

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

SEAN SHOVER,
Defendant-Appellant,

CASE NO. 14-0345

ON APPEAL FROM THE
SUMMIT COUNTY COURT OF APPEALS,
NINTH APPELLATE DISTRICT

COURT OF APPEALS
CASE NO.: CA-26800

MEMORANDUM IN SUPPORT OF JURISDICTION
OF SEAN SHOVER

Neil P. Agarwal, Esq.
(0065921)
Counsel for Appellant, Sean Shover
3766 Fishcreek Rd., #289
Stow, Ohio 44224-4379
(330) 554-7700 Phone
(330) 688-2268 Fax
Neil@AgarwalLaw.com

Heaven R. Dimartino, Esq.
(0073423)
Counsel for Appellee, State of Ohio
53 University Ave.
Akron, Ohio 44308
(330) 643-7459 Phone
(330) 643-2137 Fax
dimartino@prosecutor.summitoh.net

RECEIVED
MAR 07 2014
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
MAR 07 2014
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....1

STATEMENT OF THE CASE AND FACTS.....

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW I: The reach and protection of the U.S. Const.’s Second Amendment “the rights of the People to keep and bear Arms” applies outside the home.....

PROPOSITION OF LAW II: Improperly handling firearms in a motor vehicle under R.C. 2923.16(B) is unconstitutional under the U.S. Const. Second Amendment.....

PROPOSITION OF LAW III: Improperly handling firearms in a motor vehicle under R.C. 2923.16(B) is unconstitutional under Art. I, §4 of the Ohio Const.....

CONCLUSION.....

CERTIFICATE OF SERVICE.....

APPENDIX

State v. Shover, Summit County Court of Appeals
Case No. 26800, Decision and Journal Entry, (February 5, 2014)..... A-1

EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Sean Shover responded to a call from his brother at night that the brother was being held hostage by drug dealers in the south Akron, Ohio. Knowing that his brother had been shot previously in a similar situation, Shover and his father proceeded to help his brother, and brought a loaded gun along for their protection. Based upon his actions in trying to protect his brother and himself, Shover was convicted of improperly handling firearms in a motor vehicle, R.C. 2923.16(B).

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the United States Supreme Court declined to fully define the scope of the right to keep and bear arms and the standard of review that must be applied to laws burdening the right, leaving the lower courts to fill these voids. A definitive split among the federal and state courts has developed regarding both the scope of the right and the analytical framework that must be applied if the Second Amendment is implicated. This Court should grant jurisdiction in this case to provide guidance in this developing area of law regarding a fundamental right of United States citizens.

The court below asserted that it would assume, for sake of argument that the Second Amendment might apply to conduct outside the home. Applying what it termed “intermediate scrutiny,” the court then presumed that the state legislature had some legitimate reason for enacting the restriction at issue. Review by this Court is necessary to settle the conflict between the 9th District Court of Appeals and the various other federal and state court decisions regarding the right of citizens to both keep and bear arms for the purpose of self-defense outside the confines of the home.

Finally, this Court should re-examine its prior decisions in *Arnold v. Cleveland*, 67 Ohio St.3d 35, 47, 616 N.E.2d 163 (1993), and *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795

N.E.2d 633, in determining what level of protection is provided by Art. I, §4 of the Ohio Constitution, which provides that the people have the right to bear arms for their defense and security. These decisions are now in doubt based upon the United States Supreme Court's interpretation of the Second Amendment, which emphasis a right of self-defense in the keeping and bearing of Arms.

STATEMENT OF THE CASE AND FACTS

Mr. Shover's father received a call from Mr. Shover's brother, who said that he owed a man \$20 and that the man had a gun. Mr. Shover and his father drove to Akron to give Mr. Shover's brother the money. As Mr. Shover's brother had been shot before, Mr. Shover's father brought a loaded gun along for protection. The two men arrived at a gas station, and Mr. Shover's brother entered the back seat of the car. Police, responding to a reported kidnapping, surrounded the vehicle and ordered the men out. After the men had exited the vehicle, one of the officers saw the gun between the seats of the car, and Mr. Shover, his father, and his brother were arrested.

