

ORIGINAL

IN THE SUPREME COURT OF OHIO

12-1963

CASE NO. \_\_\_\_\_

STATE OF OHIO, )  
 )  
 Plaintiff-Appellee, )  
 )  
 vs. )  
 )  
 JUDY ANN HARTMAN, )  
 )  
 Defendant-Appellant. )

On Appeal from the Summit  
County Court of Appeals,  
Ninth Appellate District

Court of Appeals  
Case No. CA-26250

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT JUDY ANN HARTMAN

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EXPLANATION OF WHY THIS CASE INVOLVES A  
SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents several critical issues for criminal law in Ohio: (1) whether an individual can give valid consent to a search of her home while she is receiving medical treatment and after an apparent suicide note is discovered; and (2) whether a totality of the circumstances indicating danger to the welfare of an animal constitutes probable cause and an exigent circumstance in which the government may enter and conduct a warrantless search of a residence.

The Court of Appeals ruled that the trial court was correct when it concluded that Ms. Hartman had voluntarily consented to officers entering her home. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 17, Appx. at pp. 6.) It found that Ms. Hartman "knowingly and voluntarily" consented to the humane agents entering her home. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 14, Appx. at pp. 5.) Apparently because the Court of Appeals found Ms. Hartman's consent to be valid, it did not reach the question of whether there was an exigent circumstance and probable cause for the officers to enter her home without a warrant. As the decision of the Court of Appeals threatens an individual's rights in the State of Ohio, it involves a substantial constitutional question. The Court of Appeals erred in finding that Ms. Hartman validly consented to the search of her home. Assuming, *arguendo*, that consent was not valid, a warrantless entry based on a concern for the welfare of animals did not constitute a recognized exigent circumstance.

Ms. Hartman was receiving medical attention, her apparent suicide note was found, and an officer could not tell whether she was dead or alive all within a relatively short period of time. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 17, Appx. at pp. 6.) She could not have given voluntary consent for officers to search her home, especially while confined in an

ambulance for 20 to 25 minutes and cornered by officers. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 16, Appx. at pp. 6.) The implications of the decision of the Court of Appeals potentially affect everyone who may be asked to consent to a search of their home while receiving emergency medical treatment, and everyone who keeps animals in their homes. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 15-16, Appx. at pp. 5-6.) The entire process of obtaining consent and determining whether an exigency justifies warrantless entry of a residence would be frustrated and provide police with expansive justifications for invading the privacy of individuals if the decision of the Court of Appeals is permitted to stand.

Lower courts in Ohio and other states have recognized certain situations in which a threat to the welfare of animals may waive the requirement for government officials to obtain a warrant to enter private property. However, this Court has found that the community-aid/exigent-circumstance exception to the warrant requirement applies only when there is a threat to human life or a threat of serious injury to a person. *See State v. Dunn*, 131 Ohio St.3d 325, 2012-Ohio-1008, 964 N.E.2d 1037; *State v. Applegate*, 68 Ohio St.3d 348, 626 N.E.2d 942 (1994). Foul smells and barking dogs are not sufficient for officers to ignore the warrant requirement and enter a home.

In sum, this case puts in issue the essence of when consent may validly be obtained and when the unpredictable behavior of animals may justify entry into a home, thereby affecting every governmental entity and any individual in Ohio who may potentially receive medical treatment or keep an animal in her home. To promote the purposes and preserve the integrity of the Constitutions of this State and of the United States, to assure uniform application of the law, and to protect an individual's right to privacy in both her person and her home, this Court should grant jurisdiction to hear this case and review the decision of the Court of Appeals.

WHEREFORE, Ms. Hartman prays that this Court will grant review and reverse the Court of Appeals' decision and her convictions, and grant her a new trial; or, in the alternative, enter a judgment of acquittal.

#### STATEMENT OF THE CASE AND FACTS

The case arises from a warrantless search of Ms. Hartman's home. On May 11, 2011, Humane Agents Tim Harland and Shannon O'Herron responded to a call to check on the welfare of dogs in a van parked on Ms. Hartman's property. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 2, Appx. at pp. 1.) After observing the van and noticing an electrical cord powering a fan running from the home to the van and hearing noises through the van's cracked windows, Officer Harland reasonably believed that there were animals in the van. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 3, Appx. at pp. 1-2.) Officer Harland opened the van door and discovered two dogs. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 3, Appx. at pp. 2.)

After discovering the animals, the officers attempted to contact Ms. Hartman, but were unsuccessful. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 3, Appx. at pp. 1-2.) As Officer Harland approached the house, he testified that he heard several dogs barking inside and was offended by the smell of ammonia and animal waste emanating from the house. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 5, Appx. at pp. 2-3.) After several unsuccessful attempts to contact Appellant Hartman, the officers removed the dogs from the property. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 3, Appx. at pp. 2.)

After the animals were removed, the officers were able to contact Ms. Hartman and inform her that they planned to return to her home the next day to see the other animals. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 3, Appx. at pp. 2.) When the officers

initially arrived on the following day, they could not find her. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 4, Appx. at pp. 2.) Officer Harland circled the property and observed a black pickup truck that he had not noticed during his first visit. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 4, Appx. at pp. 2.) As he approached the truck, he saw Ms. Hartman was in the passenger seat. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 4, Appx. at pp. 2.) To Officer Harland, she appeared to either be dead or in a very deep sleep. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 4, Appx. at pp. 2.)

