

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2021-CA-008441-O

ERROL PEREIRA,
Petitioner,

v.

ORANGE COUNTY, FLORIDA,
Respondent.

Petition for Writ of Certiorari
From the Final Order of the Orange County
Animal Services Classification Committee.

Marcy I. LaHart, Esquire, for Petitioner.

Elaine Marquardt Asad, Esquire,
Jeffrey J. Newton, Esquire, for Respondent.

Before STROWBRIDGE, WOOTEN and HARRIS, J.J.

PER CURIAM.

Petitioner in this case seeks a writ of certiorari pursuant to Article V, § (5)(b), of the Florida Constitution and Rule 9.100(c), Florida Rules of Appellate Procedure, to review the final order of the Orange County Animal Services Classification Committee (“Committee”) which classified the attack by Petitioner’s dog (“Kenzo”) as “an attack by a Dangerous Dog with Intent to Euthanize” pursuant to § 767.13(2), Florida Statutes. Petitioner requests that this Court issue a writ of certiorari reversing the Final Order of the Committee that Kenzo be destroyed. The Court has jurisdiction based on § 767.12(4), Fla. Stat. (2021).

DISCUSSION

Standard of Review

This Court reviews quasi-judicial actions of county boards by writ of certiorari. In this context, the Court's certiorari review involves a three-prong test considering whether (1) due process was afforded, (2) the essential requirements of the law were observed, and (3) the administrative findings and judgment were supported by competent, substantial evidence. *Wiggins v. Fla. Dep't of High. Saf. & Motor Vehs.*, 209 So. 3d 1165, 1170 (Fla. 2017). The departure from the essential requirements of the law necessary for granting a writ of certiorari is something more than "a simple legal error." See *Dep't of High. Saf. & Motor Vehs v. Morrical*, 262 So. 3d 865 (Fla 5th. DCA 2019).

State Law Regarding Destruction of Dangerous Dogs

Chapter 767, section 13 of the Florida Statutes mandates the immediate confiscation and destruction of a dog which has been previously declared dangerous and subsequently attacks or bites a person or domestic animal without provocation. This section authorizes the dog owner to request a hearing under § 767.12, Fla. Stat., which requires the animal control authority to afford the owner "an opportunity for a hearing prior to making a final determination regarding the classification or penalty." Section 767.12(3) provides little guidance regarding the nature of this hearing beyond establishing relevant timelines and the general direction that "each applicable local governing authority shall establish hearing procedures that conform to this subsection."

County Code Regarding Dangerous Dog Destruction Hearings

In accordance with the statute, Orange County has adopted its own process for classification and for hearings regarding dangerous dogs in Article II, Chapter 5 of its Code of Ordinances. Section 5-32.1 involves attacks or bites by a dog previously classified as dangerous and mirrors §767.13, Fla. Stat., by directing that the dog owner shall be afforded an opportunity

to request a hearing under Section 5-32. Section 5-32(c) provides the dog owner an opportunity to “appeal the initial determination of dangerous or potentially dangerous” by requesting “a hearing before the animal services classification committee to show cause why such dog should not be declared dangerous or potentially dangerous.” The remainder of section 5-32(c) describes the process and timeline for requesting such a hearing and mirrors the statute in this respect.

Due Process

In this case, the County seeks to put down Petitioner’s family dog, Kenzo, based on Kenzo’s repeated attacks on individuals causing serious injury. The Due Process Clause of the Fourteenth Amendment requires that deprivation of life, liberty, or property be preceded by notice and an opportunity for hearing. *See County of Pasco v. Riehl*, 635 So. 2d 17, 18-19 (Fla. 1994). The Court concludes that Petitioner was provided both notice and an opportunity to be heard.

First, the Orange County Animals Services Division (“Animal Services”) provided notice of an initial determination that Kenzo was “Dangerous” with the penalty of euthanasia on July 2, 2021. This notice referenced the procedures set out in Sec. 767.13, Fla. Stat. (2021) for when a previously determined “dangerous dog” again causes severe injury. A second notice was sent on July 8, 2021 which provided the date and time at which a hearing was scheduled to take place before the Committee. Petitioner was advised of his right to submit evidence to Animal Services no later than three days before the hearing. The notice described the proceeding as an opportunity for the Committee to review the completed investigation and initial determination. Petitioner was advised of his right to have an attorney present at the hearing.

At the hearing, Petitioner was given an opportunity to be heard. Petitioner was permitted to testify, as was his wife, the dog walker, and Kenzo’s animal trainer. Further, counsel for Petitioner was permitted to cross examine the witnesses offered by Animal Services and to ask

and answer questions of the Committee itself. Petitioner was also permitted to introduce numerous evidentiary exhibits at the hearing.

Petitioner claims that in spite of these indicia of procedural due process, he was nonetheless deprived of a fundamentally fair proceeding. Petitioner argues that the hearing took place in a “procedural vacuum without published guidelines regarding how the hearing would be conducted, what burden of proof or standard of proof applies, or what minimum findings must be made before a dog is destroyed.” However, as described by our sister Court in the Seventh Judicial Circuit, due process does not require the County to educate Petitioner regarding who bears the burden of proof or the level of proof required. *See Benton v. City of Palm Coast*, 2018 Fla. Cir. LEXIS 4842. Both section 767.13, Fla. Stat. (2021), and section 4-32.1, of the Orange County Code clearly place the burden of proof on the County to establish that 1) Kenzo had previously been declared dangerous and subsequently 2) bit a person or domestic animal 3) without provocation.

