

2001 WL 1651437 (Iowa A.G.)
01-10-1

Office of the Attorney General
State of Iowa

01-10-1
October 2, 2001

CONSTITUTIONAL LAW: Denial of nonprofessional weapons permit. U.S. Const. amend. II; Iowa Const. art. I, § 1, 6 (1857); Iowa Const. art. I, § 1 (amend. 45); Iowa Code §§ 724.4, 724.7, 724.8, 724.11 (2001). Section 724.11, which provides the ninety-nine county sheriffs with discretion to issue nonprofessional weapons permits to individuals residing in their counties, does not facially offend the state constitutional guarantee to defend life and liberty and protect property. Section 724.11 does not implicate a violation of the state constitutional guarantee to equal protection of the law. (Kempkes to Boddicker, State Representative, 10-2-01)

The Honorable Dan Boddicker
State Representative
State Capitol
Local

Dear Representative Boddicker:

Historically, state governments have regulated the carrying of weapons by individuals. 79 Am. Jur. 2d Weapons & Firearms § 7, at 12 (1975); see 1920 Iowa Op. Att'y Gen. 629, 630. Not long after the Civil War, the General Assembly passed a statute permitting the carrying of concealed weapons only by police officers and those persons having the duty to execute processes or warrants or to make arrests. See Iowa Code § 3879 (1873). Just before World War I, the General Assembly enacted the first comprehensive statute governing weapons. Among other things, the General Assembly vested the county sheriff with discretion to issue a permit to a person wishing to carry a concealed revolver, pistol, or pocket billy. See 1913 Iowa Acts, 35 superth G.A., ch. 297, § 3.

You have requested an opinion on the constitutionality of the current version of this statute, which provides that each county sheriff has discretion to issue "nonprofessional weapons permits" to individuals desiring to carry weapons. Pointing to the possibility that Iowa's ninety-nine sheriffs in the exercise of their discretion might not use the same criteria for issuing such permits, you ask whether the statute offends the state constitution. Your letter, however, narrows this broad question to whether the statute offends the guarantees to equal protection of the law and to defend life and liberty and protect property.

I. Applicable law

Iowa Code chapter 724 (2001) is entitled Weapons. Section 724.4 criminalizes the act of carrying weapons:

***2** (1). Except as otherwise provided in this section, a person who goes armed with a dangerous weapon concealed on or about the person, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded **firearm** of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor.

...
(4). [Subsection 1 does] not apply to ...

...
(i). A person who has in the person's possession and who displays to a peace officer on demand a valid permit to carry weapons which has been issued to the person, and whose conduct is within the limits of that permit

Sections 724.7, 724.8, and 724.11 govern issuance of nonprofessional weapons permits: Any person who can reasonably justify going armed may be issued a nonprofessional permit to carry weapons.

Iowa Code § 724.7.

No person shall be issued a ... nonprofessional permit to carry weapons unless:

- (1). The person is eighteen years of age or older.
- (2). The person has never been convicted of a felony.
- (3). The person is not addicted to the use of alcohol or any controlled substance.
- (4). The person has no history of repeated acts of violence.
- (5). The issuing officer reasonably determines that the applicant does not constitute a danger to any person.

(6). The person has never been convicted of any crime defined in chapter 708, except "assault" as defined in section 708.1 and "harassment" as defined in section 708.7.

Iowa Code § 724.8 (emphasis added).

Applications for permits to carry weapons shall be made to the sheriff of the county in which the applicant resides. Applications from persons who are nonresidents of the state, or whose need to go armed arises out of employment by the state, shall be made to the commissioner of public safety. In either case, the issuance of the permit shall be by and at the discretion of the sheriff or commissioner, who shall, before issuing the permit, determine that the requirements of sections 724.6 to 724.10 have been satisfied

Iowa Code § 724.11 (emphasis added).

II. Analysis

You have suggested that section 724.11 offends the state constitution. We, like a court, have a limited review in determining the constitutionality of statutes:

It is fundamental that the [General Assembly] has the power to legislate on all subjects, unless it is expressly or impliedly prohibited from so doing by the Constitution, and the [statute] which is assailed must be plainly at variance with the Constitution before the court will so declare it. All doubtful questions will be resolved in favor of [its] validity

***3** Shaw v. City Council of Marshalltown, 131 Iowa 128, 104 N.W. 1121, 1124 (1905).

The challenger to a statute such as section 724.11 bears the burden to negate every conceivable basis supporting its constitutionality and to show that the statute violates the constitution beyond a reasonable doubt. State v. Keene, 629 N.W.2d 360, 364 (Iowa 2001); Iowa Dept. of Transp. v. Iowa Dist. Court, 592 N.W.2d 41, 43 (Iowa 1999).

(A)

You assert that individuals have three options in protecting themselves in cases of assault: "escape; passive acceptance; or active response, without any tools or with tools (weapons)." You also assert that section 724.11 impinges upon the third option of an individual who applies for, but does not receive, a nonprofessional weapons permit. You imply that the General Assembly cannot pass such a law, because an individual has an absolute right to keep and bear arms under the state.

