

OPINION NO. 2012-012**Syllabus:**

2012-012

1. The term “surface mining truck,” as used in R.C. 5577.043(A)(1), means a “vehicle,” as defined in R.C. 4501.01(A), used to haul minerals upon Ohio’s improved public highways and streets.
2. A deputy sheriff shall exercise his discretion in determining whether R.C. 5577.043(A)(1)(b) applies in a particular situation involving minerals that are transferred as personal property from one person to another by contract. In exercising his discretion, the deputy sheriff must consider the written terms of the contract and, if necessary, R.C. 1302.42 or any evidence that indicates when the seller and buyer intended the buyer to take ownership, dominion, and control over the minerals. If a deputy sheriff determines that a buyer acquired ownership, dominion, and control over the minerals prior to a surface mining truck transporting the minerals to another location, R.C. 5577.043(A)(1)(b) does not apply and the truck may not exceed the vehicle weight provisions of R.C. 5577.01-.09 by the percentage allowances of R.C. 5577.043(A)-(B). If a deputy sheriff determines that a buyer will acquire ownership, dominion, and control over the minerals after a surface mining truck transports the minerals from the place where the minerals are loaded to another place, R.C. 5577.043(A)(1)(b) will apply and the truck may exceed the vehicle weight provisions of R.C. 5577.01-.09 by the percentage allowances of R.C. 5577.043(A)-(B).

To: Stephen J. Pronai, Madison County Prosecuting Attorney, London, Ohio

June 2012

By: Michael DeWine, Ohio Attorney General, April 27, 2012

We have received your request for an opinion regarding the enforcement of the gross vehicle weight provisions of R.C. 5577.01-.09 and the wheel and axle load limits of those sections. You have asked about the meaning of the term “surface mining truck,” as used in R.C. 5577.043, which establishes the circumstances under which such a truck may exceed R.C. 5577.01-.09’s gross vehicle weight provisions and vehicle axle and load limits. You have also asked how a deputy sheriff determines when a surface mining truck is transporting minerals in accordance with the conditions prescribed in R.C. 5577.043(A)(1)(b).

R.C. 5577.01-.09 prescribe the maximum permissible length, width, height, and weight for a vehicle operated upon public highways and streets in this state. *See* 1979 Op. Att’y Gen. No. 79-035 at 2-117. *See generally* R.C. 4513.34(A) (an applicant may obtain a special permit “authorizing the applicant to operate or move a vehicle or combination of vehicles of a size or weight of vehicle or load exceeding the maximum specified in [R.C. 5577.01-.09]” upon a public highway). With respect to vehicle weight, these statutes prescribe the maximum gross weight of, and axle and wheel load for, a vehicle traveling upon improved public highways and streets in this state. *See, e.g.,* R.C. 5577.02 (no vehicle shall be operated upon improved public highways or streets in excess of the weights prescribed in R.C. 5577.01-.14); R.C. 5577.03 (establishing maximum weight of vehicle and load in relation to tire width); R.C. 5577.04 (establishing maximum gross weight and axle and wheel load for pneumatic tired vehicles); R.C. 5577.041 (establishing maximum gross weight and axle and wheel load for solid-tired vehicles); R.C. 5577.07 (reduction of maximum weight of vehicle and load during times of thaws and excessive moisture). R.C. 5577.042 and R.C. 5577.043 also set forth instances in which a vehicle may exceed the prescribed maximum gross weight of, and axle and wheel load for, a vehicle traveling upon improved public highways and streets in this state.

Your particular questions concern the gross weight and axle and wheel load exceptions for a surface mining truck set forth in R.C. 5577.043. These exceptions provide as follows:¹

(A) Notwithstanding [R.C. 5577.02 and R.C. 5577.04], the following vehicles under the described conditions may exceed by no more than seven and one-half per cent the weight provisions of [R.C. 5577.01-.09] and no penalty prescribed in [R.C. 5577.99] shall be imposed:

(1) A surface mining truck transporting minerals from the place where the minerals are loaded to any of the following:

¹ The exceptions set forth in R.C. 5577.043 do not apply to the operation of a surface mining truck on (1) a highway that is part of the interstate system or (2) a highway, road, or bridge that is subject to reduced maximum weights under R.C. 4513.33, R.C. 5577.07, R.C. 5577.071, R.C. 5577.08, R.C. 5577.09, or R.C. 5591.42. R.C. 5577.043(D).

