OPEN CARRY OF FIREARMS AND CONCEALED DEADLY WEAPONS IN KENTUCKY

The issue of possession firearms is addressed in both the Second Amendment to the U.S. Constitution and the Kentucky Constitution.

The Second Amendment reads:

> Amendment II
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> 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 Kentucky Constitution reads:

> Section 1
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> Rights of life, liberty, worship, pursuit of safety and happiness, free speech, acquiring and protecting property, peaceable assembly, redress of grievances, bearing arms.
> ...
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> Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.

Kentucky law provides a strong background for permitting the open carry of firearms in most places. As such, there is little case law discussing the issue, because simply put, it isn't illegal to openly carry firearms and the cases the do arise are not litigated to the point that they become case law. Even if an individual is charged, the cases will likely be quickly dismissed and will not remain in the judicial system to become legal precedent.

STATUTORY LAW

Because open carry of firearms is for the most part, legal in Kentucky, the statutes focus on concealed carry. Most of Kentucky's weapon law with respect to concealed carry is in KRS 527.020. Over the years, the statute has evolved to include matters originally resolved in case law. For example, changes that permit the carrying a weapon in a glove compartment or other enclosed installed container in a vehicle, without the need for a CCDW permit, both evolved from cases that ruled that was permissible. A recent change that specifically protects an individual who keeps a weapon secured in their vehicle at their place of employment is also as a result of attempts by employers to prohibit their employees from having weapons in the company parking lot. (KRS 237.106 also

discusses the issue of carrying within a vehicle, and places penalties on employers or property owners who attempt to regulate it, again, subject to conditions listed in that statute.) A change in the law in 2012 permits the owners or lessees of real property to carry concealed on their property without a permit, and to allow certain other listed family members to do so as well. They may also carry concealed at their business, if they are the sole proprietor of the business. (In addition, they may certainly choose not to post their business to prohibit concealed carry and to permit their employees to carry with a permit, as well.)

Individuals who are adjudicated as mentally ill may also have their right to possess firearms removed, but that requires an additional process and does not apply to individuals who are not legally adjudicated. (For example, this would be someone who commits themselves for mental health treatment, rather than waiting to be adjudicated.)

Consistent with federal law, possession of a firearm by a convicted felon is prohibited under KRS 527.040. Kentucky law prohibits the possession of a weapon on elementary or secondary (middle/high) school property, but does provide for a number of exceptions to this statute. Of particular note, an adult may possess a firearm so long as it is kept in their vehicle, unless needed for defense, of course. Peace officers authorized under KRS 527.020 to carry concealed statewide may also carry on school property, of course. (Note that not all peace officers are so authorized, they must be both on the list and authorized specifically by their agency to do so.)

Under KRS 527.100, minors are not permitted to possess handguns, except under specific exceptions as listed in the statute. Adults between the ages of 18 and 21 may possess a handgun, or, for example, be given one as a gift, but may not legally purchase one under federal law. Juveniles may, however, possess long guns. Under KRS 527.110, it is unlawful to provide a handgun to a juvenile or permit them to possess handguns, subject to the same exceptions as listed in KRS 527.100.

In addition, an individual who the subject of an EPO or DVO will have their license to carry concealed suspended until such time as the order is terminated. (An officer in that situation may be permitted to carry concealed when on duty, but only when on duty; the statute suggests that they would not be permitted to carry concealed when off-duty, although normally, they would be permitted to do so.) It should be noted, however, that not every person who is the subject of a DVO will be prohibited from possessing firearms under federal law, but only those actually convicted of a misdemeanor crime of domestic violence (usually Assault 4th Degree or Menacing).

KRS 237.110 also lists the locations where a permit holder may not carry concealed, but again, does not clearly resolve the question of whether they may carry openly. Such locations include, but are not limited to, police and sheriff's offices, detention facilities, courthouses solely occupied by the Courts, governmental meeting locations, bars and airports. Private businesses may also post under this statute. It has been ruled, however, that KRS 26A.100 permits the prohibition of weapons in actual court facilities. Private businesses may prohibit an employee from carrying a concealed weapon, providing they have a CCDW permit, in a business-owned vehicle, but public employers may not do so unless the vehicle is used to transport persons under supervision (such as prisoners or mentally ill subjects).

