

In the
Supreme Court of Ohio

CITY OF CLYDE,	:	Case No. 2007-0960
	:	
Defendant-Appellant,	:	On Appeal from the
	:	Sandusky County
v.	:	Court of Appeals,
	:	Sixth Appellate District
OHIOANS FOR CONCEALED CARRY, INC.,	:	
	:	Court of Appeals
Plaintiff-Appellee.	:	Case Nos. S-06-039 S-06-040

**MEMORANDUM IN RESPONSE OF APPELLEE
OHIO ATTORNEY GENERAL MARC DANN**

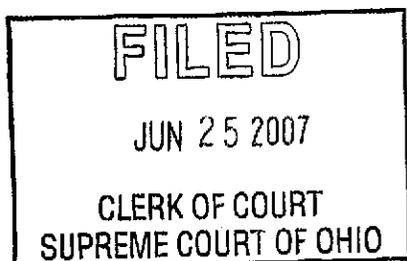
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INTRODUCTION

Although the Sixth District correctly decided this case below, Intervenor-Appellee Ohio Attorney General Marc Dann agrees with Appellant City of Clyde that the Court should accept jurisdiction. By accepting jurisdiction, the Court can resolve statewide a question that has been, and continues to be, an important statewide concern. At issue is the constitutionality of concealed carry legislation that provides properly licensed carriers of concealed handguns in Ohio with a uniform set of statewide regulations. The City of Clyde has passed a local ordinance that attempts to restrict concealed carry in city parks, in conflict with the uniform state regulation.

The issue here is not the wisdom of the specific legislative choices built into the state law or into the conflicting City of Clyde ordinance at issue. Rather, the issue is whether the General Assembly made a constitutionally legitimate choice when it decided to have a comprehensive statewide scheme—and the answer to that question is yes. Equally significantly, the Court should exercise jurisdiction over this matter because of its overriding importance and the need for the cities, the State, and Ohio citizens, to have a clear direction on this issue.

The confusion caused by ordinances that conflict with the statewide concealed carry law takes several forms, and each one is a strong reason to review the case. First, as a practical matter, complying with conflicting municipal regulations is incredibly difficult, if not near-impossible, for a law-abiding citizen with a concealed-carry license. Some Ohio municipalities are just a few blocks long, and a person taking a long walk could easily pass through several jurisdictions. Second, because of this reality, the only way a citizen could safely avoid liability is to leave her guns at home—thus directly undercutting the General Assembly's policy choice. Third, the importance of this issue extends beyond guns, as this is a *licensing* law, and whether allowing cities to trump State law in this area has potentially broad implications in other licensing areas.

By exercising the State's police powers, the General Assembly sought to avoid exactly what the Clyde ordinance represents—a municipal law that seeks to restrict the statewide right to carry a concealed handgun, opening the door to a confusing patchwork municipal regulation around the entire State. Specifically, Ohio's concealed carry law is a comprehensive legislative enactment that limits the restrictions placed on all Ohioans who are licensed to carry concealed handguns solely to state and federal law. By avoiding piecemeal local regulation, Ohio's concealed carry law specifically informs citizens of their rights, where they can exercise their rights, and where and how they can be punished if they do not follow the law throughout Ohio.

The Sixth District Court of Appeal's decision sought to avoid such uncertainty in this case when it agreed with the State and expressly upheld Ohio's concealed carry law. In particular, the Sixth District found that the law precludes the City of Clyde from regulating the licensing and carrying of concealed handguns. However, the Sixth District's ruling does not, of course, provide a conclusive statewide answer on the scope of the General Assembly's authority to expressly preclude local regulation when it comes to licensing and carrying concealed handguns. Therefore, by accepting jurisdiction over this case, the Court can provide to Ohio's concealed carriers a well-needed final resolution of their rights under the law. Further, the Court can further guide the lower courts on how to analyze home rule issues, which continue to arise in the lower courts.

STATEMENT OF THE CASE AND FACTS

A. The General Assembly passed the concealed carry law to regulate the carrying and licensing of concealed handguns in Ohio.

