**OPEN CARRY – TO DETAIN OR NOT TO DETAIN, THAT IS THE QUESTION**

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**TCAA LAW ENFORCEMENT SEMINAR**

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The legislature passed law(s) that permit persons who have a valid License to Carry (LTC), previously known as a CHL, to openly carry handguns in Texas. The handgun will have to be carried in a holster, either belt or shoulder, but will not have to be concealed. The new law has probably generated more questions than answers at this time, and we can look forward to our courts and Attorney General issuing opinions interpreting the new law. As the law is interpreted and refined, then the police approach to the issue will also change.

This is not intended to be an exhaustive review of all issues associated with the new open carry legislation; rather, this will focus on one particular issue: may police officers still enforce section 46.02 of the Penal Code in light of the new open carry law and detain persons who are openly carrying to determine if there is a violation of section 46.02 occurring?

Please note that this analysis does not constitute legal advice, nor does it necessarily constitute the position of the Texas City Attorney's Association. Policies regarding open carry should only be established after careful consideration of the underlying risks and discussions with legal counsel.

***Penal Code section 46.02:***

First, and perhaps foremost, officers need to understand that section 46.02 of the Penal Code is still in effect. The legislature did not repeal it and no court has ruled it unconstitutional. As far as we know, it is still a crime to carry a handgun "on or about" one's person unless the person can demonstrate he qualifies for an "exemption." 46.02 reads as follows:

*(a) A person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun, illegal knife, or club if the person is not:*

> *(1) on the person's own premises or premises under the person's control; or*
> *(2) inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control.*

*<Text of (a-1) effective until January 1, 2016>*

*(a-1) A person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun in a motor vehicle or watercraft that is owned by the person or under the person's control at any time in which:*

> *(1) the handgun is in plain view; or*
> *(2) the person is:*
> > *(A) engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic or boating;*
> > *(B) prohibited by law from possessing a firearm; or*
> > *(C) a member of a criminal street gang, as defined by Section 71.01.*

*<Text of (a-1) effective January 1, 2016>*

*(a-1) A person commits an offense if the person intentionally, knowingly, or recklessly carries on or about his or her person a handgun in a motor vehicle or watercraft that is owned by the person or under the person's control at any time in which:*

*(1) the handgun is in plain view, unless the person is licensed to carry a handgun under Subchapter H, Chapter 411, Government Code, and the handgun is carried in a shoulder or belt holster; or*
*(2) the person is:*
*(A) engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic or boating;*
*(B) prohibited by law from possessing a firearm; or*
*(C) a member of a criminal street gang, as defined by Section 71.01.*

*(a-2) For purposes of this section, "premises" includes real property and a recreational vehicle that is being used as living quarters, regardless of whether that use is temporary or permanent. In this subsection, "recreational vehicle" means a motor vehicle primarily designed as temporary living quarters or a vehicle that contains temporary living quarters and is designed to be towed by a motor vehicle. The term includes a travel trailer, camping trailer, truck camper, motor home, and horse trailer with living quarters.*

*(a-3) For purposes of this section, "watercraft" means any boat, motorboat, vessel, or personal watercraft, other than a seaplane on water, used or capable of being used for transportation on water.*

*(b) Except as provided by Subsection (c), an offense under this section is a Class A misdemeanor.*

*(c) An offense under this section is a felony of the third degree if the offense is committed on any premises licensed or issued a permit by this state for the sale of alcoholic beverage.*

***Penal Code section 46.15(b):***

Section 46.15, entitled "Nonapplicability," lists conduct which is not enforceable under sections 46.02 and 46.03. Generally speaking, if the actor falls within one of these descriptions, then 46.02 or 46.03 is not enforceable against that actor. This analysis will focus on 46.15(b), since that statute addresses persons with a LTC. The text of 46.02(b) follows. The text of the previous version is included:

*<Text of (b) effective until January 1, 2016>*

*(b) Section 46.02 does not apply to a person who:*

*(1) is in the actual discharge of official duties as a member of the armed forces or state military forces as defined by Section 437.001, Government Code, or as a guard employed by a penal institution;*

*(2) is traveling;*

*(3) is engaging in lawful hunting, fishing, or other sporting activity on the immediate premises where the activity is conducted, or is en route between the premises and the actor's residence, motor vehicle, or watercraft, if the weapon is a type commonly used in the activity;*

