

STATE v. HOWARD BAKER, D.V.M.

It is the finding of this Court that defendant Howard Baker, a doctor of veterinary medicine for 23 years, opened his own practice in the Township of East Brunswick approximately 12 years ago. He operated the Village Veterinary Hospital. He treated by his own estimation tens of thousands of animals in those 12 years. He, in his testimony before the Court below, professed his love of animals and his joy and satisfaction in medically treating them. He testified that until Michelle Rokae filed complaints against him on June 16, 1997, that he was aware of no complaint of mistreatment of animals made against him by anyone — owners, his assistants or the public at large.

The State presented Michelle Rokae as their chief witness — indeed it might be said that Ms. Rokae was really the State's only witness. They did offer the testimony of Harold Vegotsky, an officer of the Middlesex County Society for Prevention of Cruelty to Animals, Law Enforcement Department. His testimony, however, was brief and revealed that he signed 2 complaints against Dr. Baker upon Ms. Rokae's instigation. He denied any personal knowledge nor did he speak to any witness other than Ms. Rokae nor did he do any investigation into the matter. Mr. Vegotsky's two summonses were eventually dismissed by the court for a failure of proof at the conclusion of the entire case.

Before this Court addresses the testimony of Ms. Rokae, it is important to restate those principles of law that govern these charges. The charges made were quasi-criminal charges and each one of them carried, upon conviction, the possibility of 6 months in jail and a fine of \$1,000. It is the burden of the State to prove its case beyond a reasonable doubt.

All of the remaining 12 charges of which the defendant was convicted implicate a section of a statute, Title 4:22-7, that reads in pertinent part:

"A person who shall overdrive, overload, drive when overloaded, overwork, torture, torment, deprive of necessary sustenance, unnecessarily or cruelly beat or otherwise abuse, or needlessly mutilate or kill, a living animal or creature shall be guilty of a disorderly persons offense."

It is in this context that the testimony against the defendant must be evaluated.

Rokae's initial testimony consisted of approximately 19 hours of court time for the first 5 sessions. She was, thereafter, brought back for what was characterized as "rebuttal" testimony on 2 separate days for another 2 or 3 hours. It does not appear, however, that anything new was elicited during those latter sessions, and that additional testimony was a repetition of Rokae's initial allegations.

The difficulty of fairly summarizing Rokae's lengthy testimony is apparent. I will rather set forth the language of the 16 complaints signed by Rokae on June 16, 1997. She, of course, in her testimony elaborated on each of the alleged incidents.

Date of Offense

Charge

- | | |
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| 1. June 12, 1996 | Did torment and unnecessarily abuse a long haired Dachshund by grabbing his sore ear and banging his head on the table |
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2. June 18, 1996 Did torture 2 parakeets by twisting their necks rather than humanely euthanizing.
3. June 24, 1996 Did cruelly beat a 2 yr. old male cat by punching it in the head with a closed fist.
4. July 2, 1996 Did cruelly beat a 10 yr. old collie by slamming his head on the table and punching him twice in the head with a closed fist.
5. July 19, 1996 Did cruelly beat and torment a Dalmatian by hitting her on the head and twisting her ear.
6. August 16, 1996 Did unnecessarily abuse an 18 yr. old long-haired cat by swinging her by her neck and shaking her
7. August 17, 1996 Did torment a 3 yr. old golden retriever mix by kicking him.
8. August 22, 1996 Did cruelly beat a 10 yr. old Siamese cat by shaking him and grasping him by encircling around the neck.
9. August 23, 1996 Did cruelly beat a 10 yr. old Siamese cat by punching him in the head with a closed fist.
10. Sept. 17, 1996 Did cruelly beat/abuse by hitting a 6 yr. old cat on the head with scissors.
11. Sept. 17, 1996 Did cruelly beat a male short-hair cat by punching his head with a closed fist and with scissors.
12. Oct. 4, 1996 Did cruelly beat a 3 yr. old poodle by slamming him to the floor and punching him in the head with a closed fist.
13. Oct. 8, 1996 Did cruelly beat a 3 month old boxer by hitting her in the face with a closed fist.
14. Oct. 11, 1996 Did torment and cruelly beat a 1 yr. old male pug by hitting him in the head and shaking him by the neck back and forth in mid-air.

