law College with a focus on the educational experience of law students interested in the legal issues that relate to animals. The Clinic concern in this case is that the characterization of dogs as contraband is a significant misunderstanding of basic property law in Michigan and seeks to have the District Court Opinion overturned on this point.

In light of these concerns, the three Amicus parties have a strong interest in the proper resolution of this case and believe this brief will be of assistance to the Court.

STATEMENT OF THE CASE

Dogs are unlike the guns and drugs discussed in cases dealing with the ownership of contraband. Dogs are not considered inherently illegal by any government. It is not illegal under federal or state law to purchase or own a dog. It is not illegal to purchase an unlicensed dog.

In the first paragraph of District Court's Opinion the plaintiffs are referred to as "the dog owners", as it must, as there is no other legal term to better describe the relationship of the plaintiffs and the animals in question. If they are the owners then the cause of action under 42 U.S.C. § 1983 should be available to them. But the opinion also states that the animals are contraband and therefore not property of the plaintiffs. The district court's opinion cannot have it both ways: either the plaintiffs are the dog owners or they are not.

Accepting that property law as it relates to animals is primarily state law, it is inappropriate for a United States district court to alter the fundamental property law of the state in which it sits, impacting perhaps over two million Michigan

citizens,¹ with no support from either statutory or decisional law of that jurisdiction.

¹ The total US population of dogs is estimated at 89.7 million dogs. Michigan has 3% of US households, which equate to roughly 2,690,000 people in households with dogs. See, <https://www.statista.com/statistics/198100/dogs-in-the-united-states-since-2000/>, & <https://www.census.gov/quickfacts/fact/table/MI,US/PST045216>.

STATEMENT OF FACTS

The factual details of the case are set out in the District Court opinion and Appellant brief. This brief is focused upon the critical issue of the property status of the dogs at the time of their being killed by police. There are no facts in dispute relating to this issue.

There is no claim that the plaintiff's possession of the dogs prior to the shooting was other than lawful. There was no showing of ownership in any other person. No claim that the police who entered the home had any prior knowledge as to the dog license status of the animals. No claim that the police inquired about the license status of the dogs once in the house before shooting. The dogs were not the subject of the search warrant.

In the absence of such facts, it is a fair assertion that the license status of the dogs was not any factor whatsoever in the events that unfolded that day. It is therefore extraordinarily unfair to the plaintiffs that they be denied their day in court on this technical view of property status. The actions of the public servants should be judged on the merits of a 42 U.S.C. § 1983 action, and not be shielded from scrutiny by factors of which neither the plaintiffs, nor the defendants, had awareness of or expectation about at the time of the home entry.

ARGUMENT I

THE DISTRICT COURT'S ANALYSIS OF "CONTRABAND" WAS INCONSISTENT WITH MICHIGAN AND FEDERAL LAW.

(a)

Categorizing of the dogs as "contraband" results in loss of judicial review of a practice by government agents which has a significant impact on members of the public.

i. Plaintiffs were not afforded due process before the seizure of the alleged contraband.

The initial issue to be faced is the use of the term "contraband." That term is misused in this context.

Black's Law Dictionary defines the term as "goods exported from or imported into a country against its laws." Black's Law Dictionary (Rev. 4th edition, 1968) at p. 393. A contemporary dictionary uses an analogous definition, i.e., "illegal or prohibited traffic in goods; [g]oods or merchandise whose importation, exportation or possession is forbidden." Merriam-Webster (i-pad app., 2017).

In the case at hand, no claim of "trafficking" in dogs has been raised. They were not being taken to Canada or into a jail. The dogs were in that most protected of places, the plaintiffs' home.

As that is the term used in the district court's opinion, this brief will also continue to use the term. As used in the opinion the term "contraband" refers to goods which are illegal for a person to have and therefore cannot have any property interests in the goods so as to justify a claim under 42 USC § 1983.

This case differs significantly from forfeiture-of-goods cases. In those circumstances, the claimant is entitled to a hearing to determine if the seized items are "contraband." If so, then the claimant loses all claims of title. For example, if a prisoner's cell is searched and suspicious substances are found and removed by guards, the prisoner still has an administrative hearing to determine if it is contraband.²

In the case at hand, however, the dogs are dead. A post-"taking" hearing is futile, because the dogs cannot be revived. The shooting of the dogs - the "seizure" of the plaintiffs' property - was an arbitrary act by the police. No state actor ever determined that the dogs were contraband before they were killed and, therefore, the plaintiffs were deprived of their property without the due process of law which U.S. Constitution provides them.

