



IN THE CIRCUIT COURT OF WHITE COUNTY, ARKANSAS
FIRST DIVISION

JERRY L. MYERS

PLAINTIFF

v.

NO. CV-2009-617

STATE OF ARKANSAS

DEFENDANT

**BRIEF IN SUPPORT OF MOTION FOR
JUDGMENT ON THE PLEADINGS**

Defendant the State of Arkansas submits the following brief in support of its motion for judgment on the pleadings.

Introduction

This declaratory judgment action presents a constitutional challenge to Section 6 of Arkansas Act 33 of 2009, which criminalizes animal fighting and certain related activities. The relevant provision has been codified as Ark. Code Ann. § 5-62-120. Plaintiff Jerry Myers, who possesses “chickens that are genetically born to fight” (Compl. ¶ 1) and therefore considers himself at risk of prosecution under the Act, claims that the statute violates the Arkansas Constitution in that the Act is overbroad, vague, violates his right to privacy, violates the equal protection clause, and violates his due processes rights. Myers has also claimed that the statute violates the equal protection clause of the United States Constitution.

Myers’ complaint fails to state facts upon which relief can be granted and should be dismissed for each of the following reasons:

1. The complaint is barred by sovereign immunity;
2. Myers lacks standing;

3. Myers has failed to state facts that, even if true, would compel the Court to conclude that the challenged statute is unconstitutional;

4. Alternatively, if the Court concludes that Myers may proceed against the State of Arkansas, venue is improper in this Court; and

5. The Court has not obtained personal jurisdiction over the defendant because Myers has failed to perfect service of process.

Accordingly, the State of Arkansas respectfully requests that the Court grants its motion for judgment on the pleadings and dismisses the plaintiff's complaint.

Statement of Facts

During the 2009 Regular Session of the Arkansas General Assembly, the legislature passed, and the Governor signed into law, Arkansas Act 33 of 2009. Section 6 of the Act, which establishes criminal sanctions for "animal fighting" and related activities, provides as follows:

SECTION 6. Arkansas Code Section 5-62-120 is amended to read as follows:

(a)(1) A person commits the offense of unlawful animal fighting in the first degree if he or she knowingly:

- (A) Promotes, engages in, or is employed at animal fighting;
- (B) Receives money for the admission of another person to a place kept for animal fighting; or
- (C) Sells, purchases, possesses, or trains an animal for animal fighting.

(2) Unlawful animal fighting in the first degree is a Class D felony.

(b)(1) A person commits the offense of unlawful animal fighting in the second degree if he or she knowingly:

- (A) Purchases a ticket of admission to or is present at an animal fight; or
- (B) Witnesses an animal fight if it is presented as a public spectacle.

(2) Unlawful animal fighting in the second degree is a Class A misdemeanor.

(c) Upon the arrest of any person for violating a provision of this section, the arresting law enforcement officer or animal control officer may seize and take custody of all animals in the possession of the arrested person.

(d)(1) Upon the conviction of any person for violating a provision of this section, any court of competent jurisdiction may order the forfeiture by the convicted person of all animals the use of which was the basis of the conviction.

(2) Any animal ordered forfeited under a provision of this subsection shall be placed with an appropriate place of custody or an animal control agency.

(e) In addition to fines, penalties, and forfeitures imposed under this section, the court may require the defendant to make restitution to the state, any of its political subdivisions, or an appropriate place of custody for housing, feeding, or providing medical treatment to an animal used for unlawful animal fighting.

(f) As used in this section, "animal fighting" means fighting between roosters or other birds or between, dogs, bears, or other animals.

2009 Ark. Acts 33, § 6.

Myers alleges that he "has in his possession chickens that are genetically born to fight," because of which "litigation is pending or threatened." (Compl. ¶¶ 1, 3.) However, Myers has failed to specifically identify any pending litigation or the name of any individual who has threatened litigation against him. In challenging this criminal statute, Myers alleges that the Act is vague, overbroad, violates his right to privacy, violates the equal protection clause, and violates his due process rights under the Arkansas Constitution. (Compl. ¶¶ 7, 9.)