15. Dec. 17, 1996 Did cruelly beat a 2 yr. old black Lab by hitting him on the head.
16. April 18, 1997 Did cruelly beat a 6 yr. old golden retriever with cancer by hitting her in the head with a closed fist.

Now, with the exception of the incident alleged to have occurred on July 19, 1996, regarding the Dalmatian, Dice (and I will speak more about that later), Rokae's testimony was largely uncorroborated, and in part firmly contradicted.

Leslie McPherson, an assistant employed by Dr. Baker for 6 years, testified that she never saw Dr. Baker hit an animal as a result of rage.

She said that she would not have tolerated such abuse and would have rather terminated her employment. She did state that she did see Dr. Baker hit an animal with an open hand on the snout or on the backside and at times he found it necessary to raise his voice in seeking the cooperation of the animal in order to treat it. McPherson acknowledged the difficulties and frustrations inherent in treating sick and frightened animals. She concluded her testimony with the statement that the defendant is a "good doctor".

April Pluskota also testified on behalf of the defendant. She is a veterinary assistant employed by Dr. Baker for over 3 years. She, like McPherson, was trained in her work by Dr. Baker. She was questioned extensively about various incidents that Rokae spoke about to which Pluskota was a witness. She refuted much of what Rokae said and gave explanations for other actions that Rokae perceived as abuse, citing the necessity for being firm with animals for the safety of the animal being treated as well as the medical personnel. Pluskota did testify that Dr. Baker did on occasion slap an animal with an open hand but not punch it.

Defendant produced another witness in the person of Andrew Lytkowski, the owner of a 2 yr. old black Labrador, Champ, who was brought to Dr. Baker on December 17, 1996, for a general examination, to make sure his shots were up to date and to have his ears looked at. Lytkowski described his dog as "antsy" and a little shy around people. The doctor administered shots to the animal, weighed him, but was unable to adequately clean his ears. Lytkowski was then asked to return the dog the following morning so that he could be sedated and his ears cleaned properly. Lytkowski denied that the defendant abused the dog in any way and in any manner and said that he was present the entire time that Champ was being treated by defendant. In fact, the owner was assisting the doctor by holding Champ. One must contrast this with the account of Champ's treatment given by Rokae. She testified that the Lab resisted the ear cleaning by struggling and moving and the doctor slapped the dog on the nose twice. He continued to try to treat the ears but he couldn't. The owner was asked to bring Champ in the following morning to be anaesthetized. Rokae then reported two more strikings the following day when the animal was sedated and a callous disregard by Dr. Baker for causing the dog discomfort while he was cleaning his ears. Dr. Baker, who gave testimony on his own behalf, candidly said he slapped Champ across the muzzle that first day in an attempt to restrain the animal from moving about so that he could complete his treatment. Dr. Baker denies any hitting the second day, saying that the dog was sedated and that he was utilizing both of his hands in his efforts to clean the dog's ears. Obviously, the first day Champ was slapped across the muzzle — an act that the owner of this 82

lb. dog did not consider abusive. Ms. Rokae contended that not only was the slap on the head abusive but that the dog was the object of cruelty when the veterinarian persisted in cleaning his ears when the dog showed some discomfort. It is common knowledge that different people perceive events differently.

In addition to McPherson, Pluskota and Lytkowski, the defendant presented the testimony of Dr. James F. Wilson. He was admitted by the Court as an expert in the field of veterinary medicine and ethics. Dr. Wilson is licensed to practice veterinary medicine in 3 states and is an Adjunct Associate Professor at the University of Pennsylvania. He is also a visiting lecturer at the University of California Davis School of Veterinary Medicine and heads a consulting firm dealing with all aspects of veterinary practice. In addition to having a Veterinary Medicine degree from Iowa State University, Dr. Wilson has a Juris Doctor degree from the School of Law, University of California at Los Angeles.

