

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT**

3rd Circuit - District Division - Ossipee
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NOTICE OF DECISION

FILE COPY

Case Name: **State v. Christina Fay**
Case Number: **464-2017-CR-00777**

Enclosed please find a copy of the Court's Order dated October 06, 2017 relative to:
Order on Motions; ISSUED.

October 10, 2017

Elaine J. Lowe
Clerk of Court

(464260)

C: Timothy Morgan, Esq.; James P. Cowles, ESQ; Kent M. Barker, ESQ; Simon Robert Brown, ESQ

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

CARROLL COUNTY

3RD CIRCUIT – DISTRICT DIVISION –
OSSIPPEE

State of New Hampshire v. Christina Fay
Case No. 464-2017-CR-00777

ORDER ON MOTIONS

This matter came before the Court for hearing on various motions on October 3, 2017. The State and Defendant appeared through counsel. A recording of the hearing was made. After due consideration of the evidence and testimony presented, the Court makes the following rulings:

Motion To Amend Confiscation Order

The Defendant has filed this Motion seeking return or “rehoming” of the dogs confiscated by the State when it executed its search warrant on June 16, 2017. The State objects.

The Defendant is charged with 12 counts of Cruelty to Animals under RSA 644:8. On June 16, 2017, the State executed a search warrant on Defendant’s property and seized 75 European Great Danes. Some of the dogs have been placed in homes, while others have been housed in various humane society kennels pending trial. The Defendant alleges that while in the custody of the State, surgery and other medical procedures have been performed on the dogs and that the Humane Society of the United States (HSUS) has used the dogs for various fundraising campaigns. In addition some puppies and at least one adult dog have died.

The Defendant asserts that the HSUS has effectively engineered the seizure of the dogs for its own purposes, and has now been using the dogs in a fund raising campaign. She asserts that the dogs continue to be her property, and the State is medically treating the dogs and caring for them with no input from her. Further she is exposed to significant financial penalty the longer the dogs remain in the custody of the State. The Defendant contends that behind all of this is HSUS which is calling the shots on the care and treatment of the dogs, and doing so without her or the State’s control. She asserts that media reports indicate that HSUS has raised \$300,000 or more using this case and the dogs as a fundraising tool.

The Defendant maintains that the dogs have been subjected to needless surgery for common, non-life threatening conditions such as cherry eye and papilloma virus infection. She notes that the evidence shows that the dogs received unnecessary and duplicative vaccinations, and the veterinarians administering the vaccinations did not review medical records to determine whether this treatment was safe for the dogs. She claims at least 9 of the dogs have been rehomed to other families without her consent. She has not been provided with any information regarding the location or condition of the dogs. She concedes that by agreement with the State, she has had a friend and a veterinarian view the dogs.

The Defendant testified that the particular breed of these dogs, European Great Danes, are quite unique. They have a life span of 5 to 7 years. They are bigger than the American breed of Great Danes. They required highly scheduled care, including feeding, watering and exercise to avoid a condition called bloat, which can result in serious harm to their stomach and intestines. Even with this many big dogs, she and several employees were able to follow a daily schedule that included watering, feeding and exercise for all dogs. Although the State alleges that the dogs were kept in filthy, unsanitary conditions, the Defendant is adamant that the dogs were housed in clean conditions and their urine and feces were cleaned each day. The dogs were only allowed the minimal exercise they needed each day. She fed the dogs a raw meat diet, which she believes avoids bloat. The food fed to the dogs was sanitary and if it became spoiled, she would dispose of it. She conceded that some spoiled food may have been found on her property if it was dropped by a dog and not picked up. She also admitted that at least one refrigeration unit had failed and the food in it has spoiled, however, she disposed of it and did not feed it to her dogs.

She testified that she insured that all of the dogs received both preventive and regular veterinary care. They were given medicine for heartworm and to repel ticks and fleas. They had surgery when warranted, to prevent bloat, but only when they were under anesthesia for another procedure. To bolster her claim of proper medical treatment for the dogs, the Defendant submitted veterinary records for the treatment of one dog, Lira. The records show a history of treatment for this dog through what appears to be a pregnancy and surgery over period of months in 2016.

