IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,

Appellant,

vs.

SCOTT WILLIAM BRENDLE, ANTHONY JOHN MERLINO, AND DARIEN THOMAS BROCK,

Respondents.

No. 36004

FILED

APR 05 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from an order of the district court granting respondents' pretrial petitions for writs of habeas corpus.

The State charged respondents Scott William Brendle, Anthony John Merlino and Darien Thomas Brock by criminal complaint with various offenses related to the shooting of approximately twenty-eight estray horses in Lagomarsino Canyon. Of particular relevance to this appeal, the second amended complaint alleged that respondents each committed one felony violation of NRS 206.150 by maiming or killing twenty-three of the horses, and one gross misdemeanor violation of NRS 206.150 by maiming or killing five of the horses. Following a preliminary hearing, the justice court found probable cause to believe that respondents were responsible for the deaths of twenty-seven of the horses and bound each respondent over for trial in the district court on the single felony and gross misdemeanor counts. The felony count referred to

twenty-two of the horses;[1] the gross misdemeanor count referred to five of the horses.

Respondents filed pretrial petitions for writs of habeas corpus in the district court, seeking dismissal of both charges. Respondents also filed motions to dismiss on the grounds that the information did not allege sufficient, specific facts to put respondents on notice as to what each of them did to aid, abet, counsel and encourage the others.

Following a hearing, the district court determined with respect to the habeas petitions that (1) the State could not aggregate the value of multiple animals in a single count charging a felony violation of NRS 206.150, (2) the State failed to establish probable cause to believe respondents shot or aided and abetted each other in shooting twenty-six of the horses, and (3) the State established probable cause to believe respondents shot or aided and abetted each other in shooting one of the horses, identified as horse 12.[2] On March 23, 2000, the district court entered a written order setting forth these determinations and granting the habeas petitions "as to all charges, save and except for the singular gross misdemeanor crime that charges the individuals as being principals, and/or aiding and abetting in the killing of [h]orse #12."

In a separate order filed on the same day, the district court granted, in part, respondents' motions to

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[1]At the conclusion of the preliminary hearing, the State conceded that it had failed to establish probable cause with respect to one of the horses (horse 31) alleged in the felony count. The justice court agreed and ordered the State to amend the felony count to exclude that horse.

[2]The horses are identified by the numbers on State's Exhibit "A."

dismiss the information for failure to allege sufficient, specific facts to place respondents on notice as to what each of them did to aid, abet, counsel and encourage the others. In this order, the district court ruled, in pertinent part:

> [T]he Court denies the Motion to dismiss the Information; however, the Court grants the Motion to the extent the State is required to amend the Information to allege specific facts to put the Defendant(s) on notice as to what the State alleges each of the Defendants did to aid, abet, counsel and encourage the other(s). Said amendment shall be made within the evidence that was established during the Preliminary Hearing herein.
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> IT IS FURTHER ORDERED, said amendment to the Information charging the singular gross misdemeanor count as more fully set forth in the contemporaneously filed Order Granting Writ of Habeas Corpus shall be filed within twenty (20) days from the date of this Order, subject to the State's discretion to dismiss the singular charge . . . .

Thus, in the two written orders entered on March 23, 2000, the district court allowed the State to amend the information to allege more specific facts in support of the allegations of aiding and abetting, and to allege "the singular gross misdemeanor crime that charges the individuals as being principals, and/or aiding and abetting in the killing of [h]orse #12."

We note, however, that the State had never actually charged respondents with a gross misdemeanor violation of NRS 206.150 for killing horse 12. That horse was one of the twenty-two animals the State had attempted to aggregate into a single felony count. After the district court ruled that the felony charge was improper, technically no formal charge against respondents regarding

horse 12 remained. Thus, it appears that the language of the district court's order is somewhat confusing because it suggests that there was a gross misdemeanor charge still outstanding against respondents for the killing of horse 12. The record discloses no objection by respondents to the court's ruling in this respect.[3] Further, because the justice court found probable cause to believe respondents violated NRS 206.150 with respect to horse 12, it was well within the district court's discretion to allow the State to amend the information to charge respondents with a gross misdemeanor violation of NRS 206.150 for the death of that horse.[4]

