

2007

Kanab City v. Jeff Popowich : Reply Brief

Utah Court of Appeals

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Van Mackelprang; Kanab City Attorney; Appellee's counsel.

Aric Cramer; Cramer Latham; Appellant's counsel.

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June 26, 2008
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IN THE UTAH COURT OF APPEALS

<p>KANAB CITY, Plaintiff/Appellee, vs JEFF POPOWICH, Defendant/Appellant.</p>	<p>Case Number 20070768</p>
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APPELLANT'S REPLY BRIEF

APPEAL FROM A JUDGMENT, IMPOSITION OF SENTENCE, AND ORDER OF
PROBATION DATED October 5, 2007, THE HONORABLE DAVID L. MOWER, SIXTH
DISTRICT COURT, SANPETE COUNTY, UTAH, PRESIDING

VAN MACKELPRANG (#5996)
Kanab City Attorney
126 East 100 South
Kanab, Utah 84741

JODY K. BURNETT (#0499)
WILLIAMS & HUNT
P.O. Box 45678
Salt Lake City, Utah 84145-5678

Appellee's Counsel

ARIC CRAMER (#5460)
Cramer Latham, LLC
90 East 100 South, Suite 201
St. George, Utah 84770
Telephone (435) 627-1565

Appellant's counsel

THE DEFENDANT/APPELLANT IS NOT INCARCERATED FILED
UTAH APPELLATE COURTS

APR 30 2008

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Plaintiff/Appellee,

vs

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VAN MACKELPRANG (#5996)
Kanab City Attorney
126 East 100 South
Kanab, Utah 84741

JODY K. BURNETT (#0499)
WILLIAMS & HUNT
P.O. Box 45678
Salt Lake City, Utah 84145-5678

Appellee's Counsel

ARIC CRAMER (#5460)
Cramer Latham, LLC
90 East 100 South, Suite 201
St. George, Utah 84770
Telephone (435) 627-1565

Appellant's counsel

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ARGUMENT

**I. MR. POPOWICH HAS MARSHALED THE EVIDENCE PURSUANT TO RULE
24(a)(9) Utah R. App. P.**

Counsel for the City indicates that Mr. Popowich failed to marshal despite the statements found on pages three and four of Mr. Popowich's Brief. The City contends there are two lines that were not added to that statement. Therefore, according to the City, that equals a failure to marshal all of the evidence. Counsel for the City then points to the transcript page thirty-seven, lines seventeen through nineteen. A question was asked and answered in the affirmative by the Defendant (if his girlfriend's dogs were ever in his home for three or more days at a time.) Mr. Popowich did not specifically cite to that question and answer in the marshaling section. However, on page four

of his Brief Mr. Popowich cites the Court to Addendum 5, which is Mr. Popowich's entire testimony. Counsel for the City points to this one question and one response and characterizes it as an egregious offense.

Counsel then goes on to say that the second failure of Mr. Popowich is that he "makes the marshaling statement without giving indication of which findings might be supported by the evidence and demonstrating that the evidence is insufficient as to any particular finding by failing to ferret out the fatal flaw in the evidence." Clearly, Mr. Popowich's arguments, both in his summary and in the extended arguments in his Brief, spell out for both counsel and the Court which findings are supported by the evidence and demonstrating that all of the evidence was insufficient. Mr. Popowich has marshaled the evidence both in the spirit and by the letter of the law.

II. THE TRIAL COURT INCORRECTLY DECLINED TO GRANT MR. POPOWICH'S MOTION TO DISMISS.

The City argues that it did not have to prove a negative, i.e. that the exceptions to the Ordinance need not be proven by the City. Even if counsel is correct and the exceptions are merely affirmative defenses that could have been raised by Mr. Popowich, Kanab City Ordinance 13-200.02.010 Licensing, reads in relevant part:

Any person owning a dog within the city limits shall license the dog pursuant to the following provisions:

A. Licensing, Fees and Registration.

1. Registration - - Required - - Dogs only. It is unlawful for any person to own keep or harbor a dog over the age of three months within the limits of this city without making application to the city for that purpose and paying to the city an annual registration fee.

No evidence was shown in the City's case in chief that Mr. Popowich kept the dogs, or

harbored the dogs. Under Kanab City Ordinance 13-200.01.010 Definitions:

“Owner” means any person, partnership or corporation owning, keeping or harboring one or more animals. An animal shall be deemed to be harbored if it is fed or sheltered for three consecutive days or more.

