

[Cite as *State v. Rosenthal*, 75 Vt. 295, 55 A. 610 (1903).]

# STATE v. ROSENTHAL.

(Supreme Court of Vermont. Rutland. May 30, 1903.)

## MUNICIPAL CORPORATIONS--ORDINANCES--CARRYING WEAPONS--VALIDITY.

1. *Const. c. 1, art. 16*, declares that the people have a right to bear arms for the defense of themselves and the state. *V. S. 4922*, prohibits any person from carrying a dangerous weapon, openly or concealed, with the intent of injuring another. *Section 4923* prohibits a person, while a member of and in attendance on a school, from having in his possession any dangerous weapon. *Held*, that a city ordinance prohibiting a person from carrying within the city any brass knuckles, pistol, slung shot, or weapon of similar character, or any weapon concealed on his person, without permission of the mayor or chief of police, so far as it relates to the carrying of a pistol under any circumstances without such consent, is repugnant to the Constitution, and to that extent void.

Exceptions from City Court of Rutland; Howe, Judge.

Andrew Rosenthal was convicted of a violation of an ordinance of the city of Rutland, and appeals. Reversed.

Argued before TYLER, MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

W. H. Preston, State's Atty., for the State. Joel C. Baker, for respondent.

WATSON, J. *Section 10* of the ordinances of the city of Rutland provides that no person shall carry within the city any steel or brass knuckles, pistol, slung shot, stiletto, or weapon of similar character, nor carry any weapon concealed on his person, without permission of the mayor or chief of police, in writing, and for violation thereof a penalty is provided by a subsequent section. A complaint was filed against the respondent in the city court for carrying within the city, in violation of said ordinance, a pistol loaded with powder and bullets, concealed on his person, without such permission. On demurrer to the complaint, the respondent contends, among other things, that said ordinance is illegal, for that, so far as it forbids the carrying of a pistol, it is repugnant to and inconsistent with the Constitution and the laws of this state.

*Section 24* of the city charter gives the city council power to make, establish, alter, amend, or repeal ordinances, regulations, and by-laws, not inconsistent with the charter or with the Constitution or laws of the United States or of this state, for the purposes enumerated, and to inflict as a penalty for a violation thereof a fine not exceeding \$50. After the special designations is the general clause, "And said city council may make and establish, and the same alter, amend or repeal, any other by-laws, rules and ordinances which they deem necessary for the well being of said city and not repugnant to the Constitution or laws of this state." Power to make the ordinance in question was not expressly given the council, and they had no power to make it, beyond what is given under the general clause above quoted. The people of the state have a right to bear arms for the defense of themselves and the state. *Const. c. 1, art. 16*. But by *V. S. 4922*, a person is prohibited from carrying a dangerous or deadly weapon, openly or concealed, with the intent or avowed purpose of injuring a fellow man; and by *section 4923*, no person can carry or have in his possession any firearm, dirk knife, bowie knife, dagger, or other dangerous or deadly weapon, while a member of and in attendance upon a school. *Section 4924* provides a penalty for intentionally, without malice, pointing a firearm toward another person, and for discharging such firearm so pointed, without injury to another person; and by *section 4925* a punishment is inflicted where another person is maimed or injured by the discharge of such firearm. But *section 4926* provides that the two preceding sections shall not apply where firearms are used in self-defense or in the discharge of official duty, or in the case of justifiable homicide. Under the general laws, therefore, a person not a member of a school may carry a dangerous or deadly weapon, openly or concealed, unless he does (p.611)it with the intent or avowed purpose of injuring another; and a person who is a member of a school, but not in attendance upon it, is at liberty, in a similar way, to carry such weapons. In *State v. Carlton*, 48 Vt. [636](#),

it was held that the owner of land, having the right to use reasonable force in expelling a trespasser therefrom, had a right to go prepared to defend himself against any assault that the trespasser might make upon him while in the exercise of that right, and that if he only intended to use a pistol in such an emergency in defending his own life, or against the infliction of great bodily harm, the carrying of the pistol for such purpose would be lawful. By the ordinance in question, no person can carry such weapon concealed on his person within the city of Rutland in any circumstances, nor for any purpose, without the permission of the mayor or chief of police in writing. Therein neither the intent nor purpose of carrying them enters into the essential elements of the offense. Simply to carry them concealed without such permission constitutes a violation of the ordinance. But if a permission is procured from either of those officials there is no violation of the ordinance, even though the carrying of the weapon be with the intent or avowed purpose of injuring another person; and that a person is a member of a school, and in attendance upon it, forms no exception. Consequently, unless a special permission is granted by the mayor or chief of police for that purpose, a person is prohibited from carrying such weapons in circumstances where the same is lawful by the Constitution and the general laws of the state; and there is nothing in the ordinance to prevent the granting of such permission, notwithstanding it be in circumstances to constitute a crime under the general laws. The result is that *Ordinance No. 10*, so far as it relates to the carrying of a pistol, is inconsistent with and repugnant to the Constitution and the laws of the state, and it is therefore to that extent, void. Whether this renders the whole ordinance illegal, or whether it contains any other invalid provisions, are questions not now before the court.

Judgment reversed and sentence set aside, demurrer sustained, complaint adjudged insufficient and quashed, and the respondent discharged and let go without day.