Motion for Judgment on the Pleadings Standard

Arkansas law requires that complaints state facts demonstrating jurisdiction and an entitlement to relief. *Clayborn v. Bankers Standard Ins. Co.*, 348 Ark. 557, 561, 75 S.W.3d 174, 176 (2002), *overruled on other grounds by Low v. Ins. Co. of North Am.*, 364 Ark. 427, 220 S.W.3d 670 (2005). Mere conclusions do not satisfy this requirement. *Clayborn*, 348 Ark. at

561, 75 S.W.3d at 176. Arkansas is a fact-pleading jurisdiction, and if a plaintiff fails to set out facts in the complaint upon which relief can be granted, the complaint is subject to dismissal. Ark.R.Civ.P. 8(a) (requiring fact pleading); 12(b)(6) (providing for dismissal for failure to state facts upon which relief can be granted); *see also Ark. Dep't of Env't'l Quality v. Brighton Corp.*, 352 Ark. 396, 403, 102 S.W.3d 458, 463 (2003) (“This court has specifically and deliberately rejected the theory of notice pleading.”). Of course, a defendant has the option of moving to dismiss an insufficiently-pled complaint before answering pursuant to Rule 12(a) and (b) of the Arkansas Rules of Civil Procedure. However, the rules also provide that “[a]fter the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings.” Ark. R. Civ. P. 12(c). The State of Arkansas now presents such a motion.

Argument

A. Myers' Complaint is Barred by Sovereign Immunity

Myers' complaint must be dismissed because it is barred by sovereign immunity. Article 5, Section 20 of the Arkansas Constitution unambiguously provides that “[t]he State of Arkansas shall never be made defendant in any of her courts.” As the only named defendant in the present action is the “State of Arkansas,” the plaintiff's complaint is quite clearly impermissible and should be dismissed under the plain language of the Arkansas Constitution. Further, the State's sovereign immunity places the plaintiff's complaint outside the subject matter jurisdiction of the Court. Accordingly, the complaint should be dismissed pursuant to Rule 12(b)(1) of the Arkansas Rules of Civil Procedure.

B. Myers Lacks Standing

Even if Myers could bring a declaratory judgment action against the State of Arkansas, his complaint is subject to dismissal because he lacks standing. Arkansas's declaratory judgment

statute provides a means by which parties may seek a declaration of their rights under certain circumstances. Ark. Code Ann. § 16-111-104. However, for a declaratory judgment action to lie, four elements must be present: (1) a justiciable controversy (2) between parties with adverse interests, (3) each of whom has a legal interest in the controversy, and (4) the issues involved must be ripe for a decision. *McGee v. Ark. St. Bd. of Collection*, 375 Ark. 52, 57-58, 289 S.W.3d 18, 23 (2008). Myers' complaint does not meet either of the first two elements and is therefore subject to dismissal for failure to state facts upon which relief can be granted.

1. **Myers' Complaint Does Not Raise a Justiciable Controversy**

Myers has failed to plead facts sufficient to establish a justiciable controversy, the absence of which compels dismissal of his complaint. With respect to the justiciable controversy element, the Arkansas Supreme Court has stated:

The Declaratory Judgment Statute is applicable only where there is a present actual controversy, and all interested persons are made parties, and only where justiciable issues are presented. It does not undertake to decide the legal effect of laws upon a state of facts which is future, contingent or uncertain. A declaratory judgment will not be granted unless the danger or dilemma of the plaintiff is present, not contingent on the happening of hypothetical future events: the prejudice to his position must be actual and genuine and not merely possible, speculative, contingent, or remote.

Cummings v. City of Fayetteville, 294 Ark. 151, 154-55, 741 S.W.2d 638, 639-40 (1987)

(quoting Anderson on Declaratory Judgments 187 (2d ed. 1951)). For instance, in *Jegley v.*

Picado, 349 Ark. 600, 80 S.W.3d 332 (2002), the Arkansas Supreme Court held that a justiciable

controversy in fact existed with respect to several plaintiffs' constitutional challenge to

Arkansas's then-existing sodomy statute despite the fact that none of the plaintiffs had been

prosecuted or specifically threatened with prosecution because the plaintiffs alleged that they had

engaged in and intended to continue engaging in specific conduct in violation of the statute, thus

leaving the plaintiffs to “face a daily dilemma due to the existence of the statute.” *Picado*, 349 Ark. at 618, 80 S.W.3d at 341.

Although Myers has stated in the most conclusory of terms that “litigation is pending or threatened,” he has failed to allege that any “pending or threatened” litigation is criminal in nature, has been threatened or instituted by any official with prosecutorial authority, or that such litigation even relates to the challenged statute. (Compl. ¶ 3.) Myers has also failed to even state whether he has actually been specifically and individually threatened with prosecution or whether he simply feels threatened with litigation by virtue of the statute’s existence. This is a far cry from meeting the fact pleading requirements imposed by Rule 8 of the Arkansas Rules of Civil Procedure.

