

NO. 28793

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff-Appellee, v.
RONNIE H. MacDONALD, Defendant-Appellant

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APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT,
HONOLULU DIVISION
(HPD Cr. Nos. 163320DL (1P106-14978),
163366DL (1P106-19168), and
163366DL (1P106-14975))

MEMORANDUM OPINION

(By: Recktenwald, C.J., Watanabe, and Leonard, JJ.)

Defendant-Appellant Ronnie H. MacDonald (MacDonald) appeals from a judgment entered by the District Court of the First Circuit¹ (district court) on September 12, 2007, convicting and sentencing him for one offense of animal nuisance in violation of Revised Ordinances of Honolulu (ROH) § 7-2.3 (1990 & Supp. No. 6, 2-05)² and two offenses of negligent failure to

¹ The Honorable Paula Devens presided.

² ROH § 7-2.3 provides as follows:

Animal nuisance--Prohibited.

It is unlawful to be the owner of an animal . . . engaged in animal nuisance as defined in Section 7-2.2; provided, however, that it shall not be deemed to be animal nuisance for purposes of this article if, at the time the animal . . . is making any noise, biting or stinging, a person is trespassing or threatening trespass upon private property in or upon which the animal . . . is situated, or for any other legitimate cause which teased or provoked said animal[.]

ROH § 7-2.2 (1990 & Supp. No. 6, 2-05) provides:

"Animal nuisance," for the purposes of this section, shall include but not be limited to any animal . . . which:

(continued...)

control a dangerous dog in violation of ROH § 7-7.2 (1990 & Supp. No. 12, 2-08). We affirm in part and reverse in part.

BACKGROUND

The animal-nuisance charge and the first negligent-failure-to-control-a-dangerous-dog charge against MacDonald stemmed from an incident that occurred on June 29, 2006 at the Hawaiian Humane Society (Humane Society) dog park (dog park) in Honolulu, where dogs are allowed to run around without a leash. On that day, MacDonald and his off-leash pit bull, Beautiful Baby Girl (Baby Girl or dog), were in a pond with a fountain at the dog park when three twelve-year-old girls, Michelle, Samantha (Sam), and Konomi, entered the dog park, approached the pond, and began admiring Baby Girl and asking MacDonald questions about her. Shortly thereafter, Baby Girl bit both Michelle and Sam twice on their calves, causing bleeding and/or puncture marks.

Regarding the June 29, 2006 incident, Michelle testified that a few minutes after she and her friends had talked to MacDonald about his dog, the dog "just came out of the water

²(...continued)

. . . ;

(c) Notwithstanding the provisions of [Hawaii Revised Statutes (HRS)] Section 142-75 or any other applicable law, bites or stings a person.

HRS § 142-75 (Supp. 2007) provides now, as it did during all times relevant to the proceedings before the district court, in relevant part, as follows:

Human bitten by dog; duty of dog owners; action against owner. (a) The owner of any dog that has bitten a human being shall have the duty to take such reasonable steps as are necessary to prevent the recurrence of such incident.

. . . .

(c) Each county may enact and enforce ordinances regulating persons who own, harbor, or keep any dog that has bitten, injured, or maimed a person.

and . . . shaked the water off the body and then it, like, sniffed us and all of a sudden it bit me . . . [o]n my right leg . . . [r]ight under the knee." Then, Michelle stated, the dog "bit Sam and then after that, it went crazy, so it ran all around the park[.]" According to Michelle, she and Sam then hid behind Konomi "and then the dog bit me again . . . [o]n my other leg, my left leg" and "then Sam got bit once again[.]"

Sam testified that when she and her friends went to the dog park on June 29, 2006, she saw MacDonald "taking a shower with his dog." She and her friends then went over to talk to MacDonald, "said hi and then we asked what was the dog's name, and then we were just, like, telling him how cute his dog was." According to Sam, the dog then "just came out and started, like, sniffing Michelle" and thereafter, bit Michelle. After that, Sam testified, the dog "went around the pole, like, once or twice" then "went over to, like, me and it jumped on me and bit me" on "my [right] calf." According to Sam, she and Michelle then "ran to this bench thing and we jumped on the bench, and [the dog], like, tried, before we jumped on the bench, [the dog] like, bit us one more time but it wasn't that bad, just like a scratch." Sam also testified that she and her friends eventually got away from the dog and went to the Humane Society "and we just asked them if we could have, like, band-aids, [and] we told them we got bit[.]" An employee of the Humane Society then helped the girls fill out statements about the incident leading to the dog bites. Sam explained that the dog was not on a leash until the Humane Society staff "told [MacDonald] that he needs to get out [of the dog park]."

