

ORDINANCES

Concealed, But Not Loaded– Portland's Gun Ordinance Survives

by Erich R. Eiselt, Assistant General Counsel

In August Oregon's Supreme Court upheld a Portland ordinance (Ordinance) which makes it unlawful for a person to carry a firearm in public without having removed its ammunition. PCC 14A.60.010(A) (Ordinance) provides: "It is unlawful for any person to knowingly possess or carry a firearm, in or upon a public place, including while in a vehicle in a public place, recklessly having failed to remove all the ammunition from the firearm."

The case arose after Portland police arrested Jonathan Christian for carrying loaded two loaded semi-automatic handguns in a backpack which he had placed in a convenience store. (In addition to the loaded handguns, Christian's backpack and nearby vehicle contained knives, pepper spray, handcuffs, police batons and other related paraphernalia).

Christian was charged with violating an Oregon state law prohibiting the carrying of a concealed weapon without a license as well as the Ordinance prohibiting the public possession of a loaded weapon. He challenged the laws based on the Second Amendment as well as Oregon's own constitutional "right to bear arms" provision, but was convicted on all counts at trial. In a split *en banc* decision, the Oregon Court of Appeals affirmed. Christian appealed, challenging the Ordinance.

The Oregon Supreme Court upheld the conviction and affirmed the constitutionality of the Ordinance. It found ample evidence that Oregon's "right to bear arms" constitutional provision did not foreclose reasonable limitations to protect public safety. It cited not only Oregon precedent but also drew on legislative and judicial history from Indiana, whose constitutional clause on firearms possession was copied almost verbatim by Oregon lawmakers. The court concluded that "The ordinance reflects a legislative determination that the risk of death or serious injury to members of the public moving about in public places is increased by the threat posed by individuals who recklessly fail to unload their firearms."

(The Oregon Supreme Court differed with the lower courts' parsing of the Ordinance. The positioning of the word "recklessly" created ambiguity. While the courts below had concluded that it modified "possess or carry" the Oregon Supreme Court concluded, as did the parties, that "recklessly" modified the failure "to remove all ammunition." This nuance expanded the breadth of the Ordinance and made it more vulnerable to challenge: knowingly being in public with a loaded gun was a violation, whether one had "recklessly" carried the weapon there was irrelevant. However, the court noted that the Ordinance included significant limitations. It obviously did not apply within the home, and it contained 14 categories of exceptions, including one for holders of concealed-carry permits.)

Christian's constitutional attack on the Ordinance was two-fold. He first argued that a blanket prohibition against weapons in public places was overbroad in violation of Article I, section 27 of the Oregon Constitution which permits the use of arms in self defense: "The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power[.]".

As the Oregon court explained, "overbroad" facial challenges are of special and limited applicability. They do not assert that the challenged law is "facially" flawed and inherently unconstitutional as written; nor are they "as applied" attacks, which specify the particular context in which the challenged law has violated a plaintiff's constitutional rights. Instead, an overbreadth challenge simply asserts that there are circumstances in which the law would be unconstitutional.

The Oregon Supreme Court found that "overbreadth" challenges were singularly associated with First Amendment case law—the judicial aversion to undermining free expression is so great that courts will infer circumstances where a suspect statute might have a chilling effect. Proponents of the Ordinance argued that overbreadth did not apply to gun laws: After reviewing Supreme Court precedent, the Oregon court concurred: "We agree with the city and *amicus* that, unlike protected speech and assembly, recognizing overbreadth challenges in Article I, section 27, cases is not necessary because the enforcement of an overbroad restriction on the right to bear arms does not tend to similarly deter or "chill" conduct that that provision protects." The court declined to allow Christian's overbroad challenge and explicitly overruled Oregon precedents to the extent they implied that overbreadth was compatible with Article I, section 27 cases.

Christian was left with a "traditional" facial challenge: the Ordinance was not capable of constitutional application in *any* circumstance. This clearly was not the case under the Oregon Constitution's Article I, section 27 "self-defence" provision, because holders of valid concealed carry permits could carry loaded guns in public. And a facial challenge to the Ordinance was equally futile under the Second Amendment to the United States Constitution. Christian urged that *Heller*'s recognition of an individual's right to keep and bear arms for the purpose of self-defense within the home implied a right to keep and carry loaded firearms in public without restriction. The court rejected this expansion, citing Heller's often-quoted language regarding "presumptively lawful regulatory mea-

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pressreleases?ID=be68ad86-a0a4-4486-853f-f8ef7b99e736 (last accessed August 6, 2013)
3. http://www.fas.org/sgp/crs/misc/R42937.pdf (last accessed August 6, 2013)
4. *Id.*
5. http://www.usatoday.com/story/news/nation/2013/07/10/cost-care-aging-prisoners/2479285/ (last accessed August 6, 2013)
6. http://www.capradio.org/news/npr/story?storyid=209253516 (last accessed August 7, 2013)
7. *Id.*
8. http://articles.washingtonpost.com/2013-8-12/world/41333369 3 1 prison-population-prison-reform-prison-costs (last accessed August 25, 2013)
9. http://www.nytimes.com/2013/07/26/us/us-prison-populations-decline-reflecting-new-approach-to-crime.html?pagewanted=all (last accessed August 20, 2013)
10. http://www.sentencingproject.org/map/map.cfm (last accessed August 25, 2013)
11. *Brown v. Plata*, 131 S. Ct. 1910 (2010)
12. http://www.appeal-democrat.com/articles/state-126813-prison-inmates.html#ixzz2cXLHPIPi (last accessed August 25, 2013)

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sures" limiting who can own guns and where they can be used.

In response to Christian's assertion that "strict scrutiny" review should apply to the Ordinance (requiring the showing of a "compelling state interest" and "narrowly tailored" statutes), the Oregon court countered that the majority of federal courts have applied an "intermediate scrutiny" standard in the wake of *Heller*. This required the showing of "an important governmental objective" and means "substantially related" to that objective. Because the Ordinance did not seek to ban all public carry of loaded firearms, strict scrutiny was inapposite, and "intermediate" review was proper. On that basis, the Ordinance passed Constitutional muster: "Applying the standard of intermediate scrutiny, we conclude that the city has demonstrated that it is important to protect the public from the many risks associated with the presence of loaded firearms in public places. We also conclude that enforcement of the ordinance, as carefully drawn, is substantially related to that objective and advances that objective."

State v. Christian, No. S060407 (OR Aug. 15, 2013) http://www.publications.ojd.state.or.us/docs/S060407.pdf (last accessed August 20, 2013)

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video gaming. The administration felt that we should enact local regulations in order to provide the ability for local enforcement to ensure compliance. The ordinance which was drafted was patterned after the state regulations and also authorized a fee for local licensing of video gaming machines and locations. When the ordinance was presented to the City Council, several aldermen questioned why the City would need to act at all in the face of the state regulations. They felt that the state would provide adequate enforcement. The Mayor and I both indicated during the discussion that we felt it important to have local regulation in order to provide a much more immediate mechanism for enforcement of violations. At the end of the discussion, the City Council enacted the ordinance, but removed the provisions concerning local fees for issuance of the licenses.

While my code book is thick with regulations that mirror state statutes such as traffic regulations, I am not an advocate for enacting local regulations to cover everything possible. However, I do advocate working on an issue and enacting local regulation to provide local enforcement if state regulations and enforcement are not adequate to address a problem that needs resolution. I would encourage those municipalities which have home rule authority to keep an eye on local regulation and enforcement as the potential primary option to address local issues.