*(4) holds a security officer commission issued by the Texas Private Security Board, if the person is engaged in the performance of the person's duties as an officer commissioned under Chapter 1702, Occupations Code, or is traveling to or from the person's place of assignment and is wearing the officer's uniform and carrying the officer's weapon in plain view;*

*(5) acts as a personal protection officer and carries the person's security officer commission and personal protection officer authorization, if the person:*

*(A) is engaged in the performance of the person's duties as a personal protection officer under Chapter 1702, Occupations Code, or is traveling to or from the person's place of assignment; and*

*(B) is either:*

*(i) wearing the uniform of a security officer, including any uniform or apparel described by Section 1702.323(d), Occupations Code, and carrying the officer's weapon in plain view; or*

*(ii) not wearing the uniform of a security officer and carrying the officer's weapon in a concealed manner;*

***(6) is carrying a concealed handgun and a valid license issued under Subchapter H, Chapter 411, Government Code, to carry a concealed handgun;***

*(7) holds an alcoholic beverage permit or license or is an employee of a holder of an alcoholic beverage permit or license if the person is supervising the operation of the permitted or licensed premises; or*

*(8) is a student in a law enforcement class engaging in an activity required as part of the class, if the weapon is a type commonly used in the activity and the person is:*

*(A) on the immediate premises where the activity is conducted; or*

*(B) en route between those premises and the person's residence and is carrying the weapon unloaded.*

*<Text of (b) effective January 1, 2016>*

*(b) Section 46.02 does not apply to a person who:*

*(1) is in the actual discharge of official duties as a member of the armed forces or state military forces as defined by Section 437.001, Government Code, or as a guard employed by a penal institution;*

*(2) is traveling;*

*(3) is engaging in lawful hunting, fishing, or other sporting activity on the immediate premises where the activity is conducted, or is en route between the premises and the actor's residence, motor vehicle, or watercraft, if the weapon is a type commonly used in the activity;*

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*(5) acts as a personal protection officer and carries the person's security officer commission and personal protection officer authorization, if the person:*

*(A) is engaged in the performance of the person's duties as a personal protection officer under Chapter 1702, Occupations Code, or is traveling to or from the person's place of assignment; and*

*(B) is either:*

*(i) wearing the uniform of a security officer, including any uniform or apparel described by Section 1702.323(d), Occupations Code, and carrying the officer's weapon in plain view; or*

*(ii) not wearing the uniform of a security officer and carrying the officer's weapon in a concealed manner;*

***(6) is carrying:***

***(A) a license issued under Subchapter H, Chapter 411, Government Code, to carry a handgun; and***

***(B) a handgun:***

***(i) in a concealed manner; or***
***(ii) in a shoulder or belt holster;***

*(7) holds an alcoholic beverage permit or license or is an employee of a holder of an alcoholic beverage permit or license if the person is supervising the operation of the permitted or licensed premises; or*

*(8) is a student in a law enforcement class engaging in an activity required as part of the class, if the weapon is a type commonly used in the activity and the person is:*

*(A) on the immediate premises where the activity is conducted; or*

*(B) en route between those premises and the person's residence and is carrying the weapon unloaded.*

***Effect of "Nonapplicability" on UCW Charges:***

The legislature failed to define what it meant by "nonapplicability" when it created Penal Code section 46.15. Traditionally, defenses to criminal prosecution take on one of three forms: a defense, an affirmative defense, or an exception to prosecution. *See generally Chapter 2, Penal Code.* Section 2.03(e) of the Penal Code states: "A ground of defense in a penal law that is not plainly labeled in accordance with this chapter has the procedural and evidentiary consequences of a defense."

Texas courts, interpreting section 46.15, have ruled that exceptions under section 46.15 operate as a "defense" under the rules of the Penal Code. *See In the Matter of A.G.*, 292 S.W.3d 755 (Tex. App.—Eastland, 2009). That court stated: "Section 46.02 does not apply to a person who is traveling. TEX. PENAL CODE ANN. § 46.15(b)(3) (Vernon Supp. 2008)…The traveling exclusion from Section 46.02 has the procedural and evidentiary consequences of a defense. *Illingworth v. State,* 156 S.W.3d 662, 664 (Tex.App.-Fort Worth 2005, no pet.) (citing TEX. PENAL CODE ANN. § 2.03(e) (Vernon 2003))."