Consistent with the district court's orders, the State filed an amended information charging each respondent with one gross misdemeanor violation of NRS 205.150 for the killing of horse 12. The State also filed this timely appeal challenging the district court's order granting the habeas petitions. For the reasons discussed herein, we conclude that the district court correctly determined that NRS 206.150(1) does not permit aggregation, but that the district court erred in concluding that the State failed to establish probable cause with respect to horses 9, 15, 16, 17, 19, 23 and 24. We further conclude that because the justice court properly found probable cause to believe respondents violated NRS 206.150 with respect to horses 9,

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[3]In fact, it appears from the transcript that one of the defense attorneys below drafted the order at the request of the district court and thus may have composed the language in question.

[4]See, e.g., Benitez v. Sheriff, 111 Nev. 1363, 1364-65, 904 P.2d 1036, 1037 (1995); see also Huntley v. Sheriff, 90 Nev. 187, 188-89, 522 P.2d 147, 148 (1974).

15, 16, 17, 19, 23, and 24, the district court has discretion on remand to enter an order allowing the State to amend the information to charge the respondents with gross misdemeanor violations of NRS 206.150 for the deaths of these horses.

Interpretation of NRS 206.150(1)

"If a statute is clear on its face a court cannot go beyond the language of the statute in determining the legislature's intent." Thompson v. District Court, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984).

At the time of the alleged offenses, NRS 206.150(1) provided:

> Except as provided in subsection 2, any person who willfully and maliciously kills, maims or disfigures any animal belonging to another, or exposes any poison or noxious substance with intent that it should be taken by the animal is guilty of a public offense proportionate to the value of the loss resulting therefrom but in no event less than a gross misdemeanor.[5]

See 1979 Nev. Stat., ch. 646, § 2, at 1395.

We conclude that the applicable version of NRS 206.150(1) is clear on its face. The statutory language indicates that it is a violation of the statute to kill, maim, disfigure or poison an animal. It does not suggest that the killing, maiming, disfiguring or poisoning of

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[5]The Legislature amended NRS 206.150 in 1999. The statute now includes a new subsection 2, which provides: "Except as otherwise provided in NRS 205.220, a person who willfully and maliciously kills an estray or one or more head of livestock, without the authority to do so, is guilty of a category C felony and shall be punished as provided in NRS 193.130." 1999 Nev. Stat., ch. 486, § 1, at 2515 (codified at NRS 206.150(2)). The amended provisions do not apply to offenses committed before October 1, 1999. See 1999 Nev. Stat., ch. 486, § 12, at 2520.

multiple animals may be charged in one count to reach the value required for a felony pursuant to NRS 193.155.[6] Moreover, even assuming some ambiguity about whether the statute permits aggregation of the value of multiple animals under NRS 206.150(1) to reach felony status, we conclude that such ambiguity must be resolved in favor of respondents and that our interpretation of the statute is not overly strained or distorted. We therefore conclude that the district court properly determined that the State may not aggregate the value of multiple horses in a single count under the applicable version of NRS 206.150(1) so as to charge respondents with a felony violation of that provision.

Probable cause determination

On appeal from an order granting a pretrial petition for a writ of habeas corpus based on lack of probable cause, "[t]he sole function of the supreme court is to determine whether all of the evidence received at the preliminary hearing establishes probable cause to believe that an offense has been committed and that defendant committed it." Lamb v. Holsten, 85 Nev. 566, 568, 459 P.2d 771, 772 (1969). As a general rule, this court will not overturn an order granting a pretrial petition for a writ of habeas corpus for lack of probable cause absent a showing of substantial error by the district court. See Sheriff v. Provenza, 97 Nev. 346, 347, 630 P.2d 265, 265 (1981).

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[6]NRS 193.155 sets forth the applicable penalty where a person "is guilty of a public offense proportionate to the value of the property affected or the loss resulting from the offense."

The probable cause determination has two components: (1) that an offense has been committed; and (2) that the accused committed the offense. See NRS 171.206. The first component, known as the corpus delicti, is not implicated by the district court's order in this case and is not at issue in this appeal. Rather, the issue on appeal is: whether the State presented sufficient evidence to establish probable cause to believe that respondents committed the crime or crimes charged.

