

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 3, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP1771

Cir. Ct. No. 2003CV359

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

KELLY MAHNKE,

PLAINTIFF-APPELLANT,

v.

**COLUMBIA COUNTY, COLUMBIA COUNTY DISTRICT ATTORNEY'S
OFFICE AND COLUMBIA COUNTY SHERIFF STEVEN R. ROWE,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Columbia County:
PATRICK J. TAGGERT, Judge. *Reversed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Kelly Mahnke appeals from a judgment which ordered her to reimburse Columbia County for the costs of caring for a seized

horse. The issue is whether the seizure itself was justified. For the reasons discussed below, we conclude it was not and reverse the judgment.

BACKGROUND

¶2 Mahnke owned a thirty-two-year-old horse called April, which she boarded on David Stork's farm. On July 4, 2003, Detective Sergeant Dan Garrigan of the Columbia County Sheriff's Department went out to Stork's farm to investigate a complaint about the condition of some horses. Garrigan was aware of earlier complaints about the farm, which led him to expect that he would likely find neglected animals. When he arrived, he saw a main pasture where most of the horses were located, and a smaller, narrow, triangular enclosure with five horses in it. One of the five horses in the smaller enclosure was April. Garrigan testified that the five horses in the smaller enclosure looked different to him than the horses in the main pasture. He explained:

Everything about them caught my attention. Basically, they did not look like the other horses that I was able to see. ... They were thin. I could see their ribs. I could see hips, back bones, open wounds, injuries. They appeared shabby, ugly. ... They didn't move much.

Garrigan also observed that it was a hot and humid day. There was no green grass in the enclosure, and little or no accessible food that Garrigan could see. There was a closed container of what looked to be horse feed inside the enclosure, as well as hay in the barn, but Garrigan had no way of knowing how often the horses were fed. There was a tree at one end of the enclosure which provided a few feet of shade. There was a Rubbermaid barrel containing some water, as well as a converted fuel tank about half full of water with a hose running into it. However, there was also a wire from an electrical fence separating the enclosure from the main pasture that ran over the larger water tank. Garrigan was concerned that the

wire might keep the horses in the enclosure from getting at the water, although he did not ascertain if the wire was actually electrified. Based on “common sense ... [t]he totality of the circumstances of the setting, the horses’ appearance, their lack of everything they needed, their inability to get to things they needed,” the detective testified he thought it was obvious that the horses were being mistreated.

¶3 Because he had no personal experience with horses or the procedure for removing them, Garrigan had dispatch put him in telephone contact with a veterinarian before taking action. Based on Garrigan’s description of the conditions he was observing, the veterinarian indicated that the detective should speak to someone at the Humane Society and should consider taking the horses into custody. The veterinarian said she would not make a recommendation herself as to whether the horses should be removed without seeing them, and she was unable to come out to the farm that day. Garrigan next called someone at the Humane Society, who told him nothing that dispelled his concerns. Upon ascertaining that the woman who had called in the complaint was willing and able to take in the five horses from the enclosure, Garrigan went ahead and made arrangements to remove them from the Stork farm.

¶4 As they were loading the horses into a trailer, Stork arrived at the farm with fresh feed. He told Garrigan that the horses in the enclosure were old and had been separated from the other horses to get special care.¹ Stork also mentioned that he was not the owner of the horses that were being removed. Garrigan refused Stork’s offer to have a veterinarian come out to the farm at his

¹ Mahnke also testified that she had asked Stork to build a special enclosure after observing some of the other horses bullying and chasing April in the main pasture, but there is no indication that Garrigan was aware of that at the time of the seizure.

expense to examine the horses in question. Later that day, Garrigan also spoke with Mahnke. She wanted to take back custody of her horse. Although he had no information that Mahnke had any involvement with the conditions at the Stork farm, Garrigan would not release April back to Mahnke.

¶5 The veterinarian whom Garrigan had consulted on the phone testified at trial. She noted that April appeared nearly emaciated in a picture that had been taken the day of the seizure, and that the condition of the horse would have raised the possibility of neglect in her mind. She could not tell merely by looking at the picture, however, whether the horse was thin as the result of neglect or illness, and agreed that a layperson would not be able to tell the cause of the horse's condition merely by looking at it. She thought the water in the tank shown in the picture would be adequate if the horses could get to it, but noted that if a horse had been ever shocked by the electrical wire, the wire would deter it from getting more water.

¶6 Mahnke's veterinarian testified that April had Cushing's disease—a condition most often found in older horses which is caused by a tumor on the pituitary gland. The condition can cause a horse to lose weight, become lethargic, get a long hair coat, and get laminitis or founders. Mahnke's veterinarian also testified that older horses can lose weight because they may get pushed to the bottom of the pecking order at feeding time, or because they have dental issues. Looking at the pictures from the day the horses were seized, it was his opinion that there was adequate shade and water available in the enclosure.

¶7 The trial court concluded that the seizing officer did not need an expert opinion before removing the horses, and that the conditions he saw were sufficient to provide reasonable grounds to believe the horses were being abused.

Consequently, it ordered Mahnke to pay the costs associated with the seizure and the subsequent care given to April while in county custody. Mahnke appeals.

DISCUSSION

¶8 The parties agree that the applicable standard for county authorities to take an animal into custody is whether “there are reasonable grounds to believe that the owner has mistreated the animal in violation of ch. 951.” WIS. STAT. § 173.21(1)(a) (2005-06).² Chapter 951 of the Wisconsin Statutes, in turn, prohibits failing to provide food “sufficient to maintain all animals in good health,” failing to provide potable water “daily and in sufficient quantity for the health of the animal,” and failing to provide sufficient shade to protect an animal from direct sunlight “when sunlight is likely to cause heat exhaustion of an animal tied or caged outside.” WIS. STAT. § 951.13(1) and (2); WIS. STAT. § 951.14(2)(a).

