

**In the Court of Common Pleas
of Erie County, Ohio**

State of Ohio :
 :
 Plaintiff : Case 2007-CR-
 :
 Vs : Judge
 :
 PUBLIUS :
 :
 Defendant :

**Defendant Publius' Supplemental Motion to Suppress and/or Dismiss
and for Further Declaratory Relief**

Now comes Defendant Publius, by and through undersigned co-counsel, and supplements his previously filed Motion to Suppress and/or Dismiss. Further, Defendant Publius requests Declaratory Relief as to certain portions of Ohio's Concealed Carry Law. For cause, Movant states that it is anticipated, to the point of near certainty, that Movant's upcoming suppression hearing will place certain portions of Ohio's Concealed Carry Law in conflict with his constitutional and statutory rights and this supplemental motion is needed to squarely place the issue of the constitutionality of said provisions before this Court.

A memorandum in support follows.

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Preliminary Matters

Movant states that law and analysis on statutory interpretation, such as statutes being strictly construed against the state, statutes enjoying a presumption of constitutionality, narrowly tailoring relief to leave statutes intact while striking offending provisions etc is best left to post-hearing briefing, and is not covered in this brief.

Movant has previously filed a Motion to Suppress and/or Dismiss, which is incorporated by reference into this Motion. Movant states that certain case law has held that the arguments raised herein are more properly raised in a request for Declaratory Relief rather than in a Motion to Suppress or Dismiss. “The trial court determined that appellant should have filed his motion to suppress as a declaratory judgment action and notified the Ohio Attorney General because what he sought was a declaration that R.C. 2901.07 is unconstitutional.” State v. Bandy, (2007 Ohio App. 7 Dist) 2007 WL 624999, *8.

Simultaneously, other Court’s have ruled that a separate Declaratory Judgment Action may not be filed while a criminal proceeding is pending in most circumstances. “The trial court reasoned that a decision on the merits would not terminate the controversy; that it would not be binding on any criminal action then pending or which might be filed in the future; and that the club’s rights would be adequately protected through other available remedies.” Northland Recreation and Social Club v. City of Columbus, (1984 Ohio App. 10 Dist) 1984 WL 5909, *1.

Movant therefore seeks Declaratory Relief pursuant to R.C. § 2721.01 et seq. in the alternative, or in addition to, the Motion to Suppress and/or Dismiss as the case may prove appropriate.

Relief Requested

In addition to the relief requested in the original Motion to Suppress and/or Dismiss, Movant is requesting this Court find as follows:

1. R.C. § 2923.16(E)(3)(a) impermissibly conflicts with Movant’s statutory and constitutional right against self-incrimination. This portion of concealed carry law compels a person who has been issued a Concealed Handgun License (“CHL”) to make certain statements to law enforcement officers during interrogation or face a first degree misdemeanor charge and suspension of their license. This creates the unavoidable result of every encounter with a law enforcement officer requiring a CHL to make a “choice” between surrendering a Constitutional right or being criminally charged. To the extent that R.C. § 2923.126(A) duplicates this same requirement, it is also alleged that R.C. § 2923.126(A) impermissibly conflicts with Movant’s rights against self-incrimination.

2. R.C. § 2923.16(E)(1)(a), (b) and (c) and R.C. § 2923.16(F)(4)(c)(i), (ii) and (iii) substantially interfere with the exercise of a fundamental, individual right while not serving any legitimate government interest, thus failing the third prong of the Constitutional “vagueness test.”
3. R.C. § 2923.16(E)(1)(a), (b) and (c) and R.C. § 2923.16(F)(4)(c)(i), (ii) and (iii) provide limitless opportunity for discretionary enforcement and interpretation, thus failing the second prong of the Constitutional “vagueness test.”
4. R.C. § 2923.16(F)(3) results in a denial of Equal Protection guaranteed by the 14th Amendment to the United States Constitution and Section 2, Article I of the Ohio Constitution. Specifically, this statutory affirmative defense applies arbitrarily only to land in unincorporated areas in a township that is zoned agricultural, resulting in unequal application throughout the state. But for this arbitrary and unequal application of this affirmative defense, Defendant in this case would enjoy the protection of this affirmative defense.
5. R.C. § 2923.16(F) and R.C. § 2923.126(E) are irreconcilable and create impermissible distinctions between off-duty police officers carrying a gun in a car and a person with a CHL carrying a gun in a car, resulting in a denial of Equal Protection.