Ms. Hartman was unresponsive to Officer Harland's attempts to arouse her. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 4, Appx. at pp. 2.) This prompted Officer Harland to call the Sheriff's Office, which contacted Coventry Emergency Medical Services (EMS). (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 4, Appx. at pp. 2.) Upon arrival, EMS officers discovered what appeared to be Ms. Hartman's suicide note and thought it would be best to transport her to the hospital. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 4, Appx. at pp. 2.) However, after being able to stand and speak with the officers, she was not taken to the hospital but remained on the stretcher in the back of the ambulance. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 4, Appx. at pp. 2.) At this time, the officers allegedly elicited Ms. Harman's consent to check on the animals in her home. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 4, Appx. at pp. 2.) Numerous animals were found on the property including 40 dogs, 25 birds, 24 cats, six mice, two ferrets, and one iguana. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 5, Appx. at pp. 3.)

A complaint against Ms. Hartman was later filed in the Barberton Municipal Court, alleging that she negligently committed an act of cruelty against one or more companion animals

violating R.C. 959.131(C)(1). (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 6, Appx. at pp. 3.) Case number 11 CRB 2943 contained two counts, count A alleged a violation of R.C. 959.131(C)(1) concerning 25 birds, one iguana, two ferrets, and six mice, while count B alleged the a violation of the same R.C. section with respect to 24 cats. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 6, Appx. at pp. 3.) Case number 11 CRB 2944 alleged a violation of R.C. 959.131(C)(1) with respect to the two dogs in the van. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 6, Appx. at pp. 3.) Case number 11 CRB 1159 alleged a violation of R.C. 959.131(C)(1) concerning 40 dogs. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 6, Appx. at pp. 3.)

Ms. Hartman filed a motion to suppress on December 7, 2011, "asserting that the warrantless search was conducted without valid consent and that there was no exigent circumstances justifying the search of her home." (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 7, Appx. at pp. 3.) The trial court denied her motion, and convicted her on all four counts of negligently committing an act of cruelty against a companion animal. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 8, Appx. at pp. 3.) Ms. Hartman's sentence was stayed pending appeal. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 8, Appx. at pp. 3.)

Appellant Hartman filed a timely notice of appeal to the Ninth District Court of Appeals on January 9, 2012. On her direct appeal, the Ninth District affirmed the decision of the trial court. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 1, Appx. at pp. 1.) In its decision, the Court of Appeals found that: (1) the trial court did not err in concluding that Ms. Hartman had voluntarily consented to officers entering her home; and (2) since at least one of the birds was a companion animal as defined by the statute, there was sufficient evidence whereby

the trier of fact could find Ms. Hartman guilty of cruelty against companion animals in case number 11 CRB 2943(A) with respect to the 25 birds, one iguana, two ferrets and six mice. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 17, 24, Appx. at pp. 6, 10.)

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. I: Appellant Hartman's Fourth Amendment rights were violated as the question of whether consent to a search was voluntary or the product of a temporary inability to consent, duress, or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances, and her physical and mental condition at the time prevented her from giving voluntary consent.**

Appellant Hartman could not have voluntarily consented to a search of her home because she had just received medical attention and was still confined to an ambulance. Further, what prompted an officer to call EMS was his belief that Ms. Hartman might be dead after viewing her in her truck. Once EMS officers arrived, they discovered what purported to be Ms. Hartman's suicide note. Further, the combination of Ms. Hartman's physical and mental condition and the large number of animals would have prevented her from removing or destroying any evidence in the time it would take officers to obtain a search warrant. The Court of Appeals erred in finding that Ms. Hartman's consent was voluntary, and in not recognizing that a threat to the welfare of an animal is not a recognized exigent circumstance in Ohio.

"When police conduct a warrantless search, the state bears the burden of establishing the validity of the search. Searches and seizures without a warrant are '*per se* unreasonable' except in a few well-defined and carefully circumscribed instances." *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, 850 N.E.2d 1168, ¶ 98, citing *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). "It is equally well established, however, that a search of property without a warrant or probable cause but with proper consent having been voluntarily

obtained does not violate the Fourth Amendment." *Roberts*, 110 Ohio St.3d at ¶ 98. "To rely on the consent exception to the warrant requirement, the state must show by 'clear and positive' evidence that the consent was 'freely and voluntarily' given." *State v. Posey*, 40 Ohio St.3d 420, 427, 534 N.E.2d 61 (1988), citing *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

"The question of whether consent to a search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances." *Roberts*, 110 Ohio St.3d at ¶ 99. "The standard for measuring the scope of consent under the Fourth Amendment is objective reasonableness, i.e., what a typical reasonable person would have understood by the exchange between the officer and the suspect." *Roberts*, 110 Ohio St.3d at ¶ 99. When Officer Harland initially discovered Ms. Hartman unconscious in a truck, he could not tell whether she was in a deep sleep or dead. Generally, when one is perceived as potentially being dead, or even after waking from a deep sleep, that individual is not in a completely lucid state of mind. As a matter of common sense, one may not be completely cognizant shortly after awaking from a deep slumber. Especially after EMS officers discovered what appeared to be Ms. Hartman's suicide note. Despite Officer O'Herron's testimony that Ms. Hartman "appeared competent," after contemplating suicide, waking from a "deep sleep," and receiving medical attention, she was not in a state of mind capable of giving valid consent.