State v. Shover, 9th Dist. No. 25944, 2012-Ohio-3788, ¶2.

Shover was charged and the case proceeded to jury trial, where he was found guilty of improperly handling firearms in a motor vehicle, R.C. 2923.16(B), F-4. On August 22, 2012, the Ninth District Court of Appeals reversed the trial court's denial of Shover's motion to dismiss and remanded for the trial court to determine whether the Second Amendment's right to bear arms applied in this case, and, if it did, then the trial court should consider and apply the appropriate level of scrutiny to R.C. 2923.16(B) to determine whether the statute violated Shover's Second Amendment rights. *State v. Shover*, 9th Dist. No. 25944, 2012-Ohio-3788, ¶14.

On remand, the trial court, issued a decision finding that the requirements of R.C. 2923.16(B) affected the fundamental right to keep and bear arms recognized by the Second Amendment of the U.S. Constitution. The trial court also found that an intermediate level of scrutiny applied to whether R.C. 2923.16(B) violated Shover's Second Amendment rights, and that the statute did not, in fact,

violate his Second Amendment rights. The trial court reinstated Shover's conviction and Shover again appealed his conviction.

On February 5, 2014, the Ninth District Court of Appeals upheld Shover's conviction, holding that, under the assumption that the Second Amendment right to keep and bear arms did extend to motor vehicles, intermediate scrutiny would apply to R.C. 2923.16(B), and the statute passed constitutional muster. *State v. Shover*, 9th Dist. No. 26800, 2014-Ohio-373, ¶15.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW I

The reach and protection of the U.S. Const.'s Second Amendment "the rights of the People to keep and bear Arms" applies outside the home.

In the decision that is now before this Court, *State v. Shover*, 9th Dist. No. 26800, 2014-Ohio-373, the Hon. Judge Moore, in speaking for herself only held that, in agreement with *United State. v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011), she would not address whether the Second Amendment right to keep and bear arms applies outside the home. *Id.* at ¶13. Instead, she held that "[a]ssuming without deciding, that the Second Amendment extends outside the home, and specifically to motor vehicles, we agree with the trial court's well-reasoned conclusion that intermediate scrutiny should apply to R.C. 2923.16(B) because it acts as a regulation to preserve the safety of Ohio drivers and the state's law enforcement personnel." *Id.*

The Hon. Judge Carr concurred in judgment only, holding that she "would conclude that the individual right to bear arms contained in the Second Amendment extends to motor vehicles." *Id.* at ¶38. The Hon. Judge Hensal also concurred in judgment on the same basis articulated in Judge Carr's separate opinion. *Id.* at ¶44.

As such, the appellate court judges were split on whether the individual right to bear arms contained in the Second Amendment extended outside the home, and especially to motor vehicles,

with two judges agreeing that it did, and one judge assuming that it did so for the purpose of deciding whether R.C. 2923.16(B) violated its provisions.

This Court should use this case as a vehicle to decide once-and-for-all if the individual right to bear arms contained in the Second Amendment extends outside the homes and especially to motor vehicles. This would provide clarity to the law and prevent uncertainty in civil and criminal litigation

The Second Amendment states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” In 2008, the United States Supreme Court held that the Second Amendment protected the fundamental “individual right to keep and bear arms.” *District of Columbia v. Heller*, 554 U.S. 570, 622, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). The “central component” of the right is individual self-defense. *Id.* at 599, 128 S.Ct. 2783. This right is incorporated against states by way of the Fourteenth Amendment. *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3050, 177 L.Ed.2d 894 (2010).

The Supreme Court held “the American people have considered the handgun to be the quintessential self-defense weapon [in common use] ... for self-defense in the home.” Thus, the District of Columbia’s “complete prohibition of their use [was] invalid” because it “[amounted] to a prohibition of an entire class of ‘arms’ that was overwhelmingly chosen by American society for that lawful purpose” and therefore failed “any of the standards of scrutiny that [the Supreme Court has] applied to enumerated constitutional rights.” *Heller*, 554 U.S. at 628-29, 128 S.Ct. 2783.

