

STATE OF MICHIGAN
IN THE 87-C DISTRICT COURT FOR CRAWFORD COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

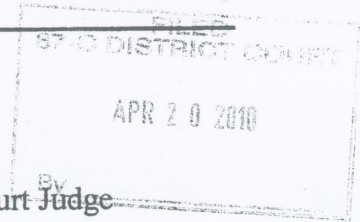
File No: 08-5628-GZ-1

v.

KENNETH MINARD,

COURT'S OPINION AND ORDER

At a session of the Court held on March 29, 2010
Present: Hon. Monte J. Burmeister, Chief Probate/District Court Judge



The Court, after having held multiple evidentiary hearings and listened to argument of counsel, hereby issues the following Opinion and Order in reference to the Prosecutor's request for an Order of Euthanasia, and Respondent's corresponding request to release the dogs in question.

Introduction.

As an introductory matter, it bears noting what this case is not about.

This is not a case of a dog protecting its property from an intruder;
This is not a case of a dog protecting its owner from harm;
This is not a case about a dog simply barking at someone;
This is not a case about a particular breed of dog;
This is not a case about a dog protecting itself from human attack; and
This is not a case about a dog simply running at large.

This is, however, a case about a Dog Attack on a person and whether it is likely that another attack will occur resulting in serious injury or death to a person.

In the instant case, the Court re-listened to all of the testimony from this case, from start to finish, before writing this opinion.

This Court begins noting its earlier finding that Mr. Gardiner was attacked. (It bears noting that this finding was affirmed by the Circuit Court, based upon its review of the testimony, that an attack did in fact occur in this case).

That bears repeating. Mr. Gardiner was attacked. And, this attack lasted 10-15 minutes.

That also bears repeating. Mr. Gardiner attempted, over a period of 10-15 minutes, to get away from these dogs without getting hurt.

This is a case of two dogs, acting in a pact mentality, continuing to confront Mr. Gardiner over the period of 10 to 15 minutes. With one dog circling around Mr. Gardiner, in a classic flanking maneuver while its partner made a frontal assault.

This attack involved the dogs lunging at him, with him using his bike as a shield.

This attack was sufficiently intense such that Mr. Gardiner cautioned the Court he would be concerned if it had been a child or elderly person who had encountered these dogs. And, this attack was intense enough to cause Mr. Gardiner, an able bodied adult male, to fear for his own safety. In point of fact, while he saw no other person present for the attack, he testified he was hoping someone would come forward to assist him.

Mr. Gardiner did not provoke the dogs. In point of fact, he did not do anything to the dogs until it became necessary, in his judgment, to protect himself from physical injury.

The above introduction re-caps Mr. Gardiner's testimony which the Court previously credited, and continues to credit.

At the initial hearing, Ms. Foguth, suggested to the Court that it err on the side of caution for the community and euthanize these dogs. She also identified at that hearing, although it was not explored by any of the parties, that the Shelby and Riley attack was the first time Minard's dogs had attacked but not the only time. Ms. Foguth identified that there had been other incidents with Minard's dogs since the Shelby and Riley attack.

Ultimately, the Court adopted the recommendation of Euthanasia as a sound recommendation, and ordered the same.

Initially, the Prosecution proceeded under one of two dog statutes in place seeking euthanasia of these dogs. The statute under which the Prosecutor proceeded, did not require a determination relative to the likelihood of future attacks.

Upon appeal, the Circuit Court opined that the two existing dog statutes had to be combined and harmonized---read as one. Adding in the other statute then added an additional element if a party sought euthanasia----a determination of whether it was likely that the subject dog(s) were likely to cause serious injury or death to a person in the future. In short, it heightened the standard necessary to reach a conclusion that euthanasia was appropriate.

The Prosecutor had the dogs evaluated and decided to proceed forward with a request for Euthanization. Respondent Minard had the dogs evaluated as well.

It is with this backdrop that this Court has now heard approximately a full day of testimony from three Expert witnesses and the Animal Control Officer.

Testimony of Expert Witnesses and Officer Gail Foguth.

The testimony of the Expert witnesses may fairly be surmised as reflecting the contents of their respective reports. Each witness described the tests they performed and how accepted, if at all, those tests were in the Animal Behaviorist community.