Moreover, unlike the plaintiffs in *Picado*, Myers has not even alleged that he has engaged in any conduct prohibited by the challenged criminal statute. The Act in question certainly criminalizes the possession of an animal, including a chicken, for “animal fighting.” 2009 Ark. Acts 33, §6(a)(1)(C). However, Myers has not alleged that his possession of “chickens that are genetically born to fight” is for any such prohibited purpose. To the contrary, Myers has alleged that “there is nothing [he] can do to prevent the chickens from fighting,” which leads the reader to conclude that Myers condemns animal fighting and would like nothing better than for his chickens to behave peacefully, but he is simply incapable of exerting that level of control over his poultry. (Compl. ¶ 8.) In other words, Myers has merely alleged that he owns aggressive chickens, nothing more. Thus, Myers has not alleged any facts that create a justiciable controversy, and his complaint is subject to dismissal for failure to state facts upon which relief can be granted.

2. **Myers' Complaint Does Not Involve Parties with Adverse Interests**

The second element necessary to prosecute a declaratory judgment action is adversity of interests among the parties. This element is lacking because Myers simply named the wrong party defendant in his complaint. Although any prosecution under the challenged statute would be instituted in the name of the State of Arkansas, the real adverse party is the duly elected county prosecutor, who is the only individual statutorily empowered to enforce the criminal statutes. *See* Ark. Code Ann. § 16-21-103 (“Each prosecuting attorney shall commence and prosecute all criminal actions in which the state or any county in his district may be concerned.”) In *Picado*, which serves as a template for adjudicating the present action, the Supreme Court observed that the circuit court had dismissed the Attorney General, who had originally been named as a defendant, because the Attorney General lacked a “nexus with enforcement” of the challenged criminal statute. *Picado*, 349 Ark. at 609, 80 S.W.3d at 335. Instead, the case was allowed to proceed against the Pulaski County Prosecuting Attorney, acting as a representative for the class of all state prosecuting attorneys in their official capacities. *Id.*

The Mississippi Court of Appeals faced a similar situation in *McClurg v. State of Mississippi*, 870 So.2d 681 (Miss. Ct. App. 2004) (en banc). That case involved a Mississippi inmate’s attempt to challenge the constitutionality of a Mississippi state statute governing parole eligibility. The Mississippi Court of Appeals affirmed the trial court’s order dismissing the complaint because the inmate plaintiff had named the “State of Mississippi” inchoate, rather than “the actual parties in interest, namely the Parole Board and Department of Corrections.” *Id.* at 682.

Like the State of Mississippi in *McClurg*, the State of Arkansas can enforce the challenged statute only through its agencies and officials. Just as the Attorney General was not a

proper defendant in *Picado* because he lacked enforcement authority with respect to the challenged statute, the State of Arkansas cannot act independently to enforce the Act 33. Rather, the prosecuting attorneys of the several judicial districts are the only officials charged with the authority and the duty to prosecute crimes. Because Myers has failed to name a defendant with the independent authority to enforce the challenged statute, the second element for declaratory judgment actions – parties with adverse interests – is not met, and Myers’ complaint should be dismissed.

C. **Myers has Failed to State Facts that, if True, Would Require the Court to Declare Act 33 Unconstitutional**

Even if his complaint was not barred by sovereign immunity, and even if he had named a proper defendant and had standing to proceed, Myers’ complaint must nevertheless be dismissed because he has failed to state facts that, if true, would require the Court to conclude that Section 6 of Act 33 of 2009 is unconstitutional. Before addressing each of the ways in which Myers alleges that Act 33 is unconstitutional, it should first be noted that when presented with a constitutional challenge to a state statute, that statute is given a strong presumption of constitutionality. *Picado*, 349 Ark. at 623, 80 S.W.3d at 344. Moreover, the party challenging the statute bears the burden of rebutting the statute’s constitutionality, and “[a]n act should be struck down only when there is a clear incompatibility between the act and the constitution.” *Id.* It is the Court’s duty “to sustain a statute unless it appears to be clearly outside the scope of reasonable and legitimate regulation.” *Id.* Myers cannot even come close to meeting this burden.

