

Opinion No. 2013-047

July 8, 2013

The Honorable Eddie Joe Williams  
State Senator  
401 Cobblestone Drive  
Cabot, Arkansas 72023

Dear Senator Williams:

You have requested my opinion regarding Act 746 of 2013, which as you note made “technical corrections concerning the possession of a handgun and other weapons in certain places.”<sup>1</sup> Before setting out your question, you state:

Under Act 746, Arkansans are allowed to carry a handgun if the person is on a journey. Journey is now defined to mean “beyond the county in which the person lives.”

You then ask:

Is it your opinion that Act 746 now permits a person to be able to carry a handgun, in plain view or concealed, if they leave their county so long as they do not visit locations that prohibit carrying a firearm such as the State Capitol grounds, airports, schools, etc.?

**RESPONSE**

The answer to your question is “no,” in my opinion. A person does not fall within Act 746’s “journey” exception to the statutes relating to the possession and

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<sup>1</sup> Acts 2013, No. 746 (Subtitle). A copy of the act is attached for your convenience. Because it contains no emergency clause or specified effective date, it is not currently in effect but will become effective on August 16, 2013. *See generally* Op. Att’y Gen. 2013-049 (regarding effective dates of acts of the 89<sup>th</sup> General Assembly).

carrying of a handgun simply because the person has left the county in which he or she lives. Stated differently, I do not interpret Act 746 as authorizing so-called “open carry.” To the contrary, the journey exception applies only to “travel beyond the county in which a person lives” -- a narrow range of activity inconsistent with the concept of “open carry.” Whether one is “traveling” beyond his or her county, so as to be on a “journey” for purposes of Act 746, will be a question of fact determined initially at the time of police intervention. Generally, however, it is my opinion that Act 746 does not in itself permit a person to possess a handgun outside of his or her vehicle or other mode of transportation while on a journey outside his or her county of residence. In offering this conclusion, I must stress that Act 746 in no way modifies the rights and obligations conferred upon those individuals who have obtained a concealed-handgun permit pursuant to the pertinent provisions of the Arkansas Code.<sup>2</sup>

## DISCUSSION

Act 746 of 2013 amends two statutes that define offenses involving possession of a handgun. Arkansas Code Annotated § 5-73-120 (Repl. 2005) defines the “offense of carrying a weapon.”<sup>3</sup> Subsection 5-73-120(c)(4), which was not amended by Act 746, excepts an individual from criminal liability under the statute if he “is carrying a weapon when upon a journey.”<sup>4</sup> The term “journey” is not defined under the statute. But as of August 16, 2013, pursuant to Act 746, it will be defined as “travel beyond the county in which a person lives.”<sup>5</sup> You have asked whether this means a person can carry a handgun if they leave their county, as long as they are not in a prohibited location.<sup>6</sup> This question suggests the

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<sup>2</sup> See A.C.A. §§ 5-73-301 through -322 (Repl. 2005 & Supp. 2011), as amended by Acts 2013, Nos. 67; 226, §§ 3 through 5; 320, § 2; 415, § 1; 419; 595 §§ 4 and 5; 989; 1089; 11220, § 1; 1271; 1328; 2013, § 1.

<sup>3</sup> The crime of possession of a handgun on school property is defined at A.C.A. § 5-73-119 (Repl. 2005). That section also prohibits possession of a handgun by persons in this state under the age of eighteen. *Id.* at (a)(1) (“No person in this state under the age of eighteen (18) years shall possess a handgun.”). Act 746 of 2013 amends section 5-73-119 in a manner similar to its amendment of section 5-73-120. But because your question reflects concern about the circumstances in which Arkansans may carry a handgun, I will limit my discussion to the “carrying a weapon” offense under section 5-73-120.

<sup>4</sup> There are a number of other exceptions under subsection 5-73-120(c), but this is the main one at issue under your question.

<sup>5</sup> Acts 2013, No. 746, § 2 (amending the definitional section of A.C.A. § 5-73-120).

