

COA NO. 69968-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

REC'D
APR 03 2014
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

JASON MARKLEY,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Cheryl Carey, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE
CONVICTION FOR FIRST DEGREE ANIMAL CRUELTY.

In the opening brief, Markley argued a person that has no previous horse experience does not commit the crime of first degree animal cruelty in failing to rehabilitate an old horse that was already starved before it came into that person's care. Brief of Appellant at 14. The State claims a person is guilty of first degree animal cruelty so long as he possesses an animal in a starved condition, regardless of whether the animal was in a starved condition before that person took control of it. Brief of Respondent (BOR) at 9, 12.¹

The State acknowledges there is very little case law regarding this issue but then complains Markley cites no case on point. BOR at 12-13. This is a case of first impression, and its status as such is no bar to relief. See, e.g., State v. Castillo, 150 Wn. App. 466, 475, 208 P.3d 1201 (2009) ("The State argues that there is no reported case that reverses on the basis that a trial court failed to use WPIC 4.01 as the reasonable doubt instruction. This is that case.").

¹ The State refers to Markley on page 8 of its brief as "the respondent." Markley is the appellant. See also Brief Writing -- Best Practices ("Avoid referring to the parties as plaintiff/defendant or appellant/respondent. Use parties' names."), available at http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.display_divs&folderID=div1&fileID=briefWriting (accessed March 17, 2014).

There are no cases comparable to the facts of Markley's case. There is no case where a person has been found guilty of animal cruelty for starving an animal where that person inherited an already-starved animal. The cases that do exist involve situations where a person has a healthy animal in his or her control and then causes the animal to become starved or dehydrated. State v. Zawistowski, 119 Wn. App. 730, 732, 737, 82 P.3d 698 (2004) (starvation), review denied, 152 Wn.2d 1010, 99 P.3d 896 (2004); State v. Peterson, 174 Wn. App. 828, 853-55, 301 P.3d 1060 (dehydration), review denied, 178 Wn.2d 1021, 312 P.3d 650 (2013). In such cases, the animal's caretaker causes the animal to deteriorate from a healthy condition to an unhealthy one. Markley's case, in contrast, involves a situation where an animal is not rehabilitated from an unhealthy condition into a healthy one.

Dr. Mueller cared for Alex for three months after Markley voluntarily surrendered the horse. 5RP 83, 96. But it took awhile to get Alex back up to a healthy weight. It took six weeks for Alex to reach a 2.5 on the Henneke scale. 5RP 78. It took three months for Alex to reach a 4.5. 5RP 79, 96. Given the duration it took to rehabilitate Alex from an emaciated state, the horse must have been in a starved condition for part of that time. Yet no one would ever claim Dr. Mueller is guilty of first degree animal cruelty for the period of time during which Alex remained

in a starved condition while under her care. Under the State's crude theory of criminal liability, however, Dr. Mueller would be guilty of first degree animal cruelty because a horse was in a starved condition while in her possession. That implausibility raises a red flag that the State's interpretation of criminal liability under the first degree animal cruelty statute is incorrect.

What is the difference between Markley and Dr. Mueller? Dr. Mueller, with her expert knowledge on how to rehabilitate an emaciated old horse, was able to formulate a specialized feeding plan to safely put weight back on the horse. 5RP 62-64, 68, 82-84. Markley, not being an equine veterinarian and otherwise lacking such expert knowledge on how to properly rehabilitate an emaciated old horse, regularly fed hay to Alex but failed to achieve sustained weight gain.

Indeed, if Markley had attempted to feed nutrient rich Eastern Washington hay and supplements to Alex without following a specialized feeding plan, the result would likely have been a disaster because it would have been too much too soon. Sergeant Eykel, who initially created a specialized feeding plan for Alex based on her experience with older, emaciated horses, explained a malnourished horse can die if it is overloaded with nutrients too quickly. 5RP 22-28, 30, 34, 40. Dr. Mueller likewise knew such a horse can crash, get colic, and die if it is fed

too much too quickly. 5RP 68. In this respect, Sergeant Eykel knew a horse could have an adverse reaction if suddenly given beet pulp. 5RP 29-30. And sure enough, Markley had tried beet pulp but discontinued it because Alex suffered diarrhea as a result. 4RP 108, 110-11, 141-42.

