

OPINION NO. 79-031**Syllabus:**

- 1) R.C. 3743.32 and R.C. 3743.33 prohibit the retail sale and use of fireworks without the written permission of the county sheriff (or fire chief of a municipal corporation).
- 2) In the performance of his duty under R.C. 3743.33, a county sheriff may exercise reasonable discretion. A sheriff may, therefore, require one who purchases fireworks at retail, including an out-of-state purchaser, to secure a permit and to sign a statement that the fireworks will be used in accordance with R.C. 3743.33.
- 3) Except as provided in R.C. 3743.37, a manufacturer of fireworks, duly licensed under federal and state law, is not prohibited from selling fireworks at wholesale.
- 4) For the purposes of R.C. 3743.32 and R.C. 3743.33, a retail sale is a sale of fireworks, usually of a small quantity, directly to one who intends to use the fireworks, and a sale at wholesale is a sale of fireworks, usually of a large quantity, to one who intends to resell the fireworks.

To: James R. McKenna, Jefferson County Pros. Atty., Steubenville, Ohio
By: William J. Brown, Attorney General, June 15, 1979

You have requested my opinion on several questions pertaining to the sale and use of fireworks. Your letter sets forth the following facts:

During the past several years at or near the time of the July 4th activities and celebration, a question was raised concerning the sale of fireworks in Ohio. Some prosecuting attorneys feel the sale is illegal and have threatened to arrest any person participating in such a sale, while many prosecutors feel such a sale is legal and are being conducted throughout Ohio in public places and by mail.

The problems seems to arise from an interpretation of Section 3743.32 of the Revised Code, Sale and Use of Fireworks, and Section 3743.33, which deals with a permit for such sale.

Under the law in some Counties, the Sheriff is granting a permit, as follows:

" _____ is hereby given permission to sell fireworks, as defined in Section 3743.32 of the Revised Code in City of or _____ County, Ohio for the purposes set forth in Section 3743.33 of the Revised Code, for public or private exhibition. This permit is effective for the calendar year 19 ____." In addition to such a permit, the purchaser is required to sign a statement for the proper use of the fireworks that were purchased.

Based upon the foregoing facts, you have requested my opinion on the following questions:

- (1) If the seller has a proper permit for sale, must then the purchaser also have a permit for sale before he can purchase fireworks?

- (2) Must a purchaser sign a statement for proper use of the purchased fireworks?
- (3) If the seller has a proper permit for the sale, must he then also obtain a statement of proper use from the purchaser?
- (4) Must an out-of-state purchaser sign a statement of proper use?
- (5) Is a manufacturer of fireworks, duly licensed by the State of Ohio and the federal government and open for business throughout the year and engaged in fireworks displays throughout the country, permitted to sell class B. and C. fireworks at wholesale to be used in public or private exhibitions?

R.C. 3743.32, set forth below, prohibits the retail sale and use of fireworks.

Except as provided in section 3743.32 of the Revised Code, no person shall possess for sale at retail, or sell at retail, or discharge, ignite, or explode any fireworks. "Fireworks" does not include toy pistols, toy canes, toy guns or other devices in which paper or plastic caps containing twenty-five hundredths grains or less of explosive compound are used, providing they are so constructed that the hand cannot come in contact with the cap when in place for the explosion, and toy pistol paper or plastic caps which contain twenty hundredths grains or less of explosive mixture, the sale and use of which is permitted.

Your specific questions, however, focus upon R.C. 3743.33, set forth below, which empowers a municipal fire chief or county sheriff to permit the sale and use of fireworks for public or private exhibitions in connection with celebrations.

Upon written permission secured from the fire chief of a municipal corporation, or from a sheriff, fireworks may be sold and used for public or private exhibitions of fireworks in connection with fairs, carnivals, or other celebrations. . . . Sections 3743.27 to 3743.43, inclusive, of the Revised Code do not prohibit any wholesaler, dealer, or jobber from selling at wholesale such fireworks as are permitted to be used by such sections or the sale of fireworks to be shipped directly out of the state.

