



Dear Ms. Carolyn D. Shook,

I am including arguments in opposition of Mr. Hynes' motion to dismiss. If you would like this information in Word format, Dana Campbell or Eileen Stark can email it to you. If you would like further assistance with drafting, or anything else, Animal Legal Defense Fund will gladly oblige. If you have any questions or concerns, please don't hesitate to contact us. Thank you for prosecuting this animal abuse case.

Sincerely,

A handwritten signature in black ink that reads "Holly Gibbons". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Holly Gibbons

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ARGUMENTS FOR OPPOSITION TO MOTION TO DISMISS

Standard of review for motion to dismiss.

When an issue of fact exists, the court should not grant motion to dismiss, because a “[m]otion to dismiss is not a substitute for summary judgment and, in ruling on motion to dismiss complaint for failure to state a cause of action, court is confined to the consideration of the allegations found within the four corners of the complaint.”¹ Here, although the facts are undisputed, the issue of Defendant’s intent is to be decided by a finder of fact.

Failure to act by withholding food from animals constitutes an “act” under felony cruelty to animals, section 828.12(2).

Defendant committed felony cruelty to animals by withholding food from nine animals, which resulted in five deaths, and four animals suffering from severe malnourishment. Prosecution rightfully charged Defendant under section 828.12(2), which states in relevant part:

A person who intentionally commits *an act* to any animal which results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering, or causes the same to be done, is guilty of a felony of the third degree. (emphasis added).

In Nicholson v. State, Florida’s Supreme Court held, “[I]t is clear that in the criminal context an omission or failure to act may constitute an act.”² In that case the defendant failed to provide food for a child, who consequently starved to death.³ The medical examiner testified that the child died in extreme pain due to lack of food.⁴ A recent Washington court held that two horses suffered unnecessary and unjustifiable pain as a result of their being severely underweight and malnourished and that it was reasonable to infer that extreme hunger was capable of causing “pain” under the governing definition of that term.⁵

Here, Defendant stated that he withheld food from his animals to punish them. Officers found all of Defendant’s animals without access to food, only one animal had access to water, and no food appeared to have been recently distributed, although he had pet food locked up in the apartment.

¹ Thompson v. Martin, 530 So.2d 495 (Fla. 2d. DCA 1988).

² Nicholson v. State, 600 So.2d 1101, 1104 (Fla. 1992) referencing Black's Law Dictionary 25 (6th ed. 1990) Court allowed prosecution under section 827.03, (abuse, aggravated abuse, and neglect of a child), even though section 827.04 (contributing to the delinquency or dependency of a child), specifically addresses food deprivation, because the facts showed an aggravated form of systematic food deprivation with intent to punish the child. Additionally, Florida statutes recognize “willful neglect” in many different contexts, such as: Tax and Finance, § 213.21; Education Code, §1012.33; Alcoholic Beverages and Tobacco, § 561.501; Public Officers, Employees, and Records, § 120.57; County Organization and Intergovernmental Relations, § 159.703; and Municipalities, § 166.234.

³ Nicholson v. State, 600 So.2d 1101, 1104 (Fla. 1992).

⁴ Nicholson v. State, 600 So.2d 1101, 1103 (Fla. 1992).

⁵ State v. Zawistowski, 82 P.3d 698, 701 (Wash. App. Div. 2, 2004).

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Five animals were dead, and the remaining four appeared severely malnourished. When the officers fed the surviving animals, they quickly “wolfed” down the food.

In Florida, cruelty to animals is a crime. Failure to act may constitute an act in the criminal context under Nicholson.⁶ Defendant’s failure to provide food constitutes an act within the criminal context of section 828.12(2).

Issue of intent is a question of fact to be determined by a trier of fact.

Felony cruelty to animals, section 828.12(2), requires an intentional act. “Intent is not an issue to be decided on a motion to dismiss under rule 3.190(c)(4), Florida Rules of Criminal Procedure, since intent is usually inferred from the acts of the parties and the surrounding circumstances; being a state of mind, intent is a question of fact to be determined by the trier of fact, who has the opportunity to observe all of the witnesses.”⁷ Whether Defendant acted intentionally is to be determined by a trier of fact, not on a motion to dismiss.

Defendant’s acted intentionally under the general intent requirement of felony cruelty to animals, section 828.12(2).

Section 828.12(2) requires that a person “*intentionally* commits an act to any animal which results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering.” (emphasis added). The intent element requires only general intent to commit an act, and not the specific intent that the act will result in death, pain, or suffering.⁸

In Reynolds v. State, Florida’s Supreme Court held that the “[l]egislature, by the plain language of the statute, intended for section 828.12(2) to operate as a general intent crime,” and not a specific intent crime.⁹ “The language of the statute expressly requires only that the defendant ‘intentionally commit an act,’ with the word ‘intentionally’ modifying the phrase ‘commit an act’ . . . Notably, section 828.12(2) previously provided: A person who tortures any animal with intent to inflict intense pain, serious physical injury, or death . . .”¹⁰

“[A] person’s subjective intent to cause the particular result is irrelevant to general intent crimes because the law ascribes to him a presumption that he intended such a result.”¹¹ Thus, section 828.12(2) “does not require that one commit an act intending to cause a cruel death or excessive

⁶ Nicholson v. State, 600 So.2d 1101, 1104 (Fla. 1992).

