NEWMARKET COURT FILE
DATE: 20071206

2007 CanLII 52982 (ON SC)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
HER MAJESTY THE QUEEN	)	A. Ghosh, for the Crown/Respondent
Crown/Respondent	)	
- and -	)	
MARVIN BLANCHARD	)	D. Harris, for the Appellant
Appellant	)	
	)	**HEARD:** November 19, 2007

ON APPEAL FROM THE DECISION OF THE HONOURABLE MADAM JUSTICE A.M. SHAW DATED SEPTEMBER 3, 2004

McISAAC, J.

[1] This is an appeal against conviction and sentence on two charges of cruelty to animals contrary to s.446 of the *Criminal Code*. The appellant advances five grounds:

(i) Error in refusing an adjournment request to retain counsel;

(ii) Error in failure to provide adequate assistance to a self-represented accused;

(iii) Error in the admission and use of evidence of "other discreditable conduct";

(iv) Unreasonable verdicts; and

(v) The sentence was manifestly unfit.

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I. BACKGROUND

[2] The appellant was charged in August 2002. After three appearances, counsel of record first attended court on November 22, 2002. Following thirteen more appearances, on October 30, 2003 a trial date was fixed for May 13 and 14, 2004. On March 16, 2004 counsel for the appellant sought permission and was granted leave to be removed from the record. On May 7, 2004, the appellant, now self-represented, sought and was refused an adjournment of the trial dates to obtain new counsel by Kenkel, J. The trial judge affirmed the adjournment refusal on May 13, 2004. The trial proceeded on that date, May 14, June 1 and 2 and August 20, 2004. Judgment was delivered on September 3, 2004 and sentencing took place on February 28, 2005, more than 28 months after the first appearance on the charges. Mr. Harris appeared for the first time on the record for the appellant on October 18, 2004.

II. GROUNDS OF APPEAL

1. Refusal of Adjournment

[3] The appellant was not present in court on March 16, 2004 when his original counsel sought and obtained leave to retire. At that time, the presiding judge directed that the trial proceed two months hence on a "with or without counsel" basis. The basis for the motion to retire was the appellant's failure to fulfill the retainer agreement.

[4] When the appellant brought his application for adjournment on May 7, 2004 he confirmed that he was aware of his former counsel's request to retire on March 16, 2004 and that he was told that day that his trial was ordered to proceed in May on a "with or without counsel" basis. He apparently did nothing about retaining new counsel up until shortly before the trial. However, this proposed counsel was not prepared to do the trial scheduled the following week. When he renewed his adjournment request before the trial judge on May 13, 2004, the appellant had nothing to confirm that this new counsel had been retained. His request was denied and the trial began. He explained that he had delayed retaining new counsel until such time as he had obtain the Crown disclosure from his former lawyer which only took place two days before his original adjournment application on May 7, 2004 when he settled his account for legal services.

[5] In denying the appellant's request for an adjournment of the trial date, the trial judge took into account several factors: the lengthy history of the proceedings, the fact original defence

counsel had been permitted to withdraw two months earlier and that the trial had been marked to proceed "with or without counsel" for two months. In addition, she emphasized the fact that the appellant had attended court with absolutely nothing from the proposed new counsel confirming that he had been retained to act. As it turns out, at best, this counsel was prepared to act at some future time, assuming he was properly retained. In my view, there is nothing to suggest that these "arrangements" would not meet the same fate as those that befell the appellant's original counsel.

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[6] It is agreed that a trial judge has a wide discretion to grant or refuse a request for the adjournment of a trial. Absent an abuse in the exercise of that jurisdiction, such discretion must be granted significant deference: see *R. v. Wood* [2005] O.J. No. 1611 (C.A.) at para. 7. The appellant has failed to satisfy me that such abuse exists in this case. This is confirmed by the fact that the appellant did absolutely nothing to retain new counsel until after he had been found guilty in September, 2004: see *R. v. Marzocchi* [2006] O.J. No. 1648 (C.A.) His failure of due diligence is manifest.

[7] Having failed to establish a miscarriage of justice based on the refusal to grant an adjournment, this ground of appeal fails.

2. Failure to assist

[8] This issue is related to the third issue, that is, admission and use of the evidence of "other discreditable conduct". In particular, the appellant suggests that the trial judge failed to advise him that he had the right to object to the admissibility of this evidence. In addition, he suggests that the trial judge provided him with "little assistance generally".

[9] A trial judge is required to provide an unrepresented accused, with a minimum level of assistance: see *R. v. Tran* (2001) 156 C.C.C. (3d) 1 (Ont.C.A.) at para. 31. The appellant does not particularize where the trial judge failed to provide assistance of a general nature. On the other hand, the Crown points to the following circumstances, among other things, to suggest there was general compliance with *Tran*:

- she explained the course of the trial;
- she explained his right to cross-examine Crown witnesses;
- she explained his right to present a defence and call defence witnesses;
- she directed him as to his right to consult duty counsel which he took up throughout the trial;
- she advised him of his right to object to the qualification of the Crown expert witness;
- she insisted that documents from Crown witnesses be appropriately authenticated;

- she assisted the appellant with the framing of his questions in cross-examination;
- she accommodated the appellant's request for the recall of an important Crown witness;
- she instructed the appellant how to call defence evidence and to connect this to his closing submissions;
- she accommodated the appellant in scheduling defence witnesses; and
- she assisted the appellant in qualifying the notes of a defence witness.

