

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE, :
 : I.D. No. 1405018947
 v. :
 :
 :
 RODERICK A. BAILEY, JR., :
 :
 :
 Defendant. :

Submitted: October 16, 2015
Decided: November 2, 2015

ORDER

Upon Defendant's Motion to Dismiss.
Granted.

Gregory R. Babowal, Esquire of the Department of Justice, Dover, Delaware; attorney for the State.

James E. Liguori, Esquire of Liguori & Morris, Dover, Delaware; attorney for the Defendant.

WITHAM, R.J.

Defendant Roderick Bailey (“Bailey”) is charged with multiple counts of Owning, Possessing, or Keeping an Animal for the Purpose of Fighting, Failure to Provide a Rabies Vaccination, and Failure to Provide a Kent County Dog License. Bailey moves to have the charges against him dismissed based on the State’s destruction of evidence. In the alternative, Bailey requests testimony relating to the scarring or injuries on any of the seized dogs, or opinions that the scarring or injuries were consistent with dog fighting, be excluded.

FACTS

On May 22, 2014, members of Delaware Animal Care and Control (“DEACC”) and the Delaware State Police conducted a search of Bailey’s residence pursuant to a search warrant and seized several pit bulls. The animals were taken to the First State Animal Center/SPCA in Camden, Delaware, and eventually euthanized. The State claims the dogs were in the care of the SPCA for over two months, and that Bailey was sent correspondence regarding the care of the dogs and the costs associated with that care, but Bailey never responded to the billing correspondence. Bailey claims he never received the billing correspondence. Bailey further claims that he was not afforded the opportunity to have an expert inspect the dogs prior to euthanization. On September 30, 2015, Bailey filed this motion to dismiss.

DISCUSSION

The State had a Duty to Notify Bailey of His Right to a Hearing via Certified Mail

A person may not own, possess, keep, train, or use a dog for the purpose of

fighting.¹ Animals involved in a violation of Delaware’s dog fighting statute must be forfeited to the State. The forfeited animal must then be evaluated by a duly incorporated society for the prevention of cruelty to animals (“SPCA”) or other authorized agency.² The owner of a seized or impounded dog shall be notified by the animal control agency by certified mail, return receipt requested. This notification is required to advise the owner of his right to a hearing before the Dog Control Panel (“Panel”) to determine whether a dog is dangerous or potentially dangerous.³ “[I]f a dog is determined to be dangerous and the Panel directs the animal control agency to dispose of the dog by euthanasia, the owner may appeal the Panel’s decision to the Court of Common Pleas within 10 days of receipt of the Panel’s decision.”⁴

The execution of a search warrant revealed that Bailey owned or possessed

¹ 11 *Del. C.* § 1326(a) states in pertinent part:

A person who owns, possesses, keeps, trains, or uses a bull, bear, dog, cock, or other animal or fowl for the purpose of fighting or baiting; . . . is guilty of a class E felony.

² 11 *Del. C.* § 1326(d) states in pertinent part:

All animals, equipment, devices, and money involved in a violation of this section must be forfeited to the State. Animals so forfeited must be evaluated by a duly incorporated society for the prevention of cruelty to animals, an authorized state agency, or a duly incorporated humane society in charge of animals for eligibility for adoption. . . .

³ 9 *Del. C.* § 922(c) states in pertinent part:

The owner of any seized and impounded dog shall be notified by the animal control agency by certified mail, return receipt requested, of the owner's right to a hearing before the Panel to determine whether the dog is dangerous or potentially dangerous. . . .

⁴ 9 *Del. C.* § 924(d).

numerous pit bulls, allegedly for the purpose of fighting. These animals were seized by the State under 11 *Del. C.* § 1326(d), and were then delivered to the First State Animal Center/SPCA in Camden Delaware. At some point between May 22, 2014, the date the dogs were seized, and July 30, 2014, the date the dogs were euthanized, the SPCA allegedly sent Bailey a correspondence regarding the care of the dogs and the costs associated with that care, but never sent the required notification regarding Bailey's right to a hearing. Bailey claims he never received the billing correspondence. Because the animals were euthanized before Bailey was properly notified of his right to a hearing under 9 *Del. C.* § 922(c), he had no opportunity to have his own expert inspect and evaluate the dogs.

