

Memorandum 99-15

Trial Court Unification: Affidavit under Fish and Game Code § 2357

The Commission's trial court unification report recommended further study of whether to make revisions regarding the repository for the duplicate of an affidavit pursuant to Fish and Game Code Section 2357. That section reads:

2357. It is unlawful to carry trout into an area where the season is closed unless an affidavit is made in duplicate before a notary public in the area in which the trout are or might be lawfully taken. Such affidavit shall state the date and place of taking such trout, and the name, address, and number of the angling license of the person legally taking such trout. The duplicate of the affidavit shall be left on file with the notary public before whom the affidavit is made.

We were involved with this provision because previously it had allowed the affidavit to be made before, and a duplicate filed with, the nearest justice court judge.

The Commission's report asks, "Is a notary a proper repository, and does this provision serve a useful function?" The question was first raised in a letter from Judge Robert Parkin for the Los Angeles Superior Court: "A notary public is not a repository of legal documents, as stated in the code section. Another repository for the affidavit, once signed and witnessed, should be identified to serve this purpose. Perhaps the County Recorder's Office should be designated as the repository or any other governmental agency." See Memorandum 97-85.

An obvious "fix" for this statute is simply to delete the requirement that a duplicate affidavit be left on file with a notary. The filing of a duplicate serves no obvious purpose — the angler's possession of the original should be sufficient proof of the angler's proper activity. Thus the provision could be revised to read:

Fish & Game Code § 2357 (amended). Transportation of trout

2357. It is unlawful to carry trout into an area where the season is closed unless an affidavit is made ~~in duplicate~~ before a notary public in the area in which the trout are or might be lawfully taken. Such affidavit shall state the date and place of taking such trout, and the name, address, and number of the angling license of the

person legally taking such trout. ~~The duplicate of the affidavit shall be left on file with the notary public before whom the affidavit is made.~~

Comment. Section 2357 is amended to delete the requirement that an affidavit under this section be made in duplicate and that the duplicate be filed with the notary public.

However, a more fundamental issue is whether the statute represents sound public policy at all. Attached is a memorandum from the Institute for Legislative Practice analyzing the provision. Exhibit pp. 1-3. The memorandum makes a convincing argument that the provision improperly criminalizes otherwise innocent conduct and is of questionable constitutionality. The memorandum suggests that this provision might simply be repealed. We have sought the reaction of the Department of Fish and Game to this suggestion, and we hope to have their response for the Commission at the February meeting.

Whatever approach the Commission decides to take, we would formulate it as a tentative recommendation and circulate it for comment to interested persons. Although this is a fairly minor issue, we see no reason to short circuit the Commission's normal process here.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

TRANSPORTATION OF TROUT INTO CLOSED AREAS (November 30, 1998)

This memorandum reviews issues concerning Fish & Game Code § 2357 relating to the carrying of trout into closed areas. The section was amended as part of the implementation of trial court unification to remove obsolete references to the justice court. Because the section, as amended, seemed to be archaic, it was added to the list of issues appropriate for future study.

Section 2357 provides as follows (for clarity of understanding, the references to the justice court and their deletion is included in this quote):

2357. It is unlawful to carry trout into an area where the season is closed unless an affidavit is made in duplicate before ~~the nearest judge of the justice court or~~ a notary public in the area in which the trout are or might be lawfully taken. Such affidavit shall state the date and place of taking such trout, and the name, address, and number of the angling license of the person legally taking such trout. The duplicate of the affidavit shall be left on file with the ~~judge of the justice court or~~ notary public before whom the affidavit is made.

It appears that the primary and perhaps sole purpose of this statute is to eliminate an excuse which a defendant charged with taking trout in an area where the season is closed might otherwise have; to wit, that the trout was actually taken legally at another location and transported to the location where the defendant was arrested. If a defendant attempts to raise this factual argument in defense, the arresting officer or prosecutor can then demand that the defendant produce the affidavit or the name of the notary public or justice court judge before whom the defendant made the affidavit as required by Section 2357. Since it is unlikely in the extreme that the defendant will have executed the required affidavit, the prosecution can charge the defendant with a violation of Section 2357 and avoid having to litigate the question of whether the trout was taken legally elsewhere and then transported into an area where the season is closed. In light of this likely purpose, it is perhaps not coincidental that a violation of Section 2357 carries with it the same penalty as the crime of taking trout in an area where the season is closed (§§ 2000-2002) (both are misdemeanors under Sections 12000 & 12002 punishable by a fine of not more than \$1,000 and/or imprisonment for not more than six months). In short, Section 2357 appears to have been enacted with the expectation that its affidavit requirement would virtually never be met.