Again, a person is guilty of first degree animal cruelty when he or she, "with criminal negligence, starves . . . an animal and as a result causes: . . . [s]ubstantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering." RCW 16.52.205(2)(a). Criminal negligence requires "a gross deviation from the standard of care that a reasonable person would exercise in *the same situation*." RCW 9A.08.010(1)(d) (emphasis added).

Markley's situation included a lack of expert knowledge on how to safely put weight on an old emaciated horse. He chose local hay not only because it was less expensive but because he could get *more of it* to feed Alex. 4RP 106, 108, 140. From an inexperienced lay person's perspective, feeding a horse *more* hay in an effort to help the animal gain weight would seem to make sense. Indeed, Reber Ranch and other feed stores carried local hay in addition to Eastern Washington hay, which would signal to a reasonable person in Markley's situation that local hay was an acceptable

food item for horses. 4RP 73-74. If it wasn't, then feed stores would not offer such hay.²

The State acknowledges Markley tried to address Alex's condition with beet pulp. BOR at 12. The State claims discontinuance of the beet pulp after the horse suffered an adverse reaction was criminally negligent because he did not request help. BOR at 12. More broadly, the State criticizes Markley for not looking into the cause of the horse's thin condition. BOR at 12. The trial prosecutor similarly argued there was criminal negligence because a reasonable person would have gone to the vet to find out how to properly care for and feed a horse of Alex's age and condition. 6RP 34-35, 73-74.

Markley did not seek out medical advice from a veterinarian on how to properly rehabilitate Alex. That is not first degree animal cruelty. The Court of Appeals recognizes an owner's failure to consult a veterinarian on how to put weight on an animal supports a second degree animal cruelty conviction for failure to seek necessary medical attention. State v. Smith, 154 Wn. App. 272, 274, 278, 223 P.3d 1262 (2009). It does not support a first degree animal cruelty conviction. See Smith, 154

² The State cites Westberg's testimony for the assertion that local hay was not available at the feed store. BOR at 4 (citing 4RP 107). Dr. Stewart, however, testified Reber Ranch and other feed stores carried local hay in addition to Eastern Washington hays. 4RP 73-74.

Wn. App. at 278 (factual prong of lesser offense test satisfied when substantial evidence supports a rational inference that the defendant committed *only* the inferior degree offense to the exclusion of the greater one).

Significantly, it is an affirmative defense to the crime of second degree animal cruelty "that the defendant's failure was due to economic distress beyond the defendant's control." RCW 16.52.207(4). The record shows Markley had financial difficulties, opting to purchase local hay because of the expense associated with purchasing Eastern Washington hay. 4RP 106, 108, 140.

Even if the first degree animal cruelty statute is susceptible to more than one reasonable interpretation, the rule of lenity requires the interpretation favorable to Markley's position. The rule of lenity requires "any ambiguity in a statute must be resolved in favor of the defendant." State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979). "Criminal statutes involving a deprivation of liberty must be strictly construed against the State." State v. Enloe, 47 Wn. App. 165, 170, 734 P.2d 520 (1987). "To strictly construe a statute simply means that given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option."

Pacific Northwest Annual Conference of United Methodist Church v. Walla Walla County, 82 Wn.2d 138, 141, 508 P.2d 1361 (1973).

The State's interpretation represents the broad one. Markley's interpretation is faithful to the mandate that criminal statutes be narrowly and strictly construed against the State. The statutory language of the first degree animal cruelty statute, when applied to the facts of Markley's case, is ambiguous in terms of whether a new horse owner is guilty of starving a horse when he fails to rehabilitate an already-starved horse that comes into his care. See State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003) (a latent ambiguity is apparent when statutory language is applied to the facts as they exist and is not apparent on the face of the language). That is an unusual factual scenario and almost certainly one the legislature did not envision in drafting the statutory language.

"The policy behind the rule of lenity is to place the burden squarely on the legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are." State v. Jackson, 61 Wn. App. 86, 93, 809 P.2d 221 (1991). The legislature needed to clearly and unequivocally warn people that taking in an animal already suffering from starvation and subsequently failing to rehabilitate that animal's weight "for a period sufficient to cause considerable suffering" constitutes the crime of first degree animal cruelty.

The legislature did not do so here. The rule of lenity operates in Markley's favor. The first degree animal cruelty conviction should be reversed.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Markley respectfully requests reversal of the conviction for first degree animal cruelty.

DATED this 3rd day of April 2014

Respectfully Submitted,

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