

IN THE SUPREME COURT OF OHIO

State of Ohio, : S.Ct. Case No. 08-0536
 : C.A. Case Nos. E-07-049
 Appellee : E-07-050
 : E-07-051
v. :
William Coburn :
Todd Parkison :
Marvin Coburn :
Appellants :
:

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APPEAL FROM THE SIXTH APPELLATE DISTRICT
ERIE COUNTY, OHIO

MERIT BRIEF OF APPELLEE

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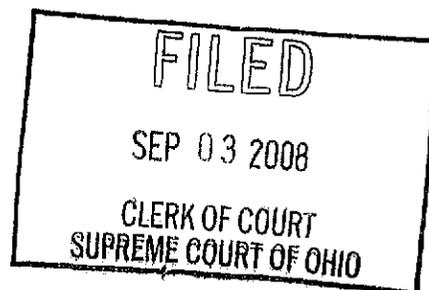


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STATEMENT OF THE CASE AND FACTS

On September 1, 2006, appellants, William Coburn (hereinafter "William"), Marvin Coburn (hereinafter "Marvin"), and Todd Parkinson (hereinafter "Todd"), were hunting mourning doves on William's property. Wildlife Officer Jared Abele (hereinafter "Abele") observed appellants hunting and identified William. Abele observed William walk to his residence while Marvin and Todd continued hunting. Abele then observed William enter a SUV and drive back to where Marvin and Todd were hunting. Abele approached appellants to check for their hunting licenses and bag limit compliance. (Abele's Law Enforcement Statement filed on October 23, 2006)

During contact with appellants, Abele noticed wheat seed scattered in piles along the ground in plain view. Abele left the property. A short time later, Abele returned to the property with Agent Jay Harnish (hereinafter "Harnish"). Harnish and Abele discovered more wheat seed located near the hunting location. Appellees were subsequently charged with hunting migratory game birds on or over a baited area. (Abele's Law Enforcement Statement filed on October 23, 2006)

Upon motion of appellants, the trial court dismissed the charges as evidenced by entries filed July 20, 2007. Appellee filed a notice of appeal in the Sixth District Court of Appeals on the judgment entries filed July 20, 2007. The Sixth District Court

of Appeals reversed the decision of the trial court holding that although wildlife officers do not have "unfettered" access to private property, Ohio Revised Code Ann. §1531.14 (hereinafter "O.R.C.") gives a wildlife officer the authority to enter private property to check for hunting licenses and bag limits. State v. Coburn, 2008 WL 303138, 2008-Ohio-371, ¶15 (Ohio App. 6 Dist.).

Appellant filed a notice of Appeal in the Ohio Supreme Court on the judgment entry from the Sixth District Court of Appeals filed February 1, 2008.

ARGUMENT

PROPOSITION OF LAW NUMBER ONE: WHERE THE CHARGING DOCUMENT PROVIDES SUFFICIENT ALLEGATIONS OF THE OFFENSE CHARGED, THE TRIAL COURT ABUSES ITS DISCRETION IN DISMISSING THE CHARGING DOCUMENT UNDER A MOTION TO DISMISS, WHEN THE TRIAL COURT EXAMINED THE EVIDENCE BEYOND THE COMPLAINT.

In State v. Finn, 2008 WL 3582802, 2008-Ohio-4126 *1 (Ohio App. 6 Dist.), the court explained the judicial process as to a motion to dismiss a compliant by stating that:

"[A] motion to dismiss charges in an indictment tests the sufficiency of the indictment, without regard to the quantity or quality of evidence that may be produced by either by the state or the defendant. The proper determination***[is] whether the allegations contained in the indictment make out offenses under Ohio criminal law." State v. O'Neal (1996), 114 Ohio App.3d 335, 336. "The Ohio Rules of Criminal Procedure***do not allow for 'summary judgment' on an indictment before trial." State v. Tipton (1999), 135 Ohio App.3d 227, 229. Therefore, "[i]f a motion to dismiss requires examination of evidence beyond the face of the complaint, it must be presented as a motion for acquittal under Crim.R. 29 at the close of the state's case." State v. Shaw (2003), 10th Dist. No. 02AP-1036, 2003-Ohio-2139, ¶ 13. In Shaw,

the court concluded that a trial court ruling on a motion to dismiss is confined to the "face" of the complaint. Id. at ¶ 14.

