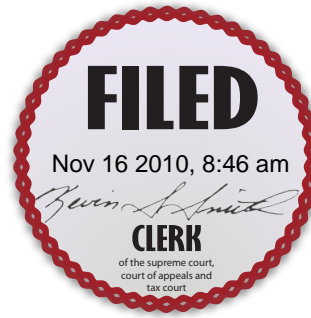


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JANE MARIE BURKART,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 46A03-0908-CR-385

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable William J. Boklund, Judge
Cause No. 46D04-0703-CM-679

NOVEMBER 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Jane Marie Burkart appeals her convictions of and sentence for five instances of abandonment or neglect of vertebrate animals, Class B misdemeanors.¹ We affirm.

ISSUES

Burkart raises three issues for our review, which we restate as:

- I. Whether the trial court abused its discretion in admitting evidence garnered after a warrantless search.
- II. Whether the trial court abused its discretion in admitting evidence when the State failed to follow the statutory procedure regarding confiscation of animals.
- III. Whether the sentence imposed by the trial court is inappropriate.

FACTS AND PROCEDURAL HISTORY

On March 7, 2007, Burkart's neighbor called the LaPorte Animal Control Center ("LACC") because he had not seen Burkart's horses for many months and because he did not see the usual pile of manure outside of the barn. Based on the nature of the complaint, Jane Bernard, an LACC employee who investigated complaints, requested that a police officer meet her at Burkart's farm.

LaPorte County Deputy Sheriff Keith Waltz met Bernard at the farm. Deputy Waltz knocked on the door of the house, but no one answered. He then saw footsteps in the snow leading to the barn, but did not see any footsteps coming back to the house. Surmising that someone was in the barn, Deputy Waltz and Bernard walked to the barn

¹ The offense of abandonment or neglect of vertebrate animals is codified at Indiana Code section 35-46-3-7. (1987).

and noticed that the door was not completely closed. Deputy Waltz knocked on the door, announced that he was from the Sheriff's Department, and took a few steps into the barn. As Deputy Waltz and Bernard entered the barn, they encountered an overwhelming smell of manure and horse urine. The smell was so strong that Deputy Waltz began to gag, and Bernard's eyes began to burn.

Burkart's daughter, who was inside the barn, approached Deputy Waltz and Bernard, and Deputy Waltz explained the reason for their presence. Burkart's daughter then called Burkart. During this time, Deputy Waltz and Bernard had been standing in animal waste that was three to five inches deep. Bernard saw five horses covered in manure, and both saw that manure was splattered all over the walls in the horse stalls and that the horses were standing in manure and urine that was eight to twelve inches deep. Bernard directed Deputy Waltz to step outside, and she informed him that a veterinarian was needed immediately.

Dr. Lyndsay Cross, a large animal veterinarian, arrived at Burkart's barn and attempted to approach the horses.² However, she could not do so because of the depth of the urine-soaked manure. The horses were eventually removed from the stalls for examination, and Dr. Cross determined that the horses needed to be immediately from the farm because of their condition. The horses did not have a clean place to lie down and the water buckets contained a large amount of fecal material.

² Dr. Cross was married before trial, and she changed her surname to "Klemens." However, she is called by the surname of "Cross" in the transcript.

The following day, a warrant was issued, and the horses were transported to a clean environment. Four of the five horses were moved to foster care after three weeks. One horse, however, had to be euthanized because it was suffering. The horse, which could no longer stand, had an infection in the area of its penis. A necropsy was performed on the horse, and the veterinarian found that the most difficult part of the procedure was to cut through the layer of manure compressed against the horse's skin. The veterinarian discovered that the horse did not have thick abdominal muscles compared to healthy horses, a condition caused by malnutrition.

Burkart was charged with and convicted by a jury of five counts of abandonment or neglect of the horses under Indiana Code section 35-46-3-7 (1987). The trial court subsequently imposed a sentence of six months' incarceration on each conviction, with the sentences to be served consecutively. The trial court suspended each sentence to probation. The trial court also ordered Burkart to pay restitution to those who cared for the horses after their removal. Burkart now appeals.

DISCUSSION AND DECISION

I. ADMISSION OF EVIDENCE: ENTRY

Burkart contends that the warrantless entry into the barn by Deputy Waltz and Bernard was in violation of the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Indiana Constitution. Thus, Burkart concludes that the admission of evidence garnered from entry into the barn was inadmissible, and the trial court abused its discretion in admitting the evidence.

