

Opinion No. 88-43

August 3, 1988

OPINION OF: HAL STRATTON, Attorney General

BY: Sarah Alley, Assistant Attorney General

TO: Honorable Terry L. Pearson, Sr., Division Magistrate Judge III, 920 Municipal Drive, Farmington, NM 87401

QUESTIONS

The New Mexico Department of Game and Fish (the "Department") confiscated an elk from a person charged with violating Section 17-2-7 NMSA, 1978 and the pertinent regulation. The magistrate court dismissed the case, because the game officer failed to identify the defendant at the hearing as the person charged. Is the Department required to return the elk, or the proceeds from the sale of the elk, to that person?

CONCLUSIONS

No.

ANALYSIS

In **State ex rel. Sofeico v. Heffernan**, 41 N.M. 219, 225, 67 P.2d 240, 223 (1936), the New Mexico Supreme Court held that the state holds title to wild animals in trust for the people, and that no individual has title to any such animal until he reduces it to lawful possession. Accordingly, if a hunter fails to tag game in accordance with all laws and regulations, he has failed to gain lawful possession and its ownership remains with the state. In **State ex rel. Visser v. State Fish & Game Commission**, 150 Mont. 525, 528, 437 P.2d 373, 377 (Mont. 1968), the Montana Supreme Court held under laws similar to New Mexico's that one who possesses an incorrectly tagged game animal fails to gain lawful possession, and the ownership of the animal or the proceeds from the sale remain the property of the state.

In New Mexico, a hunter must comply with the State Game Commission's regulations to gain legal possession of game. Section 17-2-7 NMSA 1978 provides, in part:

A. Except as permitted by regulations adopted by the state game commission or as otherwise allowed by law, it is unlawful to:

(1) possess, offer for sale, sell, offer to purchase or purchase in the state all or any part of any game animal, game bird or game fish taken, capture or killed in the state....

(Emphasis added.)

Game and Fish Department Regulation 612, Chapter 5, Article 1 requires hunters to tag any game after killing. Section A provides:

1. Any license that permits the taking of turkey or any game mammal except squirrel, pika or marmot, shall have attached thereto a tag bearing the name of the species for which the license is issued.
2. Such tags, when attached to the carcass of the turkey or pertinent mammal, shall authorize possession and storage for a period designated on the tag.

Section B provides, in part:

1. Immediately after killing any turkey or game mammal except squirrel, pika or marmot, the licensee killing the game shall detach the proper tag from his license and sign and date the tag. He shall attach the tag to the carcass of the turkey or mammal, and the tag shall remain attached to the carcass while the carcass is in any vehicle, while it is left unattended in the field, or while it is in camp or at a residence or other place of storage. The tag may be detached from the carcass while the carcass is being removed from the field to a camp or vehicle. In situations where numerous trips are required to remove the carcass from the field, the tag shall remain attached to that portion of the carcass left unattended in the field.

In addition, Game and Fish Department Regulation 645, Chapter 5, Article 2(A), entitled "Proof of Legal Game," provides:

The antlers of any deer or elk and the horns of any antelope, bighorn sheep, Barbary sheep, oryx or ibex taken shall remain attached to the skull and shall accompany the carcass to the place where it will be consumed or placed in cold storage. The scalp and both ears of females or immature males of those species shall accompany the carcass in like manner.

(Emphasis added.)

The legislature has provided three independent sanctions for failure to comply with these regulations. First, a hunter is subject to a criminal charge. Subsection C of Section 17-2-7, quoted above, provides: "Violation of this section is a misdemeanor and shall be punished as provided in Section 17-2-10 NMSA 1978." Section 17-2-10 provides: "Any person violating any of the provisions of Chapter 17 NMSA 1978 or any regulations adopted by the state game commission which relate to the manner that game animals ... may be ... possessed" may be imprisoned for up to six months and, depending on the type of game involved, fined up to \$1,000.

Second, unlawfully possessed game may be seized. Section 17-2-19A NMSA 1978 provides, in part: "The director, each conservation officer, each sheriff in his respective county and each member of the New Mexico State Police shall seize any game or fish held in violation of this chapter...." Regulation 612, Chapter 5, Article 1, Section C

provides: "1. Any conservation officer or other officer authorized to enforce the game laws and regulations shall seize the carcasses of any turkeys or game mammals that are improperly tagged or are not tagged at times required by the preceding section." (Emphasis added.) Also, Section 17-2-21 NMSA 1978 provides:

All game and fish seized under the game laws shall without unnecessary delay, be sold by the officers making such seizure, or by the state warden [director of the department of game and fish], except when such sale is impracticable or likely to incur expenses exceeding the proceeds, in which case the same shall be donated to some charitable institution or needy person not concerned in the unlawful killing, or possession thereof.... The proceeds from such sale, after deducting the cost of seizure and sale shall, if made by the state warden [director] or any deputy [conservation officer] under salary, be paid into the game protection fund, but if made by a deputy warden [conservation officer] not under salary, or any other officer, shall be paid one-half to the officer making such seizure.

Section 17-2-21 thus specifies that the entire sale proceeds will be paid into the game protection fund, unless an officer who is not a salaried game warden makes the confiscation. This section does not provide that elk proceeds shall be paid to the defendant.

Third, the Department may bring a civil action against a hunter for unlawful possession of game. Section 17-2-26A NMSA 1978 authorizes the director of the Department to bring an action on behalf of the state against a hunter for damages.

Thus, sanctions are independent. Section 17-2-26C provides:

The pendency or determination of an action for damages or payment of a judgment or the pendency or determination of a criminal prosecution for the same taking, wounding, killing or possession, is not a bar to the other, nor does either affect the right of seizure under any other provision of the laws relating to game and fish.

Section 17-2-22 NMSA 1978 establishes the only exception:

A. For the purpose of avoiding waste, game or fish confiscated and held as evidence in any prosecution for violation of the game laws, if fit for human consumption, shall be sold by the conservation officer or other officer having jurisdiction in the prosecution as soon as possible after the filing of any appeal from the decision of the court to any higher court.

B. The evidence shall be sold for the highest cash price offered and the proceeds of the sale forwarded to the main office of the department of game and fish at Santa Fe to be deposited in the game protection fund. A copy of the receipt of sale shall be delivered to the court and shall be attached to the papers forwarded to the higher court on appeal.

C. If the higher court finds the defendant to be not guilty of the charge he shall be reimbursed within ten days after such decision by the department of game and fish for the full amount of the proceeds from the sale of evidence.

(Emphasis added.) This section provides for reimbursement of sale proceeds only after a higher court reverses a conviction.

It is our opinion that under this trifurcated statutory scheme, a magistrate court's dismissal of the misdemeanor charge does not affect the Department's right to keep the proceeds from the elk sale. The state holds title to all elk in trust for its citizens until a hunter reduces one to lawful possession, including tagging it in accordance with Regulation 612. The Legislature has authorized officials to seize elk that they believe are not properly tagged, regardless of the result of any criminal prosecution. Section 17-2-26C. The only exception is where higher court reverses the conviction on appeal. Section 17-2-22C. We recognize that these statutory sections produce arguably inconsistent and inadequate results: if an appellate court reverses a conviction on the ground that the game warden failed to identify the defendant properly, the defendant is entitled to the sale proceeds; but if the magistrate court throws out the charge for the same reason, the Department keeps it. We do not address whether the elk or proceeds should be returned, or whether it could be the subject of an independent civil action brought by the hunter. Rather, we conclude only that the dismissal of the criminal charge does not mandate it. The Legislature was within its rights to that choice, and we must respect it.

ATTORNEY GENERAL

HAL STRATTON Attorney General