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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1472**

State of Minnesota,
Respondent,

vs.

Pamela Leigh Thesing,
Appellant.

**Filed February 4, 2019
Reversed and remanded
Bratvold, Judge**

Clay County District Court
File No. 14-CR-17-2307

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Moorhead, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica May Surges, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Halbrooks, Judge; and
Jesson, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant Pamela Leigh Thesing keeps approximately ten chickens on her
residential property, which is in a legally platted subdivision. She appeals from her

conviction for a misdemeanor violation of provisions in the Clay County Development Code related to keeping chickens on residential parcels. Thesing argues that the complaint is defective. In the alternative, Thesing argues that she is entitled to a new trial because the district court failed to obtain a valid waiver of her right to counsel. Because the state's complaint against Thesing relied on code provisions that do not describe a crime and expressly do not apply to Thesing's legally platted property, we conclude that the complaint is fatally defective. We reverse and remand with instructions to vacate the conviction.

FACTS

In the fall of 2016, Clay County planners "received several reports regarding the presence of chickens on the property of Pamela Leigh Thesing." The county gave Thesing notice that the development code prohibited the keeping of livestock, including chickens, on her property and instructed her to remove the animals. When Thesing failed to do so, police issued a misdemeanor citation for a violation of the development code.

Thesing first appeared in district court on August 29, 2017, and was appointed a public defender. At a plea hearing on January 3, 2018, Thesing pleaded not guilty and asked to discharge her counsel. The court inquired whether Thesing intended to represent herself or if she wanted to attempt to secure substitute counsel; Thesing said that she wanted to "take a few days to research that or to call around." The court scheduled a pretrial hearing for January 26, 2018, and adjourned proceedings. Thesing appeared without counsel at the January 26 hearing, but the court did not discuss whether she intended to represent herself or whether she was still searching for an attorney.

Thesing filed a motion to dismiss the charge against her. Four days before the motion hearing, on May 3, 2018, the state filed a formal complaint charging Thesing with a misdemeanor based on the allegation that Thesing kept chickens on her property in violation of the county development code. At a contested motion hearing on May 7, 2018, Thesing again appeared without counsel and argued her motion to dismiss. After hearing Thesing's argument, the court asked whether she intended to obtain private counsel or represent herself. Thesing stated that she could not afford private counsel and that it was her intention to proceed on her own. No further discussion on the matter was had. In a subsequent written order, the district court denied Thesing's motion.

A jury found Thesing guilty of this offense after a trial on July 10, 2018, and the district court sentenced her to a stayed 30-day jail term and 90 days of unsupervised probation. Thesing appeals.

D E C I S I O N

Thesing argues, and the state concedes, that her conviction must be reversed because the citation and complaint filed in this matter do not actually define a crime or describe any criminal behavior. Although this court is not bound by the concession of the parties,¹ we agree and reverse Thesing's conviction. Whether Thesing's citation, complaint, or the referenced portions of the development code actually define a crime or describe prohibited

¹ See *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (noting that this court has a "responsibility . . . to decide cases in accordance with law," notwithstanding the parties' arguments).

conduct involves the interpretation of zoning ordinances, which this court reviews de novo. See *State v. Reinke*, 702 N.W.2d 308, 311 (Minn. App. 2005).

Due process requires that a criminal defendant “be informed of the nature and cause of the accusation” against her. U.S. Const. amend. VI. The Minnesota Supreme Court recognized long ago that “[i]t is a rule, however, applicable to all indictable offences, that every fact material to the offence charged and necessary to constitute the crime, should be stated with such clearness and certainty as to enable the accused to know exactly what he is charged with.” *State v. Ullman*, 5 Minn. 13, 15, 5 Gil. 1, 3 (1860). A complaint or indictment that fails to provide adequate specificity is “fatally defective.” *State ex rel. Webber v. Tahash*, 152 N.W.2d 497, 501 (Minn. 1967.) Moreover, “a court is without jurisdiction to convict a defendant of conduct that is not criminal.” *Johnson v. State*, 916 N.W.2d 674, 680 (Minn. 2018).

Here, the probable cause portion of the complaint sets out the factual allegation which the state believed constituted a criminal offense—Thesing’s keeping of chickens on her property. The issue in Thesing’s case, however, is whether the complaint actually charged a criminal offense based upon this conduct. The charging portion of the complaint filed against Thesing reads as follows:

Count 1: Keeping Animals on Residential Parcels

In Violation of: 8.3.15, subpart A.

MOC: Not applicable

ICR: 17005554

Penalty: 8.4.9, subpart A.

On or about October 4, 2016, within Clay County, Minnesota, [Thesing], owner of parcels in a legally platted subdivision, did keep animals on said parcels; to wit, chickens.

Section 8-4-9, subpart A, of the Clay County Development Code—referenced as the “penalty” provision above—provides that a person who violates the development code or fails to comply with its requirements is guilty of a misdemeanor and may be punished accordingly. Clay County, Minn., Development Code § 8-4-9(A) (2012). Section 8-3-15 of the code, which Thesing was alleged to have violated, provides:

8-3-15 PROVISIONS FOR KEEPING ANIMALS ON RESIDENTIAL PARCELS:

A. Residential Parcel: [A] parcel of land that meets the criteria set forth in either in Minnesota Statute 273.13, as amended, or by the Clay County Assessor for classification as “residential” (Class 1) for property taxation purposes. *This definition does not apply to parcels in legally platted subdivisions.*

B. Animals on Residential Parcels: The keeping of chickens . . . on residential parcels shall conform to the following provisions:

Clay County, Minn., Development Code § 8-3-15 (2012) (emphasis added). Subpart B goes on to list six regulations about the keeping of livestock, such as the number of animals per acre and fencing. *Id.*

Explaining the basis for Thesing’s criminal liability under these code provisions, the probable-cause portion of the complaint states:

Specifically, [section] 8-3-15 sets forth provisions for the keeping of animals on residential parcels; by the Code’s explicit definition in subpart A, “residential parcel” does not apply to parcels in legally platted subdivisions, whereby the keeping of chickens is prohibited on Defendant’s property, located in the legally platted Auditor’s Subdivision.

