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APPEAL TO THE MARICOPA COUNTY SUPERIOR COURT
FROM THE TOWN OF CAREFREE MUNICIPAL COURT

STATE OF ARIZONA,

Plaintiff/Appellee,

vs.

ANTHONY PARETE,

Defendant/Appellant.

Case No. NC20030022

**APPELLATE
MEMORANDUM**

(Oral Argument Requested)

Appellant Anthony Parete, by and through undersigned counsel, hereby submits the following Appellate Memorandum, pursuant to the Arizona Rules of Procedure in Civil Traffic Violation Cases, requesting that the Superior Court reverse the trial court and/or declare the Noise Ordinance at issue unconstitutional. Pursuant to Rule 35, Arizona Rules of Procedure in Civil Traffic Violation Cases, Appellant requests the Court permit oral argument.

OVERVIEW OF APPEAL

On October 30, 2003, Appellant Anthony S. Parete was found responsible for violating the Town of Carefree's recently modified noise restrictions in Town Code, Chapter 6, Offenses Article 6-2 Nuisances, Section 6-2-4, as amended by Town Ordinance 02-14 (the "**Noise Ordinance**"), attached hereto as Exhibit

A. At issue in this appeal is the improper application and validity of the Noise Ordinance to Mr. Parete since there is inadequate evidence to find him individually responsible for a violation of the Noise Ordinance and because the Noise Ordinance, as applied, is unconstitutional.

In particular, the trial court found that, irrespective of whether Mr. Parete individually violated the Noise Ordinance, since he was "riding in a pack" he could be held individually responsible for the accumulation of noise from "the pack." Not only is such reasoning plainly erroneous under the unambiguous terms of the Noise Ordinance – which is directed at **individuals**, not groups – but application of the Noise Ordinance in this regard is a violation of Mr. Parete's constitutional rights.

FACTUAL BACKGROUND

On Sunday morning, September 14, 2003, at approximately 9:30 a.m., Anthony S. Parete went on a short motorcycle ride with three other friends through the Town of Carefree, Arizona. See Transcript of October 30, 2003 Hearing in the Carefree Municipal Court ("Trans.") at 3:24-4:8, attached hereto as Exhibit B. As they do almost every weekend, the group of four had just finished breakfast at Harold's Corral in Cave Creek and were headed southbound when they came to the intersection of Pima and Cave Creek Road in the Town of Carefree. See Trans. at 4:9-11 and 7:5-18.

At the time he approached the intersection, Mr. Parete saw Officer Brett Palmer's patrol vehicle parked on west the side of Pima Road, just south of the intersection. See Trans. at 7:21-24. In particular, Mr. Parete also noticed that Officer Palmer had erected a microphone above his vehicle and he immediately

recognized, having been through these types of noise “check points” before, that Officer Palmer’s vehicle was measuring for noise violations. See Trans. at 7:5-7 and 7:21-24.

The noise check point did not concern Mr. Parete, however, as he had ridden his motorcycle through such noise check points while in the Town of Carefree on several occasions since the passage of the Noise Ordinance without incident. See Trans. at 7:5-7 and 7:21-24. Indeed, Mr. Parete testified that he had friends who lived in the Town, that he was aware of the Noise Ordinance and that he took steps to ride his motorcycle in a responsible manner so that it would not cause a disturbance. See Trans. at 6:9-19 and 7:2-12.

Nevertheless, after passing Officer Palmer’s patrol vehicle in short succession, the four riders, including Mr. Parete, were stopped and cited for violating Section 6-2-4(D)(3) of the Noise Ordinance, which reads as follows:

It shall be unlawful for any person to operate a motor vehicle, a motorcycle, or combination of vehicles, at any time, or under any condition of grade, load, acceleration or deceleration, in such a manner as to exceed eighty-five (85) dBA based on a measurement taken at a distance of twenty-five (25) feet or more from the source of the noise.

Noise Ordinance, Section 6-2-4(D)(3). At the hearing on this matter in the Carefree Municipal Court, Officer Palmer testified that each of the four motorcyclists were “**three to five feet apart** from each other, riding in single file, not staggered up next to each other.” See Trans. at 4:13-15 (emphasis added).