Your first four questions are related in that they seek clarification of the requirements a sheriff may impose upon one who seeks his permission to sell or use fireworks. The statute merely requires that the sheriff's permission be in writing and be limited to permitting the sale and use of fireworks for exhibitions in connection with fairs, carnivals or other celebrations. The statute does not set forth specific guidelines or procedures the sheriff must follow in determining that the intended use of the fireworks meets this latter statutory requirement. It is apparent, therefore, that the sheriff must exercise some discretion in carrying out his duty under R.C. 3743.33.

A grant of discretionary authority under these circumstances is neither improper nor uncommon. The courts have upheld, in various contexts, legislation that delegates reasonable discretionary power to executive officers or administrative boards with respect to the licensing of activities that fall within the police power. See, e.g., State ex rel. Mook v. City of Cincinnati, 120 Ohio St. 500 (1929) (municipal ordinance empowered the city manager to prescribe the terms and conditions upon which a permit to collect and carry garbage would be issued); Yee Bow v. City of Cleveland, 99 Ohio St. 269 (1919) (municipal ordinance empowered administrative officer to license public laundries, if in his judgment adequate sanitary arrangements and ventilation existed); City of Akron v. Budiani, 52 Ohio App. 2d 116 (Summit Co. 1976) (municipal ordinance empowered fire chief to issue permits for the storage and sale of fireworks); Hermelin v. Board of Liquor Control, 76 Ohio Law Abs. 33 (Ct. App. Franklin Co. 1953) (director of liquor control exercises broad discretion in determining advisability of issuing a liquor permit).

Under these cases, it is clear that a county sheriff may impose reasonable administrative requirements upon one who seeks his permission to sell or use fireworks under R.C. 3743.33. With respect to the requirements mentioned in your letter, it would appear that such requirements are reasonably related to the sheriff's duty to be satisfied that the intended use of the fireworks falls within those uses permitted under R.C. 3743.33. Since the statute only permits fireworks to be sold for the purpose of exhibitions in connection with fairs, carnivals or other celebrations, the issuance of a general permit to the seller may be inadequate, and a county sheriff may require the purchaser to assure that the intended use is a permitted use. It is, therefore, my opinion that a county sheriff may require a purchaser, including an out-of-state purchaser, to secure a permit and/or to sign a statement for proper use, even though the seller has a proper permit for sale.

Your last question concerns that portion of R.C. 3743.33 which states that "[s]ections 3743.27 to 3743.43, inclusive, of the Revised Code do not prohibit any wholesaler, dealer or jobber from selling at wholesale such fireworks as are permitted to be used by such sections or the sale of fireworks to be shipped directly out of state." Your specific question is whether a manufacturer, duly licensed under state and federal law, is permitted to sell class B and C fireworks at wholesale to be used in public or private exhibitions.

It is my understanding that your distinction between class B and C fireworks is a reference to the classification of explosives set out at 27 C.F.R. §181.182, which has been established by the Secretary of Treasury pursuant to Title XI of the Organized Crime Control Act of 1970, 18 U.S.C. §841 *et seq.* Class B refers to low explosives, which means "[e]xplosive material which can be caused to deflagrate when combined. (For example, black powder.)" 27 C.F.R. §181.182(b) (1978). Class C refers to blasting agents. This classification has been developed for the purpose of federal regulation of the storage of explosive materials. It has not been accorded any significance with respect to this State's laws regulating the sale of fireworks at wholesale. The distinction is not, therefore, relevant to the resolution of the issue raised in your last question.

With respect to state law, there is no prohibition against the possession of fireworks for sale at wholesale or the selling of fireworks at wholesale, except R.C. 3743.37, which prohibits the sale of fireworks to children under the age of twelve. R.C. 3743.32, which sets forth the prohibitions against the sale and use of fireworks, does not prohibit the sale of fireworks at wholesale. Nor can such a prohibition be inferred from the provision of R.C. 3743.33.

