

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0087

STATE OF NEW HAMPSHIRE V. KEVIN BUTLER

*Mandatory appeal pursuant to Rule 7 from decisions of the
Seventh Circuit Court – District Division – Rochester*

Appellant's Reply Memorandum

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(5 minutes 3JX requested)

ARGUMENT

The State has mischaracterized the risk in this case. It asserts that the trial court could have found that Mr. Butler created a substantial and unjustifiable risk “by putting the husky in the car....” State’s Brief at p. 20. But that is not risky at all. To the contrary, the evidence showed that the dog was fine in the car for a substantial length of time. Rather, the risk to the dog’s health was caused when it *remained* in the car after the rest of the family went inside. It is this risk that the State must prove was overlooked on account of some culpable conduct.

The State also argues that a conviction can stand on proof that Butler understood that the dog could be harmed if it remained in a hot car. State’s Brief at p. 20. This sidesteps the issue of whether Mr. Butler understood that his dog was in his car. The State claims that by holding the State to proof that Mr. Butler had some “serious blameworthiness” in causing his failure to become aware that the dog was in the car, the defense is promoting a standard requiring some “kind of deliberate cruelty” that would be “impossible to prove” because it “is not required in a statute charging negligent animal cruelty.” State’s Brief at p. 23. However, neither of the examples it cites support the contention. *See Commonwealth v. Arcelay*, 190 A.3d 609 (Pa. Super. 2018); *Beachwood v. Pearl*, 2018-Ohio-1635. Both cases are easily distinguishable.

Arcelay involves a claim of negligent cruelty to a dog left in a car on a hot summer day. While the case lacks any in-depth analysis of negligence or criminal negligence—and it is unclear what type of negligence Pennsylvania requires on that type of charge—the facts do not compel any. There, the Defendant had testified that he “checked on the

dogs every fifteen (15) minutes and that they were only in the vehicle for thirty (30) minutes[,]” which the trial court did not find to be credible. *Id.* at 612. The import of that finding is that Mr. Arcelay tacitly admitted that he intentionally left the dog in the car, thereby creating a substantial and unjustifiable risk to the dog’s health by *knowingly leaving it* in the car.

Pearl is similar. It is an opinion lacking any analysis of criminal negligence on account of its defendant not contesting that he knew the dog was in the vehicle. Rather, his defense was that he had created ventilation and placed water in the car that he believed to be sufficient to abate the risk of harm to the dogs. *See Pearl*, 2018-Ohio-1635 at ¶¶ 84–86. The trial court found, however, that there was no water in the car and the ventilation system did not work. *Id.* at ¶¶ 83, 87.

Both cases the State cites involve defendants who clearly understood that their dogs were in a hot car. Both cases present facts that would clearly result in convictions under the statute at issue here. Had that fact been established in this case, this appeal would not be necessary. Rather, the state of the evidence in this case is that Mr. Butler failed to perceive that the dog was in the car until alerted by the police. Thus, a conviction requires evidence that Butler engaged in some “seriously blameworthy” conduct in creating the risk. In other words, there must be some culpable reason that he did not ascertain the dog’s presence in the car. The reason here was absentmindedness and distraction—heartland negligence in tort cases across the state.

Further, whether the delay in discovering the dog was two minutes or two hours does not matter; only the reason for failure to discover. In *Shepard*, it was not the

duration of the car's drifting that required reversal, it was that the drift was "inexplicable." *State v. Shepard*, 158 N.H. 743, 747 (2009). The *Shepard* Court wanted "more"—it wanted a seriously blameworthy explanation for why the car drifted. One can imagine that if the defendant in *xi* had drifted because he was intoxicated, driving fast in the snow, wrestling with a passenger, or the like, the conviction would have been sustained. The same is true here. If Mr. Butler failed to become aware that his son's dog was in the car because he was abusing drugs, running from the police, or engaging in any number of blameworthy activities, the conviction would easily stand. But in a case such as this where the defendant had no notion that the dog was in a position to suffer harm, more is required than merely demonstrating that the dog was in the car. Because nothing more was offered at trial, the conviction must be reversed.

RULE 16(11) STATEMENT

This brief contains 924 words, within the 3,000 word limit.

Respectfully Submitted,

Kevin Butler

By his attorney:

Date: March 1, 2022

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Certificate of Service

I hereby certify that this Reply Brief been forwarded this day to the New Hampshire Department of Justice, who is a registered e-filer, through the NH Electronic Filing Service.

/s/ Jared Bedrick