

APTA Legal Affairs Seminar 2019

Guns on Transit

Nicole Witt

Hanson Bridgett LLP

A. Second Amendment: “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.”

1. We are living in a time which marks a significant shift in the Supreme Court's interpretation of the Second Amendment.

a) Prior to 2008, there was substantial support in Supreme Court opinions for the interpretation that the Second Amendment was a collective right protecting states from the federal government. (See *U.S. v. Cruikshank*, (1875) 92 U.S. 542; *Presser v. Illinois*, (1886) 116 U.S. 252; *U.S. v. Miller*, (1939) 307 U.S. 174; *Lewis v. U.S.*, (1980) 445 U.S. 55, 65 fn8).

b) Additionally, the Second Amendment was held not to apply to the states, but only to the exercise of federal power. (See *Presser v. Illinois*, (1886) 116 U.S. 252; *In re Ramirez*, (1924) 193 C. 633).

c) In *District of Columbia v. Heller*, the U.S. Supreme Court recognized the individual right to bear arms. (*District of Columbia v. Heller*, (2008) 554 U.S. 570).

i) The Court considered whether a ban on the possession of functional handguns in the home violated the Second Amendment. The District of Columbia required the registration of firearms, but prohibited the registration of handguns. This served to effectively ban handguns in the District of Columbia.

ii) The Court applied a textual analysis. In particular, it noted that the prefatory clause, "right of the people" is used three other times in the Constitution to refer to individual rights and finding that the Second Amendment only protects a militia contravenes the meaning of this clause.

iii) As such, the right to keep and bear arms protects an individual in traditionally lawful circumstances, including self-defense in the home.

iv) The Court in *Heller* did not hold that the Second Amendment right is without limit, but identified areas that may be regulated by state and federal governments.

2. *Heller* was made applicable to states in *McDonald v. Chicago, Illinois*, (2010) 561 U.S. 742. The Court held that the Second Amendment right to keep and bear arms is incorporated in the Fourteenth Amendment concept of due process. This finding was based on the centrality of the right to self-defense. "Self-defense is a basic right, recognized by many legal systems from ancient times to the present day [i]t [is] clear that this right is 'deeply rooted in this Nation's history and tradition.'"

3. While *Heller* marks a shift toward acceptance of the individual rights interpretation of the Second Amendment, the *Heller* Court and other state and federal courts have consistently held that some regulation of the right to keep and bear arms is consistent with the Second Amendment.

a) "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." (*District of Columbia v. Heller*, (2008) 544 U.S. 570).

b) "While the right to bear arms enjoys constitutional protection, like many other constitutional rights, it is not beyond regulation." (*Lehman v. Pennsylvania State Police*, 839 A.2d 265, 273 (Pa. 2003).

c) "[T]he right to bear arms is not unlimited; it may be restricted in the exercise of police power for the good order of society and protection of citizens." (*R.H.S. v. Allegheny Cnty. Dep't of Human Servs., Office of Mental Health*, 936 A.2d 1218, 1229 (Pa. Cmwth. 2007).

d) "The court did not recognize a "right to keep and carry any weapon whatsoever and for whatever purpose." (*People v. Dykes*, 46 Cal. 4th 731, 778 (2009), citing *Heller*).

e) "[T]he right [is] not a right to keep and carry any weapon whatsoever *in any manner whatsoever* and for whatever purpose. There have been long-standing prohibitions imposed upon rights under the Second Amendment, including limitations on which people have the right to bear arms and restrictions upon locations where they may be possessed." (*People v. Liscotti*, (2012) 219 Cal. App. 4th Supp. 1, 4-5).

B. Federal court approaches to interpreting the right to carry firearms in public.

1. The Circuit courts have taken different approaches in interpreting the right to carry firearms in public. This right is continuing to evolve with a recent Ninth Circuit opinion.

a) The D.C. Circuit and the 7th Circuit have held that the Second Amendment protects a general right to carry in public. (*See Wrenn v. District of Columbia*, 864 F. 3d 650, 665 (2017); *Moore v. Madigan*, 702 F. 3d 933, 936-37 (2012)).

b) The Second, Third, and Fourth Circuits have presumed that the Second Amendment protects a right to carry in public. (*Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (See 2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013)).

c) *Young v. Hawaii*, 896 F. 3d 1044 (2018). The Ninth Circuit considered whether the Second Amendment encompasses the right of a responsible law-abiding citizen to carry a firearm openly for self-defense.

