

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA
CRIMINAL

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COMMONWEALTH OF PENNSYLVANIA :
 :
 vs. : Case No. SA-227-12
 :
 DONNA H. :
 :
 Defendant. :
-----X

2012 AUG -9 PM 2:04
CLERK OF COURT
CHESTER COUNTY

BRIEF OF DEFENDANT

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RELEVANT FACTS

Although there has been some contradictory testimony from the two eyewitnesses to the incident, a number of facts are undisputed:

1. On March 16, 2012, at around 2:30 pm, Will H [REDACTED] and his dog, A [REDACTED], were outside the H [REDACTED]'s residence at [REDACTED].
2. Will was attempting to start a lawnmower and when he looked back up he saw that A [REDACTED] was heading toward the [REDACTED] property at [REDACTED], where Marijaye [REDACTED] was outside with her three dogs.
3. Will followed A [REDACTED] to the [REDACTED] property and began talking with Ms. [REDACTED]. Per the testimony of both Ms. [REDACTED] and Will H [REDACTED], the two were talking for approximately 10 minutes before the dog fight broke out.
4. While Will and Ms. [REDACTED] were talking, the four dogs were sniffing each other, then T [REDACTED] and A [REDACTED] began to play by running around the house and around the yard.
5. In the time before the dog fight broke out, the neighborhood saw an unusual amount of other activity: a stranger pulled down the [REDACTED] driveway to ask directions, the neighbor's Rottweiler was at the fence adjacent the [REDACTED] property, and a third person, the [REDACTED] daughter, came out of the [REDACTED] house.
6. After A [REDACTED] and Will had been on the [REDACTED] property for approximately 10 minutes, a fight broke out between A [REDACTED] and G [REDACTED]. Ms. [REDACTED] and her daughter were continuing to talk to Will and all four dogs were standing near the three humans. No one was looking at the dogs at the time and no one can say what led up to the fight.
7. Will separated the dogs. A [REDACTED] did not bite either Will nor Ms. [REDACTED]. G [REDACTED] bit Ms. [REDACTED] when G [REDACTED] was being carried to the [REDACTED] house.
8. G [REDACTED] suffered a single bite wound with 3 punctures and a large tear, and a fractured front leg.
9. At no time did Ms. [REDACTED] ask Will to take A [REDACTED] off of her property.
10. G [REDACTED] was new to the [REDACTED] household and had only lived there two days. G [REDACTED] and A [REDACTED] had not met prior to the date of the incident.
11. A [REDACTED] had been outside unsecured on the H [REDACTED]'s property on previous occasions while the [REDACTED] other dogs, T [REDACTED] and S [REDACTED], had been outside unsecured on the [REDACTED] property, without incident.
12. A [REDACTED] weighs approximately 65 pounds. According to veterinary records, G [REDACTED] weighs 16.1 pounds.

SUMMARY OF ARGUMENT

Although Defendant is charged with a violation of § 459-305 and § 459-502-A (d), this brief will focus solely on the charge of Harboring a Dangerous Dog under § 459-502-A.

In order to find Defendant's dog, A ■, "dangerous" under Pennsylvania law, the Commonwealth must prove, beyond a reasonable doubt, that A ■ inflicted severe injury on G ■ *without provocation*, and that A ■ has either a *history* of or a *propensity* to attack people or animals. 3 P. S. § 459-502-A. (emphasis added).

The Commonwealth has not proven, beyond a reasonable doubt, that G ■ did nothing, even unintentionally, to provoke A ■, who responded as a normal dog would. The Commonwealth has introduced no evidence of a past history of attacks. And, finally, although "propensity" can be deduced from a single incident, the nature of the incident and expert testimony that A ■ is no more likely than any other dog to attack people or animals suggest that A ■ does not have a "propensity" to attack people or animals.