The State Breached its Duty to Preserve Evidence

The Delaware Supreme Court has recognized that the State has a duty to preserve evidence.⁵ This duty is derived from the Delaware Constitution, article I, section 7, on a basis independent of and alternative to the due process provisions of the Fourteenth Amendment.⁶ When the State has failed to preserve evidence, appropriate relief is determined by application of a three-part test that was developed in *Deberry v. State*.⁷ This test requires the Court to consider the following elements

⁵ *Deberry v. State*, 457 A.2d 744, 751 (Del. 1983).

⁶ *Hammond v. State*, 569 A.2d 81, 85 (Del. 1989). The duty was originally based on the due process provisions of the Fourteenth Amendment to the United States Constitution and the Delaware Constitution, article I, section 7. *Id.* The United States Supreme Court relaxed this duty in *Arizona v. Youngblood*, 488 U.S. 51, but the Delaware Supreme Court reaffirmed their prior holding in *Deberry* on independent and alternative grounds under the Delaware Constitution. *Id.* at 87.

⁷ *Johnson v. State*, 27 A.3d 541, 545 (Del. 2011).

when a party claims exculpatory evidence has been lost or destroyed:

- 1) would the requested material, if extant in the possession of the State at the time of the defense request, have been subject to disclosure under Criminal Rule 16 or *Brady*?
- 2) if so, did the government have a duty to preserve the material?
- 3) if there was a duty to preserve, was the duty breached, and what consequences should flow from a breach?⁸

If a duty to preserve evidence has been breached, a separate three part analysis is required to determine the consequences that should flow from the breach. This analysis balances “the nature of the State’s conduct and the degree of prejudice to the accused.”⁹ The consequences are determined by applying a three part analysis which considers:

- 1) the degree of negligence or bad faith involved,
- 2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available, and
- 3) the sufficiency of the other evidence produced at the trial to sustain the conviction.¹⁰

Under the first element of the test, Superior Court Criminal Rule 16(a)(1)(C)

⁸ *Hammond*, 569 A.2d at 86.

⁹ *Deberry*, 457 at 752.

¹⁰ *Hammond*, 569 A.2d at 86.

allows for the discovery of tangible objects which are in the State's possession and are material to the preparation of the defendant's defense.¹¹ On September 8, 2014, counsel for Bailey made a timely request to inspect all physical evidence seized from the him under Delaware Uniform Rule of Evidence ("D.R.E.") 16. An inspection of the animals may have provided evidence needed to rebut the State's charges, and thus the animals would have been material to the preparation of the Defendant's defense and subject to disclosure under Rule 16.

Under the second element of the test, The Delaware Supreme Court has stated that as a matter of prudence, agencies should create rules for evidence preservation that broadly define discoverable evidence to include any material that could be favorable to the defendant.¹² The duty of preservation extends not only to the Attorney General's office, but all investigative agencies, local, county, and state."¹³ Animals involved in a violation of 11 *Del. C.* § 1326, which relates to possession of animals for fighting or baiting, must be forfeited to the State. Because the condition of these animals may be material to the preparation of the Defendant's defense, the State has a duty to preserve the animals unless a compelling reason necessitates

¹¹ Super. Ct. Crim. R. 16(a)(1)(C) states:

Upon request of the defendant the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defendant's defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.

¹² *Deberry*, 457 A.2d at 752.

¹³ *Id.*

euthanasia. The State has offered no evidence of a compelling reason to euthanize the animals.