- (a) The construction site where the minerals are discharged;
- (b) The place where title to the minerals is transferred;
- (c) The place of processing.

. . . .

(B) In addition, if any of the vehicles listed in division (A) of this section and operated under the conditions described in that division do not exceed by more than seven and one-half per cent the gross vehicle weight provisions of [R.C. 5577.01-.09] and do not exceed the wheel or axle load limits of those sections by more than seven and one-half per cent, no penalty prescribed in [R.C. 5577.99] for a wheel or axle overload shall be imposed.

R.C. 5577.043.

If a surface mining truck operated under the conditions described in R.C. 5577.043(A) exceeds the weight provisions of R.C. 5577.01-.09 by more than the percentage allowance of either R.C. 5577.043(A) or (B), “both of the following apply without regard to the allowance provided by division (A) or (B) of [R.C. 5577.043]:” (1) the applicable penalty prescribed in R.C. 5577.99 and (2) the civil liability imposed by R.C. 5577.12. R.C. 5577.043(C).

The General Assembly has not defined the term “surface mining truck” for purposes of R.C. 5577.043(A)(1). The term also has not acquired a technical or particular meaning from the courts or the Department of Transportation. *See generally* 16 Ohio Admin. Code 5501:2-1-01 (defining terms used in the rules regulating the movement of overweight and over dimension vehicles). Absent such a definition, the term “surface mining truck,” as used in R.C. 5577.043, is to “be read in context and construed according to the rules of grammar and common usage.” R.C. 1.42.

The common, ordinary meaning of the term “surface mining truck” is a vehicle that is used to transport minerals extracted from the portion of the earth that covers and envelops the minerals.² *See generally Merriam-Webster’s Collegiate Dictionary* 791 (11th ed. 2005) (“mining” is “the process or business of working mines,” which are pits or excavations in the earth from which minerals are taken, *see id.* at 790); *id.* at 1257 (the word “surface,” as an adjective, means the upper part or layer of the earth); *id.* at 1343 (a “truck” is “a wheeled vehicle for moving heavy articles: as . . . a strong horse-drawn or automotive vehicle (as a pickup) for hauling”). This definition includes, among other things, a vehicle used to haul

² In Ohio, surface mining is regulated by R.C. Chapters 1513 (coal surface mining) and 1514 (other surface mining). Coal and other surface mining involve the extraction of coal and minerals from the surface of the earth. *See* R.C. 1513.01(H) (defining “coal mining operation” for purposes of R.C. Chapter 1513); R.C. 1514.01(F) (defining “surface mining operation” for purposes of R.C. Chapter 1514); R.C. 1514.01(M) (defining “in-stream mining” for purposes of R.C. Chapter 1514).

minerals upon improved public highways and streets in Ohio from one location to another.

Further, as explained previously, R.C. 5577.043(A)(1) is part of a statutory scheme to regulate the maximum gross weight of, and axle and wheel load for, a vehicle traveling upon Ohio's improved public highways and streets. *See* R.C. 5577.01-.09. R.C. 5577.043(A)(1) provides that a surface mining truck transporting minerals upon improved public highways and streets may exceed by no more than 7½ percent the vehicle weight provisions of R.C. 5577.01-.09 when transporting the minerals from the place where the minerals are loaded to (1) a construction site where the minerals are discharged; (2) a place where title to the minerals is transferred; or (3) a place of processing. The language of R.C. 5577.043(A)(1), as well as other language in R.C. 5577.043, also explicitly characterizes a surface mining truck as a vehicle used to haul minerals upon improved public highways and streets in this state. Thus, pursuant to the common meaning of the term surface mining truck and the language used in R.C. 5577.043, a surface mining truck must be a vehicle used to haul minerals upon Ohio's improved public highways and streets for R.C. 5577.043(A)(1) to apply.