In the case at bar, appellant asked the trial court to look beyond the face of the complaint when the motion to dismiss was filed. Thus, the trial court's actions were unreasonable, arbitrary, and unconscionable, when the trial court examined the evidence beyond the complaint. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219. Appellant's proper remedy was to file a motion to suppress or to file a motion under Rule 29 of the Ohio Rules of Criminal Procedure (hereinafter "Crim. R.") for an acquittal at the close of appellee's case. Thus, the trial court should have properly denied appellant's motion to dismiss because there was no demonstration that the complaints filed did not properly set forth the offenses charged.

PROPOSITION OF LAW NUMBER TWO: AN OWNER OF PROPERTY AND THE OWNER'S CHILDREN OR THE TENANT OF THE PROPERTY AND THE TENANT'S CHILDREN MAY HUNT ON THE PROPERTY WITHOUT A HUNTING LICENSE. Ohio Revised Code Ann. §1533.10.

PROPOSITION OF LAW NUMBER THREE: ANY INVITED GUEST HUNTING ON THE LAND OF ANOTHER, REGARDLESS OF WHETHER THE INVITED GUEST IS ACCOMPANIED BY THE OWNER OR TENANT, IS REQUIRED TO HAVE A HUNTING LICENSE. Ohio Revised Code Ann. §§1533.10 AND 1533.14.

Ohio Rev. Code Ann. §1533.10 (hereinafter "O.R.C.") provides that "no person shall hunt any wild bird...without a hunting license." However, there are exceptions to this rule. Those exceptions include the owners or tenants of the land, their children, and grandchildren under the age of eighteen. O.R.C.

§1533.10 does **not** extend any exception to the owner's father or "guests." Further, anyone hunting, except the owner or tenant of the land, shall carry a hunting license on their person and exhibit the license to any wildlife officer, constable, sheriff, deputy sheriff, police officer, to the owner or person in lawful control of the land upon which the person is hunting or trapping. O.R.C. §1533.14

Contrary to appellants' representations, the issue as to whether William may hunt on his own land without a license was never an issue in this case. In fact, the owner of the land was never cited for hunting without a license. Thus, this is not an issue before this Court. In contrast, nowhere in the proviso O.R.C. §1533.10 does it state, nor can it be interpreted, that if one of the hunters is known by the officer to be the owner of the property, then the other hunters accompanying the owner are exempt from carrying their license. O.R.C. §1533.14 provides that one must carry their hunting license *while hunting on the lands of another* and must exhibit the same upon request to a wildlife officer. This provision is clear and unequivocal as to the intent of the legislature. Therefore, it was within Abele's statutory authority to request and check for hunting licenses of the land owner's guests. Moreover, even though, the owner of property is not required to have a hunting license, officers may still enter the owner's land to check the owner for bag limits. O.R.C. 1531.13

Thus, the owner of property does not have unfettered hunting rights.

PROPOSITION OF LAW NUMBER FOUR: UNDER THE OHIO AND FEDERAL CONSTITUTION, A WILDLIFE OFFICER MAY ENTER PRIVATE LANDS TO CHECK FOR HUNTING LICENSES AND BAG LIMITS WITHOUT FIRST ESTABLISHING "GOOD CAUSE". Ohio Rev. Code Ann. §1531.14

A. THE STATE HAS A DUTY TO REGULATE THE HUNTING AND FISHING OF WILD GAME WITHIN THE STATE BECAUSE WILD GAME BELONGS TO THE PEOPLE AND IS NOT SUBJECT TO PRIVATE OWNERSHIP.

It has been held that officers have the right to enter private property in the exercise of their official duties. See State v. Israel, No. C961006, 1997 WL 598396, (Ohio App. 1 Dist.). See also, State v. Huff, No. 98CA23, 1999 WL 402222, (Ohio App. 4 Dist.); State v. Namey, No. 99A0003, 2000 WL 1487638, (Ohio App. 11 Dist.).