The Court of Appeals should not have accepted the trial court's finding as to Ms. Hartman providing voluntary consent to search her home because it was not sufficiently supported by competent, credible evidence. *See State v. Burnside*, 100 Ohio State.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. While certain limited facts tend to show Ms. Hartman as

conscious and competent, the totality of the circumstances demonstrate that she lacked the requisite mental clarity to provide valid consent.

**Proposition of Law No. II: Appellant Hartman's Fourth Amendment rights were violated as the community-caretaking/emergency-aid exception to the warrant requirement allows police officers to enter a residence to render aid if they reasonably believe that there is an immediate need for their assistance only to protect human life or prevent serious injury to a human being, and no person was in danger at the time of the search.**

The Court of Appeals found that Ms. Hartman provided voluntary consent. Therefore, it did not consider the question of whether probable cause and an ongoing exigent circumstance justified the officers warrantless entry and search of her home. However, at trial, the State argued and used the testimony of Officer Harland and a veterinarian to describe the condition of Ms. Hartman's home which was dangerous to the animals. (Trial Tr., pp. 37, 112) The veterinarian testified that to remedy the situation, officers needed to "immediately remove the animals" from Ms. Hartman's home. (Trial Tr., pp. 35) This Court has not spoken on the issue of whether the emergency-aid exception includes danger to the welfare of animals. Thus, assuming her consent was not voluntary and as the law currently exists, the officers could not rely on probable cause and an exigent circumstance where neither existed.

The home is sacrosanct, and "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *See Middletown v. Flinchum*, 95 Ohio St.3d 43, 44, 765 N.E.2d 330 (2002), quoting *United States v. United States Dist. Court for the E. Dist. of Michigan*, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). As the United States Supreme Court has consistently held, warrantless entry into one's home is *per se* unreasonable. *See generally Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

The exigent circumstances exception allows police to execute a warrantless search or seizure provided that before the search or seizure occurs, there is probable cause and an exigent circumstance exists. *State v. Robinette*, 80 Ohio St.3d 234, 243, 658 N.E.2d 762 (1997). The State has the burden of demonstrating the exigent circumstance that overcame the presumption of unreasonableness that attaches to all warrantless home entries. *Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). An exigent circumstance is an emergency that prompts police to believe that there is probable cause to enter a home without a warrant and there is either (1) a person in the home who is in need of immediate aid or to prevent a situation threatening life or limb, or (2) there is an immediate threat of loss, removal, or destruction of evidence or contraband. *Mincey v. Arizona*, 437 U.S. 385, 392-93, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). The State bears a heavy burden to demonstrate the need that supported the warrantless search. *Welsh*, 466 U.S. at 749-50.

"The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency." *State v. Dunn*, 131 Ohio St.3d 325, 2012-Ohio-1008, 964 N.E.2d 1037, ¶ 18, quoting *Wayne v. United States*, 318 F.2d 205, 212 (D.C.Cir.1963). Police officers have a duty to provide emergency services to **people** who are in danger of physical harm, and "courts must frequently consider the reasonableness of an officer's actions in situations \* \* \* where a **person's** life is in jeopardy." (Emphasis added.) *Dunn*, 131 Ohio St.3d at ¶ 20.

In the case at bar, there was no person in danger that would have prompted police into reacting to an exigent circumstance. There may have been a concern for the welfare of certain animals. However, this is not a sufficient basis on which to waive the warrant requirement.

"Dogs are considered by Ohio law (R.C. 955.03) to be personal property." *McDonald v. Ohio*

*State Univ. Veterinary Hospital*, 67 Ohio Misc.2d 40, 42, 644 N.E.2d 750 (Ct. of Cl.1994).

Further, there was no immediate threat to the animals. While there may have been more of a concern if the officers looking into the home could see animals lying silent and motionless or dead, Officer Harland heard dogs barking as he walked around the home and knocked on the back door and windows. Based on the number of animals and Ms. Hartman's condition, there was ample time to get a warrant and no threat to the evidence (the animals in the home) being removed or destroyed. Thus, the warrantless entry of Ms. Hartman's home violated her rights under the Fourth Amendment.

There are cases serving as persuasive authority in which courts have characterized a threat to the welfare of an animal as an exigent circumstance justifying warrantless entry into private property. *See generally State v. Kilburn*, 12th Dist. Nos. CA96-12-130, CA96-12-131, 1998 Ohio App. LEXIS 1200 (Mar. 30, 1998) [horse stuck in mud]; *State v. Bauer*, 127 Wis.2d 401, 379 N.W.2d 895 (1985) [dead horse observed in a barn]; *People v. Thorton*, 286 Ill. App.3d 624, 676 N.E.2d 1024 (1996) [dog barking inside an apartment for two to three days and an owner who could not be contacted]. However, this Court has not spoken on the issue.

