

OAG 96-40

October 4, 1996

Subject: Whether a public university policy banning possession or storage of a deadly weapon or destructive device on any campus of the university or in any facility owned, leased or operated by that university is void as violative of the right to bear arms secured by the Kentucky Constitution.

Requested by: Don Cetrulo, Director

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General

Syllabus: A public university ban on the possession or storage of a deadly weapon or destructive device on property owned or occupied by that university does not violate the right to bear arms secured by Section 1, Seventh of the Kentucky Constitution.

Statutes construed: KRS 65.870; 164.975(1);
237.115(1); 527.070(1)

Opinion of the Attorney General

The Office of the Attorney General has been asked to render an opinion on whether a University of Louisville policy banning possession or storage of a deadly weapon or destructive device on any University of Louisville campus or in any facility, owned, leased or operated by the University violates Section 1, Seventh and Section 26 of the Kentucky Constitution. The Attorney General provides this opinion on a public question of law which was submitted by the director of the Kentucky Legislative Research Commission on behalf of a legislator. KRS 15.025(1) and (2).

Specifically, the director of the Kentucky Legislative Research Commission asks:

Since Section 1 of the Constitution of Kentucky prohibits the General Assembly from controlling other than concealed "arms" and Section 26 of the Constitution of Kentucky declares all acts in violation of the Kentucky bill of rights to be void, does the action of the University of Louisville as it applies to the possession or carrying of unconcealed weapons violate the Constitution of Kentucky, even though the action of the University is allegedly taken pursuant to 1996 HB 40?

We cannot accept the premise that Section 1, Seventh of the Kentucky Constitution "prohibits the General Assembly from controlling other than concealed 'arms'". We, therefore, begin our analysis by addressing this assertion. We then proceed to the ultimate question of whether the action taken by the University of Louisville violates Section 1, Seventh and Section 26 of the Kentucky Constitution.

Section 1 of the Kentucky Constitution provides in relevant part as follows:

All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned. . .

Seventh: 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.

Some assert that the last clause of Section 1, Seventh of the Kentucky Constitution sets forth the sole power of the Kentucky General Assembly to enact laws relating to bearing arms.

In *Eary v. Commonwealth*, Ky., 659 S.W.2d 198 (1983), however, the Kentucky Supreme Court expressly recognized that the right to bear arms is subject to the state's reasonable exercise of its inherent police powers to protect the public health and safety. The *Eary* court upheld the constitutionality of a statute which prohibited convicted felons from possessing handguns. The *Eary* holding recognizes that the right to bear arms under Section 1, Seventh of the Kentucky Constitution is not absolute. In other words, while Section 1, Seventh of the Kentucky Constitution secures a right to bear arms, it does not define the scope of that right in absolute terms.

Prior to the effective date of our present constitution (1891), the Kentucky courts recognized that one does not have an absolute right to bear arms openly at all times, in any place, and in any manner. *Ogles v. Commonwealth*, Ky., 11 S.W. 816 (1889). Certainly, the English common-law tradition from which our legal heritage derives did not accord to the individual an absolute right to bear arms openly. See, e.g., Emery, *The Constitutional Right to Keep and Bear Arms*, 28 Harvard Law Review 473 (1915).

A comparison of Section 1, Seventh of our present Kentucky Constitution to its counterparts in prior Kentucky Constitutions reveals a change in language which suggests the framers of the 1891 Kentucky Constitution did not intend for the Constitution to confer an absolute right to bear arms openly. All prior versions of the Kentucky Constitution provided in relevant part that the right to bear arms "shall not be questioned". First Constitution of Kentucky (1792), Article 12, Section 23; Second Constitution of Kentucky (1799), Article 10, Section 23; Third Constitution

of Kentucky (1850), Article 13, Section 25. The drafters of the 1891 Kentucky Constitution, our present Kentucky Constitution, deleted the words "shall not be questioned".

We are aware of the case of *Bliss v. Commonwealth*, Ky., 12 Ky. 90 (1822), which construed Article 10, Section 23 of the Second Constitution of Kentucky (1799) as conferring on the individual citizen an absolute right to bear arms. The *Bliss* court concluded that legislation prohibiting the carrying of a concealed weapon was unconstitutional and void pursuant to Article 10, Section 28 of the Second Constitution of Kentucky (1799), the predecessor and counterpart of Section 26 of our present Kentucky Constitution. *Bliss v. Commonwealth*, however, was decided at a time when the Kentucky Constitution stated without qualification that the right to bear arms "shall not be questioned".

The *Bliss* opinion must be read in the context in which it was written. It does not state the law under the present Kentucky Constitution. Moreover, Kentucky Courts have recognized that the *Bliss* court's general characterization of Kentucky's Constitutional provisions as mandatory is subject to qualification. See, e.g., *Gaines v. O'Connell*, Ky., 204 S.W.2d 425, 427 (1947).