The General Assembly designed the concealed carry law to regulate the entire arena of concealed carry in Ohio. Effective on April 8, 2004, the law allows citizens with proper firearms safety training to apply with their county sheriff, or a sheriff of an adjacent county, for a license

to carry a concealed handgun. Under the law, a person licensed to carry a concealed handgun under R.C. 2923.125 or R.C. 2923.13 may carry a concealed handgun statewide, unless she knowingly is in a location prohibited by the law. *Id.* Such locations include school safety zones, courthouses, open air arenas where liquor is served, child care centers, anywhere that federal law prohibits carrying handguns, and other specified places. See R.C. 2923.126(B)(1)-(10). The law also allows private landowners to bar people from carrying firearms or concealed firearms on their property, as long as they post a sign in a conspicuous location. R.C. 2923.126(C)(3). A violation of these provisions can range from a first degree misdemeanor to a fifth degree felony, depending on location. See R.C. 2923.12(G)(1).¹

The General Assembly intended this comprehensive scheme to apply uniformly statewide, and it expressly stated that intent in Section 9 of H.B. 12, the bill enacting the law:

Section 9. The General Assembly finds that *licenses to carry concealed handguns are a matter of statewide concern and wishes to ensure uniformity throughout the state* regarding the qualifications for a person to hold a license to carry a concealed handgun and the authority granted to a person holding a license of that nature. It is the intent of the General Assembly in amending sections 1547.69, 2911.21, 2921.13, 2923.12, 2923.121, 2923.123, 2923.16, 2953.32, and 4749.10 and enacting sections 109.69, 109.731, 311.41, 311.42, and 2923.124 to 2923.1213 of the Ohio Revised Code to enact laws of a general nature, and, by enacting those laws of a general nature, the state occupies and preempts the field of issuing licenses to carry a concealed handgun and the validity of licenses of that nature. *No municipal corporation may adopt or continue in existence any ordinance, and no township may adopt or continue in existence any resolution, that is in conflict with those sections, including, but not limited to, any ordinance or resolution that attempts to restrict the places where a person possessing a valid license to carry a concealed handgun may carry a handgun concealed.*

¹ The concealed carry law also regulates how a handgun may be transported in a motor vehicle, and it creates duties for the Ohio Attorney General, the Bureau of Criminal Identification and Investigation, the Office of Criminal Justice Services and the Ohio Peace Officer Training Commission. R.C. 2923.16(B)-(C), (E); R.C. 2923.126(C)(3).

(Emphasis added). As the emphasized parts show, the General Assembly specifically intended to preclude local regulation regarding concealed carry, and even more specifically, the Assembly meant to preclude local regulations regarding the places where a licensee can carry her gun.

In addition, on December 12, 2006, the General Assembly passed Substitute House Bill 347, which amended R.C. 2923.126 and enacted R.C. 9.68, both of which became effective on March 14, 2007. The text of R.C. 9.68(A) is straightforward and expresses the General Assembly's intent that the concealed carry law is a general law:

The individual right to keep and bear arms, being a fundamental individual right that predates the United States Constitution and Ohio Constitution, and being a constitutionally protected right in every part of Ohio, the general assembly finds the need to provide uniform laws throughout the state regulating the ownership, possession, purchase, other acquisition, transport, storage, carrying, sale, or other transfer of firearms, their components, and their ammunition. *Except as specifically provided by the United States Constitution, Ohio Constitution, state law, or federal law, a person, without further license, permission, restriction, delay, or process, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition.*

(Emphasis added).

B. The City of Clyde's ordinance bars concealed carry in parks, and the Court below held that it is pre-empted by Ohio law.

Clyde enacted Ordinance 2004-41 on May 18, 2004, shortly after the General Assembly passed H.B. 12. The ordinance prohibits carrying handguns within any city park, even for a person who properly has a state license for a concealed handgun. The penalty for a violation of Ordinance 2004-41 is a first degree misdemeanor.

Shortly after its enactment, Appellee Ohioans for Concealed Carry ("OCC") filed a complaint in the Sandusky Court of Common Pleas seeking injunctive and declaratory relief from the Ordinance. OCC claimed that the Ordinance invalidly conflicts with Ohio's general concealed carry laws. Specifically, it asserted that the Ordinance was invalid on its face as an

exercise in police power that conflicts with the general law. The trial court granted a preliminary injunction prohibiting the enforcement of the Ordinance pending a hearing.

Meanwhile, on September 1, 2006, the Sixth District Court of Appeals decided *City of Toledo v. Beatty*, 2006-Ohio-4638, which involved an ordinance with a similar effect as Clyde's. The *Beatty* Court held that Ohio's concealed carry laws were not "general," in reliance on the analysis in *Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005. The Court of Appeals upheld the Toledo ordinance, and this Court denied jurisdiction for a further appeal.

The trial court in this case granted summary judgment for Clyde on the controlling precedent of *Beatty*. However, by the parties' agreement, the Ordinance has remained unenforced pending appeal.