As used in R.C. 5577.043, the term "vehicle" has the same meaning as in R.C. 5577.04 since R.C. 5577.043 creates an exception to the vehicle weight provisions of R.C. 5577.04. *See generally State ex rel. Thurn v. Cuyahoga County Bd. of Elections*, 72 Ohio St. 3d 289, 294, 649 N.E.2d 1205 (1995) (it "is a fundamental rule of statutory construction that statutes relating to the same subject matter should be construed together"). For purposes of R.C. 5577.04, a "vehicle" is "any single vehicle when not in combination, or any combination of vehicles, as defined in [R.C. 4501.01]." R.C. 5577.01(B). R.C. 4501.01(A), in turn, defines the term "vehicles" to mean "everything on wheels or runners, including motorized bicycles, but . . . not . . . electric personal assistive mobility devices, vehicles that are operated exclusively on rails or tracks or from overhead electric trolley wires, and vehicles that belong to any police department, municipal fire department, or volunteer fire department, or that are used by such a department in the discharge of its functions."

If an object traveling upon an improved public highway or street does not possess the characteristics set forth in R.C. 4501.01(A), it cannot be a vehicle for purposes of R.C. 5577.04, *see* R.C. 5577.01(B), and, as a consequence, it is not a vehicle for purposes of R.C. 5577.043. *See State ex rel. Thurn v. Cuyahoga County Bd. of Elections*, 72 Ohio St. 3d at 294. This means that a surface mining truck must be a "vehicle," as defined in R.C. 4501.01(A), that is used to haul minerals upon improved public highways and streets in Ohio for R.C. 5577.043(A)(1) to apply. Accordingly, pursuant to the common meaning of the term surface mining truck and the language of R.C. 5577.043, the term "surface mining truck," as used in R.C. 5577.043(A)(1), means a "vehicle," as defined in R.C. 4501.01(A), used to haul minerals upon Ohio's improved public highways and streets.

Your second question asks how a deputy sheriff determines when a surface mining truck is transporting minerals in accordance with the conditions prescribed

in R.C. 5577.043(A)(1)(b).³ R.C. 5577.043(A)(1)(b) provides that a surface mining truck transporting minerals upon Ohio's improved public highways and streets may exceed by no more than 7½ percent the vehicle weight provisions of R.C. 5577.01-.09 when transporting the minerals from the place where the minerals are loaded to a "place where title to the minerals is transferred."

The General Assembly has not set forth in R.C. 5577.043(A)(1)(b) or elsewhere in the Revised Code precise procedures or guidelines a deputy sheriff must follow when determining whether the driver of a surface mining truck is transporting minerals from the place where the minerals are loaded to a place where title to the minerals is transferred. Also, no Ohio court has construed R.C. 5577.043(A)(1)(b) and established standards for determining when minerals are being transported from the place where the minerals are loaded to a place where title to the minerals is transferred. In the absence of legislative and judicial guidance on the application of R.C. 5577.043(A)(1)(b), a deputy sheriff shall exercise his discretion in determining whether R.C. 5577.043(A)(1)(b) applies in a particular situation. *See Brown v. King*, 2009-Ohio-4957, 2009 Ohio App. LEXIS 4210, at ¶25 (Stark County Sept. 21, 2009); *Fuller v. Cuyahoga Metro. Housing Auth.*, 2009-Ohio-4716, 2009 Ohio App. LEXIS 3988, at ¶19 (Cuyahoga County Sept. 10, 2009); *Knapp v. Gurish*, 44 Ohio App. 3d 57, 58, 541 N.E.2d 121 (Cuyahoga County 1989); *Village of Oakwood v. Carlson*, Case No. 39329, 1979 Ohio App. LEXIS 12042, at *5 (Cuyahoga County Jan. 11, 1979); *see also McCleskey v. Kemp*, 481 U.S. 279, 297 (1987) ("discretion is essential to the criminal justice process").

