

OPINION NO. 93-14 CRIMINAL LAW; FIREARMS; WEAPONS:

The language of NRS 205.350 would be narrowly construed to include only those concealed weapons which are actually on the person or in a container carried by the person.

Carson City, June 21, 1993

Mr. Ben Graham, Deputy District Attorney, Clark County District, Attorney's Office, 200 S. Third Street - Seventh Floor, Las Vegas, Nevada 89155

Dear Mr. Graham:

This is in response to your opinion request regarding construction of Nevada's concealed weapon statute.

QUESTION

What constitutes carrying a concealed weapon?

NRS 202.350 states in part:

1. It is unlawful for any person within this state to:

....

(b) Carry concealed upon his person any:

- (1) Explosive substance, other than ammunition or any components thereof;
- (2) Dirk, dagger or dangerous knife;
- (3) Pistol, revolver or other firearm, or other dangerous or deadly weapon; or
- (4) Knife which is made an integral part of a belt buckle.

FACTS

The language of your opinion request suggests that your main inquiry deals with the proximity of the weapon to the person. Your letter states:

A weapon carried on the person is obvious. The question gets more complicated with a weapon in a purse, briefcase, carry-on luggage and such when it is in fact carried by an individual. Place those containers on the floor next to the person. Put the same container in the passenger portion of a vehicle, the weapon in the glove box, console, under the seat?

Your letter refers to several different scenarios and situations regarding the proximity of the weapon under which application of NRS 205.350 might be urged.

ANALYSIS

Our research has not revealed any case in which the Nevada Supreme Court has interpreted the precise language of NRS 202.350. However, as noted below, that language would have to be strictly construed. If the legislature's desire is to expand the statute to cover circumstances where a concealed weapon is immediately accessible, the language, such as "concealed on or about his person" would be required.

Penal statutes are subject to strict construction, *Sheriff v. Smith*, 91 Nev. 729, 542 P.2d 440 (1975), and "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process." *Sheriff v. Luqman*, 101 Nev. 149, 155, 697 P.2d 107 (1985) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). See *Brad v. State*, 104 Nev. 475, 477, 760 P.2d 139 (1988).

Thus a narrow interpretation of the applicable language of NRS 205.350 is appropriate. *People v. Pugach*, 204 N.E.2d 176 (N.Y. Ct. App. 1964). A gun discovered in a briefcase being carried by a defendant was "concealed upon the person" and was within a statute proscribing carrying weapons concealed upon the person. A hand gun concealed in a suitcase and carried by a man is sufficiently

"upon his person" to constitute a violation under a statute making it a misdemeanor to carry a concealed weapon on the person. *People v. Dunn*, 132 Cal. Rptr. 921, 922 (Cal. Ct. App. 1976). The phrase "upon the person" means that an article is either in contact with a person, or is carried in the clothing. *Commonwealth v.*

Linzetti, 97 Pa. Super. 126 (1929). The word "upon" signifies close contact. A loaded revolver underneath a cushion in the rear seat of an automobile on which the defendant was sitting was not "upon the person," so defendant's conduct was not within the meaning of an act prohibiting carrying a deadly weapon concealed "upon the person." *Id.* Thus the phrases "concealed upon person," "upon his person," and "upon the person" have been interpreted to include weapons that are in contact with the individual or are being carried within a container by an individual.

On the other hand, language such as "concealed on or about person" or "concealed on or about his person" has been interpreted to extend the proximity of the weapon necessary to constitute a violation of the statute. In *State v. Scanlan*, 273 S.W. 1062 (Mo. 1925), where the indictment charged the defendant with carrying a weapon concealed about his person, the jury was permitted to find him guilty if he carried the deadly weapon concealed upon his person since the word "about" includes everything included in the word "upon" and may, in addition, include much more. The words "on or about the person" have been applied to weapons concealed in such proximity to the person so as to be convenient to access and within immediate physical reach. *Hampton v. Commonwealth*, 78 S.W.2d. 748, 749 (Ky. 1934). See also *Prelo v. State*, 168 N.E. 135, 137 (Oh. 1929); *Collier v. Commonwealth Ky.*, 453 S.W.2d 600, 601 (Ky. 1970). A loaded pistol locked in a glove compartment of an automobile which the defendant owned and was driving was "concealed on or about the person" of the defendant as defined by a concealed weapon statute. *State v. Goodwin*, 169 N.W.2d 270, 273 (Neb. 1969). It does not appear that the word "about" is always interchangeable with "on." See W. M. Moldoff, Annotation, *Offense of Carrying a Concealed Weapon as Effected by Manner of Carrying or Place of Concealment*, 43 A.L.R.2d 492, § 4(d)

(1955). To violate a statute prohibiting carrying firearms "concealed on or about the person," the weapon must be actually concealed on the person or in such close proximity that it can be readily used as though on the person, without appreciable change in his position. See *People v. Liss*, 94 N.E.2d 320, 322-23 (Ill. 1950).

Obviously, each factual situation will be different and may be interpreted differently according to language used in the statute. It seems relatively clear that the use of the words "on or about his person" extends the area from which the defendant could obtain the weapon. However, this language has limitations as well. In one case, the evidence showed that the defendant was riding in a wagon in which there were two other persons. A quarrel arose between the defendant and one of the others. The defendant took a pistol from a satchel under the seat. These facts were not sufficient to warrant a conviction of carrying a pistol "concealed on or about his person." *Commonwealth v. Sturgeon*, 37 S.W. 680 (Ky. 1896). There was no evidence as to whom the satchel belonged. There was no evidence as to who placed it in the wagon, or to whom the wagon belonged. *Id.* Obviously, various other factors need to be considered in determining whether a concealed weapon is "about" a person. However, that inquiry is beyond the scope of this opinion.

CONCLUSION

It is our opinion that the language of NRS 202.350 would be narrowly construed to include only those concealed weapons which are actually on the person or in a container carried by the person.

Sincerely,

FRANKIE SUE DEL PAPA

Attorney General

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