<sup>6</sup> Regarding prohibited places, see A.C.A. §§ 5-73-119 and -122 (public buildings or facilities, airports, schools, churches, and certain other places), and § 5-73-306 (prohibited places for concealed carry), as amended by Acts 2013, No. 226, §§ 2-4. See also A.C.A. § 5-73-322 (regarding concealed carry in colleges and universities; enacted under Acts 2013, No. 226, § 5).

possibility that Act 746 essentially establishes an open-carry law. To assess that possibility, we must determine what the General Assembly intended by adding this definition of “journey” to section 5-73-120, since it is beyond doubt that the statute does not currently authorize open-carry.

But before addressing the extent to which Act 746 may extend gun-carry rights under current law, I will mention two provisions of the Act that, while possibly significant in themselves, should be identified as not germane to your question. First, the Act redefines – and in doing so arguably changes – the mental state required to support a conviction.<sup>7</sup> Secondly, the Act arguably shifts to the state the burden of proving that a defendant was not permissibly “carrying a weapon when upon a journey.”<sup>8</sup> Neither of these amendments, however, bears on the operative inquiry here – namely, what constitutes a “journey” for purposes of applying the journey exception.

The fundamental rule of statutory construction is to give effect to the intent of the legislature.<sup>9</sup> The rules for determining legislative intent are well-established. In the absence of ambiguity, legislative intent is determined from the usual and ordinary meaning of the language used.<sup>10</sup> When the language is ambiguous,<sup>11</sup> the courts apply rules of statutory construction and will also look to the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject.<sup>12</sup>

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<sup>7</sup> The act defines as one element of a possession offense under subsection 5-73-120(a) having “a purpose to attempt to unlawfully employ the handgun, knife, or club as a weapon against a person.” Acts 2013, No. 746, § 2 (new language underlined). Although one might debate the significance, if any, of this change in terminology, it is clearly immaterial to your question.

<sup>8</sup> The act amends subsection 5-73-120(c) to provide that “carrying a weapon” will be “permissible” under certain recited circumstances. Acts 2013, No. 746, § 2. By contrast, subsection 5-73-120(c) currently recites these circumstances as providing “a defense to a prosecution” for “carrying a weapon.” Arguably, this amendment shifts to the state the burden of establishing that a defendant was *not* on a journey, rather than burdening the defendant with going forward with evidence that he was. As with the *mens rea* amendment, however, this possible shift is unrelated to the meaning of the term “journey” as used in defining an exonerating circumstance under subsection 5-73-120(c).

<sup>9</sup> *Citifinancial Mortgage Co., Inc. v. Matthews*, 372 Ark. 167, 271 S.W.3d 501 (2008).

<sup>10</sup> *E.g., Talbert v. U.S. Bank, N.A.*, 372 Ark. 148, 271 S.W.3d 486 (2008).

<sup>11</sup> A statute is ambiguous “where it is open to two or more constructions, or where it is of such obscure or doubtful meaning that reasonable minds might disagree or be uncertain as to its meaning.” *Id.*, 372 Ark. at 155.

<sup>12</sup> *E.g., DaimlerChrysler Corp. v. Smelser*, 375 Ark. 216, 222, 289 S.W.3d 466, 472 (2008) (internal citations omitted).

Act 746 seems unambiguous in providing that any “travel” within one’s own county will not constitute a “journey” for purposes of applying the exception. Left unclear, however, is what is meant by “travel beyond the county in which the person lives.” In my opinion, the legislature’s intent in defining a “journey” as “travel beyond the county” cannot be determined from the ordinary meaning of these words. Defining the term “journey” as meaning “travel” does not render the scope of the journey exception self-evident. The term “travel” is in itself commonly used as a synonym for the term “journey.”<sup>13</sup> And the exact meaning of either of these terms can vary with the context in which it is used. Narrowly construed, both terms may designate nothing more than the act itself of moving, normally by some conveyance, from one location to another. More broadly construed, the terms may designate not only the act of transportation, but further any activities incidental thereto. The interchangeable terms “journey” and “travel” are thus inherently ambiguous, and the legislature’s use of the latter term to define the former does nothing to resolve that ambiguity. Because reasonable minds might differ on the meaning of the phrase “travel beyond the county,” the statute is ambiguous in this respect. We must accordingly look beyond the terms themselves to determine legislative intent.

