

STATE OF MAINE
CUMBERLAND, ss.

DISTRICT COURT
Location: West Bath
Docket No. WES-CR-08-149

STATE OF MAINE,

Plaintiff,

v.

**AMENDED DECISION &
JUDGMENT**

DALE R. WEEKS,

Defendant.

A trial was held on April 9, 2008. The state was represented by ADA Michael H. Madigan, Esq., and presented testimony through Maine Department of Marine Resources Warden Clint Thompson. Defendant appeared, testified and was represented by Nicholas H. Walsh, Esq. A decision was issued on July 1, 2008, and on July 3, 2008 Attorney Walsh filed a Motion seeking a specific finding. Argument was held in chambers on August 6, 2008. The court grants his motion, which does not affect the previous analysis or the outcome, and issues this modified opinion, which changes a single paragraph on page six, which for the convenience of the reader is bracketed by “ ** ”.

Defendant did not contest Count 2 (a single violation of 12 MRSA § 6431), so the trial was limited to the state’s allegations in Count 1; that is, that the Defendant violated 12 MRSA § 6436 on December 14, 2007 as he was in possession of six female lobsters that were mutilated in such a manner as could hide or obliterate a v-notch.

Facts

The court finds the following facts that are essential to its decision. Prior to December 14, 2007, Warden Thompson had received complaints that the Defendant was taking female lobsters that either had been v-notched¹ or had mutilated tails. Warden Thompson therefore met Defendant as he returned to a dock in Harpswell, and identified 6 of approximately 150 lobsters in the catch as having mutilated tails. He issued a summons for a violation of § 6436, which if proven is a Class D crime².

Defendant does not dispute that he was in possession of the lobsters, that they were in fact female, or that the critical flipper on each was damaged. However, he testified that he believed that they were legal because while the flipper on each was damaged, the damage was not consistent with damage that would be seen after previous v-notching; that the damaged area was regenerated due to interceding molting, and that other Marine Patrol officers had previously told him that possession of lobsters with this type of damage was legal.

Analysis

This case presents interesting questions of interpretation of the criminal statutes, the Department of Marine Resources' "DMR" rules and policies, and their interplay, especially when viewed in the context of the state's burden to prove the alleged violation beyond a reasonable doubt. The court requested submission of post-trial briefs, the last of which was received on May 13, 2008.

Neither counsel submitted any previous precedents governing proper interpretation, and the court has been unable to locate any written decisions. Before going further, the court notes the significance of this issue. Lobstering is one of Maine's iconic professions, and the maintenance of a viable lobster fishery is of great importance to this state, for both economic and symbolic reasons. Maine's lobster conservation program has historically been successful through a combination of self-regulation by lobstermen and lobsterwomen and vigorous enforcement of the statutes by DMR. The court ought not undermine this successful policy if it can avoid doing so.

¹ V-notching refers to a conservation practice which was initially voluntary, but is now required by DMR. Rule, 25. *Infra.*. If a lobsterman hauls a trap containing an egg-bearing female lobster, he cuts a v-shaped notch in the trailing surface of the flipper next to and immediately to the right of the lobster's center flipper.

² A second summons was issued for an alleged violation of 12 MRSA § 6431, a second class D crime. While Defendant originally pled Not Guilty to both charges, as noted, he did not contest Count 2 at trial.

However, it is equally true that lobstermen and lobsterwomen as well as Marine Patrol Officers have to make quick judgment calls about the legality of keeping a lobster, often in unfavorable conditions at sea, which can include pitching decks, frigid cold, sea spray and inclement weather, or all of these. The court also should not favor a construction of the statute and rules that is so rigorous as to make their task so difficult that it economically cripples this important industry. Similarly, it should not favor a construction that makes achievement of the legislature's purpose, conservation of the lobster fishery, practically unenforceable.

Statutory Construction

Maine's core principle for judicial construction of the meaning and intent of statutes is that the courts must interpret a statute to effectuate what has been variously called the Legislature's intent³, or the legislative purpose⁴.

In order to do so, the court has endorsed a number of maxims of statutory construction. The principles applicable to this case include:

- *Construction in pari materia.* The statutes will be construed as a whole and the entire system of legislation, of which the statute is a part, must be considered. *Charlton v. Town of Oxford*, 2001 ME 104, 774 A.2d 366; *Fernald v. Maine State Parole Board*, 447 A.2d 1236 (Me.1982); *Brennan v. Johnson*, 391 A.2d 337 (Me.1978).
- Criminal Statutes are to be strictly construed. *State v. Lane*, 495 A.2d 773 (1983); *State v. Porter*, 384 A.2d 429 (1978).
- Inconsistency and contradiction will be avoided and a reasonable construction will be placed on the laws. *State v. Hart*, 640 A.2d 740 (Me.1994), quoting *State v. Rand*, 430 A.2d 808 (Me.1981); *Dobbs v. Maine School Admin. Dist. No. 50*, 419 A.2d 1024 (Me.1980).