At trial, the State did not present any evidence of an exigent circumstance that would allow police to enter Ms. Hartman's home without a warrant. Ms. Hartman was receiving medical treatment in an ambulance and there is no indication that there was any other person in need of immediate aid. Even if this Court were to extend the community-caretaking/emergency-aid exception to the warrant requirement to animals, the search of Ms. Hartman's home was still unreasonable. There was no testimony indicating that the officers observed any dead animals. Nor was there any indication that the animals within the home were in immediate physical

danger due to their surroundings. Thus, it would not have been a heavy or difficult burden for officers to return shortly thereafter with a warrant.

The *Dunn* Court held "that the community-caretaking/emergency-aid exception to the Fourth Amendment warrant requirement allows police officers to stop a person to render aid if they reasonably believe that there is an immediate need for their assistance to protect life or prevent serious injury." *Dunn*, 131 Ohio St.3d at ¶ 22. In line with *Dunn*, this Court should hold that the community-caretaking/emergency-aid exception to the Fourth Amendment warrant requirement allows police officers to enter a residence to render aid if they reasonably believe that there is an immediate need for their assistance to protect human life or prevent serious injury to a human being.

**Proposition of Law No. III: The evidence in the record could not support a finding of guilt beyond a reasonable doubt as the trial court did not find whether the birds at issue were "companion animals" or "wild animals" per R.C. 959.131(A)(1) and R.C. 1531.01(X), depriving Appellant Hartman of her rights under Section 16, Article I of the Ohio Constitution and the Due Process Clause of the Fourteenth Amendment.**

Ms. Harman's conviction for cruelty against companion animals in case number 11 CRB 2943(A) dealt with 25 birds, one iguana, two ferrets, and six mice. However, the Court of Appeals ruled that if there was sufficient evidence whereby the trier of fact could find that at least one animal among the 25 birds, one iguana, two ferrets, and six mice was a companion animal, then Ms. Hartman's conviction of cruelty against companion animals would be affirmed. The Court of Appeals found that at least one of the birds was a companion animal as defined by the statute, and concluded that there was sufficient evidence whereby the trier of fact could find Ms. Hartman guilty of the charge.

Ms. Hartman was found guilty of violating R.C. 959.131(C)(1) which provides that "[n]o person who confines or who is the custodian or caretaker of a companion animal shall negligently \* \* \* [t]orture, torment, needlessly mutilate or maim, cruelly beat, poison, needlessly kill, or commit an act of cruelty against the companion animal[.]" However, the State failed to establish that any of the animals identified in this count were companion animals as that term has been defined. A conviction based upon less than proof beyond a reasonable doubt violates Section 16, Article I of the Ohio Constitution, and the Due Process Clause of the Fourteenth Amendment. *State v. Nucklos*, 121 Ohio St.3d 332, 2009-Ohio-792, 904 N.E.2d 512, ¶ 6, citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

A claim of insufficient evidence raises the question of whether the evidence presented by the State is legally adequate to support the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E. 541 (1997). To determine whether the evidence was sufficient to sustain a conviction, an appellate court reviews the evidence in the light most favorable to the prosecution. *State v. Jenks*, 61 Ohio St.3d 259, 274, 574 N.E. 492 (1991).

An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

*Jenks*, 61 Ohio St.3d at paragraph two of the syllabus, citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Under *Jackson v. Virginia*, 443 U.S. at 318-19, a court of appeals may not usurp the role of the finder of fact by considering how it would have resolved the conflicts, made the inferences or considered the evidence at trial. The critical inquiry for review on a sufficiency of the evidence challenge must be whether the evidence in the record could reasonably support a

finding of guilt beyond a reasonable doubt, and whether reasonable minds could not have reached the conclusion of the trier of fact. *Jenks*, 61 Ohio St.3d at 273.

Per R.C. 959.131: (A) As used in this section: (1) "Companion animal" means any animal that is kept inside a residential dwelling and any dog or cat regardless of where it is kept. R.C. 959.131(A)(1) further states, "'Companion animal' does not include livestock or any wild animal." Ms. Hartman does not dispute that the birds at issue were kept inside a residential dwelling. However, the State did not establish that the birds were not "wild animals." For purposes of defining "wild animal," R.C. 959.131(A)(5) states, "'Wild animal' has the same meaning as in section 1531.01 of the Revised Code." Per R.C. 1531.01(X), "'Wild animals' includes mollusks, crustaceans, aquatic insects, fish, reptiles, amphibians, wild birds, wild quadrupeds, and all other wild mammals, but does not include domestic deer."

R.C. 1531.01(X) does not require the reptile to be wild to be considered a "wild animal" as it is not preceded by the word "wild." Therefore, all reptiles are excluded from the definition of "companion animals" under R.C. 959.131(A)(1). Because "reptile" is not constrained by "wild" for the purposes of animal cruelty under R.C. 959.131(C)(1), a conviction for negligently committing an act of cruelty against a reptile is contrary to the plain and unambiguous language of the statute, and a reviewing court should apply the statute as written. In its decision, the Court of Appeals did not address the "iguanas" component of the trial court's finding that Ms. Hartman was guilty as to the "birds and iguanas." Rather, the Court of Appeals found that at least one of the birds was a companion animal and concluded that there was sufficient evidence to find her guilty of the charge referring to all of the animals.

