

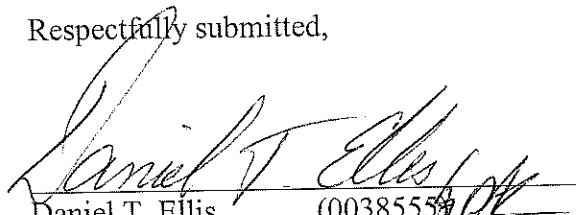
OREGON MUNICIPAL COURT
LUCAS COUNTY, OHIO

City of Oregon	)	Case No. 06CRB00524
)	
Plaintiff,	)	[Hon. Jeffery B. Keller]
)	
v.	)	<u>DEFENDANT'S MOTION TO DISMISS</u>
	)	<u>AND MEMORANDUM IN SUPPORT</u>
Daniel A. Sayers)	
	)	ANSPACH MEEKS ELLENBERGER LLP
Defendant.	)	Daniel T. Ellis (0038555)
	)	Dennis A. Lyle (0025605)
	)	300 Madison Avenue, Suite 1600
	)	Toledo, Ohio 43604-2633
	)	(419) 246-5757
	)	Fax: (419) 321-6979
)	
	)	Counsel for Defendant
	)	Daniel A. Sayers

Defendant Daniel A. Sayers moves this Court to dismiss the State's indictments for insufficient charges under Ohio Crim. Rule 12 on the basis that Oregon Municipal Ordinance 549.18 is unconstitutional on its face, is void for vagueness, conflicts with state law in that violates Ohio Const. art. XVIII, § 3, and that alleged violation of R.C. 2923.12 does not apply to the facts of the case.

A memorandum in support is attached and filed concurrently with this motion.

Respectfully submitted,



Daniel T. Ellis (0038555)
Dennis A. Lyle (0025605)

ANSPACH MEEKS ELLENBERGER LLP
300 Madison Avenue, Suite 1600
Toledo, Ohio 43604-2633
Telephone: (419) 246-5757
Facsimile: (419) 321-6979
E-mail: delis@anspachlaw.com

Counsel for Defendant
Daniel A. Sayers

MEMORANDUM IN SUPPORT

Introduction

A motion to dismiss filed pursuant to Ohio Criminal R. 12 tests the sufficiency of the charging document, without regard to the quantity or quality of evidence which may eventually be produced by the state. *State v. Patterson* (1989) 63 Ohio App.3d 91, 95, 577 N.E.2d 1165, 1167. If a motion to dismiss requires examination of evidence beyond the face of the complaint, it must be presented as a motion for acquittal under Criminal R. 29 at the close of the state's case. *State v. Varner* (1991), 81 Ohio App.3d 85, 86, 610 N.E.2d 476, 477. Therefore, in addressing the defendant's motion to dismiss, the court is limited to determining whether the language within the indictment alleges the offense. *State v. Sears*, 119 Ohio Misc.2d 86, ¶ 6, 2002-Ohio 4225, 774 N.E.2d 357.

Facts

On May 30, 2006, Daniel Sayers entered a Sunoco Foodmart located at 1855 Woodville Road, openly carrying two 380 caliber pistols in holsters on his hips in plain view. After paying for his gas, checking his oil, and washing his automobile's windows, he drove away from the Sunoco Foodmart. While Mr. Sayers was pumping his gas, Oregon police were notified that a man with guns was at the Sunoco Foodmart and were dispatched to investigate.

After leaving the Sunoco Foodmart, Mr. Sayers noticed police approaching from behind with lights and sirens going, so he pulled over in the 1600 block of Woodville Road to permit the police to pass. Mr. Sayers waited for the police to pass only to learn they were pursuing him. The police officers performed a "felony stop" by exiting their police cruisers, pointing their guns at him, instructing him to keep his hands in plain site and exit his vehicle. Mr. Sayers yelled that

he was a concealed carry permit holder and that he did not do anything wrong.¹ The police yelled for him to exit his vehicle.

After the police finally determined that he could not unlock the door and had to release his seatbelt, he was instructed to climb out the window. He climbed out the window and was ordered to lie face down on the ground. The police continued to point their guns at him, approached him and handcuffed him. After handcuffing him, they removed his firearms and placed him in the back seat of the police cruiser.

