

FEB 12 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALVIN STEPHENS; STANLEY
EDWARD HAYES, III, and all others
similarly situated,

Plaintiffs - Appellants,

v.

CITY OF SPOKANE; SPOKANIMAL
C.A.R.E., a Washington Non-Profit
Corporation,

Defendants - Appellees.

No. 07-36006

D.C. No. CV-06-00119-LRS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Lonny R. Suko, District Judge, Presiding

Argued and Submitted February 5, 2009
Seattle, Washington

Before: B. FLETCHER, RYMER and FISHER, Circuit Judges.

Calvin Stephens and Stanley Edward Hayes, III, on behalf of themselves and
a putative class (collectively, Stephens), appeal the district court's order granting

* This disposition is not appropriate for publication and is not precedent
except as provided by 9th Cir. R. 36-3.

summary judgment to the City of Spokane, Washington and Spokanimal C.A.R.E., on Stephens's claims under 42 U.S.C. § 1983. We affirm.

We construe Spokane Municipal Code § 10.03.060 as a whole to mean that a violation is established if a person allows an animal “unreasonably” to disturb an animal control officer or individual residing within 300 feet by “habitually barking, howling, yelping, whining or making other oral noises.” SMC § 10.03.060(A), (B) (2007). In other words, subsection (B) builds on, and is informed by, subsection (A). Therefore, the ordinance, which prescribes a civil infraction, adopts an objective standard that is not unconstitutionally vague. *See Grayned v. City of Rockford*, 408 U.S. 104, 109-14 (1972); *Cameron v. Johnson*, 390 U.S. 611, 615-16 & n.7 (1968); *City of Seattle v. Eze*, 759 P.2d 366, 369-70 (Wash. 1988); *cf. City of Spokane v. Fischer*, 754 P.2d 1241, 1242-43 (Wash. 1988) (striking down a criminal barking dog ordinance that was violated merely by a person's subjective feeling of annoyance or disturbance, regardless of the person's proximity or residency).

Nor does the record show that the ordinance is too vague to be enforced rationally. The barking dog petitions, which Stephens particularly faults, are not charging documents; they are citizen complaint forms. While the forms could no doubt be improved, they have only an investigatory and record-keeping role. If a

citation is issued as a result of a Spokanimal investigation, then the City has to show a violation; that is to say, it has to show that the person cited allowed his animal to unreasonably disturb an animal control officer or resident within 300 feet by habitually barking, howling, etc. on the date charged. Indeed, Stephens challenged the citation in state court, and won (though Hayes did not).

Stephens argues that the citations assess excessive penalties and require mandatory court appearances unauthorized by statute. However, Stephens paid no penalties, and Hayes was ultimately assessed a \$250 penalty that was within statutory limits. *See* SMC § 1.02.950(C)(1) (2007). Requiring a mandatory court appearance, as happened only in Hayes’s case, was a mistake that is not attributable to vagueness of the ordinance. Mandatory court appearances are an available penalty only for criminal matters, whereas violations of SMC § 10.03.060 are plainly civil. *See* SMC § 10.03.060(C).

In sum, SMC § 10.03.060 provides “people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits,” without authorizing or encouraging “arbitrary and discriminatory enforcement.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

AFFIRMED.