One question that *Heller* and *McDonald* did not expressly address has vexed the lower courts: Does the Second Amendment right to keep and bear arms for self-defense extend beyond the home? A number of federal appellate courts have resisted *Heller* by reading that decision narrowly to hew to the specific facts of the case. *See Drake v. Filko*, 724 F.3d 426, 430-31 (3rd Cir. 2013);

Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2nd Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013); *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338 (5th Cir. 2013), *cert. denied*, --- S.Ct. ----, 2014 WL 684061 (2014).

The Seventh Circuit, by contrast, has reached the opposite conclusion holding that the right does indeed extend outside the home. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012), *rehearing en banc denied*, 708 F.3d. 901 (7th Cir. 2013). (The Supreme Court has decided that the [Second] Amendment confers a right to bear arms for self-defense, which is as important outside the home as inside) *Id.* at 942.

Likewise, the Illinois Supreme Court agreed with the Seventh Circuit that bearing a handgun for self-defense in public is “the exercise of a personal right that is specifically named in and guaranteed by the United States Constitution, as construed by the United States Supreme Court.” *People v. Aguilar*, 2013 IL 112116, *5, 2 N.E.3d 321.

The Ninth Circuit Court of Appeals also recently agreed with *Moore*, and extended *Heller* to protect the right to bear arms for purposes of self-defense in public, i.e., outside the home. *Peruta v. County of San Diego*, No. 10– 56971, -- F.3d -- , --, 2014 WL 555862, *24. (Feb. 13, 2014).

The substance of the Second Amendment resides in the verbs of the operative clause: “the right of the people to *keep* and *bear* Arms, shall not be infringed.” (Emphasis added.) If the Second Amendment guaranteed the right to possess firearms only in one’s home, and that firearm restrictions outside the home do not even implicate the Second Amendment, then a right to “keep” arms – that is, to “have weapons” – would have been sufficient without an explicit guarantee of the right to “bear” arms as well. *See Heller*, 554 U.S. at 581-82. Yet “the founding generation ‘were for every man bearing his arms about him and keeping them in his house, his castle, for his own

defense.’ ” *Id.* at 616 (emphasis added) (quoting Cong. Globe, 39th Cong., 1st Sess. 362, 371 (1866) (statement of Sen. Davis regarding the Freedmen’s Bureau Act)).

The explicit guarantee of the right to “bear” arms would mean nothing if it did not protect the right to “bear” arms outside of the home where the Amendment already guarantees that they may be “kept.” The most fundamental canons of construction forbid any interpretation that would discard this language as meaningless surplus. *See, e.g., Wright v. United States*, 302 U.S. 583, 588 (1938). So does the decision in *Heller*, where the United States Supreme Court explained that “keep” and “bear” have distinct meanings and that “[t]here is nothing to” the argument that the phrase “keep and bear Arms” preserves one right instead of multiple distinct rights. *Heller*, 554 U.S. at 591. Courts may no more ignore the Second Amendment’s unmistakable distinction between the people’s right to “keep” arms in their home and to “bear” them outside the home than they may ignore the word “persons” in the Fourth Amendment guarantee of the people’s right to be secure “in their persons, houses, papers, and effects.” U.S. Const. Amend. IV.

Heller explained that “[a]t the time of the founding, as now, to ‘bear’ meant to ‘carry,’ ” and “[w]hen used with ‘arms,’ . . . the term has a meaning that refers to carrying for a particular purpose – confrontation.” 554 U.S. at 584. Accordingly, the United States Supreme Court concluded that the Second Amendment “guarantee[s] the individual right to . . . carry weapons in case of confrontation.” *Id.* at 592. Relying on a consistent course of interpretation of federal firearms statutes, *Heller* stressed that “the natural meaning of ‘bear arms’ ” is to “ ‘wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.’ ” *Id.* at 584 (alterations in original) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting) (quoting Black’s Law Dictionary)).

Thus, the text of the Second Amendment and the decision in *Heller* are plainly irreconcilable with the misguided notion that the founding generation meant to guarantee a right to bear arms only when moving from room to room within one's home.