As to the "birds," "wild birds" as defined by R.C. 1531.01(X) "includes game birds and nongame birds." R.C. 1531.01(Q). Per R.C. 1531.01(S), "'Game birds' includes mourning doves,

ringneck pheasants, bobwhite quail, ruffed grouse, sharp-tailed grouse, pinnated grouse, wild turkey, Hungarian partridge, Chukar partridge, woodcocks, black-breasted plover, golden plover, Wilson's snipe or jacksnipe, greater and lesser yellowlegs, rail, coots, gallinules, duck, geese, brant, and crows." "'Nongame birds' includes all other wild birds not included and defined as game birds or migratory game birds." R.C. 1531.01(T). "'Migratory game bird' includes waterfowl (Anatidae); doves (Columbidae); cranes (Gruidae); cormorants (Phalacrocoracidea); rails, coots, and gallinules (Rallidae); and woodcock and snipe (Scolopacidae)." R.C. 1531.01(AAA).

Statutory interpretation "involves an examination of the words used by the legislature in a statute, and when the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written." *State v. Kreischer*, 109 Ohio St.3d 391, 2006-Ohio-2706, 848 N.E.2d 496, ¶ 12.

When interpreting a statute, words must be taken in their usual, normal, or customary meaning, and courts may not restrict, constrict, qualify, narrow, enlarge, or abridge the clear meaning of a statute to suit the particular facts of a case. *See Indep. Ins. Officers of Ohio, Inc. v. Fabe*, 63 Ohio St.3d 310, 314, 587 N.E.2d 814 (1992); *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 97, 573 N.E.2d 77, 80-81 (1991); *Wachendorf v. Shaver*, 149 Ohio St. 231, 78 N.E.2d 370 (1948), syllabus.

There is no case law interpreting the terms "wild birds" or "domestic birds" for the purposes of a cruelty to a companion animal charge. Further, the State presented no evidence at trial that would lead any rational trier of fact to determine that the birds seized from Ms. Hartman were anything but "wild birds." Despite Officer Harland's testimony as to the types of birds he found and photographs of the birds, neither the common law nor the Revised Code provide

guidance as to whether these birds are "companion animals" or "wild animals" for purposes of a criminal prosecution.

The Court of Appeals resorted to a dictionary definition of "wild" and what it referred to as "common knowledge" to determine the offense was based on sufficient evidence. (*State v. Hartman*, 9th Dist. No. CA-26250, 2012-Ohio-4694, ¶ 24, Appx. at pp. 9.) This is a frail chain of reasoning on which to affirm a criminal conviction. For the foregoing reasons, the State failed to prove beyond a reasonable doubt that the "birds" for which Ms. Hartman was convicted were not included within the definition of "wild animals" and therefore excluded from the definition of "companion animal." Ms. Hartman's conviction in case number 11 CRB 2943(A) was based on insufficient evidence and violated her rights under Section 16, Article I of the Ohio Constitution, and the Due Process Clause of the Fourteenth Amendment. Thus, Ms. Hartman prays that this Court will reverse her conviction as to case number 11 CRB 2943(A) and order a new trial; and/or, in the alternative, enter a judgment of acquittal as to this case.

#### CONCLUSION

WHEREFORE, for the reasons discussed above, Appellant Hartman requests that this Court accept jurisdiction so that the substantial constitutional questions will be reviewed on the merits. Further, Appellant Hartman prays that this Court will reverse the trial court's order on the motion to suppress the evidence obtained from the warrantless search of her home; reverse her convictions as to case numbers 11 CRB 1141, 11CRB 2943, and 11 CRB 1159; and order a new trial; and/or, in the alternative, enter a judgment of acquittal as to case number 11 CRB 2943(A).

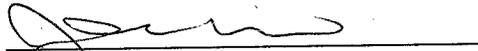
Respectfully submitted,



J. Dean Carro  
COUNSEL FOR APPELLANT,  
JUDY ANN HARTMAN

Certificate of Service

I hereby certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellee, J. Jeffery Holland, Special Prosecuting Attorney, 1343 Sharon-Copley Road, PO Box 345, Sharon Center, Ohio 44274, on this the 20<sup>th</sup> day of November, 2012.



J. Dean Carro  
COUNSEL FOR APPELLANT,  
JUDY ANN HARTMAN

COURT OF APPEALS  
SUMMIT COUNTY  
CLERK OF COURTS

STATE OF OHIO  
COUNTY OF SUMMIT

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IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 26250

Appellee

APPEAL FROM JUDGMENT  
ENTERED IN THE  
BARBERTON MUNICIPAL COURT  
COUNTY OF SUMMIT, OHIO

v.

JUDY ANN HARTMAN

CASE Nos. 11 CRB 01141  
11 CRB 01159  
11 CRB 02943 (A) & (B)  
11 CRB 02944

Appellant

DECISION AND JOURNAL ENTRY

Dated: October 10, 2012

BELFANCE, Judge.

