

FILED: February 08, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Appellant,

v.

ROBERT GRUNTZ,
Defendant-Respondent.

Crook County Circuit Court
09FE0073

A145351

George W. Neilson, Judge.

Argued and submitted on January 05, 2012.

Paul L. Smith, Attorney-in-Charge, Collateral Appeals, argued the cause for appellant. On the briefs were John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Linda Wicks, Assistant Attorney General.

Steven D. Bryant argued the cause for respondent. With him on the brief was Bryant, Emerson & Fitch, LLP.

Before Haselton, Presiding Judge, and Armstrong, Judge, and Duncan, Judge.

HASELTON, P. J.

Reversed and remanded.

1 HASELTON, P. J.

2 The state appeals, under ORS 138.060(1)(c), from an order suppressing
3 evidence of animal neglect, ORS 167.325; ORS 167.330, discovered as a result of two
4 searches pursuant to search warrants.¹ The trial court, after excising certain material
5 from the affidavit in support of the warrant application for the first search (a ruling not
6 challenged on appeal), determined that the remaining content was insufficient to establish
7 probable cause that evidence of animal neglect would be found at defendant's ranch.
8 Consistently with the standard of review prescribed in *State v. Castilleja*, 345 Or 255,
9 264-66, 192 P3d 1283, *adh'd to on recons*, 345 Or 473, 198 P3d 937 (2008), we conclude
10 that the magistrate could properly have concluded that the supporting affidavit, as
11 excised, established probable cause that a search of defendant's property would yield
12 evidence that defendant had failed to provide "[m]inimum care" for horses on his ranch
13 by failing to provide "[f]ood of sufficient quantity and quality to allow for normal growth
14 or maintenance of body weight." *Former* ORS 167.310(6)(a) (2007), *renumbered as*
15 ORS 167.310(7)(a) (2009).² Accordingly, we reverse and remand.

16 Before recounting the particular facts in this case pertaining to probable
17 cause, it is useful--indeed, essential--to put what follows into legal perspective. Two

¹ As described below, *see* ___ Or App at ___ (slip op at 6), the second search was entirely derivative of the first. Thus, the propriety of suppression with respect to both searches depended on the lawfulness of the first search.

² After the search warrants in this case issued, this section of the statute was renumbered, without textual change, as ORS 167.310(7). Or Laws 2009, ch 233, § 2.

1 overarching considerations circumscribe and inform our review. The first is procedural--
2 the operative standard of review. In [State v. Duarte/Knull-Dunagan](#), 237 Or App 13, 21-
3 22, 238 P3d 411, *rev den*, 349 Or 370 (2010), we summarized the applicable principles:

4 "[W]hen a defendant seeks to suppress evidence from a search authorized
5 by warrant, contending that the information in the predicate warrant did not
6 establish probable cause, the court's function is limited to determining
7 whether, given the uncontroverted facts in the affidavit and reasonably
8 derived inferences, the issuing magistrate reasonably 'could have concluded
9 that the affidavit (excluding the excised parts) established probable cause to
10 search * * *.' [*Castilleja*, 345 Or] at 265. That is so regardless of whether
11 the reviewing court--whether a trial court, this court, or the Supreme Court--
12 might have drawn different inferences yielding a different determination.

13 "Further, in exercising that discrete review function, the court is to
14 view the predicate affidavit in a 'commonsense, nontechnical and realistic
15 fashion,' with 'doubtful cases * * * to be resolved by deferring to an issuing
16 magistrate's determination of probable cause.' [State v. Wilson](#), 178 Or App
17 163, 167, 35 P3d 1111 (2001) (internal quotation marks omitted). That
18 deferential standard comports with 'the preference for warranted searches
19 over those conducted without prior judicial authorization.' *Id.*"

20 The second transcendent consideration is substantive--the gravamen of the
21 purported crimes. An abstract extended discussion of the content of a search warrant
22 application without reference to what must be established--*i.e.*, probable cause of *what?*--
23 is an empty exercise. Here, in issuing the warrant for the predicate first search, the
24 magistrate determined that there was probable cause with respect to first-degree and
25 second-degree animal neglect, both of which require a showing that the person has
26 "fail[ed] to provide *minimum care* for an animal" in the person's custody or control. ORS
27 167.325(1) (emphasis added); ORS 167.330(1) (emphasis added).³ Former ORS

³ ORS 167.325(1) provides:

1 167.310(6), in turn, defines "[m]inimum care," as pertinent here, as follows:

2 "Minimum care' means care sufficient to preserve the health and
3 well-being of an animal and, except for emergencies or circumstances
4 beyond the reasonable control of the owner, includes, but is not limited to,
5 the following requirements:

6 "(a) Food of sufficient quantity and quality to allow for normal
7 growth or maintenance of body weight."

