No. 25801, ***State of West Virginia v. William H. Burgess***

McGraw, J., dissenting:

The most troubling aspect of this case is that it puts the farmers of this state in serious peril, since the criminal deterrent protecting their livestock has been gutted. Cash receipts related to livestock and dairy production in West Virginia totaled over $125 million in 1997, accounting for nearly one-third of all agricultural-commodity income. There are over 14,000 cattle operations alone. This valuable economic resource is now at risk to human predators, who can prey on thousands of hard-working West Virginia farmers with relative impunity. Today, we have the odd situation where it is a felony to intentionally destroy a farmer's crops, W. Va. Code § 61-3-34 (1994) (felony offense punishable by 1-to-10 years imprisonment to destroy crops with value greater than $1,000), but no specific offense at all to "humanely" kill his or her animals![1]

[1]The majority notes that in cases such as this the defendant can still be charged with larceny or trespass. The problem is that larceny requires proof of the asportation or carrying away of another's property. *See State v. William T.*, 175 W. Va. 736, 338 S.E.2d 215 (1985) (*per curiam*); *State v. Nelson*, 121 W. Va. 310, 3 S.E.2d 530 (1939). Thus, while common law larceny might proscribe the conduct in this case (where the animal was slaughtered and carted away), it would not cover a killing unaccompanied by a theft of the animal carcass. W. Va. Code § 61-3-30 (1975), which makes it a misdemeanor offense for a person to "take and carry away, or destroy, injure or deface any property, real or personal, not his own," could conceivably impose some penalty in these situations; however, the deterrent effect is considerably less. The criminal trespass statute alluded to by the majority, W. Va. Code § 61-3B-3(a) & (b) (1978), suffers from a similar shortcoming.

Significantly, ours is not the only state to make it a felony to kill another's livestock. *See, e.g.*, Ariz. Rev. Stat. Ann. § 3-1307 (West 1995) (punishable by up to 2

years imprisonment); N.C. Gen Stat. §14-85 (1999) (punishable by up to 10 years imprisonment); Va. Code Ann. § 18.2-144 (Michie 1996) (punishable by maximum of 1-to-5 years imprisonment, and fine not exceeding $2,500).

This unfortunate circumstance results from a misreading of W. Va. Code § 61-3-27, which is clearly intended to protect property, not to govern animal slaughter. Although perhaps not a proper indicator of legislative intent, *see* W. Va. Code § 2-2-12 (1965), it cannot escape notice that this statute is codified in an article dealing with crimes against property.[2] If there could be any doubt that § 61-3-27 was not intended as an anticruelty statute, it is erased by the manner in which the statute dispenses different punishments on the basis of the value of the animal. Obviously, the Legislature was not concerned about how these animals are killed or maimed, but rather with the economic damage suffered by the owners of such property.

[2]Significantly, the Legislature has elsewhere made it a crime to cruelly mistreat an animal. W. Va. Code § 61-8-19(a) (1995) provides:

> (a) If any person cruelly mistreats, abandons or withholds proper sustenance, including food, water, shelter or medical treatment necessary to sustain normal health and fitness or to end suffering or abandons any animal to die, or uses, trains or possesses any domesticated animal for the purpose of seizing, detaining or maltreating any other domesticated animal, he or she is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred nor more than one thousand dollars, or confined in the county jail not more than six months, or both so fined and confined.

Section 61-3-27 can be traced as far back as 1670, when Parliament under Charles II made it a capital offense to "in the nighttime maliciously, unlawfully, and willfully kill or destroy any horses, sheep, or other cattle, of any person or persons whatsoever." 22 & 23 Car. 2 ch. 7, § 2 (Eng.).[3] This Court is the first in over three hundred years to construe such a law to require proof of animal cruelty.

The many cases interpreting statutes similar to § 61-3-27 hold that malice in this context relates to the intended effect on the owner of the animal, not the animal itself. This is black-letter law:

> At common law and under the statutes in affirmation thereof, the malice, which is an essential ingredient in the offense of malicious mischief or injury to animals, must be against the owner of the animal and not against the animal itself, but . . . actual ill[-]will or resentment towards the owner or possessor of the property need not be shown. . . . It need not be shown that the offender actually knew the owner but it will be sufficient to show that he was bent on mischief against the owner, who so ever he might be.

3A C.J.S. *Animals* § 319, at 839 (1973) (footnotes omitted).

American courts have largely accepted the construction given to the antecedent English statutes. *E.g.*, *People v. Minney*, 119 N.W. 918, 921 (Mich. 1909).

[3] A subsequent enactment similarly made it a felony punishable by death to "unlawfully and maliciously kill, main or wound any cattle." 9 Geo. 1 ch. 22, § 1 (Eng. 1722).

In *King v. Pearce*, 1 Leach 527, 168 Eng. Rep. 365 (Crown 1789), the court concluded that "it was necessary to sh[o]w that the maiming of the animal was done from some malicious motive towards the owner of it, and not merely from an angry and passionate disposition towards the beast itself . . . ." These early English cases rejected any contention that the malice element required a showing of cruelty toward the animal. *See King v. Shepherd*, 1 Leach 539, 168 Eng. Rep. 371, 372 (Crown 1790) ("[U]nless . . . it was done from a malicious motive against the owner of the gelding, however savage and cruel his conduct might appear, [the defendant] could not legally be found guilty under this statute.").

The modern trend is even further away from the majority's position. For example, the Michigan Court of Appeals concluded in *People v. Iehl* that malice need not be specifically directed at either the animal or its owner; rather, the element was defined in the following broad terms:

> The element of malice in this statute requires only that the jury find that defendant 1) committed the act, 2) while knowing it to be wrong, 3) without just cause or excuse, and 4) did it intentionally or 5) with a conscious disregard of known risks to the property of another.

299 N.W.2d 46, 47-48 (Mich. Ct. App. 1980) (citation omitted). This is all that should be required.

I have no trouble with the proposition that malicious intent *may* be inferred from acts of cruelty. What is perplexing, however, is how with respect to W. Va. Code § 61-3-27 the long-accepted definition of malice has been recast to *require* evidence of unusually cruel or inhumane conduct. In no other case have we defined malice, which is normally considered a mental element, *see* 1 Wayne R. LaFave & Austin W. Scott, SUBSTANTIVE CRIMINAL LAW § 3.4(a) (1986), to demand such heightened physical proof.

The definition ascribed here to the word "maliciously" will eventually compel consideration of whether other statutory offenses having malice as an element (of which there are many) require similar proof of aggravating circumstances. For example, what benchmark are we to use in interpreting W. Va. Code § 61-3-52 (1996), which makes it a felony to "willfully and maliciously" cut down or destroy the timber of another? Will the circuit courts now be compelled to instruct juries that our malicious assault statute, W. Va. Code § 61-2-9 (1978), requires conduct more brutal than the intentional infliction of a simple bullet or knife wound? While the answer to the latter question is obviously no, this decision is bound to engender confusion in the future.

Thus, for the reasons stated, I respectfully dissent.