Law and Argument

Miranda and the Duty to Disclose

There is a well-settled right to remain silent and have an attorney present during a custodial interrogation, and a duty on the State to advise the subject of these rights explicitly in order to establish that any waiver of these rights was made knowingly, intelligently and voluntarily. Miranda v. Arizona, (1966) 384 U.S. 436, 444. A threshold issue to any Miranda analysis is whether the encounter is custodial or not. As examined throughout Miranda, a typical traffic stop does not trigger Miranda protections. However, at the point the suspect’s freedom becomes curtailed to the degree associated with formal arrest, Miranda protections are afforded.

It is critical to note that the right against self-incrimination is constant and does not require a custodial interrogation to be triggered. A person in a civil deposition enjoys the same right to remain silent that an inmate in a jailhouse interview enjoys. Custody merely triggers the obligation on the part of the state to advise the subject explicitly of his/her rights. The right to remain silent exists whether the subject is advised of the right or not, and without regard to custodial status. For the purposes of this particular argument, it is immaterial whether Movant was in custody or not. However, it is

anticipated, for the purposes of the suppression argument, that it will be clearly established that Movant was in custody. Someone at gun point during a felony traffic stop is *per se* in custody.

There is an equally well-settled exception to the Miranda law in cases involving public safety, almost exclusively cases involving the location of a firearm. New York v. Quarles, (1984) 467 U.S. 649.

Ohio Court's have generally adopted this public safety exception.

The public safety exception does not apply to all situations in which a suspect is believed to have used a weapon in the commission of a crime and does not permit police officers to ask questions that are not necessary to secure their safety or that of the public at large. In order to establish the need for the exception, the state must demonstrate that (1) there was an objectively reasonable need to protect the police or the public, (2) from an immediate danger, (3) associated with a weapon, and that (4) the questions asked were related to that danger and reasonably necessary to secure public safety. This analysis is to be conducted on a case-by-case basis. **In the case herein, a review of the disputed statements demonstrates that some were clearly self-initiated and all were voluntary.** State v. Prim, (1999 Ohio App. 8 Dist) 134 Ohio App.3d 142, *154. (emphasis added.)

Key to any analysis of a claim of a public safety exception is the reasonableness of the conditions of the encounter and the voluntariness of any statements made. Simply because public safety is claimed to be involved does not create authority to compel these types of statements, and the subject is still Constitutionally entitled to remain silent. The public safety exception operates only as relief against the exclusionary rule; the public safety exception does not operate to abrogate the right to remain silent.

Ohio Concealed Carry Law, specifically R.C. § 2923.16(E)(3) and R.C. § 2923.126(A), require a person with a "CHL" to make certain statements to a law enforcement officer, even in a custodial environment, or face criminal penalty. Stated another way, Ohio's Concealed Carry Law compels someone to make a statement upon pain of criminal punishment for failing to make the statement.

The unavoidable result is that a person in Ohio with a CHL who is involved in any official police encounter must chose between exercising their Constitutional right to remain silent and being charged with a misdemeanor criminal offense merely for exercising this Constitutional right or making a statement to avoid criminal prosecution yet involuntarily abandoning their Constitutional right to remain silent. Under no circumstance or fact pattern can this be viewed as being voluntary or self-initiated, and results in a coerced statement just the same as tying someone to a tree and whipping

them. Forcing abandonment of the Constitutional right to remain silent upon pain of criminal charge is facially Unconstitutional and this Court must strike R.C. § 2923.16(E) (3) and § 2923.126(A) to the extent that these sections coerce statements.

Restrictions on Car Transportation – Void for Vagueness

Ohio's concealed carry law provides a confusing, arbitrary series of restrictions on a CHL transporting a handgun in a motor vehicle. These restrictions are set forth in different areas of the statute, specifically R.C. § 2923.16(E)(1)(a), (b) and (c) and R.C. § 2923.16(F)(4)(c)(i), (ii) and (iii), which are entirely duplicative.

A statute is void for vagueness if it fails any prong of a tripartite test.

