NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Benoit***, 2011 NSCA 99

Date: 20111101
Docket: CAC 327751
Registry: Halifax

2011 NSCA 99 (CanLII)

Between:

Gail Benoit and Dana Bailey

Appellants

v.

Her Majesty the Queen

Respondent

Judge: The Honourable Justice Joel E. Fichaud

Appeal Heard: October 4, 2011, in Halifax, Nova Scotia

Subject: Section 11 of the provincial *Animal Cruelty Prevention Act*, S.N.S. 1996, c. 22

Summary: The appellants were in the business of selling dogs. Officers of the SPCA, acting with warrants, seized puppies from the appellants' premises. The seized animals were found to be infested with parasites, had distended abdomens, and related symptoms. The appellants were convicted in the Provincial Court of causing distress to animals under the former *Animal Cruelty Prevention Act*. The appellant Benoit was convicted of assaulting and obstructing a peace officer in the execution of her duty contrary to ss. 270(1) and 129 of the *Criminal Code*. The result was affirmed by the Supreme Court of Nova Scotia sitting as the Summary Conviction Appeal Court. The appellants appealed to the Court of Appeal.

Issue: Did the Summary Conviction Appeal Court err?

Result: The Court of Appeal held there was no error in the findings that the animals were in distress and that the appellants were in charge of the animals and permitted the distress. The verdicts were not unreasonable. The Summary Conviction Appeal Court did not err in its interpretation of ss. 11 and 12 of the *Animal Cruelty Prevention Act*, and there was no violation of the appellants' rights under ss. 6, 15(1) and 8 of the *Charter of Rights*. The lower courts did not misapply the principle of reasonable doubt, and there was no demonstrated merit to the sentence appeal. The Court of Appeal dismissed the appeal.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 13 pages.

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Judges:	Fichaud, Beveridge and Farrar, JJ.A.
Appeal Heard:	October 4, 2011, in Halifax, Nova Scotia
Held:	Leave to appeal is granted but the appeal is dismissed per reasons for judgment of Fichaud, J.A.; Beveridge and Farrar, JJ. A. concurring.
Counsel:	Michael K. Power, Q.C., for the appellants William D. Delaney, for the respondent

Reasons for judgment:

[1] This is an appeal from convictions and sentence for causing distress to animals contrary to s. 11 of the provincial *Animal Cruelty Prevention Act*, S.N.S. 1996, c. 22, and assaulting and obstructing a peace officer in the execution of her duty contrary to ss. 270(1) and 129 of the *Criminal Code*.

Background

[2] Ms. Benoit and Mr. Bailey sell puppies from their residence in Roxville, Digby County. In September, 2007 the SPCA received a complaint about a dog purchased from Ms. Benoit and Mr. Bailey. Two SPCA officers went to the residence. They asked to look at the dogs on the premises. Mr. Bailey declined and asked the officers to leave.

[3] A month later, the SPCA received another complaint about sick puppies at the Benoit/Bailey residence. This time, on October 24, the two SPCA officers, Mr. Joyce and Ms. Noel, came with warrants and accompanied by the RCMP. The SPCA officers entered the home to search for the dogs cited in the warrants. The dogs found in the home were the pets of Ms. Benoit and Mr. Bailey, not the animals mentioned in the warrant, and were in good condition. The officers moved to the detached garage, where they found one of the dogs described in the warrants. Ms. Benoit picked up another puppy by the neck and threw it at Ms. Noel, saying "Here's the fucking puppy. Here's what you're looking for. Get out of here." Ms. Benoit stepped on Ms. Noel's foot and bumped her shoulder into Ms. Noel. Throughout the episode Mr. Bailey and Ms. Benoit unleashed vehement profanities. The officers left with the two puppies.

[4] While in the garage, the SPCA officers noticed that other puppies were without food or water, were in a cardboard box and covered with urine and feces, and had distended bellies with splayed legs and their backbones were showing.

[5] Based on those observations, the SPCA officers obtained a further search warrant, for eight puppies. The officers, again accompanied by the RCMP, executed that warrant on October 26. The officers knocked on the front door. Ms. Benoit was inside but would not answer. So they went to the garage, and removed the puppies. Constable Joyce said they had enlarged bellies and worms in their feces. One of the warranted puppies was not in the garage. So the officers returned to the front door. When Ms. Noel tried to enter the house, Ms. Benoit slammed the door in her face.

