

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080346
	:	TRIAL NO. C-07CRB-31186A
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
MYHEART ASKEW,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant, Myheart Askew, appeals a conviction for cruelty to a companion animal under R.C. 959.131(C). We find no merit in her four assignments of error, and we affirm her conviction.

The record shows that in August 2007, at approximately 3:00 p.m., Officer Jennifer Schwaller of SPCA Cincinnati received information from a maintenance man that a dog was overheating in the sun. When she arrived on the scene, she discovered that the dog had died. The maintenance man told her that the dog had stopped breathing just after he had called for help.

Schwaller testified that the dog was chained to a deck in the rear of a yard and that the yard had no shade at all. Food and water had been left in the yard, but the dog could not reach them due to the chain becoming caught on a nail. Schwaller noted that the temperature was about 94 degrees and that, even if the dog could have reached the water,

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

“it was too hot to drink.” She testified that in her opinion, based on her experience, the amount of water provided for the dog was insufficient. She further stated that even if the chain had not been caught on the nail, the yard had no shade that the dog could have reached.

Schwaller went to remove the dog’s body from the yard. When she unhooked the chain, she dropped it because it was so hot that it almost burned her hand. When she picked up the dog’s body, it was hot to the touch. Also, the skin “peeled off” because the dog was “just cooked.”

Dr. Tamara Goforth, Director of Veterinary Services for SPCA Cincinnati, performed a necropsy on the dog. She testified that it had died of heat stroke and corroborated that it was “cooked” and that its skin was sloughing. She testified that it was one of the most “extreme cases” she had seen. She found that the dog’s internal temperature was 106.9 degrees, even after the body had been in air conditioning for an hour and a half, when its normal temperature should have been about 101 degrees.

Goforth explained how animals compensate for temperature by consuming fluids, since they do not sweat like humans do. She confirmed that hot water would not have helped the dog to cool itself at all. She also stated that the bowl holding the water was not big enough to contain an adequate water supply for the dog.

She went on to state that she did not believe that the chain being caught on the nail had played a significant role in the dog’s death. She testified that even if the chain had not been caught on the nail, the yard still had no shade. Further, she found no sign, such as neck bruising, showing that the dog had struggled with the chain.

Askew testified that her son had a doctor’s appointment around 12:15 p.m. and that her landlord had told her to chain the dog outside because of an inspection. She said that the yard had shade when she had chained the dog before the appointment.

She admitted that she knew that temperatures were going to be hot that day, as they had been the day before. She said that the chain was long enough for the dog to get to a nearby shed. But Schwaller testified that she had tested the chain and that it was not long enough to reach the shed. Further, even if the dog could have reached the shed, its whole body would not have fit inside.

Dr. Timothy Clark, an expert in veterinary medicine, also testified for Askew. He reviewed two reports, including one from the SPCA, and looked at photographs from the scene. He testified that the temperature was not too warm for the dog if it had “remained quiet.” He stated that the dog had been hooked on the nail and had fought to get loose from it. Nevertheless, he did acknowledge that the heat and the lack of shelter could have resulted in the type of death seen in this case. He also acknowledged that the sloughing of the dog’s skin was consistent with a case of heat stroke.

We address Askew’s assignments of error out of order. In her fourth assignment of error, she contends that the trial court erred in permitting an amendment to the charge. She argues that the amendment violated Crim.R. 7 and that she was prejudiced by the amendment. This assignment of error is not well taken.

Crim.R. 7(D) provides that “[t]he court may at any time, before, during, or after a trial amend the indictment, information, complaint, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence provided no change is made in the name or the identity of the crime charged.” Because law enforcement officers can issue misdemeanor complaints without the involvement of a grand jury, courts may allow amendments of misdemeanor complaints if the defendant still has a reasonable opportunity to prepare a defense, and if the

amendment simply clarifies or amplifies in a manner consistent with the original complaint.²

In this case, the complaint was amended to allege a violation of R.C. 959.131(C)(2), which provides the following: “no person who confines or is the custodian or caretaker of a companion animal shall negligently * * * [d]eprive the animal of necessary sustenance, confine the companion animal without supplying it with sufficient quantities of good, wholesome food and water, or impound the companion animal without affording it, during the impoundment or confinement, with access to shelter from heat, cold, wind, rain, snow, or excessive direct sunlight, if it can be reasonably expected that the companion animal would become sick or suffer in any other way as a result of or due to the deprivation, confinement, or impoundment or confinement in any of those specified manners.” A violation of this section as a first offense is a second-degree misdemeanor.³

The citation stated that Askew had violated R.C. 959.131(B), which provides that “[n]o person shall knowingly torture, torment, needlessly mutilate or maim, cruelly beat, poison, needlessly kill, or commit an act of cruelty against a companion animal.” A violation of this section as a first offense is a first-degree misdemeanor.⁴ While the citation cited section (B) and stated that the offense was an “M-1,” its language was closer to the language of subsection (C)(2), stating “no shelter. unable to reach water.”

The actual complaint did not cite any specific subsection, stating only that Askew had violated R.C. 959.131. It went on to state that she “did unlawfully confine a dog without providing it access to shelter and access to water causing the dog to suffer,” which is the language of R.C. 959.131(C)(2).