Besides teaching and consulting, Dr. Wilson has written and published prodigiously on all phases of veterinary practice including law and ethics. He is currently involved in drafting language for statutes that would require veterinarians to report suspected animal abuse. He also teaches at 9 different veterinary schools with emphasis on animal cruelties. Dr. Wilson's 42-page *curriculum vitae* was submitted to the Court below and reviewed by this Court. His credentials are, in a word, impressive. He testified as an expert on the issue of veterinary practice, the standards applicable to veterinary practice as they relate to the treatment of animals, and the definition of cruelty and whether certain acts "are or are not cruelty as practiced by a veterinarian."

Dr. Wilson spoke eloquently about the perceived feelings of an animal who is brought into a veterinary clinic - fear, timidity, anxiety, aggressiveness and protectiveness of its owner. Usually when the veterinarian first sees the animal it is with its owner in a confined room - the doctor is invading the animal's space.

The animal is no longer in a home setting but rather a foreign environment — it may be in pain and it often seeks escape. The veterinarian has several concerns: He must consider the very real risk to himself, his staff and the animal's owner - scratches and bites are the least of those risks and the resultant injuries can be severe and permanent.

The doctor is not always dealing with very small or very docile animals but rather a variety of animal sizes — 80 or 100 pound dogs are not unusual. He must deal with differing temperaments — everything from a puppy to trained attack dogs, pit bulls, animals that have been abused and are afraid of people, and also animals that are barely domesticated. There are acute risks that the veterinarian is fully aware of and must protect against. In addition to those concerns, the vet's primary purpose is, of course, to examine and treat the animal. He tries to do that in the least intrusive manner — that is, by not sedating an animal if it can be convinced to be compliant. Sedation is time-consuming and adds to the expense and few, if any, owners have insurance to pay the bill. In addition, sedation can be dangerous and sometimes fatal to some animals and there are simply occasions when the doctor needs to have the animal alert and awake to evaluate it medically; for example, to look for neurological functions.

Dr. Wilson testified that it is not cruelty to the animal when the veterinarian strikes it to try to focus the animal's attention, to get it to stop resistance to the treatment, to get the animal to stop

resisting the restraints, to stop an animal who is showing aggressive behavior and to keep an animal from hurting itself. He explained that it is not considered punishment to the animal but rather negative reinforcement. The veterinarian is not striking the animal to harm it.

As Dr. Wilson testified:

"If you strike it so hard as to harm it, we're talking punishment. But we're not talking about punishment, here we're talking about negative reinforcement. We're trying to diminish the behavior that we don't want to allow, for the behavior that you do want to come forward. And dominance in the animal world is unbelievably important. As the veterinarian you have to show that you're going to be the dominant player, and once you do that the animals give up, okay, go ahead. But as soon as they detect this battle for dominance between you, the veterinarian, and me, the animal, they're going to test the waters. And when they test the waters it's usually by crying, it could be by expressing their anal sacs, it could be by trying to bite, it could be by trying to scratch, it could be by wiggling. And at that point — I'll say right now, if a veterinarian is never allowed to strike an animal then we'll all be out of veterinary practice, there will be no veterinary practice."

Over 5 days of questioning, both direct and cross-examination, Dr. Wilson went over each alleged act of cruelty charged against Dr. Baker with particularity, and explained why, in his expert opinion, those actions on the part of Dr. Baker, acting in his capacity as a veterinarian, were not cruel or abusive. The standard of inquiry was stated to be,

1. what is the action of the animal, i.e. how is it resisting;
2. what is the intensity or extent of the restraint being pursued by the vet, i.e. is it excessive;
3. is there harm to the animal, i.e. broken bone, bleeding, tissue swelling; and
4. what is the mental state of the vet, i.e. is he out of control, is he exhibiting a reckless disregard for the animal's welfare?