The third element determines whether the duty to preserve evidence was breached, and if so, considers the consequences that should flow from such a breach. Once animals are seized under Section 1326, they are then evaluated and “may be euthanized immediately if necessary to alleviate undue suffering or to protect shelter staff and/or other sheltered animals from an animal’s severe aggression or contagious deadly health condition.”¹⁴ Although no information was provided regarding the condition or temperament of the animals at the time of the seizure, it can be inferred from the fact that the animals were boarded by the SPCA for over two months, that at least five of the animals were puppies, and that all nine animals were euthanized at the same time that there was no severe aggression or deadly health condition. Because the state destroyed evidence that may have been material to the preparation of Bailey’s defense, this Court must conclude that the duty to preserve evidence was breached.

Because the Court finds the duty to preserve evidence was breached, a second

¹⁴ 16 *Del. C.* § 3004F(c) states:

Notwithstanding any other provisions of this chapter to the contrary, an animal may be euthanized immediately if necessary to alleviate undue suffering or to protect shelter staff and/or other sheltered animals from an animal’s severe aggression or contagious deadly health condition. The determination of whether euthanasia is necessary pursuant to this subsection shall be made by a licensed veterinarian or, in cases of extreme emergency occurring after regular business hours in circumstances under which a licensed veterinarian is not available, by other appropriately trained staff.

three part analysis is required to determine the consequences of the breach. The first element considers the degree of negligence or bad faith that is involved. Bailey makes no claim of negligence or bad faith. He merely states that the duty to preserve has clearly been breached and that without the dogs, the State cannot sustain the charges. Moreover, there has been no showing that the State was negligent or acted in bad faith when destroying the animals.

Under the second element, which considers the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available, the State has additional documentation and an expert witness. In response to Bailey's discovery request, the State provided kennel cards, medical and surgical records, medical reports, and intake sheets for each of the dogs seized. This secondary evidence may be probative, but it does not diminish the importance of a reliable expert's inspection of the actual animals. Notwithstanding the inspection of the animals prior to being euthanized by a veterinarian employed by a state authorized agency, Bailey should have been offered the opportunity to have an expert of his own choosing inspect the animals and possibly rebut the findings of the State authorized veterinarian. Bailey was denied this opportunity.

Under the third element, a court will consider the sufficiency of the other available evidence to sustain the conviction. As stated above, the State appears to have other evidence available with which it may attempt to sustain a conviction. In addition to the above listed records, the State seized dog crates, treadmills, scales, assorted medications, a legal pad with notes, photographs, weights, and a flash drive

when executing the search warrant . However, the probative value of this evidence has not been established by the State, and it is therefore unknown whether this evidence would be sufficient to sustain a conviction.¹⁵

Whether the other available evidence is sufficient to sustain a conviction is immaterial. The State destroyed evidence it was required to preserve, it destroyed this evidence while at the same time violating Bailey’s right to a hearing to determine whether his seized animals were dangerous, and the destroyed evidence was material to the preparation of Bailey’s defense. After balancing the nature of the State’s conduct and the degree of prejudice to the accused, the result must be a conclusion that Bailey has been prejudiced in the preparation of his defense.

CONCLUSION

The Court finds the State breached its duty to preserve evidence, and the consequence of that breach is that the Defendant’s motion to dismiss is **GRANTED**.

¹⁵ The Court has also considered the effect of a Lolly instruction on the other available evidence. The Court finds the State breached its duty to preserve evidence, and if the consequences flowing from the breach were anything short of dismissal, the Court would be required to issue a Lolly instruction as required by *Lolly v. State*, 611 A.2d 956, 960 (Del. 1992). The inspection of the animals by an expert would be the most probative evidence available in this case. A Lolly instruction would state that any missing evidence, in this case the animals, would have been exculpatory.

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Because the Defendant's motion to dismiss is granted, the Defendant's October 7, 2015 motion to suppress all evidence seized in the execution of the search warrant is *moot*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

oc: Prothonotary

xc: Gregory R. Babowal, Esquire
James E. Liguori, Esquire