Research did not reveal any recent prosecutions for a violation of Section 2357. Section 2357 is not mentioned in the Fishing Guide distributed by the Department of

Fish and Game. When contacted, Fish and Game personnel were surprised to learn of Section 2357's existence.

Section 2357 raises modest due process concerns because it effectively criminalizes an activity that an ordinary person would not think carries with it any legal consequences at all (i.e., carrying trout into an area where the trout season is closed), and it criminalizes the activity by relying upon a person's failure to do something that no ordinary person would think of doing (i.e., rushing to the nearest notary public to file a trout affidavit before traveling into an area where the trout season is closed). It is worthy of note in this regard that Section 2360 provides a contrary rule for black and spotted bass ("Black bass and spotted bass lawfully taken may be carried or transported into and possessed in an area where the season is closed").

Needless to say, the rule that "ignorance of the law will not excuse" is deeply embedded within our legal culture. *Shevlin-Carpenter Co. v. State of Minnesota*, 218 U.S. 57, 68 (1910). Applying this principle, the presence of Section 2357 on the books arguably provides sufficient constructive notice so that a prosecution for its violation satisfies due process.

However, the Supreme Court has held that due process can be violated by a criminal statute or ordinance that criminalizes a failure to act in circumstances where no reasonable person would think there was any obligation to act. In *Lambert v. California*, 355 U.S. 225 (1958), the Court held that due process was violated by a prosecution under a City of Los Angeles ordinance which required all convicted felons who remained in the city or planned on remaining within the city for longer than five days to register. The defendant had no actual knowledge of the registration requirement, and the issue was whether "a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge." *Id.*, 355 U.S. at 227. The Court held that due process was violated, emphasizing that the ordinance (1) criminalized "conduct that is wholly passive--mere failure to register" (*id.*, 355 U.S. at 228), (2) criminalized a failure to act in the absence of any "circumstances which might move one to inquire as to the necessity of registration" (*id.*, 355 U.S. at 229), and (3) criminalized the failure to register merely to implement "a law enforcement technique designed for the convenience of law enforcement agencies" (*id.*). The Court held that "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand." *Id.*

Fish & Game Code § 2357 is similar to the ordinance struck down in *Lambert* because Section 2357 criminalizes a failure to act (i.e., failure to obtain a notarized affidavit) under circumstances where no one could reasonably be expected to know of the affidavit requirement or even of the need to inquire as to the necessity of an affidavit, and the section is apparently designed primarily (if not exclusively) for the

convenience of law enforcement officials in policing the unlawful taking of trout (there being no plausible state interest in the private transport of lawfully taken trout).

Lambert has been clarified by the Supreme Court in subsequent cases. For example, in *U.S. v. International Minerals*, 402 U.S. 558 (1971), the Court stated that “where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.” *Id.*, 402 U.S. at 559. Arguably, the regulation of the location and time for taking trout (i.e., the establishment of a trout season) should put a fisher on notice of the possibility of a regulation like Section 2357. However, Section 2357 does not regulate the taking of trout. Instead, it regulates the transport of trout without securing an affidavit. It does not seem likely that a person who has lawfully taken a trout would believe that the transport of that trout within the state (as opposed to import or export or commercial shipping) is a regulated activity. As noted above, the state’s Fishing Guide does not even mention Section 2357.

In his great work, *The Common Law*, Holmes wrote, “A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.” *The Common Law*, pp. 49-50 (1881). Section 2357 appears to cross the line between fair regulation and unfair trap-setting. We recommend the repeal of Section 2357.

Respectfully submitted,

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Institute for Legislative Practice