³ *State v. Bento*, 600 A.2d 1094 (Me.1991); *State v. Edward C.*, 531 A.2d 672 (Me.1987); *State v. Hudson*, 470 A.2d 786 (Me.1984); *Raymond v. State*, 461 A.2d 161 (Me.1980); *State v. Labbe*, 404 A.2d 564 (1979); *Brackett v. Chamberlain*, 98 A. 933, 115 Me. 335 (1916).

⁴ *Bangor Hydro-Electric Co. v. Board of Environmental Protection*, 595 A.2d 438 (Me.1991); *State v. Niles*, 585 A.2d 181 (Me.1990); *Eastern of Maine, Inc. v. Vintners Group Ltd.*, 455 A.2d 936, appeal after remand, 495 A.2d 318 (Me.1983); *Seven Islands Land Co. v. Maine Land Use Regulation Commission*, 450 A.2d 475 (Me.1982).

- Courts will avoid construction that leads to inconsistency between two statutes when another construction will yield a harmonious result. *Interstate Food Processing Corp. v. Town of Fort Fairfield*, 1997 ME 193, 698 A.2d 1074; *Bernard v. Cives Corp.*, 395 A.2d 1141 (Me.1983); *Woodcock v. Atlass*, 393 A.2d 167 (Me.1978); *Opinion of the Justices*, 311 A.2d 103 (Me.1973).
- If there is more than one interpretation of a statute, one leading to results against the public interest and one avoiding it, the interpretation that will prevent "public mischief" will be adopted. *S. Portland Civil Serv. Comm'n v. City of S. Portland*, 667 A.2d 599 (Me. 1995); *Rubin v. State Board of Environmental Protection*, 577 A.2d 1189 (Me. 1990); *Clark v. State Employee Appeals Bd*, 363 A.2d 735 (Me. 1976).
- Criminal statutes must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited. . . ." *State v. McLaughlin*, 2002 ME 55, P9, 794 A.2d 69, 72 (quotation marks omitted); see also *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972) ("[All persons] are entitled to be informed as to what the State commands or forbids.") (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939)). *State v. Falcone*, 2006 ME 90, ¶ 22; 902 A.2d 141, 148 (*Dana, J., dissenting.*)
- The court will give substantial deference to an administrative agency's rules that are developed to aid in the agencies' enforcement of a statute. *Town of Eagle Lake v. Comm'r, Dep't of Educ.* 2003 ME 37, ¶¶ 7-8, 818 A.2d 1034, 1037. However, the court will not defer to an agency construction that is inconsistent with the statute or legislative intent. *Palmer v. Bath Iron Works*, 559 A.2d 340 (Me.1989); *State v. York Utilities Co.*, 142 Me. 40, 45 A.2d 634 (1946); *Lewiston Raceway, Inc. v. Maine State Harness Racing Commission*, 593 A.2d 663 (Me.1991).

Applying those maxims here, there are a number of statutory sections that must be construed together. The court first notes the language of 12 MRSA § 6436 itself, which provides:

12 § 6436. Egg-bearing lobsters; v-notched lobsters

1. Egg-bearing and v-notched lobsters. A person may not take, transport, sell or possess:

A. Any lobster that is bearing eggs; or

B. Any female lobster marked with a v-notch in the right flipper next to the middle flipper or any female lobster that is mutilated⁵ in a manner that could hide or obliterate that mark. The right flipper is determined when the underside of the lobster is down and its tail is toward the person making the determination.

[sub-§ 2 and 3 omitted]

4. Prima facie evidence.

A. Discovery of an egg-bearing lobster by a marine patrol officer in a pound not included in a permit under section 3 shall be prima facie evidence of a violation.

B. Any lobster whose right flipper is v-notched or mutilated in a manner which could hide or obliterate such a mark shall be prima facie evidence that the lobster is a v-notched female lobster.

5. Penalty.

Possession of lobsters in violation of this section is a Class D crime, except that in addition to any punishment that may be imposed under Title 17-A, Part 3, the court shall impose a fine of \$50 for each violation and, in addition, a fine of \$100 for each lobster involved that is bearing eggs and a fine of \$50 for each female lobster involved that is marked with a v-notch.