1. **The Privacy Right Does Not Encompass the Right to Possess Fighting Chickens**

Myers alleges that Act 33 violates his constitutionally protected right to privacy. (Compl. ¶¶ 4, 9.) However, his complaint does not offer any insight into how he believes the statute infringes upon his privacy right, probably because it simply does not. The right to privacy recognized by the Arkansas Supreme Court is not so broad as to encompass the conduct that the plaintiff claims it protects - possession of “chickens that are genetically born to fight.” (See Compl. ¶ 1.) As such, Myers’ claim that Act 33 violates his right to privacy fails.

The Arkansas Supreme Court first recognized the right to privacy as a fundamental right in *Jegley v. Picado*. That case presented a constitutional challenge to the threatened enforcement of a criminal statute prohibiting various forms of sodomy. After conducting a lengthy analysis of United States Supreme Court jurisprudence relating to the privacy right recognized under the federal Constitution, as well as analyzing various provisions of the Arkansas Constitution, the Arkansas Rules of Criminal Procedure, and prior Arkansas case law, the Arkansas Supreme Court concluded: “it is clear to this court that Arkansas has a rich and compelling tradition of protecting individual privacy and that a fundamental right to privacy is implicit in the Arkansas Constitution.” *Picado*, 349 Ark. at 631-32, 80 S.W.3d at 349-50. In characterizing this fundamental right, the court held that “the fundamental right to privacy implicit in our law protects all private, consensual, noncommercial acts of sexual intimacy between adults.” *Picado*, 349 at 632, 80 S.W.3d at 350. The court further held that a statute that burdens a fundamental right, such as the privacy right, must be subjected to strict scrutiny analysis. *Id.*

With respect to Myers’ privacy right argument, the Court need not review the challenged statute under the strict scrutiny test, or under any other test, because the subject conduct - possessing fighting chickens - has nothing to do with the constitutionally protected privacy right.

2. Act 33 of 2009 Does Not Violate the Equal Protection Clause

Next, Myers contends that Act 33 is overly broad and violates the equal protection provisions of the state and federal constitutions. (Compl. ¶¶ 5, 9.) In conducting an equal protection analysis under Arkansas's Equal Rights Amendment, the Arkansas Supreme Court applies the same standards and relies upon on the same precedents as would a federal court conducting a federal equal protection analysis. *Talbert v. State*, 367 Ark. 262, 271, 239 S.W.3d 504, 512 (2006). Under such an analysis, whether Myers seeks to proceed under state or federal law, his equal protection claim fails because he has not even identified a protected class of which he alleges he is a part.

“Under well-settled equal-protection analysis, any legislation that distinguishes between two groups of people must be rationally related to a legitimate governmental purpose.” *Picado*, 349 Ark. at 634, 80 S.W.3d at 351 (citing *Romer v. Evans*, 517 U.S. 620 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)). Here, however, the challenged statute makes no distinction whatsoever between groups of people. Instead, Section 6 of Act 33 merely prohibits certain types of conduct, such as the sale, purchase, possession, or training of animals for animal fighting. 2009 Ark. Acts 33, § 6(a)(1)(C). This statutory prohibition applies equally to all classes of citizens and does not burden any one particular class to a greater extent than any other. Indeed, the absence from Myers' complaint of any identifiable protected class is fatal to his equal protection claim because it prevents him from proving even the threshold requirement that the statute in question distinguishes between groups of people.

3. Act 33 of 2009 is Not Unconstitutionally Vague

Myers also alleges that Act 33 is unconstitutionally vague. (Compl. ¶¶ 6, 9.) The Arkansas Supreme Court has set out the standard for such a claim in the following terms:

As a general rule, the constitutionality of a statutory provision being attacked as void for vagueness is determined by the statute's applicability to the facts at issue. Further, when challenging the constitutionality of a statute on grounds of vagueness, the individual challenging the statute must be one of the "entrapped innocent," who has not received fair warning; if, by his action, that individual clearly falls within the conduct proscribed by the statute, he cannot be heard to complain. That a statutory provision may be of questionable applicability in speculative situations is usually immaterial if the challenged provision applies to the conduct of the defendant in the case at issue.

Graham v. State, 365 Ark. 274, 278, 229 S.W.3d 30, 34 (2006) (internal citations omitted).