MacDonald testified that when he and Baby Girl arrived at the dog park on June 29, 2006, no other person or animal was there. He tried to get Baby Girl to "swim in the waterfall and the pond," but because she was a little reluctant, he jumped in

the pool to "try to have her come in." According to MacDonald, after he had been at the park for about a half hour to thirty-five minutes,

all of a sudden to my left side, two teenagers, two teenage girls come from nowhere and then Beautiful Baby Girl, she got startled, and I guess she got very surprised too and she barked and nipped one of the girls.

The following colloquy between MacDonald and his trial counsel then ensued:

Q . . . Prior to that nip, you described as a nip, had Baby Girl ever bit another person?

A Never. She has never bit.

Q Ever bit another animal?

A She's never bit another animal.

Q Another dog?

A Absolutely not.

Q And that's prior to this June 29th date?

A That's correct.

Q Okay. Now, at this time, are you still in the pool?

A I'm still in the pool.

Q What happened next?

A And the girls, the two teenage girls screamed and they started running.

Q Okay. And what did Baby Girl do?

A Baby Girl pursued the two teenage girls and bit the other, not bit, but she nipped the other one also.

Q Okay, okay. Did you attempt to get out of the water?

A Absolutely. I jumped out of the pond as soon as I could and I ran, I ran after Beautiful Baby Girl to restrain her.

Q And when you did reach your dog, did you put a leash on Baby Girl?

A Absolutely. I was able to restrain her and put the leash on her immediately[.]

On cross-examination, MacDonald agreed that none of the girls had provoked, yelled at, or were abusive toward him or Baby Girl. MacDonald also testified that he did not actually see Baby Girl bite any of the girls but presumed that Baby Girl had nipped one of them because the girls screamed. MacDonald also related that he jumped out of the pond as soon as he could and ran after the dog to restrain her, but the girls and the dog were about fifteen feet away before he was able to chase them. When he reached the dog, MacDonald said, he immediately restrained and put a leash on the dog.

The second charge of negligent failure to control a dangerous dog arose from an incident that occurred near the Jack in the Box restaurant (restaurant) at the corner of King and McCully Streets on July 19, 2006. Ryan Cambra (Cambra) testified that on that day, he was walking to the restaurant when he passed MacDonald, who was pushing a wagon and accompanied by a dog on a leash about four feet long. Cambra stated that after he had passed MacDonald, the dog, unprovoked, turned around and bit Cambra "on [Cambra's] butt[,] " causing bleeding and leaving a one-inch scar.

At the conclusion of a bench trial, the district court orally ruled:

Alright, with respect to the cases on our calendar, 1:30 p.m. calendar, Cases TRP6, 7, and 8, State of Hawaii [(State)] versus Ronnie MacDonald, the Court finds [Michelle, Sam, and Cambra] to have been credible. The Court also finds Officer Kerber, Vernon Ling, Yvette Dante provided credible corroborating testimony, and the Court finds that based on the credible evidence adduced that the State has carried its burden of proof in each of these matters and that burden of proof is proof beyond a reasonable doubt and, therefore, the defendant is found guilty on all matters.

