

OPEN CARRY

TO DETAIN OR NOT TO DETAIN, THAT IS THE QUESTION

2017 TCAA LAW ENFORCEMENT SEMINAR
PRESENTED BY: WARREN SPENCER
817-917-2160, WARRENSPENCER@SBCGLOBAL.NET

DISCLAIMER

What's a class with an attorney without a disclaimer?

This is not intended as legal advice. Any policy or procedural changes should be discussed with local counsel. This presentation may not reflect the views of the TCAA or sane persons.

UCW is Still a Crime...

As far as we know, Penal Code section 46.02, Unlawfully Carrying Weapons, is still in effect.

- It is still a crime for a person to walk about carrying a handgun "on or about" his or her person;
- The person accused of UCW may indeed qualify for an "exemption" (more on that later)

Partial Text of Section 46.02

(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.

(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.

UCW May Not Apply in Certain Circumstances

The legislature has created a section in Ch. 46 that states certain offenses in Ch. 46 are "nonapplicable" if certain criteria exist.

Generally speaking, if the actor falls within one of these descriptions then 46.02 or 46.03 is not enforceable against that actor.

Partial Text of Section 46.15(b)

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

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

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.

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.

46.15 is a Defense to Prosecution

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 should win.

*handgun licenses are now referred to as a “license to carry” - thus, LTC. “CHL” is soooo 2015.

The LTC Must be Present for the Defense to Apply

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**.

So, no LTC – no defense to UCW.

Govt. Code 411.205

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.*

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.

*Officers should note there is no criminal penalty for failure to produce the LTC upon demand.

Should an Officer Detain Pursuant to 411.205?

46.02 is a criminal statute.

The law is well settled that a police officer may detain a person to investigate if the officer has reasonable suspicion that criminal activity is afoot.

The law may or may not support detentions to determine administrative violations. For example, officers may not stop a vehicle just to see if the operator has a license.

Perhaps the best approach 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 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?

The answer, at least for now, is 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 Constitutionality of the Texas Scheme for Handgun Licenses

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.

So Far.....

UCW is still a crime;

It is a defense to prosecution if a person carrying a handgun is also carrying a LTC;

The Govt. Code is an administrative tool regulating the LTC;

The Supreme Court said states can still regulate the carrying of handguns;

The Fifth Circuit said our current LTC scheme is ok.

So far.....we're in pretty good shape.

The Fourth Amendment – Because it Matters

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 voluntary encounter; rather, what happens when the person refuses a contact or refuses to provide proof of an LTC?

To Detain, or not to Detain...

The issue for some seems to focus on, once a person openly carries, whether or not 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*.

In other words, since Texas now has an open carry statute, must police officers assume all handguns carried are carried lawfully?

The Past

Police officers have regularly investigated persons who were carrying concealed weapons to determine if they had a LTC.

No one successfully challenged that practice.

There is a virtual absence of case law in which LTC 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.

Practically Speaking...

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 is 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 Real Issue

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.

If an officer sees a person strolling down main street with a pistol strapped to her belt, the officer may have reasonable suspicion to believe she is committing the offense of UCW.

Some factors to consider:

- If the officer knows the person has a LTC, a detention may raise concerns;
- If the person is on their own premises, a detention may raise some concerns

Conclusion

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.

This May Be Academic.....

This could very well be 45 wasted minutes of your life that you can't get back...

As of the drafting of the latest version of this paper no fewer than 70 bills have been filed in the legislature addressing weapon issues.

One bill has been introduced 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.

KEEP CALM
AND
CARRY ON
