

FISH, WILDLIFE AND PARKS, DEPARTMENT OF - Notification regarding loss of hunting, fishing, and trapping privileges is to be done by the Department of Fish, Wildlife and Parks;

FISHING AND HUNTING LICENSES – The loss of hunting, fishing, and trapping privileges that occurs upon a guilty plea, conviction, or forfeiture of bail of a fish and game violation is a direct consequence of that violation. As a result, a Judge must inform an individual accused of a fish and game violation of the potential forfeiture of fishing, hunting, and trapping privileges as a result of conviction, guilty plea, or forfeiture of bond in order to assure that a “knowing” plea is entered;

JUDGES – A Judge must inform an individual accused of a fish and game violation of the potential forfeiture of fishing, hunting, and trapping privileges as a result of conviction, guilty plea, or forfeiture of bond in order to assure that a “knowing” plea is entered;

JUSTICES OF THE PEACE – A Judge must inform an individual accused of a fish and game violation of the potential forfeiture of fishing, hunting, and trapping privileges as a result of conviction, guilty plea, or forfeiture of bond in order to assure that a “knowing” plea is entered;

MONTANA CODE ANNOTATED - Sections 46-7-102 (1999), 46-8-101, 46-12-210, (1999), 87-1-101, -102(1), (2), (2)(a), (b), (d), (f), (3), (4), 6(b), 7(b), (11), -201(1), (2);

UNITED STATES CODE - Title 18, sections 922, (g)(9).

- HELD:
1. The loss of hunting, fishing, and trapping privileges that occurs upon a guilty plea, conviction, or forfeiture of bail of a fish and game violation is a direct consequence of that violation. A Judge must inform an individual accused of a fish and game violation of the potential forfeiture of fishing, hunting, and trapping privileges as a result of conviction, guilty plea, or forfeiture of bond in order to assure that a “knowing” plea is entered.
 2. Notification regarding loss of hunting, fishing, and trapping privileges is, by statute, to be done by the Department of Fish, Wildlife, and Parks.

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Mr. David G. Rice
Hill County Attorney
County Courthouse
315 Fourth Street
Havre, MT 59501-3923

Dear Mr. Rice:

You have requested my opinion concerning the following questions:

1. Does a judge have a duty to advise persons accused of fish and game violations of the potential forfeiture of hunting, fishing and trapping privileges as a result of a conviction, plea, or forfeiture of bond in order to assure a “knowing” plea; and,
2. Should a judge or the Department of Fish, Wildlife, and Parks (FWP) enforce the forfeiture of hunting, fishing, and trapping privileges?

I.

The statutes governing the notification duties of the courts provide a list of information that must be provided to a criminal defendant. The statutes do not specifically require judges to inform persons accused of fish and game violations about the potential loss of hunting, fishing, or trapping privileges as a result of a conviction, plea or forfeiture of bond.

At the initial appearance, a judge is required to inform the criminal defendant:

- (a) of the charge or charges against the defendant;
- (b) of the defendant’s right to counsel;
- (c) of the defendant’s right to have counsel assigned by a court of record in accordance with the provisions of 46-8-101;
- (d) of the general circumstances under which the defendant may obtain pretrial release;
- (e) of the defendant’s right to refuse to make a statement and the fact that any statement made by the defendant may be offered in evidence at the defendant’s trial; and

(f) of the defendant's right to a judicial determination of whether probable cause exists if the charge is made by complaint alleging the commission of a felony.

Mont. Code Ann. § 46-7-102.

Before accepting a plea of guilty or nolo contendere, the court shall determine that the defendant understands the following:

- (a)(i) the nature of the charge for which the plea is offered;
- (ii) the mandatory minimum penalty provided by law, if any;
- (iii) the maximum penalty provided by law, including the effect of any penalty enhancement provision or special parole restriction; and
- (iv) when applicable, the requirement that the court may also order the defendant to make restitution of the costs and assessments provided by law;

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Mont. Code Ann. § 46-12-210.

In addition to the requirements contained in the above statutes, the Supreme Court has explicitly ruled that under Mont. Code Ann. § 46-12-210 and related statutes, courts must inform defendants of the direct, but not the collateral, consequences of a guilty plea. State v. Liefert, 2002 MT 48, 309 Mont. 19, 43 P.3d 329. Thus, the question presented turns on whether the forfeiture of hunting, trapping, and fishing privileges is a direct or collateral consequence of a fish and game violation.

A consequence is direct if it has a "definite, immediate, and largely automatic effect" on the defendant. Liefert, at ¶ 22 (citing United States v. Bouthot, 878 F.2d 1506, 1511 (1st Cir., 1989)). In contrast, a consequence is collateral if a defendant has control over whether or not the consequence occurs. In addition, a consequence is collateral if it is not under the control of the sentencing judge or it is a procedure under the control of a different sovereign or different agency. Id., (citing United States v. Long, 852 F.2d 975 (7th Cir. 1988)).

In the Liefert case, David Liefert was charged under federal law with unlawfully possessing a firearm, 18 U.S.C. § 922(g)(9), after pleading guilty under state law to partner/family member assault, Mont. Code Ann. § 45-5-206. Liefert, ¶ 1. After the federal violation was

charged, Liefert moved in Justice Court to withdraw his guilty plea to the partner assault, arguing good cause to withdraw his plea because the Justice Court did not inform him of the federal prohibition on possessing a firearm as a result of his plea under state law. Id.