⁵ The Defendant argues that the court ought to construe “mutilate” in a very narrow sense; that is the complete removal of a body part. While this is the first of the listed possibilities in Webster’s dictionary, that reading disregards the second meaning” to cut up or alter radically so as to render imperfect.” Similarly, the American Heritage Dictionary has a similar second meaning: “To render imperfect by damaging or excising a part.” The court construes “mutilate” in the way it believes the legislature intended by the remainder of the sentence in the statute, that is, any damage, either natural or intentional that could hide the fact that a female lobster had previously been v-notched.

Additional statutory sections that are relevant to the inquiry are Title 12 Section 6204 (A violation of any provision of marine resources law is a Class D crime these crimes are strict liability crimes as defined in Title 17-A, Section 34, subsection 4-A.”), 17-a MRSA § 34. After reviewing all of these sections, the court believes it is clear that the legislature intended to make possession of any female lobster that either had been v-notched, or that has a center right rear flipper which makes it impossible to determine whether a v-notch previously existed, illegal. Further, it is also clear that the legislature intended this to be a strict liability statute.

In fact, if the legislature had not so chosen, the entire conservation regime might become practically unenforceable; everyone who possessed a lobster with a damaged center right rear flipper would likely argue that it was impossible to determine whether the damage occurred as a result of the application of a prior v-notch or due to other naturally occurring causes.

Construction of Agency Rules and Policy

The Department of Marine Resources has adopted a relevant Rule, as well as an additional policy guidance memo. The Rule provides:

25.15 V-notching Lobsters

1. Mandatory V-notching Requirement

All lobster fishers are required to v-notch all egg bearing female lobsters caught in the process of lobstering.

2. Zero Tolerance of V-notching

V-notched female lobster means any female lobster bearing a v-shaped notch of any size in the flipper next to and to the right of the center flipper as viewed from the rear of the female lobster. V-notched female lobster also means any female, which is mutilated in a manner, which could hide, obscure or obliterate such a mark. The flipper right of the center flipper will be examined when the underside of the lobster is down and its tail is toward the person making the determination.

The policy is contained in Bureau of Marine Patrol policies Chapter 5, Policy 2.A. As that policy contains illustrative aids, it is attached and incorporated by reference. (See, Δ's Exhibit 8.)

The court finds the language of these two expressions of the department's policy to be ambiguous and inconsistent. Rule 25.15 is less than crystal clear, as the headnote says "zero tolerance of v-notching" but the text itself does not repeat that heading as a statement of the Department's intent⁶.

Then, Policy 2.A restates the statutory language, that a mutilated female lobster is one "which has the end part of the right flipper next to the middle flipper ... mutilated in such a manner that would hide or obliterate a v-notch." This language is consistent with the statute, and clear.

However, the policy then goes beyond the statutory language, and further provides in paragraph 3 that "For the purpose of this policy a naturally regenerated flipper is considered legal." What exactly does this mean?

** The uncontroverted testimony at the trial was that lobster flippers begin to regenerate the next time the lobster molts, and continue to grow at each successive molting. The presence of "hairs" or celia on the back of the tail is evidence of molting, and associated partial regeneration. Does paragraph 3 mean that any lobster with a right center flipper that has regenerated at all, even if the evidence of a previous v-notching is obscured but still discernable is legal? Or does it mean that a lobster which suffered a completely removed flipper that has been fully replaced by regeneration is legal? Or does it mean that a flipper that has partially regenerated so as to make the prior presence of a v-notch debatable is legal? After submission of briefs, its own research and careful examination of the text the court is far from certain what DMR intended to say by the adoption of paragraph 3. **

⁶In the statutory context, the text of headnotes is not part of the substantive law (1 MRSA § 71, sub-§ 10, but may be a guide to proper interpretation. It is unclear whether the same doctrine should be applied to rules.

Accordingly, the court must address whether this rule-generated ambiguity is so significant as to estop the state from proceeding to enforce what would otherwise had been a sufficiently clear criminal statute.

The court next turns to the interpretive materials made available by DMR to assist public and lobster licensees in determining what conduct is and is not prohibited under Maine law and rules. The most relevant and specific of these materials is DMR's "Guide to Lobstering in Maine", the full text of which can be found at: <http://www.maine.gov/dmr/lobsteringguide.htm>⁷

The relevant section is quoted in full as follows:

" V-Notched Lobsters
Title 12, Section 6436, Regulation 25.15

For more information on v-Notched Lobsters click [here](#)

All lobstermen in the State of Maine participate in a mandatory v-notch program, requiring them to notch all egg-bearing lobsters prior to liberation. The practice of notching a known "breeder" extends her protection beyond the hatching of her eggs. While viewing the top side, the flipper immediately to the right of the center one is subject to be notched should the female lobster be carrying eggs. A v-notch tool or a sharp knife is used to remove a one-quarter (1/4) inch deep portion from the center of the flipper. This v-notch will remain through the next few molts allowing her to reproduce for several years to come. If the v-notch grows out, it should be renotched to the one-quarter (1/4) inch size to maintain the protection of this breeder. A natural occurrence may also cause mutilation to a female's right flipper, which also makes her illegal to possess.

