

IN THE
SUPREME COURT OF MISSOURI
NO. SC 86813

State Of Missouri ex rel. William A. Zobel

Relator,

v.

The Honorable Don E. Burrell, Judge Of The Circuit Court of Green
County, Missouri, et al,

Respondents.

On The Court's Grant of Respondent's Application For Transfer From The
Court Of Appeals For The Southern Districts' Grant Of A Writ Of
Mandamus.

Relator's Reply Brief

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Preliminary Statement In Reply

The dysfunction of §578.018 R.S.Mo. is demonstrable from the undisputed facts before the Court. Respondent states in its brief that by March 11, 2005 the Humane Society of Missouri had incurred costs “in excess of \$116,000.00 in the care and keeping of the horses...”. Resp. Br. at p. 9. On March 15, 2005, four days later, Respondent entered its Amended Order that required Relator to place a bond in the amount of \$105,000.00. Rel. App. at page A-17, paragraph 5. Consequently, even had Relator filed a bond for \$105,000.00, the horses could have nevertheless been sold because the cost of care had already exceeded the amount of the bond. Relator was therefore in a “Catch-22” in that if he failed to put up the bond, the horses would be sold, however, if he *did* put up the bond, his horse would *still be sold* because the bond was insufficient on its face at the time he was required to post it.

The foregoing has relevance because the errors in setting the bond along with such errors as failing to make a finding as to the disposition of each horse¹ are appropriate matters to subject to the appeal process. The State’s efforts on behalf of the humane societies caused events to

¹ Appellant believes that *State v. Larson*, 941 S.W.2d 847 (Mo.App.W.D. 1997) is instructive by analogy. *Larson* held that each animal supporting a criminal abuse charge must be specifically identified.

overtake the orderly appeal process and required Relator to seek a writ of mandamus to save his appeal from becoming moot. Consequently, the case is now before the Court in a most unfortunate posture. The State, advocating on behalf of the humane societies, has brought the case to this Court on the unsupported presumption that failure to allow the immediate disposal of animals after the disposition hearing will adversely impact animal abuse law. Relator is before the Court because he was forced to seek a writ of mandamus to keep the status quo against the efforts of the State, and now must contest not just the interpretation of the law, but its constitutionality because the case has not ripened for an appeal under an assignment of errors.

ARGUMENT

I.

Respondent Incorrectly Asserts That Relator's Petition Should Be Dismissed Because He Asserts Arguments Not Made To The Appellate Court.

Respondent argues in its brief that Relator's petition should be dismissed because the basis of Relator's petition is not the same as that put before the Court of Appeals. Resp. Br. p. 12 – 14. Respondent is incorrect for two reasons. First, Relator is not before the Court on appeal, but on Respondent's Application for Transfer. Respondent asserted in the

Application for Transfer that the interpretation of §578.018 R.S.Mo. is a matter of general interest with important impact to public policy, and the “issue before the Court is one of statutory construction”². Consequently, it is Respondent that has altered the basis of the issues before the Court and now seeks advantage in the procedural peculiarities that is created by a transfer of a writ of mandamus by the party against which the writ is entered. For all intent and purpose, Respondent is the Appellant and Relator is the Appellee. It is disingenuous at best for the State to represent to this Court that the interpretation of §578.018 R.S.Mo. is the “issue before the Court”, and then argue to deny Relator the opportunity to respond to the issue on procedural grounds. It would be patently unjust to allow Respondent to bring the matter before this Court when it has none of the attributes of an “aggrieved party” required by §512.020 R.S.Mo., but then grant Respondent’s its objection to Relator’s brief.

The second reason Respondent errs by its assertion that Relator has altered the issues from that presented to the Appellate Court is that it is simply incorrect. The basis for seeking the writ of mandamus is the same in this Court as it was in the Appellate Court: the circuit court was without jurisdiction to order the sale of Relator’s horses under §578.018 R.S.Mo. To the extent that the legal fictions involved in the matter now

² See Application for transfer at p. 4.

before the Court require issues to be preserved in the lower courts, Relator has done so.

II.

Issues Raised In Relator's Substitution Brief Are Appropriately Before The Court Under The Doctrine Announced In *State Ex Rel Noranda Aluminum, Inc. V. Rains*.

