

FILED

OREGON MUNICIPAL COURT

IN THE MUNICIPAL COURT OF OREGON, LUCAS COUNTY, OHIO

City of Oregon/State of Ohio,

Plaintiff,

v.

Daniel A. Sayers,

Defendant.

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Case No.: 06CRB00524

ORDER

This matter comes before the court on this 18<sup>th</sup> day of August, 2006 upon a Motion to Dismiss filed by Daniel T. Ellis, attorney for Defendant Daniel A. Sayers.

STATEMENT OF THE CASE

This case derived from an incident occurring on May 30, 2006 at the Sunoco Foodmart, 1855 Woodville Rd. in Oregon, Ohio. Oregon police officers arrested the Defendant and cited him with violations of Ohio Revised Code §2923.12 and Oregon Municipal Code §549.18. Defendant has moved this Court to dismiss the State's indictments for insufficient charges under Ohio Criminal Rule 12 on the basis that Oregon Municipal Code §549.18 is unconstitutional on its face, is void for vagueness, conflicts with state law in that it violates Ohio Const. Art. XVIII, §3, and that alleged violation of Ohio Revised Code §2923.12 does not apply to the facts of this case. A hearing on the Defendant's Motion was held on August 18, 2006. Representing the City of Oregon was Prosecutor Thomas A. Dugan. Paul Goldberg, the City of Oregon's Law Director, also participated in oral arguments. Attorney Daniel T. Ellis represented the

Defendant. This opinion took into account the supplemental briefs and oral arguments of both sides.

### **STATEMENT OF FACT**

On May 30, 2006, the Oregon Police Dispatch received a call from the Sunoco Foodmart at 1855 Woodville Rd. in Oregon, Ohio. The witness informed the police dispatch that a subject had entered the Sunoco Foodmart with two pistols on his side in plain view. The witness described the subject as a white male, wearing a white t-shirt and black suspenders. The witness also told the police dispatch that the subject was driving a blue car with white stripes. According to the witness, the subject, after entering the Foodmart, proceeded to wash his vehicle's windows with the weapons still in plain view.

Officers Costanzo and Brown, of the Oregon Police Department, responded to the call. The officers stopped the Defendant in his vehicle in the 1600 block of Woodville Rd. Oregon, Ohio. Due to the fact that the officers knew the Defendant was armed from the dispatch call, the officers conducted a felony stop of the Defendant. The remaining facts are in dispute: the Defendant claims that during the felony stop, he made repeated attempts to inform the police officers that he was a holder of a Concealed Carry permit, as O.R.C. §2923.12 requires. The City of Oregon, disputes the claim of the Defendant and contends that at no point during or after the felony stop, did the Defendant mention his Concealed Carry permit. Accordingly, the Defendant was charged with violating O.R.C. §2923.12, and O.M.C. §549.18.

### **RELEVANT STATUTES**

*Ohio Revised Code §2923.12(B)*: hereafter referred to as O.R.C. §2923.12 or §2923.12

(B) No person who has been issued a license or temporary emergency license to carry a concealed handgun under section 2923.125 [2923.12.5] or 2923.1213 [2923.12.13] of the Revised Code or a license to carry a concealed handgun that was issued by another state with which the attorney general has entered into a reciprocity agreement under section 109.69 of the Revised Code, who is stopped for a law enforcement purpose, and who is carrying a concealed handgun shall fail

to promptly inform any law enforcement officer who approaches the person after the person has been stopped that the person has been issued a license or temporary emergency license to carry a concealed handgun and that the person then is carrying a concealed handgun.