Law and Discussion

The People of Ohio have a Fundamental Right to Bear Arms Openly for Their Defense and Security

Section 4, Article I of the Ohio Constitution states: “The people have the right to bear arms for their defense and security ...” This clause allows an individual to possess firearms for defense of self and property, and the Ohio Supreme Court has determined that Section 4, Article I of the Ohio Constitution confers upon the people of Ohio the **fundamental right to bear arms.** *Arnold et al. v. City of Cleveland* (1993), 67 Ohio St. 3d 35, 47; 616 N.E. 2d 163; 1993 Ohio LEXIS 1608 (emphasis added).

In order to maintain an orderly and safe society, there must be some limitation on the right to bear arms. In deciding there is no constitutional right to bear “concealed weapons,” the Supreme Court determined that every citizen of Ohio has right to bear arms “openly.” *Klein et al. v. Sheriff, et al.* (2003), 99 Ohio St. 3d 537, 542; 2003 Ohio 4779; 795 N.E. 2d 633; 2003

¹ The police report states; “Due to the potential of weapons in the vehicle we conducted a felony stop. Officer Costanzo told the subject to keep his hands up and exit the vehicle. The subject started yelling back at officer Costanzo, we could not understand him.... As the subject exited the vehicle we were able to see in plain view a black semi automatic pistol in a holster on his right hip. ...”

Ohio LEXIS 2418. In *Klein*, the court upheld several laws that limited the manner in which firearms could be carried. However, the court was clear to say that the right to bear arms is fundamental. *Klein*, 99 Ohio St.3d at ¶ 7. The court upheld these laws because they regulated the manner in which weapons may be carried. *Id.* at ¶ 13. However, the statute in question in *Klein* “leaves open the ability to bear arms by openly carrying a firearm” as the state itself admitted in argument. *Id.* at 42 (J. O’Connor, dissenting). In other words, the state admitted that the restriction on carrying concealed weapons left open the means of carrying firearms openly so that people could exercise their fundamental right to protect themselves by bearing arms. Mr. Sayers, at all times relevant, was exercising his constitutional right to bear arms “openly.”

R.C. 2923.12 (B) Does Not Apply to Openly Carrying a Firearm

After the police removed Mr. Sayers from his automobile at gun point and handcuffed him, he was charged with violating Ohio Revised Code 2923.12 (B):

No person who has been issued a license ... to carry a concealed handgun under section 2923.125 ... 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 ... to carry a concealed handgun and that the **person then is carrying a concealed handgun.** (emphasis added)

The Oregon police initiated a “felony stop” because the police were sent to investigate an individual who was openly carrying firearms at the Sunoco Foodmart. The complaint filed against Mr. Sayers clearly states that he was “carrying two clearly visible handguns on his person in plain view.” In other words, Mr. Sayers was exercising a fundamental constitutional right to bear arms openly. R.C. 2923.12 is part of the comprehensive regulation of the manner in which an Ohio citizen may carry a firearm concealed. It has no application to an individual who is openly carrying a firearm and requires a dismissal of this charge.

R.C. 2923.12 (B) is Unconstitutional, if Applied to a “Felony Stop”

A “felony stop” occurs when the police issue orders to the subject to exit his vehicle at gun point. *State of Ohio v. Carter et al.* (1994), 69 Ohio St. 3d 57, 60, 630 N.E. 2d 355, 359. Mr. Sayers was required to “comply with any lawful order or direction of any police officer invested with authority to direct, control, or regulate traffic.” R.C. 2921.331(A). His failure to do so is a misdemeanor of the first degree. R.C. 2921.331(2). After the police officers “seized” Mr. Sayers at gunpoint, he was required to follow and comply with all lawful orders given by the police. When faced with the competing obligations of “complying with any lawful order” and “promptly informing police he is licensed to carry a concealed firearm and he is carrying a firearm,” Mr. Sayers had no choice but to follow all lawful orders of the police.² To do otherwise would have risked being shot or face prosecution for a more serious charge.

Moreover, the requirement to “inform” the police that he is licensed to carry a concealed firearm and he is carrying a firearm or face prosecution is unconstitutionally void for vagueness given the competing requirements to comply with the police officers’ orders and inform them he is a licensed to carry a concealed firearm. There is no dispute that within minutes of pulling Mr. Sayers out of his car at gunpoint the police knew he was licensed to carry a concealed firearm.

