Paul

IN THE COURT OF APPEALS OF OHIO

FOURTH APPELLATE DISTRICT

HOCKING COUNTY, OHIO

State of Ohio	:	
Plaintiff-Appellant	:	Case No. 407
-vs-	:	DECISION & JUDGMENT ENTRY
James A. McDaniel	:	
Defendant-Appellee	:	

APPEARANCES:

Ms. Eleanor J. Tschugunov, Assistant Attorney General, Ohio Department of Natural Resources, Division of Wildlife, Columbus, Ohio, for Appellant.

Mr. Will Kernen, Logan, Ohio, for Appellee.

Stephenson, P.J.

This is an appeal from a judgment entered by the Hocking County Municipal Court dismissing upon pre-trial motion a criminal complaint filed against James A. McDaniel, appellee herein, charging a violation of R.C. 1531.02 and Ohio Adm. Code Sec. 1501:31-15(I). The state has appealed and assigned the following error:

"THE TRIAL COURT ERRED IN DISMISSING CRIMINAL CHARGES BROUGHT PURSUANT TO R.C. 1531.02 FOR THE ILLEGAL TAKING OF ANTLERLESS DEER AS PROHIBITED BY OHIO ADMINISTRATIVE CODE SECTION 1501:31-15-11(H)."

On November 30, 1983, the appellee shot and killed an antlerless deer in Hocking County. It was stipulated below that the land upon which the deer was shot was occupied by

appellee as a tenant. Appellee was issued a summons and complaint, which complaint was filed in the court below and reads, in its pertinent part, as follows:

> "On or about Wed. Nov. 30, 1983, at 2:55 P.M. in Starr Township Hocking County, Ohio you did unlawfully take a anterless (sic) deer without a valid anterless (sic) permit in violation of Section 1531.02 O.R.C. and O.A.C. Rule 1501:31-15-11(I)"

Ohio Adm. Code Sec. 1501.31-15-11(H) and (I) read, in their pertinent parts, as follows:

> (H) It shall be unlawful for any person to hunt, take or possess an antlerless deer, which shall include deer with antlers less than five inches, except antlerless deer taken in deer zone three, without applying for and receiving a free antlerless permit from the division of wildlife..." [1]
>
> (I) Any person who owns ten or more acres in a contiguous block prior to hunting antlerless deer shall submit one application to obtain a family antlerless permit that will permit the landowner, or his spouse, or his child either to take one antlerless deer on lands which he owns in deer zones one, two, and three, except in deer zone four upon receiving separate antlerless permits the landowner may take one antlerless deer and his spouse and children may take one antlerless deer between them. Only one family permit will be issued regardless of the number of owners or number of properties owned. It shall be unlawful for any person to take more than one deer under authority of the family antlerless permit, except in deer zone four the landowner may take one antlerless deer and his spouse and children may take one antlerless deer between them. It shall be unlawful for a landowner who owns less than ten acres, or members of a landowner's family, or any person not owning land to apply for or receive such a family antlerless deer permit. Successful hunters must surrender their antlerless permits at an official checking station at the time their deer is checked in."

Also relevant to this appeal is R.C. 1523.10 and 1523.11 which, as here pertinent, reads as follows.

R.C. 1533.10

"Except as provided in section 1533.12 of the Revised Code, no person shall hunt any wild bird or wild quadruped without a hunting license. Each day that any person hunts within the state without procuring such a license constitutes a separate offense. Every applicant for a hunting license who is a resident of the state shall procure a resident hunting license, the fee for which shall be seven dollars, but the owner and the children of the owner of lands in the state may hunt thereon without a hunting license. The tenant or manager and children of the tenant or manager, residing on such lands, may hunt thereon without a hunting license....

This section does not authorize the taking and possessing of deer ... without first having obtained, in addition to the hunting license required by this section, a special deer ... permit as provided in section 1533.11 of the Revised Code..."

R.C. 1533.11

"Except as provided in section 1533.12 of the Revised Code, no person shall hunt deer on lands of another without first obtaining an annual special deer permit...

The owner and the children of such owner of lands in this state, may hunt deer ... thereon without a special deer ... permit. The tenant or manager and children of the tenant or manager, may hunt deer ... on lands, where they reside, without a special deer ... permit."

The trial court sustained the pretrial motion to dismiss upon the basis that the Ohio Adm. Code Sections 1501:31-15-11(I), and impliedly 1501:31-15-11(H), are in conflict with the exemption from deer hunting permits granted to tenants in R.C. 1533.11 and is, therefore, invalid. Whether such conflict exists posits the pivotal issue for review in this appeal.