In short, the core purpose of the Second Amendment is protecting the right to carry weapons for the purpose of self-defense – not only for self-defense within the home, but for self-defense, period. See *Heller*, 554 U.S. at 599 (“[S]elf-defense . . . was the central component of the right itself.”); *McDonald*, 130 S. Ct. at 3036 (“Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is ‘the central component’ of the Second Amendment right.” (footnote and citation omitted)).

Indeed, in the founding era “a distinction between keeping arms for self-defense in the home and carrying them outside the home would, as we said, have been irrational.” *Moore*, 702 F.3d at 937. Such a distinction is no more rational today, for “the interest in self-protection is as great outside as inside the home.” *Id.* at 941. “To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*.” *Id.* at 937. In conclusion, based upon the above legal analysis, this Court should consider and decide whether the Second Amendment's protection extends outside the home, including to motor vehicles.

PROPOSITION OF LAW II

Improperly handling firearms in a motor vehicle under R.C. 2923.16(B) is unconstitutional under the U.S. Const. Second Amendment.

Sean Shover was convicted for improperly handling firearms in a motor vehicle R.C. 2923.16(B), which states:

No person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle.

R.C. 2923.16 prohibits the transportation of a loaded firearm in a motor vehicle. In doing so, it created an overly broad prohibition against citizens carrying a firearm for defensive purposes. While the Supreme Court, in *McDonald* and *Heller*, *supra*, acknowledged the rights of a state to place legitimate restrictions on the carrying of a firearm, nowhere did it sanction such a broad restriction preventing citizens from carrying a firearm in public for defensive purposes.

In rejecting Chicago's numerous arguments in support of its ban on handguns, the Supreme Court was clear in its holding that the Second Amendment allowed the right to possess firearms for defensive purposes. The carrying of a handgun for defensive purposes is not limited to the protection of one's home. No one can dispute the everyday fear of our citizens that they may be the victim of a crime, not just in their home, but as they travel in public. Ohio's statute for improperly handling firearms in a motor vehicle, R.C. 2923.16, does not contain an exception for a person to transport a loaded handgun when there is a reasonable fear of a criminal attack, or for defense or security. As such, it criminalizes actions that are well protected under the Second Amendment.

R.C. 2923.16(B) prohibits carrying or transporting firearms for self-defense purposes despite *Heller's* recognition that "the inherent right of self-defense has been central to the Second Amendment right." *Heller*, 554 U.S. at 628. In interpreting the phrase "bear arms" in the Second Amendment, the *Heller* majority held that "[w]hen used with 'arms,' ... the term ["bear"] has a meaning that refers to carrying for a particular purpose—confrontation." *Heller*, 554 U.S. at 584. "*Heller* does not simply reaffirm the traditional right to act in self-defense when threatened. Rather, it recognizes a right to have and carry guns in case the need for such an action should arise." Blocher, *The Right Not To Keep or Bear Arms*, 64 *Stanford L.Rev.* 1, 16 (2012).

The complete ban imposed by R.C. 2923.16(B) on carrying a firearm for self-defense purposes is unconstitutional. The statute fails to pass muster even if intermediate scrutiny is applied.

The intermediate scrutiny standard requires: (1) that the government's stated objective must be significant, substantial, or important; and, (2) that there is a reasonable fit between the challenged regulation and the government's asserted objective. *United State v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). For there to be a “reasonable fit,” the statute must not be substantially broader than necessary to achieve the government's interest. *Id.*

Here, R.C. 2923.16(B) is designed to protect the public and prevent criminal activity. If the statute ended there, it would satisfy the “reasonable fit” test. But it extends to ban firearms entirely from being carried for self-defense. It is simply too broad. Drafted long before *Heller*, it violates the Supreme Court's description of Second Amendment rights. The statute is outdated, unconstitutional, and needs to be brought up to date. *See Morris v. U.S. Army Corps of Engineers*, --- F.Supp.2d ----, *4, 2014 WL 117527 (D. Idaho).

