

OPINIONS OF THE ATTORNEY GENERAL

VOLUME NO. 42

OPINION NO. 83

CRIMINAL LAW AND PROCEDURE - Definition of "explosives" in statute prohibiting unlawful transactions with children;

FIRE MARSHAL - Definition of "explosives" in Uniform Fire Code applied to statute prohibiting unlawful transactions with children;

JUVENILES - Definition of "explosives" in statute prohibiting unlawful transactions with children;

ADMINISTRATIVE RULES OF MONTANA - Section 23.7.111(1);

MONTANA CODE ANNOTATED - Sections 1-2-107, 7-33-4205, 7-33-4206, 45-5-623(1)(a), 45-8-332(2), 45-8-344, 50-3-102(3), 50-37-103(2).

HELD: The term "explosives" in section 45-5-623(1)(a), MCA, does not include small arms ammunition or fireworks permitted to be sold to the public under section 50-37-104(1), MCA.

10 May 1988

Ray E. Blehm Jr.  
State Fire Marshal  
Room 371, Scott Hart Building  
303 North Roberts  
Helena MT 59620-1417

Dear Mr. Blehm:

You have asked my opinion on the following question:

Does the term "explosives" in section 45-5-623(1)(a), MCA, include small arms ammunition or fireworks?

Section 45-5-623(1)(a), MCA, provides:

A person commits the offense of unlawful transactions with children if he knowingly ... sells or gives explosives to a child under the age of majority except as authorized under appropriate city ordinances.

The term "explosives" is not defined for the special purposes of this statute. The Montana Criminal Code does not contain a generally applicable definition in section 45-2-101, MCA. However, a definition of "explosive" is found in section 45-8-332(2), MCA, which is helpful in answering your question. In the absence

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of a clear legislative expression of contrary intention, this definition is applicable to the term "explosives" in section 45-5-623, MCA. See § 1-2-107, MCA.

Section 45-8-332(2), MCA, states that "explosive," as used in the Montana Criminal Code's chapter on offenses against public order, means any explosive defined in rules adopted by the state fire marshal pursuant to section 50-3-102(3), MCA. Section 50-3-102(3), MCA, provides that the state fire marshal "shall adopt rules based on nationally recognized standards necessary for safeguarding life and property from the hazards associated with the manufacture, transportation, storage, sale, and use of explosive materials." Pursuant to his rulemaking authority, the state fire marshal, through the Department of Justice, has adopted and incorporated by reference the Uniform Fire Code, International Conference of Building Officials (1985 ed.) See § 23.7.111(1), ARM, eff. March 28, 1986.

Section 9.107 of the Uniform Fire Code defines "explosive" as follows:

EXPLOSIVE is any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion, that contains any oxidizing and combustible units or other ingredients in such proportions, quantities, or packing, that an ignition by fire, by friction, by concussion, by percussion or by detonator of any part of the compound or mixture may cause such a sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructive effects on contiguous objects or of destroying life and limb.

I note that this definition is identical, in all substantial respects, to the definition of "explosives" in section 61-1-506, MCA, concerning highway safety (see § 61-9-413, MCA), and the definition of "explosives" in former section 50-38-101(3), MCA.

In determining whether small arms ammunition or fireworks should be viewed as "explosives" for purposes of section 45-5-623(1)(a), MCA, I am guided by certain provisions in Article 77 of the Uniform Fire Code, which applies to the manufacture, possession, storage, sale, transportation, and use of explosives. Sections 77.102(a)(3) and 77.102(a)(4) of the Code provide that nothing in Article 77 shall be construed as applying to the "sale, possession or use of fireworks" or to the "possession, transportation, and use of small arms

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ammunition." Although both fireworks and small arms ammunition contain small amounts of explosive materials, neither is considered an explosive for purposes of the regulatory provisions of Article 77 of the Uniform Fire Code.

I therefore conclude that neither small arms ammunition nor permissible fireworks, as those terms are defined in the Uniform Fire Code and Montana statutes, comes within the meaning of "explosives" as that term is used in section 45-5-623(1)(a), MCA.

This conclusion is supported by my review of the background of section 45-5-623(1)(a), MCA, and is consistent with the apparent intention of the Legislature. See § 1-2-102, MCA.

Section 45-5-623, MCA, is a partial recodification of a number of statutes on unlawful transactions with children and was enacted by the Legislature as part of the Montana Criminal Code of 1973. Subsection (1)(a) was taken from section 69-1902, R.C.M. 1947, which stated in pertinent part:

It shall be unlawful to sell, give away, or otherwise dispose of, or deliver to any person under eighteen (18) years of age any explosives, whether said person is acting for himself or for any other person.