While the appeal was pending in the Sixth District, the General Assembly passed H.B. 347, as explained above. The Sixth District held that the new enactment, and specifically, R.C. 9.68, indicated the General Assembly's intent that concealed carry laws have general and uniform operation throughout the State of Ohio. The court below therefore reversed the trial court and held that the Ordinance was pre-empted by Ohio law.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

The Court should review this case because, even though the Sixth District's decision was correct, it applies to only part of Ohio, and only this Court can resolve the issue for the whole State. For several years, litigation has been ongoing on the validity of Ohio's concealed carry law. *City of Toledo v. Beatty*, 169 Ohio App.3d 502, 2006-Ohio-4638 (superseded by R.C. 9.68); *City of Cleveland v. State of Ohio*, Case No. Cuyahoga Cty. C.P., CV-07-618492 (challenging the constitutionality of R.C. 9.68). Unless the Court accepts jurisdiction over the case, properly licensed carriers of concealed handguns outside of the Sixth District will continue to be uncertain

as to their rights under the law. In addition, misinterpretation of the issue by cities and the lower courts may also threaten the statewide application of other licensing laws.²

A. Cities outside the Sixth District may continue to pass restrictive ordinances that undercut the State’s concealed carry law, creating confusion for citizens.

Unless this Court takes this case and affirm the Sixth District’s correct ruling, municipalities outside the Sixth District may disregard the General Assembly and pass restrictive local regulations. Without this Court’s input, the General Assembly’s intent—i.e., to avoid a confusing patchwork of concealed carry regulations throughout Ohio—will be thwarted. Outside the Sixth District, neither cities nor citizens know whether to rely on the ruling below, and that creates several layers of uncertainty. The State faces uncertainty about whether its chosen policy can be completely undercut. The cities do not know what they can and cannot do. And, most problematically, citizens who have validly satisfied State law will not know whether a short walk into another jurisdiction will trigger an arrest under a local law. In other areas of law, the fact that adjoining municipalities have differing regulations may not be troublesome because those laws regulate what a person may do in a fixed location. But the idea of concealed carry is to *carry*. Thus, for example a jogger carrying a gun for protection would have to be worried about being arrested, as well about being mugged, if her route traversed municipal boundaries. The Court should review this case to eliminate the uncertainty.

² This case originally addressed the conflict between former R.C. 2923.126 and the City of Clyde’s ordinance. During the appeal, the General Assembly enacted H.B. 347. The Sixth District appropriately applied the newly-enacted R.C. 9.68 to invalidate the ordinance. As the challenge here is facial and not as-applied, this Court should also analyze the concealed carry law as it now exists. See also *Diffenderfer et al. v. Central Baptist Church of Miami, Florida, Inc.*, 404 U.S. 412 (1972) (when law changes during pendency of a constitutional challenge, court should consider the law as it stands at the time of decision, not as it was originally).

B. Courts throughout Ohio need guidance as to this Court's home rule jurisprudence in the context of licensure schemes.

Also, the Court's home-rule analysis should be confirmed and clarified. The Court has already held that the State has police power regarding the manner in which concealed carry is allowed. See *Klein v. Leis* (2003), 99 Ohio St.3d 537, 2003-Ohio-4779, citing *State v. Nieto* (1920), 101 Ohio St. 409, 413. Earlier, the Court harmonized the State's police power with the home rule amendment as follows: "[t]he city may exercise the police power within its borders, but the general laws of the state are supreme in the exercise of the police power, regardless of whether the matter is one which might also properly be a subject of municipal legislation. Where there is a direct conflict, the state regulation prevails." *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 90 (quoting *Canton v. Whitman* (1975), 44 Ohio St.2d 62, 66).

The Court should use this opportunity to combine these holdings in the narrow concealed-carry context, as well as the broader licensure context. The Sixth District originally misinterpreted the Court's home-rule jurisprudence in *Beatty*, and without this Court's intervention, other districts may do so in the future. This would undermine not only the concealed carry law, but would also affect the validity of other State *licensing* schemes. The State grants licenses, after qualifications are met, and then tells licensees what they can and cannot do. And the Court has already held that local laws cannot add to licensing schemes. For example, in *Ohio Ass'n of Private Detective Agencies v. North Olmsted* (1992), 65 Ohio St.3d 242, the Court held that a municipality cannot add requirements to the statewide licensing of private detectives. In *State ex rel. McElroy*, 173 Ohio St. 189, the Court found that boat licensing is a matter of statewide concern, and the right of the state to extend its control over licensing the use of watercraft is based in the police power for the preservation of public safety and welfare.

See also *Anderson v. Brown* (1968), 13 Ohio St.2d 53 (statewide licensing of trailer parks trumped local ordinance requiring extra license).

Thus, the Court should take this case to ensure that the courts below understand its home rule jurisprudence with regard to all State licensing laws.