In People v. Perez (1996), 51 Cal.App.4th 1168, 59 Cal.Rptr.2d 596, the court upheld the check-point screening of hunters. The California Court, in reaching its decision, amply described the special nature of hunting and the significance of protecting wildlife. The court stated that:

In analyzing the reasonableness of the search (inspection) and seizure (detention) of hunters, the special nature of hunting is significant. Indeed, the issue of the constitutionality of warrantless inspections by game wardens was anticipated by Justice Blackmun in his concurring opinion in Delaware v. Prouse (1979) 440 U.S. 648,....In Prouse, the court found roving patrols to check the licenses and registration of motorists were unconstitutional. Justice Blackmun stated: "I would not regard the present case as a precedent that throws any constitutional shadow upon the necessarily somewhat individualized and perhaps largely random examinations by game wardens in the performance of their duties." (*Id.* at p. 664,...(conc. opn. of Blackmun, J.).)

As explained above, hunting is a highly regulated activity. "The wild game within a state belongs to the people in their collective, sovereign capacity; it is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good." (Ex parte Maier (1894) 103 Cal. 476, 483, 37 P. 402.) The high degree of regulation over the privilege of hunting, in turn, reduces a hunter's reasonable expectation of privacy. (Betchart v. Department of Fish & Game, [(1984)]...158 Cal.App.3d [1104] at p. 1110...)

Under Fish and Game Code section 2006, officers have authority to check a hunter's rifles and shotguns to determine if they are loaded. (People v. Johnson (1980) 108 Cal.App.3d 175, 179, 166 Cal.Rptr. 419.) Game wardens may inspect receptacles, except the hunter's clothing, where wildlife may be stored. (Fish & Game Code, § 1006.) Fish and Game Code section 2012 requires hunters to exhibit on demand licenses, tags, and the wildlife taken. Government officials may exercise such powers as are necessary to carry out the powers granted by statute or that may be fairly implied from the statute. (In re Cathey (1961) 55 Cal.2d 679, 689, 12 Cal.Rptr. 762, 361 P.2d 426.) To this end, wardens may, without a warrant, enter and patrol private open lands where hunting occurs to enforce Fish and Game laws (citation omitted); search a restaurant to inspect commercially caught fish (citation omitted); board a vessel to inspect the fishing haul (citation omitted); and inspect containers known to be used to hold game (citation omitted).

Perez 51 Cal.App.4th at 1177-1178, 59 Cal.Rptr.2d at 601.

In Betchart v. Department of Fish & Game (1984), 158 Cal.App.3d 1104, 205 Cal.Rptr. 135, the court held that the warrantless entry by agents of the Department of Fish & Game constituted a minimal intrusion into the private use of property because the state has a duty to preserve and protect wildlife.

Since wildlife is publicly owned and not held by owners of private land where wildlife is present, government agents can enter and patrol private lands to enforce the fish and game laws.

In the case at bar, the State of Ohio has a duty, as was recognized in the State of California, to protect wild game, which game belongs to the people in their collective, sovereign capacity. This game is not the subject of private ownership. This duty to protect has been recognized by the Ohio legislature with the passage of the regulations controlling hunting and fishing. **Accord State v. Ackers**, Case No. 445,446, 1987 WL 16563 (Ohio App. 4 Dist., Sept. 8, 1987); **State v. Lucas**, Case No. 1169, 1984 WL 3535 (Ohio App. 4 Dist., July 23, 1984).

B. OHIO STATUTES WHICH RELATE TO THE SAME SUBJECT ARE IN PARI MATERIA, AND SHOULD BE READ TOGETHER TO ASCERTAIN AND EFFECTUATE THE LEGISLATIVE INTENT. HOWEVER, WHEN THE PROVISIONS OF O.R.C. §§1531.13, 1531.14, 1533.10 AND 1533.14 CAN STAND ALONE BECAUSE THE MEANING OF EACH STATUTE IS UNAMBIGUOUS, THEN EACH STATUTE SHOULD BE APPLIED AS WRITTEN AND IT IS NOT NECESSARY THAT THE STATUTES BE READ TOGETHER IN PARI MATERIA.

O.R.C. §§1531.13, 1531.14, 1533.10, and 1533.14 can be read in harmony with each other in defining the role and authority of wildlife officers in the protection of wildlife.¹ However, when a statute is unambiguous, then the statute can stand alone in its interpretation and application.

O.R.C. §1.47 provides that:

¹ Appellant's did not argue the relevance of O.R.C. §1533.10 in the trial court or on appeal.

