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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

BRENT ARTHUR PAINTER,

Plaintiff and Appellant,

v.

JOHN C. ELLERY et al.,

Defendants and Appellants.

C068408

(Super. Ct. No. 170959)

Brent Arthur Painter appeals from a judgment denying his petition for writ of administrative mandate. (Code Civ. Proc., § 1094.5.) In his petition, Painter sought to overturn an administrative decision, rendered under Penal Code section 597.1, subdivision (f), that upheld Shasta County's (County or the County) seizure of Painter's 17 Arabian horses in order to protect their health.

On appeal, Painter contends he was entitled to a pre-seizure administrative hearing, rather than a post-seizure one. (Pen.

Code, § 597.1, subds. (f), (g).)¹ He also claims the administrative hearing officer, John C. Ellery, D.V.M.,² was unfair in (a) denying him a continuance, (b) admitting into evidence an investigatory hearsay report from Jen Powers, D.V.M., and photographs, and (c) viewing the seized horses without Painter present. Finally, Painter claims the superior court judge who denied his petition was biased. We find no prejudicial error and shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The informal evidence presented at the postseizure administrative hearing held on February 14, 2008, encompassed (1) oral presentation from County animal control officers involved in the case; (2) a written report from Dr. Powers who evaluated the horses, as well as their housing and feeding, on January 31, 2008; (3) photographs of the premises, feed, water supply, and the horses before their removal; (4) Painter's explanation of events; and (5) Dr. Ellery's (the hearing officer) personal observation of the removed horses on February 14, 2008. (See Gov. Code, § 11513 [governing administrative hearing evidence].) This evidence showed the following.

¹ Undesignated statutory references are to the Penal Code.

² Although Dr. Ellery is named as a respondent in the petition for administrative mandate, it is only in his capacity as a hearing officer for the County, which is the appropriate respondent.

Responding to complaints about the condition of Painter's horses, County animal control officers on January 9, 2008, met with Painter and viewed the horses. The officers observed 11 horses in unsheltered pens, all of which were in "very poor condition" (very thin and emaciated), and eight horses in a pasture, several of which were very thin. There was a foot of snow on the ground, and no visible signs of feed.

Two particular mares "looked the worst" and needed veterinary attention. Painter had approximately 150 bales of hay in the barn. The officers told Painter that the horses needed immediate shelter because of the conditions and suggested sheltering methods, and said they would return.

When animal control officer Ferrara returned on January 30, 2008, to pick up the two mares for their veterinary appointment the next day (the officers had been prevented from returning earlier, around January 24, because of bad weather conditions), Painter told Ferrara he had destroyed them. And, when Painter showed Ferrara their carcasses, Ferrara saw two additional carcasses—a stallion and a mare destroyed weeks to months before—there as well. At this point, Ferrara decided to impound the 17 remaining horses, on the property, and posted an impound notice.

The next day, January 31, Officer Ferrara returned to the property with Dr. Powers. In a written report, Dr. Powers detailed the inadequate shelter (three feet of snow on the ground, including the unsheltered pens; most of the horses

"visibly shaking"); the inadequate feed (mold-saturated; and horses "pawing in the snow, trying to find feed"); and the inadequate water (water containers full of snow). According to Dr. Powers's report, all the penned horses "were emaciated to varying degrees."

On January 31, Officer Ferrara seized the 17 horses, and served a notice of seizure on Painter (this notice form contained a request for postseizure hearing that Painter had to submit within 10 days, which he did).

Because of bad weather and the logistical difficulties involved in removing 17 horses, the horses were not actually removed until February 8, 2008 (the County checked them, however, on February 5).

Painter explained at the administrative hearing that his horses had been subjected to a virus and an improper chemical cocktail from a neighbor years before, and that his hired hand had done an inadequate job recently.

Based on this evidence, the administrative hearing officer, Dr. Ellery, concluded that, given the "general condition of the horses, particularly those in the pens," there "was more than sufficient justification for removing [the horses]" pursuant to the "prompt action" postseizure hearing procedure of section 597.1, subdivision (f).

In a thorough and detailed ruling, the trial court upheld Dr. Ellery's findings and denied Painter's petition for writ of administrative mandate.

DISCUSSION

I. Authority for Postseizure Hearing

Painter contends that the postseizure hearing procedure of section 597.1, subdivision (f) did not apply here because that section requires, as relevant, "a reasonable belief that prompt [seizure or impound] action is required to protect the health or safety of the animal," yet the County allowed eight days to elapse between the seizure posting of January 31, 2008, and the physical removal of the horses on February 8. Given this lengthy interval, Painter claims, due process entitled him to a *preseizure* hearing under section 597.1, subdivision (g). We disagree.