[10] From my review of the record, there is not much more the trial judge could have done to assist the appellant without facing an allegation that she had "entered the arena" on his behalf. This ground of appeal is also without merit.

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3. Admission of "other discreditable conduct".

[11] This issue arose in the following circumstances. The appellant was charged with two counts alleging cruelty to a number of dogs contrary to s.446 of the *Criminal Code*. These charges arose as a result of the execution of a search warrant at his premises following an undercover operation by the Ontario Society for the Prevention of Cruelty to Animals ("OSPCA"). During the course of the presentation of the prosecution case there was some reference to various other animals in varying states of neglect. These involved birds, rabbits, sheep, chickens, a horse and a pig. Some of them were dead. The appellant suggests that this "other discreditable conduct", what I will refer to as "other animals" evidence, was admitted without submitting it to the probative value/prejudicial effect analysis mandated by well-established principles: see *R. v. Handy* (2002), 164 C.C.C. (3d), 481 (S.C.C.). In the result, he continues, this caused prejudice to him resulting in an unfair trial. The Crown responds that this "other animals" evidence did meet the test for admissibility mandated in *R. v. Handy*, supra. Alternatively, the Crown argues that the trial judge ignored this problematic evidence and rendered the verdict on evidence limited to the dogs.

[12] Assuming without deciding that it was legal error for the trial court to proceed to admit evidence of "other animals" without testing it in the crucible of a *voir dire*, I have been persuaded by the Crown that this caused no substantial wrong to the appellant and was "harmless error": see s.686(i)(b)(iii) C.C. Although the trial judge made brief reference to the evidence of "other animals" in her reasons for judgment, it is clear that she did so in her narration of the evidence heard over several days of trial. She did not, at any time, refer to it as being probative of the two charges before the court. In her analysis leading to conviction, she relied solely on the evidence focused on the dogs. In those circumstances, I can say with every confidence that the "other animals" evidence did not, in any way, infect her assessment of these allegations: see *R. v. Leaney* (1989) 50 C.C.C. (3d) 289 (S.C.C.) at p. 305.

[13] In the result, this ground also fails.

4. Unreasonable verdict

[14] The appellant faced two charges in relation to these dogs: (1) wilfully causing unnecessary pain, suffering or injury contrary to s.446(1)(a) C.C. and (ii) wilfully neglecting or failing to provide suitable care contrary to s.446(1)(c) C.C. A stay was entered on the first count after the findings of guilt.

[15] The trial judge accepted the evidence of the appellant that he only had possession of the dogs for several weeks and had not been responsible for the 21 dogs becoming severely matted as they were found by the OSPCA. She based her findings of guilt on the fact that he had failed to take sufficient steps to have their neglected condition attended to by grooming and veterinarian care. She accepted his evidence that he had made arrangements for this care to take place on July 19, 2002, three days after the dogs were seized. He had been assembling these animals for resale since the last week of June and all of them were obviously in need of care once he received them. The trial judge accepted the evidence of the appellant that he had made persistent but unsuccessful efforts to arrange for care for these dogs.

[16] It is suggested that these verdicts were unreasonable given the findings of fact in favour of the appellant. The appellant submits that, given the length of time that it had taken for the condition of the dogs to deteriorate to the admitted poor state that it had, it was an abdication of her judicial duty to adopt the testimony of the expert witness that the dogs were in need of immediate care. On the other hand, the Crown argues that the trial judge was entitled to find that, although the appellant had made some efforts to arrange for care for these dogs, he had not done enough given the fact that he had had possession of some of them for a period of three weeks.

[17] In my view, the trial judge was justified in finding liability on the basis of the appellant's failure to do more to obtain immediate care for these dogs. There is no suggestion that the cost for such care would have been prohibitive or that no care was available before the 19th of July. In those circumstances, the trial judge was entitled to find an absence of due diligence on the part of the appellant in relation to his obligation to have them properly cared for. This would appear to conform to the legal definition of "wilfully" referred to in the jurisprudence: see *R. v. McHugh* [1966] 1 C.C.C. 170 (N.S. Sup. Ct. App. Div).

[18] There is no basis to disturb the conviction on this ground.

5. Sentence

[19] At the sentencing herein, the Crown sought a period of imprisonment of 30 days while the appellant sought a suspended sentence. The trial judge found aggravating circumstances

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from the previous criminal record, the number of dogs wilfully neglected and the fact that the appellant was in a position of trust toward his canine victims. I can see no error in principle in the trial judge's acceptance of these factors in arriving at the sentence she did. In the result, I must defer to her decision on this aspect of the sentence.

[20] On the other hand, the appellant has satisfied me that there are two aspects of this sentence that should be varied. Firstly, I agree that there is no jurisdiction to delay the prohibition under s.446(5) until the end of the three-year period of probation that also included a term that the appellant not possess or have the custody or control of any dogs. Second, I agree that the restitution order be reduced to reflect the monies obtained by the OSPCA upon sale of the 21 dogs to third parties. That award is reduced to $4,752.00.

III. CONCLUSION

[21] In the result, the conviction appeal is dismissed as well as the sentence appeal except for the two modifications to the incidental orders. A warrant will issue if required.

McISAAC, J.

Released: December 6, 2007

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