STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT IV

Case No. 15AP863-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BARBARA THIRY,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and Order for Restitution Entered In Waupaca County, the Honorable Raymond Huber Presiding

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ISSUE PRESENTED

1. Is Thiry responsible for reimbursing Waupaca County under Wis. Stat. § 173.24 for the costs of boarding five horses when, after a jury trial, she was convicted of only one count related to one specific horse and acquitted of all charges relating to the remaining horses?

   The circuit court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested as the case can be decided by the parties' briefs. Because this is an appeal of a misdemeanor conviction, it is to be determined by a single appellate judge, and therefore, is ineligible for publication under Wis. Stat. § 809.23 (1)(b).

STATEMENT OF THE CASE AND FACTS

The Defendant-Appellant, Barbara Thiry, was charged in a criminal complaint filed on October 9, 2013. (R. 2). The complaint alleged 15 criminal violations, specifically; five counts of Intentionally Failing to Provide Food for an Animal, contrary to Wis. Stat. § 951.13(1), five counts of Negligently Providing Improper Outdoor Animal Shelter, contrary to Wis. Stat. § 951.14(2)(b)1, and five counts of Mistreating Animals-Intentionally or Negligently, contrary to Wis. Stat § 951.02. (R. 2). The three different types of charges all correlated to one specific horse. (R. 2). The names of the five horses named in the complaint are; BiBi, Lady, Rebecca, Ruby, and Two Socks. (R. 2). Thiry entered pleas of not guilty to all 15 counts. (R. 49).

The case eventually proceeded to a jury trial which took place from July 30, 2014 to August 1, 2014. (R. 55-57). Following the close of the State's case, all five counts of Negligently Providing Improper Outdoor Animal Shelter were dismissed, as were two other counts relating to the horse "Two Socks." (R. 56: 70-74). After deliberations, the jury found Thiry guilty of only one of the remaining counts. (R. 57: 8-9). Thiry was convicted of count 4 in the criminal complaint, Intentionally Failing to Provide Food for an Animal in reference to the horse named "Lady." (R. 57: 8).

Following the jury's verdict the court entered a judgment of guilt against Thiry on count 4. (R. 57: 12). The court proceeded to sentencing that same day. (R. 57:15). The court withheld sentence and placed Thiry on probation for one year. (R. 57: 24).

On October 27, 2014 a restitution hearing was held. (R. 59, Appx. 101). At the hearing, the state presented evidence that the five horses had been seized by the county at the outset of the criminal case against Thiry. (R. 59: 3-4, Appx. 103-104). Evidence was entered showing the total cost incurred by the county for care and maintenance of the five horses was $9,020.51. (R. 59: 11, Appx. 111). The state noted for the court that Thiry had already paid $3,850.00 to the county as the result of a prior civil order requiring monthly payments for the care of the horses. (R. 59: 3-4, 11; Appx. 103-04, 111). The state sought a restitution order for the remaining balance in the amount of $5,170.51. (R. 59: 13, Appx. 113).

Trial counsel for Thiry detailed for the court the line item total for costs incurred by the county for the horse "Lady." (R. 59: 15-16, Appx. 115-116). This amount totaled $905.47. (R. 59: 16, Appx. 116). This total, as it related to Lady, was not in dispute. (Id.).

The court relied upon Wis. Stat. 173.24 when issuing its decision. (Id.). The court reasoned that the statute does not indicate that the expenses of an animal which there was no conviction for shouldn't be assessed so long as there was a conviction under chapter 951 of the Wisconsin statutes. (R. 59: 17, Appx. 117). Consequently, the court ordered restitution in the amount of $5,170.51. (Id.).

Thiry now appeals.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN ISSUING A RESTITUTION ORDER IN THE AMOUNT OF $5,170.51 BECAUSE THIRY WAS ACQUITTED OF ALL CHARGES RELATING TO FOUR OF HER HORSES.