² Michigan Department of Corrections, Policy Directive, Number 04.07.112 ("Prisoner Personal Property Policy").

The point of a due process hearing is to act as a check on over-intrusive actions by government officials against the property rights of individuals. Yet, the plaintiffs' received no hearing.

Given the nature of the execution of drug warrant in a private residence it is difficult to see how any hearing is possible before the events unfold. Therefore, it is imperative the courts retain the power to review the actions of the police after the event to make sure the actions of the government agents are constitutional and in compliance with the civil rights laws.

While the dogs cannot be brought back to life, then at least the possibility of damages under 42 U.S.C. § 1983 should be available to act as a check on over intrusive police actions

ii. Plaintiffs had a possessory interest in their companion animals.

It must also be acknowledged that the “goods” in this matter were not just physical objects with a market value, but companion animals, where there is a fair probability of strong emotional attachment with the owners of the house invaded. This weighs in on the importance of the right of review for property status over the technical existence of a state or local dog license of trivial cost.³

³ In Eaton County, Michigan, for example, a dog license costs \$10 or \$15.

Courts have acknowledged that the distinction between animate “property” and other goods makes the private Fourth Amendment interests involved are appreciable. *See, Altman v. City of High Point*, 330 F.3d 194, 205 (4th Cir. 2003) (“the bond between a dog owner and his pet can be strong and enduring”); *Moreno v. Hughes*, 157 F.Supp.3d 687, 689 (E.D. Mich. 2016) (some owner “think of dogs solely in terms of an emotional relationship, rather than a property relationship ,” quoting ,” quoting *Altman, supra*).

Defendants admitted to the killing of perhaps 90 dogs in the exercise of their police duty. (DC Opinion, page ID 938-39.) A fair question can be raised, therefore, whether the killing of dogs in drug bust operations is standard practice for the Detroit Police Department.⁴ The federal courts should not abandon their duty to review such practices based upon the minor and unrelated issue of whether the dog is licensed by a municipality.

Allowing police officers to rely on the licensure status of a dog to justify killing it will also promote, rather than reduce, dog shootings. Law enforcement officer could now use the excuse that they “did not think the dogs were licensed” to justify the use of lethal force against valuable property in the home of the owner.

⁴ This concern is also supported by the testimony of one of the officers. “When asked whether the only two options for dealing with dogs were to ‘either shoot or kick away,’ Officer Wawrzyniak responded ‘absolutely,’ and that the police ‘have no other tool to deal with a dog.’” (DC Opinion at page ID 932-33.)

If the status of a dog as “contraband” is allowed to bar review of police shooting, then this Court will have relinquished its mandate to check the power of the executive branch.

(b)

The district court’s categorization of unlicensed dogs as “contraband” is not supported by an appropriate application of Michigan law.

The Michigan “dog law,” Mich. Comp. L. Ann. §287.261 *et seq.*, was enacted in 1919 and has been the subject of multiple amendments. For purposes of the case at hand, the relevant section is Mich. Comp. L. Ann. § 287.262, which provides that it is “unlawful for any person to own any dog 6 months old or over, unless the dog is licensed.” *Id.* This language is exactly as it was in the original statute with the exception of an increase in the applicable age to six months from four. (Michigan Acts of 1919, Act 339)

The court should recognize the context of the licensing requirement. Two motivations seem to have existed for the adoption of the law. One was to deal with the spread of rabies by dog bite, a matter of serious public health at that time. The other was to allow dog owners to be identified so that if dog killed livestock, or were otherwise a nuisance, there the responsible owner could be identified.

There is no indication that the licensing requirement was adopted to control

ownership of dogs. Nor is there any indication that the Michigan Legislature, either in 1919 or since then, intended that the owner of an unlicensed dog forfeited his or her ownership of the animal.

There is no direct legislative history of the 1919 act. *Corpus Juris Secundum*, published in 1936, however, is instructional of attitudes at that time. It has a specific section on unlicensed dogs. 3 C.J.S. *Animals* §10 (1936). While it discusses the power to tax (require a license) and the penalties for not having a license, nothing in the text suggests that failure to have a license results in the dog's being considered contraband.

