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From Horses to Guns

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December, 2010

Criminal Justice

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From Horses to Guns

Introduction

In the last *Criminal Justice* column we talked about horses. This month, we will talk about guns. I suppose horses and guns are appropriate subjects for a legal magazine that is published from one of the westernmost locations in the lower 48 United States. The recent gun cases decided by the United States Supreme Court invoked the Second Amendment regarding local ordinances in Washington, D.C. and Chicago. And there is legal activity here in California. .

I am sure that many lawyers reading this column have clients or friends who ask them what can and cannot be done with firearms legally in California. Whether or not a lawyer approves of guns or is opposed to them entirely or in one form or another, legal advice is legal advice. I will give a quick history and overview of current criminal sanctions associated with guns in California. Then we will look at what is still a developing area of law given the Supreme Court's recent jurisprudence.

History of Firearms Regulation in California

In 1902, the flamboyant Los Angeles trial lawyer, Earl Rogers, carried a firearm in the courtroom. This was not unusual among lawyers.^[1] But, in a remarkable application of the principles of demonstrative evidence, he actually drew a concealed Colt .45 in the courtroom. It was a murder trial in front of a jury and the question was whether a witness would have recoiled at the sight of a gun. The witness claimed that he did not at the time and had, thus, seen what he claimed to have seen. After the dramatic demonstration in which the prosecutor himself recoiled, the jury believed that the witness also did.^[2]

Eventually, the California legislature enacted Penal Code Section 12025 in 1953 prohibiting the carrying of a concealed firearm in public. Nevertheless, it was lawful to carry a loaded firearm in public as long as it was not concealed. Californians could wear loaded guns on their belts outside their clothing and they could carry loaded rifles in public places.

There was a certain amount of consternation when the Black Panthers in the 1960's started to arm themselves with automatic rifles and appear in public. There was considerable support among white voters to limit the right to carry loaded firearms in public. Such restrictions were enacted in Penal Code Section 12031 in 1968. That section and others have been amended multiple times in the last 40 years. Now California has some of the most restrictive gun laws in the country. In what follows, we will give a very general overview of the gun laws in this State but the reader is referred to the footnotes for the statutes which should be consulted before giving specific legal advice.^[3]

What Firearms are Illegal in California?

The maze of firearms statutes and regulations in California is now quite complex. The courts have required the Department of Justice to promulgate regulations, for instance, relating to assault rifles so that consumers and courts can determine what weapons are actually subject to restriction. The issue of permissible and impermissible ammunition has caused similar confusion. Some weapons and some ammunition is simply designated a contraband by make and model (e.g., the AK 15) while others are prohibited based on generic characteristics (e.g., the short barreled shotgun)..

Generally, for non-law enforcement personnel, ordinary handguns and rifles are legal to possess as are shotguns. The handgun or rifle may be semi-automatic, requiring a trigger pull to initiate each shot, but cannot be fully automatic. California also has a prohibition on possession of a magazine that has the capacity of more than ten rounds.

When Can a Person Possess a Firearm?

Certain persons are prohibited from possessing or having access to a firearm. A convicted felon is prevented from doing so by state and federal law. California also prohibits firearm possession by people who have had a domestic violence restraining order imposed on them, those who have been convicted of domestic violence, even if a misdemeanor, and for people adjudicated as mentally ill. There are also restrictions on possession by minors.

If neither the person nor the firearm is prohibited, there is no restriction on owning firearms. California does not have a law requiring registration. However, California does require that all transfers, with limited exceptions, be made through a licensed gun dealer and that the transfer of handguns be accompanied by proof of successful completion of a handgun safety class. A person may only have one handgun transferred to her or him in any 30 day period.

How Can a Person Carry a Firearm?

A person can carry a loaded and unconcealed firearm in certain places. These include, a firing range, hunting areas (with a hunting license), or other areas where discharge of a weapon is not prohibited. The later includes unincorporated areas with qualifications as to distances from roadways and other restrictions. In addition, a person can have a loaded firearm at her or his place of residence or business, including temporary locations like campsites.

It is not permissible to carry a firearm concealed without a CCW permit, except at place of residence or business or in the limited circumstance of preservation immediately before and after calling the police in an emergency situation. A CCW permit may be requested from the Sheriff or Chief of Police of the county or city in which the person resides.