When the dogs were fed, watered and exercised each day, the Defendant and an employee would monitor them to insure that they drank the correct amount of water and ate. Water was not left in the dogs pens because the amount of water the dogs consumed could not be monitored. The presence of a water bucket in the dogs cages overnight could present a health hazard as a dog might get their head lodged in a bucket or chew the bucket and swallow pieces of it.

The Defendant has had prior training as a veterinary technician. She is not breeding these dogs for profit. She has a love of the breed and was running her kennel out of a passion for this breed of dogs.

The Defense call Samantha Moffitt, DMV, as a witness. Dr. Moffitt is a veterinarian in Virginia. She testified to her credentials. She was admitted as an expert witness, without objection from the State, for the purpose of this hearing only. She admitted she does not have training in a specialty nor is she board certified. She was not hired by Ms. Fay and was providing her time and testimony voluntarily.

Dr. Moffitt was allowed, by agreement of the parties, to view the dogs and report on their condition. She viewed 5 of the dogs, however, was not allowed to touch them or conduct any examination. She noted that some of the dogs were barking, which is common, while others were either pacing or laying still and seemingly depressed. One was laying on its dog bed, and had feces under its tail on the bed. She contends that some of the pens in which the dogs are being held are too small for them. She was concerned at seeing a white substance in one dog's uneaten food, which may indicate it had not eaten medicine given to it. She noted that the adults have been separated in a different building from the puppies, which was appropriate. Five of the dogs were not available for

viewing as they were being treated by a veterinarian. She noted that wet and dry commercial dog food had been stocked by the shelter and expressed concern that the dogs have not had their diet slowly transitioned to commercial food, which can upset their digestion. Her review of the records led her to believe that the veterinarian caring for the dogs had vaccinated them without determining whether they had been previously vaccinated, which in her opinion constituted neglectful treatment of the dogs. She did not note a specific medical standard, but simply opined that over vaccination is frowned upon in the veterinarian world.

Dr. Moffitt explained that both cherry eye and papilloma virus are common in this breed and don't necessarily require treatment, unless the conditions become serious. With respect to cherry eye, she noted that some breeders treat it and some don't. With papilloma virus, the condition is benign, unless it causes bleeding. She further noted that she could not determine if the dogs had giardia or were affected by ammonia gas without further testing. She asserts that the dogs are showing signs of stress and/or depression and would be better off rehomed. She did acknowledge that the dogs are being kept in clean conditions, although they appear to have diarrhea, which may have resulted from a change in diet. Dr. Moffitt admitted that the dogs may have had happy tail, however, she noted that this is only a serious problem if the wound becomes infected and causes exposed bone or nerve damage. It is a difficult condition to treat without surgery, because the dogs continually wag their tails and it's hard to keep topical medication and bandages on the tail. She was unable to assess the severity of happy tail on any of the dogs.

Dr. Moffitt conceded that she was not present when the dogs were confiscated by the State and couldn't comment on their condition or the conditions of their housing at that time. She expressed concern that the records revealed discrepancy in treatment of the dogs by various veterinarians since they were confiscated by the State.

Pursuant to RSA 644:8, a person charged with animal cruelty may have their animals confiscated by the arresting officer. If the person is convicted, the Court may dispose of the animal in any manner it decides. If the defendant is convicted, she may be assessed the costs of boarding, treating and disposing of these dogs.

While not applicable in this case, it is worth noting that the statute also provides, in section IV-a(a) a law enforcement officer or officer of a duly licensed humane society may confiscate an animal without notice to the owner when there is clear and imminent danger to the animal's life or health.

This law acknowledges, and the Court is mindful, that the seizure of animals is unique from the seizure of most other property. Animals are living beings, and the State has an obligation, not only to preserve them as property, but to insure their proper care and treatment. The statute is silent as to how this is best done, and whether and when the animals can or should be returned to the owner, pending the outcome of the litigation. The Defendant noted at least one recent case in which dogs had been returned to an owner during the case. The clear intent of the statute is to insure that animals be removed from, and not returned to, an environment where they will continue to suffer from mistreatment or cruelty. This Court has the obligation to determine the disposition of the animals if the defendant is convicted.