A more recent authority, focused solely on legal issues involving dogs, has a section, "If you don't license your dog." Mary Randolph, *Dog Law* (4th ed.) 2/4 – 2/5 (2001). The author suggests several possible negative consequences, but there is not even the hint that an unlicensed dog would be considered contraband.

The Michigan dog law imposes obligations on the owner of a dog, such as the obtaining a license, and provides punishment for failure to comply with those requirements. The stated penalty is fine of up to \$100 or imprisonment of up to three months. Mich. Comp. L. Ann. § 287.286.

Mich. Comp. L. Ann. § 287.321 to 287.323 addresses the independent issue of when an animal (dog or other) should be considered "dangerous" and thus

justifies removing a dog from the owner and having it killed. There is no distinction in these statutes between licensed and unlicensed dogs or other animals. Notably, the statutory scheme provides for the due process required for removal of property by the government. *See Mich. Comp. L. Ann. § 287.322(3)* (“after a hearing . . .”)

Likewise, chapter 33 of the Animal Industry Act, Mich. Comp. L. Ann. § 287.331 to 287.240, which regulates pet shops, animal control shelters and animal protection shelters, makes no distinction in its provisions between licensed and unlicensed dogs.

Under the criminal law, if an owner of a dog was charged with a crime for actions against his dog, he does not lose his property rights unless a hearing is held. *See, generally*, Mich. Comp. L. Ann. §750.50b(9); Mich. Comp. L. Ann. §750.50b(6). Again, no distinction is made as to licensed or unlicensed dogs; property rights are presumed to be present in both cases.

While two sections of the dog law do provide different treatment for licensed or unlicensed dogs, (Mich. Comp. L. Ann § 287.287 and § 287.279). These sections suggest that the owner of an unlicensed dog has less protections than a licensed dog, but not that all property rights are lost. Instead, the critical section is § 287.277, which requires local government to create a list of unlicensed

dogs and directs the “the prosecuting attorney shall commence proceeding against the owner of the dog”.⁵ This assures a judicial hearing on the issue. But, the consequence of the action is not a determination of the existence of contraband; rather, the only punishment available to the prosecutor is a fine and/or jail time.

There is no evidence suggested in the district court opinion to support the proposition that the Michigan legislature, in either 1919 or its subsequent amendments, contemplated that dogs without licenses would be contraband. Neither is there any national law that makes dogs without licenses contraband.

This Court should reverse the district court.

(c)

The district court’s categorization of unlicensed dogs as contraband is a novel position unsupported by Michigan or federal case law.

No Michigan appellate court has held that an unlicensed dog is “contraband.”

A digital search of the cases of Michigan did not discover any case in which a dog was considered contraband for not having a license. Within the federal

⁵ It is not at all clear that such list even exists, let alone result in any prosecution against unlicensed dog owners.

courts, the limited case law does not support the district court's position.

In *Brown v. Muhlenberg Twp.*, 269 F.3d 205, 208 (3rd Cir. 2001), the court noted that the dog was unlicensed, but did not otherwise consider the fact significant.

In a Pennsylvania case, the state had previously seized the plaintiff's animals in the context of criminal charges for violation of state anti-cruelty law. Under a state hearing he lost possession of the animals. In this subsequent federal case the court found that the plaintiff had no property interest in the animals to support a 4th Amendment claim, because of the prior hearing. *Allen v. Pennsylvania S.P.C.A.* 488 F.Supp.2d 450 (D.C. Penn. 2007).

Perhaps most interesting is an 8th Circuit case from 1995. *Leshner v. Reed*, 12 F.3d 148 (8th Cir. 1994):

The district court concluded no constitutional violation had occurred because the LRPD owned the dog at the time the animal was taken from the Leshers' home. Regardless of the disputed ownership of this dog, the court erred in dismissing the Leshers' Fourth Amendment claim. A seizure of property occurs when there is some meaningful interference with a person's possessory interests in that property. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). The Leshers' constitutional right against unreasonable seizures is not vitiated merely because the defendants believed the dog belonged to the LRPD.

Id at 151. This suggests that the District Court was wrong in the initial premise that ownership was critical to supporting a § 1983 claim. This case states that a

possessory interest is sufficient. Clearly the plaintiffs of this case had a possessory interest in the dogs that were killed.

