STATE OF MISSISSIPPI

JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

September 18, 2014

David Ringer, Esq.
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Post Office Box 737
Florence, MS 39073

Re: Opinion Request Concerning Application of Gun Laws

Dear Mr. Ringer:

Attorney General Jim Hood has received your request for an official opinion and assigned it to me for research and response.

Issues Presented and Responses

On behalf of the Town of Florence, your letter asks the following questions which this opinion will respond to seriatim.

1. **We are mindful of Miss. Code Ann. Section 45-9-101(13) which lists the places where a concealed weapons license holder is not allowed to carry his/her concealed weapon. We are also mindful of Miss. Code Ann. Section 45-9-53(1)(f), which clarifies that a municipality may regulate the carrying of a firearm at: " (I) a public park or at a public meeting of a county, municipality or other governmental body; (ii) a political rally, parade or official political meeting; or (iii) a nonfirearm-related school, college or professional athletic event[.]" Our concern is that there is no authority that would allow the City to prevent people from openly carrying weapons inside such places as City Hall, the police station, municipal courtroom, etc. Is there any authority that would allow the Governing Authority to prevent people from openly carrying weapons on City property?**

In MS AG Op. Trapp (Dec. 2, 2013), this office opined that the only places that a municipality may regulate the possession of firearms are those places and events listed in Section 45-9-53(1)(f). This remains our opinion, and we are unaware of any other authority under which a municipality can regulate the possession of firearms. Although not specifically asked in your opinion request, we did discuss in the Trapp Opinion the

authority of a municipality to use the signage provisions of Section 45-9-101(13) to prevent concealed carry of weapons in certain instances. The Trapp opinion has been supplanted in part by the recent enactment of H.B. 314, effective July 1, 2014, which contains very specific and express limits and/or requirements on municipalities' authority to post signage to prevent concealed carry.

2. **We are also mindful that Miss. Code Ann. Section 45-19-101(13) further provides that:**

> **the carrying of a stun gun, concealed pistol or revolver may be disallowed in any place in the discretion of the person or entity exercising control over the physical location of such place by the placing of a written notice clearly readable at a distance of not less than (10) feet that the "carrying of a pistol or revolver is prohibited."**

Is there similar authority that would allow a private property owner (or even a county or municipality) to post similar signs in regards to openly carrying a weapon, and if so what are the criminal penalties (if any) if a person who is openly carrying disregards such a sign.

We are aware of no statutory authority that specifically provides for a private person to post signs to prevent the open carrying of weapons on his or her property. However, with regard to private property owners, they have, as a matter of property rights, the ability to control the use of their land, including the ability to prevent individuals from possessing either concealed or openly carried weapons on the property. The answer to your question can be found in our discussion in Lance as follows:

> At the core of this question, as well as question 7., is whether the change to the concealed weapons statute alters the power of private property owners and of custodians of public property generally to prohibit conduct on that property that is not criminal, in particular, the carrying of unconcealed weapons. Our answer is that it does not.
>
> ***A private property owner or manager of a retail store, grocery store or restaurant may exercise his property rights and deny entry to persons carrying weapons on his property (verbally, by posting a sign or by other means).*** A private property owner may even prohibit enhanced concealed permit holders from their property. As stated by the Mississippi Supreme Court in *Biglane v. Under the Hill Corporation*, 949 So.2d 9, at 16 (Miss. 2007):
>
> > It is a basic tenet of property law that a landowner or tenant may use the

> premises they control in whatever fashion they desire, so long as the law is obeyed. This leads to the logical conclusion that a landowner or valid tenant may forbid any other persons from using their property. This ideal is protected in our law to the point that there are both civil and criminal prohibitions against trespassing.

See also, *GeorgiaCarry.Org v. Georgia, 687 F.3d 1244* (11th Cir. 2012)(2nd amendment right to bear arms is limited by equally fundamental rights of private property owners to control their property). ***Depending on the facts, violation of a private property owner's prohibition of weapons might constitute a violation of 97-17-97 (trespass after warning), 97-17-93 (entry without permission) or other statute***'

MS AG Op. Lance (June 13, 2013)(emphasis added).

In our Trapp opinion, we opined that where municipalities post signs to prohibit the carrying of weapons they do so under state law and not municipal authority. We also opined that Section 45-9-101(13) signage applied only to concealed weapons. Thus we concluded in Trapp as follows:

> With regard to posting of signs pursuant to Section 45-9-101(13), a municipality is acting pursuant to state law and not exercising its independent regulatory authority. As discussed herein below, the Legislature has placed substantial limitations on a municipality's authority to regulate the possession of firearms. This principle is important because as we noted above Section 45-9-101(13) applies only to the carrying of concealed weapons and not openly carried weapons. ***Thus, we find no authority for a municipality to restrict the open carrying of firearms by use of signs or any means other than the express and limited authority given by Section 45-9-53***

MS AG Op., Trapp (Dec. 2, 2013)(emphasis added)..

3. May the agents of a business require that someone, who has entered the premises of the business while otherwise lawfully openly carrying a weapon, to leave the premises of the building and not return unless he/she leaves the weapon outside the premises?

Because this question applies to private entities and not municipal officers we cannot answer by way of an official opinion. We believe that the answer is generally that a private person has resort to the State's trespass law to either prevent a person from entering property or requiring the person to leave. The ultimate answer would depend

on the facts of any given circumstances, and private entities faced with such issues should seek private legal advice.