In enacting a statute, it is presumed that:

- (A) Compliance with the constitutions of the state and of the United States is intended;
- (B) The entire statute is intended to be effective;
- (C) A just and reasonable result is intended;
- (D) A result feasible of execution is intended.

When interpreting the primary goal of a statute, the court is to ascertain and give effect to the legislature's intent in enacting the statute. State v. Lowe (2007), 112 Ohio St.3d 507, ¶9, citing Brooks v. Ohio State Univ. (1996), 111 Ohio App.3d 342, 349. The court must first look to the statute's plain language to determine the legislative intent. Id., citing State ex rel. Burrows v. Indus. Comm. (1997), 78 Ohio St.3d 78, 81. When the statute's meaning is unambiguous, the court must apply the statute as written. Id., citing Portage Cty. Bd. of Commrs. v. Akron (2006), 109 Ohio St.3d 106, ¶52, citing State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn. (1996), 74 Ohio St.3d 543. Thus, the general assembly is not presumed to enact laws producing unreasonable or absurd consequences. State v. Parks (1983), 13 Ohio App. 3d 85. "[I]t is the duty of courts, if language of statute fairly permits, to construe statute so as to avoid such an interpretation." Id. at 86. See, also Canton v. Imperial Bowling Lanes, Inc. (1968), 16 Ohio St.2d 47, paragraph four of the syllabus; State, ex rel. Cooper v. Savord (1950), 153 Ohio St. 367, paragraph one of the syllabus. "[C]ourts must apply a rule of reason in their

interpretation of this state's criminal statutes. State v. Jacobellis (1962), 173 Ohio St. 22..., paragraph three of the syllabus, reversed. on other grounds (1964), 378 U.S. 184....Indeed, under the Revised Code, it is presumed that a just and reasonable result is intended in the enactment of a statute. R.C. 1.47(C)" Parks, 13 Ohio App.3d at 86.

Another aspect of statutory interpretation in reviewing statutes is that statutory provisions must be construed together as the Ohio Rev. Code is an interrelated body of law. State v. Moaning (1996), 76 Ohio St. 3d 126. "Statutes which relate to the same subject are *in pari materia*. Although enacted at different times and making no reference to each other, they should be read together to ascertain and effectuate the legislative intent. State ex rel. Pratt v. Weygandt (1956), 164 Ohio St. 463, 466..." Moaning, 76 Ohio St.3d 126, 128. "Moreover, the mere fact that sections are found in different chapters of the Revised Code does not prevent them from being *in pari materia*." State v. Lofties (1991), 74 Ohio App. 3d 824, 827.

D. IN READING O.R.C. §§1531.13, 1531.14, 1533.10 AND 1522.14, THE STATUTES ARE UNAMBIGUOUS AND CAN STAND ALONE. ASSUMING ARGUENDO THAT THE STATUTES MUST BE READ IN PARI MATERIA, GOOD CAUSE AND/OR PROBABLE CAUSE IS NOT REQUIREED FOR A WILDLIFE OFFICER TO ENTER UPON PRIVATE PROERTY IN THE EXERCISE OF HIS OFFICIAL DUTIES TO CHECK HUNTING LICENSES AND BAG LIMITS. Division of Wildlife v. Freed (1995), 101 Ohio App.3d 709, 711.

In the case at bar, appellants are clearly misconstruing

O.R.C. §§1531.13, 1531.14, 1533.10, and 1533.14.

O.R.C. §1533.10 prohibits hunting without a license, and O.R.C. §1533.14 requires the hunter to carry and exhibit a hunting license while hunting. Thus, O.R.C. §§1533.10 and 1533.14 are unambiguous and do not need to be read in pari material.

O.R.C. § 1531.14, **Right to enter privately owned lands**, provides that:

Any person regularly employed by the division of wildlife for the purpose of conducting research and investigation of game or fish or their habitat conditions or engaged in restocking game or fish or in any type of work involved in or incident to game or fish restoration projects or in the enforcement of laws or division rules relating to game or fish, or in the enforcement of section 1531.29 or 3767.32 of the Revised Code, other laws prohibiting the dumping of refuse in or along streams, or watercraft laws, while in the normal, lawful, and peaceful pursuit of such investigation, work, or enforcement may enter upon, cross over, be upon, and remain upon privately owned lands for such purposes and shall not be subject to arrest for trespass while so engaged or for such cause thereafter.

