STATE OF IDAHO)
County of Kootenai)ss
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CLERK, DISTRICT COURT
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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff/Appellant,

vs.

JOSEPH C. FOELSCH,

Defendants/Respondents.

Case No. **CRM 2004 23525**

MEMORANDUM DECISION AND ORDER ON APPEAL

I. BACKGROUND:

Defendant (Foelsch) appeals Magistrate Judge Eugene A. Marano's entry of judgment of conviction and sentence for violation of Coeur d'Alene Municipal Code (CMC) § 6.05.090- Disturbing the Peace. On October 23, 2004, Foelsch was charged by citation with violating CMC § 6.05.090, Foelsch pled not guilty and trial was held on January 10, 2005, before Judge Marano. At trial, the State called three witnesses: Jennifer Navarro (Navarro), who witnessed Foelsch's dog barking for extended periods of time outside her window and had contacted Animal Control on several occasions; Officer Jana Allman, who issued the citation after visiting Foelsch's home and spoke with Navarro after Animal Control had been unable to investigate Navarro's complaints; and Officer Eric Turrell, who had also visited Navarro's home and witnessed Foelsch's dog barking while chained approximately twenty-five feet from Navarro's home. Foelsch appeared *pro se* at trial. Following the bench trial, Judge Marano found Foelsch guilty.

Foelsch filed his Notice of Appeal on February 15, 2005. Foelsch listed the following

as the issue on appeal (although he expressly did not limit the appeal to this one issue): "Whether or not the court imposed an excessive sentence, specifically reserving thr [sic] right to supplement with additional appellate issues upon review of the transcripts and other requested documents." Notice of Appeal, p. 2, ¶ 4. As set forth in his briefs, Foelsch now appeals on the grounds that CMC § 6.05.090 is void for vagueness because the ordinance "fails to provide sufficient notice to dog owners of the degree of barking that constitutes a violation." Appellant's Brief, p. 3.

II. STANDARD OF REVIEW:

Appeals from the magistrate's division shall be heard by the district court as an appellate proceeding unless the district court orders a trial *de novo*. Idaho Criminal Rule 54.2. Where a district court acts in an appellate capacity on an appeal taken from the magistrate's division, and a further appeal is taken, appellate courts review the record independently of, but with due regard for, the decision of the district court. *State v. Bailey,* 117 Idaho 941, 942, 792 P.2d 966, 967 (Ct.App. 1990).

The constitutionality of a statute is a question of law over which reviewing courts exercise free review. *Lochsa Falls, LLC v. State,* 147 Idaho 232, ___, 207 P.3d 963, 968 (2009) (quoting *American Falls Reservoir Dist. No. 2 v. Idaho Dept. of Water Resources,* 143 Idaho 862, 869, 154 P.3d 433, 440 (2007)).

> There is a presumption in favor of the constitutionality of the challenged statute or regulation, and the burden of establishing that the statute or regulation is unconstitutional rests upon the challengers. An appellate court is obligated to seek an interpretation of a statute that upholds its constitutionality. The judicial power to declare legislative action unconstitutional should be exercised only in clear cases.

Id.

III. Analysis:

A. Preservation of Issues on Appeal

The State preliminarily argues that because Foelsch did not object to CMC § 6.05.090 being admitted or raise constitutional issues before Judge Marano, Foelsch did not preserve this issue for appeal. Brief of Respondent, p. 6. The State points the Court to Idaho case law in which reviewing courts refuse to consider the constitutionality of statutes where the issues were not raised in pleadings or argued before the trial court. *Id.,* p. 7, citing *Oregon Shortline R.R. v. City of Chubbuck,* 93, Idaho 815, 817, 474 P.2d 244, 246 (1970); *Sanchez v. Arave,* 120 Idaho 321, 321-22, 815 P.2d 1061, 1061-62 (1991); *State v. Fry,* 128 Idaho 50, 54-55, 910 P.2d 164, 168-69 (1994). Foelsch has not responded to the State's preliminary waiver argument.