The description of the conditions of Fay's home couldn't be more different. Fay describes a sanitary, orderly environment in which the dogs are cared for on a strict schedule and receive appropriate medical care. The State describes filthy conditions, with unhealthy dogs being fed rancid meat, not receiving water and lacking proper medical care. Determination of the actual facts is left for the trial in this matter. At present, there is no evidence to show that the dogs are being harmed or subjected to improper medical treatment. Dr. Moffitt's testimony was admittedly limited by the fact that she could not examine the dogs and that she had no actual knowledge of the condition in which they were kept when confiscated. While she expressed disagreement with some of the treatment provided by the veterinarians presently caring for the dogs, she did not identify any actual harm being done to them. She suggested that some of the dogs may be depressed, but did not offer an opinion on what was causing this condition. She did conclude that the dogs would be better off rehomed, because of the stress they appear to be experiencing in their present environment. Dr. Moffitt, however, was unaware of the conditions at Ms. Fay's home. She admitted she had not been present when the dogs were seized and had no knowledge of the conditions they had been kept in at that time.

Ms. Fay's offered solution is that 31 of the dogs be distributed to her friends and the others be returned to her.

As Dr. Moffitt is admittedly unaware of the conditions the dogs were kept in at Fay's home, it is difficult to understand how she can conclude that returning them there is better for the dogs. As the intent of RSA 644:8 is to insure the safety and proper care of the animals seized, the risk of returning the dogs to the care and custody of the Defendant, now, is simply too great. In addition, the State and this Court have the obligation to consider appropriate disposition of the dogs in the event of a conviction. To release the dogs to Fay and various others now would require further transport of them and, perhaps their confiscation, once again, if Fay is convicted. This would create an unnecessary burden and a logistical nightmare for both the State and this Court. Accordingly, the dogs will not be released from state custody.

Motions to Quash/Requests for Bill of Particulars

The Defendant has filed 12 Motions to Quash/Request for Bill of Particulars challenging the sufficiency of the State's complaints. The Defendant asserts as that each of the complaints fails to provide sufficient information so as to allow the Defendant to prepare a defense. The State objects, claiming all complaints are sufficient.

The long-established test in this state to determine whether a complaint is sufficiently definite in its terms is to inquire whether it states the charge so that the defendant may understand it and prepare for trial. *State v. Hamson*, 104 N.H. 526, 528 (1963). An indictment is generally sufficient if it recites the language of the relevant statute; it need not specify the means by which the crime was accomplished or any other facts that are not essential elements of the crime. *State v. Davis*, 149 N.H. 698, 704, (2003). The question is not whether the indictment could be more certain and comprehensive, but . . . whether it contains the elements of the offense and enough facts to warn the accused of the specific charges against him. *State v. Hermsdorf*, 135 N.H. 360, 366, (1992).

A bill of particulars is, in this State, a tool for clarifying an inadequate indictment or complaint. *State v. French*, 146 N.H. 97, 100, (2001). The purpose of a bill of particulars is to protect a defendant

against a second prosecution for an inadequately described offense and to enable him to prepare an intelligent defense. *Id.* at 101.

RSA 644:8 I defines cruelty as including, but not be limited to, acts or omissions injurious or detrimental to the health, safety or welfare of any animal, including the abandoning of any animal without proper provision for its care, sustenance, protection or shelter.

The Defendant challenges complaints ID #'s 553-557, as not sufficient to allow her to prepare her defense. Each of the complaints was brought under RSA 644:8 III(f). Each of these complaints recites specifically the words of this statute. In addition each alleges the specific dog identified in the complaint was kept in conditions where the floor was covered in a mixture of feces and urine, in a dark, poorly ventilated room, with a high level of ammonia. Each of the complaints alleges specific injuries to, or illnesses afflicting, the dog named in the complaint. These facts if proven true all could constitute cruelty as defined in RSA 644:8I. RSA 644:8 III (f) does not require the State to show specific act or omission, but rather that the defendant "negligently permits or causes any animal in his possession or custody to be subjected to cruelty, inhumane treatment or unnecessary suffering of any kind". These complaints clearly allege that these dogs were in the defendant's possession and custody when being subject to conditions which constitute cruelty.

