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DUELING AND KENTUCKY FIREARMS JURISPRUDENCE

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Most Kentucky lawyers fondly remember the day they took the oath as members of the Kentucky Bar. Family and friends gathered for a formal ceremony in Frankfort. Leading representatives of Kentucky's Bar administered the traditional oath and a reception was held at the Bar's headquarters. What made this affair noticeably different from proceedings in other states was the requirement that the new lawyers affirm that they have not participated in duels.[1] Duels? Is this 2016 or 1816? Most visitors from out-of-state wonder why such an antiquated affirmation continues to exist well into the 21st century. The fact is this "oddity" actually provides an insight into Kentucky's jurisprudence regarding firearms. Unlike many states, the Commonwealth's statutory bent has a tradition of narrowly tailoring the regulation of guns and gun usage. A perusal of statutes in states such as Wisconsin and Minnesota will find many laws regulating the use of firearms for hunting and sport shooting.[2] But Kentuckians have always had a "carry a gun like I wear a pair of shoes" attitude. And this culture, whether originating from the dueling tradition of the South or the frontier spirit of Daniel Boone, has made citizen gun carry a trademark of Kentucky from its beginning.

One of the earliest instances of the Kentucky courts addressing the right to carry a firearm was the 1822 case of *Bliss v. Commonwealth.*[3] Kentucky's highest court invalidated a Kentucky statute that criminalized carrying a concealed weapon. The Court ruled the statute violated the Kentucky constitutional right to bear arms.[4] At that time, the Kentucky constitutional guarantee of the right to bear arms was much more absolute than it is today. The Commonwealth's first Constitution stated, "the right of the citizens to bear arms in defense of themselves and the state, shall not be questioned."[5] The Court in *Bliss* said that this language did *not* make exception for the legislature to regulate the *mode* of carry. The Court reasoned that prohibiting either concealed or open carry essentially questioned the right and was therefore at odds with the Kentucky Constitution.[6] Because of this ruling, lawmakers were forced to add a qualification to later versions of the Constitution (our current version is from 1891) that qualified the right. The current Kentucky Constitution states that, "[a]ll men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: 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.*"[7] This opened the door to statutory prohibitions on the concealed carry of weapons. But the open carry of firearms remained unregulated and, for the most part, untouched by those crafting the law.

So, from the late 19th century to just recently, the preferred method of carry in Kentucky was "plain view." Secured in a belt holster and visible for all to see, the right to carry a gun in public was well-accepted. In the 1956 case, *Holland v. Commonwealth,*[8] the Kentucky high court opined that many states gave their legislatures the power to regulate the carry of firearms, and some states even provided their assemblies with the power to regulate mere gun possession. But Kentucky only empowered its legislature to regulate the citizens' ability to carry *concealed* weapons. Therefore, the Court wrote "*...if the gun is worn outside the jacket or shirt in full view, no one may question the wearer's right so to do.*"[9] This perhaps summed up the general view in Kentucky and helped distinguish the state from so many others.

But, despite this unrestrictive attitude at the state level, Kentucky law did not prohibit local communities from enacting ordinances that would restrict or, in some cases prohibit, the public carry of loaded weapons, either openly or concealed.[10] These ordinances, while lacking the same harsh penalties mandated by the corresponding Kentucky statutes, caused enough problems to make open carry impractical.[11] Most law-abiding citizens did not want to knowingly violate a traffic ordinance much less one regulating weapons carry. And the potential for inconsistency when crossing from one small town to the next had a chilling effect similar to that of a "speed trap" for those exercising their right to carry.[12]

Thus, establishing statewide uniformity became a principle goal of those promoting the right to carry. In 1984, the General Assembly enacted a comprehensive preemption law that became a model for many other states.[13] The new Kentucky statute was titled "Local Firearms Control Ordinances Prohibited." The new statute prohibited the future enactment of local ordinances regulating the "*... possession, carrying, storage, or transportation of firearms, ammunition etc. . . .*" Further, the new law nullified any existing ordinances.[14] In one fell swoop, the General Assembly eliminated the ability of local governments to regulate gun carry absent a specific grant of power from Frankfort. Subsequent amendments to the law also provided those harmed by enforcement of an otherwise preempted local ordinance with a civil cause of action against the offending entity.[15] Much to the chagrin of urban areas that continued to enforce the newly unenforceable local ordinances, citizens were eligible for damages and reasonable attorney's fees for any local overreach.[16]

Even with preemption, those exercising their right to carry openly continued to be harassed for engaging in otherwise lawful behavior.[17] In 1990, a Cincinnati man was told by a Covington Police dispatcher that open carry was lawful in Kentucky. He proceeded to carry a handgun in a visible belt holster while walking around Covington's Main Strasse area. Police were summoned on a report of a "man with a gun." The visitor was arrested on a disorderly conduct charge and forced to appear in court. The presiding judge quickly dismissed the charge as having no legal basis, finding that a handgun secured in a visible belt holster does not meet the standard necessary to effect an arrest for disorderly conduct.[18] The case exemplified how otherwise lawful behavior, if perceived by some as odd, could bring unwanted police attention to a citizen attempting the exercise of a fundamental right.