The Second Amendment to the United States Constitution provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. This language does not create a right on the part of individuals to keep and bear arms. United States v. Nelsen, 859 F.2d 1318, 1320 (8th Cir. 1988); Olympic Arms v. Magaw, 91 F. Supp.2d 1061, 1071 (E.D. Mich.

2000). See generally Annot., "Right to Bear Arms," 37 A.L.R.Fed. 696, 701 (1978). Similarly, our state constitution does not expressly recognize an individual right to keep and bear arms. Kopel, Cramer & Hatrup, "A Tale of Three Cities: the Right to Bear Arms in State Supreme Courts," 68 Temp. L. Rev. 1177, 1177 & n. 13 (1995). With regard to arms, the state constitution provides only that "[t]he militia of this state ... shall be armed, equipped, and trained, as the [General Assembly] may provide by law" and that "[n]o person or persons conscientiously scrupulous of bearing arms shall be compelled to do military duty in time of peace" Iowa Const. art. VI, §§ 1, 2.

You suggest, however, that an individual right to keep and bear arms may inhere in another provision of the state constitution: "All men and women are, by nature, free and equal, and have certain inalienable rights - among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness." Iowa Const. art. I, § 1 (amend. 45) (emphasis added).

***4** We do not believe, however, that the words "defend" (life and liberty) or "protect" (property) presuppose an individual right to keep and bear arms. Nothing in their common meanings necessarily implicates the keeping and bearing of arms. See Black's Law Dictionary 419 (1991); Webster's Ninth New Collegiate Dictionary 294, 919 (1979). As you acknowledge, persons may certainly defend life and liberty and protect property without resorting to arms. We have previously indicated that persons protect their property by resorting to the legal system. See 1976 Iowa Op. Att'y Gen. 451, 452, 453 (right of individual to protect property "is a basic inviolable right" that is "protected by affording individuals the right to due process of law, and equal protection of the laws").

Even if there were a state constitutional right on the part of an individual to keep and bear arms, the State can impose reasonable regulations upon it. Rights, though inalienable, are "subject ... to such reasonable regulations as the peace, comfort and welfare of society may demand." *State v. Osborne*, 171 Iowa 678, 154 N.W. 294, 300 (1915). Accord *Gibb v. Hansen*, 286 N.W.2d 180, 185 (Iowa 1979). As legal historians have explained, no constitutional right in England or America "was absolute in the modern sense, that is, unqualifiable." W. Nelson & R. Palmer, *Constitution and Rights in the Early American Republic* 66 (1987). Qualification of rights "was merely the realization of the rights of others in society." *Id.* See *Des Moines Joint Stock Land Bk. v. Nordholm*, 217 Iowa 1319, 253 N.W. 701, 727 (1934) (Claussen, C.J., dissenting). Iowa's judiciary reached this realization quite some time ago. See *In re Ruth*, 32 Iowa 250, 252-53 (1871).

We conclude that the state constitutional guarantee to the inalienable right to defend life and liberty and protect property does not prohibit the State from reasonably regulating the carrying of weapons. See Annot., "Gun Control -- State Constitutions," 86 A.L.R.4th 931, 937 (1991) (state constitutional guarantees to keep and bear arms generally interpreted to grant right "that is limited rather than absolute"). Cf. **¶79** Am. Jur. 2d **Weapons & Firearms** § 4, at 8, (1975) (common law did not recognize absolute right to keep and bear arms). Were it otherwise, children, ex-felons, or prisoners could go about carrying weapons and anyone could carry sawed-off shotguns, AK-47s, or machine guns. We also conclude that requiring a permit to carry a weapon constitutes reasonable regulation.

(B)

***5** You have indicated that section 724.11 may offend the state constitutional guarantee to equal protection of the law on the basis that it may treat persons differently depending upon the county in which they reside. See generally Iowa Const. art. I, § 6; *In re Morrow*, 616 N.W.2d 544, 547 (Iowa 2000). Case law from other jurisdictions points to a different conclusion. See *Mecikalski v. Wyoming Att'y Gen.*, 2 P.3d 1039, 1046-47 (Wy. 2000); *San Jose Police Officers Ass'n. v. City of San Jose*, 245 Cal.Rptr. 728, 733 (App. 1988); *City of Cape Girardeau v. Joyce*, 884 S.W.2d 33, 35 (Mo. App. 1994). Any equal-protection argument attacking the county-by-county determination sanctioned by section 724.11 suffers from at least three flaws.