In short, the Prosecutor's Expert witness, Jason Major, opines, albeit with some qualifiers, that the dogs are likely to cause serious injury or death to a person in the future. Conversely, the respondent's Expert witnesses, Ms. Christine Conklin and Dr. Maria Iliopoulou, opine the dogs are not likely to cause serious injury or death to a person in the future. As with Mr. Major's opinion, they each have some qualifications to that opinion.

The Court incorporates by reference the respective reports of each of the Expert Witnesses. It bears noting that each Expert Witness has identified they have in the past recommended Euthanasia for dogs in past cases.

Mr. Jason Major.

With regard to Mr. Major, he has had an occupation as an Applied Animal Behaviorist for 12 years. He presented to this Court with a Bachelor of Science Degree in Psychology and as a Graduate student working on his Masters in Experimental Psychology. The focus of his graduate work is in studying aggression in dogs and facilitating mixed breed adoptions. He had prior work experience for six years at the Animal Behavior Institute, where he was involved in diagnosis and treatment of behavior problems in animals. Specifically, he was involved in predicting a dog's aggressive behavior in the future.

Mr. Major testified that when you re-introduce an animal to old environment, left to their own devices, they will revert back to their prior behavior.

In addressing aggression, he noted that if a dog does not de-arouse quickly there is a possibility of sustained attack in the future. Further, if a dog demonstrates a predisposition to emotionality that they are prone to be aggressive when presented with a stressful situation.

He also testified that aggression is a process and not static. Mr. Major also noted that a dog may have building blocks of aggression, or put differently, a foundation for aggression, from which they can continue to build upon. The net result, if the building is allowed, is a higher level of aggression and more sustained aggression.

With regard to Shelby and Riley, he found in testing them that they were biologically pre-disposed to be aggressive. He also found that they lacked a pro-social skill set (necessary for a well balanced stable dog) and demonstrated emotionality. All of these findings are supportive of aggressive tendencies.

Ms. Christine Conklin.

Christine Conklin, for her part, has been a Dog Trainer and Animal Behaviorist for 25 years. She has also been a Therapy Dogs International trainer since 1996. Further, Ms. Conklin does temperament testing for the Lansing area shelters and has been involved in testing for the U.S. Department of Agriculture relative to pit bulls confiscated from fighting rings.

Based on her testing, Ms. Conklin believes both dogs are stable. Riley, she believes, would qualify to be a Therapy dog. She opines the dogs are not likely to cause serious injury or death based on her evaluation—also taking into account that they are more mature and sexually altered now. Further, Ms. Conklin notes the dogs definitely need more training and need to be monitored. In a controlled situation, she would not see them as anything but social.

In a rare moment of harmony amongst experts, she agreed that Mr. Major's assessment was a fair assessment of aggression but not of fight or flight. She further agreed with Mr. Major that if a dog is aggressive it is a management issue and not a training issue.

Dr. Maria Iliopoulou

Relative to Dr. Maria Iliopoulou, she is a licensed Veterinarian. She also has extensive history evaluating various species of dogs and now only evaluates Pit Bulls. She has done over 50 Pit Bull evaluations.

Her work has involved behavior and disposition assessments.

She concurs that the neutering and spaying of the dogs would make them more calm, and notes this is preferable with Pit Bulls and Rottweilers to avoid issues in the future.

Dr. Iliopoulou notes that under normal circumstances and under good care the dogs should be like they were when she tested them. In this vein, she also notes that aggression is contextual.

In the end, her opinion, based on her testing, is that these two dogs do not pose a danger to the Public. Clarified further, if the things she recommends at the end of her report are followed the dogs will not endanger life.

Officer Gail Foguth.

Relative to Officer Gail Foguth, she testified as to issues following the event with Shelby and Riley. The Shelby/Riley incident occurred on 7/18/08. Subsequent to the Shelby/Riley event, on October 18, 2008, one of Minard's other dogs got loose and

attacked a dog being walked by a neighbor. The attack involved the Minard dog biting the neighbor's dog, causing a puncture wound to the face.

Then, on January 24, 2009, Gail Foguth received another complaint from the same neighbor. The neighbor was confronted by the same dog that had bit his dog on October 18, 2008. This time there was no bite, but the neighbor felt threatened and wanted to report the incident.