ARGUMENT

Appellee Ohio Attorney General's Proposition of Law:

*Ohio's concealed carry law, R.C. 2923.126, is a general law that is part of a statewide and comprehensive legislative enactment and overrides any conflicting local ordinance.*³

Under Section 3, Article XVIII of the Ohio Constitution ("Ohio's Home Rule Amendment"), state statutes control over all conflicting local regulation if they are general laws.

A statute is a general law for purposes of home rule analysis if the statute:

1. is part of a statewide and comprehensive legislative enactment,
2. applies to all parts of the state alike and operates uniformly throughout the state,
3. sets forth police, sanitary, or similar regulations, and
4. prescribes a rule of conduct upon citizens generally.

City of Canton v. State (2002), 95 Ohio St.3d 149, 154; 2002-Ohio-2005, ¶ 21. Thus, when an ordinance conflicts with a general law of the State, the state law overrides the conflicting ordinance. *Am. Financial Servs. Ass'n v. City of Cleveland*, 112 Ohio St.3d 170, 2006-Ohio-6043, ¶ 23; *Ohio Ass'n of Private Detective Agencies v. North Olmsted* (1992), 65 Ohio St.3d 242.

Although the City of Clyde insists that Ohio's concealed carry law is invalid, as it argues that the City's home rule powers allow it to trump the State law here, the City is wrong. Applying the four-part test set forth in *Canton*, Ohio's concealed carry law is a general law that overrides the City of Clyde's home rule authority.

³ This is a rewording of Appellant's Proposition of Law, which says "Revised Code Section 2923.126 is not a general law." See City of Clyde Memorandum at 6.

A. Ohio's concealed carry law is a statewide and comprehensive legislative enactment that regulates the carrying of a concealed handgun.

Because Ohio's concealed carry law involves a comprehensive legislative enactment that regulates the licensing and carrying of a concealed weapon and ensures that the regulations are uniformly applied and enforced, the law is a part of a statewide and comprehensive legislative enactment. The 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. *Am. Financial Servs Ass'n*, 2006-Ohio-6043, ¶ 23 (upholding statewide consumer mortgage lending scheme that precluded local regulation); see also *State ex rel. McElroy v. Akron* (1962), 173 Ohio St. 189 (upholding statewide licensing scheme for watercraft); *Ohio Ass'n of Private Detective Agencies*, 65 Ohio St.3d 242 (upholding statewide licensing scheme for regulation of security personnel); *Clermont Envtl. Reclamation v. Wiederhold* (1982), 2 Ohio St.3d 44, 48 (upholding statute that forbade any additional zoning or other approval for construction or operation of a hazardous waste facilities); *Decertification of Eastlake v. Ohio Bd. of Building Standards* (1981), 66 Ohio St.2d 363, 368, (statute prohibiting political subdivisions from placing requirements conflicting with the statute establishing a one-step approval process for industrialized units throughout the State of Ohio is a general law); *City of Westlake v. Mascot Petroleum Co., Inc.* (1991), 61 Ohio St.3d 161 (State also has the exclusive authority to regulate the sale and consumption of alcoholic beverages) and *State ex rel. Adkins v. Sobb* (1986), 26 Ohio St.3d 46, and *State ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88 (only State law governs public employees' vacation credits); *City of Kettering v. State Employment Relations Bd.* (1986), 26 Ohio St.3d 50, 54 (State exclusively regulates collective bargaining by public employees); *Automatic Refreshment Service, Inc. v. City of Cincinnati* (Hamilton Cty. 1993), 92 Ohio App.3d 284 (placement of tobacco vending machines controlled by state law);

Families Against Reily/Morgan Sites v. Butler Cty. Bd. Of Zoning Appeals (Butler Cty. 1989), 56 Ohio App.3d 90, 96 (water and sewage control of industrial facilities is so heavily State-regulated that any local action conflicts with general law); *Reading v. Pub. Util. Comm.*, 109 Ohio St.3d 193, 2006-Ohio-2181 (closing of railroad crossings controlled by state law).

Ohio's concealed carry law, as enacted by H.B. 12 and later amended in H.B. 347, is a statewide and comprehensive legislative enactment. Ohio's concealed carry laws, as a whole, regulate the licensing and carrying of a concealed handgun throughout the State of Ohio; therefore, the first prong of the general law test is satisfied.