There is no specific criminal charge for carrying a concealed weapon in a location that does not permit it, so long as the person has a valid permit to carry concealed and is not otherwise prohibited. And, of course, there is no provision to prohibit an individual from carrying openly, either. However, the person may be subject to denial or removal from the premises. If they refuse to leave, they could be charged with Criminal Trespass. However, it would be questionable to place additional charges, such as Disorderly Conduct or Menacing against that individual unless facts exist to support those charges. (For example, simply because an individual is upset that another individual is legally carrying a weapon would not be enough to support a Disorderly Conduct charge, no more than someone wearing a shirt with an offensive logo would be.)

KRS 237.115 permits a university or other postsecondary education facility to control the possession of deadly weapons on their property, but that has been changed someone by recent case law. (See below.) Local governmental bodies may prohibit the carrying of concealed weapons on their property, although the issue of carrying opening in such areas has never been adequately addressed. This statute does not apply to public housing and a few other listed areas. Under that statute, as well, there is no penalty for carrying concealed in any location where an unconcealed weapon may be carried.

Under the federal Law Enforcement Officers Safety Act, retired officers (who meet the provisions of the federal law) may be certified to carry off duty as well, but they are subject to the ordinary concealed carry provisions of the state in question. (In other words, they get a special permit, but not necessarily special privileges in Kentucky.)

Under KRS 237.104, the right to possess weapons may not the limited under times of emergency, nor may weapons be seized unless the individual is otherwise prohibited from carrying, is violating the law with the weapon or the weapon is stolen. In addition, under KRS 39A.295, if a person is relocated to temporary housing because of a disaster situation, they may not be deprived of

their rights under KRS 237. (However, the law is silent on the issue of whether an emergency shelter, especially one located in a facility that prohibits firearms, is required to permit firearms.)

Holders of permits from other states may also carry in Kentucky, so long as reciprocity is recognized. At the current time, according to the Kentucky State Police (which is legally obligated to maintain the list), the following state permits are NOT recognized by Kentucky: California, Connecticut, District of Columbia, Hawaii, Illinois, Maryland, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Washington and the territories of Guam, Puerto Rico, Samoa and the Virgin Islands. (Note, this list is subject to change and available on the KSP website.)

CASE LAW

Most case law on the issue of firearms, particularly concealed firearms, either predates the enactment of the law permitted concealed weapons permits or covers individuals who do not have a CCDW permit. These include, for example, situations where an officer observed something that suggested an unlawfully concealed weapon in a pocket.

In Mitchell v. University of Kentucky, 366 S.W.3d 895 (Ky. 2012), a graduate student who was also an employee of UK admitted to having a firearm in his vehicle, which was parked on UK property. Although he was not criminally charged for having the weapon, UK elected to terminate his employment. He sued UK for wrongful termination and the Court agreed that under Kentucky law, the termination was improper. (There is no indication as to what has happened in this case since the ruling, but UK has changed their policy with respect to firearms in vehicles on campus. Arguably, the same statute may apply to housing units, particularly those set up as apartments on university campuses.)

In Louisville-Jefferson County Metro Government v. Stoke, 2008 WL 2468757 (Ky. App. 2008), Stoke was an employee of a local gun store. He was spotted with an unconcealed handgun while at a nearby restaurant and LMPD was notified. (There was no allegation that he did anything with the gun, or that the location prohibited weapons, just that he had it holstered on his person.) They located him as he returned to the gun store and pulled in behind him. Officers approached him with weapons drawn and gave him contradictory commands. One of the officers seized his weapon. Despite being told by the owner that the subject was disabled by a bone disease, and officer forced him to the ground and handcuffed him, causing him intense pain. After confirming that there was no reason to hold him, he was yanked up by the handcuffs, again causing injury. The handcuffs were removed and his gun returned to him.

Stoke filed a lawsuit, asserting false arrest and battery. The Kentucky Supreme Court ultimately determined that although Metro Louisville itself is immune from suit (as it gained the status of a political subdivision / county at merger), that the officers themselves bore some responsibility.

Specifically, the Court stated:

> Though we know of no law prohibiting a private citizen from carrying an unconcealed firearm, we acknowledge that the frequency of such behavior in major metropolitan areas is sufficiently rare that we cannot say that the officer's decision to make an investigatory stop was not "a good faith judgment call[ ] made in a legally uncertain environment.
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> The Court agreed that officers may "perform investigatory detentions when they have articulable suspicion that the detainee is engaged in criminal activity."[1] As such, the Court agreed the officers were entitled to official immunity on the detention, as they had, "at worse, a 'reasonable misapprehension" of the constitutional law governing the circumstances." However, the Court did not extend the immunity the treatment Stokes alleged, which included that the officers "(1) issued conflicting commands; (2) forced him at gunpoint to the ground and handcuffed him in a rough manner despite warnings about his frailness; and (3) otherwise treated him roughly without any legitimate cause." The Court noted that the allegations indicated that the "officer's treatment of him went well beyond that which was necessary to conduct a reasonable investigatory stop" as he was apparently completely cooperative. The case was remanded back and no further legal action was taken, which suggests the case was ultimately settled by Louisville Metro.