Still further, after the 7/18/08 Shelby/Riley incident, the Minards had yet another dog running loose (not Shelby or Riley or the other dog who attacked the neighbor's dog).

Officer Foguth reported the 10/18/08 incident and was instructed by the Prosecutor's Office not to pursue the matter. Officer Foguth identified she was frustrated at not being able to pursue the matter, but she needed the Prosecutor's permission and did not receive that. And, the neighbor who reported the matter and saw no further action taken was frustrated as well.

Court's Findings and Analysis.

With regard to Mr. Major's testimony, the Court credits the following positions articulated by Mr. Major:

1. That aggression is not static.
2. That dogs are capable of having building blocks and/or a foundation for aggression. And, that dogs that experience aggression and find it works for them in a given situation, will respond with aggression in the future to similar circumstances. In short, that dogs can learn to use aggression as a tool to manipulate their situations and/or environment.
3. That a dog may be genetically pre-disposed to aggression.
4. That emotionality is indicative of aggression and lack of a pro-social skill set is indicative of aggression.
5. That aggressive dogs require management, not training.
6. That specifically, as relates to Shelby and Riley, both dogs demonstrate emotionality and a lack of a pro social skill set.
7. That specifically as related to Shelby and Riley, both dogs tested in a manner indicating that they are likely to be aggressive in the future in a manner which is likely to cause serious injury or death to a person, if left on their own.

With regard to the testimony of Ms. Conklin, the Court credits the following testimony:

1. That the dogs in question need to be monitored.
2. That under a controlled situation the dogs would be nothing but social.

3. That Mr. Major's test was an accurate reflection of aggression for these dogs.
4. That aggressive dogs require management as opposed to training.
5. That at the time of testing, the dogs reflected as stable well adjusted dogs.
6. That the dogs would need rehabilitation socialization if placed.

With regard to the testimony of Dr. Iliopoulou, the Court credits the following testimony:

1. That the neutering and spaying of the dogs would make them more calm, and that such action is preferable with Pit Bulls and Rottweilers to avoid issues in the future.
2. That under normal circumstances and under good care the dogs should be like they were when she tested them.
3. That aggression is contextual.
4. That at the time she tested them, Shelby and Riley presented as stable well adjusted dogs.
5. That what occurred with Shelby and Riley and Mr. Gardiner was predatory behavior.

As to Officer Gail Foguth, the Court credits all of her testimony as noted above in this opinion.

The above points do not end the Court's findings on the testimony given.

Despite having differences of opinion, each expert witness has agreed that these two dogs are trainable and/or manageable.

Mr. Major identified that his opinion of risk of future serious injury or death essentially hinged on the issue of whether the dogs were left to their own devices and not put through behavior therapy. He was also very clear that even putting the dogs through therapy was only part of the equation. This is so because the owner also has to be involved and prepared to control the dogs when reintegrated. If the owner doesn't then the therapy won't work and these dogs will be dangerous. That is what he meant by his statement that the dogs will be dangerous in the future if left on their own. And, that is why the Court noted his opinion came with a qualifier, as did each of the other Expert Witnesses.

Ms. Conklin essentially agrees with this premise in the sense that she testified that in a controlled situation the dogs would be social, and that the dogs need training and need monitoring.

Dr. Maria Iliopoulou also agrees with this premise in the sense that she testified the dogs are not dangerous as tested. And, under normal circumstances and under good care, the dogs will present as tested. She also echoed the need for training and monitoring.

Where each Expert Witness departed was the degree to which supervision would be required and whether these dogs need to be trained or managed. Mr. Major essentially said the dogs would require constant supervision. Dr. Iliopoulou and Ms. Conklin made the same claim regarding the need for better supervision but to a lesser degree than constant supervision. Ms. Conklin and Dr. Iliopoulou also think the dogs need training but not behavior management as Mr. Major describes it.

The Court credits that these dogs are aggressive as testified to by Mr. Major. As such, if they were not euthanized they would need managing and/or therapy. In crediting that testimony by Major, the Court also is cognizant of its own questions to Ms. Conklin and Dr. Maria Iliopoulou.

Notably, Ms. Conklin admitted to the Court that if the dogs were returned and got loose again the same incident that occurred with Gardiner could occur again. But she did not think it would be as pronounced. However, she also acknowledged this was all an assumption on her part. In short, Ms. Conklin acknowledged she could not answer the question of whether they would repeat the a Gardiner type incident again if they got out.

