

COUNTY OF GAINES



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RECORDS DIVISION

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May 12, 2006

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OPINION COMMITTEE

RQ-0488-GA

Hon. Greg Abbott,
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-44805-06

I.D. # 44805

RE: OPINION REQUEST

Dear Sir:

I am seeking an Attorney General's Opinion regarding the applicability of Chapter 12, Subchapter D, Parks and Wildlife Code, to an offense committed under Section 62.011(c) of the Parks and Wildlife Code.

APPLICABLE LAW:

Parks and Wildlife Code Section 62.011(c) provides that "it is an offense if a person while hunting kills or wounds a ... white-tailed deer and ... intentionally, knowingly, or recklessly or with criminal negligence fails to keep the edible parts of the animal in an edible condition.

Parks and Wildlife Code Chapter 12, Subchapter D addresses the "RECOVERY BY THE STATE FOR VALUE OF FISH, SHELLFISH, REPTILE, AMPHIBIAN, BIRD, OR ANIMAL." Section 12.301, entitled, "Liability for Value of Fish, Shellfish, Reptile, Amphibian, Bird, or Animal," relates that "A person who kills, catches, takes, possesses, or injures any ... animals in violation of this code or a proclamation or regulation adopted under this code is liable to the state for the value of each ... animal unlawfully killed, caught, taken, possessed, or injured.

FACTS:

On February 21, 2006, John S. Martens was charged with the offense of Waste of Game, which had allegedly been committed on December 21, 2005. The gist of the charge is that Mr. Martens failed to harvest the meat from a white-tailed deer which had

otherwise been taken in compliance with all applicable law. This charge resulted from an investigation by Game Warden Steve Urben. A copy of a probable cause affidavit from Mr. Urben, detailing the course of the investigation, is attached hereto for reference.

POSITION OF GAINES COUNTY:

For the purpose of this Opinion Request, it is the position of Gaines County that Parks and Wildlife Code Chapter 12, Subchapter D does not apply to an offense committed under Parks and Wildlife Code Section 62.011(c).

ARGUMENT:

The primary question at issue is whether a person who fails to preserve the edible meat from an otherwise legally taken animal is liable to pay restitution to the state. The answer to that question depends on whether the person has violated Subchapter D, which provides for recovery by the state of the value of animals unlawfully killed, caught, taken, possessed or injured.

In the case at hand, it is undisputed that Mr. Martens killed a white-tailed deer. There is no intimation of any illegal catching, taking, or injuring of an animal. Regarding the killing of the deer, there is no evidence to support any illegality. Apparently, Mr. Martens acted with the knowledge and permission of the landowner, using a weapon and hunting techniques that were lawful. In fact, the key piece of evidence leading to the charge against Mr. Martens was the fact that a portion of his properly issued deer tag was found attached to the deer's carcass.

Having disposed of the issues of illegal killing, catching, taking, and injuring, the issue remaining is whether the deer was unlawfully possessed. The Parks and Wildlife Code does not define "possession" in regard to a legally taken white-tailed deer. The Penal Code defines "possession" as "actual care, custody, control, or management." Dictionary definitions generally relate that "possession" means the actual holding or control over an item of property (See, e.g., American Heritage Dictionary, fourth edition).

In our fact situation, the deer in question was found in a pasture behind Mr. Martens' house. Along with the deer in question were two other deer carcasses from which the meat had been taken. When initially questioned by Game Warden Urben, Mr. Martens appeared to have no knowledge of the matter. During the course of the interview however, Marten later recalled the deer without prompting from the game warden. Mr. Martens confessed to killing the deer on December 21st. Game Warden Urben questioned

Mr. Martens on January 4th, some two weeks after the deer was killed. The fact that the deer was found with two other cleaned carcasses in a field, two weeks after it was shot, would indicate that Mr. Martens had in fact abandoned whatever possession of the animal he had previously exercised. If the finder of fact should decide that Mr. Martens did have possession of the deer at the time of his charged offense, for Subchapter D purposes the issue would become whether such possession resulted from a violation of law. As previously discussed, this does not appear that this is the case.

While the Attorney General cannot be expected to act as a finder of fact in criminal prosecutions, the fact scenario is illustrative. In Chapter 12, Subchapter D recovery cases, the respondent will, by definition, have committed a criminal violation of our hunting laws. Typically, these violations will include poaching activities. They would not typically involve the type of violation committed by Mr. Martens, unless coupled with a poaching violation. In other words, the issue of possession would typically be a moot point.

What ultimately needs to be clarified is whether the purpose of Chapter 12, Subchapter D is to discourage the acquisition (possession) of game by illegal means; to discourage the commission of undesirable acts involving legally acquired game; or to discourage both. It would appear that only the first category involves a legitimate governmental interest. Certainly the state has an interest in controlling the manner and means of acquiring game. There are environment concerns relating to the controlling of numbers as well as protection of species from overhunting. There are the economic interests of landowners and others involved in the hunting industry. There is the aspect of assuring revenues sufficient to pay for hunting programs.