It is important to note that as firearms should be allowable for self-defense within a vehicle, the occupant of the vehicle must be able to access the weapon, which is currently prevented by R.C. 2923.16(B) unless an individual possesses a concealed carry license. In *Heller*, although the Court’s finding was specific to the use of firearms in the home, the Court stated that the requirement that firearms be kept inoperable prevented them from being used for self-defense. *See Heller* at 630 (the requirement that firearms be kept inoperable “makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional”). In that regard, it is difficult to say that the state’s regulation of firearms under R.C. 2923.16(B) is narrowly tailored since it prevents individuals from exercising their right to use a firearm for their own defense.

It would have been shocking to our founding fathers that when Minutemen answered the call to arms on April 19, 1775, and they met the Redcoats on the village green in Lexington and at North Bridge in Concord, they were first required to obtain a government permit to answer a call for help

outside of their homes. At what point were they supposed to get a license to aid in the protection of their homeland from the British invaders?

According to the Trial Court, the legislature is free to regulate as many different types of firearms, in and outside the home, as long as there is but one type of firearm that was not covered. It does not make sense for disparate treatment of handguns from other protective weapons, including shotguns, rifles, etc.

In *Ezell v. City of Chicago*, 651 F.3d 684 (2011), the plaintiffs challenged the constitutionality of a related Chicago ordinance that required one hour of firing range training as a prerequisite to lawful ownership, yet simultaneously prohibited virtually all firing ranges from operating in the City. *Id.* at 689-90. In reversing the district court's order denying the plaintiffs' motion for a preliminary injunction, *Id.* at 711, the Seventh Circuit distilled, from *McDonald* and *Heller*, a two-step inquiry. Under *Ezell*, the first step is to conduct a historical inquiry into the scope of the Second Amendment right as it was understood either in 1791 (when the Bill of Rights was ratified) for federal law or in 1868 (when the Fourteenth Amendment was ratified) for state and local law. *Id.* at 702-03. At step one, the burden is on the State of Ohio to "establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment." *Id.* If the State succeeds, then "the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review." *Id.* at 703.

But if the State does not succeed at step one - either because the historical evidence is inconclusive or the regulated activity is not categorically unprotected - then the analysis proceeds to a second step. *Id.* At that step, the court must examine the strength of the State's justifications for regulating that activity by evaluating the regulations the government has chosen to enact and the

public-benefits ends it seeks to achieve. *Id.* *Ezell* teaches, after analyzing First Amendment jurisprudence - which *Heller* and *McDonald* suggest is an appropriate analogue, see *Heller*, 554 U.S. at 582, 128 S.Ct. 2783; *McDonald*, 130 S.Ct. at 304 - that the means-end inquiry is a sliding scale and not fixed or static.

But no matter where on the sliding scale the challenged statute is located, one thing is sure: the standard of judicial review is always stricter than rational basis review. See *Heller*, 554 U.S. at 628 n. 27, 128 S.Ct. 2783 (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”); *Ezell*, 651 F.3d at 701 (“[T]he Court specifically excluded rational-basis review.”); *United States v. Yancey*, 621 F.3d 681, 683 (7th Cir.2010) (per curiam).

This, then, is the framework that *Ezell* has crafted. For each challenged statute, the State bears the burden of first establishing that the statute regulates activity generally understood in 1791 to be unprotected by the Second Amendment. If the State does not carry that burden, then it must proffer sufficient evidence to justify the statute’s burden on Second Amendment rights. And in this means-end analysis, the quantity and persuasiveness of the evidence required to justify each statute varies depending on how much it affects the core Second Amendment right to armed self-defense and to who it affects. The more people it affects or the heavier the burden on the core right, the stricter the scrutiny. If the State also fails at this second stage, the ordinance is unconstitutional. *Illinois Ass’n of Firearms Retailers v. City of Chicago*, --- F.Supp.2d ----, 2014 WL 31339, *7 (N.D. Ill).

In this case, the State cannot meet the two-step analysis under *Ezell*. First, as demonstrated from the first assignment of error, the Second Amendment’s protection of the right to “keep and bear

Arms” clearly and unequivocally extends outside the home as generally understood in 1791. Second, the State’s justifications for regulating Shover’s right to possess a firearm in a vehicle without an exception for self-defense is not narrowly tailored and cannot provide any reasonable justifications to curtail Shover’s right to achieve any public benefit.