Dr. Maria Iliopoulou, for her part, made comments to the Court's inquiries such as:

She believes there is not a high probability of injury or death to a person by these dogs, at least not as they tested. However, she makes the point that the test shows certain behaviors at the time of the test but no test can predict the future. She claims you can't predict a dog's action in the future and in another situation in a different context nobody knows what the dog will do. In sum, when she offers to the court there is no danger, it is a guess. Still further, Dr. Iliopoulou could not offer this Court an explanation for the prolonged attack behavior of the dogs when asked by the Court whether dogs that tested stable in her tests would act that way. She simply indicated it was puzzling.

Further, the extent of the information that Ms. Conklin and Dr. Iliopoulou had on the Gardiner attack came from them googling the case and reading newspaper accounts and portions of Gardiner's statement. In the Court questioning them it became clear they were not very familiar with the underlying facts of the initial attack, which the Court thinks would be useful when testing these dogs.

The limited information they had and the positions as articulated by Ms. Conklin and Dr. Iliopoulou, as noted immediately above, of course weaken the standing of the opinions they offer on the tests they performed. The Court has not credited those tests as a predictor of future behavior for these dogs. In this regard the Court credits Mr. Major's contention that the tests are commonly used by lay-people but not necessarily a good indicator of aggression and risk of future harm.

The Court notes the above segments of the Conklin and Iliopoulou testimony simply to note that were the Court to fully credit the testimony of these two experts, on their best day, they really offer no assurances that the dogs are not dangerous. That is an academic point because that is not really the standard in play here. It is also academic because the Court has affirmatively credited that portion of Mr. Major's testimony related to the aggressiveness of these dogs.

The fact that Ms. Conklin and Dr. Iliopoulou had good tests and encountered dogs they thought were stable does not, in the Court estimation, dismiss Mr. Major's findings about the building blocks of aggression being present in these dogs.

All of that said, it is clear that all the experts agree that in answering the question before the court, i.e. whether it was likely the dogs were likely to cause serious injury or death to a person in the future, that the Court has to consider the dog owner in answering that question. The Court credits each witness's testimony on the point that it needs to consider the owner in this whole equation on whether these dogs are a threat to the point that the prosecutor's case reaches the heightened standard articulated by the Circuit Court.

In considering that issue, Officer Foguth's testimony is significant. As noted earlier the Court has credited her testimony. Despite argument or claim by Respondent's attorney that the Gardiner statement was somehow manufactured/created by Foguth or the Prosecutor, the Court finds such claims to be without merit. Mr. Gardiner testified previously to authoring the statement and the Court credited that testimony.

Additionally on the claim of bias, Respondent's attorney questioned Officer Foguth on why it took so long between issuance of the ticket and the filing of the complaint starting the instant case. She testified she provided the ticket and statement immediately after the incident in July of 2008 (within days), to the Prosecutor's office. Officer Foguth further testified that she was not asked to file a complaint by the Prosecutor until several months later. Officer Foguth was asked why nothing was done as to the October 18, 2008 incident. Again, she testified she was instructed by the Prosecutor's office not to pursue the matter. Such testimony is credited by the Court and does not demonstrate any bias by Ms. Foguth.

Moreover, as a matter of preliminary procedure, this Court notes, aside from Officer Foguth's testimony (which is itself enough to defeat the argument of bias) that Officer Foguth, as with any other officer, does not control when a matter is introduced to the Court by way of a formal complaint being filed. The Prosecutor's Office controls that. As a preliminary procedural matter, Officer Foguth, like any other officer, does not control whether the Prosecutor's office pursues a case or declines a case. The Prosecutor's Office controls that. While this Court cannot answer from the record before it why the October 18, 2008, incident was not pursued, it is common knowledge among the bar of this State that the Prosecutor's office is vested with the discretion to determine whether they pursue a claim or not. Just as making a claim that the Prosecutor's office

may have manufactured a report is without merit, so too is the claim of bias, based on the procedural aspects of this case, against Officer Foguth.

Having noted that the Court credits Officer Foguth's testimony and dismisses as meritless the claims of bias, the Court moves to the next issue.