The Court below in its opinion, while finding Dr. Wilson to have exceptional credentials, explicitly rejected his testimony. The Court stated that he "just does not buy the doctor's testimony particularly in the area that a vet must assert dominance." The Court below rather credited the testimony, of Dr. Gordon Stull, a practicing Veterinarian who was presented by the State in rebuttal, that there is no excuse for a veterinarian to exercise dominance over nor to physically discipline even an aggressive animal. Curiously, Dr. Stull testified that the very same conduct by the owner of the animal would be neither inappropriate nor abusive.

I accept in its entirety Dr. Wilson's testimony. I find it to be convincing. I find that it comports with reason. One cannot bargain with an animal through speech. An animal that is in pain or frightened cannot (as indeed even some small children cannot) understand that the doctor is doing what he does in the animal's best interest and, as we all know, medical examination and treatment does involve discomfort and sometimes pain and we, as humans, tolerate that because we understand the necessity for it.

The Court below chose to accept wholeheartedly all of the accounts of these events as perceived by Rokae, saying "Thus, I deem Ms. Rokae credible in her testimony. I believe the events as she

related them and I believe they happened."

Judge Toth dismissed out of hand the testimony of McPherson and Pluskota, finding them to be biased based on their employer/employee relationship with defendant. He further stated that he did not believe Dr. Baker, who gave testimony on his own behalf. Judge Toth found his testimony to be "contrived, contradictory, confusing and disingenuous."

This Court respectfully disagrees with the assessments of credibility by the Court below and I will carefully document my reasons by reference to the testimony in this case as well as the tape in evidence.

In June, 1996, Rokae applied for a position with Dr. Baker as a Veterinary Assistant. She filled out an application form that neglected to include the fact that she was employed as an undercover operative by a Virginia-based animal rights group, People for the Ethical Treatment of Animals, hereinafter referred to as PETA. Rokae had been sent to New Jersey by PETA to secure employment at a medical laboratory operated by Huntington Life Sciences, Inc., in East Millstone, New Jersey. Her clandestine mission at Huntington was to seek out any evidence of abuse to animals used in medical testing. It was while waiting to start work at Huntington, her prime assignment, Rokae applied for and accepted the position at Dr. Baker's Clinic. Rokae then continued with Dr. Baker even after she was hired by Huntington in September, 1996. Rokae testified as to several of her prior assignments as an undercover operative for PETA. She infiltrated a horse farm in North Dakota in order to gather evidence about the treatment of pregnant mares whose urine was being collected to make an estrogen replacement drug. Another assignment involved an investigation of a chicken ranch in North Carolina and yet another involved a research facility at Boystown, Nebraska. The fact of Rokae's affiliation with PETA and that she, of necessity, conducted her activities covertly, or that she admittedly lied to numerous employers in pursuit of her aims — to search out what PETA considers violations of the rights of animals — is not dispositive as to her credibility before the Court. However, her testimony that she lied about her prior employment history to Dr. Baker is more revealing because she testified in court that she took the position with him not expecting to uncover any evidence of animal abuse but rather to gain experience in working in an animal clinic as she had neither training in veterinary medicine nor any familiarity with it. Why then not candidly admit to being an employee of PETA and share her views with Dr. Baker?