DISCUSSION

1. The Commonwealth has not proven beyond a reasonable doubt that the "attack" was "without provocation"

The Pennsylvania Supreme Court has defined "provocation" broadly. "Although the Dog Act does not define the term 'provocation,' 'to provoke' has been defined by Webster's Ninth New Collegiate Dictionary 948 (1986), as to 'arouse to a feeling or action; to incite to anger; to call forth; to stir up purposely.'" Eritano v. Commonwealth, 547 Pa. 372, 378 (Pa. 1997). (emphasis added). But, beyond defining the term, neither the Eritano court, nor other Pennsylvania courts, have explored what constitutes "provocation" in an actual case. However,

courts in other jurisdictions with statutory language similar to Pennsylvania's have adopted the same definition of provocation, and have weighed in on how to apply it.

First, courts in a number of other states held that provocation does not need to be an intentional act, but can include an unintentional act. "The definition of 'provocation' does not take into account the intent of the actor; rather, the definition focuses on the nature of the act itself and the relationship between that act and an outcome. Thus, an unintentional act could constitute provocation within the plain meaning of the statute ..." Brans v. Extrom, 701 N.W.2d 163, 165 (Mich. App. 2005). *See also* Nelson v. Lewis, 344 N.E.2d 268 (Ill. App. Ct. 1976); Toney v. Bouthillier, 129 Ariz. 402, 631 P.2d 557 (Ariz. Ct. App. 1981).

Second, at least two states have gone further and adopted what can only be called a "reasonable dog" standard. In 2000, an Illinois appeals court upheld a jury instruction defining provoke as "any action or activity, whether intentional or unintentional, which would be reasonably expected to cause a normal dog in similar circumstances to react in a manner similar to that shown by the evidence." Kirkham v. Will, 724 N.E.2d 1062, 1067 (Ill. App. 2000). This exact jury instruction was also upheld in a Michigan Appeals Court in 2005. Brans v. Extrom, 701 N.W.2d 163, 167 (Mich. App. 2005).

Most of the case law regarding dangerous dogs deals with injuries to people and thus only addresses provocation from the view of what a human could do to provoke a dog. It is more difficult for anyone other than an expert in canine behavior to discern what a dog may do that could provoke another dog. Canine miscommunication is often the impetus for dog fights. A study by Dr. Deborah Goodwin, an animal psychologist at the University of Southampton, in England, shows that the less a dog looks like a wolf, the less it is able to "speak wolf," and thus communicate with other dogs. Deborah Goodwin, John W.S. Bradshaw, Stephen M. Wickens,

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(Feb. 1997). Of the fifteen most important aggressive and submissive behaviors wolves use to communicate with each other during a conflict, Siberian Huskies had all fifteen behaviors, while Cocker Spaniels had only six. Temple Grandin & Catherine Johnson, Animals Make Us Human: Creating the Best Life for Animals 34 (2009). As Fred Kray, Florida dog-bite attorney states, “So what does this have to do with dangerous dogs? It gives you an idea of what constitutes provocation from a dog’s point of view. A lot of times the big dog gets the blame, but it was the little dog that started it.” Fred M. Kray, Big Dogs-Little Dogs: Double Standard (June 18, 2010), <http://www.dangerousdoglaw.com/canine-interest/dog-behavior>.

Defense’s expert, Carol S [REDACTED] has testified that it is possible that G [REDACTED] did something to provoke A [REDACTED]. The fact is that we had a group of dogs that were getting along for an extended period of time and then a fight broke out. Neither owner was looking at the dogs at the time so no one has any idea what might have set it off. G [REDACTED] had only been living in her new home for two days, and this was her third home in her life. She was also now suddenly having to compete in her home with two other dogs. As S [REDACTED] states, “[d]ogs thrive on predictability. Change in routines such as moving to a new home no matter how wonderful it may be, can increase anxiety.” Defense Exhibit 7 at 5. “The sudden presence of a very large, excited dog (A [REDACTED]), along with a growling Rottweiler at the fence adjacent to the property, a stranger in a car pulling in to ask directions, people in and out of the [REDACTED] house, along with the arousal of watching A [REDACTED] and T [REDACTED] run loops around the house and driveway, could significantly increase G [REDACTED]’s already high stress level.” *Id.*