Concealable handguns may be transported if unloaded and locked in a separate container or the trunk of a motor vehicle. They may not be carried in the glove box. Rifles and shotguns may be transported unloaded and in the open. There are no rules with regard to transporting by boat or private airplane but it is likely that the same rules would apply. Certainly, it would be unlawful to conceal a loaded firearm in any type of vehicle, unless it is a housecar or a place of business.

Constitutional Challenges

There have been constitutional challenges to various gun regulations as long as gun regulations have existed.. San Francisco had enacted a gun ordinance prohibiting possession of a handgun within the city or county by residents. Even before the recent United States Supreme Court decisions, the California courts and the Ninth Circuit found that local ordinances prohibiting possession of handguns were preempted by state law.

There have also been challenges to the CCW permit process as a denial of equal protection. The practices of the various sheriffs and chiefs of police around the state vary widely. That means that the opportunity to obtain a CCW permit is based on the where a person happens to live. So far, these challenges have not been successful. On another theory, *People v. Hodges*, 70 Cal. App. 4th 1348, 83 Cal. Rptr. 2d 619 (3d Dist. 1999) held that the concealed weapons law did not violate substantive due process.

In 2008, United States Supreme Court decided that an individual's right to bear arms under the Second Amendment of the United States Constitution precluded a ban on all handguns by the federal district in Washington, D.C. (*District of Columbia v. Heller* (2008) --- U.S. ----, 128 S.Ct. 2783, 171 L.Ed.2d 637 (*Heller*).) In this last term, the Court made the remarkable determination that the Second Amendment was incorporated into the Fourteenth Amendment and was, therefore, applicable to the states. As a result, the Court struck down the prohibition of handgun possession by the City of Chicago. (*McDonald v. City of Chicago* (2010) --- U.S. ----, 130 S.Ct. 3020, 177 L.Ed.2d 894 (*McDonald*).

The question remains after *Heller* and *McDonald* as to what gun rights are protected by the second Amendment and how far states and cities can go in placing restrictions on them. On September 10, 2010, the Ninth Circuit lifted a stay on proceedings to declare three San Francisco ordinances unconstitutional which restricted ammunition, disallowed discharge of a weapon within city limits and required trigger locks.[\[4\]](#) So far, California state courts are just starting to respond. The Court of Appeal decided that the *Heller* decision did not abrogate the California prohibition against carrying a concealed weapon. *People v. Yarbrough*, 169 Cal. App. 4th 303, 86 Cal. Rptr. 3d 674 (1st Dist. 2008). The Court in that case assumed, for the sake of decision, that the Second Amendment applied to the states, as later decided by *McDonald*, and upheld the statute. But, one can assume that variations on the theme will continue to make their way through both the state and federal courts.

Conclusion

Whatever the reader's personal position is with regard to the possession of hand guns or with regard to firearms in general, the fact is that the law is in flux. Jerry Brown is the Governor, the Marijuana Initiative was defeated and we have renewed Second Amendment rights. These are interesting times!

[1] There was no state law prohibiting the carrying of a concealed and loaded firearm although various localities did enact such as ordinances. *Luening, Ex parte*, 3 Cal. App. 76, 84 P. 445 (2d Dist. 1906) .

[2] Adela Rogers St. John, *Final Verdict*, Doubleday, 1962. See also, Los Angeles Times, October 31, 1902 quoted at <http://www.metnews.com/articles/2007/perspectives010907.htm>.

[3] The California gun laws are found in Penal Code Sections 12000, *et seq.* These statutes define various types of weapons, including firearms, and restrictions and crimes relating to their manufacture, sale, possession and transportation. This article is too brief to cover all of the law in detail and the reader is referred to the relevant Penal Code Sections, including 12001 (definitions), 12025 (carrying concealed), 12026 (possession at home/private property), 12031 (carrying loaded), and 12035-36 (firearms storage / access by children) as well as the Federal Firearms Act found at 26 U.S.C. ch. 53.

[4] Jackson v. City and County of San Francisco, PACER: Case3:09-cv-02143-RS Document37 Filed09/13/10 Page1 of 2 lifting the stay in light of *Heller* and *McDonald*, despite the *Nordyke v. King*, No. 07-15763, pending review.