i) The court held that, the right to keep arms includes incidental carrying, for example from the place of purchase to the home. As such, interpreting the right to bear arms to protect some level of public carry, is necessary to avoid rendering the right to bear arms as mere surplusage.

ii) Furthermore, the court noted that both *Heller* and *McDonald* suggest that the right to self-defense is most significant in the home, indicating that there is some right to self-defense outside of the home.

iii) The court held that the right to carry a firearm openly in public for self-defense is within the core of the Second Amendment. It is worth noting that the court considered the *Heller* Court's focus on the application of the Second Amendment within the home to hold little weight, as the case was exclusively concerned with firearms in the home.

iv) The court found that, because the law at issue limits open carry to those engaged in the protection of life and property, it had the effect of only allowing security guards and the like to openly carry.

As a result, the court held that the law "'amounts to a destruction' of a core right, and as such, it is infirm '[u]nder any of the standards of scrutiny.'" (applying strict scrutiny).

C. State laws impacting the regulation of firearms on public transportation.

1. State Constitutional Rights. Many states' constitutions include some version of a right to keep and bear arms.

a) "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men." (Arizona Constitution, Article 2, Section 26).

b) "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. The individual right to keep and bear arms shall not be denied or infringed by the state or political subdivision of the state." (Alaska Constitution, Article 1, Section 19).

c) "The people have the right to bear arms for their defense and security; but standing armies in time of peace are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power." (Kansas Bill of Rights, Section 4).

d) "The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person." (Louisiana Constitution, Article 1, Section 11).

e) California's Constitution does not include a right to keep and bear arms in its state constitution.

2. State laws addressing the carrying of firearms on public transportation or in vehicles.

a) A few states have laws specifically addressing firearms on public transportation.

i) Georgia specifically permits licensed gun owners to carry on public transportation: "[A]ny person with a valid weapons carry license may carry a weapon in all parks, historic sites, or

recreational areas . . . and on public transportation." (GA ST 16-11-126).

ii) Missouri: "Any passenger who boards a bus with a dangerous or deadly weapon or other means capable of inflicting serious bodily injury concealed upon his or her person or effects is guilty of the felony of "possession and concealment of a dangerous or deadly weapon" upon a bus." (MO ST 577.703). Missouri law also prohibits firearms on any public mass transportation system of the Bi-State Metropolitan Development District, except for a rifle or shotgun carried unloaded in an enclosed case. (MO ST 70.441).

iii) Washington prohibits a person from knowingly carrying on a transit vehicle or while at a transit facility an "article or material likely to cause harm to others, except that nothing herein prevents a person from . . . carrying a firearm or ammunition in a way that is not otherwise prohibited by law." (Wash. Rev. Code. Ann. § 9.91.025(1)).

iv) Colorado: "A person commits a class 6 felony if, without legal authority, he has any loaded firearm . . . in his possession in, or carries, brings or causes to be carried or brought any such items into, any facility of public transportation." (Colo. Rev. Stat. § 18-19-118).

v) South Carolina prohibits carrying or possessing any weapon on a bus or any other public transportation vehicle. (S.C. Code Ann. § 58-23-1830).

vi) The District of Columbia prohibits an individual with a concealed carry license from carrying a pistol on a public transportation vehicle. (D.C Code Ann. § 7-2509.07).

vii) Illinois law prohibits carrying a firearm on any conveyance owned, leased, or contracted by a public transportation agency or public transportation facility. (IL ST 720 § 5/24-1). This law was recently found to be unconstitutional as it applies to possession of a firearm within 1000 feet of a school. (*People v. Green*, 2018 IL App (1st) 143874).

b) States have also adopted laws related to carrying firearms in a vehicle which, from plain reading of the statutes, might also apply to publicly owned vehicles.

i) Arkansas: "A person commits the offense of carrying a weapon if he or she possesses a handgun . . . in a vehicle occupied by him or her, or otherwise readily available for use with a purpose to attempt to unlawfully employ the handgun." (AR ST 5-73-120).

ii) Utah prohibits a person from carrying "a loaded firearm in or on a vehicle unless the vehicle is in the person's lawful possession; or the person is carrying the loaded firearm in a vehicle with the consent of the person lawfully in possession of the vehicle." (UT ST § 76-10-505).

c) On January 22, 2019, the Supreme Court granted certiorari and will hear oral arguments on whether New York City's ban on transporting a licensed, locked and unloaded handgun outside of city limits is consistent with the Second Amendment. (*New York State Rifle & Pistol Assn., Inc. v City of New York*; lower court case number 883 F. 3d 45).