Any such person, upon demand, shall identify himself to the owner, tenant, or manager of such privately owned lands by means of a badge or card bearing his name and certifying his employment by the division.

Thus, by the literal reading of the statute, an officer need not establish good cause to enter the property.²

O.R.C. §1531.13 specifically provides that a wildlife officer may, *at any time or place*, except within a building, check for bag

² Appellants argue that appellee did not raise O.R.C. §1531.14 in the trial court; however, a trial court is presumed to know the applicable law and apply it accordingly. State v. Eley (1996), 77 Ohio St.3d 174.

limits of wild animals. State v. Ohio v. Apthorpe, No. 1235, 1983 WL 6237, (Ohio App. 11 Dist. April 15, 1983). Further, a wildlife officer may **search any place** when the officer has good cause. O.R.C. §1531.13. A wildlife officer also has the statutory authority to enter private property, and remain on the property, to inquire of possible gaming law violations. O.R.C. §1531.14. **See also, State v. Davis**, 2004 WL 958051, 2004-Ohio-2255, (Ohio App. 5 Dist.). Even though the statutes can stand alone, by reading the statutes together, under O.R.C. §1531.14 "a wildlife officer may enter and cross lands and may traverse the streams in the State of Ohio in pursuit of duties. Under R.C. 1531.13, where he believes a law is being violated he may enter lands and, vested with the authority of law enforcement officers, make an arrest. Under the first statute the wildlife officer is merely authorized to enter lands in order to do his job without being deemed a trespasser, but once he has cause to believe a crime is being committed his entry is as a law enforcement officer. As any law enforcement officer he may gather evidence presented to him...***" Lucas, Case No. 1169 *2.

In the case at bar, appellants argue that, pursuant to O.R.C. §1531.13, Abele was required to have had good cause to enter upon Williams' property. This argument is without merit. Although O.R.C. §1531.13 states that in order for an officer to conduct a "search" of any place, he must have good cause, in the case at bar, Abele

was not on the property to conduct a search. Abele was on the property to check hunting licenses and bag limit compliance. Consequently, Abele noticed wheat seed scattered in piles along the ground in plain view. (Abelle's Law Enforcement Statement filed on October 23, 2006)

O.R.C. §1533.14 requires that "[e]very person, while hunting on the lands of another, shall carry the persons hunting license on the persons own self and exhibit it to any wildlife officer, constable, sheriff, deputy sheriff, or police officer, to the owner or person in lawful control of the land upon which the person is hunting or trapping, or to any other person. Failure to so carry or exhibit such a license constitutes an offense under this section." (Emphasis added)³ A wildlife officer does not need probable cause to ask a hunter to exhibit his hunting license. Division of Wildlife v. Freed (1995), 101 Ohio App.3d 709, 711.

In Freed, defendant and two others were hunting on private property when they were approached by officers checking hunting licenses. Defendant was with the owner of the property. After determining the licenses were valid, officers left. Subsequently, it was determined that the property was owned by someone else and defendant was charged and convicted of hunting on lands of another without permission. On appeal, defendant argued the officer did not

³ Appellants are misstating O.R.C. §1533.14 by adding the word "or" before "to the owner". In so doing, appellants change the meaning of what the General

have probable cause to stop him. The court held that pursuant to O.R.C. §1533.14, the officer did not need probable cause to stop defendant and request he exhibit his hunting license.

In State v. Rohr (1988), 53 Ohio App.3d 132, defendant was convicted of hunting without a license and hunting without a deer permit. Defendant appealed the trial court's denial of his motion to suppress. Defendant argued that the officer did not have probable cause for the stop and arrest. The reviewing court found that the officer saw, in plain view, that defendant was not wearing his license on his back, and when the officer requested defendant's license, he was unable to produce it. The court held that it was obvious to the officer that defendant was not displaying his license on his back, and the officer had the authority to check for defendant's license pursuant to O.R.C. §1533.14. The court further held that it was "analogous to a situation where the officer saw hunters walking in a field without having their licenses displayed on their backs. *The officer would have the statutory authority to stop these hunters and inquire about their licenses...*" (Emphasis added) Id. at 133. Thus, no search was conducted.

In the case at bar, Abele observed appellants hunting mourning doves on William's property. Pursuant to O.R.C. §§1531.13, 1533.14, and 1533.10, Abele had the authority to enter the property and inquire as to appellants hunting licenses and bag limit compliance.