8 Thus, our inquiry here reduces to whether the issuing magistrate could
9 reasonably have concluded that the uncontroverted and unexcised facts in the predicate
10 affidavit, along with inferences reasonably derived from those facts, established probable
11 cause that a search of defendant's ranch would yield evidence that defendant had failed to
12 provide horses in his custody or control with "[f]ood of sufficient quantity and quality to
13 allow for normal growth or maintenance of body weight." *Former* ORS 167.310(6)(a).
14 We turn to the content of that affidavit.

15 On March 28, 2009, Crook County Deputy Sheriff Plinski executed an
16 affidavit in support of an application to search defendant's ranch for evidence of animal

"A person commits the crime of animal neglect in the second degree if, except as otherwise authorized by law, the person intentionally, knowingly, recklessly or with criminal negligence fails to provide minimum care for an animal in such person's custody or control."

ORS 167.330(1) provides:

"A person commits the crime of animal neglect in the first degree if, except as otherwise authorized by law, the person intentionally, knowingly, recklessly or with criminal negligence fails to provide minimum care for an animal in the person's custody or control and the failure to provide care results in serious physical injury or death to the animal."

1 neglect. As pertinent here,⁴ Plinski, in addition to recounting her training and experience
2 with respect to animal-related crimes, including animal neglect and animal abuse,
3 described her "personal experience and knowledge" of horses that "comes from being
4 raised around horses all my life" and "currently own[ing] 3 horses that I care for on a
5 daily basis." By way of pertinent experience, Plinski further averred:

6 "From 2002 to 2007[,] I managed a ranch consisting of about 20 head of
7 horses in Deschutes County[,] keeping records of all of the care for each.
8 The horses were on breeding programs along with a routine feeding * * *
9 and supplement program. Based on my training and experience I know that
10 each horse has to stay on a routine program to maintain weight and good
11 health.

12 "Based on my history of owning horses I know horses need to be fed and
13 watered on a daily basis * * *. Horses need approximately 20 pounds of
14 feed per day and an unlimited water source."

15 Plinski's March 28 affidavit described her observations and information
16 obtained with respect to the condition of horses on defendant's property. On December
17 19, 2008, Plinski visited defendant's ranch along with Crook County Sergeant Chapman.⁵
18 At that time, Plinski "observed about 15 horses that appeared to be malnourished and
19 severely under weight." One of the ranch hands told Plinski that he "did not approve" of

⁴ The description that follows does not, except collaterally, refer to the content of Plinski's affidavit that the trial court excised. Further, because we conclude that the nonexcised portions of the affidavit establish probable cause with respect to defendant's alleged failure to adequately feed his horses, we limit our description to the portions of Plinski's affidavit pertaining to that type of animal neglect and do not--except, again collaterally--refer to those portions of the affidavit pertaining to defendant's purported failure to provide adequate veterinary care to one or more horses.

⁵ A copy of Chapman's contemporaneous report, describing both the December 19 visit and his visit three days later, on December 22, was attached and incorporated as an exhibit to Plinski's March 28 affidavit.

1 the feeding methods being employed and that he "felt the horses needed to be fed more."

2 On December 22, Chapman, along with a veterinarian, Sharpnack, returned
3 to the ranch to speak with defendant. Defendant "did not feel as though the horses were
4 in bad condition" in that they were "race horses and didn't need to be fed much."
5 However, defendant also stated that "he was working on getting more hay to feed on a
6 more regular basis." The veterinarian, Sharpnack, was of the opinion, following the
7 December 22 visit, that, "for the most part[,] the horses' condition did not evince
8 "neglect"--"but that the care needed to be stepped up to the next notch so that the
9 condition of the horses did not fall below the level that they were[,] and actually in most
10 of the horses they needed to improve somewhat."

11 Between the December 22 visit and late March 2009, the Crook County
12 Sheriff's Office received "approximately eight citizen complaints of the horses not being
13 fed on a regular basis."⁶ Plinski's March 28 affidavit did not specify the date of those
14 complaints or the identity of the complainant or complainants.