The trial court incorrectly ordered restitution in the amount of $5,170.51. Thiry's counsel correctly calculated the restitution owed as $905.47 because she is only required to pay restitution for charges that resulted in a conviction.

Because of the unique nature of this case and the issue at hand, no case law exists that is directly on point. As such, the court must rely upon a statutory interpretation of the statute at issue.

This case presents an issue of statutory interpretation. A question of statutory interpretation is a question of aw that is reviewed independently of the lower court's ruling. *State v. Leitner*, 2002 WI 77, ¶16, 646 N.W.2d 341.

When interpreting a statute, the reviewing court must begin with the language used in the statute and determine if the meaning is plain. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 681 N.W.2d 110. Statutory language is reviewed based on its common, ordinary, and accepted meaning. *Id.* When determining the plain meaning of a particular statute, a court may consider the scope, context, and purpose of the statute. *Id.* at ¶48. The plain

meaning of a statute is not determined in a vacuum. *Osterhues v. Bd. Of Adjustment*, 2005 WI 92, ¶24, 698 N.W.2d 701 (citing *Kalal*, 2004 WI 58, ¶46). Statutory language should be interpreted in the context in which it is used and in relation to the language of surrounding or closely related statutes. *Kalal*, 2004 WI 58 at ¶46. Examining the context of a statute is done to avoid absurd or unreasonable results. *Id.*

In *Kalal* the Supreme Court provided the method to be used when addressing issues of statutory interpretation. According to *Kalal*, the purpose of statutory interpretation is "to determine what the statute means so that it may be given its full, proper, and intended effect." *Id*. at ¶44.

A. Under the plain meaning of Wis. Stat. § 173.24, Thiry can only be ordered to pay resititution for "Lady".

The relevant sections of the statute at issue read as follows:

> **(1)** A court shall assess the expenses under this section in any case . . . in which an animal has been seized because it is alleged that the animal has been used in or constitutes evidence of any crime under ch. 951.
>
> **(3)** If the person alleged to have violated ch.951 is found guilty of the violation, the personal shall be assessed the expenses under subs (1) and (2). If the person is not found guilty, the county treasurer shall pay the expenses from the general fund of the county.
>
> Wis. Stat §§ 173.24 (1) & (3).

1. The language used in § 173.24.

Subsection (1) of § 173.24 states that expenses shall be assessed when **"the** animal" (emphasis added) has been used in or is evidence of a crime under chapter 951 of the statutes. Wis. Stat. § 173.24 (1). Subsection (3) of § 173.24 states that if the defendant is found guilty of "**the** violation" (emphasis added), the person shall be assessed the expenses. Wis. Stat. § 173.24 (3).

The statute uses the word "the" to specify a specific animal. Subsection (1) refers to "the animal" that has been seized as evidence of a crime under ch. 951, and subsection (3) refers to "the violation" of ch. 951. The use of this language indicates the legislature intended that the defendant should only be assessed the costs associated with the specific animal for which there was a conviction under ch. 951.

There is no additional language within § 173.24 that would indicate that a defendant should be responsible for costs relating to animals for which there was an acquittal. Rather, the statute allows for expenses to be assessed when a specific animal that constitutes evidence of a crime under ch. 951 has been seized, and that the alleged violation for which the animal has been seized results in a conviction.

The statute provides only for expenses to be paid by the defendant when the costs incurred by the county were related to a charge which ultimately resulted in a conviction. Here, Thiry was convicted of only one charge as it related to a specific horse, meaning that she is only to be assessed the expenses incurred by the county for the care and maintenance of that specific horse.

Further, by providing that the county shall bear the incurred expenses in the result of an acquittal, the legislature

indicates that it is seeking to limit the situations in which the defendant is responsible for these costs. By including this provision, the legislature has required the state to obtain a conviction to recoup the expenses incurred from seizing an animal from its owner.