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[6] The seized puppies were taken to a veterinarian, Dr. Carnegy. He observed that the puppies were emaciated with rib cage, backbone and hip bones evident, and had bloated bellies. A fecal examination showed infestation with round worms, giardia and coccidia. Giardia is a parasite that causes extreme diarrhea and abdominal cramping. The puppies had a significant worm load, their abdomens so distended they could barely stand. Yet they were thin with little muscle mass, because the parasites intercepted the nutrition.

[7] After deworming and with proper nutrition, over the next few weeks the puppies began to thrive. Their dull coats began to shine. Their potbellies slimmed and they gained flesh.

[8] Mr. Bailey and Ms. Benoit were tried in the Provincial Court on June 26, October 24 and November 4, 2008. Judge Jean-Louis Batiot found Ms. Benoit guilty of assaulting and obstructing a peace officer in the execution of her duty under ss. 270 and 129 of the *Criminal Code*, and convicted both Ms. Benoit and Mr. Bailey of causing distress to animals contrary to s. 11(2) of the *Animal Cruelty Prevention Act* (*ACPA*). The *ACPA* was replaced by the current *Animal Protection Act*, S.N.S. 2008, c. 33, ss. 41-42, which came into force on proclamation on January 19, 2010. The events covered by these charges occurred during the currency of the earlier *ACPA*.

[9] The judge issued a fine of $1,500 against each of Ms. Benoit and Mr. Bailey for the offence under the *ACPA*, plus a victim surcharge and restitution after a credit of $2,478.54. For the offence under s**.** 270 of the *Criminal Code*, the judge issued a suspended sentence with eighteen months probation. For the offence under s. 129 of the *Code*, Ms. Benoit was given 21 days incarceration.

[10] Ms. Benoit and Mr. Bailey appealed to the Supreme Court of Nova Scotia, sitting as the Summary Conviction Appeal Court (SCAC). Justice Bryson, as he then was, heard the appeals on February 3, 2010, and dismissed the appeals by a written decision on March 16, 2010 (2010 NSSC 97).

[11] Ms. Benoit and Mr. Bailey apply for leave to appeal to the Court of Appeal under s. 839 of the *Criminal Code* and s. 7 of the *Summary Proceedings Act*, R.S.N.S. 1989, c. 450.

Issues and Standard of Review

[12] I group the appellants' grounds and submissions into the following:

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1. Did the SCAC commit an appealable error respecting whether the animals were in "distress" under s. 11(2) of the *ACPA*?
2. Did the SCAC commit an appealable error respecting whether Mr. Bailey and Ms. Benoit were "in charge" of the animals under s. 11(2) of the *ACPA*?
3. Did the SCAC err in law respecting ss. 11 and 12(2) of the *ACPA*?
4. Did the SCAC err by not upholding the appellants' submissions under the *Charter of Rights*?
5. Did the SCAC err respecting the principles in *R. v. W.(D.)*, [1991] 1 S.C.R. 742?
6. The appellants' factum also says Ms. Benoit and Mr. Bailey appeal sentence, but the factum makes no substantive submission on sentence.

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[13] A number of the appellants' submissions involve issues of fact. Section 839 permits appeals based on error of law alone. Issues of law are reviewed for correctness.

First Issue - "Distress"

[14] Section 11(2) of the *ACPA*, under which Ms. Benoit and Mr. Bailey were convicted, said:

> 11(2) No owner of an animal or person in charge of an animal shall cause or permit the animal to be or to continue to be in distress.

Section 2(2) said "[a]n animal is in distress, for the purpose of this Act, where the animal is (a) in need of adequate care, food, water or shelter; or (b) injured, sick, in pain, or suffering undue hardship, privation or neglect".

[15] Judge Batiot found as a fact that the animals were in distress because they lacked food and water and were suffering from privation and neglect. The SCAC judge said: "[t]he evidence strongly supports the judge's conclusion that the puppies were in distress".

[16] In my view this ground raises an issue of fact, not law. Further, the evidence fully supports the facts set out earlier (paras 4 and 6) that the puppies were infested with parasites, with the distress attendant on that condition.