⁷ State v. Carwile, 615 So.2d 748, 750 (Fla. 2d DCA 1993).

⁸ Reynolds v. State, 842 So.2d 46 (Fla. 2002).

⁹ Reynolds v. State, 842 So.2d 46, 48 (Fla. 2002).

¹⁰ Reynolds v. State, 842 So.2d 46, 49 (Fla. 2002) (“The Legislature has expressed no intent to create an additional element requiring proof that an alleged offender acted with the mental intent to inflict a cruel death or unnecessary suffering. Furthermore, if the Legislature wanted the statute to include the specific intent to cause a cruel death or suffering, they could have specifically said so.”).

¹¹ Reynolds v. State, 784 So.2d 509, 511 (Fla. 2001) referring to Linehan v. State, 442 So.2d 244, 247-48 (Fla. 2d DCA 1983) (en banc), approved as to result only, 476 So.2d 1262 (Fla. 1985).

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or repeated unnecessary pain or suffering.”¹² Instead, the statute “requires only that one ‘intentionally commit[] an act to any animal which results in the cruel death, or excessive or repeated infliction of unnecessary pain or suffering’ to be guilty of the offense.”¹³ Additionally, “one can willfully omit or neglect to do something that results in unnecessary or unjustifiable pain and suffering just as one can willfully commit an act that produces the same result.”¹⁴

Here, the defendant intentionally withheld food from his animals. According to his own statements, “[H]e used food as a means to punish his animals for not behaving like his female Rottie named Jewel, who was a very good dog.” Referring to specific animals, Defendant admitted “[t]he other two dogs misbehave so I don’t even give them food.” Defendant stated that “[h]e wasn’t sure when the last time the animals were fed,” and that “he used food in an attempt to punish his animals.” The defendant intended to, and did, withhold food from his animals, which resulted in the death of one dog, two birds, one lizard, and one turtle, as well as excessive infliction of unnecessary pain and suffering for two dogs, a snake, and a bird.

By committing the act of withholding food, the Florida Supreme Court recognizes that defendant intended the result.¹⁵ Defendant meets the general intent requirement, because he intended to withhold food from his animals, and that is all that is required under section 828.12(2).

An act specifically prohibited under misdemeanor cruelty to animals statute does not exclude same act from also meeting criteria for felony cruelty to animals.

Section 828.12(1) defines misdemeanor cruelty to animals and states in relevant part:

A person who unnecessarily overloads, overdrives, torments, *deprives of necessary sustenance* or shelter, or unnecessarily mutilates, or kills any animal, or causes the same to be done, or carries in or upon any vehicle, or otherwise, any animal in a cruel or inhumane manner, is guilty of a misdemeanor of the first degree. (emphasis added)

The prosecution agrees with defendant that section 828.12(1) “specifically proscribes the type of conduct that is undisputed in this case”; i.e., defendant deprived his animals of necessary sustenance. However, the defendant’s act also meets the felony criteria under section 828.12(2), because the deprivation resulted in cruel death by starvation for five animals and unnecessary pain and suffering for the “severely malnourished” surviving four animals.

Defendant committed both misdemeanor and felony cruelty to animals by withholding food for such a time as to cause cruel death, excessive infliction of unnecessary pain, and suffering.

¹² Reynolds v. State, 842 So.2d 46, 47 (Fla. 2002).

¹³ Reynolds v. State, 842 So.2d 46, 47 (Fla. 2002).

¹⁴ Nicholson v. State, 600 So.2d 1101, 1103-04 (Fla. 1992).

¹⁵ Reynolds v. State, 784 So.2d 509, 511 (Fla. 2001) referring to Linehan v. State, 442 So.2d 244, 247-48 (Fla. 2d DCA 1983) (en banc), approved as to result only, 476 So.2d 1262 (Fla. 1985).

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Legislative history shows the gravity of cruelty to animals.

Legislative intent regarding cruelty to animals is clear. Legislative history shows that lawmakers take the crime of animal cruelty seriously by (1) adding a felony provision, (2) changing the felony from a specific intent crime to a general intent crime, and (3) consistently increasing the penalties. In fact, pending legislation will increase the penalties again.¹⁶

Conclusion

Defendant withheld food from his animals, which resulted in five deaths and four animals being severely malnourished. This conduct constitutes an act under felony cruelty to animals, section 828.12(2). The act was intentional under the general intent requirement of the statute. Defendant deprived his animals of necessary sustenance under section 828.12(1) to such an extent that it resulted in "cruel death" and "excessive or repeated infliction of unnecessary pain or suffering" under section 828.12(2). The undisputed facts establish both misdemeanor and felony cruelty to animals.

¹⁶ 2006 FL H.B. 43 (NS), 2006 Florida House Bill No. 43, Florida One Hundred Eighth Regular Session (Jul 26, 2005).