

In The Cleveland Municipal Court

City of Cleveland, :
 Plaintiff : **Case No. 2008-CRB-017846**
Vs. :
 : **Judge Cassidy**
Damon Wells :
 Defendant :

MOTION TO DISMISS AND FOR COURT COSTS AND ATTORNEY FEES

Now comes Defendant, by and through undersigned counsel, pursuant to Criminal Rule 12(A) et seq., and requests the above styled case be dismissed. For cause, Defendant states that he is charged in the instant case with possession of an unregistered handgun, an alleged violation of Cleveland Codified Ordinance 674.02. Such Ordinance is unenforceable and in conflict with applicable state and federal law, and the sole charge against Defendant must be dismissed.

MEMORANDUM IN SUPPORT

The facts in the instant case are uncontroverted: Defendant is licensed by the State of Ohio to carry a concealed handgun. On or about May 28, 2008, Cleveland Police Detectives, as a result of an investigation of a traffic violation, were informed by Defendant that he is licensed to carry a concealed handgun and had a loaded handgun concealed on his person, all in compliance with all obligations under applicable state law. Said Cleveland Police Detectives seized Defendant's handgun and charged him with possession of an unregistered handgun.

As the City of Cleveland is well aware, the Ohio General Assembly passed H.B. 347 over Governor Taft's veto, and took effect on March 14, 2007. H.B. 347 includes R.C. Section 9.68, which states, in pertinent part, that all Ohio citizens may, unless prohibited by state or federal law, possess firearms and their components without further permission, license or process. "...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....” R.C. 9.68(A)

Further, as part of the original concealed handgun licensing scheme, R.C. Section 2923.126 grants all licensees the right to carry any concealed handgun anywhere in the State of Ohio, unless prohibited by applicable state or federal law. “Except as provided in divisions (B) and (C) of this section, a licensee who has been issued a license under section 2923.125 or 2923.1213 of the Revised Code may carry a concealed handgun anywhere in this state if the licensee also carries a valid license and valid identification when the licensee is in actual possession of a concealed handgun.” R.C. 2923.126(A)

The net result of these two Revised Codes Sections is that Cleveland no longer has any authority to require Defendant’s handgun be registered. This is consistent with the September 18, 2008 holding of the Ohio Supreme Court in Ohioans for Concealed Carry, Inc. et al v. City of Clyde et al 2008-Ohio-4605, which struck down a municipal ordinance attempting to regulate concealed carry in the City of Clyde.

The unavoidable, incontrovertible and indisputable result is that the City of Cleveland may not enforce Codified Ordinance 674.02. As the Supreme Court stated in paragraph 20 of the Clyde decision, “Simply put, 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. A municipal ordinance cannot infringe on that broad statutory right.” As Cleveland’s Codified Ordinance may not be enforced, the above styled case must be dismissed and Defendant discharged from further proceedings herein.

MANDATORY AWARD OF ATTORNEY FEES

The City of Cleveland is well aware that their local firearm laws are unenforceable. In addition to filing NOT ONE BUT TWO Amicus briefs in the Clyde case, Cleveland also filed a separate declaratory judgment action against the State of Ohio in Cuyahoga County Common

Pleas Case CV-07-618492. The sum focus of these briefs and the declaratory judgment action were to have R.C. Section 9.68 declared invalid. As noted above, the Ohio Supreme Court's decision means Cleveland has failed in all of these attempts.

In summary, Cleveland was well aware of their inability to enforce their local ordinance at the time Defendant was charged. Alternatively, the most favorable possible reading of the facts is that Cleveland was aware that the enforceability of their ordinances was already in front of the highest court in Ohio. Despite this fact, Cleveland placed Defendant in criminal jeopardy by charging him with violating the local ordinance after the Ohio Supreme Court had already taken the question up and held oral argument and briefing.

The Ohio General Assembly foresaw such situations, and included a mandatory award of attorney fees and court costs for any person who successfully challenges a local ordinance as being in conflict with state law. "In addition to any other relief provided, the court shall award costs and reasonable attorney fees to any person, group, or entity that prevails in a challenge to an ordinance, rule, or regulation as being in conflict with this section." R.C. 9.68(B)

In addition to the explicit, mandatory statutory requirement to award costs and attorney fees to Defendant, public policy considerations favor the award of costs and fees in this situation. The City of Cleveland was indisputably aware that the Ohio Supreme Court had already heard oral arguments in the case that would control the enforceability of their local ordinances and was pending an opinion at the time Cleveland charged Defendant in the instant case. The responsible use of police power in such situation would dictate that the city should await the high court's decision prior to placing a Defendant in criminal jeopardy, with attendant burdens, stigma and financial drain.

Cleveland did not elect to pursue this prudent and responsible course, instead choosing to place the jeopardy and burden on an innocent citizen instead. This is a choice that Cleveland should pay for, literally and figuratively.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Demand for Discovery and Request for Evidence Notice was served upon all necessary parties by either regular United States Mail or delivery to Courthouse mailbox this ___ day of September, 2008.

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