This incident, along with similar ones in Lexington and Louisville, prompted calls for the enactment of a licensing law that would allow the carry of *concealed* loaded guns in public. In 1996, the General Assembly enacted Kentucky's License to Carry Concealed Deadly Weapon Law.[19] This law provided a legal means whereby residents could apply to the State Police for licenses authorizing

them to carry concealed firearms in public. It created standards for application that were based on qualifying factors that were objectively derived. Citizens who had clean criminal records would not be forced to demonstrate a "viable need" for carry, as was the case in more restrictive states. Instead, if one met the objective criteria set forth by the statute, paid the required fees and attended an eight-hour gun safety course, one would be issued a license to carry a concealed firearm.[20]

The new law essentially created an exception to Kentucky's general prohibition on concealed carry and codified this exception in Section 4 of the preexisting law.[21] It allowed licensees to carry concealed in most public areas except those specifically prohibited such as law enforcement offices, daycare centers, bars, K-12 schools, courthouses, and meetings of legislative bodies. It also permitted private businesses, hospitals and post-secondary institutions to post signs prohibiting concealed carry on their premises. But an exceptions clause in the new law exempted violators of these posted prohibitions from incurring any criminal penalties and also shielded lawful car carry from any adverse enforcement actions.[22]

It is interesting to note that the General Assembly did extend some measure of local control to cities and counties who wished to prohibit concealed carry of firearms in buildings publicly owned, leased or controlled. Local governments were allowed to post signs prohibiting *concealed* carry in these areas but were not given authority to regulate open carry.[23] The local rules could not carry criminal penalties for violations, only denial of admittance to the facilities.[24] Local governments were limited to regulating carry within their own buildings. Open spaces, such as parks and parking lots, were not specifically listed as areas subject to regulation.[25] Attempted regulation in these areas could result in lawsuits against the offending entities per Kentucky's preemption law.[26] Additionally, KRS §527.020 provided civil penalties against public and private employers who prohibited licensees and other lawful persons from keeping loaded or unloaded firearms in vehicles parked on their properties.[27]

In 2012, the University of Kentucky lost a high profile case in which they fired an anesthesia tech for possessing a firearm in his vehicle parked at the UK Medical Center. The Kentucky Supreme Court ruled that UK's actions violated public policy (the right to bear arms) and were patently unlawful.[28] The statute that allows universities to control firearms on their premises is explicitly qualified by another part of the Kentucky statute which exempts licensees, and other lawful gun owners, from adverse action for storing guns in their vehicles while parked on university property.[29] The unanimous Court, stated, "[w]e conclude that Mitchell's discharge was contrary to a fundamental and well-defined public policy, ie. 'the right to bear arms' as evidenced by the Kentucky Revised Statutes. We further conclude that an explicit legislative statement prohibited Mitchell's discharge."[30]

The Court essentially confirmed the plain language of the statutes. But this ruling also highlighted an important public policy exception to the state's broad employment-at-will doctrine which holds that at-will employees may be discharged, "for good cause, for no cause, or for a cause that some might view as morally indefensible."[31] The Court pointed to the "narrow public policy exception" developed in previous case law, most notably *Grzyb v Evans*,[32] which held that if a discharge is contrary to well-define public policy, as evidenced by existing constitutional or statutor authority, it is a question of law for the court to decide as to wheth er or not the discharge is legitimate. KRS §527.020 not only pro vided a blanket protection clause for vehicle gun possession, bu also mandated civil and criminal penalties for the property owne violating the protection. Similar fact patterns occurring in state without this statutory preciseness would likely be decided in favo of the property owner/employer based on an application of th general "at will" doctrine. But Kentucky's tradition of citizen gu carry, coupled with a legislature in step with this tradition, mad for an outcome relatively unique to the Commonwealth.[33]