Burkart claims, and the trial court's Chronological Case Summary substantiates, that she filed a pre-trial motion to suppress. However, the case proceeded to trial after denial of the motion; thus, the sole claim now is whether the trial court abused its discretion in admitting the evidence garnered from the warrantless entry and search of the barn. *See Baxter v. State*, 891 N.E.2d 110, 117 (Ind. Ct. App. 2008). Burkart failed to object to the evidence at the time it was offered, thus failing to preserve any error. *See Lundquist v. State*, 834 N.E.2d 1061, 1067 (Ind. Ct. App. 2005) (citing *Jenkins v. State*, 627 N.E.2d 789, 797 (Ind. 1993)). Because there is no claim of fundamental error, Burkart has therefore waived the issue on appeal.

II. ADMISSION OF EVIDENCE: STATUTE

Burkart contends that the trial court abused its discretion in admitting evidence regarding the condition of the animals because the State failed to follow Indiana Code section 35-46-3-6 (2002). Burkart also appears to contend that the assessment of a restitution order was improper because of the failure to follow the statute. Indiana Code section 35-46-3-6(e) states that when charges are filed under the animal abuse statutes, "the court shall appoint the state veterinarian under IC 15-17-4-1 or the state veterinarian's designee to: (1) investigate the condition of the animal and the circumstances relating to the animal's condition; and (2) make a recommendation to the court under subsection (f) regarding the confiscation of the animal." Subsection (f)(1) provides that the state veterinarian or the state veterinarian's designee appointed under subsection (e) shall "[m]ake a recommendation to the court concerning whether confiscation is necessary to protect the safety and well-being of the animal." The

subsection also states that if confiscation is recommended, the state veterinarian or the state veterinarian's designee shall "recommend a manner for handling the confiscation and disposition of the animal that is in the best interests of the animal." The subsection further states that the aforementioned recommendation "shall articulate to the court the reasons supporting the recommendation."

Here, Burkart bases her contention on the denial of her motion to suppress. As we explained in our discussion of Issue I, because Burkart's case went to trial after denial of the motion to suppress, the sole claim is now whether the trial court abused its discretion in admitting evidence over Burkart's objection. Burkart makes no claim that she objected at trial to any evidence on the basis that it was inadmissible due to violations of Indiana Code section 35-46-3-6 (2002). This failure to raise the issue at trial results in waiver of the issue on appeal. *See Heaphy v. Ogle*, 896 N.E.2d 551, 555-56 (Ind. Ct. App. 2008) (holding that a party "may not present an argument or issue to an appellate court unless the party raised that argument or issue to the trial court").

III. SENTENCING

Burkart contends that her sentence of six months on each conviction is inappropriate. She emphasizes that six months is the maximum sentence for a Class B misdemeanor, and she argues that the sentence should be reserved for the worst offender and the worst offense.³

³ Indiana Code section 35-50-3-3 (1977) provides that a person who commits a Class B misdemeanor "shall be imprisoned for a fixed term of not more than one hundred eighty (180) days. . . ."

The revision of a sentence is authorized by Indiana Appellate Rule 7(B), which provides that we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” In determining the appropriateness of a sentence, a court of review may consider any factors appearing in the record. *Schumann v. State*, 900 N.E.2d 495, 497 (Ind. Ct. App. 2009). A defendant bears the burden of persuading us that his sentence is inappropriate. *Id.* at 1131.

In considering the “worst offense and worst offender” contention, we should “concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant’s character.” *Brown v. State*, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), *trans. denied*. Here, Burkart’s neglect resulted in the death of one horse and, absent intervention by the State, may have resulted in the death of the other horses. Without a doubt, Burkart’s neglect caused great pain to the horses, which was alleviated only because the horses were taken from Burkart. As indicated by the amount of urine and manure on the barn floor and the walls, the neglect of the horses was not momentary, but took place over a significant amount of time. Given the nature of the offenses and what it tells us about the nature of the offender, we cannot say that the sentence imposed by the trial court, which included the bestowal of probation rather than incarceration, was inappropriate. *See Davidson v. State*, 926 N.E.2d 1023, 1025 (Ind. 2010) (in inappropriateness review under

Appellate Rule 7, appellate courts may consider all aspects of penal consequences imposed by trial judge, including whether a portion of the sentence is suspended).

Affirmed.

DARDEN, J., and NAJAM, J., concur.