[17] At the appeal hearing, the appellants' counsel said that Dr. Carnegy, a veterinarian, testified all dogs have worms, and therefore, according to counsel's

submission, the issue of worms is eliminated from the “distress” equation. Dr. Carnegy testified:

> Q. Dr. Carnegy, don’t most of the dogs have worms?
>
> A. A lot of dogs, puppies, will have some roundworms. It’s unusual to have the Coccidia and the Giardia.
>
> . . .
>
> Q. Right. But come back to my original point here, that most -- most dogs -- I’m no dog expert and I can’t give evidence anyway, but in my ...
>
> A. Roundworm is very common.
>
> Q. Yeah.
>
> A. But, I mean, usually most of the kennels that are actually working with puppies start deworming their puppies at two weeks of age.

Dr. Carnegy further testified:

> Q. Okay. And is it possible to say how long they would have been present based on the size of the worms or ...
>
> A. Well, with -- the fact that there’s actually adult worms there, it takes them about 25 to 30 days to go from an egg to a mature stage, so that we know that the adult worms that were there had been there for up to a month, or it took that long for them to develop, so they would have been exposed before that.
>
> Q. And were there adult worms in all of the feces or ...
>
> A. In most of them, yes.
>
> Q. Okay. And how old were these dogs would you say?
>
> A. I think most of them were -- were just puppies and probably six to eight weeks, I would think the majority of them were, in that range.
>
> . . .
>
> Q. There is another possible story for those two microscopic contaminants that were found in these puppies before the court?

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A. Correct. Another dog may have brought them into the kennel, but now it's in the kennel and all of the dogs showed it, so which indicates that there's a problem with hygiene in that kennel.

Q. That's right. And what's the -- what's the solution?

A. Massive cleaning and ...

Q. And was that communicated ...

A. ...and probably deworming everything that comes in there.

. . .

Q. Were the animals in a distressful state?

A. Now, with the amount of parasites that passed over the next few days after deworming, I mean, there was -- there was possibilities of obstructions with the worm load that was there, and so, yeah, I think just the fact that they're straining hard is a sign of distress.

Q. And they're straining to have a bowel movement?

A. Correct.

Q. Okay.

A. Now, with the Giardia, I mean, and as I say, it's hard to talk to a dog, but in people that have this, they're very uncomfortable. It's a lot of cramping. There's -- they feel like their guts are on fire.

[18] Dr. Carnegie's testimony made it clear that the mature parasitic load and consequent distress in these puppies far exceeded the common situation of embryonic roundworm, before a kennel begins immediate deworming.

[19] The verdicts are not unreasonable under the test recently reiterated in *R. v. Sinclair*, 2011 SCC 40. Neither the trial judge nor the SCAC committed an appealable error by finding that the animals were in distress as defined by the *ACPA*. I would dismiss the grounds of appeal related to whether the puppies were in "distress".

Second Issue - "In Charge"

[20] Mr. Bailey and Ms. Benoit say the puppies were owned by others, and were

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just housed on their premises. They submit this is not being "in charge" under s. 11(2). To this point, the SCAC judge said:

> 27. ... Whatever the commercial arrangements between Ms. Robar-Harlow and the appellants is not determinative of whether the appellants were "in charge" of the puppies within the meaning of the *Act*. In fact, ss. 11(2) and 11(3) expressly distinguish between an owner and a person in charge. In other words, the statute recognizes that a non-owner can be "in charge" under the *Act*. The real question is whether the appellants had *de facto* custody, possession and control of the puppies at the relevant time and place. The evidence is overwhelming that they did.

The SCAC judge (para 28) then recited the summary of that evidence.

[21] The SCAC judge made no legal error. The appellants' submissions are factual. As determined by the SCAC judge, the evidence supported the finding that the appellants were in charge at the critical time. The verdicts are not unreasonable under the test in *R. v. Sinclair* and the authorities reviewed in that decision. I would dismiss this ground of appeal.