15 On March 26, 2009, Plinski met with an informant, who wished to remain
16 anonymous, about the informant's concerns, based on personal observation, that a horse
17 at defendant's ranch required immediate veterinary care. Plinski's description of the
18 interview with the informant does not include any reference to the informant having
19 observed horses that were inadequately fed.

⁶ At some unspecified point in that interval, a feed supply store also contacted the Sheriff's Office "about filing an NSF check case" based on delivery of hay to defendant's ranch.

1 On March 27, in response to the informant's complaint, Plinski and two
2 other officers spoke with the ranch manager at his home, which is not located on the
3 ranch. The manager told Plinski that "he knew the horses had not been fed to standards
4 lately," but "he was working on it." The manager further stated that "he has not been able
5 to purchase hay regularly because the owners have not been transferring funds to be able
6 to do so."⁷ The manager told Plinski that, "if the owners did not transfer money today[,]
7 he was coming to see us [law enforcement]."

8 The manager subsequently, and without defendant's consent, took the
9 officers to the ranch, where they observed evidence of animal neglect. Plinski then
10 submitted a warrant application, supported by her affidavit, describing her March 27
11 observations at the ranch--material that the trial court ultimately excised in determining
12 the motion to suppress--as well as the other matters recounted above. The magistrate
13 issued the warrant, and officers seized, *inter alia*, several horses. However, in executing
14 the warrant, the officers inadvertently failed to seize one additional horse that required
15 medical treatment; accordingly, on March 31, Plinski submitted an application for a
16 second warrant authorizing the search of that horse. The magistrate issued that warrant
17 on March 31, and it was executed on April 2.

18 Defendant was charged by indictment with multiple counts of first-degree
19 and second-degree animal neglect. ORS 167.330; ORS 167.325. Defendant moved to

⁷ In that connection, the manager mentioned that "none of the [ranch] employees [had] been paid lately."

1 suppress the evidence seized during the execution of the two search warrants.⁸ Defendant
2 argued, in part, that the material in Plinski's affidavit derived from the March 27
3 warrantless entry of the ranch must be excised, that the material pertaining to the two
4 lawful December entries was impermissibly "stale," that the information provided by the
5 "anonymous" informant was not reliable, and that, in all events, the material in Plinski's
6 affidavit failed to establish probable cause.

7 The trial court excised the material derived from the March 27 entry and,
8 after rejecting defendant's contentions concerning staleness and assuming, without
9 deciding, the informant's reliability, concluded that the unexcised material failed to
10 establish probable cause. Specifically, with respect to animal neglect based on
11 inadequate feeding, the trial court reasoned that the affidavit failed to establish probable
12 cause because,

13 "[w]hile [the] December investigation does establish some greater attention
14 to care and feeding is necessary, based upon the professional opinion of Dr.
15 Sharpnack a case for animal neglect was not present; * * * [the manager]
16 expressed a concern that feeding patterns were weak, but failed to describe
17 what, if any, impact was exhibited by the herd of horses on the Powell
18 Butte Ranch. That lack of information is particularly significant
19 considering the unnamed informant failed to report any concern regarding
20 other horses (nearly 80 in number) on the premises."

21 The trial court, consequently, granted the motion to suppress evidence seized pursuant to
22 the March 28 search and the derivative April 2 search.

⁸ Defendant also filed a motion to controvert material in Plinski's March 28 affidavit. The trial court denied that motion, and, on appeal, defendant does not contest that ruling.

1 On appeal, the state contends that the trial court's analysis and disposition
2 cannot be reconciled with the standard of review prescribed in *Castilleja* and amplified in
3 *Duarte/Null-Dunagan*. Specifically, the state asserts that "[t]he trial court here
4 erroneously made its own findings and drew its own inferences * * * rather than
5 examining the facts and inferences supporting probable cause to determine whether they
6 were sufficient such that the issuing magistrate *could* find probable cause." (Emphasis in
7 original.)