G [REDACTED]’s high stress level could have provoked A [REDACTED]. S [REDACTED] testified that, in her expert opinion, A [REDACTED] could have been “aroused to a feeling or action,” that is, provoked, based on

something that G ■ did. No one is arguing that G ■ deliberately provoked A ■, but an unintentional act, so long as it provokes an animal or dog, may constitute provocation. Nelson v. Lewis, 344 N.E.2d 268, 270 (Ill. App. Ct. 1976). An inability to “speak wolf” could have caused G ■ to communicate inappropriately and inadvertently arouse A ■ to a feeling or action, leading her to respond as a normal dog would. Therefore, the Commonwealth has not met its burden to show, beyond a reasonable doubt, that the incident was without provocation.

2. The Commonwealth has offered no evidence of a history of attacking people or animals

The Commonwealth has not proven beyond a reasonable doubt that A ■ has a history of attacking people or animals. In fact, the Commonwealth has offered no evidence whatsoever of any prior attacks by A ■ on people or animals. Will H ■ testified that in the four and a half years he’s lived with A ■, she has never attacked so much as a squirrel. The Chester County Society for the Prevention of Cruelty to Animals (“CCSPCA”) adopted A ■ out without noting any prior attacks. Defense Exhibit 7 at 4. And a note from A ■’s original owner provided to the CCSPCA states that she is great with people and small children, and that she’s never been mean. Defense Exhibit 7 at 1.

In the past, A ■ has interacted appropriately with both small and large dogs and has shown no signs of aggression toward other dogs. Defense Exhibit 7 at 2. In addition, she completed a six-week group obedience class without any signs of aggression to the other dogs in the class. Id. Because the Commonwealth has shown no evidence of a prior history of attacks, its case fails on this element.

3. The Commonwealth has not met its burden of proof to show a “propensity” to attack people or animals

Because A ■ has no history of attacking people or animals, in order to prevail in its claim that A ■ is a “dangerous dog, the Commonwealth must show that A ■ has a “propensity” to attack.

The Commonwealth has not proven beyond a reasonable doubt that A ■ has a “propensity” to attack people or animals. Although a “propensity” may be inferred from a single incident, courts often find that it is not. In this case, it is inappropriate to infer a “propensity to attack,” because this was not even an “attack.” It was a fight between two dogs, who had not been properly introduced to each other.

Defense’s expert, Carol S ■, has testified that during the behavioral evaluation conducted by her on June 13th, 2012, A ■ exhibited none of the behaviors commonly associated with dog aggression, despite being subjected to a battery of tests design to elicit just such behaviors. Further, Ms. S ■’s report states that, in her expert opinion, A ■ is no more likely than any other dog to present a risk of bite or injury. Defense Exhibit 7 at 5.

A. The 1996 Amendment to § 459-502-A did little to clarify legislative intent

In 1996 the General Assembly amended § 459-502-A to add language that stated that “[a] propensity to attack may be proven by a single incident of the conduct described ...” H.B. 397, 1995 Gen. Assemb., Reg. Sess. (Pa. 1996). This amendment was in response to a decision that found a dog not dangerous because, prior to an incident where it had attacked a child causing multiple lacerations of her face which required plastic surgery, the dog had “never exhibited aggressive conduct or bitten or attacked another individual.” Eritano v. Commonwealth, 547 Pa. 372, 380 (Pa. 1997); Commonwealth v. Figley, 663 A.2d 873 (Pa. Commw. Ct. 1995).

Unfortunately, this amendment did little to clarify the legislature’s intent with regard to “propensity” for two reasons. First, the legislature deliberately chose to use the word “may,” indicating continuing room for judicial discretion in whether a single incident demonstrates “propensity.” Second, the legislature did not statutorily define “propensity.” Neither the Senate nor the House Journals during the 1995 and 1996 deliberations of H.B. 397 give any further insight into the General Assembly’s intent in its choice of words.

