Opinion No. 64-86

June 23, 1964

BY: OPINION OF EARL E. HARTLEY, Attorney General Jerry Wertheim, Assistant Attorney General

TO: Mr. Patrick F. Hanagan, District Attorney, Fifth Judicial District, Chaves County Court House, Roswell, New Mexico

QUESTION

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Where a live coon is placed in a shallow barrel which is swiveled to rotate around a pole when pushed, and where hound dogs, made aware of the coon in the barrel, are turned loose with the object of finding the dog which can pull the coon out of the barrel in the shortest time, does this constitute cruelty to animals as defined in Section 40A-18-1, N.M.S.A., 1953 Compilation?

CONCLUSION

Yes.

OPINION

ANALYSIS

Section 40A-18-1, N.M.S.A., 1953 Compilation provides in pertinent part that:

"Cruelty to animals consists of: (A) torturing, tormenting, depriving of necessary sustenance, cruelly beating, mutilating, cruelly killing or overdriving any animal . . ."

Clearly both a hound dog and a coon come within the statutory language "any animal." No legislative intent appears to restrict the sanction of Section 40A-18-1, supra, to any particular class of animals. This is supported by the predecessor statutory provision, Laws 1887, Ch. 1, Section 1 which similarly refers to the generic terms of "animals" and "any animal."

Realizing that one can not determine whether a criminal offense occurs until the specific facts of the particular activity are known, one must, however, conclude that either torture, torment, or mutilation, or all three, will result to the coon and perhaps to the hound dogs in the facts which you describe in your letter. Therefore the activity which you describe appears to constitute a violation of Section 40A-18-1, supra.

The effect of **State v. Buford,** 65 N.M. 51, 331 P. 2d 1110, 82 A.L.R. 2d 787 (1958) on the statutory construction of Section 40-A-18-1, supra, must be considered for a complete answer to your question. A comparison indicates that the predecessor section, Section 40-4-3, N.M.S.A., 1953 Compilation, which the New Mexico Supreme Court was called upon to interpret in **Buford** was substantively the same as Section 40A-18-1, supra. One must conclude that the legislature intended to incorporate the **Buford** interpretation into the new section as it did not choose to change or clarify the statutory section in enacting it anew.

If the Supreme Court of New Mexico found a legislative intent to except all sporting activities from the sanction of the applicable cruelty to animals statute, then the activities which you describe would probably be excepted. Clearly this is not the holding in the **Buford** case. **Buford** determined that the legislative intent was to except cockfighting from the sanction of the cruelty to animals statute. Justice McGhee makes this clear at 57:

"Certainly from early times, cockfighting has been considered a lawful and honorable sport in New Mexico. See Kilpatrick v. State, 1953, 58 N.M. 88, 265 P. 2d 978 (dictum). In 1875 the territorial legislature passed Sunday laws which contained a specific prohibition of cockfighting on Sunday. See Laws of 1875-1876, Ch. 29, § 1. It should be noted that a statute which had the effect of amending this statute was passed on February 17, 1887, five days after the original cruelty to animals statute was approved. See Laws of 1887, ch. 26, now § 40-44-2, N.M.S.A., 1953. Thus, the legislature again recognized that cockfighting was legal on week days, this time after passage of the cruelty to animals provision."

Courts of other states have similarly found a specific exception for cockfighting in interpreting their cruelty to animals statute. However, they do not go further with a broad exception for sporting activities with animals in general. See 82 A.L.R. 2d 794, 821; **State v. Stockton,** 85 Ariz. 153, 333 P. 2d 735 (1958); **Lock v. Falkenstine,** Okla Cr. 380 P. 2d 278 (1963). Therefore, it is the conclusion of this office that the acts which you describe will constitute a violation of Section 40A-18-1, supra.