B. Ohio's concealed carry law applies to all parts of the State alike and operates uniformly throughout the State.

Ohio's concealed carry law regulates all parts of the State alike, and thus operates uniformly. For example, the law creates a standard license to carry a concealed handgun in Ohio, and creates requirements for applying for a license that must be submitted to the sheriff of the county in which the person resides or the sheriff of any county adjacent to the county in which the person resides. R.C. 2923.125. Also, the law prohibits the carrying of a concealed weapon, even with a license, in certain locations throughout the State. R.C. 2923.126(B)(1)-(10).

Ohio's concealed carry law is neither unreasonable nor arbitrary. The City of Clyde argues that R.C. 2923.126(C), the sign provision, is not a general law because, as the *Beatty* Court reasoned, it arbitrarily allows private land owners to decide whether or not they would permit concealed carry upon their premises. But the law does not make an arbitrary distinction between private land owners and other entities—the law applies uniformly to similarly situated private land owners. The General Assembly made the policy decision to require private landowners to post signs if they choose to restrict concealed carry on their property. Furthermore, a law need not apply to every person identically in every situation to have uniform operation. The General

Assembly may treat individuals differently from municipalities, as long as all individuals are treated the same and all municipalities are treated the same.

Finally, the law does not strike at what this Court termed the “heart of municipal home rule: the orderly planning of a city” through its zoning regulations. *City of Canton*, 2002-Ohio-2005, ¶ 38. The law has nothing to do with zoning regulations or city planning. Rather, the General Assembly has acted within its police powers to pass a general law that operates throughout Ohio.

Thus, Ohio’s concealed carry law does not arbitrarily or unreasonably discriminate among localities and has uniform operation as to those similarly situated across the State of Ohio. The regulations operate uniformly in every political subdivision and upon every individual in the State, thereby satisfying the second prong of the general law test.

C. Ohio’s concealed carry law sets forth state police regulations and is not unconstitutional merely because it prohibits local regulation.

As explained above, a statutory scheme regulating the manner in which weapons can be carried involves the police power of the State. *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, ¶ 13. Ohio’s concealed carry law establishes the statewide regulation of licensing and carrying a concealed handgun in the State of Ohio.

Furthermore, Ohio’s concealed carry law does not solely grant or limit legislative power. Instead, the law is part of a comprehensive legislative enactment that serves the overriding state interest in regulating the carrying of a concealed handgun. In determining whether a statute purports only to grant or limit municipal legislative power, the Court must look at the scheme as a whole, not a statute in isolation. *Clermont*, 2 Ohio St.3d at 48; *Ohio Ass’n of Private Detective Agencies*, 65 Ohio St.3d at 245.

Citing *Clermont*, the Court has recently stated that statutes limiting municipal authority are general laws if they regulate matters “‘for the protection of the lives of the people of the whole state’ and have ‘no special relation to any of the political subdivisions of the state.’” *City of Canton*, 95 Ohio St.3d at 157, quoting *Clermont*, 2 Ohio St.3d at 48. This case is no different. Instead of leaving citizens to guess at the various municipal procedures for licensing and carrying a concealed handgun across the State, Ohio now comprehensively regulates the licensing and carrying of concealed handguns for the entire State. Most importantly, the law ensures that citizens who are licensed to carry a concealed weapon under Ohio law are familiar with the statewide laws and will, therefore, be more likely to act in accordance with them. Thus, the concealed carry law is the exact type of state police regulation that can and should override a municipal ordinance, because it ensures that citizens properly licensed under Ohio law know where they can or cannot carry a concealed handgun. Thus, the third prong of the general law test is satisfied.

D. Ohio’s concealed carry law prescribes a rule of conduct upon citizens generally.

Ohio’s concealed carry law satisfies the final prong of the general law test because it prescribes a rule of conduct on citizens generally. All citizens benefit from the protections afforded under the law, because all citizens are informed about where a concealed weapon can and cannot be carried. The state statutes prescribe a rule of conduct on properly licensed carriers by prohibiting the carrying of a concealed weapon only in certain locations. Indeed, the State’s concealed carry law prescribes a rule of conduct upon citizens generally, just as the statutes in *Ohio Ass’n of Private Detective Agencies*, *McElroy*, and *Eastlake* each prescribed a rule of conduct on citizens generally.

By establishing a comprehensive regulatory enactment regarding the carrying of a concealed handgun, the law prescribes a rule of conduct upon citizens generally, and the fourth

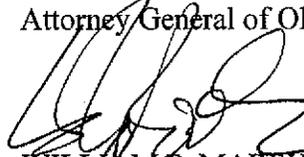
and final prong of the general law test is satisfied. Thus, Revised Code Section 2923.126 is a general law that overrides a conflicting ordinance.

CONCLUSION

For the reasons explained above, the Court should grant discretionary review in this case.

Respectfully submitted,

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