The district court sentenced MacDonald to pay a fine of \$50 for the animal-nuisance offense. For the two negligent-failure-to-control-a-dangerous-dog offenses, the

district court sentenced MacDonald to serve concurrent six-month terms of probation and perform one hundred hours of community service for each offense. The district court also ordered Baby Girl to be humanely destroyed but stayed the sentence pending appeal.³

ISSUES ON APPEAL

On appeal, MacDonald contends that:

(1) There was insufficient evidence to support his conviction for negligent failure to control a dangerous dog as to Sam because: (a) the ordinance establishing the offense was not intended to address a situation where a dog bites for the first time; (b) insufficient evidence was adduced to prove that he failed to take reasonable measures to prevent Baby Girl from biting Sam on June 29, 2006; and (c) insufficient evidence was adduced to prove that he negligently failed to take reasonable measures to prevent the attack on Sam; and

(2) There was insufficient evidence to prove that he negligently failed to take reasonable measures to prevent Baby Girl from biting Cambra on July 19, 2006.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the case law and statutes relevant to the arguments advanced and issues raised by the parties, we resolve MacDonald's arguments on appeal as follows.

DISCUSSION

A. ROH § 7-7.2 Does Not Require Evidence of a Dog's Previous Bite.

The offense of negligent failure to control a dangerous dog is set forth in ROH § 7-7.2, which states, in pertinent part:

³ The opening brief indicates that although MacDonald's sentence was stayed, "Baby Girl was put down after sentencing."

Prohibited acts--Conditions on owner--Penalties.

- (a) A dog owner commits the offense of negligent failure to control a dangerous dog, if the owner negligently fails to take reasonable measures to prevent the dog from attacking, without provocation, a person or animal and such attack results in: . . . (2) bodily injury to a person other than the owner. A person convicted under this subsection shall be guilty of a petty misdemeanor for a first offense and a misdemeanor for a subsequent offense and sentenced in accordance with subsections (c), (d), and (e).
- (b) For the purposes of this section, "reasonable measures to prevent the dog from attacking" shall include but not be limited to: (1) measures required to be taken under Article 4 of this chapter to prevent the dog from becoming a stray; and (2) any conditions imposed by the court for the training of the dog or owner or for the supervision, confinement or restraint of the dog for a previous conviction under this section.

The term "[d]angerous dog" is defined in ROH § 7-7.1 (1990 & Supp. No. 12, 2-08) as "any dog which, without provocation, attacks a person or animal. A dog's breed shall not be considered in determining whether or not it is dangerous." ROH § 7-7.1.

ROH § 7-7.1 also provides that the term "'[n]egligently' shall have the same meaning as is ascribed to the term in HRS Section 702-206." HRS § 702-206 (1993), in turn, states, in relevant part:

- (4) "Negligently."
- (a) A person acts negligently with respect to his [or her] conduct when he [or she] should be aware of a substantial and unjustifiable risk taken that the person's conduct is of the specified nature.
- (b) A person acts negligently with respect to attendant circumstances when he [or she] should be aware of a substantial and unjustifiable risk that such circumstances exist.
- (c) A person acts negligently with respect to a result of his [or her] conduct when he [or she] should be aware of a substantial and unjustifiable risk that his [or her] conduct will cause such a result.
- (d) A risk is substantial and unjustifiable within the meaning of this subsection if the person's failure to perceive it, considering the nature and purpose of his

[or her] conduct and the circumstances known to him [or her], involves a gross deviation from the standard of care that a law-abiding person would observe in the same situation.

Additionally, the word "[a]ttack" is defined as "aggressive physical contact with a person or animal initiated by the dog which may include, but is not limited to, the dog jumping on, leaping at or biting a person or animal." ROH § 7-7.1.

"Provocation" means that

the attack by a dog upon a person or animal was precipitated under the following circumstances:

- (1) The dog was protecting or defending its owner or a member of its owner's household from an attack or assault;
- (2) The person attacked was committing a crime or offense while on the property of the owner of the dog;
- (3) The person attacked was teasing, tormenting, abusing or assaulting the dog or at any time in the past had teased, tormented, abused or assaulted the dog;
- (4) The dog was attacked or menaced by the animal or the animal was on the property of the owner of the dog;
- (5) The dog was responding to pain or injury inflicted by the attacked person or animal;
- (6) The dog was protecting itself, its kennels or its offspring from the attacked person or animal;
- (7) The person or animal attacked was disturbing the dog's natural functions, such as sleeping or eating, while the dog was on its owner's property; or
- (8) The dog was responding to a command or encouragement to attack the person or animal.

ROH § 7-7.1. "'Bodily injury' means the same as that term is defined in HRS Section 707-700." Id. HRS § 707-700 (1993) states that "'[b]odily injury' means physical pain, illness, or any impairment of physical condition."