The district court relied heavily on an unreported district court opinion from Illinois, *Pena v. Village of Maywood*, No. 14 C 4214 (N.D. Ill. Mar. 15, 2016), 2016 WL 1019487. The *Pena* court was uncomfortable about the property status of the dog, but did not hold that it was contraband. Indeed, when considering the list of charges against the dog the lack of a license seems the least compelling reason for concern:

As already noted, the Penas had not licensed, registered, or neutered their pit bull, violating three city ordinances. They kept him too close to a public park in violation of yet another ordinance. They were not oblivious to the reasoning behind these laws—the dog had bitten one of their relatives and, worse, had killed someone’s pet dog while on a walk with Mr. Pena around the neighborhood.

Id. at *8. The court did not hold that the dog was contraband. *Pena*, then, is of minimal value in the present controversy. There is nothing in the record to support a conclusion that plaintiffs “violated three city ordinances,” nor is there any evidence than the dogs had ever posed a threat to anyone at all. *Pena* should not have provided a rationale for granting summary judgment to defendants.

(d)

Categorizing of unlicensed dogs as contraband is contrary to public expectations and removes the certainty of peaceful

possession sought to be established by the longstanding property laws of our common law heritage.

Amicus curiae asks the court to take note of public expectation that when an animal is purchased or adopted, that members of the public believe they own the animal. This is so basic to our society that it is essentially impossible to provide a citation for it.

The state of Michigan does not keep track of title or require any registration of dogs to transfer title; neither do the local license laws suggest that title will transfer only with the obtaining of a license. Mich. Comp. L. Ann. §287.273 allows a dog license to be transferred to a new owner, but does not require it or say anything about ownership status. A dog owner may sell a dog without transferring the license. “Selling” and “licensing” a dog are separate activities.

Commercial kennel dogs are not required to have individual licenses.⁶ That would seem to cause considerable confusion, but is not addressed. These would presumably be lawful dogs but a review of the license roll would not provide information about specific dogs. What do the police do with a raid on a kennel?

Young dogs (i.e., those less than six months old) also do not require licenses.

⁶ Mich. Comp. L. Ann. §287.270 allows a kennel license “in lieu of [the] individual license required under this act . . .”

Is it a consequence of the district court's opinion that, the day after the statute requires a license, the humans no longer own their dog? If not them, then who is the owner and who is responsible for the dog's actions? As they seem to be able to sell the puppies; it seems illogical to hold a puppy is property at five months old but is contraband at seven.

Can veterinarians refuse to return dogs to their humans if the dog is unlicensed? May a neighbor shoot a dog without legal consequence because the dog is unlicensed? These and other questions illustrate that holding that a dog without a license is contraband flies in the face of all reasonable expectations of all the dog owners of the state.

CONCLUSION

In is not fair or appropriate that citizens can lose a constitutional right for failure to pay a small fee to a local government. This is particularly the case when the property in question may well be a beloved member of the family.

There is no law or public policy that supports the district court's conclusion that an unlicensed dog is "contraband" that can be removed from its owner without due process of law.

This Court should reverse.

Respectfully submitted,

/s/David S. Favre

DAVID FAVRE (P37872)

COUNSEL FOR AMICUS CURIAE

Animal Welfare Clinic, MSU College of Law

Attorneys for Animals

Michigan Humane Society

648 N. Shaw Lane, Room 361

East Lansing, MI 48824-1300

(517) 432-6890

CERTIFICATE OF COMPLIANCE

I certify that the foregoing appellant's brief on appeal complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). The text of the brief (exclusive of Disclosure of Corporate and Financial Interests, Table of Contents, Table of Authorities, Statement in Support of Oral Argument, Certificate of Compliance, Certificate of Service and Designation of Appendix), contains text in proportionally spaced typeface (Times New Roman at 14 point), containing 3505 words.

I declare that the foregoing Certificate of Compliance is true to the best of my knowledge, information and belief.

_/_s/_ David S. Favre _____

DAVID A. FAVRE

CERTIFICATE OF SERVICE

On October 19, 2017, I served the attached Amicus Curiae Brief via the Court's ECF system.

I declare under penalty of perjury that the above statement is true to the best of my knowledge, information and belief.

/s/ David S. Favre _____

DAVID A. FAVRE