

MIAMI VALLEY RISK MANAGEMENT ASSOCIATION

LEGAL ALERT

RE: LEGAL CONSIDERATIONS FOR POLICE OFFICERS WHEN CONFRONTED WITH INDIVIDUALS WHO CHOOSE TO OPENLY CARRY FIREARMS IN PUBLIC AREAS.

Observing individuals in public areas with firearms openly affixed to their hip has become increasingly more common. Concerned citizens will inevitably contact the police at the first sight of a gun. Any complaint involving a suspect with a firearm thereafter necessitates an immediate response from the police; it is at this point when an officer is placed in a very difficult situation. An officer should always assess the level of danger demonstrated by the suspect once contact is ultimately accomplished. The degree of agitation illustrated by the suspect should guide the officer's response. However, in the absence of a perceived threat, officers must be conscious of those prevailing rights possessed by gun owners.

This memorandum will discuss the primary considerations affecting police officers when the suspect does not demonstrate an imminent threat of harm. The purpose is to help police officers develop a better understanding of the established law affecting gun rights. In turn, the hope is that police officers will be both cautious and confident when approaching and interacting with individuals openly carrying firearms in observance of both their federal and state statutory rights. Accordingly, the discussion below will provide a brief explanation of the rights afforded to gun owners under both state and federal law.

State law

In 2006, the General Assembly enacted R.C. § 9.68 as a component of Sub.H.B. No. 347, effective March 14, 2007, recognizing that the right to keep and bear arms is a "fundamental individual right" that is a "constitutionally protected right in every part of Ohio." According to the Ohio General Assembly, R.C. § 9.68 was enacted due to the "need to provide uniform laws throughout the state" regulating ownership and possession of firearms. R.C. § 9.68(A).

Ohio Revised Code section 9.68 provides:

(A) The individual right to keep and bear arms, being a fundamental individual right that predates the United States Constitution and Ohio Constitution, and being a constitutionally protected right in every part of Ohio, the general assembly finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, or other transfer of firearms, their components, and their ammunition. Except as specifically provided by the United States

Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition.

(Emphasis added.)

Notwithstanding this fundamental right, the ability to own and carry a gun is not unfettered. There are a host of state laws regulating firearms in Ohio despite the enactment of R.C. § 9.68. The Ohio Supreme Court declared in *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967, that “the General Assembly, by enacting R.C. 9.68(A), gave persons in Ohio the right to carry a handgun unless federal or state law prohibits them from doing so.” In turn, it appears that only those statutory provisions enacted by the Federal Government or the Ohio General Assembly can limit the right to openly carry firearms in public. In fact, the Ohio legislature has enacted statutes that prohibit possession of firearms in specific places.¹ Other statutes preclude the discharge of a firearm in certain locations.² In addition, there are statutes that prohibit certain persons from possessing firearms.³ State law also bans the acquisition and possession of certain firearms, such as automatic firearms, sawed off firearms, zip guns, and semiautomatic weapons.⁴ And, Ohio has established a statutory framework for carrying concealed handguns.⁵

Again, R.C. § 9.68 codifies the fundamental right to possess and carry a firearm. The ability to openly carry a firearm is encompassed in this right. This right is not subject to restriction, except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law.

Federal law

¹ See, e.g., R.C. § 1547.69 [vessels], R.C. § 2921.36 [detention and mental health facilities], R.C. § 2923.121 [liquor establishments], R.C. § 2923.122 [school zones], and R.C. § 2923.123 [courthouses]

² See, e.g., R.C. § 1541.19 [state parks], R.C. § 2909.08 [airports], R.C. § 2923.16 [motor vehicles], R.C. § 2923.161 [habitation structures], and R.C. § 2923.162 [cemeteries, schoolhouses, churches, dwellings, charitable institutions, and public roads]

³ See, e.g., R.C. § 2923.13 [felons and incompetents], R.C. § 2923.15 [persons under the influence of drugs or alcohol], and R.C. § 2923.211 [minors]

⁴ See, R.C. §§ 2923.11(E) and (K), see, also, R.C. § 2923.17

⁵ See, e.g., R.C. § 2923.125 [licensing procedures] and R.C. § 2923.126 [listing of places where carrying concealed handguns is prohibited and where it is permitted.] It bears noting that H.B. 231 proposes to amend the current CCW law and remove certain. The proposed revision would remove certain limitations like prohibiting concealed weapons in governmental buildings and other sensitive areas.

It is universally accepted that the Second Amendment protects an individual's right to possess a firearm in certain situations. The Second Amendment states as follows:

The Second Amendment provides that “A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”

But today, it remains unsettled whether the individual right to bear arms for the purpose of self-defense announced by the Second Amendment extends beyond the home. In 2008, the Supreme Court explicitly recognized for the first time that the Second Amendment confers *upon individuals* a right to keep and bear arms for self-defense by holding that a District of Columbia law forbidding the individual possession of usable handguns *in the home* violated the Second Amendment.⁶ In 2010, the Court recognized that the Second Amendment right articulated in *Heller* applied equally to the states through the Fourteenth Amendment.⁷ Taken together, these cases made clear that “Second Amendment guarantees are at their zenith within the home.”⁸ Outside of the home, however, the application of the Second Amendment remains unclear. By and large, most Courts have not interpreted the Second Amendment to apply outside the home. The Supreme Court’s position on this issue has yet to change.