² *State v. Campbell*, 150 Ohio App.3d 90, 2002-Ohio-6064, 779 N.E.2d 811, affirmed, 100 Ohio St.3d 361, 2003-Ohio-6804, 800 N.E.2d 356.

³ R.C. 959.99(E)(2).

⁴ R.C. 959.99(E)(1).

Under the circumstances, the amendment did not change the name or identity of the crime charged. The amendment simply clarified the citation and the complaint. Further, the amendment changed the charge from a first-degree to a second-degree misdemeanor, and the court continued the case so that Askew could prepare her defense.⁵ Therefore, Askew was not prejudiced, and we overrule her fourth assignment of error.

In her first assignment of error, Askew contends that the evidence was insufficient to support her conviction. She argues that the state failed to prove that she had acted recklessly. This assignment of error is not well taken.

Even though Askew argues that the parties proceeded under the assumption that the state had to prove recklessness, the statute actually required the state to prove that Askew had acted negligently. “A person acts negligently when, because of a substantial lapse of due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances exist.”⁶

The amended charge contemplated a greater lapse of due care than ordinary negligence. But the determination of whether a defendant’s conduct constituted a substantial lack of due care is ordinarily a matter for the trier of fact to decide.⁷

The state’s evidence showed that Askew had left her dog out for several hours in the afternoon sun, when the temperature was 94 degrees, without adequate water and shelter. Askew could have reasonably foreseen that her conduct would cause the dog to suffer, and it constituted a substantial lapse of due care. Askew argues that she could not have known that the dog’s chain would be caught on the nail, but the state’s evidence

⁵ See *State v. McGlothin*, 1st Dist. No. C-060145, 2007-Ohio-4707; *State v. Coleman*, 3rd Dist. No. 9-03-23, 2003-Ohio-6440.

⁶ R.C. 2901.22(D).

⁷ *State v. Dailey*, 5th Dist. No. 2006-CA-0012, 2007-Ohio-2544; *State v. Mechlem* (Jan. 24, 1996), 1st Dist. No. C-950328.

showed that even if it had not become caught, the animal would still not have had access to shade or adequate water.⁸

Our review of the record shows that a rational trier of fact, after viewing the evidence in a light most favorable to the prosecution, could have found that the state had proved beyond a reasonable doubt all the elements of cruelty to a companion animal under R.C. 959.131(C)(2). Therefore, the evidence was sufficient to support the conviction.⁹ We overrule Askew's first assignment of error.

In her second assignment of error, Askew contends that the conviction was against the manifest weight of the evidence. After reviewing the record, we cannot say that the trier of fact lost its way and created such a manifest miscarriage of justice that we must reverse Askew's conviction and order a new trial. Therefore, her conviction was not against the manifest weight of the evidence.¹⁰

Askew contends that the trial court speculated on the animal's cause of death. She points to her expert witness's testimony that the dog must have struggled against the chain. But the trial court obviously believed the state's evidence that the dog had died of heat stroke. Matters as to the credibility of evidence are for the trier of fact to decide.¹¹ Consequently, we overrule Askew's second assignment of error.

In her third assignment of error, Askew contends that the trial court erred in overruling her Crim.R. 29 motion for a judgment of acquittal. But this case involved a bench trial. The purpose of a motion for a judgment of acquittal is to test the sufficiency of the evidence and, where the evidence is insufficient, to take the case from the jury. In a

⁸ Compare *State v. Bergen* (1997), 121 Ohio App.3d 459, 700 N.E.2d 345.

⁹ See *State v. Jenks* (1991), 61 Ohio St.3d 259, 547 N.E.2d 492; *State v. Angus*, 10th Dist. No. 05AP-1054, 2006-Ohio-4455.

¹⁰ *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541; *State v. Russ*, 1st Dist. No. C-050797, 2006-Ohio-6824.

¹¹ *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433; *State v. Williams*, 1st Dist. Nos. C-060631 and C-060668, 2007-Ohio-5577.

nonjury trial, the defendant's plea of not guilty serves as a motion for a judgment of acquittal. Therefore, the rule does not apply to a case tried to the court.¹²

Even if Crim.R. 29 did apply in this case, a claim that the court erred in overruling a motion for a judgment of acquittal is the same as a claim that the evidence was insufficient to support the conviction.¹³ We have already held that the evidence was sufficient to support Askew's conviction. Consequently, we overrule her third assignment of error and affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., CUNNINGHAM and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on February 25, 2009

per order of the Court _____
Presiding Judge

¹² *Dayton v. Rogers* (1979), 60 Ohio St.2d 162, 398 N.E.2d 781, overruled on other grounds in *State v. Lazzaro*, 76 Ohio St.3d 261, 1996-Ohio-397, 667 N.E.2d 384; *State v. Kelso*, 5th Dist. No. 2004-CA-0006, 2005-Ohio-1725; *Toledo v. Glaser*, 6th Dist. No. L-02-1362, 2004-Ohio-1652.

¹³ *State v. Ritze*, 154 Ohio App.3d 133, 2003-Ohio-4580, 796 N.E.2d 566.