*Oregon Municipal Code §549.18(a)*: hereafter referred to as O.M.C. §549.18 or §549.18

(a) No person, in and about the streets, alleys, public places of the City, or at any place other than the residence or fixed place of business of such person, or while on a suitable firing range or while being used for lawful hunting, or while unloaded at a public firearms display, show, or exhibition shall be in possession of, carry, or have on or about his person, any pistol, revolver, rifle, shotgun or any weapon by whatever name known, which is designed to expel a projectile or projectiles by the action of expanding gases, or any bowie knife, dirk, blackjack, billyclub, brass knuckles or any other weapon capable of inflicting bodily harm. (Ord. 3-1974. Passed 1-14-74.)

### ANALYSIS

The Defendant's motion rests primarily on whether Ohio Revised Code §2923.12 and Oregon Municipal Code §549.18 are constitutional. After a dissertation, including the recognized fundamental right to "bear arms," the Defendant challenged the constitutionality of O.M.C. §549.18 and O.R.C. §2923.12 on several grounds. This opinion will focus on the Defendant's challenge of the Oregon Municipal Ordinance first.

First, the Defendant claims that §549.18 is unconstitutional because it violates Article I §9 of the Ohio Constitution, which prohibits municipal ordinances from being more restrictive than the state law. This Court finds this argument to be unpersuasive. As the prosecution illustrated, many other city ordinances in Ohio restrict the right to openly carry firearms. The prosecution also counters with the notion that §549.18 is not in conflict with the general law of Ohio under the test proscribed in *The Village of Struthers v. Sokol*, 108 Ohio St. 263 (Ohio 1923), which states, "A police ordinance is not in conflict with a general law upon the same subject merely because certain specific acts are declared unlawful by the ordinance, which acts are not referred to in the general law, or because certain specific acts are omitted in the ordinance

but referred to in the general law, or because different penalties are provided for the same acts, even though greater penalties are imposed by the municipal ordinance.”

Second, the Defendant claims that §549.18 is unconstitutional because it is void for vagueness. The test for vagueness is illustrated in *State v. Williams*, 88 Ohio St. 3d 513 (Ohio 2000), in which the Court held that in order to survive a void for vagueness challenge, a law must be worded in a manner that a person of common intelligence is able to determine what conduct is prohibited. In the Defendant’s Motion to Dismiss, the claim is made that §549.18 is vague because, “...it is overly broad in defining what weapons are prohibited so that a reasonable person of ordinary intelligence can not make a determination what conduct is prohibited.” The law must also be worded in such a way that there are sufficient standards to prevent arbitrary and discriminatory enforcement.

The Defendant contends that the language, “...or any other weapon capable of inflicting bodily harm,” renders the ordinance, “incomprehensible on what ‘weapon’ may or may not be in your possession.” At the Motion to Dismiss hearing, the Defendant offered that §549.18 was also vague because the phrase, “...designed to expel a projectile or projectiles by the action of expanding gasses...” could lead to an interpretation that paintball guns, BB guns, “bird bangers” as well as science fair rockets, are prohibited as well as pistols and other firearms, by the ordinance. This Court finds this argument lacking based in part by the prosecution’s argument. The prosecution first reminds this Court that city ordinances have a presumption of validity by virtue of the Ohio Constitution, Article XVIII §3. Second, the prosecution proposes that the Defendant does not have the necessary standing to challenge the two phrases of §549.18 because the Defendant was charged specifically with carrying pistols, and pistols are specifically listed in the ordinance before the phrases in question. This Court, being wary on issuing “advisory opinions,” chooses to withhold judgment as to the constitutionality of the phrases the Defendant

cites and will focus on the fact that §549.18 distinctively prohibits the carrying of pistols, which is what the Defendant was exclusively charged with carrying.