Title to minerals is (1) the right of a person to own, possess, and have custody of the minerals or (2) legal evidence of a person's ownership rights in the minerals. *See generally Merriam-Webster's Collegiate Dictionary* 1312 (11th ed. 2005) ("title" is "a : all the elements constituting legal ownership b : a legally just cause of exclusive possession c : the instrument (as a deed) that is evidence of a right"). Under Ohio law, minerals may be transferred as personal property from one person to another by contract.⁴ *See* R.C. 1302.03(A) ("[a] contract for the sale of minerals or the like, including oil and gas, or a structure or its materials to be

³ R.C. 5577.13 provides that, "[i]n those counties having forty miles or more of improved intercounty or state highways, the sheriff of each such county shall, and in all other counties may, detail one or more deputies for the work of enforcing [R.C. 5577.01-.14]." *See* 2009 Op. Att'y Gen. No. 2009-039.

⁴ Title to minerals that have not been mined from the earth may be transferred from one person to another as an interest in the land. *See generally Ferguson v. Strader*, 94 Ohio App. 3d 622, 627, 641 N.E.2d 728 (Clermont County 1994) ("[g]enerally, the term 'interest in land' means some portion of the title or right of possession, and does not include agreements which may simply affect land"); *DePugh v. Mead Corp.*, 79 Ohio App. 3d 503, 510, 607 N.E.2d 867 (Ross County 1992) ("[a]n 'interest in land' within the meaning of the Statute of Frauds is any right, privilege, power or immunity, or combination thereof, which is an interest in land under the law of property and is not 'goods' within the Uniform Commercial Code. Restatement of the Law 2d, Contracts (1979) 318, Section 127"). The transfer

removed from realty is a contract for the sale of goods within [R.C. 1302.01-.98⁵] if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell”); *Waters v. Monroe Coal Co., Inc.*, 54 Ohio Misc. 37, 42, 376 N.E.2d 977 (C.P. Muskingum County 1977) (“there is a clear distinction between an absolute conveyance of the mineral in place and the grant of a mining right to enter upon the land and convert the mineral into personalty and dispose of it. In case of an absolute sale there is a severance of the title to the realty; in case of a lease there is no such severance, although the mining right entitles the lessee to extract the mineral” (quoting 1A *Thompson on Real Property*, at p. 41)). Thus, the application of R.C. 5577.043(A)(1)(b) to a particular situation depends on whether the minerals are transferred as personal property from one person to another by contract.⁶

When that type of transfer occurs, a deputy sheriff must consider first the written terms of the contract. See R.C. 1302.20-.24; R.C. 1302.42; R.C. 1302.47(A); *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶11 (2003). See generally R.C. 1302.14 (a contract for the sale of minerals as personal property obligates a seller “to transfer and deliver” the minerals and a buyer “to accept” the minerals “and pay in accordance with the contract”).⁷

If there is no written contract or ambiguity exists with regard to the language of a written contract, a deputy sheriff may then consider other evidence that indicates when the seller and buyer intended the buyer to take ownership, dominion, and

may occur by deed, grant, adverse possession, or other conveyance of the interest. See *State ex rel. Shelly Materials, Inc. v. Clark County Bd. of Commr's*, 115 Ohio St. 3d 337, 2007-Ohio-5022, 875 N.E.2d 59, at ¶32 (2007); *Moore v. Indian Camp Coal Co.*, 75 Ohio St. 493, 499, 80 N.E. 6 (1907); *Gill v. Fletcher*, 74 Ohio St. 295, 305, 78 N.E. 433 (1906). When this kind of transfer occurs, the buyer of the minerals does not take title to the minerals at a location that is different from where the minerals are mined from the earth.

⁵ R.C. 1302.01-.98 are Ohio’s codification of Article 2 of the model Uniform Commercial Code, which governs the sale of goods. For purposes of these statutes, minerals are goods that may be sold by contract. See R.C. 1302.01(A)(8); R.C. 1302.01(A)(11); R.C. 1302.03(A).

