

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:
	:
vs.	: No. CR-1956-2014
	:
TIMOTHY KUHNS, II,	:
Defendant	:

OPINION AND ORDER

On October 10, 2014 at approximately 6:00 p.m., Defendant was alleged to have forcibly smeared his four-month old Pitbull puppy's face into a pool of urine on the floor and then to have thrown the puppy against the wall.

Defendant was charged with one count of animal cruelty in violation of 18 Pa. C.S. § 5511 (a) (2.1) (i) (a), namely, maiming, torturing and/or disfiguring the puppy. The charge was based on statements provided to law enforcement by, among others, Monica Houser, who allegedly told Human Society Police Officer Lawrence Woltz that she witnessed the incident.

A jury trial was held before this court on September 24, 2015. Following the presentation of the Commonwealth's case, the court granted Defendant's motion for a judgment of acquittal pursuant to Rule 606 (A) (1) of the Pennsylvania Rules of Criminal Procedure.

The court concluded that the evidence, even when viewed in a light most favorable to the Commonwealth, was insufficient to enable the jury to conclude that the Commonwealth established all of the elements of the offense charged beyond a reasonable doubt.

The testimony of Ms. Houser was completely lacking. She testified that she did not witness any misconduct toward the puppy by Defendant. The testimony merely established that at some point while in Defendant's care, the puppy suffered an injury to his leg. That injury was consistent with either an accident or misconduct by Defendant.

Evidence was presented regarding the care of the dog following the incident. The puppy was in obvious distress requiring that it be held by Ms. Houser the entire night. Defendant failed to seek immediate veterinary care. It was not until the following morning that Defendant's mother arrived at the house and took the puppy for veterinary care.

The puppy was found to have a significant break to his shoulder area requiring surgery and anticipated extensive rehabilitation.

On October 14, 2014 pursuant to a search warrant, Officer Woltz seized the puppy. The puppy has been in possession of the SPCA since then.

Defendant has now filed a motion for return of property pursuant to Rule 588 of the Pennsylvania Rules of Criminal Procedure. Defendant argues that the puppy must be returned because the charges were dismissed and the puppy is not contraband or derivative contraband. The court held a hearing on Defendant's motion on October 28, 2015.

There is no dispute that the puppy was owned by Defendant. There is no dispute that law enforcement seized the puppy and that the SPCA presently has the puppy in its possession. As well, there is no dispute that the puppy is not contraband per se. Contraband per se is property of which the mere possession is unlawful. ***Commonwealth v. Reynolds***, 876 A.2d 1088, 1094 (Pa. Cmwlth. 2005)(citing ***Commonwealth v. Fassnacht***,

369 A.2d 800, 802 (Pa. Super. 1977), cert. denied sub. nom. *Fassnacht v. Pennsylvania*, 439 U.S. 911 (1978)).

Pursuant to Rule 588 of the Pennsylvania Rules of Criminal Procedure and the cases interpreting it, an owner of property seized by the government is entitled to the return of said property unless the government can prove that the property is contraband or derivative contraband. *Commonwealth v. Durham*, 9 A.3d 641, 646 (Pa. Super. 2010), app. denied, 19 A.3d 1050 (Pa. 2011).

The Commonwealth's burden in this case given what is undisputed between the parties, is to prove that the subject property is derivative contraband. Said burden must be proved by a preponderance of the evidence. *Barren v. Commonwealth*, 74 A.3d 250, 255 (Pa. Super. 2013). The preponderance of evidence standard requires just enough evidence to make it more probable than not that the fact to be proved is true. *Commonwealth v. Brown*, 786 A.2d 961, 968 (Pa. 2001).

Derivative contraband is property that is innocent in itself but has been used in the perpetration of an unlawful act. *Durham*, supra. As well, there must be a nexus between the property and the alleged criminal activity. *Id.*

Initially, and contrary to what Defendant claims, the dismissal of the criminal charges against the Defendant has no preclusive effect in a subsequent proceeding on a motion for return of property. *Reynolds*, 876 A.2d at 1093.

Under all of the circumstances of this case, the court concludes that the puppy is derivative contraband and that Defendant is not entitled to the return of it.

In determining whether property is contraband and if so what type, a court must look to the nature of the property and to the statutes that it is contended make possession of the property or its use unlawful. ***Commonwealth v. Fassnacht***, supra.

Initially, it must be noted that “[d]espite the status owner’s bestow on their pets, Pennsylvania law considers dogs to be personal property.” ***Desantis v. Pritchard***, 803 A.2d 230, 232 (Pa. Super. 2002). However, and likely because of said status, “[a] person commits an offense if he...neglects any animal as to which he has a duty of care...or deprives any animal of necessary...veterinary care.” 18 Pa. C.S.A. §5511 (c) (1).

Clearly, once Defendant became aware of the fact that his dog had suffered a very serious injury causing the dog to be immediately lame and to subsequently cry for an entire evening despite being comforted, Defendant had a duty of care to immediately seek necessary veterinary care. Defendant failed to do so, thus violating the statute. Because the dog was being held in violation of the statute, it is therefore derivative contraband. See for example, ***Commonwealth v. Shattenberg***, 2010 Pa. Dist. & Cnty. Dec. LEXIS 555 (Venango County 2010), aff’d, 15 A.3d 564 (Pa. Commw. 2011).

ORDER

AND NOW, this ____ day of November 2015, following consideration of Defendant's motion for return of property and a subsequent hearing and argument, the court **DENIES** Defendant's motion.

By The Court,

Marc F. Lovecchio, Judge

cc: Melissa Kalaus, Esquire (ADA)
 Joshua Bower, Esquire (APD)
 Gary Weber, Lycoming Reporter
 Work file