{¶1} Defendant-Appellant Judy Ann Hartman appeals from the decisions of the Barberton Municipal Court. For the reasons set forth below, we affirm.

I.

{¶2} On May 11, 2011, Summit County humane officers Tim Harlan and Shannon O'Herron received a call requesting them to check on the welfare of two dogs being housed in a van located on a property on Jarvis Road. The caller was concerned because it was an excessively hot day. When they arrived, the officers found no one at the house. However, they heard multiple dogs barking inside and were overwhelmed by the stench of ammonia and animal waste coming from inside the residence.

{¶3} The van had an electrical cord running into it from the house, the front windows were down, and the side windows were open a few inches. Officers tried to reach the owner via

Appendix A

a number on the side of the van but were unable to reach anyone. The officers heard noises coming from inside the van and opted to open it. The van contained two dogs which were heavily panting. Officer Harlan estimated that the temperature of the van was approximately five to ten degrees warmer than the outside air, despite the small fan that was running inside the van. After the officers had already removed the animals from the property, Ms. Hartman returned the officers' phone calls. The officers notified Ms. Hartman that they would have to come back to the property to see the rest of the animals.

{¶4} Officers returned to the property the following day. At first, they thought that no one was home again. Officers then noticed a black truck at the back of the property. Officers found Ms. Hartman in the truck; Officer Harlan felt she was either in a very deep sleep or was deceased. After Officer Harlan tried unsuccessfully to awake her, he called EMS. When EMS arrived, EMS personnel were not going to transport Ms. Hartman because they did not think anything was wrong and thought she was in a deep sleep; however, after an apparent suicide note was discovered, EMS thought it best to take her to the hospital. Prior to placing Ms. Hartman on a stretcher, she woke up, was able to stand, and was able to have a conversation with sheriff deputies and Officer O'Herron while she was in back of the ambulance on the stretcher. Ms. Hartman advised Officer O'Herron that she could go into the house. Ms. Hartman indicated that the front door was unlocked and that there were keys in the vehicle in case officers needed to get into the tractor-trailer on the property which contained dog food. Ms. Hartman requested that officers go in and check on the animals. The sheriff deputy specifically asked Ms. Hartman if the officers could go in and she said yes.

{¶5} Officers went into the house and confronted what Officer Harlan described as the worst smell of ammonia and waste that he had ever smelled in his 17 years of working as a

humane officer. Officers discovered filthy cages containing various animals along with waste covered floors. In addition, officers discovered several animals running loose in the house. The smell from the house required officers to exit the residence at times to get fresh air. Officers encountered 40 dogs, 24 cats, 25 birds, an iguana, two ferrets, and six mice on the property.

{¶6} Multiple complaints were filed against Ms. Hartman in four separate case numbers. Some of the counts were subsequently amended. Case number 11 CRB 1141 was dismissed after Ms. Hartman agreed to surrender her animals to the Humane Society of Greater Akron. Case number 11 CRB 2943 contained two counts, count A alleged a violation of R.C. 959.131(C)(1) concerning 25 birds, one iguana, two ferrets, and six mice, while count B alleged a violation of R.C. 959.131(C)(1) with respect to 24 cats. Case number 11 CRB 2944 alleged a violation of R.C. 959.131(C)(1) with respect to the two dogs in the van. Case number 11 CRB 1159 alleged a violation of R.C. 959.131(C)(1) concerning 40 dogs.

{¶7} On December 7, 2011, Ms. Hartman filed a motion to suppress, asserting that the warrantless search was conducted without valid consent and that there were no exigent circumstances justifying the search of her home. Ultimately, the three remaining cases were tried together to the court. Evidence concerning the motion to suppress was heard at the same time.

{¶8} The trial court denied Ms. Hartman's motion to suppress and found her guilty of each of the four counts. Ms. Hartman's sentence was stayed pending appeal. This Court's record was supplemented with a judgment entry reflecting the disposition of all of the counts.

{¶9} Ms. Hartman now appeals, raising two assignments of error for our review.

## II.

## ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED IN DENYING APPELLANT HARTMAN'S MOTION TO SUP[P]RESS THE EVIDENCE OBTAINED FROM THE WARRANTLESS SEARCH OF HER HOME ABSENT HER VOLUNTARY CONSENT OR AN EXIGENT CIRCUMSTANCE IN VIOLATION OF HER RIGHT TO BE FREE FROM UNREASONABLE SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

{¶10} Ms. Hartman asserts in her first assignment of error that the trial court erred in denying her motion to suppress because she did not provide voluntary consent to search the home and there were no exigent circumstances. We conclude that the trial court did not err in concluding that Ms. Hartman had voluntarily consented to officers entering her home.

{¶11} The Supreme Court of Ohio has held that:

[a]ppellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses. Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.

(Internal citations omitted.) *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶ 8.

