In the Provincial Court of Alberta

Citation: R. v. McConkey, 2008 ABPC 37

Date: 20080204
Docket: 070721113P10101,0201
Registry: Calgary

Between:

Her Majesty the Queen

- and -

Wylene McConkey and Jack James Gannon

Reasons for Sentence of the Honourable Judge A. A. Fradsham

Introduction

[1] The two defendants have each pleaded guilty to a charge that each of them:

> "Between the 7th day of November, 2006, and the 7th day of May, 2007, both dates inclusive, at or near Calgary, Alberta, did cause or permit to be caused dogs, of which she was the owner or person ordinarily in charge to be, or to continue to be, in distress, contrary to section 2(1) of the Animal Protection Act."

Issues

[2] There are two issues for determination:

1. What is the appropriate penalty, and to what extent should consideration be given to the financial circumstances of each of the defendants?

2. Should there be a prohibition order made under section 12(2) of the ***Animal Protection Act***, R.S.A. 2000, c. A-41, as amended, and, if so, what terms should such an order contain?

Facts

[3] On May 2, 2007, in response to a complaint made to the Humane Society about the welfare of certain animals, a peace officer employed by the Society attended at the residence shared by the two defendants. The officer discovered a number of dogs which appeared to have severely matted coats. The officer, exercising his discretion, gave the defendants one week to have the animals properly groomed or face the possibility that the animals would be seized.

[4] On May 6, 2007, the officer spoke to Ms. McConkey, and learned that no grooming appointment had been made, and that such an appointment would not be made within the time previously allotted for the purpose. As a result, four dogs were seized. One other dog and three cats, all of which appeared to be healthy, were left with the female defendant.

[5] Both defendants admitted that they were both responsible for the four seized dogs.

[6] On May 7th, a veterinarian examined the four seized dogs, and the following observations were made (which I accept as fact):

Shih Tzu Cross # 1

[7] This dog was approximately ten years old.[1] The dog had scarring to its left eye, matting of its coat, severe dental disease, and a "cauliflower" growth in one of its ear canals. That tumour had been growing for months, if not years. The matting caused the dog skin irritation.

Maltese Cross

[8] This approximately 15 year old[2] white female dog was severely distressed, and howled as it was examined by the veterinarian. It was very thin, and suffered from severe matting of its coat. The matting was so advanced around its muzzle that the dog could only slightly open its mouth to eat, and could get its tongue out to drink only with discomfort. The dog suffered significant skin

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[1] The examining veterinarian estimated this dog's age to be seven years, but the defendant McConkey said the dog's age was approximately ten years, and the Crown did not dispute that estimate.

[2] The examining veterinarian estimated this dog's age to be eight years, but the Crown accepted the defendant McConkey's assertion that the dog was approximately 15 years old.

irritation. There was matting around the vulva such that when the dog urinated the urine would soak into the mats which caused a burning irritation. The dog had to be groomed under anaesthetic.

[9] One of the dog's nails was growing between its toes, and some of the other nails had grown so long that they had curved around and grown into the foot pads of the dog. The veterinarian was of the opinion, and I accept this opinion, that it would have taken a couple of months for the nails to grow that long.

[10] The dog was also suffering from dehydration and renal failure.

[11] The veterinarian was of the opinion, which I accept, that this dog should have been euthanized, but the Crown was unable to tell me if that has yet occurred.

Shih Tzu Cross # 2

[12] This dog had matted fur to such an extent that it caused the dog distress. It also had mild dental tartar which needed attention.

Shih Tzu Cross # 3

[13] This dog was 5 years old. It had moderate dental tartar, and large mats over its lower back. These mats pulled at the dog's skin which was red and tender. The mat on the dog's tail was three times the length of the actual tail. The tugging of the skin caused by the mats caused the dog distress.

Facts Relating to the Defendants

[14] The defendant McConkey is 76 years old. She is the mother-in-law of the defendant Gannon who is 52 years old. Gannon was married to McConkey's daughter who died of cancer in 2001.

[15] Ms. McConkey lives on a government pension, and suffers from arthritis. However, she volunteers at a local nursing home, helping residents with crafts and painting.

[16] The dogs seized in this matter came to the two defendants from Mr. Gannon's adult son (Ms. McConkey's grandson). I am told, and accept, that these dogs have been in the possession of the two defendants "for some time".