Section 597.1 "is a self-contained regulatory scheme covering treatment of animals." (*Broden v. Marin Humane Society* (1999) 70 Cal.App.4th 1212, 1216 (*Broden*).) Subdivision (f) of section 597.1 provides, as relevant here, that whenever an authorized officer "seizes or impounds an animal based on a reasonable belief that prompt action is required to protect the health or safety of the animal . . . , the officer shall, prior to the commencement of any criminal proceedings authorized by this section, provide the owner . . . of the animal . . . with the opportunity for a postseizure hearing to determine the validity of the seizure or impoundment, or both."

Subdivision (g) of section 597.1, by contrast, states as relevant: "Where the need for immediate seizure is not present and prior to the commencement of any criminal proceedings authorized by this section, the agency shall provide the owner . . . of the animal . . . with the opportunity for a hearing prior to any seizure or impoundment of the animal."

It is true that eight days elapsed between the notice of seizure and the actual removal of the 17 horses. But this delay was occasioned by bad weather and the logistical difficulties of removing 17 horses in snow-covered conditions, rather than by a belief that prompt action was not required to protect the health or safety of the horses. Moreover, the "prompt action" envisioned by section 597.1, subdivision (f) does not always mean prompt "removal." The subdivision speaks in terms of "seizure" or "impound[ment]." Here, the County, based on visits to Painter's property, impounded the horses on the property on January 30, 2008, seized them on January 31, and checked upon them again on February 5, before actually removing them on February 8. The logistical difficulties presented by this case illustrate well why section 597.1, subdivision (f) speaks in terms of impoundment or seizure, rather than removal.

In short, the eight-day interval between seizure and actual removal does not automatically negate, as Painter would have us believe, the County's reasonable belief that prompt action was required to protect the health of the horses. Accordingly, the

postseizure hearing procedure of section 597.1, subdivision (f) applied here.

In a related "argument," Painter asserts the trial court erred in finding (applying an independent judgment test) that the County lawfully seized the 17 horses, "as there is no substantial evidence to support that finding" in light of the eight-day interval discussed above. On at least three procedural grounds, Painter has forfeited this argument. First, Painter does not provide any substantive argument on this point in his briefing. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 701, pp. 769-770.) Second, Painter relies only on the evidence favorable to him—the eight-day interval—and does not set forth, with proper citations to the record, any of the other evidence in this case. (See *Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832.) And, third, Painter has not separately headed this argument in his briefing. (Cal. Rules of Court, rule 8.204(a)(1)(B).)

II. Denial of Continuance

Painter contends the administrative hearing officer, Dr. Ellery, acted unfairly in denying Painter's request at the outset of the hearing for a continuance to obtain legal representation to ensure "everything is done correctly." We disagree.

Painter notes that he was served with the notice of hearing on Tuesday, February 12, 2008, a court holiday, and the hearing was scheduled and held just two days later, on February 14.

Painter claims he had difficulty obtaining an attorney during this brief span between notice and hearing, and therefore should have been given a continuance to secure counsel.

Painter's argument would carry some weight were it not for certain salient facts he conveniently omits. The County impounded Painter's 17 horses on January 30, 2008, posting a notice at his property. On January 31, 2008, the County seized the horses and served a "Notice Seizure of Animal(s)" on Painter. A prominent part of that seizure notice included a request form for Painter to request a postseizure hearing. Pursuant to a stated deadline on that request form (in line with section 597.1, subdivision (f)(1)(D)), Painter had 10 days from the seizure notice to request a hearing, which Painter did using the request form. Under section 597.1, the "postseizure hearing shall be conducted within 48 hours of the request, excluding weekends and holidays." (§ 597.1, subd. (f)(2).)

Consequently, Painter was on notice, at least from January 31, 2008, that the County had seized his horses and that he could request a hearing on that seizure. Painter made his request for continuance at the outset of the administrative hearing. Therefore, he was not misled as to the nature of the hearing, and he could have checked about counsel during the interval between the seizure notice (January 31) and the administrative hearing (February 14). We conclude the administrative hearing officer did not abuse his discretion in agreeing with the County's representatives and implicitly

denying Painter's request for a continuance. (See *Foster v. Civil Service Com.* (1983) 142 Cal.App.3d 444, 448 [abuse of discretion standard of review applies to rulings on continuances].)