We also are aware of hyperbolic dicta in *Holland v. Commonwealth*, Ky., 294 S.W.2d 83, 85 (1956), characterizing Section 1, Seventh of the Kentucky Constitution as "an exemplification of the broadest expression of the right to bear arms". One need only look to the language of Article 12, Section 23 of the First Constitution of Kentucky (1792) to see that this statement, if interpreted literally, is false. The right to bear arms was expressed more broadly in our first constitution as follows:

The rights of the citizens to bear arms in defense of themselves and of the state shall not be questioned.

The *Holland* court also stated:

In our state the legislature is empowered only to deny to citizens the right to carry concealed weapons. The constitutional provision is an affirmation of the faith that all men have the inherent right to arm themselves in the defense of themselves and of the state. The only limitation concerns the mode of carrying such instruments.

Holland v. Commonwealth, supra, 294 S.W.2d at 85. This language is not an essential part of the holding in the *Holland* case. Moreover, the *Holland* case is internally inconsistent. The case also cites with approval the provisions of KRS 435.230, since repealed. KRS 435.230 included a prohibition against selling "a deadly weapon, other than an ordinary pocket knife, to a minor". The penalty for this offense was set by statute at of a term of imprisonment of not less than two nor more than five years. The *Holland* court determined that "the legislature has exercised the power granted it by enacting KRS 435.230". *Id.*, at 85. The *Holland* court recognized the validity of a legislative enactment which went beyond merely denying citizens the right to carry concealed weapons, even though the *Holland* court asserted "the legislature is empowered only to deny to citizens the right to carry concealed weapons". *Id.*, at 85. The Kentucky Supreme Court has since expressly recognized that the legislature's power with respect to the right to bear arms is not limited only to denying citizens the right to carry concealed weapons. *Eary v. Commonwealth*, Ky., 659 S.W.2d 198 (1983).

In *Commonwealth v. Wasson*, Ky., 842 S.W.2d 487, 492 (1992), the Kentucky Supreme Court recognized that "much of our original Kentucky Bill of Rights" derived from "the then recently enacted Pennsylvania counterpart". "[B]ecause of the common heritage shared by the Kentucky Bill of Rights of 1792 and the Pennsylvania Bill of Rights of 1790", "[d]ecisions of the Pennsylvania Supreme Court interpreting like clauses in the Pennsylvania Constitution are uniquely persuasive in interpreting our own". *Commonwealth v. Wasson*, supra, 842 S.W.2d at 498. Article 1, Section 21 of the Pennsylvania Constitution, governing the right to bear arms, reads today just as it did in the Pennsylvania Constitution of 1790. That section states:

The right of the citizens to bear arms in defense of themselves and the State shall not be questioned.

Article 12, Section 23 of the First Constitution of Kentucky (1792) states:

The rights of the citizens to bear arms in defense of themselves and the state shall not be questioned.

The Pennsylvania Constitution of 1790 contained a provision similar to Section 26 of our present Kentucky Constitution. Article 1, Section 25 of the present Pennsylvania Constitution retains the relevant language from the Pennsylvania Constitution of 1790, to wit:

To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.

Section 26 of the Kentucky Constitution states:

To guard against transgression of the high powers which we have delegated, We Declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void.

In *Commonwealth v. Ray*, Pa.Super, 272 A.2d 275 (1970), vacated on other grounds in 292 A.2d 410, a Pennsylvania appellate court held that the right to bear arms was not violated by a state statutory provision which contained a general prohibition against carrying "a firearm, rifle or shotgun at any time upon public streets or upon any public property in a city of the first class". *Commonwealth v. Ray*, supra, 272 A.2d at 278. The appellate court noted that "[t]he limitation is as to an area constituting a very small portion of the Commonwealth". *Id.*, at 278. The Pennsylvania appellate court recognized the view "[t]hat the right to bear arms guaranteed by the Constitution is not an unlimited right is almost universally accepted". *Id.*, at 279. The court reasoned "that a reasonable regulation in a gun control law is a valid exercise of the police power of the Commonwealth prescribing for the good order and protection of its citizens". *Id.*, at 279.

The holding in *Commonwealth v. Ray* suggests that banning deadly weapons and destructive devices on university property does not violate the right to bear arms conferred by the Kentucky Constitution. The Kentucky statutes and Kentucky case decisions support this conclusion.

KRS 164.975(1) states in relevant part that "[t]he governing boards of public institutions of higher education" have "the power and authority to govern and control the method and purpose of use of property owned or occupied by their respective institution". *See also*, KRS 164.950 and KRS 164.955. KRS 164.200 grants broad discretion to a university board of trustees to "establish proper regulations for the government of the university." As this office said in OAG 69-357:

[T]he establishment of regulations which may limit the access of students and/or nonstudents to the campus, or which may condition their access upon certain reasonable requirements based upon the necessity for preservation of order and/or protection of students, staff or facilities is a proper exercise of the Board's legal authority. However, the determination of the specific controls which may be required as based upon the facts gathered by or known to the Board is a matter which is to be decided by the Board, acting within its sound discretion in the discharge of responsibilities imposed by law as the governing body of the University.