Third Issue - Sections 11 and 12

[22] Sections 11 and 12 of the *ACPA* say:

> **Prohibitions**
>
> **11(1)** No person shall willfully cause an animal unnecessary pain, suffering or injury.
>
> **(2)** No owner of an animal or person in charge of an animal shall cause or permit the animal to be or to continue to be in distress.
>
> **(3)** For the purposes of subsection (2), the owner of an animal or the person in charge of an animal does not permit the animal to be in distress where the owner or person in charge takes appropriate steps to relieve the distress.
>
> **(4)** Subsections (1) and (2) do not apply where the distress, pain, suffering or injury result from an activity carried on in accordance with reasonable and generally accepted practices of animal management, husbandry or slaughter or an activity exempted by the regulations.
>
> **Powers of peace officer**
>
> **12(1)** Where a peace officer finds an animal in distress and the owner or person in charge of the animal

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(a) does not immediately take appropriate steps to relieve its distress; or

(b) is not present or cannot be found promptly,

the peace officer may, subject to this Act, take such action as the peace officer considers necessary to relieve the distress including, without restricting the generality of the foregoing,

(c) taking custody of the animal;

(d) arranging for any necessary transportation, food, water, care, shelter and medical treatment, or any one or more of them;

(e) delivering the animal into the custody of the Society or a suitable caretaker.

(2) Before taking action pursuant to subsection (1), a peace officer shall take reasonable steps to find the owner or person in charge of the animal and, if the owner is found, shall endeavour to obtain the owner's co-operation to relieve the animal's distress.

(3) Where the owner of the animal is not present or not found and informed of the animal's distress, the peace officer, or the Society in whose custody the animal is delivered, shall take reasonable steps to find the owner and inform the owner of the action taken.

(4) Where the peace officer has reasonable and probable grounds for believing that an animal is in distress

(a) in or upon any premises other than a private dwelling place; or

(b) in any vehicle or thing,

the peace officer may, with or without a warrant, and by force, if necessary, enter the premises, vehicle or thing and search for the animal and exercise the powers conferred on the peace officer by this Section with respect to any animal in distress found therein.

(5) A peace officer who, on reasonable and probable grounds, believes that there is an animal in distress in a private dwelling house, shall obtain a warrant to enter the private dwelling house for the purpose of carrying out duties pursuant to this Section.

(6) Before entering any premises, vehicle or thing pursuant to this Section, a peace officer shall take reasonable steps to find the owner or person in charge and

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> endeavour to obtain the co-operation of the owner or the person in charge.
>
> **(7)** Where a peace officer uses force in entering premises, a vehicle or thing, the peace officer shall use no more force than is reasonably required under the circumstances.
>
> **(8)** Where a person other than a peace officer finds an animal in distress, that person may, upon signing a release in the form prescribed by the regulations, turn the animal over to the custody of the Society.

[23] The appellants cite s. 11(3), that there is no offence under s. 11(2) "where the owner or person in charge takes appropriate steps to relieve the distress". The appellants then cite ss. 12(2), 12(3) and 12(6) and say the officers owed a duty to the appellants to notify the appellants of the distress and attempt to enlist the appellants' co-operation in the relief of the distress. The appellants say that they were charged before being given this notice and opportunity, and this entitles them to an acquittal.

[24] The SCAC judge rejected this submission for the following reasons:

> [40] ... in my view, as a matter of law, s. 11 and s. 12 are discrete sections, and are not inter-related or inter-dependent. Section 11 is prefaced with the heading "Prohibitions". Section 11(2) sets out the prohibited conduct. Neither an owner nor person in charge shall permit an animal to be or continue to be in distress. Subsection 3 of s. 11 says that there is no contravention of the *Act* under subsection (2) if appropriate steps are taken to relieve that distress. These are the only subsections that need to be read together for the purposes of determining whether the *Act* has been contravened in this respect.
>
> [41] Section 12 is quite different and addresses relief of distress by others. It describes when a peace officer can act, seize and provide care to an animal in distress. The cooperation referred to in ss. (2) of s. 12 is in the context of a peace officer taking steps to relieve distress. It reasonably provides that, if possible, the cooperation of an owner should be enlisted before the peace officer acts on his or her own initiative. It really has nothing to do with whether someone has contravened s. 11 of the *Act*.