Assembly intended.

During contact with appellants, Abele noticed wheat seed scattered in piles along the ground in plain view. The illegality of the wheat seed was immediately apparent to Abele and appellants were later charged with hunting migratory game birds on or over a baited area. (Abelle's Law Enforcement Statement filed on October 23, 2006).

E. THE STATUTES IN ISSUE ARE CONSTITUTIONAL AND, THEREFORE, APPELLANT'S RIGHTS WERE NOT VIOLATED.

Appellants argue that this was an investigative stop, search, and frisk under Terry v. Ohio (1968), 392 U.S. 1. Contrary to appellants' argument, an investigative stop, search and frisk, should not be likened to a wildlife officer entering private lands to ask hunters, *other than the owner of those lands*, for their hunting licenses which is reasonable, justifiable, and lawful pursuant to O.R.C. §§1531.13, 1531.14, 1533.10, and 1533.14. Appellee submits that, in the case at bar, *no search* was conducted as supported by the cases of Rohr, supra; Lucas, supra, and Freed, supra.

In Betchart, supra, the California Appellate Court upheld the constitutionality of warrantless searches and entries onto private property. In reaching this decision, the court stated that the claim of an illegal warrantless search should be measured by a balancing test. The court must determine whether a person has exhibited a reasonable expectation of privacy and whether that

expectation has been violated by unreasonable governmental intrusion. Even if a person has expressed a demand for privacy with locked gates or no trespassing signs, it does not mean that the expectation of privacy is reasonable when determining whether a warrantless search or entry is permissible. The court must look at the totality of the circumstances involved in the case. The California Court then states that:

California's pervasive scheme of regulating wild game hunting would be a futile pursuit without frequent and unannounced patrols. Certain types of illegal hunting activity must be viewed on the scene; e.g., using lights or infrared sniperscopes..., hunting at night..., hunting while intoxicated..., shooting from a vehicle..., herding with a vehicle..., using a net, trap or poison...or using dogs in hunting deer...Also, wild game, when reduced to possession, can easily be altered as to form and identity, concealed and moved. Of practical necessity, wardens must have the power to reasonably enter open private lands to enforce game regulations. "[G]overnmental officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly be implied* from the statute granting the powers." [Citation.]" (In re Cathey (1961) 55 Cal.2d 679, 689, 12 Cal.Rptr. 762,...)

Hunters are required to be licensed. By choosing to engage in this highly regulated activity, there is a fundamental premise that there is an implied consent to effective supervision and inspection as directed by statute.

Wild game hunting is not a commercial enterprise (as are the liquor and firearms industries). Nevertheless, hunting takes place in "open fields" whether publicly or privately owned; this is a convincing factor that plaintiff's expectation of privacy while hunting is unreasonable. Open field sites are regarded as so public in nature that searches are justifiable without any

particular showing of cause or exigency. (citation omitted) "This hierarchy of protection arises not from the application of differing constitutional standards to various locales, but rather from an application of a single standard of reasonableness to all places in accordance with a fundamental understanding that a particular intrusion into one domain of human existence [such as the home] seriously threatens personal security, while the same intrusion into another domain does not." (citations omitted)

The entries by the wardens are for the purpose of regulating and managing a state-owned resource. Thus, the circumstances are even more compelling than the warrantless inspections of privately owned...***. The Legislature has given Fish and Game supervision over property belonging to the sovereign. The warrantless entries by authorized Fish and Game personnel onto open fields constitute only a minimal intrusion into the private use of the property. Such entries are permitted where game is present and hunting occurs. The inspections may not exceed the specific limited purpose of enforcing wild game regulations, absent probable cause.

Betchart, 158 Cal.App.3d at 1108-1110, 205 Cal.Rptr. at 137-139.