4. **During a traffic stop or while making other contact, may a police officer take possession of the weapon of someone who is otherwise lawfully openly carrying a weapon so as to ensure the safety of the officer, driver, passengers, and bystanders?**

5. **During a traffic stop or while making other contact, may a police officer take possession of the weapon of someone who is lawfully carrying a concealed weapon so as to ensure the safety of the officer, driver, passengers, and bystanders?**

Questions 4 and 5 raise questions which would be dependent on the individual factual scenario of each case. Moreover, the answer would be determined by reference to and application of federal constitutional law including the prohibitions against unlawful search and seizures. Our office does not opine on factual matters and does not opine on questions of federal law. For these reasons, we must decline to respond to these questions. For informational purposes, I am enclosing the Appendix to our Lance Opinion which provides research and discussion of federal case law touching on these issues. If you have further questions regarding these matters and would like to discuss the issues further, I suggest you contact one of our attorneys working in the criminal law area.

If this office can be of further assistance, feel free to contact us.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:

Ricky G. Luke
Assistant Attorney General

APPENDIX A

TERRY STOPS AND TRAFFIC STOPS

Under *Terry v. Ohio*, 392 U.S. 1 (1968), a law enforcement officer may briefly detain an individual if he has a reasonable, articulable suspicion that the person to be detained is involved or is about to be involved in criminal activity. Where such a detention occurs, the officer may frisk the outer clothing of the person detained to be sure the person is not armed, if the officer has a reasonable belief that the person may be armed and presently dangerous. *See also Ybarra v. Illinois*, 444 U.S. 85 (1979); *Adams v. Williams*, 407 U.S. 143 (1972); *Sibron v. New York*, 392 U.S. 40 (1968). If the officer feels a weapon, he may take it from the person to ensure the safety of the officer. The reason an officer is permitted to frisk for weapons, where he has a reasonable belief that the person detained may be armed and presently dangerous, is to ensure officer safety. *Terry, supra.*

Terry frisks normally involve instances in which a police officer believes that a person detained has a weapon concealed on his person. Where a person is carrying a weapon in a non-concealed fashion, the question, assuming a valid *Terry* stop, is simply whether the officer may temporarily seize that weapon during the period of the detention.

There have been a number of decisions nationwide that hold that an officer may temporarily seize a weapon that is in plain view in order to ensure the safety of the officer as well as the safety of others who may be nearby, where there is a legitimate or reasonable concern for safety. *E.g. United States v. Antwine* 882 F.2nd 1144, 1147 (8th Cir. 1989)(Officer may seize weapons when justified by the officer's legitimate concern for the safety of others); *United States v. Malacheson*, 597 F.2d 1232 (8th Cir. 1979); *United States v. Rodriquez*, 601 F.3rd 402 (5th Cir. 2010)(Officers justified in temporarily seizing weapons in plain view where officers were reasonably concerned about safety); *United States v. Bishop*, 338 F.3rd 623 (6th Cir.)(*and cases cited therein*). What factual circumstances would be sufficient to give rise to a legitimate concern for safety of an officer or others is a question that can only be addressed on a case - by - case basis.

As stated above, If an officer observes a person carrying a weapon included in Miss. Code Ann. Section 97-37-1(1) in a way that is not "hidden or obscured from common observation", this, without more, will not give rise to a reasonable suspicion of criminal activity. Nor will it of itself present a reasonable or legitimate concern about safety. The fact of carrying such a weapon in such a manner will not in and of itself provide a lawful basis for a *Terry* stop, or provide a lawful basis to remove the weapon from the person carrying it. However, there could be circumstances in which the carrying of such a weapon could be a factor which, when taken together with other factors, could give rise to a reasonable suspicion of criminal activity.

In the instance of a valid traffic stop, an officer may conduct a limited *Terry* search for weapons in the areas of the passenger compartment of an automobile where a weapon may be placed or hidden, if the officer possesses a reasonable belief, based upon specific, articulable facts, that the occupant or occupants are dangerous, and may take immediate control of a weapon in the car. *Michigan v. Long*, 463 U.S. 1032 (1983). It is our view that where a weapon is in plain view in an automobile, and, where an officer has a reasonable concern about his safety or the safety of others, he may seize the weapon for that reason. He may also order the driver out of the vehicle, *Pennsylvania v. Mims*, 434 U.S. 106 (1977), and he may order the passengers out of the vehicle, *Maryland v. Wilson*, 519 U.S. 408 (1997).

In all instances in which the detention ends without arrest, the weapon seized is to be returned by the officer.

COMMUNITY CARETAKING

Law enforcement officers have "complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses"; by design or default, the police are also expected to "reduce the opportunities for the commission of some crimes through preventive patrol and other measures," "aid individuals who are in danger of physical harm," "assist those who cannot care for themselves," "resolve conflict," "create and maintain a feeling of security in the community," and "provide other services on an emergency basis." 3 Wayne R. LaFave, A Treatise on the Fourth Amendment, § 6.6, p. (5th ed.)

In *Cady v. Dombrowski*, 93 S.Ct. 2623, 2528 (1973), the Supreme Court used the term "community caretaking function" to refer to police responsibilities that were "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."

When law enforcement officers are not "identifying and apprehending persons committing" criminal offenses, but instead are performing non-investigative duties characterized as part of the "community caretaking function," their actions must be reasonable. For instance, an officer may stop an individual with a firearm who is believed to be mentally deranged and a danger to himself or others if "a reasonable person, given the totality of the circumstances, would believe [the individual] is in need of help or that the safety of the public is endangered." [internal quotations omitted] *Trejo v. State*, 76 So.3d 684 (Miss. 2011). Should a stop under the community caretaking function disclose evidence that is later used for criminal prosecution, courts will carefully analyze the circumstances to ensure that this doctrine is not "abused or used as a pretext for conducting an investigatory [stop and] search for criminal evidence." *Trejo* at 689.