

FILED _____

AT _____ O'clock ____ M
CLERK, DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,)
)
) *Plaintiff,*)
 vs.)
)
 THOMAS F. GILL,)
)
) *Defendant.*)
 _____)

Case No. **CRF 2015 20447**

**MEMORANDUM DECISION AND
ORDER ON ENHANCEMENT**

I. FACTUAL BACKGROUND.

The parties in this criminal case have left the Court to decide whether a \$1,500.00 civil penalty applies or whether a \$10,000.00 civil penalty applies in sentencing pursuant to an I.C.R. 11(f)(1)(c) agreement.

On December 10, 2015, a Complaint was filed against Defendant Thomas F. Gill (Gill), which accused Gill as follows:

with committing the crime(s) of: POSSESSION OF UNLAWFULLY TAKE [sic] BIG GAME ANIMAL, Idaho Code §36-1401(c)(3), committed as follows:

That this defendant, THOM AS [sic] F. GILL, on or about the month of September, 2014, in the County of Kootenai, State of Idaho, did knowingly possess unlawfully taken big game animal, to-wit: a bull moose, all of which is contrary to the form, force and effect of the statue in such case made and provided and against the peace and dignity of the People of the State of Idaho.

Complaint 1-2. Probable cause was found on January 29, 2016, and an arrest warrant was issued. On May 13, 2016, that warrant was served on Gill and Gill posted bond the

same day. On August 11, 2016, Gill, through his attorney Craig Zanetti waived his right to a preliminary hearing, and he was bound over to District Court. On August 15, 2016, an Information was filed. The Information contained the identical language as the Complaint, replete with typographical errors. Information 1-2. On October 13, 2016, Gill was arraigned and pled “not guilty”; trial was set for January 31, 2017. On January 23, 2017, Gill, through counsel, filed a motion to continue the Pretrial Conference and Trial, and a written Waiver of Right to Speedy Trial. District Judge Scott Wayman granted the motion to continue and scheduled the trial for March 28, 2017. At the pretrial conference on March 24, 2017, the parties asked for another continuance and the parties asked for mediation. Trial was scheduled for May 23, 2017, and mediation was ordered to occur on May 11, 2017, before Senior District Judge John P. Luster. On May 11, 2017, Judge Luster filed a Report of Mediator announcing “The parties have reached an agreement.” The jury trial was vacated and on July 13, 2017, Judge Wayman took Gill’s plea of guilty to the charge. A Rule 11 Plea Agreement was filed on July 13, 2017. That agreement, signed by Gill and his attorney, and by Jed Whitaker, Deputy Prosecuting Attorney on behalf of the plaintiff State of Idaho, set forth that;

Mr. Gill will enter a guilty plea to the charge as alleged in the Information. The Binding Sentence between the parties and the court will be:

1. Mr. Gill shall receive a probation sentence of 2 years. No actual jail shall be imposed as a term of probation. The parties are free to argue for what the underlying sentence should be.
2. No fine shall be imposed in this case. Mr. Gill will be subject to the statutory reimbursement and civil penalties, but no fine in addition.
3. Mr. Gill’s hunting privileges will be suspended for a period of no less than one (1) no more than four (4) years in the court’s discretion. The parties are free to argue to the Court for the length they deem appropriate.

Rule 11 Plea Agreement 1-2. Sentencing was scheduled for September 7, 2017. On July

28, 2017, this case was administratively re-assigned to the undersigned. On July 31, 2017, the case was scheduled for sentencing on October 2, 2017, before the undersigned.

On October 2, 2017, Gill and his attorney Craig Zanetti, as well as Ken Brooks, Deputy Prosecuting Attorney appeared for sentencing. Gill was given his opportunity to correct the presentence investigation, and did. No witnesses were called by either side for sentencing. Brooks gave the State of Idaho's recommendations, and in doing so stated: "We are asking for the processing fee by statute of \$250.00 as well as the civil penalty of \$10,000.00." Zanetti then gave Gill's recommendations, and in doing so stated:

Another thing that we couldn't come to an agreement on during the mediation session was in fact this statutory reimbursement and civil penalties. You've heard from the state and what their belief is and we would agree that there's a \$250 processing fee under 36-1407, it states that the processing fee for moose is \$250 per animal kill, possessed or waste, but it is our position Your Honor that the statutory penalty associated with this, not a fine but the statutory penalty is \$1,500, and that comes under 36-1404(a) which states that the illegal killing or the illegal possession, which Mr. Gill has entered his plea to, for a moose is \$1,500. State's position is that it's ten under the fact that it's a trophy animal pursuant to section 36-202(h). Your Honor, Mr. Gill was not charged by a complaint nor was the information ever alleged to be a trophy animal in this situation under the 36-202(h), so it's our position Your Honor that the fee should be \$1,500 plus the two fifty for a total of \$1,750.