It appears, then, that the provisions of 46.15 operate as defenses to criminal conduct. 46.15(b)(6) tells us that a person carrying a handgun, either concealed or openly in a holster, who has a LTC has a defense to prosecution for unlawfully carrying a weapon. In order for a defense to be effective, the accused must raise it – once raised it is the state's burden to disprove it. In other words, if a defendant wants to argue

that he or she was not unlawfully carrying a handgun, he or she must assert at trial that he or she has a valid LTC; the state would then be obliged to prove the LTC was invalid – if not, the defense wins.

As a practical matter, police officers usually do not arrest persons who are carrying a handgun who have a LTC or meet one of the other defenses in the statute. Law enforcement understands that if the defense if properly asserted, the state usually cannot disprove it – so police do not make the arrest. This nod to procedure does not mean that a person carrying a handgun is exempt from arrest; rather, it means it makes no sense to arrest someone once police know he or she has a LTC. The fact that there is a dearth of case law addressing the assertion of an LTC as a defense at trial supports the assumption that police rarely arrest a LTC holder for unlawfully carrying a weapon.

Indeed, the wording of 46.15(b)(6) expressly states that section 46.02 "does not apply to a person who is carrying a license issued under Subchapter H, Chapter 411, Government Code, to carry a handgun…" The very text of that portion of the statute makes it clear that in order for the carrying of the handgun to be lawful the actor must be carrying a LTC.

However, one bill has been introduced in the 2017 session that would effectively render the offense of UCW under section 46.02 null and void. HB 375 contains the following language as an additional section to the "nonapplicability" provision of section 46.15:

> *SECTION 9. Section 46.15, Penal Code, is amended by adding Subsection (k) to read as follows:*
>
> *(k) Notwithstanding any other law to the contrary, a person who is not otherwise prohibited by law from possessing a firearm shall not be required to obtain any license to carry a handgun as a condition for carrying a handgun.*

In other words, unless there is another law which prohibits a person from carrying a weapon at any time (think felon), or perhaps in a particular place, the burden on the state will be to prove the existence of such a law to disprove the defense asserted by the person carrying the weapon. This would come close to creating a right to carry similar to such a right to carry sometimes referred to as a "constitutional" right to carry. Under this scheme a police officer may very well not be able to rely upon 46.02 in and of itself as a lawful basis for a detention, i.e. the presumption may well be one of lawful carrying – since the possession of a LTC would no longer be required to carry lawfully.

***Earlier Discussions of Exemptions under 46.02 PC:***

Prior to the enactment of 46.15, allegations of unlawfully carrying a handgun could be defended by asserting certain "exemptions" from the application of the statute; e.g. "traveling" (which is now codified at 46.15(b)(2)); or the defendant could argue that he or she was on his or her own premises (business or home), and could carry the handgun lawfully. *See Birch v. State, 948 S.W.2d 880 (Tex. App.—San Antonio, 1997) and cases cited therein.*

A common theme of the cases wherein persons asserted they were "exempt" from the application of section 46.02 was the requirement that the person asserting the defense, or exemption, establish his or her eligibility for the defense. For example, a person claiming traveling as a defense had to produce sufficient evidence that her or she was in fact traveling at the time of the possession of the handgun. *See Birch, above; See also Chatman v. State, 513 S.W.2d 854 (Tex. Crim. App. 1974) holding: "The burden is upon the accused to bring himself within one of the exceptions [to 46.02] making his possession of the weapon lawful."*

***Conclusion of Validity of section 46.02:***

According to Texas statutes and case law, 46.02 is still valid law and in order to defend against an allegation of 46.02 the accused must assert a defense which would excuse the carrying of the weapon.

***Govt. Code 411.205 and the Applicability of 46.02:***

As previously stated the legislature has not yet repealed section 46.02 of the Penal Code. The case law interpreting sections 46.15 and 46.02 of the Penal Code establish that the person carrying the weapon must establish his or her exemption from the application of section 46.02. A LTC is listed as an "exemption" under section 46.15 – the same section that now includes the traveling defense.

The Govt. Code still requires the holder of a handgun license to produce it upon demand of a police officer. *See section 411.205, Government Code.* Officers should note there is no criminal penalty for failure to produce the LTC upon demand. What option does the officer have if the person carrying the handgun does not produce a LTC or does not fall within another defense under 46.15? The officer should have arrest authority pursuant to 46.02 of the Penal Code. Conversely, if an officer knows a person who is carrying a handgun has a LTC, then the officer should not detain the person.