With respect to complaint ID #'s 767-769 and 771-772 and 717 and 714 the Defendant asserts that these complaints are defective because they fail to identify the specific dogs affected by the conditions outlined in the complaints. Further, the Defendant asserts that the State has failed to identify how the Defendant failed to properly treat specific conditions in the complaints. These complaints allege violations of RSA 644:8 III (a) which makes it a misdemeanor for an a person who "Without lawful authority negligently deprives or causes to be deprived any animal in his possession or custody necessary care, sustenance or shelter." Again, each of the complaints contains a recitation of the specific statutory language. In addition, each complaint alleges that the Defendant had "more than 70" of the dogs in her possession or custody. Each recites the specific basis for of the Defendant's failure to provide care, shelter or sustenance, including, for example, failure to treat cherry eye or giardia infection, failure to provide water or feeding spoiled food. These complaints allege that many of the dogs, or the majority of the dogs, were subject to the alleged conditions. There are sufficient facts in these complaints to warn the Defendant of the specific charges against her, and allow her, through discovery, to determine what evidence the State has to support these charges.

Each of the complaints filed by the State contain sufficient detail to allow the Defendant to prepare for trial.

As the Court has determined that the complaints are adequate, no bill of particulars is required.

Motion for Return of Property RSA 595-A

In this Motion, the Defendant request seeks the return of all property seized at pursuant to the State's search warrant, including return of all dogs. The Defendant argues that RSA 595-A:6 provides that the Defendant may petition the Court for return of property seized pursuant to a search warrant.

RSA 595-A:6 provides that property seized shall be safely kept, under the direction of the court, so long as necessary to permit them to be produced or used as evidence in any trial. This statute leaves return or disposition of seized property to the discretion of the Court. The Defendant asserts that much of the property seized by the State has no evidentiary value, but is valuable to her and should be returned immediately. Such items would include records of importation of the dogs and personal papers. The State objects to return of this property, noting it has four banker boxes of records and has yet to identify all of the items it may need for trial. This Court has already made an order that the State make all documents seized available to defense counsel for review and copying.

The return of the dogs is denied for reasons set forth above. The State shall not be obligated to return any property which it deems to have evidentiary value needed for use at trial. After the State determines which items are necessary for its case, the remaining items shall be returned to the Defendant.

Motion to Suppress Search Warrant

The State called the Officer, Michael Strauch, of Wolfeboro Police Department (WPD) to testify. Officer Strauch has been a police officer for 12 years, 10 of which have been with WPD. He is the canine handler for WPD. His investigation included the accounts of several witnesses including Tona McCarthy, an investigator for the SPCA, two veterinarians and two witnesses who had actually worked for the Defendant. He also relied on his personal knowledge as he been to the Defendant's property. He testified that on May 8, 2017 he went to the Defendant's property to serve a summons. He observed several unopened bags of dogfood, which were in soggy, wet cardboard containers. From 40 feet away, he detected the strong odor of urine and feces and a rotting smell. He looked through a window and saw the floor was covered in feces and couldn't see anywhere clean for the dogs to lay down. He also observed two stainless steel freezers. He interviewed two individuals, a juvenile identified as A.N., and Marilynn Kelly, both of who worked for the Defendant. He reviewed pictures of the condition of the premises provided by the witnesses. He interviewed two veterinarians who had had recently treated some dogs the Defendant had owned. He also received information from another witness who claimed that an employee of the Defendant had witnessed a dog overheating to the point of need an intravenous fluid to rehydrate. Each of the witnesses gave detailed and consistent accounts of conditions in which the dogs were being kept. Neither A.N. nor Kelly were identified as confidential informants.

Based on his investigation, Officer Strauch provided the following facts, among others, in his application for the search warrant:

The dogs were housed in areas which had floors thick with feces and urine.

The dogs were fed spoiled food, infested with maggots.

Some dogs suffered from happy tail.

The dogs did not have sufficient water.

Some dogs appeared to be under-weight.

Some dogs had open wounds, injuries to their feet and untreated medical problems.

Some puppies and dogs had been mistreated and died from neglect.