{¶12} “When police conduct a warrantless search, the state bears the burden of establishing the validity of the search. Searches and seizures without a warrant are per se unreasonable except in a few well-defined and carefully circumscribed instances.” (Citation omitted.) *State v. Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, ¶ 98. “It is equally well established, however, that a search of property without a warrant or probable cause but with proper consent having been voluntarily obtained does not violate the Fourth Amendment.” *Id.* “To rely on the consent exception of the warrant requirement, the state must show by clear and

positive evidence that the consent was freely and voluntarily given.” (Citations omitted.) *State v. Posey*, 40 Ohio St.3d 420, 427 (1988); *see also State v. Hetrick*, 9th Dist. No. 07CA009231, 2008-Ohio-1455, ¶ 23.

{¶13} “The question of whether consent to a search was voluntary or the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances.” *Roberts* at ¶ 99. “The standard for measuring the scope of consent under the Fourth Amendment is objective reasonableness, i.e., what a typical reasonable person would have understood by the exchange between the officer and the suspect.” *Id.*

{¶14} In the instant matter, the trial court concluded that Ms. Hartman knowingly and voluntarily consented to the humane officers entering her home and that the evidence discovered was in plain view. We note that Ms. Hartman does not challenge the scope of the search or the trial court’s analysis concluding that the evidence was in plain view upon entry into the home. *See Hetrick* at ¶ 23 (“Consent to enter premises does not also extend to consent to search the premises.”). Instead, Ms. Hartman argues that, under the circumstances, her consent allowing the officers to enter the home to care for her animals was not voluntary.

{¶15} Officer Harlan testified that, on the date officers returned to the property, they found Ms. Hartman unconscious in a truck. Officer Harlan indicated that he was not sure if she was in a very deep sleep or deceased. Thus, EMS was called. Upon arriving, Officer Harlan testified that EMS was not going to transport Ms. Hartman to the hospital because it believed she was just in a deep sleep. However, once a possible suicide note was discovered, EMS thought it best to transport her.

{¶16} Prior to transport, Ms. Hartman awoke and was able to stand. Once in the ambulance, she was able to have a conversation with Officer O’Herron. Officer O’Herron

testified that Ms. Hartman was speaking with her and a sheriff deputy and advised them that officers could go in the house and that Ms. Hartman wanted them to go in and check on the animals. Ms. Hartman further advised officers that the front door was unlocked and explained where a key to the tractor trailer containing dog food was located. Officer O'Herron asserted that Ms. Hartman appeared competent, was fully conscious once she was inside the ambulance, and was inside the ambulance for approximately 20-25 minutes before it left. And while Ms. Hartman was provided with an oxygen mask while in the ambulance, she kept taking it on and off to talk with officers.

{¶17} The trial court's finding that Ms. Hartman's consent for officers to enter the home was voluntary is supported by competent, credible evidence. *See Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶ 8; *Roberts*, 110 Ohio St.3d 71, 2006-Ohio-3665, at ¶ 99. At the time Ms. Hartman gave consent, there was evidence that Ms. Hartman was fully conscious and appeared competent. Moreover, Ms. Hartman was aware of the fact that she had animals in the house that needed care and had the mental clarity to inform officers of where the key to the trailer was located so that they might feed the animals. Thus, in light of the argument made on appeal, we cannot conclude the trial court erred in denying Ms. Hartman's motion to suppress. We overrule Ms. Hartman's first assignment of error.

#### ASSIGNMENT OF ERROR II

AS TO COUNT TWO (11 CRB 02943(A)), THE TRIAL COURT ERRED IN CONVICTING APPELLANT HARTMAN OF NEGLIGENTLY COMMITTING AN ACT OF CRUELTY AGAINST A COMPANION ANIMAL AS THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT HARTMAN COMMITTED THE ACT AGAINST A COMPANION ANIMAL PER R.C. 959.131(A)(1) AND R.C. 1531.01(X), DEPRIVING APPELLANT HARTMAN OF HER RIGHTS UNDER SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

{¶18} Ms. Hartman asserts in her second assignment of error that her conviction for cruelty against companion animals in case number 11 CRB 2943(A) with respect to the 25 birds, one iguana, two ferrets, and six mice is based upon insufficient evidence because the State failed to prove beyond a reasonable doubt that any of the animals were companion animals. The count of the complaint at issue alleges that Ms. Hartman committed an act of cruelty against one or more of the listed animals. Thus, if this Court concludes that there was sufficient evidence that one of the animals was a companion animal then Ms. Hartman's conviction must be affirmed. Ms. Hartman does not assert that the other elements of the crime were not established beyond a reasonable doubt. Because we conclude that at least one of the birds was a companion animal as defined by the statute, we conclude that there was sufficient evidence whereby the trier of fact could find Ms. Hartman guilty of the charge.

{¶19} In determining whether the evidence presented was sufficient to sustain a conviction, this Court reviews the evidence in a light most favorable to the prosecution. *State v. Jenks*, 61 Ohio St.3d 259, 274 (1991). Furthermore:

[a]n appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

*Id.* at paragraph two of the syllabus.

{¶20} Ms. Hartman was found guilty of violating R.C. 959.131(C)(1). That section provides that "[n]o person who confines or who is the custodian or caretaker of a companion animal shall negligently \* \* \* [t]orture, torment, needlessly mutilate or maim, cruelly beat, poison, needlessly kill, or commit an act of cruelty against the companion animal[.]" R.C.