Rokae testified that it was within just days of being employed at the Clinic that she determined that Dr. Baker was, as she stated in her formal complaints, tormenting and cruelly beating the animals that he was medically treating. She was ultimately to file 16 complaints against Dr. Baker. The dates on which Rokae alleged cruelty were June 12, 18, 24, July 2 & 19, August 16, 17, 22 & 23, September 17, 17, October 4, 8 & 11, then December 17 and not again until four months later, on April 18, 1997. She left Dr. Baker's employ on April 18, 1997 and did not file the 16 complaints until June 16, 1997, one year after she first became employed. Thirteen of the 16 complaints charged incidents that are alleged to have occurred in just a few short months of Rokae's employment. She testified that she secretly videotaped Dr. Baker by means of a camera that she concealed in her handbag starting July 19, 1996, and although Rokae conceded that she may have taped as much as 200 hours of Dr. Baker's treatment, what was actually presented as evidence in support of her charges was initially an edited tape of approximately three minutes. Further, Rokae did not dispute that Dr. Baker may have treated as many as 2,000 animals during

the ten months she worked there. She testified that the tapes were either erased by taping over or forwarded to PETA Headquarters in Virginia. That three-minute edited tape was initially the only tape provided to the defendant in discovery by the State. Rokae testified that the tape was a compilation of three separate scenes put together by the audio/visual person at PETA Headquarters in Virginia. Upon cross-examination Rokae admitted that certain portions of the incident with the Dalmatian Dice that were not considered relevant by PETA were edited out. Another brief portion concerned a cat and the third scene which was a mostly inaudible audio reference to a cat. These last 2 portions were not the subject of any complaint.

Ultimately the original tape made by Rokae of Dice's examination of July 19, 1996 was obtained from PETA and this 20-minute 8-millimeter tape was then authenticated and admitted by the Court below. Parenthetically, Rokae admitted that PETA gave the edited collage tape to the media during the trial and that she gave several interviews that were on television where the edited tape was played to the public. This was during breaks in her testimony before the Court. She also admitted conferring with advisors from PETA during her testimony.

It is well settled in the law that a criminal conviction can be had on the uncorroborated word of a single witness, if believed. However, given the burden of proof that the State bears — that is proof beyond a reasonable doubt — and given the presumption of innocence accorded to one accused of a crime, that testimony should be evaluated and scrutinized very carefully.

There are well tested factors that come into play in assessing the credibility of a witness whether the trier of fact be a jury or judge. One must take into consideration the appearance and demeanor of the witness and the manner in which a witness testifies. In this regard, the judge who conducts a trial has the better opportunity to assess credibility than does the appellate judge who relies upon the written record, and that is why due deference is given in this area to the trial court. However, there are other factors that must also be considered such as the witnesses' interest in the outcome of the trial, the witnesses' power of discernment, meaning his or her judgment or understanding, the possible bias in favor of the side for whom the witness testified, the extent to which, if at all, the witness is corroborated or contradicted, supported or discredited by other evidence, inconsistencies and discrepancies in the testimony of a witness and certainly the reasonableness or unreasonableness of the testimony given.

Applying these factors, I cannot find that Michelle Rokae is a credible witness such as to be the reed on which the State has built this case. They cannot meet their burden on this testimony that I find suspect and, therefore, I depart from the conclusion of the Court below as to credibility. Her bias was amply set forth in the record. She candidly admitted that she saw animal abuse where others may not. She has made a career of her devotion not to animal welfare but to animal rights. She has no training in veterinarian medicine nor any experience and she indicated that she took the position with Dr. Baker to learn. Yet within 2 days of becoming employed by Dr. Baker, she finds abuse, as she sets forth in her Complaint #90293, Howard Baker, D.V.M., did on June 12, 1996, torment and unnecessarily abuse a long-haired Dachshund by grabbing his sore ear and banging his head on the table.

She further finds abuse on June 18, 1996, six days later, when she charged Dr. Baker with "torturing two parakeets by twisting their necks rather than humanely euthanizing." The facts of this incident are clear. The owner of two young parakeets brought them to Dr. Baker to be

disposed of. The owner noticed that the birds were inactive and she thought the mother bird had sat on them and injured them. She wanted them disposed of in the "cheapest way possible." The doctor verified that the leg was broken and twisted the neck of each. The medical description is "disarticulating the bird's cervical vertebrae," which was testified to by Dr. Wilson as an accepted method of euthanization of birds by a veterinarian. Admittedly, viewing this is not for the squeamish, but it is not torture under the Statute. Rokae continued to document 16 instances of perceived abuse during the following months, however, no complaint was filed, as I said earlier, until June 16, 1997, a year after Rokae became employed.