[17] The one dog and three cats not seized belong to Ms. McConkey alone, and, as evidenced by the fact that they were not seized, are properly cared for by Ms. McConkey.

[18] For the last 15 years, Mr. Gannon has received a CPP disability pension. He suffers from back problems. He has two grown children who live on their own.

Law and Analysis

Crown Position

[19] The Crown submitted that the fine "should be four figures", and that a section 12(2) prohibition order should be made.

Defence Position

[20] Counsel for the defendants jointly submitted that fines are appropriate, but that they must reflect the economic status of the defendants.

[21] Ms. McConkey submitted that any prohibition order should not prevent her from having the animals she currently owns, and for which she is providing adequate care.

[22] Mr. Gannon did not contest the Crown's application for a prohibition order so long as it does not adversely affect his mother-in-law's ability to have her current pets.

Court's Analysis

[23] The ***Animal Protection Act***, *supra*, is regulatory legislation. In ***R. v. Kreft*** (2006), 66 Alta. L.R. (4th) 341 (Alta. Prov. Ct.), I set out my understanding of the types of regulatory legislation, and their objective. While I will not entirely repeat myself here, I do rely upon my previous analysis.

[24] The ***Animal Protection Act***, *supra*, in keeping with other regulatory Acts, is designed to regulate future conduct. This particular piece of legislation is intended to regulate the future conduct of those persons who have ownership or who are in charge of animals, or whose acts affect animals (in respect of the latter, see section 2(1.1) of the ***Act***). The conduct which is being regulated is that conduct which would cause an animal to be in distress, or which would permit an animal to be in, or continue to be in, distress. However, not all conduct which would cause an animal to be in distress is regulated by the ***Animal Protection Act***, *supra*. Section 2(2) of the ***Act*** states:

> "This section does not apply if the distress results from an activity carried on in accordance with the regulations or in accordance with reasonable and generally accepted practices of animal care, management, husbandry, hunting, fishing, trapping, pest control or slaughter."

[25] The legislation, to adopt the words of Cory, J. in ***R. v. Wholesale Travel Group Inc.*** (1991), 130 N.R. 1 (S.C.C.), sets "minimum standards for conduct and care" as it relates to animals.

[26] Having said that, there is a continuum of regulatory offences, and regulatory offences which are at the more serious end of the spectrum are more like criminal offences with an element of moral blameworthiness in the conduct regulated: ***R. v. Beach Motors Inc.,*** [2002] O.J. No. 4458

(Ont. C.J.) at paragraph 30. The offences set out in section 2 of the ***Animal Protection Act***, *supra*, are such offences.

[27] The sentencing provisions set out in sections 718 to 718.2 of the ***Criminal Code*** apply to the ***Animal Protection Act***, *supra*.[3] In determining the sentencing objectives applicable to the offence currently before me, it is important to remember the moral blameworthiness aspect of the prohibited conduct. The acceptable standard of conduct which is set by the legislation is designed to permit the use and enjoyment of animals without offending the community's generally held view that animals should be treated in a humane manner.[4] Taking all that into account, it is my view that the sentencing objectives for the offence before me are denunciation and deterrence.

Fine

[28] Section 12(1) of the ***Animal Protection Act***, *supra*, states that "a person who contravenes this Act or the regulations is guilty of an offence and liable to a fine of not more than $20,000.00." By setting such a high maximum penalty under the legislation, the Legislature has communicated its view that the legislation deals with matters of significant public interest.

[29] When determining the appropriate fine, I must take into account not only the purpose of the legislation, the fundamental purpose of sentencing (section 718), the sentencing objectives, the fundamental principle of sentencing (section 718.1), and the sentencing principles set out in section 718.2, but I must also consider the ability of the particular accused person to pay a fine: Section 734(2) of the ***Criminal Code***.

[30] The aggravating factors in this case are:

1. The animals suffered from a number of severe conditions: all had extremely badly matted fur, one had a large growth in one of its ear canals, and one had nails that had grown so long as to enter the dog's footpad. These problems took months to develop and reach the stage

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[3] ***Provincial Offences Procedure Act*** R.S.A.2000, c. P-34, sections 1(e), 1(i), 2, and 3

[4] Legislation such as the ***Animal Protection Act***, *supra*, falls under the general heading of "animal welfare legislation", and the humane treatment goals of such legislation share much in common with legislation which protects another defenceless segment of our society, namely, children. "It is interesting to note that the movement in society to protect children from violence and neglect was often an outgrowth of similar movements to protect animals": ***Child Protection Law in Canada, Volume 1***, by Lynn M. Kirwin et al. (Thomson Carswell, Toronto, 1996) at p. 1-1.