B. The legislature, in its choice of language, did not intend this to be a strict liability statute

Despite the lack of a legislative record showing the intent of the General Assembly, there is reason to believe that the choice of the word “may,” was not accidental. Other provisions of Pennsylvania’s dog law are clear in their intent to take away any discretion. For example, Section 502 states that “[a]ny dog which bites or attacks a human being *shall* be confined in quarters approved by a designated employee of the Department of Health, a State dog warden or employee of the Department of Agriculture, an animal control officer or a police officer.” 3 P. S. § 459-502 (a) (emphasis added). If the General Assembly had intended § 459-502-A to be a strict liability statute they would have used a word other than “may.”

Furthermore, under Pennsylvania’s Statutory Construction Act, penal provisions of statutes must be strictly construed. 1 Pa.C.S. § 1928(b)(1). Thus, where an ambiguity is found in the language of a penal statute, “such language should be interpreted in the light most favorable to the accused,” Commonwealth v. Huggins, 836 A.2d 862, 868 n.5 (Pa. 2003) (quoting Commonwealth v. Booth, 766 A.2d 843, 846 (Pa. 2001)). Therefore, the court is compelled to read the word “may,” as “may” and not “shall,” and as allowing judicial discretion to not find “propensity” based on a single incident.

C. Although propensity may be proven by a single incident, courts often find that it is not

Even though a “propensity” to attack may be proven by a single incident, courts often find that it isn’t, although the dearth of written opinions makes this difficult to substantiate.

Three Commonwealth Court cases addressed the issue of propensity after the 1996 amendment, but all three deal with violent attacks by dogs against humans. The first such case, Commonwealth v. Hake, found “propensity” where a dog ran out of a house, bit a child then ran across the street and bit a neighbor. The court interpreted the 1996 amendment to Section 502-A

to allow propensity to be found from a single incident “where it is clear from one attack that a dog is dangerous...” Commonwealth v. Hake, 738 A.2d 46, 50 (Pa. Commw. Ct. 1999).

This theme was again taken up two years later in Commonwealth v. Baldwin, where the court found that a single incident could show propensity as “deduced from the nature of the attack.” Commonwealth v. Baldwin, 767 A.2d 644, 646 (Pa. Commw. Ct. 2001). In Baldwin, propensity was shown when a dog attacked and bit a woman walking down the middle of the street because she was simply walking home and “did not excite or provoke him and tried to retreat.” Id.

Similarly, in Commonwealth v. Seyler, the court found that “propensity” could be deduced from a single incident where a dog jumped out of the window of its owner’s home, joined another dog in attacking a third dog, and then two of the three dogs ran onto a neighbor’s property and began biting her. Commonwealth v. Seyler, 929 A.2d 262, 266 (Pa. Commw. Ct. 2007).

Unfortunately, these cases only show the “contours of the law” in one direction – violent attacks by dogs against humans where propensity is found from the incident at issue. Cases where courts don’t find propensity are resolved at the Court of Common Pleas level and do not come up on appeal. Even in the rare instance of a written opinion where “propensity” was not “deduced from the act” there is insufficient detail to allow extrapolation. In Commonwealth v. Tiberi, the court found that, “[w]hile we recognize that a propensity to attack may be proven by a single incident of conduct described in paragraph (1)(i)(ii)(iii) or (iv), ... nonetheless, we find that the Commonwealth, from all the evidence proffered at trial, failed to sustain its burden.” Commonwealth v. Tiberi, No. 113 SA 2006 (Fayette Cnty. Ct. Common Pleas, Dec. 18, 2006). Unfortunately, the facts of the case are not given, except to say that it involved the attack of a

human being without provocation, and the rationale for finding the propensity element to be unproven is not given.

