

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1999 Term

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No. 25801

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STATE OF WEST VIRGINIA,  
Plaintiff Below, Appellee

v.

WILLIAM H. BURGESS,  
Defendant Below, Appellant

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Appeal from the Circuit Court of Jackson County  
Honorable Charles E. McCarty, Judge  
Civil Action No. 97-F-10

VACATED AND REMANDED

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Submitted: May 5, 1999  
Filed: May 26, 1999

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JUSTICE MAYNARD delivered the Opinion of the Court.  
JUSTICE MCGRAW dissents and reserves the right to file a dissenting Opinion.

SYLLABUS

When a person unlawfully dispatches a domestic animal belonging to another person by using a commonly accepted, humane method, and there is no evidence of any other form of malice, the killing is not malicious and consequently does not violate W.Va. Code § 61-3-27 (1994).

Maynard, Justice:

On December 3, 1997, the defendant, William H. Burgess, was convicted by jury trial in the Circuit Court of Jackson County, West Virginia, of the malicious killing of an animal in violation of W.Va. Code § 61-3-27 (1994). The defendant was sentenced to one to ten years in the penitentiary. He appeals, contending the killing was not malicious. We agree.

In October 1996, Robert Henry owned seven head of cattle, including a seven-month-old Charolais-Hereford worth approximately \$300. The cattle were pastured on Elmer McMurray's property. On October 11, 1996, Mr. Henry was working for and riding home with P. J. Pendley. During the ride home, Henry asked Pendley if the two could stop to check on the cattle. When they arrived at the McMurray pasture, they discovered the Hereford lying down. While checking the situation out, they discovered the calf was dead. It had been shot through the eye and had been field dressed. The two immediately left the calf to call the authorities and get a gun. They then returned to the pasture to await the possible return of the cow's killer.

Perhaps an hour later, just as the sun was setting, a truck came to a stop at the top of the hill. A person got out, and, using a flashlight, entered the pasture by crossing a gate and began walking toward the dead cow. That person was later

identified as the defendant. The defendant was stopped by Henry and Pendley. He had blood on his pants and shirt and was carrying two knives on his person. One knife had blood on it. The defendant attempted to rid himself of that knife by throwing it on the ground before the West Virginia Department of Natural Resources Law Enforcement Officer (DNR Officer) arrived on the scene. The knife was recovered about five feet from the place where the defendant was sitting on the ground.

When asked what he was doing on the property, the defendant replied he was going frog gigging. When asked where his gig was, he replied he was looking for the pond and after finding it, he would return home to get his gig. When asked who was in the truck, the defendant said that was his uncle, Cecil Burgess. When asked where his uncle was going, he replied to the Pit `N Git to get a six-pack of beer. Cecil Burgess returned to the pasture and parked in the road to await the defendant's reappearance, but eventually left after being questioned by Henry as to what he was doing there.

The DNR Officer arrived and placed the defendant in protective custody. After inspecting the dead cow, he advised the defendant of his constitutional rights. After taking a statement from the defendant, the officer transported the defendant to the sheriff's office. The officer then assisted Deputy James Barr by taking swabs of blood from the defendant's hands and fingernails. At trial, the DNR Officer testified that the defendant's knife had blood on it and the defendant's clothes had blood on them. Deputy

Barr testified that these were sent, along with the swabs, to the state police laboratory to be analyzed. Some blood from the animal was also sent for comparison purposes.

David Miller, forensic scientist for the West Virginia State Police Biochemistry Laboratory, testified at trial that the samples were tested for species of origin and the blood was indeed cow blood. Miller explained that the blood on the jeans was not transfer stains. That simply means the blood was not transferred from the ground to the jeans; rather, the evidence showed the blood was sprayed or splattered onto the jeans. Miller also explained this case did not involve DNA analysis.