In **State v. Sorenson**, (1988), 430 N.W.2d 231, 232-233, the Minnesota Court of Appeals addressed the constitutional issue of a conservation officer entering private land, in the performance of his duties, without probable cause of any wrong doing. The court recognized that the officers are given broad statutory authority to enter any land to carry out the duties and functions of the fish and wildlife division of the Department of Natural Resources. The court then stated that in the present case "the only information available to Officer Buria, prior to his entry upon appellant's property, was that a hunting camp was located on appellant's property, increased amounts of traffic were entering and leaving

appellant's property, and it was deer hunting season. This information, while supporting Buria's conclusion that hunting was occurring on appellant's land, did not give Buria probable cause to believe a game law violation had occurred." Id. Thus, the court was required to address the issue of determining whether wildlife officers need probable cause prior to making warrantless searches on private lands. The court stated that:

In order for appellant to establish that the conservation officer's presence on his property was an unreasonable search and constitutionally prohibited, appellant must first establish that he had a "constitutionally protected reasonable expectation of privacy" in the area searched. Katz v. United States, 389 U.S. 347, 360... (1967). The activities engaged in by the conservation officer while on appellant's property took place entirely in open fields. Consequently, appellant's fourth amendment rights were not violated, because the special protections accorded by the fourth amendment do not extend to open fields. Hester v. United States, 265 U.S. 57, 59,... (1924).

Because open fields are accessible to the public and the police in ways that a home, office, or commercial structure would not be, and because fences or "No Trespassing" signs do not effectively bar the public from viewing open fields, the asserted expectation of privacy in open fields is not one that society recognizes as reasonable. Oliver v. United States, 466 U.S. 170, 171,... (1984).

We reject appellant's contention that this case does not deal solely with a search of "open fields," but also involves a search of the "curtilage" surrounding appellant's cabin. Fourth amendment protection extends both to the home and to the curtilage immediately surrounding the home. The term curtilage has been defined to mean:

The area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life." Oliver, 466 U.S. at 180,... (citing

Boyd v. United States, 116 U.S. 616, 630, ...).

Sorenson, 430 N.W.2d 231, 232-234 (1988)

In Commonwealth v. Russo, (2007), 594 Pa. 119, 934 A. 2d 1199, the Supreme Court of Pennsylvania held that the Fourth Amendment open fields doctrine applies under search and seizure of the Pennsylvania Constitution. Recognizing and adopting the open fields doctrine as explained in Hester v. United States (1924), 265 U.S. 57 and Oliver, supra, the court found that there is nothing under search and seizure provision of the constitutions that suggests the open fields are entitled to the same protection as is afforded to a person's home, papers and possessions. The court found that:

***...other states have adopted the federal open fields doctrine for purposes of their respective constitutional guarantees against unreasonable searches and seizures. The wording of the constitutional provisions of these states,...is substantially similar to that of Article I, Section 8 of our Constitution. See, e.g., State v. Pinder, 128 N.H. 66, 514 A.2d 1241, 1246 (1986) (adopting federal open fields doctrine under N.H. CONST. part I, art. 19); State v. Havlat, 222 Neb. 554, 385 N.W.2d 436, 440 (1986) (NEB. CONST. art. I, § 7); Williams v. State, 201 Ind. 175, 166 N.E. 663 (1929) (IND. CONST. art. I, § 11); **1212 Wolf v. State, 110 Tex.Crim. 124, 9 S.W.2d 350 (1928) (TEX. CONST. art. I, § 9); State v. Zugras, 306 Mo. 492, 267 S.W. 804, 806 (1924) (MO. CONST. art. II, § 11); Ratzell v. State, 27 Okla.Crim. 340, 228 P. 166, 168 (1924) (OKLA. CONST. Bill of Rights § 30); Brent v. Commonwealth, 194 Ky. 504, 240 S.W. 45, 48 (1922) (KY. CONST. § 10); State v. Gates, 306 N.J.Super. 322, 703 A.2d 696, 701 (1997) (N.J. CONST. art. I, ¶ 7); Betchart v. Dep't of Fish & Game, 158 Cal.App.3d 1104, 205 Cal.Rptr. 135 (1984) (CAL. CONST. art. I, § 13). For this reason, we find the decisions from these states more

persuasive than the decisions from the four states upon which appellant relies.

Russo, 594 Pa. at 140, 934 A.2d at 1211-1212. The court then found that the statutes and regulations were enacted to enforce the preservations of wildlife in Pennsylvania. "Thus, our Constitution and enacted statutes-as well as the agencies created to enforce them-all confirm that, in Pennsylvania, any subjective expectation of privacy against governmental intrusion in open fields is not an expectation that our society has ever been willing to recognize as reasonable. In short, the baseline protections of the Fourth Amendment, in this particular area, are compatible with Pennsylvania policy considerations insofar as they may be identified. More importantly, there is nothing in the unique Pennsylvania experience to suggest that we should innovate a departure from common law and from federal law and reject the open fields doctrine." Id. at 142-143 and 1213. The court then held that "the guarantees of Article I, Section 8 of the Pennsylvania Constitution do not extend to open fields; federal and state law, in this area, are coextensive. Id.