1. A female lobster marked with a v-notch in the right flipper next to the middle flipper is illegal to possess. The correct flipper is determined when the underside of the lobster is down and the tail is toward the person making the determination.

⁷ This document was not introduced in to the record, nor is it cited in either party's brief. The court concludes that whether or not its contents are legally accurate, for the limited purpose of whether the court should apply some form of equitable estoppel, the contents are judicially noticeable under M.R. Evid. 201(b)(2).

2. It is illegal to possess a female lobster mutilated in a manner which could hide or obliterate a v-notch, including that missing flipper.

3.No violation is charged if a v-notched/mutilated female lobster is immediately liberated into our coastal waters. The penalty for a v-notched/mutilated female is \$50 for the violation and \$50 for each lobster.

For more information on v-Notched Lobsters click here”

This additional explanatory material makes it unquestionably clear that “A natural occurrence may also cause mutilation to a female’s right flipper, which also makes her illegal to possess.” and “2. It is illegal to possess a female lobster mutilated in a manner which could hide or obliterate a v-notch, including that missing flipper.”

Had the ambiguous text of DMR Policy 2A(3) caused any confusion in Mr. Weeks mind, or in the mind of any lobsterman exercising due care in attempting to determine “what the State commands or forbids” a brief look at the most specific and broadly available state publication should have resolved any reasonable confusion.

Conclusion

The court concludes that 12 MRSA § 6436 must be construed together with 12 MRSA § 6204, and that taken together the legislative intent is clear. A lobsterman who takes and keeps a female lobster that has a damaged right center flipper that could have once been v-notched does so at his peril. The statutes create a strict liability situation. In fact, to construe them otherwise would be to create a loophole so large that the effectiveness of the entire v-notching program could be eviscerated.

The language of DMR Policy 2A(3), which the court determines to be ambiguous on its face, is such as to create confusion in the mind of a conscientious lobsterman as to which lobsters may or may not legally be kept. However, as a matter of law, the court determines that language to be legally ineffective, as it creates an exception that is not authorized by the express language of the statute. However, even if it is legally ineffective, a Defendant can make a facially

persuasive argument that the policy is so confusing that fundamental fairness should estop the state from holding her or him liable, especially in light of the “beyond a reasonable doubt” standard required in criminal prosecutions.

However, more specific and quite clear publicly available materials place a lobster licensee on explicit notice of precisely what is required, of what is prohibited, and of the fact that this law creates a strict liability situation. Accordingly, the facially persuasive argument that a conscientious lobsterman can be lured into the commission of an unwitting criminal act fails on closer examination.

The Department’s policy, as fully articulated, is consistent with the statute, which creates a strict liability situation, and in fact must do so if the underlying legislative purpose – conservation of fertile female lobsters – is to be achieved.

Accordingly, the court concludes that Defendant is guilty of illegally possessing four mutilated lobsters⁸. In light of all of the circumstances here the court finds a just disposition to be the imposition of the mandatory minimum fine (\$50.00, plus \$50.00 per lobster), or \$250.00 plus surcharges, to be appropriate. However, the court strongly urges the Department of Marine Resources to rewrite its rules and policies so as to eliminate any future argument about exactly what is prohibited. Alternatively, if the Department wishes to construct some kind of exemption for regenerated flippers, it must be clear about exactly what it means by that, and propose a revision to 12 MRSA § 6436 that will allow the Department to establish an exemption, of whatever kind.

Accordingly, the Court **ORDERS** that the clerk shall enter the following verdict and disposition on the criminal docket: “Amended Decision & Judgment

⁸ In fact, the logic of the court’s analysis should lead to a conviction for possessing all six of the mutilated lobsters initially alleged by the state. However, the court concludes that having decided in mid-trial that two of the lobsters’ flippers were insufficiently damaged to merit a conviction (those shown in State’s Ex. 3 & 5), it concludes that principles of due process and double jeopardy prohibit reconsideration of that decision at this point. The court is basing its guilty findings on the damaged flippers shown in State’s Ex. 1, 2, 4 & 6.

entered. Count 1: Trial held. Verdict: **GUILTY**. Fine: \$250.00 plus surcharges.
Count 2: Plea changed to Nolo. Verdict: **GUILTY**. Fine: \$100.00 plus surcharges.
Defendant shall have 30 days to pay.”

Dated:

John David Kennedy
Judge, Maine District Court