[25] I agree with those comments. Section 12(2) directs the officer to seek cooperation "[b]efore taking action pursuant to subsection (1)". Section 12(3) supplements that directive. That action prescribed in s. 12(1) is the "action as the peace officer considers necessary to relieve the distress" including taking custody, providing amenities and delivery to a caretaker. Neither the laying of a charge for violating s. 11(2), nor the conviction by a court for violating s. 11(2), is such an "action pursuant to subsection (1)" of s. 12.

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[26] Section 12(6) says that "[b]efore entering any premises, vehicle or thing pursuant to this Section", the officer shall try to obtain the cooperation of the owner or person in charge. The provision does not state any condition precedent to laying a charge or issuing a conviction for a violation of s. 11(2).

[27] Section 11(3) says no offence is committed under s. 11(2) if the owner or person in charge "takes appropriate steps to relieve the distress". Mr. Bailey and Ms. Benoit did not take such steps. Section 11(3) does not exempt from prosecution and conviction a person who is not given the opportunity to cooperate. The appellants seek to read ss. 11 and 12 as prescribing a condition precedent to conviction that they be given a warning with recommendations by the peace officer, followed by an opportunity to implement those recommendations. That condition does not appear in the legislation.

[28] I would dismiss this ground of appeal.

Fourth Issue - Charter of Rights

[29] The appellants say:

> The Appellants, Bailey/Benoit have a right to earn a living as stated in Section 6(2) of the ***Canadian Charter of Rights and Freedoms***"

That is the extent of the submission on s. 6 of the *Charter*.

[30] Section 6(3)(a) says that the right under s. 6(2) is subject to laws and practices of general application except those that discriminate based primarily on province of residence. The *ACPA* is a law of general application and, as the appellants' counsel acknowledged at the hearing, the *ACPA* does not discriminate based on province of residence. There is no breach of s. 6.

[31] The appellants submit that they were denied equality before the law without discrimination, contrary to s. 15(1) of the *Charter*. The appellants' factum did not cite the ground of differential treatment upon which they rely. At the hearing, counsel for the appellants said they rely on an analogous ground, not an enumerated ground in s. 15(1). But, when asked, counsel was unable to identify any analogous ground. In my view there is no differential treatment on any ground, enumerated or analogous, that is protected by s. 15(1).

[32] The appellants cite their right not to be subject to unreasonable search and

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seizure under s. 8 of the *Charter*. They say that the individual who provided the information that led to the search had a grudge against the appellants which tainted the convictions.

[33] The search and seizure was further to warrants. There was no application to quash the warrants. The informations sworn to obtain the warrants are not in the Appeal Books. The trial judge found that the SPCA officer, Mr. Joyce, in good faith swore the informations to obtain the warrants. It is irrelevant that the individual, Ms. Donna Nugent, who complained to the SPCA, disapproved of the appellants' puppy brokerage business. Further, I note that s. 12(4) of the *ACPA* permits entry of premises other than a dwelling and seizure without warrant where there is a reasonable and probable to believe an animal is in distress. The animals seized here were in the garage, not the dwelling. There is no merit to the appellants' submission under s. 8 of the *Charter*.

Fifth Issue - The W(D) Case

[34] The appellants cite Justice Cory's statement in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, pages 757-8, that a jury should be instructed to acquit if the jury believes the accused, or is left with a reasonable doubt by the evidence of the accused, or if the jury is left with a reasonable doubt by whatever evidence the jury accepts. The appellants' factum says:

> On each of the issues of assault and obstruction, there was evidence of another explanation which we submit did not receive any analysis like that outlined in the ***R. v. W.(D.)*** case.

[35] The trial judge did not offend *W.(D.)*'s principles. The judge expressly rejected the evidence of the appellants. He independently accepted evidence of other witnesses. He did not reject the evidence of the appellants because he accepted the evidence of the Crown's witnesses. The judge expressly found, based on the evidence he accepted, that the Crown had proven the charges beyond a reasonable doubt.

[36] I would dismiss this ground of appeal.

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Sixth Issue - Sentence Appeal

[37] The appellants' factum and oral presentation recited a sentence appeal, but offered no submission to support it. Having nothing from the appellants, the Crown offered no response.

[38] In my view, there is no merit to the sentence appeal.

Conclusion

[39] I would grant leave to appeal but dismiss the appeal.

Fichaud, J.A.

Concurred in:

Beveridge, J.A.

Farrar, J.A.

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