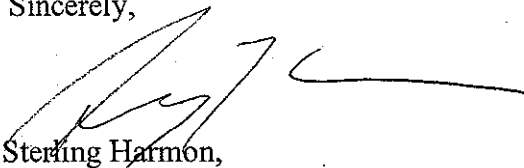
What then is the legitimate state interest in collecting restitution from those offenders who acquire game legally, yet offend by using (or failing to use) that legally acquired game animal in accordance with state law? The individual has not trespassed nor poached, so the number of game animals has not been adversely affected. Applicable fees and licenses have been paid, so state coffers have not suffered. From this analysis, it seems that the only reasonable purpose behind Chapter 12, Subchapter D is to discourage the act of illegally acquiring game, not to punish acts or omissions committed with legally acquired game.

CONCLUSION:

It appears that the recovery provisions of Parks and Wildlife Code Chapter 12, Subchapter D cannot legitimately apply to an offense committed under Parks and Wildlife Code Section 62.011. There is no legitimate state interest served by imposing such civil penalties on those offenders.

I thank you for your attention to this request.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sterling Harmon', with a long horizontal flourish extending to the right.

Sterling Harmon,
Gaines County Attorney

PROBABLE CAUSE AFFIDAVIT

THE STATE OF TEXAS
COUNTY OF GAINES

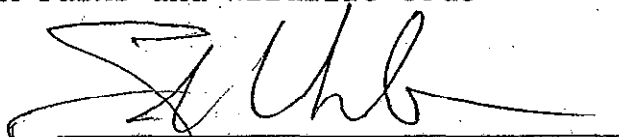
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BEFORE ME, the undersigned authority, on this 21st day of February, 2006, personally appeared STEVE URBEN, who after being duly sworn upon oath deposes and states:

I.

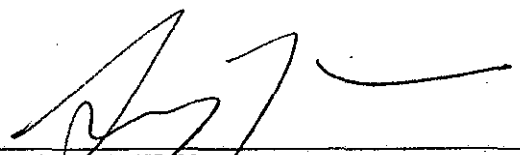
My name is STEVE URBEN. I am a licensed Texas peace officer, currently serving as a Game Warden in Gaines County, Texas. I am over 18 years of age, a resident of Gaines County, Texas, and I am fully able and competent to make this affidavit. On January 4, 2006, I was contacted by Mr. Bob Froelich of Gaines County, Texas. Mr. Froelich advised that he and some quail hunters he was guiding the day before had found a suspicious white-tail deer carcass. I met with Mr. Froelich around 5:00 p.m. on CR 306. He led me to the carcass, which was of an 8-point white-tail buck. I noted the location by GPS coordinates of the carcass in my report. This location is entirely within Gaines County, Texas. In examining the carcass, I observed that the deer had been gutted, but no meat had been taken. The animal was rotting and maggot-infested. This appeared to be a clear violation of Parks and Wildlife Code §62.011, which prohibits waste of game. On closer inspection, I found a portion of a deer tag attached to one of the deer's antlers. The tag had part of a name, "John S." Two other deer carcasses were also at the scene, but all the meat had been removed from these animals. After investigating the scene, I noticed a residence about 200 yards away. I approached the house to see if anyone there might know something about the matter. On reaching the house, I was met by two men in the garage area. I advised the men that I needed to speak with John. One of the men advised that he was John. On questioning, I learned that this man was JOHN SCHMITT MARTENS. I asked MARTENS if he knew anything about the dead deer near his house, and he said "No." Since MARTENS' name was consistent with the information from the partial tag, and MARTENS' residence was in close proximity with the carcass, I asked MARTENS to accompany me to my truck so I could get more information. During this conversation, MARTENS said "Oh, you mean those deer over there?" I told him, "Yes, what do you know about them?" At this point, MARTENS advised that he had shot the deer and the meat had gone bad. He had dumped the carcass where I had found it. I then advised MARTENS of his rights and asked if he would be willing to give a written statement. MARTENS agreed to make a statement after waiving his rights in writing. In MARTENS' statement, he confessed to shooting the deer near Sheffield on about December 21st. He field-dressed the deer

after he had killed it, but did not make any attempt to take the meat at that time. MARTENS confessed to transporting the deer back to his home, but he did not make any attempt to harvest the meat until December 23rd. At that time, he discovered that the meat had gone bad, and he dumped the carcass. I feel that MARTENS failure to harvest the meat was negligent. Attached hereto and incorporated herein by reference are copies of the investigative report I prepared on this matter, along with MARTENS' written waiver of rights and voluntary confession statement. Based on the foregoing, I believe that probable cause exists for the issuance of a warrant of arrest for JOHN SCHMITT MARTENS for the offense of WASTE OF GAMES, a Class A Parks and Wildlife Code Misdemeanor.


Affiant

Before me, the undersigned authority, on this day personally appeared STEVE URBEN, known to me to be the person whose name is subscribed to the foregoing Probable Cause Affidavit and, after being duly sworn by me, duly stated that he signed the same and the statements herein are true and correct.

Subscribed and sworn to before me on this the 21st day of February, 2006.


STERLING HARMON
Gaines County Attorney