These values are first, to provide fair warning to the ordinary citizen so behavior may comport with the dictates of the statute; second, to preclude arbitrary, capricious and generally discriminatory enforcement by officials given too much authority and too few constraints; and third, to ensure that fundamental constitutionally protected freedoms are not unreasonably impinged or inhibited. Proper constitutional analysis necessitates a review of each of these rationales with respect to the challenged statutory language. State v. Tanner, (1984) 15 Ohio St.3d 1, *3.

Ordinarily, a law that infringes upon a fundamental, individual right is reviewed under a strict scrutiny analysis, or if the law merely regulates the manner of exercising the right, under an intermediate scrutiny analysis. Unfortunately, and to the consternation of the dissent and at least one Appellate Court¹, the Ohio Supreme Court, without analysis or findings, appears to have taken a profound departure from this longstanding approach. In Klein v. Leis, (2003) 99 Ohio St.3d 537 and Arnold v. Cleveland, (1993) 67 Ohio St.3d 35, the Court ruled that the right to bear arms is fundamental.

It is important to note the import of a “fundamental” right.

Fundamental rights (personal liberties) are those rights which are explicitly or implicitly embraced by our Constitution and the federal Constitution.^{FN11} Our goal should be to preserve the existence of these sacred rights. However, to achieve this objective, the people of our nation, and this state, cannot have unfettered discretion to do as we please at all times. Neither the federal Bill of Rights nor this state's Bill of Rights, implicitly or

¹ “Although the analysis to determine the validity of legislative restrictions on a fundamental right appears to have recently changed from strict scrutiny to the reasonableness of the legislation in Klein v. Leis, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633, we believe that the rule in Klein is limited to cases in which the state's interest relates to the right to bear arms under Section 4, Article I of the Ohio Constitution.” Thorp v. Strigari, (2003 Ohio App 1 Dist) 155 Ohio App.3d 245, *251.

explicitly, guarantees unlimited rights. Arnold v. Cleveland, (1993) 67 Ohio St.3d 35, *44.

In making this finding, the Arnold Court correctly noted that no fundamental right is absolute; all are subject to reasonable restriction. The Court correctly gave analogies with regard the right to free speech (shouting “fire” in a crowded theater) and made similar analysis with regard to freedom of the press, freedom from unreasonable search and seizure, right to counsel and the right to a trial by jury. Fundamental rights all.

Where the Arnold Court clearly departed from any known legal trail was in the conclusion, without analysis or support, that the fundamental right to bear arms alone is subject to a “reasonableness” standard. Indeed, of the three cases that the Arnold Court cited in support of the reasonableness standard, Olin Mathieson Chem. Corp. v. Ontario Store, (1967) 9 Ohio St.2d 67. Porter v. Oberlin, (1965) 1 Ohio St.2d 143 and Allion v. Toledo, (1919) 99 Ohio St. 416, none dealt with instances involving the exercise of a fundamental right.

With the mere waiving of a pen, and without analysis or support, the Court created a lesser, “second-class” of fundamental right. The Arnold Court appeared to recognize the incongruence of their actions at Footnote 12 of the opinion. Movant intends very much to argue that the appropriate standard for review is intermediate scrutiny, without regard to this legally defective precedent.

Whichever standard this Court ultimately adopts, the restrictions set forth in R.C. § 2923.16(E)(1)(a), (b) and (c) and R.C. § 2923.16(F)(4)(c)(i), (ii) and (iii) are Unconstitutionally vague. First, the restrictions are an unreasonable restriction and/or impingement upon the exercise of a fundamental right, bearing arms, thus violating the third prong of the vagueness test. Second, as will be further discussed in the impermissible classification section, R.C. § 2923.16 creates subclasses of concealed carry license holders and treats them differently with regard to the operation of these car carry restrictions, while simultaneously providing no guidance or safeguard regulating how the officer in the field is to make determinations. Far from precluding arbitrary, capricious or discriminatory enforcement by authorities given power but no constraints, the car carry restrictions are written to guarantee this abuse, in fact, happens.

Equal Protection Clause – Affirmative Defense Arbitrarily Available

All statutes are subject to at least a rational basis review to determine whether the statute violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Section 2, Article I of the Ohio Constitution. If the statute touches on a classification dealing with a fundamental right, or based upon race or national origin, the standard is strict scrutiny, requiring that the discriminatory classification be narrowly tailored to serve a compelling state interest. See, e.g., State v. Thompson, (2002) 95 Ohio St.3d 264, *267.