⁶ R.C. 5577.043(A)(1)(b) may apply when minerals are transferred as personal property from one person to another by gift. See generally *Merriam-Webster’s Collegiate Dictionary* 528 (11th ed. 2005) (a “gift” is “something voluntarily transferred by one person to another without compensation”). This opinion does not consider the application of R.C. 5577.043(A)(1)(b) to a situation involving minerals transferred as personal property from one person to another by gift since you have indicated in your letter that you are concerned about the transportation of minerals that are sold as personal property pursuant to a contract.

⁷ As used in R.C. 1302.01-.98, a “buyer” is “a person who buys or contracts to buy goods” and a “seller” is “a person who sells or contracts to sell goods.” R.C. 1302.01(A)(1) and (A)(4).

control over the minerals. See R.C. 1302.05; *Huff v. FirstEnergy Corp.*, 130 Ohio St. 3d 196, 2011-Ohio-5083, 957 N.E.2d 3, at ¶12 (2011); *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d at ¶12; *Kostelnik v. Helper*, 96 Ohio St. 3d 1, 2002-Ohio-2985, 770 N.E.2d 58, at ¶15 (2002); *Graham v. Drydock Coal Co.*, 76 Ohio St. 3d 311, 313-14, 667 N.E.2d 949 (1996).

Finally, a deputy sheriff may rely on R.C. 1302.42, which establishes when title to goods passes from a seller to a buyer under a contract for the sale of goods, to determine where and when title to the minerals is transferred from the seller to the buyer.⁸ When the contract is silent on these matters and no other provision of R.C. 1302.01-.98 applies, one of the rules set forth in R.C. 1302.42(A)-(C) may indicate where and when title to the minerals passes from the seller to the buyer.

R.C. 1302.42(A) states that “[t]itle to goods cannot pass under a contract for sale prior to their identification to the contract pursuant to [R.C. 1302.45],” which concerns the manner of identifying goods to a contract so that an insurable interest in the buyer and the rights set forth in R.C. 1302.46 will accrue. R.C. 1302.42(B) provides the instances when title of goods passes “to the buyer at the time and place at which the seller completes performance with reference to the physical delivery of the goods.” Pursuant to this division, if a “contract requires or authorized the seller to send the goods to the buyer but does not require the seller to deliver them at destination, title passes to the buyer at the time and place of shipment; but . . . [i]f the contract requires delivery at destination, title passes on tender there.” R.C. 1302.42(C) states that, where delivery is to be made without moving the goods, “title passes at the time when the seller delivers the” required tangible or electronic document of title or, “[i]f the goods are at the time of contracting already identified and no documents of title are to be delivered, title passes at the time and place of contracting.” R.C. 1302.42(A)-(C) thus provide further guidance in determining the place where title to minerals is transferred when a written contract or other evidence does not indicate where the seller and the buyer intended the buyer to take ownership, dominion, and control over the minerals.

⁸ The official comments to U.C.C. § 2-401 (amended 2003), which is codified in Ohio as R.C. 1302.42, state that “[t]his Article deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not ‘title’ to the goods has passed.” U.C.C. § 2-401 cmt. 1 (amended 2003), 1 U.L.A. 457, 458 (2004). The Ohio Supreme Court, however, has stated that R.C. 1302.42 may be consulted when it must be determined whether title to goods has transferred under a contract for the sale of goods. See *Standards Testing Laboratories v. Zaino*, 100 Ohio St. 3d 240, 2003-Ohio-5804, 797 N.E.2d 1278, at ¶21 (2003); *Arga Co. v. Limbach*, 36 Ohio St. 3d 220, 222, 522 N.E.2d 1074 (1988); *PPG Indus. Inc. v. Lindley*, 1 Ohio St. 3d 212, 213-14, 438 N.E.2d 907 (1982); *Wheeling Steel Corp. v. Porterfield*, 21 Ohio St. 2d 57, 59-60, 255 N.E.2d 257 (1970). Accordingly, in situations involving minerals that are transferred as personal property from one person to another by contract, a deputy sheriff may use R.C. 1302.42 to determine when and where title to minerals is transferred.