The fact that the City did not show in its case in chief that any of the dogs observed by the animal control officer were observed in that house three consecutive days is sufficient to dismiss the charges for failure to carry their burden of showing that Mr. Popowich was the owner. It is not harmless error, except from the City’s perspective. The evidence of keeping is not present either, as the animal control officer did not observe Mr. Popowich (or any other person) at the home, ever. (See Transcript at ¶ 19, lines 18-21.)

As to the kennel charge under section 13.200.04 Kennels et sec., the City never provided any information that the home was in a residential agricultural district, nor did it enter any evidence as to the house being 200 feet away from any neighboring house, or 150 feet from any road. In fact, there is no showing that Mr. Popowich was trying to run a kennel, only that to “keep” more than two dogs would require a kennel license.

When the Court did not rule on the Defendant’s motion to dismiss, the Defendant was left with no choice but to take the stand and testify truthfully, which he did. At that point he had to testify against himself and he answered honestly that the dogs had been there three or more consecutive days. The Court was in error in ruling that there was a *prima facie* case showing that the Defendant kept the dogs and operated a kennel prior to his testimony.

III. MR. POPOWICH HAS MET HIS BURDEN TO ESTABLISH THAT THE ORDINANCES ARE UNCONSTITUTIONAL.

Mr. Popowich agrees that the presumption of validity applies to all statutes and ordinances passed. Mr. Popowich's analysis is not muddled if the City would look at the arguments presented. This is a due process claim. The threshold issue that is involved in Mr. Popowich's substantive due process challenge, is a property interest subject to constitutional protections such as property interest in Mr. Popowich's land, home and contents of the home. Mr. Popowich has a substantive due process right to not have the government come onto his land, into his house, or take his property, be they dogs or any other property, without due process. (See Utah Constitution Article I, § 14 and the Fourth Amendment of the United States Constitution.) This governmental action is arbitrary, is without a rational basis and does shock the conscience. Mr. Popowich is not complaining about the vagueness of the law as applied to the conduct of others, but is claiming this vagueness as applied to him.

In uncontroverted testimony, Mr. Popowich indicated that the requirement for a dog license or a kennel license in the year 2006 required that his home be allowed to be searched with no limitations upon the government as to the time, scope, or nature of those searches. The Ordinance in 2007 was changed and Mr. Popowich licensed his two dogs at that point.

Q. Jeff, I'd like to draw your attention towards the, ah, issue of a kennel license. Would you tell the Court if you ever applied for a kennel license in 2006.

A. I did not.

Q. Why - - why did you not do that?

A. Because in 2006 you were required to sign a piece of paper consenting for searches of your house. And I didn't feel that was right, so I didn't license my two dogs.

Q. Well, I'm talking about the kennel. I'm not talking about the dogs.

- A. That was for any dog license.
Q. For any dog license. For a kennel license - -
A. Right.
Q. - - or a dog license.
A. Um-hm.

(See Transcript at ¶ 35, lines 20-25 and ¶ 36, lines 1-9.)

The issue in this case and with this Ordinance, is not the health standards that counsel refers to, but the undefined ability for law enforcement to search a home without notice or without probable cause, by signing the license. Notably, that unfettered search wording in the Ordinance was removed in the 2007 version of the City Ordinance.

CONCLUSION

In conclusion, the City still has not and cannot show sufficient legal or factual evidence on why this Court should not overturn the decision of the trial Court. There was insufficient evidence presented in the City's case in chief to support the case going forward. Directed verdict should have been granted. The case should be remanded with an order to dismiss this case. In the alternative, the Court should remand this case to the District Court with an order to dismiss counts 3, 4 and 5, for failure, at the end of the trial, to convict Mr. Popowich beyond a reasonable doubt on those counts. In the third alternative, the Court should remand this case to the District Court with an order to dismiss count 5, due to the fact that Kanab City's Kennel Ordinance was unconstitutionally vague as applied to the facts of this Defendant.

DATED this 29th day of April, 2008.



Eric Cramer
Attorney for Appellant/Defendant

CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing instrument to the following parties of interest on the 29 day of April, 2008.

Clerk of the Court
Utah Court of Appeals
450 South State Street
Salt Lake City, Utah 84114

Van Mackelprang
Kanab City Attorney
126 East 100 South
Kanab, Utah 84741

Jody K. Burnett
WILLIAMS & HUNT
P.O. Box 45678
Salt Lake City, Utah 84145-5678

Jeff Popowich
213 East 350 North
Kanab, Utah 84741



A handwritten signature in black ink, appearing to read "Jeff Popowich", is written over a horizontal line.

ADDENDUM 1

Article I, Section 14. [Unreasonable searches forbidden -- Issuance of warrant.]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

ADDENDUM 2

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.