Significantly, Officer Palmer stated that **he did not get individual decibel readings** for each of the four riders, but that he only obtained measurements for the “first” and “last” motorcycles. See Trans. at 4:16-5:7. Officer Palmer explained that:

[T]he first bike [to pass] was at 88 decibels [and] [a]s the bikes continued to pass by my location, with the decibel meter, I observed it continuously going up. And at no point did it fluctuate to a lesser decibel [level] The decibel meter continued to go up, and finally completed at 98.8 decibels with the passing of the fourth bike [Thereafter,] I contacted the riders of all four motorcycles and issued citations to all four riders for noise above 85

decibels, which is a violation of the town ordinance for noise.

See Trans. at 4:19-5:7. At no time did Officer Palmer identify Mr. Parete's position in the sequence of motorcycles, except to indicate that he was one of the group of four. See Trans. at 4:16-5:7.

Officer Palmer testified that the decibel readings were done using a Quest Technologies Sound Level Meter Model No. 2100 (the "**Sound Level Meter**") and that the device had been calibrated the morning before his shift. See Trans. at 5:8-15. Officer Palmer did not testify, however, concerning any of the basic settings on the Sound Level Meter, as recommended by the manufacturer's User Manual, attached hereto as Exhibit C (the "**User Manual**"), such as whether the meter's "RESPONSE" switch was set to "FAST" or whether the microphone on top of his patrol car was shielded by a windscreen to prevent errors caused by ambient wind or background noise. Indeed, the User Manual states:

The RESPONSE switch controls the ***rate at which the meter responds to changing input signals***. Most sound measurements are done with the response set to SLOW. The FAST response is generally used when measuring short duration noises such as moving vehicles.

See User Manual Section 2.2.2 (emphasis added). The User Manual explains that, under the "SLOW" setting, the Sound Level Meter responds to input changes lasting more than one second, whereas, under the "FAST" setting, the Sound Level Meter responds to input changes lasting more than 125 milliseconds. See User Manual Section 2.2.2.

These settings can have a big difference in measuring sounds that are grouped together, as further review of the User Manual reveals that, under the "SLOW" setting, the "decay time" for sound measurements is 4.35 dB per second, whereas, under the "FAST" setting, the "decay time" for sound measurements is 34.7 dB per second. See User Manual Section 5.7. In other words, as ***the trial court readily acknowledged***, Officer Palmer's measurements may, and probably did, simply reflect ***the cumulative***

increase in decibels that occurs when equivalent noises are grouped in close succession. See Trans. at 8:21-9:6; *see also* Transcript of October 23, 2003 Hearing in the Carefree Municipal Court at 7:8-21, attached hereto as Exhibit D (***Officer Palmer testifying that grouping two equivalent noises together will typically result in a 3.00 dB increase in noise measurement***).

The trial court explained that, notwithstanding the cumulative effect of “grouped noises” and the fact that Mr. Parete may have not individually violated the Noise Ordinance, Mr. Parete could be held responsible for the “**accumulation of noise**” since he was “**part of a pack.**” The trial court reasoned as follows:

[Y]ou know that there is a build-up of sound if you ride in a pack and [you] raised the level of noise in that pack to where it would appear to the officer that everybody’s violating [the Noise Ordinance] **There’s this [accumulation of noise [that is being measured].**

And while you – you’re taking the position, “Well, I can’t help it. I’m in this pack. And I think that I’m not guilty.” Well I guess it’s my position that since you know that **you don’t have to be in that pack. You have to separate yourself from that pack,** and then your bike would be registering its own **individual decibel level, whatever that is.**

Because I don’t think it’s going to be a defense to say, “Well, we’re all in a pack. Therefore, we’re all not guilty.” Just because there is one bad apple or there are no bad apples, **it’s just a cumulative effect I don’t think that’s going to be a defense when you have a pack of 10 or 15 bikes that come roaring through town and everybody measures [less than] 85 [dBA] [individually], but the cumulative effect of that entire pack is maybe 90 [dBA].** I mean, I don’t know. I don’t know what the spread is. So the point is, is that it’s my opinion that, under these circumstances, you were in violation of the noise ordinance.