2. Examination of the most closely related statute

As noted above, when determining the plain meaning of a statute, the reviewing court should look to surrounding or closely related statutes to determine the context of the statute at issue. *Kalal*, 2004 WI 58 at ¶46. The purpose or scope of a statute may be apparent from its relationship to closely related statutes. *Id.* at ¶49.

Here, the general criminal restitution statute found under § 973.20 serves as a closely related statute to §173.24 and would be beneficial in examining to determine the purpose and scope of § 173.24. Examining § 973.20 is important in this case because it establishes the circumstances in which a court can ordinarily order a criminal defendant to restitution.

§ 973.20 provides for a method for the court to order a defendant to pay restitution to any victims of the underlying criminal act. *See* Wis. Stat. § 973.20. Under the restitution statute, the court can order restitution for any crime considered at sentencing. Wis. Stat. § 973.20(1r). A crime considered at sentencing is any crime that the defendant was convicted of, or any crime that was read-in by the state as a result of a plea agreement. Wis. Stat. § 973.20(1g)(a) & (b). Crimes for which the defendant was acquitted, or that were dismissed but not read-in cannot be used to calculate restitution. *See* Wis. Stat. § 973.20.

Here, had the trial court been required to rely on § 973.20 to order restitution, the order would only have been applicable to the horse "Lady", as "Lady" was the only animal of which Thiry was convicted of neglecting or abusing. The expenses incurred by the county for the other four horses would have not have been counted under crimes that can be considered at sentencing because the charges relating to those horses did not result in convictions nor were those charges read-in pursuant to a plea agreement.

Interpreting the plain meaning of § 173.24 within the context of the closely related statute of § 973.20 it is clear that the legislature did not intend to expand upon § 973.20, but rather to establish that the county could be treated like a victim of a crime and be compensated for its losses in a manner consistent with the method in which victims are ordinarily compensated. Had the legislature intended for courts to interpret § 173.24 as an expansion of § 973.20 for animal neglect and abuse cases, it would have made that purpose clear.

3. Avoiding an absurd or unreasonable result

It is important to reasonably interpret a statute to avoid absurd or unreasonable results. *Kalal*, 2004 WI at ¶46.

Here, the circuit court, in its interpretation of § 173.24, produced an absurd result by allowing restitution to be ordered for animal neglect crimes of which the defendant was acquitted. § 173.24 does not clearly indicate a legislative intent to expand upon § 973.20. Allowing such a reading would produce the absurd result of requiring restitution for acquitted or dismissed charges in animal neglect and abuse cases. This result contradicts the clear purpose of § 973.20, and creates an exception to the rule that a defendant is not

responsible for restitution in charges which resulted in an acquittal.

There is no indication within § 173.24 that it was designed to create a scenario where a defendant could be ordered to pay restitution for charges that were ultimately dismissed or where the defendant was acquitted at trial, and a ruling from this court to the contrary would create an absurd and unreasonable outcome.

CONCLUSION

The full, proper, and intended effect of § 173.24 is assess to a criminal defendant the expenses incurred in the maintenance of a seized animal only when the defendant was convicted of a criminal act related to that particular animal.

For all the reasons stated, the Defendant-Appellant, Barbara Thiry, respectfully asks this court to vacate the imposed restitution order and issue an order of restitution in the amount of $905.47, the total cost incurred by the county for the care and maintenance of "Lady."

Dated this 20th day of July, 2015.

Respectfully submitted,

_____

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CERTIFICATION OF MAILING

I hereby certify that:

This brief was, on July 20, 2015, delivered to a 3rd-party commercial carrier (FedEx) for delivery to the Clerk of Court of Appeals within three calendar days pursuant to Wis. Stat. § 809.80 (3)(b). I further certify that the brief was correctly addressed and postage was pre-paid.

Dated this 20th day of July, 2015.

Signed:

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,004 words.

Dated this 20th day of July, 2015.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of July, 2015.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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