In Fisher v. Harden, 398 F.3d 837 (6th Cir. 2005), Fisher, age 77 was walking through open farmland near his Ohio home. He was carrying a rifle, with the intention of shooting groundhogs that were ravaging crops. He found a position to shoot that was some distance away from, but within sight, of a county road. A passerby called the Sheriff's Office and reportedly, mistakenly, that Fisher had tied himself to the railroad tracks. Deputies responded to the scene and ordered him, via microphone, to put down the rifle and his other belongings, which he did. The deputies pointed weapons at him and eventually ordered him, at gunpoint, to lie down, whereupon he was handcuffed. He went into cardiac arrest, but apparently the deputies did not recognize the seriousness of the situation and did not provide him any medical assistance immediately. Neighbors came to the scene and once they realized what was going on, Fisher was sent for immediate assistance. Upon

[1] Terry v. Ohio,392 U.S. 1 (1968).

a subsequent lawsuit for their actions, the deputies claimed they were seizing him for mental health reasons. The Court noted, however, that such seizure could only be justified by a showing of at least reasonable suspicion that the subject was "dangerous to himself or others." Finding nothing that suggested that was the case, or that he was dangerous in any way, the Court agreed that Fisher's rights were violated.

In Embody v. Ward, 2012 3733507 (6th Cir. 2012), Embody went to a Tennessee state park carrying a handgun. Tennessee state law permits the carrying of handguns, but the weapon in question was a AK-47 Draco pistol with a barrel length of 11 ½ inches, just shy of the 12 inch limit on such weapons under their law. The weapon also had a 30-round magazine and the tip of the barrel was painted orange. Embody was stopped by the park ranger, ordered the ground and questioned, and the park ranger also asked for assistance from Metro Nashville police in determining whether the weapon was legal. After about 2 ½ hours, and a final determination that the weapon was lawful, Embody was released. He filed suit, but the Court agreed that under the undisputed facts, it was appropriate for the officers to fully investigate the situation. The Court noted that Embody "worked hard to appear suspicious" and the officers held him only so long as necessary to "investigate the legitimacy of the weapon."

Another series of cases involve the issue of when a weapon is considered actually concealed. In Prince v. Com., 277 S.W.2d 470 (Ky. 1955), the Court discussed a situation where a deputy sheriff found a loaded automatic pistol in Prince's front pants pocket. Prince claimed that the weapon protruded from the pocket, but the deputy stated he did not see it. However, he admitted that it might have been visible from someone "in a different position." The Court ruled that a "weapon is generally held to be concealed when so placed that it cannot be readily seen under ordinary observation." Some of these cases involve situations which have been made moot by the court, since the law now permits weapons to be carried in any regularly-installed compartment in a vehicle. A weapon that is "merely screened from view" by the body is not concealed. Williams v. Com., 37 S.W. 680 (Ky. App. 1896); Reid v. Com., 298 Ky. 800 (Ky. 1944). It might become concealed, however, by the subject putting on a jacket, for example. Hall v. Com., 215 S.W. 2d 84 (Ky. 1948).

Another line of cases involves whether the gun is actually a deadly weapon, or is, for example, inoperable because of damage or the lack of a critical piece. The Court generally requires that the defendant prove that to be the case, allowing officers to assume that a weapon that appears to be functional actually is, for purposes of KRS 527.[2] Arnold v. Com., 109 S.W. 3d 161 (Ky. App. 2003). However, a weapon that is proven to be incapable of being fired is not a deadly

[2] Note that may be different than the proof needed, for example, for a prosecution under KRS 503 (Use of Force) or 515 (Robbery).

weapon. Bowman v. Com., 309 Ky. 414 (Ky. 1949); Jarvis v. Com., 306 Ky. 190 (Ky. 1947). A firearm does not have to be loaded to be considered to be a deadly weapon, however. Com. v. Harris, 344 S.W.2d 820 (Ky. 1961).

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