More recently, a Fayette County Court of Common Pleas judge dismissed dangerous dog charges against a beagle in an animal shelter who had bit a 9-year old child (necessitating three stitches). Liz Zemba, Beagle who bit child spared designation as dangerous, Tribune-Review (March 15, 2012), http://triblive.com/x/dailycourier/news/s_786595.html. However, it is not clear if the case was dismissed or settled, or if fully tried, if the determination hinged on an inability to find “propensity.”

Other than written opinions, we only have anecdotes from other attorneys who have defended dangerous dog charges. In conversations with two attorneys who have handled cases like this in Allegheny County they recount that without exception, courts do not find “propensity” where there has been no prior history of attack, where a certified behaviorist has evaluated the dog and found no aggressive behaviors, and where, as it is in this case, it’s just “dogs being dogs.”

D. A █ does not have “an often intense natural inclination or preference” to attack people or animals.

In the absence of a statutory definition of “propensity,” we are left with the definition adopted by the Pennsylvania Supreme Court in Eritano. There, “propensity” was defined as “an often intense natural inclination or preference.” Eritano v. Commonwealth, 547 Pa. 372, 379 (Pa. 1997). Defense’s expert, Carol S █, testified that, with a reasonable degree of professional certainty in her field, A █ does not have an “often intense natural inclination or preference” to attack people or animals. Defense Exhibit 7 at 5. S █’s behavioral evaluation of A █ revealed “a friendly, non-aggressive dog with good human-interaction skills and self-control. A █ showed good bite inhibition while interacting with [S █] (taking toys and her bone gently). A █’s

behavior is consistent with that of other reasonable, well-mannered and easily managed dogs. A ■ is no more likely than any other dog to present a risk of bite or injury.” Id. Thus, finding that A ■ has a “propensity to attack” based on her behavior would mean locking up every other dog in the Commonwealth, a result surely not intended by the legislature.

E. The nature of the act does not support an inference of a “propensity to attack” because this was not an “attack”

The nature of the act does not support an inference of a “propensity to attack” because this was not an “attack.” Defense’s expert stated that the fight between A ■ and G ■ is not consistent with a predatory attack or the attack of a dog that is inherently dog aggressive. “[I]n an aggressive attack, the fight would have broken out immediately and not after a period of well-mannered play.” Defense Exhibit 7 at 4. Truly dog-aggressive dogs, will focus on attacking dogs when making contact, not playing. Defense Exhibit 7 at 5.

Rather, this was a fight between two dogs “caused by one or both dogs being aroused by the play and stressed by a combination of environmental stimuli.” Defense Exhibit 7 at 4. “Fighting is a natural dog behavior. Fights typically occur in high arousal situations that can be caused by extreme play, competing over resources, stress, anxiety and fear.” Defense Exhibit 7 at 4. The unusual amount of activity at the ■ residence that day – a neighbor’s Rottweiler standing or running along the fence adjacent to the ■ property, an unfamiliar car pulling into the driveway to ask for directions, Ms. ■’s daughter coming out of the house – “could have served to heighten the arousal of any or all 4 of the dogs.” Id. Therefore, the nature of the dog fight does not support an inference of a “propensity to attack.”

F. “Propensity” to attack cannot be inferred from the breed of the dog

During cross examination of defense’s expert, Carol S ■, the Commonwealth seemed to be attempting to establish that “propensity to attack” can be inferred from the breed of the dog.

According to CCSPCA's records, A ■ is a "Boxer/Pitbull" although A ■ has never been DNA tested. It is believed that the CCSPCA based its assessment of A ■'s genetic makeup on her appearance, a notorious unreliable method. A 2009 study found that even people who work with dogs on a daily basis in an expert capacity cannot reliably identify breed mixtures. The study found that, where adoption agencies had identified a dog as a particular breed or mix of breeds, in only a quarter of these dogs was at least one of the breeds proposed by the adoption agencies also detected as a predominant breed by DNA analysis. Victoria Voith et al., Comparison of Adoption Agency Identification and DNA Breed Identification of Dogs, 12 Journal of Applied Animal Welfare Science 253 (July 2009). 87.5% of the dogs were identified by DNA as breeds which had not been recognized by the agency workers. Id.

