

19 Misc.3d 1105(A), 859 N.Y.S.2d 906, 2008 WL 724724 (N.Y.City Crim.Ct.), 2008 N.Y. Slip Op. 50556(U)  
(Table, Text in WESTLAW), Unreported Disposition  
(Cite as: 19 Misc.3d 1105(A), 2008 WL 724724 (N.Y.City Crim.Ct.))

**C**

(The decision of the Court is referenced in a table in the New York Supplement.)

Criminal Court, City of New York,  
New York County.  
The PEOPLE of the State of New York, Plaintiff,  
v.  
Martin WALSH, Defendant.  
  
No. 2007NY022001.  
Jan. 3, 2008.

Robert M. Morgenthau, Esq., District Attorney, by  
Ada Jennifer Gilhuly, Esq., New York, for People.

Henry I. Weil, Esq., Law Offices of Henry I. Weil,  
New York, for Defendant.

SHAWN DYLA L. SIMPSON, J.

**INTRODUCTION**

\*1 The defendant is charged with one count of Overdriving, Torturing and Injuring Animals; Failure to Provide Proper Sustenance under [Agriculture and Markets Law \(hereinafter A.M.L.\) § 353](#). The defense has brought a motion to dismiss on the grounds that the information fails to state an offense and on facial deficiency. In the alternative, the defense seeks a bill of particulars; discovery; inspection; suppression of statements or a *Huntley* hearing; and an adjournment to prepare for trial. A response was filed by the People. For the foregoing reasons, the defendant's motion to dismiss is denied.

[New York Agriculture and Markets Law § 353](#) states, in pertinent part that: A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animal of necessary sustenance, food or drink, or neglects or re-

fuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who wilfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a class A misdemeanor and for purposes of paragraph (b) of subdivision one of [section 160.10 of the criminal procedure law](#), shall be treated as a misdemeanor defined in the penal law.

The accusatory instrument upon which the defendant is arraigned reads as follows:

Deponent is informed by Dr. Robert Reisman, of the Bergh Memorial Animal Hospital, that at the above stated date and time informant observed one feline suffering from: (i) dehydration; (ii) emaciation/underweight; (iii) a swollen and bleeding front right paw and said paw has a tumor; (iv) bone loss in the digits of said paw due to said tumor that was left untreated; (v) a [polyp in the nasal cavity](#) which caused said feline to have breathing difficulty; (vi) an [ingrown nail](#) that grew back into said feline's front left paw; (vii) chronic liver and [kidney disease](#); and (viii) advanced [periodontal disease](#). Informant further informs deponent that said feline has been medically neglected.

Deponent states that she asked the defendant if the defendant owned the feline and whether the feline had any medical conditions to which the defendant stated in sum and substance: I NEVER TOOK THE CAT TO THE VET. I OWNED HIM FOR FIFTEEN YEARS AND NEVER TOOK HIM TO THE VET. I NOTICED THE PAW WAS LIKE THAT. IT HAS BEEN LIKE THAT FOR A YEAR.

The accusatory instrument is signed and dated by the deponent and a corroborating statement from the informant is included.

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## BACKGROUND

In its motion, the defense argues that the failure to provide medical care to an animal does not violate A.M.L. § 353 because medical care is not “necessary sustenance” pursuant to *People v. Arroyo*, 777 N.Y.S.2d 836 {3 Misc.3d 668} [Crim. Ct., Kings Co.2004]. The defense also asserts that the information fails to show a causal connection between the defendant's alleged acts and the animal's medical condition. In response, the People assert that the statute is constitutional; the term “sustenance” covers more than food and drink; the requisite mental state is shown; and that *People v. Arroyo*, *supra*, is inapplicable to the instant case.

\*2 That part of A.M.L. § 353 that deals with acts by omission imposes criminal liability where a defendant deprives an animal of necessary sustenance or neglects or refuses to furnish such sustenance to an animal or where the animal is permitted to be tortured or subjected to cruelty (*see* A.M.L. §§ 353 and 350(2)). Although it is alleged that the animal was under weight and dehydrated, this allegation does not establish that the defendant deprived the animal of necessary sustenance, that is food or water, given the additional facts alleged herein. To this extent, the defense is correct in its assertions. However, the issue of unjustifiable physical pain is not addressed by the defense. *Agriculture and Markets Law* § 350(2) defines torture and cruelty as permitting an animal to suffer unjustifiable physical pain. In this case, the allegations do provide a *prima facie* showing that the animal was permitted to suffer unjustifiable physical pain.