See Trans. at 8:24-10:2. Simply put, the trial court found that Mr. Parete's choice to "ride in a pack," ***even if he was not individually responsible for violating the Noise Ordinance***, rendered him responsible for violating the Noise Ordinance where the ***cumulative effect*** of the group's noise exceeded the Noise Ordinance's threshold, making it unlawful for "***any person*** . . . to exceed eighty-five (85) dBA." See Trans. at 8:24-10:2.

Fortunately, this was Mr. Parete's first "violation" of this Noise Ordinance, which subjected him to a \$175.00 fine. Should Mr. Parete chose to again "ride in a pack" during the next twelve months in or through the Town of Carefree, he risks a \$350.00 fine and, if cited a third time, a fine of up to \$2,500.00, imprisonment for up to one hundred eighty (180) days and up to three years probation for a "Class 1" misdemeanor. Needless to say, the Noise Ordinance will have a huge chilling effect on Mr. Parete's motorcycling activities.

ARGUMENT

Application of the Noise Ordinance to Mr. Parete was unlawful under the plain terms of the Noise Ordinance and, as applied to Mr. Parete, was unconstitutional. Accordingly, the Court should overrule the trial court's ruling, find Mr. Parete "not responsible" and declare that the Noise Ordinance is invalid on its face and/or as applied to Mr. Parete.

1. SINCE THE PLAIN TERMS OF THE NOISE ORDINANCE TARGETS "INDIVIDUALS," IT IS UNLAWFUL TO APPLY THE ORDINANCE TO "GROUPS" ABSENT EVIDENCE OF INDIVIDUAL VIOLATIONS.

Simply put, the plain and unambiguous terms of the Noise Ordinance does not punish noise made by "groups," it can only be violated by individuals. Section 6-2-4(D)(3) of the Noise Ordinance reads as follows:

It shall be unlawful for any person to operate a motor vehicle, a motorcycle, or combination of vehicles, at any time, or under any condition of grade, load, acceleration or deceleration, in such a manner as to exceed eighty-five (85) dBA based on a measurement taken at a distance of twenty-five (25) feet or more from the source of the noise.

Noise Ordinance, Section 6-2-4(D)(3) (emphasis added). Unless there is sufficient evidence to show that Mr. Parete violated the Noise Ordinance individually, which there is not, it is clearly unlawful to apply the Noise Ordinance to a "group" or "pack" of motorcycles. *Cf.* Trans. at 9:13-16 ("You have to separate yourself from that pack, and then your bike would be registering its own individual decibel level, whatever that is.")

Although the Noise Ordinance references a "combination of vehicles," this reference is modified by the initial prerequisite that it is unlawful for "any person to operate" a combination of vehicles. The Noise

Ordinance does not state that it is unlawful for any “persons” or “group of persons” to exceed eighty-five (85) dBA and it is not proper for the trial court to graft such language upon the Noise Ordinance, especially where the effect of the trial court’s adding such language would be to broaden the terms of the Noise Ordinance.

The trial court held that Mr. Parete’s choice to “ride in a pack,” ***even if he was not individually responsible for violating the Noise Ordinance***, rendered him responsible for violating the Noise Ordinance where the ***cumulative effect*** of the group’s noise exceeded the Noise Ordinance’s threshold. See Trans. at 8:24-10:2. Since the Noise Ordinance only applies to noise made by “any person,” this is clearly erroneous absent evidence that Mr. Parete individually violated the Noise Ordinance.

2. THE NOISE ORDINANCE IS UNCONSTITUTIONAL AS APPLIED.

At the end of the day, the Noise Ordinance is nothing short or an anti-biker ordinance and, as applied in this case, the Noise Ordinance is unconstitutional in that it discriminates arbitrarily against motorcyclists who chose to travel in groups and denies them due process. ***Indeed, to punish bikers individually for riding in a group without requiring evidence of individual wrongdoing is clearly unconstitutional.***

1. It is a Violation of Due Process for the Trial Court to Find Appellant Responsible for a Violation Without Evidence of His *Individual Wrongdoing*.