Oregon Municipal Ordinance 549.18 violates Ohio Constitution Art. I, §4, and is Unconstitutional

After consulting with the Oregon prosecutor, Mr. Sayers was later charged with violating Oregon Municipal Code 549.18:

² Mr. Sayers will testify that he informed police he was licensed to carry a concealed firearm while he was still in his automobile. The police appear not have heard him, but were again informed before they placed him in the backseat of the police cruiser.

No person, in and about the streets, alleys, public places of the City, ... 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.

O.M.C. 548.18 bans the carrying and possession of all of firearms within the City limits of Oregon whether in the trunk of your automobile or on your person. Mr. Sayers has a fundamental constitutional right to possess and bear arms for his personal protection and security. The law on this matter is well settled – people have the right to carry firearms openly, but courts will uphold some restrictions if they affect only a class of firearms or a manner in which firearms may be carried. For example, in *Arnold*, the court upheld a law forbidding assault rifles from entering the City of Cleveland. The statute in question was a Cleveland City Ordinance which banned the possession and sale of assault rifles. *Arnold*, 67 Ohio St.3d at 38. In this case, the statute in question bans **all** firearms and weapons from the City of Oregon. The Ohio Supreme Court noted this distinction in *Arnold* when it said “the ordinance at issue affects a class of firearms. Clearly, **the city would have exceeded its authority** under Section 3, Article XVIII, and would have violated Section 4 Article I **if it had banned all firearms.**” *Id.* at 49 (emphasis added). O.M.C. 549.18 bans all firearms and weapons, and unconstitutionally conflicts with Section 4, Article I of the Ohio Constitution by exceeding its authority under Section 3, Article XVIII. Consequently, this Court must hold Oregon Municipal Ordinance 549.18 unconstitutional.

Oregon Ordinance 549.18 violates Ohio Constitution Art. XVIII, § 3.

Oregon Ordinance 549.18 is also unconstitutional because it directly conflicts with state law. Under R.C. 2923.125, people in the state of Ohio may obtain a license to carry concealed weapons if they meet the requirements to obtain such a license. Defendant, at the time of the incident, possessed such a license. Oregon Ordinance 549.18, however, directly conflicts with R.C. 2923.125 because those properly licensed under R.C. 2923.125 may still be arrested within Oregon for violating 549.18. Section 3, Article XVIII of the Ohio Constitution (the Home Rule Amendment) states “municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, **as are not in conflict with general laws.**”

To determine whether a conflict exists with general laws for Home Rule analysis, the following test must be met:

- A. Is the statute a general law?
 - 1) “The words ‘general laws’ as set forth in Section 3 of Article XVIII of the Ohio Constitution means statutes setting forth police, sanitary or other similar regulations and not statutes which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations;”
 - 2) That it is part of a state-wide and comprehensive legislative enactment;
 - 3) That it operates and applies uniformly throughout the state;
 - 4) And that it prescribes a rule of conduct upon citizens generally.

Village of West Jefferson v. Robinson (1965), 1 Ohio St.2d 113, 118, 205 N.E.2d 382, 386; *City of Canton v. State* (2002), 95 Ohio St. 3d 149, 154; 2002 Ohio 2005, ¶21.

- B. Is the ordinance an exercise of police power?
- C. Is the ordinance in conflict with the statute?

If you answer yes to A, B, and C, then the local ordinance will be found in conflict and found unconstitutional. Thus, when an ordinance is in conflict with a general law of the State, the State law overrides the conflicting municipal ordinance. *Ohio Ass'n of Private Detective Agencies v. North Olmsted* (1992), 65 Ohio St. 3d. 242; *Dayton v. State*, 2004-Ohio-3141.

R.C. 2923.12 meets all of the requirements of a general law and O.M.C. 549.18 conflicts with it. R.C. 2923.12 is part of a comprehensive statewide licensing scheme to authorize the manner concealed weapons may be carried in Ohio and ensures that the regulations are uniformly applied and enforced. The Ohio Supreme Court has upheld statewide and comprehensive legislative enactments as general laws under the home rule amendment even if they prohibit municipalities from enacting conflicting laws. *State ex rel. McElroy v. Akron* (1962), 173 Ohio St. 189; *Ohio Ass'n of Private Detective Agencies v. North Olmsted* (1992), 65 Ohio St.3d 242; *Clermont Envil. Reclamation v. Wiederhold* (1982), 2 Ohio St.3d 44.