A threshold issue presented by appellee is that this court should summarily affirm since the averments of the complaint

allege a violation of Ohio Adm. Code Sec. 1501.31-15-11(H), supra, while the complaint cites Ohio Adm. Code Sec. 1501.31-15-11(I), supra, a dismissal on that ground should have been made in the trial court. We disagree.

Crim. 12(B) reads, in part, as follows:

> "(B) PRETRIAL MOTIONS. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. The following must be raised before trial:
> (1) Defenses and objections based on defects in the institution of the prosecution;"

Crim. R. 12(C) provides, inter alia, that required pretrial motions shall be filed within thirty-five days after arraignment. Inasmuch as no timely objection was made below to the incorrect administrative rule section number, when an amendment could arguably have been made under Crim.R. 7(D), the objection was waived pursuant to Crim. R. 12(C). Further, whether the complaint is viewed as charging a violation under subsection (H) or subsection (I), the issue on appeal is the same, i.e. whether the General Assembly intended to exempt tenants from the regulatory scheme adopted, including the license requirement, respecting antlerless deer.

The primary authority regulating the hunting of wild animals in Ohio is R.C. 1531.02, which reads as follows:

> "The ownership of and the title to all wild animals in this state, not legally confined or held by private ownership legally acquired, is in the state, which holds such title in trust for the benefit of all the people. Individual possession shall be obtained only in accordance with the Revised Code or division of wildlife orders. No persons shall at any

> time of the year take in any manner or possess any number or quantity of wild animals, except such wild animals as the Revised Code or division orders permit to be taken, hunted, killed, or had in possession, and only at such time and place, and in such manner, as the Revised Code or division orders prescribe. No person shall buy, sell, or offer any part of wild animals for sale, or transport any part of wild animals, except as permitted by the Revised Code or division orders. No person shall possess or transport a wild animal which has been taken unlawfully outside the state.
>
> A person doing anything prohibited or neglecting to do anything required by Chapter 1531. or 1533. of the Revised Code, or contrary to any division order violates this section." (Emphasis added)

In implementation of R.C. 1531.02 the General Assembly delegated regulatory authority in R.C. 1531.08, which statute as in effect at the time of the proceedings below, provided, inter alia, the following:

> "...the chief of the division of wildlife has authority and control in all matters pertaining to the protection, preservation, propagation, possession, and management of the wild animals and may issue temporary written orders for the management of such wild animals....
>
> The chief may establish, modify, rescind, and enforce orders throughout the state or in any part or waters thereof as provided by sections 1531.08 to 1531.12 and other sections of the Revised Code. Such orders, when filed in proposed form with the secretary of state pursuant to Chapter 119. of the Revised Code, shall be on file and available at the central wildlife office in Columbus and at each of the wildlife district offices, including the Lake Erie unit located at Sandusky. Such orders shall be based upon a public hearing and investigation including among other things, the distribution, abundance, breeding conditions, food, cover, life history, and economic importance of the wild animals involved, together with the influence of topography, soil, weather, and other nonliving or living things on these wild animals, and whether or not such animals are

> materially destroying property or are otherwise becoming a nuisance or the sexes are not properly balanced or the natural food supply is insufficient or additional numbers may be taken without depleting the brood stock.
>
> All orders shall clearly and distinctly describe and set forth the waters or area or part thereof affected by each such order and whether such order is applicable to all wild animals, or only to certain kinds of species designated therein, and shall also clearly specify and set forth the length of time each order shall remain in effect.
>
> The chief may regulate:
> (A) Taking and possessing wild animals, at any time and place or in any number, quantity, or length, and in any manner, and with such devices as he prescribes;
> ...." (Emphasis added)

Given the broad authority delegated to Chief of Wildlife and the enumerated criteria which must be utilized in enacting regulatory orders, the question devolves into whether the General Assembly intended by the statutory tenant exemptions from hunting license and special deer permit requirements to also exempt such tenants from any additional regulatory requirements respecting antlerless deer, specifically the antlerless deer permit.

In that Ohio Adm. Code 1501.31-15-11(H) provides that it shall be "unlawful for any person to hunt, take or possess an antlerless deer...", manifestly it was intended that all persons, including those already holding a hunting license as well as a special deer permit, comply with the additional license requirement to hunt or take an antlerless deer. While certain classes of persons, including tenants, are exempted from the hunting and special deer license requirements, we are not persuaded that the General Assembly intended to also exempt them

from other duly enacted regulations concerning the hunting and taking of certain classes of deer.