Although *Heller* does not explicitly identify a right to *publicly* carry firearms for self-defense, a minority of Courts have determined otherwise. In fact, the Seventh Circuit Court of Appeals reached this very conclusion in *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir.2012), when it stated that “[t]he Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside.” These federal Circuit Courts seemingly recognize that *Heller* “was never meant ‘to clarify the entire field’ of Second Amendment jurisprudence,” but rather struck down a single law that “ran roughshod” over D.C. residents' individual right to possess usable handguns *in the home*.⁹

Most gun advocates contend that the “text, history, tradition and precedent all confirm that individuals enjoy a right to *publicly* carry arms for their defense.” But the Supreme Court has never addressed this contention by engaging in full-blown historical analysis regarding the scope of the right to bear arms. And, no Court of law has conclusively found that a historical analysis inevitably leads to the conclusion that the Second Amendment confers upon individuals a right to carry handguns in public for

⁶ See, *District of Columbia v. Heller*, 554 U.S. 570, 595, 128 S.Ct. 2783 (2008).

⁷ See, *McDonald v. City of Chicago*, --- U.S. ---, 130 S.Ct. 3020, 3026 (2010)

⁸ *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir.2012), *cert. denied*, --- U.S. ---, 133 S.Ct. 1806 (2013).

⁹ *Kachalsky*, 701 F.3d 81, 88-89 (2d Cir.2012) (quoting *Heller*, 554 U.S. at 635, 128 S.Ct. 2783),

self-defense. Even as the Second Circuit observed in *Kachalsky*, “[h]istory and tradition do not speak with one voice here. What history demonstrates is that states often disagreed as to the scope of the right to bear arms, whether the right was embodied in a state constitution or the Second Amendment.”¹⁰

In summary, the United States Supreme Court has declined to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home, the “core” of the right as identified by *Heller*. While some circuit courts have recognized that the Second Amendment's individual right to bear arms *may* have some application beyond the home, these courts have generally refrained from answering this question definitively. Under today's interpretation, the right to bear arms afforded by the Second Amendment seemingly ends at the footsteps of the home.

Application

Again, an individual has a fundamental right to possess a firearm under Ohio law. While Ohio's legislature has enacted a series of laws affecting gun rights, there is no prohibition against openly carrying a firearm in public. Although the Second Amendment appears to secure only the right to possess a gun within the home, Ohio's view on gun possession is seemingly broader. So, what can an officer do to make contact with an individual openly carrying a firearm in public? An officer can unquestionably engage the gun possessor in a “consensual encounter.” This is the most effective approach when the officer lacks reasonable suspicion to perform a Terry Stop or probable cause to make an arrest. An officer has no authority to stop the individual or force such person to engage in a discussion, however. And, the officer cannot require that the individual disclose her name or other personal identifying information during the encounter. Pursuant to R.C. § 2921.29(A)(1), no person who is in a public place shall refuse to disclose such information when requested by a law enforcement officer *if he is reasonably suspected of a criminal offense*. Therefore, an officer cannot require an individual to provide his name, address, social security number, or date of birth unless the officer reasonably believes the individual is engaged in the commission of a crime. Similarly, an officer cannot detain individuals for Obstructing Official Business or other related offense for failing to disclose their personal identifying information.

In short, an officer cannot stop and detain an individual absent some *reasonable suspicion* that the person is engaged in a criminal offense. Simply carrying a firearm in an open and lawful manner does not constitute reasonable suspicion for the offense of Disorderly Conduct or Inducing Panic. Additional evidence of a crime must exist which is separate and distinct from the firearm (i.e. the individual is obviously under the influence of alcohol, the officer has a reasonable basis to believe the individual is under a weapons disability, the individual is yelling out dangerous threats to harm others.) Otherwise, an officer could potentially face liability in a lawsuit alleging a civil rights violation.

¹⁰ *Kachalsky*, 701 F.3d at 91.

Liability

Having discussed the application of the prevailing law above, it is important for officers to realize the source of potential liability for an unlawful stop/detention/arrest. There is no civil liability imposed upon an officer under R.C. § 9.68. Furthermore, the Second Amendment would be inapplicable because it has yet to be defined as applying outside the home. As discussed herein, individuals have been granted the fundamental right to open carry their firearms in the State of Ohio. This right permits such individuals to travel along most public walkways with a gun, which is not a crime. If an individual is stopped and/or arrested while lawfully carrying a firearm, liability is potentially implicated under the Fourth Amendment. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Therefore, an officer who illegally stops an individual for lawfully carrying a firearm could be the subject of a lawsuit that alleges an unlawful seizure. The lawsuit will likely make a claim for monetary damages against the officer (including punitive damages) and will certainly demand attorney fees.

Conclusion

To conclude, individuals in Ohio have a fundamental right to carry a firearm openly. Law enforcement officers need to be observant of this right during the course of any attempted interaction with anyone who is the subject of a gun complaint. Absent evidence of a criminal offense, an officer cannot impede this right. While an officer can always attempt a consensual encounter with the gun owner, the encounter cannot not go beyond a consensual discussion absent the requisite suspicion of a crime.

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