Probable cause exists if a person of ordinary caution would justifiably believe that what is sought will be found through search and will aid in a particular apprehension or conviction. *State v. Johnson*, 140 NH 573, 576 (1995). The application for the search warrant must only contain sufficient facts and circumstances to establish a substantial likelihood that items sought will be found in the place to be searched. *State v. McMinn* 144 NH 34, 38 (1999). The review standard for a search warrant is totality of circumstances. *Id.*

The Defendant contends that the warrant lacked sufficient or complete information. This argument is mainly based on the fact that one witness, Kelly, had only worked for Fay for 6 days and the Court was not made aware of the level of care provided to the dogs by Fay. This argument ignores that information was provided by a variety of witness, including Strauch, himself. A search warrant isn't required to contain all possible information and explanations, but only sufficient information to support the search requested.

The Defendant contends that due to lack of evidence in the affidavit, there was not probable cause to issue the warrant. Again the Defendant focuses on the statement of one witness, A.N. a juvenile and ignores the evidence and statements provided by other witnesses. Certainty and specific detail isn't required to find probable cause. The Court must consider the totality of the circumstances to determine that evidence will be found which will aid in a conviction. Strauch, himself testified that he observed the dogs in unsanitary conditions at Defendant's home and he gathered evidence from a variety of witness all detailing unsanitary conditions and dogs afflicted with illness and injury at the premises. The fact that a witness may have had incomplete or limited knowledge doesn't create a lack of probable cause, as the totality of all information presented established that probable cause did exist.

The Defendant claims that the State recklessly disregarded the truth in basing the search warrant on information from A.N. and Kelly. The Defense argues that Strauch did not question or verify information provided by A.N. or Kelly. This is simply incorrect. As set forth above, Strauch relied on his own observations at the Defendant's home as well as statement by a variety of witnesses. He reviewed pictures taken by witnesses. He specifically testified that the information provided by other witnesses was consistent with his own observations. This alone establishes that Strauch had a reasonable basis to conclude other witnesses statements were truthful and accurate. Neither A.N. nor Kelly are confidential informants.

The Defense further asserts that the State should have contacted Fay prior to beginning the investigation, to confirm or dispel the claims of the other witnesses. Although Strauch did not attempt to discuss or confirm the witness accounts with Fay herself, he did go to her home and made observations regarding the condition in which the dogs were kept. The affidavit must contain sufficient information, not complete information, to establish probable cause. The fact that the State did not seek to confirm or dispel the accounts of witnesses by speaking to Fay, herself, does not establish a lack of probable cause.

Motion to Dismiss Civil Forfeiture

The State has withdrawn this complaint. The Defendant's Motion for Attorney's Fees and Costs is denied.

Motion for Discovery

Defendant's Motion for Discovery is granted. As stated above, the State will make all documents requested by the Defendant available to the Defendant for viewing and copying. In addition the State shall make all other information requested in the Defendant's Motion at least 5 days prior to trial.

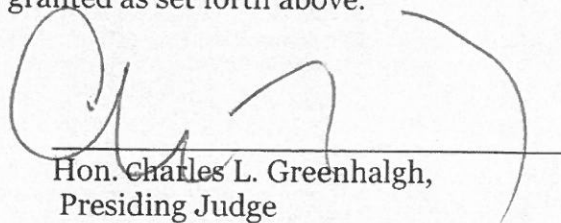
Accordingly:

- A. The Defendant's Motion To Amend Confiscation Order is denied.
- B. The Defendant's Motions to Quash/Requests for Bill of Particulars are all denied.
- C. The Defendant's Motion for Return of Property RSA 595-A is denied with respect to the dogs. The Motion is denied with respect to property that will be used by the State in prosecution of this matter and granted with respect to any property which the State will not use in prosecution of this matter. The State shall notify the Defendant, through counsel, when it identifies property to be returned and promptly make available to the Defendant.
- D. The Defendant's Motion to Suppress is denied.
- E. The Defendant's Motion to Dismiss Civil Forfeiture is moot and her request for fees and costs is denied.
- F. The Defendant's Motion for Discovery is granted as set forth above.

So Ordered:

October 6, 2017

Date



Hon. Charles L. Greenhalgh,
Presiding Judge