The defendant was indicted during the February 1997 term of court for “unlawfully, feloniously and maliciously kill[ing] and caus[ing] the death of an animal, to-wit: one (1) cow of the value of greater than One Hundred Dollars (\$100.00), of the property of Robert Henry, in violation of West Virginia Code 61-3-27, against the peace and dignity of the State.” A jury trial was held on December 2-3, 1997. The defendant was convicted of the malicious killing of an animal in violation of W.Va. Code § 61-3-27 (1994)<sup>1</sup> and was sentenced to a period of one to ten years in the penitentiary. It is from this order the defendant appeals.

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<sup>1</sup>W.Va. Code § 61-3-27 (1994) reads as follows:

If a person maliciously administers poison to, or exposes poison with the intent that it should be taken by, any horse, cow or other animal of another person, or if any

On appeal, the defendant assigns several errors. He contends: (1) the State did not prove the killing of the cow was malicious; (2) that during closing arguments, the State misrepresented the law and/or the facts; and (3) the circuit court erred by denying his request for a continuance when he had not been provided a transcript of the grand jury proceedings.

According to the evidence adduced at trial, there is little doubt the defendant killed Henry's calf. In fact, at trial, Cecil Burgess testified his nephew told him on the evening of October 11, 1996 that he had killed a cow. In his brief to this Court, the defendant does not contend he did not kill the cow. Even though he does not admit he killed the cow, he admits the killing was unlawful. He argues instead that the evidence presented by the State at trial does not prove the cow was killed maliciously.

The evidence shows the cow was killed by one bullet to the eye and was then field dressed. We recognize that large farm animals have been raised for their meat

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person maliciously maims, kills, or causes the death of any horse, cow or other animal of another person, of the value of one hundred dollars or more, the person is guilty of a felony, and, upon conviction, shall be imprisoned in the penitentiary not less than one year nor more than ten years; and, if the horse, cow or other animal is of less value than one hundred dollars, the person is guilty of a misdemeanor, and, upon conviction, shall be confined in jail not more than three months and fined not more than five hundred dollars: Provided, That this section shall not be construed to include dogs.

in West Virginia for many many years. These animals are almost always dispatched by a gunshot to the head or by slitting the animal's throat. Also, wild animals, such as deer, or domestic animals, such as cows or horses, often run or wander into the highway and are hit by vehicles. When law enforcement officers are called to the scene of such an accident, the humanely accepted method of dispatching the injured animal is a gunshot to the head. We cannot say these killings are malicious.

The defendant cannot be convicted under W.Va. Code § 61-3-27 unless malice is proven by satisfactory proof. *State v. Fletcher*, 106 W.Va. 601, 146 S.E. 628 (1929). The statute can be fairly paraphrased as follows: If a person maliciously kills any cow of another person, of the value of one hundred dollars or more, the person is guilty of a felony, and, upon conviction, shall be imprisoned in the penitentiary not less than one year nor more than ten years.

By anyone's standards, that is a serious sentence. The law's apparent extraordinary concern regarding the manner and method by which we slaughter livestock should not come as a surprise to the reader. Custom, culture and the law have spoken for thousands of years on these matters. In fact, the ancient Hebrews had strict laws regulating such slaughter which have survived into the present.

For example, animals must be swiftly killed with a single stroke of a thin, very sharp blade. If not, and the beast suffers, then the meat is not “kosher” and it cannot be eaten. It is also a violation of orthodox dietary rules to mix meat and dairy products. This prohibition against eating meat and dairy at the same meal is thought to have come from the ancient pagan practice of boiling baby goats alive in their own mother’s milk and then eating them. The horror of this inhumane cruelty was so repugnant to the patriarchs that it was banned and the meat/dairy prohibition still exists today.

In the examples, Hebrew law forbade cruel treatment or unnecessary suffering of a dumb animal by dietary strictures. Today, we use the stricture of a penitentiary sentence to forbid the same cruelty. However, before the penitentiary sentence in this case can be invoked, malice must be proven.