The enactment of concealed carry licensing witnessed a steady an dramatic rise each year in the number of people applying for li censes.[34] This fact, and the reports from the Federal Bureau of In vestigation (FBI) detailing the record number of gun purchases i the Commonwealth, suggested that gun carry among average citi zens became even more common than it was before the law.[35] Bu the practicality of concealed carry was still the subject of muc discussion. If a licensee used a gun in self-defense, what would b the legal consequences for him? The traditional Castle Doctrin accepted by many states, holds that a person has no duty to re treat when confronted by a threat to his life within his own hom or place of abode.[36] But confrontations outside of one's residenc are an entirely different matter. Many states still require those i public areas to "retreat to the wall" before employing deadly forc against an attacker.[37] And other states may not impose a "duty t retreat" in special areas outside one's home, such as vehicles, bu still require retreat in most public places.[38]

Kentucky's judiciary has spoken on this subject consistently ar in rather emphatic terms as early as 1931.[39] The case of *Gibson Commonwealth* said it best: "[i]t is the tradition that a Kentuckia never runs. He does not have to....he is not obliged to retreat, n to consider whether he can safely retreat, but is entitled to star his ground, and meet any attack upon him with a deadly weapo ..."[40] The operative language, "stand his ground" has become qui common in the news as of late. Much of the media characteriz this phrase as being a recent invention. But it has been a pa of Kentucky's case law for 86 years. And Kentucky's courts ha upheld it consistently throughout the Commonwealth's histo One would think that such strong history would render furth statutory input unnecessary. Yet disturbing trends in the judici decisions of other states prompted the General Assembly to a dress the issue in 2006 with a strong codification of existing Ke tucky case law.

Kentucky's "stand your ground" law was formally enacted in Ju of 2006.[41] The law restated much of what was already evident the case law. It set forth a presumption that a person who us deadly force against an intruder who *unlawfully and forcibly* ente that person's dwelling, residence or occupied vehicle is acting l gitimately, regardless of what force the defender employs agai

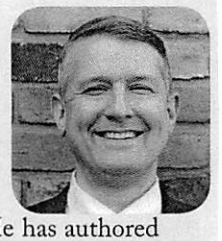
the intruder. So, if an intruder breaks into a vehicle armed with a drinking straw, and the occupant uses a gun to defend him or herself, such force arguably would be considered legitimate under the circumstances because the vehicle's occupant is presumed to have a "reasonable fear of imminent peril of death."[42] Of course, exceptions to the presumption exist. If the defender is engaged in illegal activity, for instance illegal drug sales, or if the intruder is a policeman in performance of his duties or an immediate family member, the presumption would not apply.[43]

Most importantly, the law created the much talked about "stand your ground" standard in *public* places. A person not engaged in unlawful activity in a place *he has a right to be* (most public places), has no duty to retreat when attacked. He may meet force with force, including deadly force.[44] This differs slightly from the standard applied when a dwelling, residence or occupied vehicle is involved. In those places, deadly force is almost always justified if the invasion was *forcible and unlawful.* But, in public places, one must only meet force with force to be lawful. If an attacker wields a baseball bat, and the victim of the attack shoots him, the use of deadly force is justified. But the totality of the circumstance always will be examined. If the attacker is wildly swinging a baseball bat five feet away from the victim, a head shot from a .45 would be justified. The victim was clearly in danger of death or serious bodily harm. But if the attacker was menacing the victim with a baseball bat from 100 feet away, deadly force may not be justified. But in either situation, a victim in Kentucky has no duty to retreat.

Finally, the law provided both criminal and civil immunity for those using force as permitted under the new law.[45] Citizen gun carriers were most concerned about the possibility of being charged with a crime or being named in a lawsuit from the lawful use of their firearms.[46] Most gun owners have heard horror stories of the burglar who sues the homeowner for damages after the homeowner shoots and wounds him. Under the Kentucky statute, criminal and civil immunization is provided for a person who, "uses force as permitted...and is justified in using such force."[47] The statute also awards reasonable attorney's fees, court costs and other damages for expenses incurred by a person defending against any adverse action taken in violation of this statute. This makes Kentucky's "stand your ground" law one of the strongest in the nation.[48]

Kentucky's historical connection with firearms is reflected in its jurisprudence. And this jurisprudence reflects what Kentuckians value most—lawful gun ownership and lawful gun use. It was recently reported in an online news magazine that, based on National Crime Information Center (NCIC) background check information from the FBI, the Commonwealth has the highest per capita number of gun transactions in the country, making for probably the highest per capita rate of actual gun ownership.[49] When coupled with a favorable legal climate for guns, practicing attorneys are bound to run into cases that require knowledge of gun laws and their place in both Kentucky legal history and present-day society. As Kentucky's elected representatives can attest, the one subject guaranteed to be addressed in the General Assembly each session is that of guns. And the oath we take to enter into our profession as Kentucky lawyers enshrines this tradition of responsible and lawful gun ownership. B&B