As the above discussion suggests, the law governing the transfer of title to minerals sold by contract as personal property is complex and intricate, and involves making factual determinations on a case-by-case basis. Therefore, to the extent that it is possible to provide general guidance on the subject, we advise you that a deputy sheriff shall exercise his discretion in determining whether R.C. 5577.043(A)(1)(b) applies in a particular situation involving minerals that are transferred as personal property from one person to another by contract. In exercising his discretion, the deputy sheriff must consider the written terms of the contract and, if necessary, R.C. 1302.42 or any evidence that indicates when the seller and buyer intended the buyer to take ownership, dominion, and control over the minerals.⁹ If a deputy sheriff determines that a buyer acquired ownership, dominion, and control over the minerals prior to a surface mining truck transporting the minerals to another location, R.C. 5577.043(A)(1)(b) does not apply and the truck may not exceed the vehicle weight provisions of R.C. 5577.01-.09 by the percentage allowances of R.C. 5577.043(A)-(B). If a deputy sheriff determines that a buyer will acquire ownership, dominion, and control over the minerals after a surface mining truck transports the minerals from the place where the minerals are loaded to another place, R.C. 5577.043(A)(1)(b) will apply and the truck may exceed the vehicle weight provisions of R.C. 5577.01-.09 by the percentage allowances of R.C. 5577.043(A)-(B).

In conclusion, it is my opinion, and you are hereby advised as follows:

1. The term “surface mining truck,” as used in R.C. 5577.043(A)(1),

⁹ To the extent that R.C. 5577.043(A)(1)(b) is an exception to the provisions of R.C. 5577.01-.09 governing the gross weight and axle and wheel load for a surface mining truck operated upon Ohio’s improved public highways and streets, R.C. 5577.043(A)(1)(b) may be treated as an “affirmative defense,” as defined in R.C. 2901.05(D), to a violation of R.C. 5577.01-.09. R.C. 2901.05(D) defines an “affirmative defense” as either “[a] defense expressly designated as affirmative” or “[a] defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence.”

R.C. 5577.043(A)(1)(b) provides an excuse or justification to criminal liability under R.C. 5577.01-.09. *See generally* R.C. 5577.99 (setting forth the penalties for a violation of R.C. 5577.01-.09). In addition, evidence supporting a claim that a surface mining truck is transporting minerals to the place where title to the minerals is to be transferred is evidence that the driver of the truck should be able to provide to a deputy sheriff. Absent the production of such evidence, a deputy sheriff may reasonably determine that the exception set forth in R.C. 5577.043(A)(1)(b) does not apply and that the surface mining truck may not exceed the vehicle weight provisions of R.C. 5577.01-.09 by the percentage allowances of R.C. 5577.043(A)-(B). *See generally* R.C. 2901.05(A) (“[t]he burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused”).

means a “vehicle,” as defined in R.C. 4501.01(A), used to haul minerals upon Ohio’s improved public highways and streets.

2. A deputy sheriff shall exercise his discretion in determining whether R.C. 5577.043(A)(1)(b) applies in a particular situation involving minerals that are transferred as personal property from one person to another by contract. In exercising his discretion, the deputy sheriff must consider the written terms of the contract and, if necessary, R.C. 1302.42 or any evidence that indicates when the seller and buyer intended the buyer to take ownership, dominion, and control over the minerals. If a deputy sheriff determines that a buyer acquired ownership, dominion, and control over the minerals prior to a surface mining truck transporting the minerals to another location, R.C. 5577.043(A)(1)(b) does not apply and the truck may not exceed the vehicle weight provisions of R.C. 5577.01-.09 by the percentage allowances of R.C. 5577.043(A)-(B). If a deputy sheriff determines that a buyer will acquire ownership, dominion, and control over the minerals after a surface mining truck transports the minerals from the place where the minerals are loaded to another place, R.C. 5577.043(A)(1)(b) will apply and the truck may exceed the vehicle weight provisions of R.C. 5577.01-.09 by the percentage allowances of R.C. 5577.043(A)-(B).