## DISCUSSION

A plain reading of the statute reveals that “necessary sustenance” is described within that clause as “food or drink.” The grammatical construction of the clause “or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink” indicates that “necessary sustenance” is “food or drink.” “[W]here phrases were meant to be separated, the statute delineates such separation by

placement of a comma before the disjunctive or’ “ (*Annabi v. City Council*, 235 N.Y.L.J. 106 [June 2, 2006] ). Was the statute intended to list three separate types of deprivation it would have read “... sustenance, food, or drink ...” (*see*, R. Lederer & J. Shore, *Comma Sense*, 29-30 (2005)). For example, in an author's dedication “to my parents, the Pope and Mother Theresa”, the absence of a comma between “Pope” and “and” indicates that the author's parents are the Pope and Mother Theresa and not that a separate dedication was being made to each of the three (*Id.* at p. 29). “Three or more items in a series should be separated by commas” (Elisabeth Chesla, *Grammar Source*, 319 (2005)). Evidently, the clause “... necessary sustenance, food or drink, or ...” is not a series or a list <sup>FN1</sup>. Further, “[w]here a statute describes a particular situation to which it applies, an inference must be drawn that what is omitted or not included was intended to be omitted or excluded” (*Annabi v. City Council*, *supra* ). The plain language of the law must be relied upon and in this instance, the meaning of “necessary sustenance” is reiterated in the statute as food or drink <sup>FN2</sup>.

<sup>FN1</sup>. Similarly, as the People discuss in their responsive papers, the term “mutilated or killed” expounds on the word “maimed.” “Maimed” and “mutilated” are synonymous, just as “sustenance” and food are. This grammatical construction gives cause to conclude that this clause is not a series or list.

<sup>FN2</sup>. The words “food or drink” in this instance are what is known as Appositives since they serve to give additional information about the immediately preceding word, in this case “sustenance”, and are set off from the rest of the clause with commas (*see* Rh Value Publishing, *Webster's Grammar and Punctuation Handbook*, 240 (2001)).

The statute also states that the law applies where the defendant “... refuses to furnish it such

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sustenance or drink, or causes, ...”, omitting or replacing the term sustenance for food. The terms “sustenance” and “food” are used interchangeably in the statute and are consequently one in the same. “A central rule of statutory construction is that when the statutory language is clear and unambiguous, the court should construe the language so as to give effect to the plain, ordinary meaning of the words used” (*Annabi v. City Council, supra, citing People v. Finnegan, 85 N.Y.2d 53 [1995]*) <sup>FN3</sup>. Under the statute, “necessary sustenance” is defined by its ordinary meaning as essential alimentations <sup>FN4</sup>. Therefore, the failure to provide an animal with medical care is not encompassed in the phrase “necessary sustenance.”

<sup>FN3</sup>. See also, *People v. Buckmire, 167 Misc.2d 581* [Crim. Ct., N.Y. Co.1995] holding that “[g]enerally, penal laws must be construed so as to give effect to their most natural and obvious meaning. A court is obligated to construe an unambiguous statute according to its plain meaning, even if the plain meaning seems unintended or inadvisable. Moreover, it is basic that a criminal statute is to be narrowly construed against the State and in favor of the accused. A strained or unnatural interpretation of a penal statute could potentially expand criminal liability and therefore courts must be scrupulous in insuring that penal responsibility is not extended beyond the fair scope of the statutory mandate.”

<sup>FN4</sup>. Alimentation is a synonym of sustenance as provided in The American Heritage Dictionary of the English Language (4th ed.2000 updated in 2003).

\*3 A charge under A.M.L. § 353 for failure to provide medical care cannot be based solely on the term “necessary sustenance” since such care is not included in the ordinary meaning of the phrase. However, the failure to provide medical care alone may be chargeable based on section 350 of A.M.L. since torture and cruelty are defined therein as

every act, omission, or neglect, that causes or permits an animal to suffer unjustifiable physical pain or death (A.M.L. § 350(2)). The test for torture or cruelty is whether the act or omission is unjustifiable (*People v. Sitors, 815 N.Y.S.2d 393* {12 Misc.3d 928} [Co. Ct., Schoharie Co.2006] ). The instant allegations sufficiently demonstrate that the animal was subjected to unjustifiable physical pain and consequently, the charge may be maintained.