> they were in when the animals were seized. There was ample time within which the defendants would have realized the problems plaguing the dogs, and within which they could have taken remedial action (either by getting professional care, or by transferring the animal to a humane society).
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> 2. The degree of distress with which the animals had to endure was significant. It was neither transitory nor minor.

[31] The mitigating factor is the guilty pleas entered by the defendants.

[32] In ***R. v. Chan*** (1999), 251 A.R. 44; 68 C.R.R. (2d) 123 (Alta. Prov. Ct.), I dealt with a man who locked a cat in the trunk of his car for several days. The cat was stressed, starving and dehydrated when found. The water left in the car trunk for the cat had a 1/4 inch covering of ice on it because the outside temperature was minus 4 degrees Celsius.

[33] I imposed a fine of $1500.

[34] It is folly to attempt to minutely compare the levels of conduct and the distress resulting therefrom as may occur in various cases and their fact situations. For example, in the case at Bar, the acts and resultant distress lasted much longer than the acts and distress found in the ***Chan*** case. However, in ***Chan***, the act of locking a cat in a car trunk carries with it particular immediate horrors for the animal. Rather than trying to compose a table of conduct setting out various types of conduct and which types are equivalent in egregiousness, I think it is better to consider generally both the overall degree of distress suffered by the animal and the conduct of the defendant who caused the distress. That will involve considering the actions involving the animal, the length of time over which they occurred, and the type and intensity of the discomfort and injury which resulted.

[35] In my view, the conduct of the defendants, and the level of distress caused the four dogs in the case at Bar, is at least of the same overall degree as that present in the ***Chan*** case. In my view, the appropriate penalty for this conduct would be a fine of $1500 (inclusive of the provincial surcharge).

[36] However, it must be remembered that there are two persons, forming one economic unit, who are equally guilty of the offence, and that the offence was comprised of a single course of conduct. The two defendants effectively "acted as one person" in the commission of this offence. In these circumstances, it is appropriate to apportion the aggregate penalty between the two individuals. Accordingly, each defendant, subject to the issue of ability to pay, should be fined $750.00.

[37] With respect to the financial ability of the two defendants to pay a fine, I am guided by these words of Clayton Ruby in his book ***Sentencing, Sixth Edition*** (LexisNexis Butterworths, Markham, Ontario, 2004) at paragraphs 11.15 to 11.16:

> "It has always been an error in principle for a sentencing judge to impose a fine without investigating the offender's ability to pay a fine. This stricture goes considerably beyond the requirements of the Criminal Code. A fine imposed without such inquiry will be set aside or reduced. But the possibility of imprisonment for default of paying a fine has led Parliament to impose an absolute prohibition against fining an offender other than a corporation, except in regard to proceeds of crime matters, without being satisfied that the offender is able to pay the fine or discharge it pursuant to a fine option programme alternative. The requirement for imprisonment for non-payment of a fine probably triggers the offender's rights under section 7 and certainly triggers a violation of section 12 of the Canadian Charter of Rights and Freedoms. Rather than litigate on a case-by-case basis the constitutionality of any particular fine, Parliament has limited its imposition.
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> Unless careful regard is had to the means of the offender, the amount of the fine will not be appropriate. 'It is right that any fine imposed should be one which causes some hardship. ...if it causes hardship, so it should, but it should not create a situation where the applicant is in a position either that he cannot pay or that in order to pay he has to be under a burden of paying instalments' for a lengthy period of time. . . ." [footnotes omitted]

[38] In a footnote to the main body of the text, Mr. Ruby referred to ***R. v. Deslisle***, [2003] B.C.J. 662 (B.C.C.A.), and stated that it ran against the principle that a fine should not require a defendant to pay installments "for a lengthy period of time." In ***Deslisle***, the defendant was fined a total of $50,000.00, and allowed 50 months within which to pay it. The British Columbia Court of Appeal concluded that an aggregate fine of $50,000.00 was reasonable. The Court did not comment on the principle that a defendant should not be "under a burden of paying instalments for a lengthy period of time." In the absence of any comment by the Court, I am not prepared to hold that the Court intentionally ignored or overruled the principle. Rather, I think the proper conclusion to be drawn is that the Court did not find 50 months to be too lengthy a period of time.