As in Pennsylvania, Ohio has adopted the "open fields" doctrine in that one does not have a legitimate expectation of privacy in open fields as set forth in Oliver, supra, and Hester, supra. State v. Sheets (1996), 112 Ohio App.3d 1, 7; State v. Paxton (1992), 83 Ohio App. 3d 818. Thus, open fields and wooded

areas are not afforded Fourth Amendment constitutional protection. State v. Bernath (1981), 3 Ohio App.3d 229; State v. Bayless Case No. 92 CA 527, 1992 WL 368847, *2 (Ohio App. 4 Dist., Dec. 10, 1992); Lucas, supra. Consequently, appellant's constitutional arguments are without merit. In Ohio, a wildlife officer has the statutory right to enter land to perform his duties. In Russo, the Pennsylvania law regarding wildlife officers provides that the officer may enter upon any land or water outside of buildings, posted or otherwise, in the performance of the officer's duty. 34 Pa.C.S.A. § 901. Consequently, the reasoning of the case of Russo is applicable to the case at bar.

CONCLUSION

In the State of Ohio, wild game belongs to the people in their collective, sovereign capacity. Wild game is not the subject of private ownership. Therefore, the legislature has required hunters, except for the owners or tenants of the land, their children, and grandchildren under the age of eighteen, to have, carry and display a hunting license. O.R.C. §§1533.10, 1533.14 The exception to the hunting license, by law, does **not** extend to the owner's father or "guests." Appellants want this Court to believe that Abele entered the property just to check on the license of the owner. This is not an issue. There were other hunters hunting with the owner and, thus, Abele, as a wild life officer, had the legislative authority to enter private lands while in the normal,

lawful, and peaceful pursuit of an investigation in the enforcement of laws relating to game, without the demonstration of good cause. O.R.C. § 1531.14. Specifically, Abele may, at any time or place, except within a building, check for licenses or bag limits for wild animals. O.R.C. §1531.13. Abele's initial entry did not rise to the level of search and seizure which would require the constitutional application of the Fourth Amendment and Ohio Constitution.

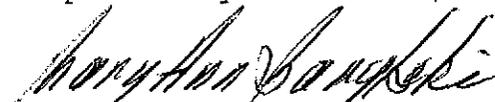
Appellants were observed hunting in open fields. Open fields, even though the fields are fenced in with no trespassing signs posted, are accessible to the public and police. This accessibility of open fields is recognized to be different than a home, office, or commercial structure. The asserted expectation of privacy in open fields is not one that society recognizes as reasonable. Oliver, supra. Thus, open fields and wooded areas are not afforded Fourth Amendment constitutional protection. State v. Bernath (1981), 3 Ohio App.3d 229; State v. Bayless Case No. 92 CA 527, 1992 WL 368847, *2 (Ohio App. 4 Dist., Dec. 10, 1992); Lucas, supra.

When he entered the land to check on the licenses and bag limits, Abele observed the wheat seed scattered in piles along the ground in plain view. When Abele observed the wheat scattered in plain view, Able had cause to believe a crime was being committed, such as bating. Therefore, Abele, based on probable cause, became

a law enforcement officer and issued the proper citations.

Appellants make much to do about the relationship between Abele and William. This relationship is not an issue as to whether Abele had the legal authority to enter the lands and should not sway this Court as to the issues of the entry and constitutionality of the hunting statutes. Based on the case law and statutes in issues, appellee respectfully moves this Honorable Court to affirm the judgment of the Sixth District Court of Appeals.

Respectfully submitted,



Mary Ann Barylski #0038856
Assistant Prosecuting Attorney

CERTIFICATION

This is to certify that a copy of the foregoing merit brief of appellant was sent to John Climaco, Attorney for Appellants, 55 Public Square, Suite 1950, Cleveland, Ohio 44113 this 2nd day of September, 2008, by regular U.S. Mail.



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