

Opinion No. 63-107

August 20, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. J. W. Peckumn, Chief Wildlife Enforcement Department of Game and Fish
Santa Fe, New Mexico

QUESTION

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1. Is a State Game Department Conservation Officer invested with authority to enforce the following sections of the New Criminal Code (Chapter 303, Laws 1963):

- A. Improper handling of fire (§ 17-1),
- B. Unlawful Disposal of refuse (§ 8-3, 8-4),
- C. Polluting Water (§ 8-2),
- D. Criminal damage to property (§ 15-1)?

2. May a State Game Department Conservation officer carry sidearms while in the lawful discharge of his duties?

CONCLUSIONS

- 1. See analysis.
- 2. Yes.

OPINION

{*232} ANALYSIS

The general legislative enactment specifying the authority of State Game Department employees to enforce violations of certain {*233} state laws is detailed in § 53-2-22, N.M.S.A., 1953 Compilation. This Section provides in part that:

"The director and every conservation officer of the state, and every sheriff and constable in his respective county, and every member of the state police, are authorized and required to enforce this act and seize any game or fish taken or held in violation of this act, and he shall have full power and authority, and it shall be the duty of every such officer, with or without warrant, to arrest any person whom he knows to be guilty of a

violation thereof; and it shall also be the duty of such officer to open, enter and examine all camps, wagons, cars, tents, packs, boxes, barrels and packages where he has reason to believe any game or fish taken or held in violation of this act is to be found, and to seize the same. Any warrant for the arrest of a person shall be issued upon sworn complaint, the same as in any other criminal cases, and any search warrant shall issue upon a written showing of probable cause supported by oath or affirmation, describing the place or places to be searched or the persons or things to be seized. Conservation officers are authorized, under the direction of the State Game Commission and the director, to establish from time to time as needed for the proper functioning of the game and fish research and management division, checking stations at points along established roads."

In addition to the above general provision, Section 53-2-23 specifies authority for game enforcement officials to seize devices used for violating game and fish laws; Section 53-2-24 authorizes game department officials to sell or dispose of game and fish after seizure; Section 53 - 2- 26 permits game enforcement officials in certain instances to take possession of and use any animals or vehicles used in transporting seized game and fish; Section 53-2-35 imposes the duty upon regular or deputy game wardens to arrest persons hunting or boating while intoxicated or under the influence of narcotic drugs; and Section 53-5-9 authorizes state game wardens to make searches, seizures and arrests of violations of the statutes regulating certain fur-bearing animals.

Examination of the above statutes indicates express authorization by the Legislature to officers of the State Department of Game and Fish to enforce certain enumerated state laws pertaining basically to fishing, hunting, trapping, possessing or transporting game or fish. Express statutory authority is not spelled out by legislative enactment authorizing game and fish conservation officers to enforce other state laws. In the absence of such express authority, the power of game and fish officers to act as official peace officers and to make arrests is generally restricted in nature. As pointed out in 38 C.J.S., "Game" § 9, at pages 9-10:

"The officials charged with the enforcement of the game laws and questions as to their appointment, status, term of office, powers, compensation, and removal, are controlled by the terms of the applicable statutes.

Such committees or officers are usually empowered to arrest violators of the game laws; seize game, or parts thereof, unlawfully taken or possessed; bring actions for damages for trespassers on {*234} lands in the forest reserve, or for the value or possession of game unlawfully taken or possessed; and institute actions or prosecutions for penalties for violations of the game law, and employ counsel to assist in such prosecution. . ."

As indicated above, game officers and employees possess authority as peace officers to enforce those state laws which they are specifically charged by law to enforce. No specific state law invests authority upon state game and fish officers to act as peace

officers for the enforcement of other state laws outside the scope of those statutes detailed above.

Under the Criminal Code, Laws 1963, Chapter 303, Article 17, certain acts involving the improper handling of fire are made a criminal offense; Article 8, makes certain acts, including polluting public water and improper disposal of refuse criminal acts; and Article 15, makes the unauthorized intentional damaging of real or personal property of another a criminal offense. The Criminal code does not contain specific authorization for state game and fish personnel to act as peace officers or make arrests for violations of these statutes.