In this case, the state's concealed carry law and the constitutional right to carry a firearm openly, directly conflicts with the Oregon Ordinance. Furthermore, the state legislature clearly stated its intent to enact comprehensive legislation to ensure uniformity throughout the State in the bill in which Ohio created its concealed carry law. Section 9 of Ohio House Bill 12 (125th General Assembly) states "the General Assembly finds that licenses to carry concealed handguns are a matter of statewide concern and wishes to ensure uniformity throughout the state." Clearly,

the General Assembly intended R.C. 2923.12 to be a general law. Since Oregon Ordinance 549.18 does not permit a firearm to be carried concealed, as the General Assembly intended,” Oregon Municipal Ordinance 549.18 is unconstitutional in that it is an exercise of police power, it directly conflicts with R.C. 2923.12, and R.C. 2923.12 is a general law.

Oregon Municipal Ordinance 549.18 is Void for Vagueness

Oregon Municipal Ordinance 548.18 is also unconstitutional and void for vagueness 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. O.M.C. 549.18 states:

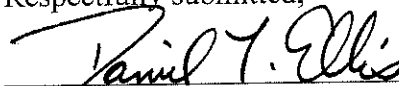
No person, in and about the streets, alleys, public places of the City, ... shall be in possession of, carry, or have on or about his person, any pistol, revolver, rifle, shotgun or any weapon by whatever name known, which is designed to expel a projectile, or projectiles by the action of expanding gases, or any bowie knife, dirk, blackjack, billyclub, brass knuckles or **any other weapon capable of inflicting bodily harm.** (Emphasis added)

This definition including “any other weapon capable of inflicting bodily harm” renders the ordinance incomprehensible on what “weapon” may or may not be in your possession. For example, is an individual precluded from carrying a baseball bat, knitting needles, a blank or B.B. gun, a sling shot, a pocket knife or a hockey stick? Any item capable of inflicting bodily harm

could be considered prohibited under this definition. Consequently, Oregon Municipal Ordinance 549.18 should be found unconstitutional for three reasons: (1) it violates defendant's fundamental right to carry a firearm openly for his defense and security; (2) it violates the Ohio Home Rule because it directly conflicts with R.C. 2923.12, a general law of the State; and (3) it is void for vagueness.

WHEREFORE, Defendant requests that Oregon Municipal Ordinance 549.18 be held unconstitutional and unenforceable; that R.C. 2923.12 is not applicable when an individual is openly carrying a firearm; that R.C. 2923.12 does not apply and is unconstitutional when a "felony stop" occurs; that all charges against Mr. Sayers be dismissed, and all of his personal property be immediately returned to him. A proposed Order is submitted herewith for the Court's convenience.

Respectfully submitted,



Daniel T. Ellis (0038555)

ANSPACH MEEKS ELLENBERGER LLP
300 Madison Avenue, Suite 1600
Toledo, Ohio 43604-2633
(419) 246-5757
Fax: (419) 321-6979

Counsel for Defendant
Daniel A. Sayers

OREGON MUNICIPAL COURT
LUCAS COUNTY, OHIO

City of Oregon	)	Case No. 06CRB00524
)	
Plaintiff,	)	[Hon. Jeffery B. Keller]
)	
v.	)	ORDER
)	
Daniel A. Sayers)	
)	
Defendant.)	

This matter is before the Court on Defendant's Motion to Dismiss the instant action with prejudice. The Court being advised in the premise finds the Motion well taken and that it should be granted, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that Oregon Municipal Ordinance 549.18 is unconstitutional and unenforceable;

IT IS ORDERED, ADJUDGED AND DECREED that R.C. 2923.12 does not apply to an individual exercising his fundamental constitutional right to bear arms by openly carrying his firearm;

IT IS ORDERED, ADJUDGED AND DECREED that R.C. 2923.12 does not apply when a "felony stop" occurs;

IT IS ORDERED, ADJUDGED AND DECREED that R.C. 2923.12 is unconstitutional void for vagueness when a "felony stop" occurs;

IT IS ORDERED, ADJUDGED AND DECREED that all charges against Mr. Sayers are dismissed;

IT IS ORDERED, ADJUDGED AND DECREED that all personal property belonging to Mr. Sayers in the possession of the Oregon Police or prosecutor is to be immediately returned to him; and

IT IS ORDERED, ADJUDGED AND DECREED that the instant action is dismissed with prejudice.

Date

Judge