Notwithstanding Relator's foregoing argument, the posture of the this case implicates the doctrine announced by this Court in *State ex rel Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861 (Mo.banc 1986). In *Noranda* the Court addressed the propriety of deciding a rather ancillary issue in a writ proceeding. The Court noted that there is a "category" of cases that act as a mechanism for "deciding an important legal question that routinely escapes this Court's attention because of the litigation process and the lack of interest in some instances to prosecute an appeal at a client's expense." *State ex rel Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d at 862. The Court then announced that:

[W]here there is an issue which might otherwise escape this Court's attention for some time and which in the meantime is being decided by administrative bodies or trial courts whose opinions may be [sic] reason of inertia or other cause become percedent [sic]; and, the issue is being decided wrongly and is not a mere misapplication of law; and, where the aggrieved party may suffer considerable

hardship and expense as a consequence of such action, we may entertain the writ for purposes of judicial economy under our authority to “issue and determine original remedial writs.”

State ex rel Noranda Aluminum, Inc. v. Rains, 706 S.W.2d at 862,863.

In its application for transfer, Respondent stated:

Circuit Courts throughout the state routinely hold disposition hearings under section 578.018 wherein they convey abused and neglected animals to third parties (e.g., humane societies) for immediate disposition by adoption and/or euthanasia. In 2004, for example, law enforcement placed animals impounded under the authority of sixteen different search warrants with the Humane Society of Missouri alone. These warrants resulted in approximately 941 animals being permanently awarded to the Humane Society of Missouri by circuit courts at the 578.018 disposition hearing, or prior to that hearing, by way of voluntary owner surrender.

Application For Transfer at pp. 10-11.

By the State’s admission, the circuit courts are rather routinely taking peoples property (animals) under §578.018 disposition hearings. A search of Missouri cases, however, reveal but a single case appealed under

§578.018. R.S.Mo.³ It would thus seem apparent that application of the doctrine set out in *Noranda* to the case before the Court is both appropriate and necessary. Relator's substitution brief is therefore not only correct under the issues presented to the Court by Respondent, but is necessary for its determination of that issue under *Noranda*.

III.

Respondent's Argument That §578.018 R.S.Mo. Is Not Unconstitutionally Vague Because The Terms Animal Abuse And Animal Neglect Are Elsewhere Defined Is Not Persuasive And Does Not Save The Statute.

In his substitute brief, Relator argues that the express language of §578.018 R.S.Mo. is unconstitutionally vague because the term "neglected or abused animals" is not defined for purpose of the civil action of impounding the animals. In response to Relator's position, Respondent argues that both animal neglect and animal abuse are defined in the criminal statutes and that those definitions serve to define the terms for purposes of §578.018. Resp. Br. at p. 35. Respondent states that animal abuse is defined in §578.012 R.S.Mo. as "when a person 'having ownership or custody of an animal knowingly fails to provide adequate

³ See, *Boshers v. Humane Soc. Of Missouri, Inc.*, 929 S.W.2d 250 (Mo. App.S.D. 1996).

care or control”’. Id. This, of course, does not define an abused animal; it defines an animal abuser. It is not sufficient for a law that impinges upon the constitutional right of property ownership to infer abuse from charges of abuse. Stated another way, the Respondent would support the impoundment and dispossession of animals solely upon the fact that an owner has been charged with abuse. Of course in this case, the animals were impounded prior to any charges being filed and the issue of whether any abuse charges had been filed seems not to have been relevant during the disposition hearing. Consequently, by Respondent’s interpretation of the statute, the very act of impounding animals is a self-validating.

If Respondent is correct, however, and the definitions of §§578.008 and 578.012 are substantive law for interpreting §578.018, then §578.018 can only be interpreted as a post-criminal conviction proceeding in animal abuse cases. That is, the statute can only apply in post-conviction situations where the owner has been convicted of animal abuse or neglect. Reading the statute in the context of a post-conviction proceeding makes sense and does not necessitate the Court’s statutory revision to make the law say what the State believes it ought to say so the State can do what it believes it ought to be able to do.

Reading §578.018 as a post-criminal conviction process would allow a search warrant to issue on “probable cause to believe a violation of sections 578.005 to 578.023 **has occurred.**” A conviction for animal

abuse or neglect would certainly support probable cause. Moreover, since *State v. Larson*, 941 S.W.2d 847 (Mo.App.W.D. 1997) requires that abused animals be specifically identified, only those animals specifically identified in the criminal proceedings would be impounded. The disposition hearing provided by §578.018.1(1) is the determination of whether the animals may be returned to the owner (or not) as provided by §578.021. The bond provisions of §578.018.2 would allow a convicted owner an opportunity to dispossess himself of the animals if he reasonably believed the animals would not be returned to him after the disposition hearing and the value of his property (the impounded animals) merited posting the bond and auctioning, or selling the animals.⁴ The disposition hearing would allow the owner to make his own arrangements for the disposition of the animals, and, failing to do so, would allow the court to order their immediate sale or other disposition. This interpretation is in keeping with providing due process and equal protections of constitutional property rights. Certainly reading §578.018 R.S.Mo. in the light of a post-criminal proceeding, brings into focus the abysmal lack of constitutional protections inherent in the law as interpreted by Respondent.