A coherent reading of these cases and statutes could lead one to reasonably conclude that a person who is openly carrying a handgun may reasonably be believed to be unlawfully carrying a weapon. Once the subject produces the LTC, the "exemption" comes into play and a reasonable officer would most likely not arrest.

Perhaps the approach to consider is the enforcement of section 46.02 as opposed to trying to detain a person for something that is noncriminal and administrative in nature, i.e. whether or not the person has a LTC under Ch. 411 of the Govt. Code.

***Constitutional Concerns:***

The Second Amendment:

Much has been said of the fact that the possession of weapons is something that is constitutionally protected. Indeed, the U.S. Supreme Court has ruled that the Second Amendment right to possess weapons is a personal right, not one contingent upon militia membership or some other qualification. *See Dist. Of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783 (2008).*

Given the fact that individuals are protected by the Second Amendment; can government still regulate the carrying of weapons? Yes. In *Heller,* the Court noted that even though the right to possess weapons was constitutional in nature, "the right was not unlimited, just as the First Amendment's right of free speech was not." *Heller at 595.* The Court also noted, "commentators and courts routinely explained the right [to possess weapons] was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller at 626.*

The U.S. Fifth Circuit has ruled that Texas's statutory scheme for handgun licenses, which does not allow 18 – 20 year olds to carry handguns in public, does not violate the Second Amendment. *See Natl. Rifle Assoc. of America, Inc. v. McCraw, 719 F.3d 338, (U.S. 5th Circuit, 2013).* The Texas scheme that completely prohibits 18 – 20 year olds from carrying a handgun in public is part of the same scheme that permits open carry by those older than 21, but only with a LTC.

Texas has not enacted a scheme, as of yet, in which any person can openly carry a handgun (please note that as of the latest version of this paper no fewer than 70 bills have been filed in the legislature

addressing weapon issues). The Texas scheme only permits certain persons to carry handguns, openly or concealed. A person who does not qualify for an "exemption", which includes a LTC, under the Texas statutes and carries a handgun in public, is committing the offense of unlawfully carrying a weapon.

The Fourth Amendment:

According to the U.S. Supreme Court and the Texas Court of Criminal Appeals, there are only three types of encounters between police and civilians: (1) consensual encounters; (2) detentions; (3) arrests. Detentions and arrests are seizures under the Fourth Amendment. The Fourth Amendment protects us against unreasonable seizures. In order for a detention to be lawful, i.e. reasonable, it must be supported by reasonable suspicion. In order for an arrest to be lawful, i.e. reasonable, it must be supported by probable cause. A consensual encounter between an officer and a person carrying a handgun would not bring the Fourth Amendment into play. If the officer approaches the person carrying the handgun in the context of a consensual encounter and the person voluntarily provides proof of the LTC, the issue is resolved and we all go about our business. The concern obviously is not this simple scenario, but what happens when the person refuses a contact or refuses to provide proof of an LTC?

The issue for many seems to focus on whether or not, once a person openly carries, police officers will have reasonable suspicion to detain a person to determine if he or she is lawfully carrying the handgun *based solely upon the fact the weapon is carried*.

It should be noted at this juncture that police officers up to this point have regularly investigated persons who were carrying concealed weapons to determine if they had a CHL (now LTC). No one successfully challenged that practice. As explained before, there is a virtual absence of case law in which CHL holders were prosecuted for UCW pursuant to section 46.02. It is improbable that police never investigated persons carrying handguns – we just didn't arrest or prosecute them for a violation of section 46.02 once we knew they had a LTC.

Some argue that since Texas now has an open carry provision we are required to assume that all handguns openly carried are *lawfully* carried. This argument appears to be built upon a statement in one case from the U.S. Fourth Circuit. That case dealt with the detention of a group of men, one of whom was openly carrying a pistol. The investigation actually focused on a different member of the group. With regards to the one carrying the pistol, the court stated: "[W]here a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention [of the man carrying the pistol]". *U.S. v. Black, 707 F.3d 531, 540 (U.S. 4th Circuit 2013)*. That same court, in the next paragraph stated: "Additionally *even if the officers were justified in detaining Troupe for exercising his constitutional right to bear arms*, reasonable suspicion as to Troupe does not amount to, and is not particularized as to Black, and we refuse to find reasonable suspicion merely by association." *Black at 540* [emphasis added]. In other words, the court seems to imply in case they're wrong about that whole pistol thing the government still didn't have reasonable suspicion to detain the other guy…

The court in *Black* seems to take the position that officers can never have reasonable suspicion when a person is openly carrying a handgun, if the detention is based solely upon the fact that the person is carrying a pistol. The court cites no U.S. Supreme Court authority to support its position. The court says that police may not rely upon "innocent" conduct in order to build reasonable suspicion. In other words, if conduct is as consistent with innocent activity as with criminal activity, the police may not use it to build reasonable suspicion or probable cause.