959.131(C)(1). On appeal, Ms. Hartman asserts that the State failed to establish that any of the animals identified in this count of the complaint were companion animals as that term has been defined.

{¶21} “‘Companion animal’ means any animal that is kept inside a residential dwelling and any dog or cat regardless of where it is kept. ‘Companion animal’ does not include livestock or any wild animal.” R.C. 959.131(A)(1). Here, Ms. Hartman does not dispute that there was evidence that the birds at issue were kept inside a residential dwelling. Instead, she asserts that the State did not establish that the birds were not wild animals.

{¶22} “‘Wild animal’ has the same meaning as in section 1531.01 of the Revised Code.” R.C. 959.131(A)(5). R.C. 1531.01(X) provides that “[w]ild animals’ includes mollusks, crustaceans, aquatic insects, fish, reptiles, amphibians, wild birds, wild quadrupeds, and all other wild mammals, but does not include domestic deer.” “‘Wild birds’ includes game birds and nongame birds.” R.C. 1531.01(Q). Game birds are further defined as including

mourning doves, ringneck pheasants, bobwhite quail, ruffed grouse, sharp-tailed grouse, pinnated grouse, wild turkey, Hungarian partridge, Chukar partridge, woodcocks, black-breasted plover, golden plover, Wilson’s snipe or jacksnipe, greater and lesser yellowlegs, rail, coots, gallinules, duck, geese, brant, and crows.

R.C. 1531.01(S). Whereas nongame birds are defined as including “all other wild birds not included and defined as game birds or migratory game birds.” R.C. 1531.01(T). Migratory game birds are defined as including “waterfowl (Anatidae); doves (Columbidae); cranes (Gruidae); cormorants (Phalacrocoracidea); rails, coots, and gallinules (Rallidae); and woodcock and snipe (Scolopacidae).” R.C. 1531.01(AAA).

{¶23} While not all of the birds listed in the complaint were discussed, some of them were. Officer Harlan discussed many of the animals he found upon entering the residence. Specifically he testified that the birds found in the house in the cages included cockatiels,

macaws, parrots, parakeets, and cockatoos. In addition, Officer Harlan testified concerning several exhibits which included pictures of the birds in cages. The exhibits were admitted, and, thus, the trial court was able to observe the birds that were discussed and the conditions in which they were living.

{¶24} In light of the characterization of the birds as parrots, parakeets, macaws, cockatiels, and cockatoos, it is clear that the birds are not contemplated as being “game birds” or “migratory game birds” in light of the definition of those terms. See R.C. 1531.01(S),(AAA). Thus, the question remains whether the birds are nongame birds and, thus, wild birds. See R.C. 1531.01(Q), (T). As noted above, nongame birds are defined as including “all other wild birds not included and defined as game birds or migratory game birds.” R.C. 1531.01(T). Given that the phrase, “all other wild birds[,] or “wild” itself, is not otherwise defined, we look to the common meaning of the word “wild.” See *State v. Willan*, 9th Dist. No. 24894, 2011-Ohio-6603, ¶ 23, citing R.C. 1.42. Wild means “living in a state of nature and not ordinarily tame or domesticated[.]” *Merriam-Webster’s Collegiate Dictionary* 1432 (11th Ed.2005). The evidence presented supports the reasonable inference that the birds at issue were domesticated and, thus, not wild. The birds listed by Officer Harlan are birds that would be familiar to the average person. It is within the common knowledge of the average person that birds such as parrots and parakeets are often kept in cages as pets. See *Newman v. Cleveland Museum of Natural History*, 143 Ohio St. 369, 378 (1944) (observing that fact that an elephant is a wild animal is a matter of common knowledge). Further, there was evidence that these particular birds discussed by Officer Harlan were kept inside a residence in cages alongside other companion animals, such as dogs and cats. See R.C. 959.131(A)(1). The trier of fact was able to view photographs of the birds and cages and the surroundings. Viewing the totality of the evidence in a light most

favorable to the State, we conclude there was evidence whereby a trier of fact could conclude beyond a reasonable doubt that at least one of the birds discussed by Officer Harlan was a companion animal as that term is defined by R.C. 959.131(A)(1). Accordingly, based on Ms. Hartman's limited argument on appeal, the conviction she challenges is not based upon insufficient evidence. Ms. Hartman's second assignment of error is overruled.

## III.

{¶25} In light of the foregoing, we affirm the judgment of the Barberton Municipal Court.

Judgment affirmed.

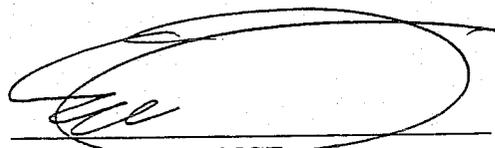
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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Barberton Municipal Court, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.



EVE V. BELFANCE  
FOR THE COURT

A-10

CARR, P. J.  
DICKINSON, J.  
CONCUR.

APPEARANCES:

J. DEAN CARRO, Appellate Review Office, School of Law, The University of Akron, for Appellant.

J. JEFFERY HOLLAND, Special Prosecuting Attorney, for Appellee.