⁴ While the law is largely applied to companion animals, the law does not distinguish among species and must therefore be as applicable to cattle, sheep, pigs, goats, and chickens as it is to dogs, cats and horses.

In *State v. Young*, 695 S.W.2d 882 (Mo. banc 1985) this Court determined that §578.050 R.S.Mo. was unconstitutional. In its ruling the Court stated:

Section 578.050 is not sufficiently clear to give reasonable notice of the prohibited conduct and to apprise enforcers of the proper standards for enforcement. For this Court to convert the statute into a constitutional proscription would be to indulge in statutory revision, a matter within the exclusive province of the General Assembly.

State v. Young, 695 S.W.2d at 886.

In an opinion concurring in the result, Judge Donnelly wrote, “It is enough to hold that §578.050 has deprived appellant of a constitutional right because it fails to satisfy the requirement that a legislature establish minimal guidelines to govern law enforcement.” *State v. Young*, 695 S.W.2d at 887. (Internal quote and cite omitted). Section 578.018 should be found unconstitutional for the very same reasons. The statute clearly impinges upon the property rights of the animal owners but it is so vague that, on its face and as applied, a sick animal cannot be distinguished from an abused one. Section 578.018 is so vague that, as applied, animals that showed no signs of abuse, illness or disease were still be impounded under it rubric. The “disposition hearing”, in practice, evolved from a “sufficiency of the warrant” hearing to an “evidence of abuse hearing” to a “bond proceeding”. These machinations are not the proceedings under a

constitutionally sound law. While the law may be “close enough” to provide animals protection against abuse, it certainly is not close enough to provide constitutional protection for the owners of animals.⁵

IV.

Respondent’s Argument That Exigent Circumstances In Animal Abuse and Animal Neglect Cases Justify Only Those Procedural Safeguards Contained In §578.018 Is Demonstrably Incorrect.

Respondent argues in its brief at page 43, that because of the “exigent circumstances presented in this case, and in most cases involving abuse or neglect, there would be little or no public value in additional safeguards.” This argument is exactly 180 degrees off. It is when constitutional rights are likely to come under strain by “exigent circumstances” that procedural safeguards are most critical. In §578 cases, the public interest of protecting animals from abuse comes into direct conflict with the constitutional right to own and keep animals. When the State has given itself the authority to enter private property of citizens and take that citizen’s property, it is more important than ever to provide

⁵ As Respondent points out in its brief, even the right of the animal owner to be present at the disposition hearing must be inferred. See Resp. Br. at p. 45.

procedural safeguards to the citizens to save them from the sort of abuse of process presented in this case.

The “exigent circumstances”, as demonstrated in this case, allowed even horses that were “fine” to be impounded. The “exigent circumstances” of this case allowed the humane societies to subject the horses to the stress of transporting the majority of them over 200 miles when the statute specifically forbids the impounding of animals if “no... animal shelter is available.” §578.018.1.(2). It is clear, as evidenced by the facts of this case, that “exigent circumstances” becomes the exception that swallows the rule; and along with it, the constitutional rights of Relator.

Conclusion

Section 578.018 R.S.Mo. was not enacted by the Missouri legislature in response to dogs, cats, horses, and goats roaming the capitol’s hallways lobbying the legislature for protection. Instead, 578 was enacted due to the efforts of well-meaning and generous hearted citizens that were, and are, genuinely concerned about the health and welfare of animals. Laws that protect animals from cruelty and abuse are right and good and reflect the kind heart that beats in the chest of Missourians. But also within Missourians lies the strong will to be left alone from government intrusion into their lives. The law that reconciles these two indomitable spirits must be broad enough to satisfy the heart without destroying the will. Section 578.018 R.S.Mo. fails this test.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the limitations contained in Rule 84.04 and that the brief contains 2,751 words. The undersigned further certifies that the discs simultaneously filed with the briefs have been scanned and are free from viruses.

Dale L. Ingram

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief, and documents including the appendix found bound here within, as well a one floppy disc, was mailed via first class mail, postage prepaid to:

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