One might reasonably question her sincerity and her motivation. If one truly believed that animals were being tortured, tormented and cruelly beaten, why wait one year to complain. After all, Rokae had by her admission surreptitiously taped approximately 200 hours of Dr. Baker treating as many as 2,000 animals. What the State saw fit to present as corroborative evidence was one 20-minute video tape of Dr. Baker's treatment of a Dalmatian named Dice on July 19, 1996. In that tape, which I have viewed numerous times, I see what has been called the x-ray room of the Village Veterinary Clinic. I see Rokae standing at the table with an apron on, Pluskota is in front of the camera partially obscuring what is going on. Dr. Baker is preparing to take an x-ray of the Dalmatian's leg. Parenthetically, this is a dog that Dr. Baker treated since he was a puppy and the doctor testified that he had never before had any trouble with him. The doctor takes the dog's leash which is a leash with a choker chain. The doctor then scratches the dog's hindquarters and affectionately ruffles his neck fur, all the time speaking to the dog in a high-pitched voice like baby talk calling him a fat boy, saying, "Who's a fat boy?" This goes on for a minute or so, the dog's tail is wagging and soon Pluskota is holding the leash and the dog sits. The doctor approaches the dog with a cloth muzzle in his hand saying to the dog, "Don't be offended, everyone who goes on the table gets this." The doctor reaches down, the dog yips and lunges forward and pulls back almost simultaneously. The doctor's hands pull back and he moves out of the way, saying "He tried to bite me." Immediately the doctor slapped the dog on the top of the head, saying "Don't bite me, I'll bite you back." It was clear that the doctor was shocked by the attempted bite. He then pulled on the choker collar in an effort to (according to Dr. Baker) get his attention and show him "I'm not fooling around." The doctor then takes the dog into the next room to tranquilize him, saying, "You're going to get a needle." Several minutes go by and the doctor returns carrying this large dog in his arms, places the dog on the x-ray table and gently arranges his leg for x-ray. Two x-rays are taken — the balance of the tape shows Dr. Baker and Rokae casually conversing while the dog is still sedated.

The Court below found the defendant Guilty of this and the other offenses charged, saying, "I have determined that even if his actions did not rise to the level of an unnecessary or cruel beating (as set forth in the statute) he may be liable for his actions as a torment or reference under the 'otherwise abuse' section of the Statute." The Court did not further define "torment" or the phrase "otherwise abuse".

I have searched for case law in this area in this State and it is sparse, and of the few cases found, none is apposite to this case. However, through the miracles of modern-day computers and with the good services of my law clerk, we have compiled and reviewed all criminal cases in the U.S. since 1950 that deal with the issue of what constitutes cruelty to animals and we can find none that involves a prosecution against a veterinarian for such. I take this as recognition of the special considerations given to the veterinarian practice of medicine. The cases speak of the

distinction between discipline or training on one hand and the needless infliction of pain accompanied by a cruel disposition on the other. As in all criminal statutes (with few legislative exceptions) there must be shown a *mens rea*, an intent to harm. In the case before the Court no harm was ever proved. Admittedly, many, many animals in our society are cruelly treated — deprived of necessary food and shelter, shut up in too small cages. They are beaten, burned, shot, used for fighting games, abandoned, tortured and tormented. Certainly, there is never an excuse for inhumane treatment of animals in an ethical society but we should never become committed to a point of view that we overlook reason and what is necessary and, therefore, justifiable. That was done in this case. The convictions against Dr. Baker cannot stand and are hereby set aside, the defendant is acquitted.

All fines and costs paid by the defendant will be returned.

JOYCE E. MUNKACSI, J.S.C.

Dated: April 14, 2000