Regardless of A ■'s actually genetic heritage, the Commonwealth of Pennsylvania prohibits the discrimination against dogs based on breed. 3 P.S. § 459-507-A. And for good reason – courts around the country have found a legitimate factual dispute as to the alleged inherently dangerous nature of certain breeds of dogs, such as "pit bulls." In American Canine Foundation v. City of Aurora, a United States District Court rejected a request for summary judgment, finding that there was sufficient contradictory information about the inherent danger of "pit bulls" to preclude judicial notice. Order on Summary Judgment, American Canine Foundation v. City of Aurora, 618 F. Supp. 2d 1271 (No. 06-CV-1510) 2008 WL 2229943, at *9 (D. Colo. 2008). The court cited other cases where courts have found that there was insufficient evidence that "pit bull" dogs or puppies are inherently dangerous. *See* Carter v. Metro North Assocs., 255 A.D.2d 251, 251-52, 680 N.Y.S.2d 239 (N.Y. App. Div. 1998)

Aggression in dogs stems from a variety of factors, including "a genetic predisposition towards aggression, lack of early socialization with people, specific training to fight, the quality

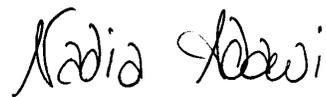
of care provided by the owner, and the behavior of the victim.” Zuniga v. San Mateo Dept. Of Health Serv., 218 Cal. App. 3d 1521, 1533, 267 Cal. Rptr. 755, 761 (Cal. App. 1990). Numerous studies have found that “genetic predisposition” cannot be determined merely by the breed of the dog. A study in Germany found no difference between the temperament of 415 dogs of so-called “dangerous” breeds as compared to Golden Retrievers. SA Ott et al., Is There a Difference? Comparison of Golden Retrievers and Dogs Affected by Breed Specific Legislation Regarding Aggressive Behavior, 2 Journal of Veterinary Behavior 134 (May 2008).

Contrary to the Commonwealth’s assertion that “pit bulls” were bred to be guard dogs, they are better known as the “nanny” dog, because of their gentle disposition and protective nature towards young children. Court’s Sentencing Memorandum at *4, U.S. v. Berry, 2010 WL 1882057 (S.D. Ill. May 11, 2010). The “pit bull” was so popular in the early 1900’s that the breed was used to represent the United States on World War I recruiting and propaganda posters. Breed traits such as friendliness, tolerance towards humans, bravery, and intelligence allowed “pit bulls” to serve in the military, work as service dogs, and stand beside some of our nation’s most respected leaders. Brief of Amici Curiae at 9, U.S. v. Michael Vick, 3:07-cr-00274-HEH-4 (E.D. Va., Sept. 2007). But “pit bulls” of today face a far different set of circumstances. Severe prejudice against this breed has been brought on by decades of poor training, mistreatment, and neglect. The breed’s great strength and bravery has made them the dog of choice for the criminal element, thus perpetuating the myth of the “vicious” pit bull. However, this myth should not be the basis for a finding of “propensity” based on the breed of the dog.

CONCLUSION

For the foregoing reasons, the Commonwealth has not met its burden to show that A is a “dangerous dog” under 459-502-A. The Commonwealth has not shown beyond a reasonable doubt that A was not provoked by something G did, even if unintentional. The Commonwealth has introduced no evidence that A has a history of attacking people or animals. And, although a “propensity to attack” people or animals can be inferred from a single instance, such inference is not supported in this instance. We have expert testimony that A exhibits none of the common signs of aggression to people or other animals and is no more likely than any other dog to present a risk of bite or injury. This was simply a fight between two dogs who were not properly introduced. Both owners should be held accountable, and for her part, Ms. H has taken responsibility for payment of all of G’s veterinary bills related to the incident. Defendant asks that the court find her not guilty of the charge of “Harboring a Dangerous Dog.”

Respectfully submitted,



Nadia Adawi