Section 69-1902, R.C.M. 1947, was retained by the 1973 Legislature and was eventually recodified as section 50-38-302, MCA. As part of the statutory law regarding explosives, this section was subject to the other provisions of Title 50, chapter 38, including section 50-38-105(2), MCA, which stated that the chapter's provisions did not apply to small quantities of explosives (not exceeding five pounds at any one time) or to persons carrying ammunition in reasonable amounts. Chapter 38 of Title 50 was repealed in its entirety by the Legislature in 1985 (section 3, chapter 187, 1985 Mont. Laws); however, prior to repeal the Legislature apparently intended to exempt small arms ammunition and small amounts of explosive materials, such as those contained in lawful fireworks, from the provisions of these former statutes, including the statute from which section 45-5-623(1)(a), MCA, was derived.

I also note that the sale of fireworks is regulated by separate provisions in both the Montana statutes and the Uniform Fire Code. Tit. 50, ch. 37, MCA; Art. 78, Uniform Fire Code (1985). While section 50-37-103(2), MCA, makes it unlawful for an individual under the age

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of 18 to possess for sale, sell, or offer for sale permissible fireworks, it does not forbid the sale of such fireworks to persons under the age of majority. If the Legislature had intended to restrict the sale of fireworks to persons who have attained a certain age, it would have expressly provided for such a restriction in chapter 37 of Title 50. Nor is any such age restriction found in Article 78 of the Uniform Fire Code.

Another indication of legislative intent to treat fireworks and explosives differently is found in sections 7-33-4205 and 7-33-4206, MCA, which provide separate grants of authority for a city or town council to regulate these two kinds of fire-causing materials. If the Legislature considered fireworks to be "explosives," it would not have needed to grant additional authority, in section 7-33-4206, MCA, to the municipal council to regulate the sale and use of fireworks.

Courts in other jurisdictions have held that the commonly accepted meaning of "explosives" does not include ordinary fireworks which are lawfully available for sale to the public. See, e.g., People v. Santorelli, 408 N.Y.S.2d 893 (N.Y. Sup. Ct. 1978); Henderson v. Massachusetts Bonding & Insurance Co., 84 S.W.2d 922 (Mo. 1935). While the annotation compiler's comments to section 45-5-623, MCA, suggest that the Legislature may have intended to include fireworks within the coverage of subsection (1)(a), MCA, I have found no further indication of such intent in my review of both present and former statutes regulating this area.

With respect to small arms ammunition, you correctly point out that a contrary construction of section 45-5-623(1)(a), MCA, would result in apparent conflict with more specific statutes which regulate the use of firearms, particularly for hunting. Section 45-8-344, MCA, permits a child under the age of 14 to carry and use a loaded firearm in certain supervised situations and by implication allows a child over the age of 14 to possess a loaded firearm without the direct supervision of an adult. Provisions in part 5 of Title 87, chapter 2, MCA, allow persons who are 12 years of age or older to obtain various game animal licenses which entitle the holder to hunt, shoot, and kill game animals. Selling or giving small arms ammunition to persons under the age of majority is implicitly and necessarily authorized by these statutes, and it would be inconsistent to construe the term "explosives" in section 45-5-623(1)(a), MCA, in a manner that would turn such sales or gifts into unauthorized transactions with children.

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You have directed my attention to certain hazardous materials regulations of the United States Department of Transportation. These regulations classify both common fireworks and small arms ammunition as Class C Explosives and set forth specifications for shipping containers used in the transportation of explosives and other dangerous articles. 49 C.F.R. §§ 173.50 to 173.114. While I can understand that the federal government would view substantial quantities of common fireworks and small arms ammunition as minimum-hazard explosives for purposes of regulating their transportation, I am not persuaded that this classification should apply to section 45-5-623(1)(a), MCA. I note that the federal code chapter on explosive materials does not apply to small arms ammunition and its components. 18 U.S.C. § 845(a)(4). Although the definition of "explosives" in 18 U.S.C. § 841(d) has been held to include certain illegal and highly powerful fireworks (see, e.g., United States v. Womack, 654 F.2d 1034 (5th Cir. 1981), cert. denied, 454 U.S. 1156 (1982)), the federal definition in Title 18 is substantially broader than the Uniform Fire Code's definition of "explosive" and, in any event, does not appear to include permissible "common fireworks," as defined in section 50-37-105, MCA, which may be lawfully sold to the public pursuant to section 50-37-104, MCA.

It is certainly possible, of course, that fireworks which do not meet the definition of "permissible fireworks" under section 50-37-105, MCA, could come within the purview of section 45-5-623(1)(a), MCA. My holding is therefore confined to those fireworks which may be lawfully sold at retail in accordance with section 50-37-104(1), MCA.

Finally, I again call your attention to the specific authority of cities and towns to regulate both explosives and fireworks. §§ 7-33-4205, 7-33-4206, MCA. Section 45-5-623(1)(a), MCA, acknowledges this authority by expressly permitting a city to enact an ordinance excepting certain transactions from the scope of the statute. I do not find any indication of legislative intent to extend this ordinance-making authority to counties.

THEREFORE, IT IS MY OPINION:

The term "explosives" in section 45-5-623(1)(a), MCA, does not include small arms ammunition or fireworks permitted to be sold to the public under section 50-37-104(1), MCA.

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Very truly yours,

MIKE GREELY  
Attorney General