Article 1-13 of the Criminal Code defines the term "peace officer," when used in the Code, to mean "any public official or public officer vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes".

This section does not broaden the authority of state game and fish officers to enforce state laws, but merely defines the term "peace officer" as used in the Criminal Code.

In respect to the enforcement of other state laws, state game and fish officers stand in the same position as private citizens. As set out in **State v. Barreras**, 64 N.M. 300, 328 P.2d 74; **Territory v. McGinnis**, 10 N.M. 269, 61 P. 208, any person may without a warrant, arrest a felon. Also, it is pointed out in 6 C.J.S., "Arrest," Sec. 8, at page 606:

"It is a general rule, unless changed by statute, that it is both the right and the duty of a private person, **who is present when a felony is committed**, to apprehend the felon without waiting for the issuance of a warrant; and the arrest may be made at any subsequent time as well as at the time of the commission of the felony. . ." (Emphasis supplied)

A duly authorized peace officer may arrest an individual without a warrant when he has reasonable grounds to believe that the person to be arrested has committed a misdemeanor in his presence. **Cave v. Cooley**, 48 N.M. 478, 152 P. 2d. 886; **City of Clovis v. Archie**, 60 N.M. 239, 290 P. 2d. 1075; and, as stated in such case:

"A crime is committed in the presence of an officer when the facts and circumstances occur within the observation, in connection with what, under the circumstances, may be considered as common knowledge, give him probable cause to believe or reasonable grounds to suspect that such is the case."

In the case of misdemeanors, or petty misdemeanors, a private person may make a citizen's arrest without a warrant only for **{*235}** those crimes constituting a breach of the peace and which are committed in his presence. To justify a private arrest by a citizen without a warrant and for offenses not amounting to felonies, it is essential that the offense shall have actually been committed or attempted in the presence of the person making the arrest, and the arrest must be made at the time the offense was

committed or where there is a continuing danger of its renewal. As also stated in 6 C.J.S., "Arrest," § 8, at page 608:

"A private person does not have the right to make an arrest for a misdemeanor without a warrant after the event, or on mere information or suspicion."

Under the Criminal Code, Laws 1963, Chapter 303, § 4-3, the intentional confinement or restraining of another person without his consent and with knowledge that no lawful authority for such confinement or restraint exists, may subject the person confining or restraining another to severe criminal liability.

Thus, we conclude, in answer to your first question, that Game Department Conservation Officers do not possess express statutory standing as "peace officers" to make arrests to enforce the provisions of the Criminal Code; they may, in appropriate situations, make citizens' arrests for felonies committed in their presence or for crimes not amounting to felonies, but which constitute breaches of the peace and which are actually committed in their presence. In our opinion, none of the offenses listed in your first question would, in most instances, constitute breaches of the peace. In the case of criminal damage to property however, (Laws 1961, Chapter 303, § 15-1) if the damage to the property amounts to more than \$ 1,000.00 such would constitute a felony.

We wish to point out that Game Department Conservation officers **would be authorized to act as peace officers** for the enforcement of such criminal statutes, within particular counties **if they were deputized by the county sheriff** to act as deputy sheriffs within such county. Section 15-40-9, N.M.S.A., 1953 Compilation, permits the sheriff to appoint deputies to serve at his pleasure. As stated in Section 15-40-11, N.M.S.A., 1953 Compilation:

"The said deputies are hereby authorized to discharge all the duties which belong to the office of sheriff, that may be placed under their charge by their respective principals, with the same effect as though they were executed by the respective sheriffs."

In your second question you inquire if a State Game Department Conservation Officer may carry sidearms while in the lawful discharge of his duties. The answer to this question is clearly in the affirmative. Laws 1963, Chapter 303, Article 7, Section 7-2 (Criminal Code) specifies that deadly weapons, concealed or as sidearms may be carried by "A peace officer in the lawful discharge of his duties." Under the statutes above cited, State Game Department Conservation Officer is a "peace officer" within the Criminal Code and as specifically defined in Section 1-13 of the Criminal Code.

By: Thomas A. Donnelly

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