Everyone concerned knows an attack occurred on July 18, 2008, perpetrated by Shelby and Riley. A citation was issued and Officer Foguth talked to Mrs. Minard about the incident. Basically, there is no big mystery here about what happened. Thus, the Minards were clearly aware that their dogs were involved in an altercation. Further, based on the attack, the Minards knew they needed to control their dogs.

So, with that backdrop, how well do the Minards control their dogs? Not very well.

Within approximately 90 days, on October 18, 2008, they let another one of their dogs get loose who then attacks a neighbor's dog while he is walking it, causing a face puncture wound.

Then, on January 24, 2009, the same neighbor whose dog got the face wound, is accosted again, by the same dog running loose. So, again, within about 90 days from the last attack, a Minard dog is loose again making the neighbor feel threatened.

So now there are three incidents (two attacks and one which the Court will not characterize as an attack as it didn't have sufficient details on the incident to understand why the neighbor felt threatened) with Minard's dogs running at large.

Added to this record of a failure to control their dogs is that Officer Foguth further testified that thrown into the mix, sometime after the Shelby/Riley incident, she had another incident with yet another of Minards dogs running loose (not Shelby & Riley and not the other attacking dog), but this time without an attack.

There seems to be a pattern for the Minards not controlling their dogs.

The Court considers all of these incidents in this Opinion. It has been said "there are not bad dogs, just bad owners." While the Court does not subscribe to that theory wholeheartedly, it is illustrative of the circumstance here.

Even further, aside from any issues of a pattern, in the instant case, the Court considers the evidence presented by Ms. Foguth as being indicative of Mr. Minard's intent to control his dogs. That intent is germane to the question of whether Shelby and Riley will be dangerous in the future.

Accordingly, considering the intent exception under MRE 404(b), the Court finds that Mr. Minard does not have the intent to control his dogs.

Further, the Court also notes that even assuming arguendo the evidence does not meet the exception under MRE 404(b) and the admissibility of the subject evidence thereto is jeopardized under that rule of evidence, the evidence comes in through another avenue and is properly considered by the Court.

The statute(s) in question require the Court to consider future acts. It raises the issue of the future conduct of the dogs. The statute contemplates the Court considering whether it is likely in the future that the dogs will seriously injure or cause death. At its basest terms, the Legislature has required this Court predict future acts of the dogs. The legislature has required this even though one of Respondent's Expert witnesses says that cannot be done (ironically, despite making the claim one cannot predict the future acts of dogs that did not stop this witness from predicting that the dogs will be not be a danger in the future).

All Experts have offered opinions on that question based on their testing. However, all of the experts also squarely place the owner in the middle of that equation. In other words, in one form or another, all the Experts agree that in making that determination of whether the dogs are likely to cause serious injury or death to a person, the Court has to consider the owner. The Court has to consider whether the owner is going to control, monitor, train, and/or manage these dogs because controlling, monitoring, etc. impacts how these dogs will act in the future.

Even if the Court were incorrect in its analysis of MRE 404(b), the Rule of Evidence would be trumped by the statute. Where a statute and a rule of evidence conflict on an issue of substantive law, the statute governs. [See McDougall v. Schanz, 461 Mich. 15, 597 N.W.2d 148 (1999); Donkers v. Kovach, 277 Mich.App. 366, 745 N.W.2d 154 (Mich.App.,2007); and People v. Watkins, 482 Mich. 1114, 758 N.W.2d 267 (2008)].

Since even Mr. Minard's experts place his future conduct in issue, relative to his control of the dogs, the Court has to make a determination whether it can rely on Mr. Minard actually having the intent to control his dogs, for the public's safety. Even if he had the intent they might still not be adequately controlled. But, it's clear that that if he does not have the intent they most certainly will not be controlled. And, this Court has concluded Mr. Minard does not demonstrate an intent to control his dogs, Shelby and Riley included.

As such, the Court makes the following ruling.

Having credited Mr. Major's testimony and tests regarding the aggressiveness of these dogs and the risk of injury, the Court notes that MCL 287.322 provides in relevant part:

After a hearing, the court may order the destruction of the animal, at the expense of the owner, if the court finds that the animal is a dangerous animal that did not cause serious injury or death to a

person but is likely in the future to cause serious injury or death to a person or in the past has been adjudicated a dangerous animal.