First: To maintain a prima facie case, challengers to section 724.11 must show that a

recognizable, distinct class has been singled out for different treatment under the law. See, e.g., *Castaneda v. Partida*, 430 U.S. 482, 493, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977). Section 724.11 does not, on its face, create any class or classes of people. At the very most, by allowing the sheriff in each county to decide whether to issue a nonprofessional weapons permit, it creates the possibility that applicants may receive different treatment from county to county. In an analogous case, *Shackleford v. Catlett*, 244 S.E.2d 327, 330 (W. Va. 1978), a court found no violation of equal protection in considering a statute that permitted each county court in the state to elect against subscribing to a worker compensation fund. An employee of a county court electing against subscription asserted a violation of equal protection on the ground that employees of other county courts, which had subscribed to the fund, received worker compensation benefits. The court held that the equal protection guarantee only encompassed the employees of a single county court and did not require equal treatment of all employees of all county courts. What happened in other counties had no relevancy to the question of equal protection. We thus disagree that unsuccessful applicants residing in one county can maintain an equal-protection action premised upon the treatment accorded applicants residing in other counties.

Second: To establish a prima facie case, unsuccessful applicants would also have to show that they and the successful applicants from other counties constitute "similarly situated" classes under the law. See *In re Morrow*, 616 N.W.2d at 547; *Klinger v. Nebraska Dep't of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994), cert. denied, 513 U.S. 1185 (1995).

***6** Issuing or denying a permit will involve an assessment of the facts and conditions peculiar to a geographic area. No two counties are alike -- their differing crime rates and differing demographics may have an impact on the decision to issue nonprofessional weapons permits. See *Galvan v. Superior Court*, 452 P.2d 930, 938 (Cal. 1969) ("[t]hat problems with **firearms** are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority"). We recently observed in analogous circumstances:

Our state commonly makes classifications according to geography that result in different treatment. Depending on where we are or where we live, we may have very different rights

....

[T]here is no rule that counties, as counties, must be treated alike; the Equal Protection Clause relates to equal protection of the laws "between persons as such rather than between areas A State, of course, has a wide discretion in deciding whether laws should operate statewide or shall operate only in certain counties, the legislature "having in mind the needs and desires of each."

2000 Iowa Op. Att'y Gen. ____ (# 00-2-1) (citation omitted). Similarly, the United States Supreme Court has observed:

Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government.

... The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line If diversities of laws ... may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State.

Missouri v. Lewis, 101 U.S. 22, 30-31, 31-32, 25 L.E. 989 (1879).

We thus conclude that unsuccessful applicants residing in one county likely cannot show that they and successful applicants from other counties constitute "similarly situated" classes. See *Salsburg v. Maryland*, 346 U.S. 545, 552, 74 S. Ct. 280, 98 L. Ed. 281 (1954) (when territorial differences exist, "[t]erritorial uniformity is not a constitutional requisite").

Third: That a county sheriff might erroneously deny issuing a nonprofessional weapons permit in a given case does not transform such a simple and common instance of decision-making into a violation of equal protection. See *Village of Willowbrook v. Olech*, 528 U.S. 562, 565, 120 S. Ct. 1073, 145 L. Ed. 1060 (2000) (Breyer, J., concurring). One federal

appeals court has observed that "[t]he concept of equal protection is trivialized when it is used to subject every decision made by state or local government to constitutional review" *Indiana St. Teachers Ass'n v. Indianapolis Bd. of School Comm'rs*, 101 F.3d 1179, 1181 (7 superth Cir. 1996).

***7** We seriously doubt that an unsuccessful applicant for a nonprofessional weapons permit can maintain an equal-protection action based solely upon a faulty decision by the county sheriff. See *New Burnham Prairie Homes, Inc. v. Burnham*, 910 F.2d 1474, 1481 (7 superth Cir. 1990), cert. denied, 498 U.S. 1039 (1991) (discrimination based merely on individual rather than group reasons will not suffice to maintain a claim of unequal treatment); *Hayden v. Grayson*, 134 F.3d 449, 454 (1st Cir.), cert. denied, 524 U.S. 953 (1998) (same). Were it otherwise, every unsuccessful applicant for a governmental permit, license, contract, or job to assert "that the decision was arbitrary and an arbitrary decision treats likes as unlike and therefore denies the equal protection of the laws." *Indiana St. Teachers Ass'n v. Indianapolis Bd. of School Comm'rs*, 101 F.3d at 1181.

Finally, we point out that the lack of an equal-protection basis for challenging decisions by county sheriffs does not insulate them from judicial review. Section 724.11 requires county sheriffs to exercise discretion, and unsuccessful applicants may use that requirement as a basis for challenging the denial of a nonprofessional weapons permit. As we have previously explained, if a county sheriff

would categorically refuse or deny the issuance of any permits whatsoever, the discretionary or decision making power vested in him by the legislature would be rendered a nullity and the responsibility conferred under the language of the statute to render a judgment would be abrogated. This a sheriff cannot do. The legislature has not said that no person may carry a concealed weapon, but rather citizens may be so armed if the sheriff in his judgment finds it to be warranted

1976 Iowa Op. Att'y Gen. 767, 768 (citations omitted).

III. Summary

Section 724.11, which provides the ninety-nine county sheriffs with discretion to issue nonprofessional weapons permits to individuals residing in their counties, does not facially offend the state constitutional guarantee to defend life and liberty and protect property. Section 724.11 does not implicate a violation of the state constitutional guarantee to equal protection of the law.

Sincerely,

Bruce Kempkes
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