Given the procedural posture of this constitutional challenge – a claim in a declaratory judgment action, rather than a defense to a criminal prosecution – Myers' claim of vagueness is particularly puzzling. Certainly, he cannot take the position that he is an "entrapped innocent," lacking fair notice that he has engaged in conduct that violates the challenged statute and finding himself caught up in a criminal prosecution, because he is the party who has alleged that the statute covers his activities, and he has not specifically alleged that a criminal prosecution is in fact proceeding against him. (*See* Compl. ¶ 8) (alleging that "the statute specifically addresses roosters and birds (chickens) of which plaintiff has possession of."). Not qualifying as an "entrapped innocent," Myers lacks standing to prosecute this aspect of his declaratory judgment action. *See, e.g., Graham*, 365 Ark. at 278, 229 S.W.3d at 34 ("We cannot reach the merits of [the appellant/criminal defendant's] vagueness argument, because she was not an entrapped innocent and, thus, lacks standing to argue that [the challenged criminal statute] is unconstitutionally vague.").

Further, Myers has failed to identify any particular provision of the Act that he considers to be ambiguous or in what manner he considers such a provision to be unclear. He has not alleged that he was in fact confused as to what conduct is permitted and what conduct is prohibited under the Act, nor has he alleged that such confusion resulted in any prejudice to him,

such as an unexpected criminal prosecution. Myers has simply failed to state facts upon which his void for vagueness claim could be granted.

4. Act 33 of 2009 does Not Violate Myers' Due Process Rights

Finally, Myers appears to allege that Act 33 violates his due process rights. (Compl. ¶ 9.) This implication, however, is made without any further specificity as to how Myers believes his due process rights might be imperiled by the statute. Because the challenged statute, which is a criminal statute, does not include any particularized prosecution procedures, it must be assumed that Myers is challenging the Arkansas Rules of Criminal Procedure and the criminal jury trial system overall as an inadequate form of process. This can hardly be viewed as a serious argument, and the State respectfully requests that the Court dismisses it without further consideration.

D. Alternatively, the White County Circuit Court is an Improper Venue

In the event the Court determines that Myers should be permitted to proceed against the State of Arkansas, venue in this Court is improper, and the complaint should be dismissed. Pursuant to Ark. Code Ann. § 16-60-103(3), all actions against the State must be brought in Pulaski County unless the venue laws would also permit the action to be brought in another county as well. Because none of the venue statutes permits this action to be brought in White County, and because the plaintiff has not identified any statute under which this case could be brought elsewhere than in Pulaski County, venue in this Court is improper, and the complaint should be dismissed pursuant to Rule 12(b)(3) of the Arkansas Rules of Civil Procedure.

E. Myers has Failed to Perfect Service of Process on the State of Arkansas

Finally, Myers' complaint should be dismissed pursuant to Rules 12(b)(2) and 12(b)(5) of the Arkansas Rules of Civil Procedure because Myers has failed to perfect service of process on

the State of Arkansas. Accordingly, the Court has yet to obtain personal jurisdiction over the defendant. “Arkansas law is long settled that service of valid process is necessary to give a court jurisdiction over a defendant. Our case law is equally well-settled that statutory service requirements, being in derogation of common-law rights, must be strictly construed and compliance with them must be exact.” *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 709 (2003).

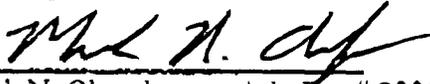
Rule 4(d) of the Arkansas Rules of Civil Procedure requires that “[a] copy of the summons and complaint shall be served together.” The plaintiff attempted to serve the State of Arkansas via certified mail delivery to Governor Mike Beebe. The Complaint purports to attach a copy of the challenged statute as “Exhibit A.” (Compl. ¶ 2.) This exhibit, however, was not attached to the service copy delivered to the Governor’s office via certified mail. Without this exhibit, the copy of the complaint served on the defendant was not a true and accurate copy of the complaint. Thus, the plaintiff has failed to perfect service of process, and the Court has not yet obtained personal jurisdiction over the defendant.

Conclusion

WHEREFORE, the State of Arkansas respectfully requests the Court to grant the defendant’s motion for judgment on the pleadings and dismiss the complaint of plaintiff Jerry L. Myers, and to grant the State of Arkansas all other appropriate relief.

Respectfully Submitted,

DUSTIN McDANIEL
Attorney General

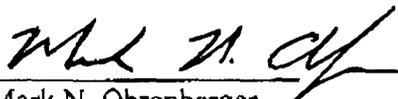
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CERTIFICATE OF SERVICE

I, Mark N. Ohrenberger, do hereby certify that on December 9, 2009, I served a copy of the foregoing document on the following individual via U.S. Mail:

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