We note that the complaint states that Thesing’s property is in a legally platted subdivision.

We conclude that this complaint is defective for two reasons. First, the charging portion of the complaint indicates that Thesing's conduct violates section 8-3-15, subpart A. This specific subpart does not actually describe any crime and neither imposes obligations on county residents nor prohibits any conduct—it only provides a definition for the term “residential parcel” as used within the remainder of the section. *See id.* As such, there is no basis on which a person can be deemed to have violated or failed to comply with subpart A for keeping chickens on her property. It does not, even in conjunction with the penalty provision in section 8-4-9, define a crime of any sort or describe prohibited conduct.

Second, Thesing's property is explicitly excluded from the definition of “residential parcel” found in subpart A because her property is in a legally platted subdivision. *Id.* Consequently, none of the six regulations concerning the keeping of livestock listed in subpart B are applicable to Thesing under the plain meaning of the ordinance. *See Schiff v. Griffin*, 639 N.W.2d 56, 61 (Minn. App. 2002) (“When an ordinance is clear and unambiguous, we are not permitted to look beyond its plain meaning.”). As noted in the introductory text of subpart B, the provisions apply only to the keeping of livestock on residential parcels, as defined in subpart A. In conflict with its position at trial, the state now concedes that the cited ordinance does not apply to Thesing's property. Reading subparts A and B together, we conclude that none of the requirements or terms of section 8-3-15 are applicable to Thesing or her keeping of chickens by virtue of the undisputed character of her property. Thus, the complaint fails to allege facts that demonstrate criminal conduct or the commission of a criminal offense.

This did not escape the notice of the district court, which voiced its own concerns during trial:

[T]he Clay County Development Code that is alleged to be violated here, the complaint lists subpart A. And subpart A is really just a description of residential property. It's not—I can't see how you can violate subpart A on its own.

And then in regard to the description listed in the complaint, it's referencing legally platted subdivisions when subpart A says the definition does not apply to parcels of legally platted subdivisions. So the name of the charge and the description, as well as the subpart that's referenced, don't seem to align as currently listed in the complaint.

Rather than dismiss the complaint, the district court remarked that it was difficult to craft a jury instruction when “the elements aren't clear exactly which part is alleged to be in violation.”

In response to the district court's concerns, the prosecuting attorney defended the validity of the charge by arguing that “uses of your property are not allowed unless they are specifically allowed.” We understand the state's position at trial, as follows: because the keeping of livestock on legally platted parcels is not expressly provided for, it is implicitly unauthorized by the code and therefore a crime. But this argument is unpersuasive and, indeed, the state has not seen fit to assert it on appeal. The state failed to provide any citation for its premise that an unspecified use of land is per se impermissible. The plain language of the code provisions referenced in the complaint do not support the prosecutor's claim.

Here, the scope of section 8-3-15 is clearly and expressly concerned with regulating the keeping of domestic livestock on residential parcels and excludes parcels that are in

legally platted subdivisions. An ordinary citizen would not read this ordinance restricting the keeping of animals on residential parcels and conclude that its express exclusion of legally platted subdivisions is the equivalent of including them. *See Press v. City of Minneapolis*, 553 N.W.2d 80, 84 (Minn. App. 1996) (“Due process requires that an ordinance that provides for criminal prosecution be drafted with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”) (quotations omitted). To the contrary, the most one could reasonably infer from this ordinance is that it is inapplicable to legally platted subdivisions.

The citation and complaint in this matter were therefore “fatally defective” for failing to define a criminal offense or describe any criminal behavior. *See Webber*, 152 N.W.2d at 501. Thus, the district court was without jurisdiction to convict Thesing of any crime. *See id.*; *Johnson*, 916 N.W.2d at 680. Thesing’s conviction therefore must be reversed. We remand with instructions to vacate the conviction.

Because we reverse Thesing’s conviction, we need not address whether she validly waived her right to counsel. We take this occasion to state, however, that the record does not appear to support such a finding. To ensure a valid waiver of counsel,

[A] court should comprehensively examine the defendant regarding the defendant’s comprehension of the charges, the possible punishments, mitigating circumstances, and any other facts relevant to the defendant’s understanding of the consequences of the waiver. The defendant should be made aware of the dangers and disadvantages of self-representation,

so that the record will establish that he knows what he is doing and his choice is made with eyes open.

State v. Camacho, 561 N.W.2d 160, 173 (Minn. 1997) (citation and quotations omitted).

There was essentially no discussion between Thesing and the court concerning her decision to represent herself, other than that she was opting to do so. And Thesing expressed during the proceedings that she did not understand which code section she was being charged with violating. One could not reasonably conclude on this record that Thesing was adequately aware of the nature of her charges, her rights, or even the punishment that it could entail.

Reversed and remanded.