[39] In the case at Bar, both defendants have government pensions as their source of income. That does not in and of itself mean that they are incapable of paying fines. It means that I must be mindful of their limited income when I set the fine. As indicated in ***Sentencing, Sixth Edition***, *supra*, the fine should "cause some hardship". In my view, a fine of $750.00 for each of the defendants would cause the requisite hardship without being too onerous. If, for example, the defendants were given 12 months within to pay their fines, each would have to pay $62.50 per

month (if they chose to budget the payments over the full year). That is neither too onerous in amount nor in the length of time needed to pay it.

Prohibition

> Section 12(2) states that:
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> "If the owner of an animal is found guilty of an offence under section 2, the Court may make an order restraining the owner from continuing to have custody of an animal for a period of time specified by the Court."

[40] Section 12(3) permits the Court to make such an order "on any terms and conditions it considers appropriate."

[41] The Crown seeks such an order in respect of both defendants.

[42] The defendant Gannon does not have any animals, but the defendant McConkey has one dog and three cats (the animals left with her by the investigating authorities). Mr. Gannon does not oppose a section 12(2) order so long as it does not adversely affect Ms. McConkey's ability to keep her current pets. Ms. McConkey opposes the Crown's application insofar as it relates to her current pets.

[43] In general terms, I think the conduct of the two defendants would usually disentitle them to the right to have custody of any animal. However, the one dog and three cats presently in the custody of the defendant McConkey have been adequately cared for, and I see no point in inflicting stress on the animals by taking them out of their long-time home. I am satisfied that there is no unmanageable risk to the well-being of those animals if they remain with Ms. McConkey, but there are two very real risks if the animals are removed from her custody: (1) the animals will suffer stress at the loss of their home; and (2) the animals may not be able to be relocated to another home (and if that were the case, the removal would in essence be a death sentence). I am going to leave these animals with the defendant McConkey for their benefit, and not hers.

[44] I do not think a section 12(2) Order against Mr. Gannon would adversely affect Ms. McConkey as long as he does not assume a custodial role in respect of her current pets.

Sentence

[45] I sentence each of the defendants to pay a fine of $750.00 (inclusive of the provincial surcharge), and in default of payment have a judgment entered against the defaulting defendant in the amount of $750.00 in favour of Her Majesty The Queen in Right of Alberta.

[46] I will hear applications for time to pay.

[47] Pursuant to sections 12(2) and 12(3) of the ***Animal Protection Act***, *supra*, I make an Order restraining the defendant Gannon from having the custody of any animal for a period of five years.

[48] Pursuant to the same sections, I make an Order restraining the defendant McConkey from having the custody of any animal other than the dog and three cats of which she presently has custody for a period of five years. I also make it a term of this Order that during the time of this Order the defendant McConkey will permit and facilitate the inspection of the animals of which she is permitted to have custody under this Order, by a peace officer (as defined in the ***Animal Protection Act***, *supra*), or by a registered veterinarian (as defined in the ***Animal Protection Act***, *supra*) acting under the instructions of a peace officer or both. It is a further term of this Order that, during the time of this Order, the defendant McConkey will, upon the demand of a peace officer, provide to that peace officer, at the defendant's expense, once in any calendar year, a report prepared by a registered veterinarian in respect of the health and well-being of any or all of the animals of which she is permitted to have custody pursuant to this Order.

[49] I direct the Crown to prepare a form of Prohibition Order reflecting my decision under sections 12(2) and 12(3) of the ***Animal Protection Act***. I give leave to the Crown to identify the one dog and three cats which the defendant McConkey is permitted to retain by reference to the number of any municipal licences in respect of the animals or tattoo numbers they may bear, or both.

Dated at the City of Calgary, in the Province of Alberta this 4th day of February, 2008.

A. A. Fradsham
A Judge of the Provincial Court of Alberta

Appearances:
G. Haight
for the Crown

M. Keelaghan
for Accused McConkey

K. Williams (Student Legal Assistance)
as Agent for Accused Gannon