The general prohibition in KRS 65.870 against local firearms regulation by city, county or urban-county governments does not apply to the governing boards of public institutions of higher education.

KRS 237.115(1), enacted in the 1996 session of the Kentucky General Assembly (1996 HB 40), states in relevant part as follows:

Nothing contained in KRS 237.110 shall be construed to limit, restrict, or prohibit in any manner the right of a college, university, or any postsecondary education facility, including technical schools and community colleges, to control the possession of deadly weapons on any property owned or controlled by them. . .

KRS 237.110 is the statute which authorizes the issuance of licenses to individuals to carry concealed deadly weapons. While KRS 237.115(1) recognizes the right of colleges and universities to control possession of deadly weapons, generally, on their properties, KRS 237.115(1) limits other units of state government, city governments, county governments, urban-county governments, and charter county governments to prohibiting only the carrying of *concealed* deadly weapons. The Kentucky General Assembly, therefore, has recognized that the governing board of a college or university of this Commonwealth has a right to control the possession of all deadly weapons on its properties, regardless of whether the weapons are concealed or carried openly.

We are aware that KRS 527.070(1), creating a criminal offense for unlawful possession of certain weapons on school property, excludes "institutions of postsecondary or higher education". The fact that the legislature has elected not to criminalize the carrying of those weapons on the property of institutions of postsecondary or higher education, however, does not preclude the governing boards of public institutions of higher education from otherwise controlling the possession of deadly weapons on their properties.

In *O'Leary v. Commonwealth, Ky.*, 441 S.W.2d 150 (1969), Kentucky's high court addressed the nature of a university's control over its property. The Court considered whether a student's right of free speech and assembly was violated when he was arrested for breach of the peace for

refusing to leave a university hallway where he and others were blocking the entrance to a room as a form of protest. The *O'Leary* court noted that university premises generally are not "maintained for use by the public in general". *O'Leary v. Commonwealth*, supra, 441 S.W.2d at 157. Mr. O'Leary had predicated his appeal in part on provisions contained in the Kentucky Bill of Rights relating to free speech and the right of assembly. The *O'Leary* court reasoned in relevant part as follows:

We are fond, in this country, of reiterating the principle that even the greatest majority is powerless to throttle a constitutional right. It is equally true, however, that the existence of a constitutional right is neither a sword to cut up the rights of others nor a shield against the consequences of conduct that otherwise violates the law. The majority too has rights, not the least of which is the protection afforded by its criminal laws.

It is clear from the decisions of the [U.S.] Supreme Court...that free speech and the right of assembly in public places must not be left to the *ad hoc* discretion of provincial authorities, nor can people be ordered off the premises of business establishments, otherwise open to the public, for no reason except their creed or color. There is a difference, however, between public and private places, and in this context we regard the premises of a college or university as no different from private property. That the institution is financed with tax money is no reason why its governing body should not have the same dominion and control over it as would a private owner. No one would contend, we trust, that the presence of a group of demonstrators in the office of its president would be any more legitimated and protected by the Constitution than would be their presence in the White House at Washington.

Id., at 156. The *O'Leary* court specifically held that "the sanctity of a college campus and buildings is no less than that of private property".

There is no absolute right under the Kentucky Constitution to carry arms on to the property of another. The governing board of a university, like a private property owner, may direct those who come upon its property to do so unarmed.

"[I]t is axiomatic that private rights must yield to a reasonable exercise of the police power". *Colten v. Commonwealth*, Ky., 467 S.W.2d 374, 378 (1971), affirmed in *Colten v. Kentucky*, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972). The right to bear arms is subject to a reasonable exercise of the police power. *Eary v. Commonwealth*, Ky., 659 S.W.2d 198 (1983).

The geographic areas occupied by university campuses are quite limited. Given this and also given the fact that one has no absolute right to carry arms on to the property of another, it is reasonable to conclude that a university ban on deadly weapons and destructive devices is not clearly contrary to that right to bear arms which is secured by Section 1, Seventh of our Kentucky Constitution.

Universities are unique places of public assembly. Given that the governing boards of public institutions of higher education are authorized to control the method by which university property is used and the purpose for which university property is used, and given that large

numbers of people frequently gather on university campuses, a university ban on weapons and destructive devices is not an unreasonable exercise of the police power in furtherance of the public health and safety.

The University of Louisville policy prohibiting possession or storage of deadly weapons or destructive devices on any University of Louisville campus or in any facility owned, leased or operated by the University does not violate Section 1, Seventh of the Kentucky Constitution. The policy therefore is not void pursuant to Section 26 of the Kentucky Constitution.

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