¶9 The parties further agree that the “reasonable ground” standard should be considered akin to the probable cause standard for arrest that applies in Fourth Amendment law. A police officer has probable cause to arrest when the totality of the circumstances within that officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime. *State v. Koch*, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). In making probable cause determinations, law enforcement officers may also draw reasonable inferences “based on their own training and experience.” *U.S. v. Carrillo*, 269 F.3d 761, 766 (7th Cir. 2001). Ultimately, this is a practical test

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

based on “considerations of everyday life on which reasonable and prudent [people], not legal technicians, act.” *State v. Drogsvold*, 104 Wis. 2d 247, 254, 311 N.W.2d 243 (Ct. App. 1981) (citation omitted). The objective facts before the police officer must lead to the conclusion that guilt is “more than a possibility.” *State v. Richardson*, 156 Wis. 2d 128, 148, 456 N.W.2d 830 (1990).

¶10 Mahnke first argues that the trial court erroneously admitted photographs taken weeks or months after the seizure,³ as well as expert testimony about the probable condition of the horses on the day of the seizure that the detective would not have known when making his reasonable grounds decision. We agree that the court’s decision should have been made solely on the information within the possession of the detective at the time of the seizure and reasonable inferences there from. *See Koch*, 175 Wis. 2d at 701, *Carrillo*, 269 F.3d at 766. Thus, expert testimony about the condition of April based on subsequent examination of the horse and review of pictures taken later was irrelevant and it does appear that there was some inadmissible evidence before the court. We need not address any particular evidentiary rulings, however, because we conclude that the record was insufficient to support the trial court’s decision, even with any erroneously admitted evidence.

¶11 For the purposes of this appeal, we will assume that the detective could reasonably have imputed Stork’s actions to the owners of the horses boarded on his farm, even if he learned that Stork did not himself own the animals before

³ It is unclear whether the trial court accepted the later photos into evidence in order to consider any change in the horse’s condition as evidence that it would have been reasonable for the officer to conclude that the horse had been mistreated, or under the alternate proposed theory that the photos were relevant to the issue of damages because they demonstrated the care that had been given to the seized horses.

they were removed. The information within the detective's knowledge, upon which he relied for the seizure, falls into three general categories: adequate food, adequate water, and adequate shade.

¶12 Addressing the last category first, we note that the term "caged" in WIS. STAT. § 951.14(2)(a) is defined to exclude farm fencing used to confine farm animals. Therefore, the statutory provision requiring adequate shade does not apply to the five horses located in the smaller enclosure on the Stork farm. Consequently—even without considering the sufficiency of the shade from a tree in the corner of the enclosure—the seizing officer did not have any reasonable grounds to conclude that April had been "mistreated" under WIS. STAT. § 173.21(1)(a) by a violation of the adequate shade provision of § 951.14.

¶13 With regard to the adequacy of the water supply, the officer explained his concern that a wire over the large water tank might deter or prevent the horses from getting water from the tank. However, picture 2b of Exhibit 1 shows that there was a gray barrel right next to the larger tank, and there was unrefuted testimony that the barrel also contained water for the horses in the enclosure. The detective did not explain why the water in the gray barrel was insufficient.⁴ Furthermore, the detective acknowledged that he did not know how long the horses had been in the enclosure, or how often the containers were refilled. He also did not report seeing anything that made him think that the horses were actually dehydrated. Seeing a horse with access to only limited water at a

⁴ The detective noted that there was another smaller container with water shown in picture 2a of Exhibit 1 that he considered too small and dirty to provide adequate water. However, Stork testified that container contained runoff from the roof and was not meant as a water supply for the horses.

given moment does not provide anything more than a mere possibility that the horse is not being given adequate water over the course of a day. Since WIS. STAT. § 951.13(2) requires only that sufficient water be provided on a “daily” basis, the facts within the detective’s knowledge were not sufficient to conclude that Mahnke’s horse had been “mistreated” by a violation of the statutory adequate water provision.

¶14 Similarly, the fact that the detective did not see any accessible feed in the enclosure at the time he went out to the farm does not mean that the horses were not being fed at other times that same day—particularly when the detective observed a closed container of feed in the enclosure and hay in the barn, and also saw Stork drive up with bags of fresh feed before the horses were removed. The remaining basis, then, for the detective’s belief that the horses in the enclosure were not being adequately fed was the thin appearance of the horses themselves. But the detective had no way of knowing how the horses became thin. Even if he had grounds to suspect Stork underfed the horses, he did not have probable cause. Furthermore, Stork told the detective that the horses in the enclosure had been separated from the main herd because they needed special care. Garrigan admitted that he would not be able to tell the difference between a sick horse and an abused horse, and did not know whether it would reasonable to segregate sick animals from the rest of the herd. Given that the detective observed many more of what looked to him to be healthy horses than unhealthy horses on the farm, and given that nothing in the detective’s training or experience allowed him to determine whether the horses in the enclosure were suffering from illness rather than neglect, we see nothing in the officer’s knowledge that provides probable cause, that is, provides reasonable grounds to believe that April had been mistreated by a violation of the adequate food statute.

¶15 Accordingly, we conclude that the seizure of Mahnke's horse was unwarranted, and she should not be charged the County's costs in caring for the animal.

By the Court.—Judgment reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