Further, because the case is civil in nature and the Court agrees that Kenzo is Petitioner’s personal property and the county’s action is akin to a civil forfeiture, the appropriate standard of proof is whether the County has met its burden by a preponderance of the evidence. *See Brinkley v. County of Flagler*, 769 So. 2d 468 (Fla. 5th DCA 2000). The Court finds that the County has met this burden based on the evidence introduced and considered at the hearing. The Court notes that the County would have met its burden even if subjected to the more stringent clear and convincing evidence standard.

Future Due Process Concerns

Despite the Court’s conclusion that Petitioner was provided notice and a meaningful opportunity to be heard, the Court has concerns regarding the quality of the relevant Orange County Code provisions. It is undisputed that the Orange County Code does not include the sort

of detailed hearing procedures which Petitioner points to in similar sections of the county code in other Florida counties – such as Broward and Clay County. The Court is concerned that in the absence of more formal, written procedures, other individuals who may not as zealously advocate for their voice to be heard could ultimately be deprived of due process. In particular, the Court is concerned with the problematic language of section 5-32(c) which characterizes the role of the dangerous dog hearing as an “appeal” of the County’s initial determination at which the individual may “show cause.” The Statute does not contemplate dangerous dog hearings as appellate style hearings in any respect, instead these hearings are a first chance instance for individuals to challenge and be heard with respect to the County’s ultimate decision. It is the Court’s recommendation that the County consider including more detailed, written procedures in the Code in order to prevent a possible deprivation of due process.

For example, the Court was particularly concerned by the ability and decision of the County to effectively limit Petitioner’s ability to present evidence by preventing access to Kenzo by Petitioner’s animal behaviorist. While we believe that this decision in the instant case amounted to harmless error because there was no authority under the Statute for a lesser or different sanction, the County’s decision-making authority in this respect is potentially problematic because there is no apparent forum for review of that decision.

Essential Requirements of the Law

The second prong of this Court’s certiorari analysis requires a determination of whether the essential requirements of the law were observed. *See Wiggins* 209 So. 3d at 1170. The departure from the essential requirements of the law necessary for granting a writ of certiorari is something more than “a simple legal error.” *See Morrival*, 262 So. 3d at 865.

Petitioner argues that section 5-32(c), Orange County Code, erroneously places the burden of proof on Petitioner to prove that his dog should not be destroyed. However, as

described above, the Statute and the Orange County Code clearly place the burden of proof on the County, and the County's actions at the hearing did nothing to displace that burden.

Petitioner also argues again that no specified standard of proof was announced at the hearing. As discussed in the previous section, Florida law does not require the County to educate Petitioner regarding the applicable standard of proof in a quasi-judicial proceeding. Nonetheless, as a civil case involving a civil forfeiture the Court finds that the applicable standard was a preponderance of the evidence, and as described above the evidence presented by the County met this standard.

Finally, Petitioner argues that the County failed to adopt procedures consistent with State law. Section 767.12(3) requires "each local governing authority" to "establish hearing procedures that conform to this subsection." However, the relevant subsection's only procedural requirements for a hearing involve the timeframes which Petitioner admits have been adopted in the County Code. As discussed above, while it would be prudent for the County to adopt more detailed procedures governing the required hearing and to adopt those procedures in the County Code in order to avoid potential deprivations of due process, a plain reading of the Statute does not require any specific set of procedures. Accordingly, the County has fulfilled its bare statutory obligation to establish hearing procedures in conformance with sections 767.12(3) and (4), Fla. Stat. (2022).

Competent, Substantial Evidence

The final prong of this Court's certiorari analysis requires consideration of whether the administrative findings and judgment were supported by competent, substantial evidence. *See Wiggins*, 209 So. 3d at 1170. As noted by the County, Petitioner has failed to make any argument regarding whether competent, substantial evidence existed to support the Committee's findings. The Court notes that the record includes evidence in the form of testimony from

Petitioner and the bite victim, as well as photographic and documentary evidence, which supports the Committee's conclusion that Kenzo had previously been declared dangerous, and subsequently did in fact bite an individual unprovoked. Accordingly, the Committee's decision was based on competent, substantial evidence.

Based on the above findings, the Petition for Writ of Certiorari is hereby **denied**.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, on this 4th day of November, 2022.



PATRICIA L. STROWBRIDGE
Presiding Circuit Judge

WOOTEN and HARRIS, J.J., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **Marcy I. LaHart, Esq.**, Marcy I. LaHart, P.A., 249 SE Tuscahill Road, Micanopy, FL 32667 at marcy@floridaanimallawyer.com; and **Elaine Marquardt Asad, Esq.**, Senior Assistant County Attorney, Orange County Attorney's Office, Orange County Administration Center, 201 S. Rosalind Avenue, Third Floor, P.O. Box 1393, Orlando, FL 32802-1393 at elaine.asad@ocfl.net and Judith.catt@ocfl.net, on this 4th day of November, 2022.



Judicial Assistant