“The touchstone of due process under both the Arizona and federal constitutions is fundamental fairness.” *State v. Melendez*, 172 Ariz. 68, 71, 834 P.2d 154, 157 (1992). Simply

put, "it [is] a violation of due process to convict and punish a man without evidence of **his** guilt." *Thompson v. City of Louisville*, 362 U.S. 199, 206, 80 S.Ct. 624 (1960). Thus, "**a [judicial] body must have evidence of a statutory violation by an individual before it may punish that individual.**" E.g., *James P. v. Lemahieu*, 84 F.Supp.2d 1113, 1120 (D.Hawai'i 2000).

Officer Palmer testified that **he did not get individual decibel readings** for each of the four motorcycle riders, but that he only obtained measurements for the "first" and "last" motorcycles. See Trans. at 4:19-5:7. Indeed, in a related hearing, Officer Palmer testified that "**there is no way to distinguish the measurement of any individual motorcycle in [a] grouping.**" See Transcript of October 23, 2003 Hearing in the Carefree Municipal Court at 10:1-3. Moreover, the uncontroverted testimony from the hearing in the trial court was that there was "[n]o individual testing of [any of] the bikes at the roadside." See Trans. at 6:4-5.

Since "it is beyond question . . . that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged would violate due process," *Harris v. United States*, 404 U.S. 1232, 1233, 92 S.Ct. 10 (1971), ***Mr. Parete's conviction of violating the Noise Ordinance must be reversed. While it was error for the trial court to rely upon "cumulative noise" rather than evidence of individual violations, such practice also violates due process since there was no evidence of Mr. Parete's individual violation of the Noise Ordinance.*** To the contrary, since Mr. Parete had previously ridden his motorcycle through such noise check points while in the Town of Carefree on several occasions since the passage of the Noise Ordinance without incident, the evidence was quite clear that he did not individually violate the Noise Ordinance. See Trans. at 7:5-7 and 7:21-24.

2. Application of the Noise Ordinance to Groups of Motorcyclists is Discriminatory, Depriving Groups of Motorcyclists Equal Protection.

Arizona's Equal Protection Clause provides that "[n]o law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Ariz. Const. art. 2, § 13. Although "[e]qual protection is not intended to prohibit all unequal or discriminatory treatment, [it] is intended . . . to require equal treatment of persons similarly situated in a given class and [that] this classification itself is reasonable and not discriminatory." *Lindsay v. Indus. Comm'n of Ariz.*, 115 Ariz. 254, 256, 564 P.2d 943, 945 (App.1977) (emphasis added).

As applied in this case, the Noise Ordinance violates Arizona's Equal Protection Clause since it results in unequal treatment of individual motorcycle riders versus groups of motorcycle riders. As the trial court explained, "it's my position that . . . you know that **you don't have to be in that pack. You have to separate yourself from that pack** [even though you are at an intersection]." See Trans. at 9:12-16 (emphasis added); see also Trans. at 10:3-6 (Mr. Parete explaining that "[w]ith respect to separating yourself from the pack, I mean, there were four of us. It was – **the officer was positioned right past the stop sign**. So when you came to the stop sign, everybody stopped, and everybody went through in succession. **So there's no way [to separate yourself from the pack].**").

This is simply unfair, as it discriminates against motorcycle riders who chose to ride in a group, which is very common among motorcycle enthusiasts, and acknowledges that those same riders who do not ride in a group, would not necessarily violate the Noise Ordinance. Inasmuch as the state has no legitimate interest in discriminating against "group riders" versus "individual riders," doing so violates the State and federal Equal Protection Clauses and the Noise Ordinance must be declared unconstitutional as applied.

CONCLUSION

For the foregoing reasons, Mr. Parete respectfully requests that the Superior Court reverse the trial court and/or declare the Noise Ordinance at issue unconstitutional.

RESPECTFULLY SUBMITTED this ____ day of January, 2004.

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ORIGINAL AND ONE (1) COPY of the foregoing was
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Court Clerk
Carefree Municipal Court
100 Easy Street, Suite 1
Carefree, Arizona 85377

Beth Johnson