R.C. 3743.33 is a penal statute because R.C. 3743.99 provides for a fine of not less than twenty five nor more than five hundred dollars for violation of R.C. 3743.33. As a penal statute, R.C. 3743.33 must be strictly construed. *See*, R.C. 2901.04(A). R.C. 3743.33 merely states that R.C. 3743.27 to 3743.43, inclusive, are not intended to prohibit the wholesale sale of fireworks permitted to be used or the sale of fireworks to be shipped directly out of state; it does not expressly proscribe any particular type of sale. One cannot, consistent with a rule of strict construction, infer from a statement that certain sales are not prohibited that other types of sales are prohibited. Penal statutes cannot be extended by inference or construction to include conduct not expressly proscribed. *State v. Dunham*, 154 Ohio St. 63 (1950); *City of Cincinnati v. Levine*, 81 Ohio App. 181 (Hamilton Co. 1947); *City of Middletown v. Baker*, 73 Ohio App. 296 (Butler Co. 1943).

My opinion that neither R.C. 3743.32 nor R.C. 3743.33 prohibits the sale of fireworks at wholesale conflicts with the following statements made by one of my predecessors in 1905 Op. Att'y Gen. No. 1346, pp. 12, 15:

The "Fireworks Regulation Act of Ohio" was primarily enacted to protect the general public. Such statutes should be given a liberal interpretation so as to carry out the primary purposes of the statute. The term "such fireworks as are permitted to be used by this act," as used in Section 5904-7, General Code, should be given the same construction. Thus, the only fireworks permitted to be used in Ohio

are those used in connection with "fairs, carnivals, or other celebrations" and then only when written permission has been secured from the fire chief of a city or village, or the sheriff. From this, it can be seen that the legislators intended that wholesalers should sell fireworks only to out of state purchasers and those within the state who have secured the prerequisite written permission.

It should be noted, however, that the question presented to my predecessor was whether a fireworks firm could sell fireworks to children by advertising in comic books and claiming an exemption as a wholesaler. The opinion makes it quite clear, and I concur, that such practice is prohibited as a retail sale and may also violate the prohibition against a sale of fireworks to children. On the other hand, with respect to my predecessor's belief that the statutes regulating the sale and use of fireworks should be liberally interpreted, I am constrained to disagree. Since the statutes are penal in nature, they must be strictly construed even though enacted to protect the general public. R.C. 1.11.

It must be noted, however, that by the enactment of Am. Sub. H.B. 590, effective November 1, 1978, R.C. 3743.99 will be repealed on July 1, 1979. Since as of the date of the repeal of R.C. 3743.99, R.C. 3743.32 and R.C. 3743.33 will no longer be penal in nature, it is necessary to consider whether my opinion that the wholesale sale of fireworks is not prohibited would change, if the rule of strict construction of penal statutes is not applicable.

The purpose of any rule of statutory construction is to determine the legislative intent where the provisions of a statute are unclear. As indicated previously, the provisions of R.C. 3743.32 and R.C. 3743.33 are ambiguous with respect to the General Assembly's intent to restrict the wholesale sale of fireworks. One might infer from that portion of R.C. 3743.33 that states that "[s]ections 3743.27 to 3743.43 . . . do not prohibit any wholesaler . . . from selling at wholesale such fireworks as are permitted to be used by such sections . . ." that the General Assembly believed that it had somewhere in those sections otherwise restricted the wholesale sale of fireworks. R.C. 3743.32, which sets forth the general prohibition on the sale and use of fireworks, however, implies the contrary conclusion, since the General Assembly only expressly prohibits therein the retail sale of fireworks.

While the former interpretation is permissible absent the requirement of strict construction, it is my opinion that the latter interpretation is the better interpretation. Read together the two statutes clearly intend some distinction between sales at retail and sales at wholesale. If the former interpretation is selected, no such distinction is maintained; the sale of fireworks at wholesale would be subject to the same restrictions as retail sales. I am, moreover, reluctant to conclude that the General Assembly would impose such restrictions expressly with respect to one type of sale but only impliedly with respect to the other type of sale.