This Court has heretofore recognized that “malice” is not easy to define. In *State v. Michael*, 74 W.Va. 613, 620, 82 S.E. 611, 613 (1914), this Court noted that “[m]alice is a well-known legal term, but one not easy to define in the abstract.” This Court also recognized in *State v. Starkey*, 161 W.Va. 517, 524, 244 S.E.2d 219, 223 (1978), *overruled on other grounds*, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), that “[t]he term malice has been frequently used, but not extensively defined, by this Court.” We therefore begin with a definition from Black’s Law Dictionary 956 (6th ed. 1990), which defines malice as “[t]he intentional doing of a wrongful act without just



cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent. . . . A condition of the mind showing a heart regardless of social duty and fatally bent on mischief.” “Malicious” means “[c]haracterized by, or involving, malice; having, or done with, wicked, evil or mischievous intentions or motives; wrongful and done intentionally without just cause or excuse or as a result of ill will.” Black’s Law Dictionary 958 (6th ed. 1990).

*Michael* and *Starkey* both refer to an old criminal case, *State v. Douglass*, 28 W.Va. 297, 299 (1886), where this Court discussed malice by stating:

the source of . . . malice is not only confined to a particular ill will to the deceased, but is intended to denote . . . an action flowing from a wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate cruel act[.]

“Perhaps the definition of malice most often quoted is that stated in *State v. Doig*, 2 Rich. 179, which is as follows: ‘In law, malice is a term of art, importing wickedness and excluding a just cause or excuse.’” *State v. Harvey*, 220 S.C. 506, 514, 68 S.E.2d 409, 412 (1951), *overruled on other grounds*, *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

Most definitions include one or more terms such as wicked, evil, depraved or cruel.

We can say the act committed in the case at bar was deliberate and with no just cause or excuse; however, we simply cannot say the act was evil and cruel. If the defendant had tortured the animal by repeatedly stabbing it until it died, or if the defendant had beat the animal with a stick or club until it died a slow, agonizing death, or if he had burned the cow to death or used any other inhumane method, that would show a wicked and depraved heart.<sup>2</sup> However, as we previously stated, the method used to kill the cow is the most humane, instantaneous, painless method known. It is the same method used throughout West Virginia by farmers and slaughterhouses every day. There simply is not sufficient evidence in this case from which a reasonable jury could find malice.<sup>3</sup> To decide otherwise would leave every farmer or stockyard owner who dispatches an animal for “another person” susceptible to being charged with the crime of maliciously killing an animal. We therefore hold that when one unlawfully dispatches a domestic animal belonging to another person by using a commonly accepted, humane

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<sup>2</sup>We note here that there may be other ways whereby the humane killing of livestock might nevertheless be malicious. For example, proof that the defendant killed the animal for no other reason than just to watch it die; or proof that he did so out of spite or to extract vengeance against or to simply annoy the owner, would be other forms of proof of malice.

<sup>3</sup>This Court enunciated the sufficiency of the evidence standard in *State v. Guthrie*, 194 W.Va. 657, 668, 461 S.E.2d 163, 174, (1995), by stating, “[T]he relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.”

method, and there is no evidence of any other form of malice, the killing is not malicious and consequently does not violate W.Va. Code § 61-3-27 (1994).<sup>4</sup>

This is a difficult case because a serious crime deserving serious punishment was committed when Henry's cow was shot and butchered. Unfortunately, there is a charging error in this case. The prosecuting attorney properly could have charged the defendant with larceny or trespass or both; however, he was indicted for neither of these crimes. This defendant was obviously trying to steal beef he intended to obtain by butchering the animal. His intent was theft. He had larceny in his heart, not malice. He was motivated by his stomach, not his heart. In this case, the State failed to prove the killing was malicious. Consequently, the conviction and sentence for the malicious killing of an animal belonging to another person is vacated and the case is remanded for entry of a judgment of acquittal. *See State v. Baker*, 177 W.Va. 769, 771, 356 S.E.2d 862, 864 (1987) ("In view of the fact that the defendant was entitled to a judgment of acquittal, no retrial is permitted and the case is remanded for the entry of such judgment.")

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<sup>4</sup>Because we are reversing the trial court's verdict on this error, we find it is not necessary to reach the other errors assigned by the defendant.

The conviction and sentence in this case is vacated and the case is remanded for entry of a judgment of acquittal. The defendant is ordered to be released.

Vacated and  
remanded.