Generally, failure to raise constitutional issues below waives those issues on appeal. *Whitehawk v. State,* 119 Idaho 168, 170, 804 P.2d 341, 343 (Ct.App. 1991) (citing *Sullivan v. Sullivan,* 102 Idaho 737, 739, 639 P.2d 435, 437 (1981)). "The constitutionality of a statute will not be passed on unless it is absolutely necessary for a determination of the merits of the case". *Swensen v. Buildings, Inc.,* 93 Idaho 466, 469, 463 P.2d 932, 935 (1970). An exception to the general rule exists where the constitutional issue raised on appeal concerns a "fundamental error" of the lower court. *State v. Roseman,* 122 Idaho 934, 936, 841 P.2d 1085, 1087 (Ct.App. 1992). Here, the constitutionality of the ordinance at issue, CMC § 6.05.090, is necessary for the determination of the merits of the case, and to the extent fundamental error may have occurred below, this Court can hear Foelsch's issue raised for the first time on appeal. "An error is fundamental when it 'so profoundly distorts the trial that it produces manifest injustice and deprives the accused of his fundamental right to due process.'" *State v. Anderson,* 144 Idaho 743, 748, 170 P.3d 886, 891 (2007) (quoting *State v. Lavy,* 121 Idaho 842, 844, 828 P.2d 871, 873 (1992)).

However, to determine whether any alleged fundamental error below is reviewable, or occurred at all, reviewing Courts must first determine whether lower Courts even committed an error. See *Anderson,* 144 Idaho 743, 748, 170 P.3d 886, 891. Therefore, this Court must engage in a void-for-vagueness analysis both because such analysis is necessary for determination of the merits of this case and to establish whether the ordinance's alleged vagueness produced manifest injustice depriving Foelsch of his fundamental right to due process, which in turn would allow him to raise the issue for the first time on appeal.

B. Void for Vagueness Doctrine

Foelsch argues CMC § 6.05.090, while containing a reasonableness standard, attempts to prohibit any barking, howling, whining, crowing or cry, which is a standard so subjective that it offers dog owners no guidance as to any level or degree of barking prohibited. Appellant's Brief, p. 6. The State replies that the ordinance, when read as a whole, prohibits barking rising to level "such that reasonable persons would be disturbed, then the barking has exceeded what has been proscribed." Brief of Respondent, p. 10.

The ordinance at issue reads:

> 6.05.090: DISTURBING THE PEACE:
>
> It is unlawful for any person owning, harboring or having the care, custody or possession of any animal, bird or fowl to keep or maintain or cause or permit to be kept or maintained upon any premises in the city or upon any public street, highway, sidewalk, alley, park, playground, or other public place in the city, any animal, bird or fowl which by any barking, howling, whining, crowing or by any source or cry disturbs the peace and comfort of any reasonable person or interferes with the reasonable and comfortable enjoyment of life or property, excluding the animal control shelter.

The United States Supreme Court distinguishes between two doctrines used to challenge laws claimed to be facially unconstitutional:

> First, the overbreadth doctrine permits the facial

> invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma,* 413 U.S. 601, 612-615, 93 S.Ct. 2098, 37 L.Ed.2d 830 (1973). Second, even if the enactment does not reach a substantially protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Kolender v. Lawson,* 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

City of Chicago v. Morales, 527 U.S. 41, 52, 119 S.Ct. 1849 (1999). The void-for-vagueness doctrine is premised on the due process clause of the Fourteenth Amendment to the United States Constitution; it is a basic principle of due process that an enactment is void where its prohibitions are not clearly defined. *State v. Korsen,* 138 Idaho 706, 711, 69 P.3d 126, 131 (2003). (citing *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294 (1972)). A statute is void for vagueness where it "either forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning." *Haw v. Idaho State Bd. Of Med.,* 140 Idaho 152, 157, 90 P.3d 902, 907 (2004). When faced with void-for-vagueness challenges, laws must meet two requirements: (1) the laws must create minimum guidelines for police, judges, or juries charged with enforcement of the statute; and (2) they must provide a reasonable person with adequate and fair warning of the proscribed conduct. See *Kolender,* 461 U.S. 352, 357, 103 S.Ct. 1855; accord *Grayned,* 408 U.S. 104, 108, 09, 92 S.Ct. 2294. "The more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine, the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender,* 461 U.S. 352, 358, 103 S.Ct. 1855, 1861 (quoting *Smith v. Goguen,* 415 U.S. 566, 574, 94 S.Ct. 1242 (1974)).

Foelsch cites extensively to *City of Spokane v. Fischer,* 110 Wash.2d 541, 754 p.2d

1241 (Wash. 1988) (en banc), for the proposition that an ordinance without any objective measurement as to the degree of barking amounting to a violation of an ordinance is void for vagueness. Appellant's Brief, p. 5. In *Fischer,* the Washington Supreme Court found the following language unconstitutionally vague:

> No owner of a dog or owner or occupant of premises upon which a dog is kept or harbored may allow such a dog to disturb or annoy any other person or neighborhood by frequent or habitual howling, yelping or barking. Whoever harbors such a dog maintains a nuisance.