Because of the distinction between retail and wholesale sales under R.C. 3743.32 and R.C. 3743.33, some note of their distinguishing characteristics is necessary. The terms are not expressly defined for the purposes of R.C. Chapter 3743; they must, therefore, be interpreted in accordance with common usage. R.C. 1.42; see also, North American Van Lines, Inc. v. United States, 243 F.2d 693 (6th Cir. 1957); State v. Bovee, 6 N.P. (n.s.) 337 (C.P. Lorain Co. 1907).

Various courts have considered the distinction, in common usage, between the terms "retail" and "wholesale." See, e.g., Roland Electric Co. v. Walling, 326 U.S. 657 (1946); White Motor Co. v. Littleton, 124 F.2d 92 (5th Cir. 1941); Guess v. Montague, 51 F. Supp. 61 (E.D.S.C. 1942), modified on other grounds, 140 F.2d 500 (4th Cir. 1943); Stolze Lumber Co. v. Stratton, 54 N.E. 2d 554 (Ill. 1944). The courts have generally held that a retail sale means a sale in small quantity or direct to a consumer and a sale at wholesale means a sale in large quantity to one who intends to resell. See also, 1950 Op. Att'y Gen. No. 1346, supra.

In order to determine whether the courts of this state will follow this prevailing view in interpreting the provisions of R.C. 3743.32 and R.C. 3743.33, it is necessary to consider the decision of the Lucas County Court of Appeals in State v. DeWees, 2 Ohio App. 2d 343 (1965), rev'd per curiam, 6 Ohio St. 2d 153 (1966). The defendant in that case had sold a single package of fireworks to a police officer and was convicted of making an illegal retail sale of fireworks under R.C. 3743.32. The defendant appealed his conviction, contending that there was no evidence that there had been a retail sale. In its consideration of this issue, the Court of Appeals adopted the prevailing view of the meaning of "retail" as opposed to "wholesale" and concluded ". . . that as used in Section 3743.32, Revised Code, the term, 'sell at retail' means to sell to a consumer." Id. at 345. The Court then noted that a consumer is one who consumes, eats, uses up, or destroys the item purchased. The Court held, therefore, that, since there was no evidence that the police officer had used up or destroyed the fireworks, or that at the time of the purchase he intended to do so, a sale at retail had not been proven.

The Ohio Supreme Court's reversal of the decision was accompanied only by the statement that "[t]he sale of fireworks to the police officer was a sale 'at retail' within the meaning of the statute." Since the Court used the term "retail sale" without offering a different interpretation of its meaning, one must presume that the Court concurred with the definition adopted by the Court of Appeals, although it disagreed with the conclusion that a retail sale had not been proven. I am certainly reluctant to conclude that the Supreme Court would undertake to reject the prevailing view of the distinction between a retail and a wholesale sale in an equivocal manner. It is, therefore, my opinion that for the purposes of R.C. 3743.32 and R.C. 3743.33, a retail sale is a sale of fireworks, usually of a small quantity, directly to a consumer, and a sale at wholesale is a sale of fireworks, usually of a large quantity, to one who intends to resell.

In response to your specific questions, it is, therefore, my opinion, and you are advised, that:

- 1) R.C. 3743.32 and R.C. 3743.33 prohibit the retail sale and use of fireworks without the written permission of the county sheriff (or fire chief of a municipal corporation).
- 2) In the performance of his duty under R.C. 3743.33, a county sheriff may exercise reasonable discretion. A sheriff may, therefore, require one who purchases fireworks at retail, including an out-of-state purchaser, to secure a permit and to sign a statement that the fireworks will be used in accordance with R.C. 3743.33.
- 3) Except as provided in R.C. 3743.37, a manufacturer of fireworks, duly licensed under federal and state law, is not prohibited from selling fireworks at wholesale.
- 4) For the purposes of R.C. 3743.32 and R.C. 3743.33, a retail sale is a sale of fireworks, usually of a small quantity, directly to one who intends to use the fireworks, and a sale at wholesale is a sale of fireworks, usually of a large quantity, to one who intends to resell the fireworks.