The Court held that a potential federal firearms prosecution under 18 U.S.C. § 922 was a collateral consequence because it is not an automatic, definite, or immediate consequence of a state guilty plea and because the later prosecution is under the control of the federal government. Liefert, ¶ 25. The Court found that Liefert had discretionary control over whether or not he would be in violation of federal law upon entry of his guilty plea. If he chose to possess a weapon after pleading guilty, he would be in violation of federal law; if he chose not to possess a weapon, he would not be in violation. Id. Finally, Liefert's federal prosecution was under the control of a different sovereign entity. Id. Accordingly, the trial court was not required to inform Liefert of this collateral consequence. Liefert, 2002 MT 48, ¶ 25. See also Saadiq v. Iowa, 387 N.W. 2d 315, 325 (Iowa, 1986) (holding that restriction on firearms under a different section of Iowa law was a collateral consequence); Reponde v. State, 566 P.2d 577, 584 (1974) (restriction on holding a gun is a collateral consequence).

The loss of hunting, fishing, and trapping privileges that occurs upon a guilty plea, conviction, or forfeiture of bond of a fish and game violation is different. The majority of the fish and game statutes make forfeiture of hunting, fishing, and trapping privileges a mandatory consequence of a violation. See Mont. Code Ann. § 87-1-102(2), (a), (b), (d), (f), (3), (4), 6(b), 7(b). Some allow discretion on the part of the judge. See Mont. Code Ann. § 87-1-102 (1). Regardless, the loss of privileges is a direct and immediate consequence of a conviction. It is a consequence that is completely outside the control of the defendant. The consequence is either completely automatic or entirely dependent upon the discretion of the sentencing judge. It is my opinion that the loss of hunting, fishing, and trapping privileges that occurs upon guilty plea, conviction, or forfeiture of bail of a fish and game violation is a direct consequence of the violation. Therefore, a Judge must inform a defendant of the potential forfeiture of privileges as a result of conviction, guilty plea, or forfeiture of bond in order to assure that a "knowing" plea is obtained.

Though not directly on point, the recent decision in State v. Kempin, 2002 MT 313, 308 Mont. 17, 38 P.2d 859, supports this opinion. In that case, the Justice of the Peace advised defendant's counsel of the possible loss of privileges as a consequence of the forfeiture of bond. Kempin, ¶ 5. The Montana Supreme Court noted that fact in determining that a court may forfeit privileges upon the forfeiture of bond. Id., ¶ 18. The Court also noted that the Notices to Appear issued to the defendant contained notices regarding the

possibility of loss of privileges. Id. The Court specifically referred to these notifications in determining that Kempin's due process rights were not violated. Kempin, ¶ 18.

II.

The statutes governing the powers and duties of FWP clearly authorize that department to enforce the forfeitures. Mont. Code Ann. § 87-1-201(1) provides that FWP "possesses all powers necessary to fulfill the duties prescribed by law and to bring actions in the proper courts of this state for the enforcement of the fish and game laws and the rules adopted by the department." Mont. Code Ann. § 87-1-201(2) further provides that FWP "shall enforce all the laws of the state respecting the protection, preservation, and propagation of fish, game, fur-bearing animals, and game and nongame birds within the state." FWP performs these functions primarily by control of licenses and permits to hunt, fish, and trap. The statutes governing the forfeiture of privileges specifically direct FWP to notify the defendant of the loss of privileges. See Mont. Code Ann. §§ 87-1-102(1) and (2).

The principle function of FWP in regards to forfeiture of privileges is that of notifying the individual that his/her privileges have been forfeited as a result of a conviction, plea, forfeiture of bond, or an administrative hearing. See Mont. Code Ann. §§ 87-1-101(1) and (2). See also § 87-1-102(11). This notification by FWP is premised upon either a conviction, plea, forfeiture of bond, or an administrative ruling. Id. Due process requires an opportunity to be heard at a meaningful time. Montana State University v. Ransier, 167 Mont. 149, 154, 536 P.2d 187 (1975). As the forfeiture of privileges is either mandatory or at the discretion of the sentencing judge, any due process issues that a defendant may have would be as a result of the conviction, plea, forfeiture of bond, or administrative ruling, not the notification provided by FWP. Assuming adequate notice to the defendant of the possibility of forfeiture, as discussed in Part I above, the defendant's due process right to a hearing would clearly be satisfied by his ability to raise and argue any objections to the forfeiture at that time. The law also provides adequate opportunities to raise issues after sentencing, through a motion to withdraw a guilty plea, appeal from the conviction, or through a postconviction petition. Thus, the notification action itself required by the statutes provides sufficient due process to a recipient.

THEREFORE, IT IS MY OPINION:

1. The loss of hunting, fishing, and trapping privileges that occurs upon guilty plea, conviction, or forfeiture of bail of a fish and game violation is a direct consequence of that violation. A Judge must inform an individual accused of a

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fish and game violation of the potential forfeiture of fishing, hunting, and trapping privileges as a result of conviction, guilty plea, or forfeiture of bond in order to assure that a “knowing” plea is entered.

2. Notification regarding loss of hunting, fishing, and trapping privileges is, by statute, to be done by the Department of Fish, Wildlife, and Parks.

Very truly yours,

MIKE McGRATH
Attorney General

mm/pdb/jym