We also disagree with Painter's related point that a postseizure hearing under section 597.1 is an administrative hearing with criminal implications and, therefore, "must offer a right to counsel."³ Generally, there is no right to full criminal procedures in a postseizure civil administrative hearing involving property deprivation; Painter did have notice and an opportunity to be heard on the seizure of his 17 horses, thereby affording him due process of law. (See *Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422, 433-434 [71 L.Ed.2d 265, 276-277].) Furthermore, the section 597.1 postseizure administrative hearing concerns the following administrative issues: the validity of the seizure or impoundment, the return of the animals, and the liability for costs regarding the animals' seizure and care; the hearing does not concern an ultimate decision on the issue of abuse or neglect, and the hearing is designed to take place expeditiously—in fact, before any criminal proceedings are commenced. (*Broden, supra*, 70 Cal.App.4th at p. 1216; § 597.1, subds. (f)(1), (2), (4) & (j).)

³ Section 597.1 states that the failure to provide animals with "proper care and attention" may constitute a misdemeanor. (§ 597.1, subd. (a).)

III. Consideration of Hearsay Evidence and Photographs

A. Hearsay Evidence

Painter claims that the hearing officer improperly admitted and considered hearsay evidence—i.e., Dr. Powers's written report—and that he (Painter) was unconstitutionally denied the opportunity to cross-examine Powers.

Government Code section 11513, governing the admission of evidence in administrative hearings, provides as pertinent:

"(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

"(d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

Regarding Painter's point that the hearing officer improperly admitted and considered the hearsay report of Dr. Powers, Painter concedes, in line with Government Code section 11513, that "hearsay evidence *alone* 'is insufficient to satisfy the requirement of due process of law.'" (Quoting and relying upon, in his brief, *Gregory v. State Bd. of Control* (1999)

73 Cal.App.4th 584, 597, italics added.) Here, the hearing officer did not base his findings *solely* on Dr. Powers's report. The hearing officer also considered the oral presentations of the relevant animal control officers, the photographs of the animals and their conditions, Painter's explanations, and the hearing officer's observation of the animals.

As for the issue of confronting Dr. Powers—assuming for the sake of argument that Painter has preserved this issue for appellate review—the hearing officer allowed Painter a full opportunity to dispute Dr. Powers's report. Furthermore, as noted in the previous section of this opinion, Painter does not have a right to full criminal procedures (which would include witness confrontation in person) in a postseizure civil administrative hearing such as this one, so long as he is afforded due process of law, as Painter was here.

B. Photographs

Painter contends that the County's photographs were not properly introduced or catalogued at the administrative hearing, and that the hearing officer declined to admit Painter's photographs into evidence.

Painter has forfeited these points by not making these objections at the administrative hearing. Moreover, Painter's briefing does not contain citations to the record on the substance of these points. (See *Weiss v. Brentwood Sav. & Loan Assn.* (1970) 4 Cal.App.3d 738, 746-747; Cal. Rules of Court, rule 8.204(a)(1)(C).) In any event, the administrative record

includes 28 photographs that Painter submitted at the hearing, as well as the hearing officer's remark to Painter that he (the officer) would "look at any pictures that [Painter] would like."

IV. Hearing Officer's Observation of the Horses

The hearing officer, on the date of the hearing, February 14, 2008, viewed the seized horses without Painter being present.

Assuming for the sake of argument the hearing officer erred in doing so, we would still not reverse. This is because the evidence was sufficient to support the horses' seizure and the hearing officer's findings, without the officer's observation of the horses; and the trial court noted this fact in denying Painter's petition for administrative mandate.

V. Judicial Bias

Finally, Painter claims the superior court judge was biased because the judge who denied his petition for writ of administrative mandate in April 2011, Judge Stephen H. Baker, was the same judge who had presided at Painter's plea bargain hearing of no contest to two misdemeanor counts in January 2011 (arising from this matter).

Painter has forfeited this claim on appeal because he never objected in the trial court to Judge Baker's deciding the petition for writ of administrative mandate. (Code Civ. Proc., § 170.6; see also 9 Witkin, Cal. Procedure, *supra*, Appeal,

§§ 390, 391, pp. 448-450 [appellant may not induce alleged error].)⁴

DISPOSITION

The judgment is affirmed.

BUTZ _____, J.

We concur:

NICHOLSON _____, Acting P. J.

MURRAY _____, J.

⁴ Painter has also forfeited, for "[o]bvious reasons of fairness," his argument, raised for the first time in his reply brief that the County failed to demonstrate exigency or any other basis to excuse it from first obtaining a warrant before seizing Painter's horses. (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 295, fn. 11.)