When the Court asked for clarification of Gill's position, Zanetti responded:

He pled to the information judge which does say a bull moose, but it states that the crime was under 36-1401. There was never any mention that it was a trophy big game animal or under 36-202(h). I recognize what the trophy big game statue says in regards to a bull moose, but he wasn't charged under 36-202(h). That's where the rub was initially Your Honor and that's why we brought it to the court. Your Honor gets to make the decision about what's the appropriate section.

Brooks then clarified the State's position that the fact of it being a trophy animal or the definition of a trophy big game animal found in I.C. § 36-202(h) are not elements of the offense for which he pled, which was I.C. §36-1401(c)(3). Brooks stated,

If it was a cow moose we'd be under the subsection two that Mr. Zanetti

first cited to and we'd be looking at \$1,500 reimbursement, but as it's a bull moose it falls under the definition of a trophy moose and \$10,000.00. But again, it's not a matter of how it was charged or how it was pled because it is – doesn't make a difference as far as the crime goes. We can't charge – we can't allege a trophy moose as the element of the offense. It's simply a matter for the court to make a determination based upon the facts before it whether or not it falls under one category or the other for civil reimbursement purposes. As he pled to a bull moose on the record, the State's position is that it's \$10,000.00.

Although the parties have clearly left it to the Court to decide the appropriate civil penalty, neither party gave the Court any advance notice of such. There is no mention in the written Rule 11 Plea Agreement that there was no agreement on this significant issue. From the time the Rule 11 Plea Agreement was filed on July 13, 2017, to the sentencing hearing on October 2, 2017, there was no written notice to the Court that the Court would have to decide this significant issue. No briefing has been submitted to the Court. The only argument is as set forth above. Thus, the Court took the matter under advisement, and re-scheduled sentencing for October 17, 2017. No briefing was submitted by either party after the October 2, 2017, hearing.

Subsequently, the Court listened to the audio recording of the July 13, 2017, hearing before Judge Wayman when Gill pled guilty. Judge Wayman discussed there are civil penalties to this crime. Gill's attorney said they would take this issue up at sentencing. Judge Wayman instructed the attorneys for the parties they would need to inform him of those penalties at that time.

II. ANALYSIS.

It is clear that Gill pled guilty to “knowingly possess[ing] an unlawfully taken big game animal, to-wit: a bull moose”, a violation of Idaho Code §36-1401(c)(3). That is the language of the Information. Information 1. Pursuant to I.C. §36-202, a “trophy big game animal” means any big game animal deemed a trophy as defined in this subsection

(h)1. through 8.” Idaho Code §36-202(h)(5) lists “Moose, any bull”. Thus, a “bull moose” is a “trophy big game animal.” Gill pled guilty to “possess[ing] an unlawfully taken big game animal, to-wit: a bull moose.” Thus, Gill pled guilty to possessing an unlawfully “taken trophy big game animal.”

Idaho Code §36-1404 requires, as “reimbursable damages”, that

(a) ...any person who pleads guilty [to]...illegal possession...of a trophy big game animal as defined in section 36-202(h), Idaho Code, shall reimburse the state for each animal so...possessed..., as follows:

...

5. Trophy moose: ten thousand dollars (\$10,000) per animal...possessed....”

...

(c) In every case of a plea of guilty...the court before whom such plea of guilty...is obtained shall enter judgment ordering the defendant to reimburse the state in a sum or sums as hereinbefore set forth including postjudgment interest.

I.C. §36-1404(a), (c). The court ordering the judgment must order such payments be made to the department of fish and game. I.C. §36-1404(f)(3). The defendant is allowed no more than two years to pay the judgment. I.C. §36-1404(d).

Idaho Code §36-1401(c)(3) requires that,

(c) Felonies. Any person who pleads guilty to...a violation of the following offenses shall be guilty of a felony:

...

3. Unlawfully... possessing...any combination of numbers or species of wildlife within a twelve (12) month period which has a single or combined reimbursable damage assessment of more than one thousand dollars (\$1,000), as provided in section 36-1404, Idaho Code.

...

I.C. §36-1401(c)(3). Since a bull moose has a reimbursable damage assessment of \$10,000.00, Gill pled guilty to a felony. Apparently, Gill now contends that he pled guilty to a felony because the reimbursable damage assessment of \$1,500.00, for a non-trophy big game animal was met, only because the Information does not mention I.C. §36-202(h).

This completely ignores the fact that the Information alleges, and Gill pled guilty to “possess[ing] an unlawfully taken big game animal, to-wit: a bull moose.” A “bull moose” is what causes this to be a “trophy big game animal”; there can be no other interpretation. A “bull moose”, being a “trophy big game animal”, the Court has no choice but to order a reimbursable damage assessment of \$10,000.00.