8 We agree. Here, the unexcised portions of Plinski's affidavit establish, at
9 least, the following facts: (1) Plinski, who had extensive experience in managing and
10 caring for horses, stated that horses need "to stay on a routine program to maintain weight
11 and good health" and that they "need to be fed and watered on a daily basis," requiring
12 "approximately 20 pounds of feed per day." (2) In late December 2008, Plinski observed
13 at defendant's ranch "about 15 horses that appeared to be malnourished and severely
14 under weight." (3) At the same time, a ranch hand told Plinski that he believed that "the
15 horses needed to be fed more." (4) At the same time, defendant stated that he was
16 "working on getting more hay to feed on a more regular basis." (5) Between late
17 December 2008 and late March 2009, the Crook County Sheriff's Office received
18 "approximately eight citizen complaints of [defendant's] horses not being fed on a regular
19 basis." (6) On March 27, the ranch manager told Plinski that the horses had "not been fed
20 to standards lately"--and that that was so because he had "not been able to purchase hay
21 regularly because the owners [had] not been transferring funds to be able to do so." (7)

1 Although the manager said that he had "been trying to get the horses fed on a regular
2 basis," he was also "coming to see" the Sheriff's Office if "the owners [including
3 defendant] did not transfer money [for the purchase of feed] today."⁹

4 From the foregoing, an issuing magistrate *could* reasonably have found and
5 inferred that, even as of late December, at least some of defendant's horses were not
6 being fed "[f]ood of sufficient quantity and quality to allow for normal growth *or*
7 *maintenance of body weight.*" Former ORS 167.310(6)(a) (emphasis added). To be sure,
8 the veterinarian, Sharpnack, *may* have had a different view--but, given Plinski's extensive
9 experience in caring for horses and the qualified character of Sharpnack's evaluation
10 (*e.g.*, "for the most part * * * was not that it was neglect"), the issuing magistrate was not
11 required to give Sharpnack's assessment conclusive or preclusive effect.

12 Further, an issuing magistrate *could* reasonably also have found, by way of
13 reasonable inference, that the neglect that existed in late December 2008 continued to
14 exist as of March 28, 2009. Even putting aside the multiple, but amorphous, citizen
15 complaints about lack of regular feeding in that interim, the ranch manager's statements
16 to Plinski on March 27 regarding his inability to purchase feed regularly for the horses
17 because of defendant's failure to provide the necessary funds supports a reasonable, albeit
18 not ineluctable, inference that the conditions existing in December had not been remedied
19 by March. In that regard, an issuing magistrate could reasonably have viewed the ranch

⁹ None of that information was obtained from the informant whose reliability, as noted, the trial court assumed but did not determine.

1 manager's statements about intending to contact law enforcement "today"--that is,
2 "blowing the whistle" on his employer--as confirmation that the conditions extant in
3 December had not only continued but had become so extreme as to elicit an extraordinary
4 response.

5 We emphasize that we do not suggest that a reasonable magistrate could not
6 have drawn different inferences, for the reasons identified by the trial court in granting
7 suppression, and, for those reasons, have declined to issue a warrant. For example, a
8 magistrate could reasonably have drawn a negative inference from the content of Plinski's
9 interview of the informant on March 27--*viz.*, that, if the informant had seen evidence of
10 inadequately fed horses when she visited the ranch, she would have so informed Plinski,
11 but she did not. Or a magistrate could reasonably have construed the ranch manager's
12 comments about funding for feed as expressing only frustration about a nonculpable
13 circumstance or merely apprehension about a prospective, not yet realized, condition.

14 But all of that is immaterial to our review (or the trial court's review) under
15 *Castilleja*. As we explained in *Duarte/Knull-Dunagan*, the question is not whether we or
16 the trial court could, or would, have construed the predicate affidavit differently, drawing
17 different inferences; rather, the question is whether the issuing magistrate could
18 reasonably have construed the affidavit, including reasonably derivative inferences, in
19 such a way as to substantiate probable cause. *Duarte/Knull-Dunagan*, 237 Or App at 21.
20 We appreciate the trial court's thoughtful consideration of the motion to suppress but
21 respectfully reiterate one observation from *Duarte/Knull-Dunagan*:

1 "The [trial] court's deconstruction of the content of the affidavit, albeit
2 nuanced and cogent, and its consequent assessment of the relative strength
3 of competing inferences that could be drawn from the uncontroverted facts
4 set out in the affidavit partake of the function of an issuing magistrate and
5 not of the rigorously circumscribed role of a reviewing court."

6 237 Or App at 22.

7 Consistently with the standard of review prescribed in *Castilleja*, we
8 conclude that the magistrate could properly have concluded that the unexcised portions of
9 Plinski's March 28 affidavit established probable cause to search defendant's ranch for
10 evidence of animal neglect and, particularly, of failure to provide "[m]inimum care" as
11 defined in *former* ORS 167.310(6)(a). Accordingly, the trial court erred in suppressing
12 evidence seized pursuant to the March 28, 2009, search and the derivative April 2, 2009,
13 search.

14 Reversed and remanded.