Probable cause to support a criminal charge "may be based on slight, even 'marginal' evidence, because it does not involve a determination of the guilt or innocence of an accused." Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (citations omitted). "To commit an accused for trial, the State is not required to negate all inferences which might explain his conduct, but only to present enough evidence to support a reasonable inference that the accused committed the offense." Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340, 341 (1971). "Although the state's burden at the preliminary examination is slight, it remains incumbent upon the state to produce some evidence that the offense charged was committed by the accused." Woodall v. Sheriff, 95 Nev. 218, 220, 591 P.2d 1144, 1144-45 (1979).

Based on our review of the record, we conclude that the State presented enough evidence to support a reasonable inference that respondents violated NRS 206.150 with respect to any horses shot with a .270 or .22 caliber weapon. The evidence presented supports a reasonable inference that respondents committed those offenses because respondents had access to such weapons, they admitted being

in Lagomarsino Canyon at or near the time period in which the horses were shot, they admitted shooting into a herd of horses, and they admitted returning or attempting to return to the scene to collect or destroy evidence.

Our review of the record indicates that, as the district court found, the State presented sufficient evidence to support a reasonable inference that respondents shot and/or aided and abetted each other in shooting horse #12 with a .270 caliber weapon. In particular, we note that the State's ballistics expert, Kevin Lattyak, testified that a bullet within the .27 caliber range was recovered from horse #12.

Further, our review of the record similarly indicates that the justice court properly found that the State presented sufficient evidence to support a reasonable inference that respondents violated NRS 206.150 by shooting horses 9, 15, 16, 17, 19, 23 and 24 with a .22 caliber weapon. Lattyak testified that he examined a number of .22 caliber projectiles recovered from the dead horses. Forensic Investigator Jerry Straits testified that a .22 caliber projectile was recovered from the uterus of horse 9. The veterinarian's descriptions of projectiles recovered from horses 15, 16, 17, 19, 23 and 24 were identical to his description of the projectile that Straits recovered from horse 9 and identified as a .22 caliber projectile. Also, Straits testified that .22 caliber shell cases were found near horses 15, 16, 17, 19, 23 and 24. We therefore conclude that the district court committed substantial error in finding no probable cause with respect to these

seven horses.[7] In all other respects, however, we affirm the district court's findings regarding all the remaining horses, including horse 12.

For the reasons stated above, we affirm the district court's ruling that the State may not charge respondents in a single count with the killing of multiple horses for the purposes of establishing a felony violation of NRS 206.150. We reverse the district court's determination that the State failed to establish probable cause that respondents violated NRS 206.150 with respect to horses 9, 15, 16, 17, 19, 23 and 24. Because the justice court properly found probable cause to believe respondents killed each of these horses, we conclude the district court has discretion on remand to allow the State to amend the information to charge respondents with gross misdemeanor violations of NRS 206.150 in connection with the deaths of horses 9, 15, 16, 17, 19, 23 and 24. We affirm the district court's rulings in all other respects. Accordingly, we

ORDER the judgment of the district court AFFIRMED

[7]We acknowledge the testimony, based on interviews with respondents, that Merlino was not present in Lagomarsino Canyon with Brock and Brendle prior to the trip to Wal-Mart on December 27, 1998 and that, although respondents had access to .22 caliber weapons, they did not take a .22 caliber weapon to Lagomarsino Canyon. While this evidence may affect the State's ability to obtain a conviction, we reiterate that "[i]t is not the function of the supreme court, nor of the magistrate at the preliminary hearing, nor of the district court upon the habeas corpus proceeding to pass upon the sufficiency of the evidence to justify conviction." Holsten, 85 Nev. at 568, 459 P.2d at 772.

IN PART, REVERSED IN PART, AND REMANDED for further proceedings consistent with this order.[8]

Maupin, C.J.

Shearing, J.

Becker, J.

cc: Hon. Michael R. Griffin, District Judge
Attorney General
Storey County District Attorney
Law Offices of Scott N. Freeman
Marc P. Picker
Ohlson & Springgate
Storey County Clerk

[8]We vacate the stay of the district court proceedings imposed by this court on October 6, 2000.