There is nothing about Idaho Criminal Rule 7 that would require the plaintiff State of Idaho to include any other information or language in its Information filed in this case. The Information must state the official or customary citation of the statute, rule or regulation or other provision of law that the defendant is alleged to have violated. I.C.R. 7(b)(4). As mentioned above, the Information in this case charges:

with committing the crime(s) of: POSSESSION OF UNLAWFULLY TAKE [sic] BIG GAME ANIMAL, Idaho Code §36-1401(c)(3), committed as follows:

That this defendant, THOM AS [sic] F. GILL, on or about the month of September, 2014, in the County of Kootenai, State of Idaho, did knowingly possess unlawfully taken big game animal, to-wit: a bull moose, all of which is contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the People of the State of Idaho.

Information 1-2. The crime is listed in I.C. §36-1401(c)(3). There is no crime listed in I.C. §36-202(h). The fact that a “bull moose” is mentioned in the language of the Information would cause any reference to I.C. §36-202(h) to be surplusage (and would be stricken by the court under I.C.R. 7(d)) and redundant. The Court specifically finds that the reimbursable damage assessment of \$10,000.00 as a result of this animal being a bull moose, is not a sentencing enhancement as was discussed in *State v. Lopez*, 107 Idaho 826, 828, 693 P.2d 472, 474 (Ct. App. 1984), and thus need not be included in the Information in this case.

The Idaho Supreme Court has stated that the Information must enable a person of

ordinary understanding to adequately know the details of the crime the state charged and intended to prove at trial. *State v. Owens*, 101 Idaho 632, 627, 619 P.2d 787, 792 (1979).

The Idaho Supreme Court in *State v. Herreman-Garcia*, 160 Idaho 643, 646, 377 P.3d 1105, 1109 (2016), held:

A legally sufficient information is a plain, concise, and definite written statement of the essential facts constituting the offense charged. I.C. §§ 19–1303, 19–1409 to 19–1412, and 19–1414 to 19–1418; I.C.R. 7(b); *State v. Darbin*, 109 Idaho 516, 519, 708 P.2d 921, 924 (Ct. App. 1985). The sufficiency of an information ultimately depends on whether it fulfills the basic functions of the pleading instrument. *State v. Windsor*, 110 Idaho 410, 417, 716 P.2d 1182, 1189 (1985). The sufficiency of an information is tested by a functional analysis encompassing two inquiries: (1) whether the pleading contains the elements of the offense charged and fairly informs the defendant of the charge which must be defended against; and (2) whether the information enables the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907–08, 41 L.Ed.2d 590, 620–21 (1974). An information must be specific enough to advise a defendant as to the particular section of the statute he or she is being charged with having violated and, in addition, must set forth a concise statement of the facts constituting the alleged offense sufficient that the particular offense may be identified with certainty as to time, place, and persons involved. *State v. Grady*, 89 Idaho 204, 211, 404 P.2d 347, 351 (1965).

The Idaho Court of Appeals has held a legally sufficient information must adequately set forth the nature and circumstances of the offense charged to enable a person of ordinary understanding to know what is intended in the charge. *State v. Lenz*, 103 Idaho 632, 651 P.2d 566 (Ct. App. 1982). The Information must inform the defendant of the criminal acts of which he is charged. *State v. Munhall*, 118 Idaho 602, 798 P.2d 61 (Ct. App. 1990).

The Information in the present case meets these requirements. Gill knew he was charged with violating I.C. §36-1401(c)(3) by unlawfully possessing a bull moose, a big game animal, and a bull moose is defined in that same statutory scheme as a “trophy” big game animal.

Even if the fact of this bull moose being big game animal, and the fact that the bull

moose is a “trophy”, could somehow be construed to be an “aggravating circumstance”, the Idaho Supreme Court has held that such “aggravating circumstances” are not required to be included in the indictment. *State v. Abdullah*, 158 Idaho 386, 348 P.3d 1 (2015).

Finally, Gill has never filed a motion pursuant to I.C.R. 12. Had Gill felt there was a legal issue present regarding the amount of reimbursable assessment, he should have filed a motion pursuant to I.C.R.12, specifically, I.C.R. 12(b)(2) requiring “defenses and objections based on defects in the complaint, indictment or information” be made before trial. Having arrived at the point of sentencing, and failing to raise such issue by motion, Gill has waived the same.

IV. ORDER.

IT IS HEREBY ORDERED THAT because THOMAS F. GILL unlawfully possessed a bull moose, a trophy big game animal, THOMAS F. GILL is assessed a reimbursable damage assessment of \$10,000.00.

DATED this 16th day of October, 2017

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of October, 2017 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Craig Zanetti
Prosecuting Attorney -

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____
Deputy