The legislative history of A.C.A. § 5-73-120 is an appropriate source in this regard. The “offense of carrying a weapon” is currently defined by A.C.A. § 5-73-120 as a crime that occurs when “[a] person ... possesses a handgun, knife, or club on or about his or her person, in a vehicle occupied by him or her, or otherwise readily available for use with a purpose to employ the article as a weapon against a person.”<sup>14</sup> By stating that one commits the offense if he or she possesses the article with a purpose to use it as a weapon, the statute requires some proof of motive.<sup>15</sup> The Arkansas Supreme Court has held that there is a presumption that a loaded pistol is placed in a car as a weapon.<sup>16</sup> And as noted in the unofficial

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<sup>13</sup> See, e.g., *The New Shorter Oxford English Dictionary* 377 (1993) (defining the noun “travel” as “[t]he action of travelling or journeying...”); *Random House Webster’s Unabridged Dictionary* 2015 (2nd ed. 2001) (defining “travel” as “to go from one place to another, as by car, train, plane, or ship; take a trip; journey...”) See also *Webster’s II New College Dictionary* 1173 (3rd ed. 1995) (noting that “[t]ravel was originally a variant of *travail* but has become a separate word used exclusively in the sense ‘to journey.’” (Emphasis original)).

<sup>14</sup> A.C.A. § 5-73-120(a) (Repl. 2005). Section 5-73-120 was originally enacted under Act 696 of 1975.

<sup>15</sup> See Comment, *Act 696: Robbing the Hunter, or Hunting the Robber?* 29 Ark. L. Rev. 570, 571 (1976).

<sup>16</sup> *McGuire v. State*, 265 Ark. 621, 726, 580 S.W.2d 198 (1979) (citing *Clark v. State*, 253 Ark. 454, 486 S.W.2d 677 (1972) and *Stephens v. City of Ft. Smith*, 227 Ark. 609, 300 S.W.2d 14 (1957)).

commentary to A.C.A. § 5-73-120, “[t]he presumption should apply *a fortiori* when a weapon is carried ‘about the person’ of the defendant.”<sup>17</sup>

It is a defense to prosecution, however, that “the person is carrying a weapon when upon a journey.”<sup>18</sup> As the author of a recent law review article observes, “[t]his defense is almost as old as the state itself, dating back to at least 1842.”<sup>19</sup> The author further explains how the journey defense has “caused much confusion over the years” due to “the General Assembly’s failure to define what constitutes a journey and from the judiciary’s erratic interpretation of the term journey.”<sup>20</sup> After reviewing the case law, the author notes that Arkansas courts generally use a “circle of friends” standard when determining whether a person is on a journey within the meaning of the statute.<sup>21</sup> As stated by the Arkansas Court of Appeals in one of the more recent cases:

A journey has long been defined as

where one travels a distance from home sufficient to carry him beyond the circle of his neighbors and general acquaintances and outside of the routine of his daily business ... “The prohibition was designed to stop the carrying of weapons among one’s habitual associates; the exception was designed to permit it when necessary to defend against perils of the highway to which strangers are exposed, and that are not supposed to exist among one’s own neighbors.”<sup>22</sup>

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<sup>17</sup> 1988 Supplementary Commentary to section 5-73-120 (Repl. 1995, Vol. B).

<sup>18</sup> A.C.A. § 5-73-120(c)(4) (Repl. 2005). As stated above, the statute establishes a number of other exceptions, but this is the main one at issue under your question.

<sup>19</sup> John Thomas Shepherd, *Who Is the Arkansas Traveler?: Analyzing Arkansas’s “Journey” Exception to the Offense of Carrying a Weapon*, 66 Ark. L. Rev. 463, 465 (2013).

<sup>20</sup> *Id.* at 465-466.

<sup>21</sup> *Id.* at 468, 473.

<sup>22</sup> *Riggins v. State*, 17 Ark. App. 68, 70, 703 S.W.2d 463 (1986), quoting *Ellington v. Denning*, 99 Ark. 236, 237, 138 S.W. 453, 453 (1911) (in turn quoting *Hathcote v. State*, 55 Ark. 181, 185, 17 S.W. 721, 722 (1891)).