None of the experts simply opined that these dogs are likely to cause serious injury or death to a person in the future, period. Mr. Major said, yes they are, IF put back in the same environment without proper therapy to replace the aggression and without an owner who would be omni-present and maintaining the therapy.

Because of the difficulties of ownership as presented by Mr. Minard and his demonstrated lack of control, and crediting Mr. Major's testimony as noted and his report, the Court finds that if the dogs were returned to Minards then and in such event, they are likely to cause serious injury or death to a person in the future.

Alternatively, if the dogs were not returned to the Minards, they very well might not pose a danger, if the proper steps were taken to rehabilitate them and if they were placed with the right type of individual. As noted by Ms. Conklin even fighting dog Pit Bulls have been rehabilitated. The Court acknowledges Ms. Conklin's claim in this regard. In this vein, the Court further notes that Ms. Conklin and Dr. Iliopoulou both presented with impressive experience and credentials. While the Court disagrees with some of their findings, it should be noted that if the Court had either of them, or Mr. Major, or someone of comparable credentialing that the Court could turn these dogs over to, it would. The Court would do that because it would be confident that the dogs would be controlled, monitored, trained and/or managed, as necessary for the public's safety.

The Court's finding that the dogs are likely to cause serious injury or death to a person is hinged on the issue of returning the dogs to the Minards. Without the Minards and their demonstrated intent, the Court might well have a different ruling.

Paragraph 4 of MCL 287.321 applies when the Court finds an animal is dangerous but does not put it down because it hasn't caused serious injury or death or isn't likely in the future. Subparagraph (e) of the statute allows the Court to enter other orders it deems appropriate for the safety of the Public.

Toward that end, at the Minards option, the Court further rules that if the Minards wish to relinquish ownership of these dogs, so that they can be adopted out, the Court would allow them to be adopted out within a specified time frame. However, any adoption would be under certain parameters to protect the public. Those parameters would be as follows:

1. The adoptee would need to be a person of comparable credentialing to the experts in this case. By that, the Court does not mean, as in the case of Ms. Conklin, someone who has evaluated the number of dogs she has, or worked for the USDA, but rather means someone with a background in training and/or animal behavior management. Any of the three experts in this case would work (the court is not suggesting the experts take these dogs—only referencing them by way of example).

2. The adoptee would need to keep the dogs—in other words they could not be re-adopted out.
3. The adoptee would need to put the dogs through behavior management class/therapy.
4. The adoptee would need to be approved by the Court---for the reason that to do otherwise would simply allow this community to potentially rid itself of a safety hazard by foisting that hazard on another community. The Court will not do that.
5. The dogs would not be therapy dogs.
6. The dogs would be adopted and placed within 90 days of written notification from Respondent that he wishes to pursue this option.
7. The adoptee would need to comply with subparagraph 4(b) of MCL 287.322.

If the Minards wish to save their dogs this is potentially an opportunity to do that. The Court will not require they take this step. It is optional. If they wish to avail themselves of this option they shall so notify the Court in writing within 30 days of entry of this Order. Even if they did this it is no guarantee against Euthanasia, as a person to adopt might not be found. However, the Court assumes the shelter and experts would be willing to assist in this regard given there comments during the hearing.

MCL 287.322, et seq. provides that in the event a dog is determined a dangerous animal likely in the future to cause serious injury or death to a person or dog the Court may order that dog put down.


That is an important point because it underscores the Legislature's recognition that there exist circumstances where an animal has not yet caused serious injury or death but should be euthanized nonetheless. This provision of the statute references a clear public policy of the state of Michigan that one does not need to await the drawing of blood to determine an animal should be put down particularly if there is sufficient evidence of the dangerous tendencies of an animal.

Such a policy also recognizes the need to protect the citizens of Crawford County and this State from dangerous animals. The Court is vested with the authority necessary to protect the citizens of this community.

This Court has ruled it will not return these dogs to the Minards, as the Court is of the opinion they would be allowed to build upon their already demonstrated aggressive tendencies and be dangerous, i.e. there would be a high probability of risk of serious injury or death to a person.

Accordingly, if the Minards do not wish to relinquish ownership of the dogs for adoption under the parameters identified above, then the Court exercises its authority, consistent with the legislative mandate outlined above, and Orders these dogs Euthanized.

So Ordered:



4/20/10

Hon. Monte J. Burmeister