We must presume that in the adoption of the regulatory scheme here under review the Director considered, pursuant to R.C. 1531.08, the criteria therein enumerated and concluded that limited and closely regulated taking of antlerless deer by utilization of a free antlerless deer permit scheme, which includes does and young bucks, was necessary for the best control of such class of deer.

Given the broad statutory grant of administrative authority to the Director to regulate the taking of wild animals, we hold neither Ohio Adm. Code Sections 1501.31-15-11(H) and (I) are in conflict with or derogates from the exemption granted tenants in R.C. 1533.10 and 1533.11 from hunting and special deer permit requirements. Simply put, if the General Assembly intended an all inclusive exemption from all other regulations respecting deer control, it would seem reasonable that they would have utilized such language. The silence of the General Assembly in other matters of deer hunting regulation is indicative that such was not intended.

Appellee advances in this court an argument that an interpretation of R.C. 1533.11 so as to require antlerless deer permits by tenants hunting on their own land would be constitutionally invalid under the due process clauses of the Ohio and federal constitutions. Suffice it to say that such claim was not raised in or passed upon by the court below and, hence, is not properly before us in this appeal. See 4 Ohio Jur. 3d 298,

Sec. 137 (Appellate Review) and cases cited.

The assignment of error is sustained, the judgment reversed and the cause remanded to the trial court.

---

1) Hocking County is located in deer zone four. See Ohio Adm. Code Sec. 1501:31-15-17(U).

It is ordered that (appellant-~~appellee~~) recover of (~~appellant~~-appellee) Nil costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

JUDGMENT REVERSED

Abele, J. Concurs
Grey, J., Dissents with opinion

Earl E. Stephenson
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 9, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

State vs. McDaniel, No. 407 Hocking County

GREY, J. DISSENTING:

I dissent.

R.C. 1533.10 says that to hunt you must have a hunting license, but owners and tenants don't need a license to hunt on their own land.

R.C. 1533.11 says that to hunt deer you need a special deer permit, but that owners and tenants don't need a special permit to hunt on their own land.

These statutes are clear. An owner or a tenant may hunt "deer", which in its ordinary meaning includes antlerless deer. Discounting any regulation, an owner or tenant is allowed to take antlerless deer under the statute.

But there are, of course, regulations, regulations which must be followed by all hunters whether they have permission to hunt by license, permit, or operation of law. Unquestionably, the Division of Wildlife has the power to regulate hunting, including the hunting of deer. The question in this case is: What is the extent of that power?

Considering the broad language of Chapter 1531 and 1533 of the Revised Code, it appears the Division of Wildlife has the authority to make any regulation that is not in conflict with the statute. It can, I believe, regulate the taking of antlerless deer, O.A.C. 1501:31-15-11-F, by requiring antlerless deer permits. It can make the taking of antlerless deer without a permit unlawful.

What the Division of Wildlife cannot do is change Ohio's statutes. This is solely the function of the legislature. The

legislature has determined in R.C. 1533.10 and .11 that landowners and tenants shall be treated the same. This is a reasonable policy. A balance between man and wildlife living on the same lands has to be maintained, but the relationship of any individual to any piece of land is a question of real property law. Whether a person resides on a piece of land in fee or by lease, is really irrelevant to the effect his occupancy has on the surrounding wildlife. The legislature recognizing this principle mandated that owners and tenants be treated equally.

O.A.C. 1501-31-15-11-I abrogates the clear expression of legislative intent. The Division of Wildlife will issue antlerless deer permits only to landowners. Permits will not issue to tenants. The taking or prohibition against taking antlerless deer is clearly within the power of the Division. A total ban on antlerless deer would, for example, be entirely proper.

But may the Division issue or deny permits on the basis of real estate holdings? I think not. The statutes make no such distinction, and indeed the question of title is unrelated to ecology. To be sure, there is a proper ratio of man to animal, and that ratio must be maintained. I am aware that since the enactment of R.C. 1533.10 and .11 the relative numbers of owners and tenants versus the herd size may have changed. The Division may have to take some action to limit the number of antlerless deer taken, but the action they took by refusing to issue permits to tenants is in violation of the statute.

In the case before us, appellant was in fact issued a permit, but because he was a tenant the Division claims the permit

is invalid. I would hold that the regulation is invalid, and would sustain the trial court's dismissal, and would affirm.