Texas law does not support this position. The Texas Court of Criminal Appeals has ruled that officers need not distinguish between innocent and suspicious activity for the purpose of building probable cause or reasonable suspicion. That court stated: "Today we follow the guidance of the Supreme Court in *Cortez* and *Sokolow* and hold that the 'as consistent with innocent activity as with criminal activity' construct is no longer a viable test for determining reasonable suspicion." *See Wood v. State, 956 S.W.2d 33, 38 (Tex. Crim. App. 1997).* Under that now-abandoned test officers could not use "innocent activity" to build reasonable suspicion or probable cause. The current test for determining whether reasonable suspicion and probable cause exists is the "totality of the circumstances" test.

The current Texas LTC statute does not create a "general" right to carry handguns, either openly or concealed. The position that officers must assume a person who openly carries a handgun does so lawfully does not appear to be currently supported in either Texas law or Supreme Court case law.

The real question for the Fourth Amendment analysis will be whether the totality of the facts and circumstances, which would include the carrying of a handgun, articulated by the officer support a finding of reasonable suspicion for the detention or probable cause for the arrest.

***Due Process and Prouse:***

The U.S. Supreme Court decided that police officers could not stop persons driving cars just to see if they had a driver's license. Officers must have reasonable suspicion to believe other criminal activity is afoot. *See Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 1401 (1979).* The Court stated: "Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities…" *Prouse at 1400-1401.* In other words, it is a basic component of everyday life. Due process – the justification for the government's intrusion to be free from unreasonable seizures – is an important consideration in every case involving the Fourth Amendment and is applicable in any detention involving a potential violation of section 46.02.

The argument has been proffered that a handgun license is like a driver's license, so officers can't detain a person openly carrying a handgun just to determine if the carrier has a LTC. However, nothing in *Prouse* states that a license to carry a handgun is synonymous with a license to drive a car. The government's interest in controlling who carries a handgun into the public is a valid one. The argument can certainly be made that driving a car is not the same as carrying a handgun. Texas's regulatory scheme for obtaining a LTC is different, and in some ways more exclusive, than the process for getting a driver's license, e.g. age limits and background checks.

The Court's position in *Prouse* that the government must abide by due process concerns in search and seizure matters is well established. At this time there is no reason to automatically assume that persons carrying handguns would be subject to the same "pass" as persons driving a car, i.e. persons carrying handguns cannot be detained unless officers have reasonable suspicion to believe there may be additional criminal activity. It is possible that a court of competent jurisdiction may make that ruling at some point in the future; until that time 46.02 remains a valid statute.

***Conclusion:***

Officers should be mindful of the limitations on their authority to detain persons in any situation, not just those involving open carry. A detention must be supported by reasonable suspicion that criminal activity is afoot.

Section 46.02 of the Penal Code is still valid law. Texas case law states that a person seeking an exemption from the restriction on carrying handguns must demonstrate he or she falls under one of the exemptions. A LTC is an "exemption" for carrying a handgun.

The U.S. Supreme Court has ruled that the carrying of weapons can be regulated by the state. The Fifth Circuit has ruled that our regulatory scheme barring those under 21 from carrying handguns does not violate the constitution, and it can be argued that ruling supports our regulatory scheme – which includes the requirement for a LTC to carry handguns under certain circumstances. There is no Supreme Court or Texas case that holds officers must presume a person openly carrying a handgun is doing so lawfully.

Accordingly, an argument can be made that officers may lawfully detain persons who are openly carrying handguns to investigate the possible commission of an offense under section 46.02, Penal Code. Please note this is a discussion of only one option. Departments, acting in concert with legal counsel and local prosecutors, should explore all options and consider all risks before deciding upon a policy addressing open carry issues. Finally, it is probable there will be statutory amendments, court opinions and Attorney General Opinions changing and interpreting these statutes – law enforcement should monitor those sources for new information.