ROH, chapter 7, article 4, entitled "Regulation of Dogs[,]" includes definitions in ROH § 7-4.1 (1990 & Supp. No. 12, 2-08), among them the following:

"Stray" or "stray dog" means any dog: (1) on the premises of a person other than the owner of the dog, without the consent of an occupant of such premises; or (2) on a public street, on public or private school grounds, or in any other public place, except when under the control of the owner by leash, cord, chain or other similar means of physical restraint; provided, that such leash, cord, chain or other means is not more than eight feet in length; and provided further, that this provision shall not be construed to permit that which is prohibited by any other law.

Under the rules of statutory construction, the plain language of a statute controls unless there is "ambiguity," which has been defined as "doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute[.]" City & County of Honolulu v. Inq, 100 Hawai'i 182, 189, 58 P.3d 1229, 1236 (2002).

On its face, ROH § 7-7.2 does not state that the ordinance applies only to owners of dogs that have previously bitten a person. By its plain and unambiguous language, the ordinance applies whenever a dog owner "negligently fails to take reasonable measures to prevent the dog from attacking, without provocation, a person . . . and such attack results in . . . bodily injury to a person other than the owner." The only instance where a "prior" attack by a dog would be relevant is at sentencing, since ROH § 7-7.2(a) provides that "[a] person convicted under this subsection shall be guilty of a petty misdemeanor for a first offense and a misdemeanor for a subsequent offense" and ROH § 7-7.2(c) provides for higher penalties if a negligent-failure-to-control-a-dangerous-dog offense is committed within five years of a previous conviction of the same offense.

B. Insufficient Evidence Was Adduced to Support MacDonald's Conviction for the Offense of Negligent Failure to Control a Dangerous Dog as to Sam.

We agree with MacDonald that insufficient evidence was adduced at trial to support his conviction for the offense of negligent failure to control a dangerous dog as to Sam.

The testimony at trial established that Sam was bitten by MacDonald's dog at a park where dogs are allowed to run around without a leash. MacDonald testified that Baby Girl had never bitten any person or animal before that date, and no evidence to the contrary was adduced. While the exact timing and sequence of events that occurred on June 29, 2006 are not entirely clear, the testimony at trial established that Baby Girl's biting or nipping of Michelle and Sam took place suddenly, unexpectedly, and in close succession. Under these circumstances, the State failed to establish that MacDonald negligently failed to take reasonable measures to prevent Baby Girl from biting Sam on the day in question.

C. There Was Substantial Evidence to Support MacDonald's Conviction for the Offense of Negligent Failure to Control a Dangerous Dog as to Cambra.

Our review of the record reveals substantial evidence to support the district court's conviction of MacDonald for the offense of negligent failure to control a dangerous dog as to Cambra.

Cambra, whom the district court expressly found to be credible, testified that on July 19, 2006, he walked past MacDonald, who was pushing a wagon and accompanied by a thirty-five- to forty-pound, beige-and-white pit bull that was on a leash about four feet long. According to Cambra, after he passed MacDonald, "the dog turned around and bit [him]" in the butt, resulting in bleeding and a one-inch scar. Cambra stated that he did not make any type of motion to the dog or to

MacDonald and did not provoke the dog in any way before being bitten.

There is also substantial evidence in the record from which it can be inferred that although MacDonald was aware of the dog-biting incidents at the dog park, he did not take any reasonable measures, such as muzzling Baby Girl while in public or keeping Baby Girl in his wagon, to prevent the risk that Baby Girl might again bite someone unexpectedly.

The district court did not err in determining that MacDonald negligently failed to take reasonable measures to prevent the dog from attacking Cambra, without provocation, resulting in bodily injury to Cambra.

CONCLUSION

In light of the foregoing discussion, we affirm that part of the judgment of the district court that convicted and sentenced MacDonald for animal nuisance and negligent failure to control a dangerous dog as to Cambra. We reverse that part of the judgment that convicted and sentenced MacDonald for negligent failure to control a dangerous dog as to Sam.

DATED: Honolulu, Hawai'i, January 30, 2009.

On the briefs:

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