This passage plainly reflects the journey exception’s purpose, which the above article further conveys: “The purpose behind the [journey] exception is to allow individuals to travel with a firearm in order to protect themselves from the dangers of the open road.”<sup>23</sup>

With this history in mind, we turn to Act 746. This act marks the first statutory definition of “journey” for purposes of this exception under subsection 5-73-120(c)(4). As noted above, the exception has long been a part of Arkansas statutory law, and the judicial interpretation of the exception can be traced back to the mid-1800s. As defined in case law, it is “designed to permit [the carrying of weapons] when necessary to defend against perils of the highway....”<sup>24</sup> This definition and purpose have undoubtedly become a part of the statute itself.<sup>25</sup> The General Assembly is presumed, moreover, to have enacted Act 746 with full knowledge of the court decisions defining “journey.”<sup>26</sup> And it is presumed to have enacted it with reference to those decisions.<sup>27</sup>

In my opinion, this legislative and judicial history would not support reading the definitional term “travel” broadly so as to interpret the phrase “travel beyond the county” as permitting “open carry.” To the contrary, given the statute’s history, I believe the term “travel” is properly viewed as reflecting the legislature’s recognition of the “journey” exception’s historical purpose to allow people to protect themselves from the dangers of the open road. The term should therefore be narrowly construed, in my opinion, to mean the action of moving from one place to another via some mode of transportation.<sup>28</sup> It should not be construed to include any activities incidental to the act of transportation. More specifically in

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<sup>23</sup> 66 Ark. L. Rev. at 482.

<sup>24</sup> *Riggings, supra*, n. 21.

<sup>25</sup> *See generally Arkansas Dept. of Human Services v. Harris*, 322 Ark. 465, 469, 910 S.W.2d 221 (1995) (noting that “... as time passes, the interpretation given a statute becomes a part of the statute itself[.]” citing *Gibson v. Gibson*, 264 Ark. 418, 572 S.W.2d 146 (1978)).

<sup>26</sup> *Id.* (citations omitted).

<sup>27</sup> *Id.*

<sup>28</sup> I should also note that according to my understanding, the Arkansas State Police views the “journey” exception as involving vehicular travel. Given the exception’s historical purpose (defense against perils of the highway), and the fact that travel today invariably is vehicular, I believe that interpretation will survive a court’s scrutiny.

terms of your question, I do not interpret Act 746's definition of "journey" as authorizing open-carry.<sup>29</sup>

As for the "beyond the county" part of Act 746's journey definition, it seems clear, as noted above, that this language narrows the court's definition of "journey" to the extent of making the exception unavailable within one's own county of residence. A question may remain whether the legislature intended by this language to abandon the so-called "circle of neighbors" rule discussed above. Given the confusing case law interpreting the term "journey," I believe a strong argument can be made that this was the intent. But regardless of how the words "beyond the county" are interpreted, the answer to your particular question is clear, in my opinion: Act 746 does not authorize "open carry." This act does not, in other words, permit a person to possess a handgun outside of their vehicle or other mode of transportation while on a journey outside their county of residence.

Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN MCDANIEL  
Attorney General

DM/EAW:cyh

Enclosure

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<sup>29</sup> I believe it also bears noting in this regard that the journey exception under Act 746 must be read in light of the other exceptions listed under subsection 5-73-120(c). *See generally Chism v. Phelps*, 228 Ark. 936, 311 S.W.2d 297 (1958). Particularly significant in this respect is subsection (c)(1), which provides an exception when "[t]he person is in his or her own dwelling or place of business *or on property in which he or she has a possessory or proprietary interest[.]*" (Emphasis added). Interpreting the "journey" exception to mean a person can carry a weapon anywhere as long as they are outside their county would essentially render this "possessory interest" provision meaningless, contrary to the longstanding rule that the court construes a statute "so that no word is left void, superfluous, or insignificant, and meaning and effect are given to every word in the statute if possible." *Brock v. Townsell*, 2009 Ark. 224, 231, 309 S.W.3d 179.