3. State laws addressing the right of public employees to carry firearms.

a) A few states have adopted laws specifically addressing the right of a public employer to restrict its employees from carrying firearms.

i) Alabama: "[A] public or private employer may restrict or prohibit its employees, including those with a permit . . . from carrying firearms while on the employer's property or while engaged in the duties of the person's employment." (AL ST § 13A-11-90).

ii) North Carolina: "A county or municipality may regulate the transport, carrying, or possession of firearms by employees of the local unit of government in the course of their employment with that local unit of government." (NC ST § 14-409.40).

b) What is more common is the adoption of laws prohibiting a public employer from limiting an employee's ability to store a lawfully possessed firearm in a private vehicle on the employer's property.

i) Alabama: "A public or private employer may not restrict or prohibit the transportation or storage of a lawfully possessed firearm or ammunition in an employee's privately owned motor vehicle while parked or operated in a public or private parking area if the employee satisfies" certain requirements." (AL ST § 13A-11-90).

iii) Florida: "No public or private employer may prohibit any . . . employee . . . from possessing any legally owned firearm when such firearm is lawfully possessed and locked inside or locked to a private motor vehicle in a parking lot." (FL ST § 790.251; held unconstitutional on other grounds).

iv) Georgia law provides that, with limited exceptions, "no private or public employer, including the state and its political subdivisions, shall condition employment upon any agreement by a prospective employee that prohibits an employee from entering the parking lot and access thereto when the employees privately owned motor vehicle contains a firearm or ammunition or both, that is locked out of sight within the truck, glove box, or other enclosed compartment or area within such privately owned motor vehicle." (GA ST § 16-11-135).

4. In considering the issue of regulating firearms on public transportation, the question of state preemption of local regulations is critical. The states have addressed the question of preemption in varied ways.

a) With some exceptions, the North Carolina General Assembly has found that "the regulation of firearms is properly an issue of general, statewide concern, and that the entire field of regulation of firearms is preempted from regulation by local governments." (NC ST § 14-409.40).

b) Alaska: "A local unit of government shall not enact any ordinance or regulation pertaining to, or regulate in any other manner, the ownership, transfer, transportation, carrying, or possession of firearms, ammunition for firearms, or components of firearms, except as otherwise provided in state or federal law." (AK ST § 14-16-504). This prohibition does not apply regulations prohibiting the unsafe discharge of a firearm.

c) California: "It is the intention of the Legislature to occupy the whole field of regulation of the registration or licensing of commercially manufactured firearms as encompassed by the provisions of the Penal Code, and such provisions shall be exclusive of all local regulations, relating to registration or licensing of commercially manufactured firearms, by any political subdivision as defined in Section 1721 of the Labor Code." (Cal. Gov. Code § 53071).

d) Iowa: "A political subdivision of the state shall not enact an ordinance regulating the ownership, possession, legal transfer, lawful transportation, registration, or licensing of firearms when the ownership, possession, transfer, or transportation is otherwise lawful under the laws of this state.

An ordinance regulating firearms in violation of this section existing on or after April 5, 1990, is void. If a political subdivision of the state, prior to, on, or after July 1, 2017, adopts, makes, enacts, or amends any ordinance, measure, enactment, rule, resolution, motion, or policy regulating the ownership, possession, legal transfer, lawful transportation, registration, or licensing of firearms when the ownership, possession, transfer, transportation, registration, or license is otherwise lawful under the laws of this state, a person adversely affected by the ordinance, measure, enactment, rule, resolution, motion, or policy may file suit in the appropriate court for declaratory and injunctive relief for damages." (IA ST § 724.28).

Additional Sources:

1. Steven P. Halbrook, *Firearms Law Deskbook Appendix A* (November 2018 Update).
2. John E.D. Larkin, *Guns in Government Parks & Buildings – Municipal Enforcement of Safety Rules Without Running Afoul of State Preemption*, Pennsylvania Bar Association Quarterly (July 2015).
3. 7 Witkin, Summary 11th Const Law §§ 205, 206 (2018).
4. Phillip B. Rose, *Heller, Nordyke, and Beyond: Second Amendment Developments*, Lincoln Law Review (2009-2010).