ABOUT THE AUTHOR



SCOTT KAPPAS is an attorney in Covington, Ky. Since 1996, he has written and published the, "Traveler's Guide to the Firearm Laws of the Fifty States." The book is updated yearly and is currently in its 21st edition with over 1,000,000 copies sold nationwide. Purchasers of the book include the NFL, NBA and the National Rifle Association. Along with his publishing business, Kappas is active in the fight to preserve and expand the right to bear arms. He has authored several academic studies on the subject and has spoken on behalf of gun rights before both media outlets and legislative committees. He holds a Bachelor of Arts in history from NKU (1990) and a Juris Doctorate from Chase College of Law (1993).

ENDNOTES

1. Kentucky Constitution Section 228 requires each member of the Bar to swear "I have not fought a duel with deadly weapons within this State nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as second in carrying a challenge, nor aided or assisted any person thus, offending, so help me God."
2. This point is exemplified by statutes in both states prohibiting the possession of loaded long guns in vehicles. These prohibitions ostensibly prevent hunting from vehicles. Long guns are not considered "self defense" weapons in these states. Kentucky has no such prohibition, illustrating that Kentucky considers any firearm legitimate for self defense. *See, Minn. Stat. §97B.045 & Wis. Stat. §167.31.*
3. *Bliss v. Commonwealth*, 12 Ky. 90 (KY 1822).
4. *Id.*
5. *Id.*
6. *Id.*
7. KY Const. Bill of Rights §1.
8. *Holland v. Commonwealth*, 294 SW 2d 83 (Ky. 1956).
9. *Id.*
10. Prior to 1984, the Kentucky Revised Statutes did not preempt the local regulation of firearms.
11. For example, in 1956, violating Kentucky's concealed weapons law carried a possible two to five year felony sentence at Eddyville. Ky. Rev. Stat. Ann. (hereinafter KRS) §435.230 (repealed 1974 Ky. Acts ch. 406, §336, eff. Jan. 1, 1975).
12. Michael P. O'Shea, *Why Federalism Beats Firearm Localism*, 123 Yale L.J. Online 359 (2014), www.yalelawjournal.org/forum/why-firearm-federalism-beats-firearm-localism.
13. KRS §65.870.
14. KRS §65.870(3).
15. KRS §65.870(4).
16. *Id.*
17. John Fisher, *Man Would Rather Tote His Gun in Kuwait*, The Kentucky Post, March 15, 1991, at 1K.
18. *Id.*
19. KRS §237.110.
20. KRS §237.110(4)(i).
21. KRS §527.020 – general prohibition against concealed carry of firearms – subsection (4) exception for licensees.
22. KRS §237.110 (17).
23. KRS §237.115(2).
24. *Id.*
25. *Id.*
26. KRS §65.870(4) provides for the recovery of declaratory and injunctive relief, attorney's fees, costs, and expert witness fees and expenses.
27. KRS §527.020(4).
28. *Mitchell v. University of Kentucky*, 366 SW 3d 895 (Ky. 2012).
29. KRS §527.020.
30. *Mitchell*, 366 SW 3d at 897.
31. *Id.* at 898.
32. *Grzyb v. Evans*, 700 S.W.2d 399, 401(Ky. 1985).
33. See generally, John Prescott Kappas, 2017 Traveler's Guide to the Firearm Laws of the Fifty States (2017), available at www.gunlawguide.com.
34. *Number of Concealed Carry Licenses Rising in Kentucky*, WKYT, Dec. 31, 2014, available at www.wkyt.com/home/headlines/number-of-concealed-carry-licenses-rising-in-Kentucky.
35. *The Most Armed States*, The Daily Beast, Sept. 28, 2010, available at www.thedailybeast.com/articles/2010/06/28/state-with-the-most-guns.
35. Mitch Vilos and Evan Vilos, Self-Defense Laws of All 50 States, p. 28 (2010).
36. *See,e.g. State v. Quarles*, 504 A. 2d 473 (RI 1986).
37. Vilos, *supra* note 35, at 29.
38. *Gibson v. Commonwealth*, 34 SW 2d 936 (Ky. 1931).
39. *Id.*
40. KRS §503.055.
41. KRS §503.055(1)(a) and (b).
42. KRS §503.055(2)(c) and (d).
43. KRS §503.055(3).
44. KRS §503.85.
45. Vilos, *supra* note 35 at 5.
46. KRS §503.085.
47. Vilos, *supra* note 35 at 169.
48. *The Most Armed States*, supra note 34.