110 Wash.2d 541, 542, 754 P.2d 1241, 1241. The Washington Supreme court agreed with the lower Court's finding of vagueness and affirmed the reversal of Fischer's conviction, reasoning that "[t]he crux of the ordinance is that it gives to *any* person who feels a dog's frequent or habitual barking is annoying or disturbing the power to make a subjective determination a crime has been committed." 110 Wash.2d 541, 544-45, 754 P.2d 1241, 1242 (emphasis in original). Foelsch concedes that unlike the ordinance at issue in *Fischer,* CMC § 6.05.090 does possess a reasonableness standard. However, Foelsch argues the standard does not apply to the degree of barking amounting to a violation and, as such, is subjective and offers no guidance on the level of barking prohibited. Appellant's Brief, p. 6. The State argues CMC § 6.05.090:

> [E]stablishes a threshold tolerance and provides a line of distinction both in terms [of] owner conduct and State enforcement in that the disturbance caused must be reasonable. That is, ordinary people of common sensitivity and tolerance set the threshold, not those hypersensitive individuals who might consider a dog's routine bark at their passing presence a frequent, habitual, alarming, unrelenting, "unreasonably loud and long" disturbance.

Brief of Respondent, p. 12.

Courts have held that ordinances may be construed as constitutional by importing a

reasonable person standard into the ordinance's language. *Town of Baldwin v. Carter,* 794 A.2d 62, 68 (Maine 2002). In *Town of Baldwin,* the Court found that the ordinance "only proscribes barking that disturbs the comfort of ordinary people to an unreasonable extent." *Id.* The Court clearly imported a reasonable person standard as the ordinance at issue in *Town of Baldwin* only states:

> No owner or keeper of any dog kept within the legal limits of the Town of Baldwin shall allow such dog to unnecessarily annoy or disturb any person by continued or repeated barking, howling, or other loud or unusual noises anytime day or night.

794 A.2d 62, 64. The Maine Court goes on to evaluate the concept of reasonableness under the common law, finding it a well-defined concept. 794 A.2d 62, 68; citing *State v. Sylvain,* 344 A.2d 407, 409 (Maine 1975) (holding statute not impermissibly vague because it only prohibited objectionable and unreasonable noise and was "framed in words of common use and understanding. Only…noises…[that] offend the sensibilities of the hearing public to an unreasonable degree are prohibited"). Additionally, the ordinance in *Town of Baldwin* contained restrictions which added clarity to its meaning "and set forth an ascertainable standard of guilt": "continued and repeated" language amounted to more than incidental barking; only unnecessary barking was prohibited; and procedural protection in the ordinance provided the dog owner be warned by the town. 794 A.2d 62, 68-69.

In the instant matter, CMC § 6.05.090 prohibits barking which disturbs the peace and comfort of any reasonable person or interferes with the reasonable and comfortable enjoyment of life or property. Therefore, the barking must not only disturb reasonable persons (as opposed to *any* persons in the *City of Spokane* case), it must also unreasonably interfere with enjoyment of life or property. Implicit in this is that incidental or necessary barking would not unreasonably interfere with the enjoyment of life or property, nor would intermittent or necessary barking disturb reasonable people. Ultimately, because

CMC § 6.05.090 in fact does contain a standard as to the degree of barking amounting to a violation, contrary to Foelsch's argument it is likely not overly subjective and likely does offer guidance on the level of barking prohibited (that level of barking being one that disturbs reasonable people and unreasonably interferes with enjoyment of life and property). See e.g. *State v. Holcombe,* 187 S.W.3d 496, 499-500 (Tex.Crim.App. 2006) ("We agree with the State that the Bedford noise ordinance contains objective criteria for determining what conduct is prohibited and therefore does not permit arbitrary enforcement. The ordinance clearly establishes an objective reasonable-person standard by referring to 'neighboring persons of ordinary sensibilities' and banning noise that 'unreasonably disturb[s] or interfere[s] with the peace, comfort and repose' of such persons."); *United Seniors Ass'n v. Social Security Admin.,* 423 F.3e 397, 408 fn. 5 (4th Cir., 2005) ("the objective standard of reasonableness is not unconstitutionally vague."); *People v. Burpo,* 164 Ill.2d 261, 272, 647 N.E.2d 996, 1001-02 (Ill. 1995) ("a reasonableness standard, which suffices to define behavior in other areas of law, is not so amorphous as to render the scheme unconstitutionally vague.").

IV. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED Judge Marano's Decision is AFFIRMED.

DATED this 17th day of September, 2009

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of September, 2009 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – Michael Clapin
Prosecuting Attorney – Jennifer Tinkey

CLERK OF THE DISTRICT COURT

KOOTENAI COUNTY

BY:_____
Deputy