Finally, the prosecution makes the distinction between the act of carrying weapons in a concealed manner, and carrying weapons in an open and notorious manner. The prosecution contends, and this Court agrees, that the Defendant was carrying his pistols in an open and notorious manner. The pertinent issue rests not on whether the Defendant had a Concealed Carry Permit, because the manner in which he was carrying was not concealed. In *Ramsey v. State*, 91 Ala 29, (1890), the Court held that the test for concealment is whether the weapon was discernible by ordinary observation. The Court in *Carr v. State*, 34 Ark 448 (1879), also reinforced the test for concealment, holding that the weapon must be so hidden from general view as to put others off their guard. In *Jones v. State*, 51 Ala 16 (1874), the Court qualified the test for concealment, holding that to be concealed, a weapon must not be invisible from inspection or examination but is sufficient if it is hidden from ordinary observation. The Court held further that “ordinary observation” was to be determined by the trier of fact. Ohio courts also addressed the matter of “ordinary observation”. In the case, *In re Daniels*, 1997 Ohio App. 4277 (Ohio Ct. App. 1997), the Court cited *McFinley v. Bethesda Oak Hosp.*, 79 Ohio App. 3d 613, 618 (1992), which reiterated that it is well-established under Ohio law that the element of concealment does not require that the weapon be completely hidden from view under all conceivable circumstances. However, in the case at hand, the Defendant did not even begin to satisfy the element of concealment beyond ordinary observation. The Defendant’s pistols were clearly visible on his person, and thus the people of Oregon, in his vicinity, were immediately placed on guard.

After reviewing the Oregon Municipal Code as well as the police action taken in the felony stop of the Defendant, the Court is of the opinion that the Oregon Police Department acted in accordance with §549.18 and therefore denies the Defendant's Motion to Dismiss.

The Defendant also challenged the constitutionality of O.R.C. §2923.12. The Court will now address those arguments.

The Defendant argues that §2923.12 does not apply in this case because the Defendant was "openly" carrying the firearms. Also, the Defendant argues that during the stop he made repeated attempts to notify the officers of his concealed carry permit. The police report does state that during the felony stop, the Defendant did yell several non-discernable statements. Finally, the Defendant argues that the police did in fact know of the Defendant's concealed carry permit. According to the Defendant, the mounted police camera captured a scene during the arrest that shows an officer holding the Defendant's concealed carry permit.

The prosecution argues that the procedure described in §2923.12 illustrates that the Defendant is to notify the police at the beginning of the traffic stop, and that at no time, when the Defendant was shouting back at the officers, did he mention his concealed carry permit. Also, the prosecution counters the Defendant's claim by examining the language of §2923.12(B), which requires the Defendant to notify the officer of the concealed carry permit, arguing that the notification requirement was not satisfied by the fact that the officers searched the vehicle and happened to find the Defendant's permit. This Court finds the prosecution's arguments more persuasive.

This Court further finds that since there is a material question of fact pertaining to the notification of the Defendant's Concealed Carry Permit, the Motion to Dismiss is not the proper vehicle to decide this issue and should be decided by the trier of fact.

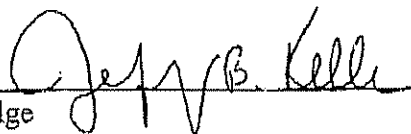
**CONCLUSION**

The City of Oregon, by and through its City Council, enacts legislation for purpose of the welfare and the safety of its citizens. This legislation is then enforced by the Oregon Police Department. The Court must give deference to the policy considerations that the Council has weighed in enacting O.M.C. §549.18. The Defendant contends a fundamental right to bear arms applies in the case at hand. This Court finds Justice Paul Pfeifer, writing for the Ohio Supreme Court, to be more persuasive in his majority opinion in *Klein v. Leis*, 99 Ohio St. 3d 537, 539 (Ohio 2003), in which he said, "Yet, however fundamental and entrenched in the constitutional heritage of our state, the right to bear arms is not absolute. Most, perhaps all, of the rights we hold fundamental have limitations." This Court, in light of the case law and statutes, hereby denies the Defendant's Motion to Dismiss.

**IT IS THEREFORE ORDERED ADJUDGED AND DECREED** that the Defendant's Motion to Dismiss is **DENIED**.

**IT IS SO ORDERED.**

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Judge