The allegations state that the animal was medically neglected. The allegations provide that the animal, a cat, was unable to use its right front paw because of a tumor. The animal is alleged to have had a tumor in its right front that was swollen, bleeding and incurred bone loss in the digits. The allegations describe a condition that was readily visible. The cat is also said to have had a nail growing back around into its left front paw. The cat is further alleged to have had a polyp in its nasal passage that caused it difficulty breathing. The cat's periodontal, liver and kidney diseases are also alleged to have been chronic. Although the animal is said to have been fifteen years old, it is also alleged that the defendant left it in the above described condition for over a year. Therefore, it is difficult to conclude at this stage that the physical condition the animal was allegedly permitted to suffer was justifiable.

Further, the issue of justifiability is one left more appropriately for trial. These allegations sufficiently demonstrate that the defendant permitted the animal to suffer unjustifiably. If the defendant was unable to care further for the animal, for financial or any other reason, he could have surrendered the animal to the Society for the Prevention of Cruelty to Animals (ASPCA). A justification for the defendant's act of omission, that is permitting the animal to suffer for over a year, is not apparent at this stage and none is asserted by the defense. The defendant may proffer the reason he believes he was justified in not providing medical care or surrendering the animal at trial. In this case, the allegations provide a *prima facie* showing that the defendant's

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failure to provide medical care to the animal was unjustifiable given the prolonged period the animal was left in the condition alleged. Further, the question of “unjustifiable physical pain” cannot be easily discerned in a motion to dismiss. Viewing the allegations in the light most favorable to the People ( *People v. Contes*, 60 N.Y.2d 620, 621[1983] ) the element of unjustifiable physical pain is sufficiently established herein.

Additionally, the statute is constitutional where the defendant is shown to have overdriven, tortured, injured, or failed to provide proper sustenance to an animal, or permitted it to suffer unjustifiable pain as is the case in this proceeding (see *People v. Bunt*, 462 N.Y.S.2d { 118 Misc.2d 904 } 142 [Justice Ct., Dutchess Co.1983]; *People v. Voelker*, 172 Misc.2d 564 [Crim. Ct., Kings Co.1997]; *People v. Garcia*, 777 N.Y.S.2d 846 {3 Misc.3d 699} [Sup.Ct., N.Y. Co.2004]; *People v. Garcia*, 812 N.Y.S.2d 66 {29 AD3d 255} [App. Div., 1st Dept 2006]; but see, *People v. Arroyo*, *supra*, holding law inapplicable to defendant who failed to provide medical care to a terminally ill animal). In *People v. Temples*, docket No. 2003KN066507 [Crim. Ct., Kings Co. June 4, 2004], the court, which also ruled in *Arroyo*, *supra*, stated that the proceeding in *Arroyo*, *supra*, was dismissed because those allegations failed to show a pattern of neglect. However, the allegations in this case sufficiently demonstrate a pattern of neglect that a reasonable person should have known could give cause for criminal liability.

#### CONCLUSION

\*4 As discussed above, the allegations sufficiently show that the defendant neglected the animal and permitted it to suffer unjustifiable physical pain. Consequently, the allegations are sufficient for the charge.

Accordingly, the defendant's motion to dismiss is denied.

The defendant's motion for discovery is granted to the extent required by [Criminal Procedure Law §](#)

240.20.

The defendant's motion for a bill of particulars is granted to the extent provided for in the voluntary disclosure form included along with the People's response.

The defendant's motion to suppress statements is granted to the extent that a *Huntley* hearing is ordered on the issue.

The defendant's motion for an adjournment to prepare for trial is granted.

This constitutes the decision, opinion and order of the Court.

N.Y.City Crim.Ct.,2008.

People v. Walsh

19 Misc.3d 1105(A), 859 N.Y.S.2d 906, 2008 WL 724724 (N.Y.City Crim.Ct.), 2008 N.Y. Slip Op. 50556(U)

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