This brief has already covered the right to bear arms being a fundamental right. R.C. § 2923.16(F)(3) sets forth an affirmative defense for persons who are in an automobile and the automobile is operated by a person, or the spouse of a person, who owns, or is a tenant on, the real property in question, PROVIDED THE REAL PROPERTY IS LOCATED IN AN UNINCORPORATED AREA OF A TOWNSHIP AND IS ZONED OR USED FOR AGRICULTURE. This results in a situation where entire segments of Ohio are excluded from enjoying this affirmative defense. Movant states that there is no compelling state interest that is served by this narrow affirmative defense, and by application, Movant is not able to enjoy the protections of the law enjoyed by persons similarly classified but located in other geographic locations in the state.

Equal Protection Clause – Impermissible Classifications

R.C. § 2923.126(E) clearly states that “(a) peace officer has the same right to carry a concealed handgun in this state as a person who was issued a license to carry a concealed handgun under section 2923.125 of the Revised Code.” Yet turning to R.C. § 2923.16(F)(1), it is clear that the statute attempts to create special exceptions and rights for one category of concealed carry licensee, off-duty peace officers, not enjoyed by another category of concealed carry license holder, citizens. Simply put, an off-duty peace officer could not be criminally charged in the same manner as Movant in the instant case, despite R.C. § 2923.126(E) specifying the officer only has the same rights as a “mere” citizen CHL.

This brief previously covered that the right to bear arms is a fundamental right, and previously covered that classifications that affect a fundamental right are subject to strict scrutiny. The General Assembly, by and through, R.C. § 2923.16(F)(1) already determined that peace officers were to be treated as CHLs for all purposes of carry in Ohio, and this Court is bound by that legislative classification determination. This Court cannot “find” some special classification exception or compelling state interest for peace officers, as the issue classification was already determined by the General Assembly – peace officers have the same rights as CHLs. Equal Protection guarantees that members of the same class enjoy the same benefits, and this is not happening under Ohio’s Concealed Carry law.

The only permissible method for reconciling R.C. § 2923.126(E) and R.C. § 2923.16(F) under Equal Protection is to find that all classifications of CHLs operate under the same laws. To allow otherwise would be to allow sub-classification in the exercise of a fundamental right and this cannot survive strict scrutiny. Movant enjoys the same freedom of religion a priest enjoys, the same freedom of speech a news anchor enjoys, the same freedom of press an editor enjoys, the same right to jury trial an attorney enjoys, the same right to counsel someone facing the death penalty enjoys – in no other area does the law permit one citizen to enjoy a fundamental right to a greater extent than

another citizen. The right to bear arms is no different, and Movant must be given the same protection afforded by R.C. § 2923.16(F).

Conclusion

It is therefore respectfully requested, in addition to the relief previously requested, this Court find R.C. § 2923.16(E)(3)(a) and R.C. § 2923.126(A) facially Unconstitutional; find that the car carry restrictions set forth in R.C. § 2923.16(E)(1)(a), (b) and (c) and R.C. § 2923.16(F)(4)(c)(i), (ii) and (iii) are void for vagueness; find that R.C. § 2923.16(F)(3) violates the Equal Protection clauses if only applied to the limited real property described therein; and find that Ohio's concealed carry law creates impermissible distinctions among equal class members and is therefore a violation of the Equal Protection clauses. Movant demands this Court dismiss all charges against him on these grounds and further demands all statements made by him to police officers be suppressed. Movant further demands this same relief as Declaratory Judgment.

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Certificate of Service

A true copy of the foregoing was served upon the following via regular mail this 3rd day of September, 2007.

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Now comes Defendant, by and through undersigned co-counsel, pursuant to Ohio Revised Code Section 2721.12, and gives notice to the honorable Marc Dann, Attorney General of Ohio, that he has requested declaratory relief.

Defendant claims that certain provisions of Ohio's Concealed Carry law are facially Unconstitutional, and that others are Unconstitutionally vague, and that others are contrary to the Equal Protection Clause. A copy of Defendant's motion is attached hereto.

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