Accordingly, for the reasons stated herein, Shover respectfully asks this Court to hear and consider this assignment of error, and determine whether R.C. 2923.16(B) is unconstitutional under the U.S. Constitution’s Second Amendment.

PROPOSITION OF LAW III

Improperly handling firearms in a motor vehicle under R.C. 2923.16(B) is unconstitutional under Art. I, §4 of the Ohio Const.

Art. I, §4 of the Ohio Constitution states:

The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power. (Emphasis added).

When considering Art. I, §4 of the Ohio Constitution, this Court has previously concluded that the test for whether a gun control law is constitutional “is one of reasonableness.” *Arnold v. Cleveland*, 67 Ohio St.3d 35, 47, 616 N.E.2d 163 (1993). This Court reaffirmed this standard in *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633. However, those interpretations of the Ohio Constitution must be re-examined in light of the United States’ decisions deciding in *Heller* and *McDonald*.

Ohio’s Constitution is a document of independent force and significance. *See Arnold, supra*. The rights of citizens under the Ohio Constitution are not to be lessened by the jurisprudence of related federal constitutional provisions. In the syllabus of *Arnold*, the Ohio Supreme Court stated:

The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as

state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

Id. at paragraph one of the syllabus.

Further, Ohio Const. Art. I, §1 gives every citizen the constitutional right to defend oneself from violent attack. Ohio Const. Art. I, §4 gives every citizen the fundamental constitutional right to bear a firearm for their defense and security. Ohio Const. Art. I, §20 provides that the enumeration of rights in the Constitution does not impair or deny other rights retained by the citizens and that all rights not specifically delegated to the government are retained by the citizens.

Citizens have a fundamental constitutional right to bear firearm for their defense and security. “Defense” and “security” are two different concepts. Although the concept of “defense” may be adequately served by transporting or having an unloaded firearm in a motor vehicle, it is clear that the fundamental constitutional right to bear a firearm for security cannot be served by the transporting or having an *unloaded* firearm in a motor vehicle. Therefore, citizens of the state of Ohio have a fundamental constitutional right to transport or have a loaded firearm in a motor vehicle for their defense and security -- a right which is protected by Ohio Const. Art. I, §4. As a result, R.C. 2923.16(B), which denies to law-abiding citizens the right to transport or have a loaded firearm in a motor vehicle for their defense and security, is an unreasonable and arbitrary denial of said constitutional right.

Approximately one year after this Court’s decision in *Klein* was released, on April 8, 2004, the General Assembly enacted Ohio’s concealed carry law. R.C. 2923.125, et seq. As part of the same legislation, the General Assembly expanded the right of Ohio’s citizens to bear arms in a motor vehicle by enacting R.C. 2923.16(E). As with R.C. 2923.16(B), the applicable version of R.C. 2923.16(E) was also enacted effective September 9, 2008. This subsection expanded the right to bear

arms in a motor vehicle. Prior to the enactment of these subsections, a loaded firearm was not permitted in the passenger compartment of a motor vehicle. See R.C. 2923.16(B). R.C. 2923.16(E)(1) and (3) permit, with certain limitations, the holder of a concealed carry license to have a loaded firearm in the passenger compartment of a motor vehicle. R.C. 2923.16(E)(1) and (3) place lesser restrictions on the right to bear arms than the former version of the statute.

In its decision denying Shover's motion to dismiss, the Trial Court cited *Klein* for the proposition that R.C. 2923.16(B) was constitutional. However, the Appellate Court did not issue any decision regarding Shover's State Constitutional claims. In *Klein* found that R.C. 2923.12 was constitutional and that "there is no constitutional right to bear concealed weapons." *Id.* at paragraph one of the syllabus. *Klein* refers to R.C. 2923.16(B) only in the context of determining whether it is vague. R.C. 2923.16(B) does not deal with concealed weapons but, instead, only with the improper handling of a firearm and states "[n]o person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle." Therefore, since the *Klein* court's holding was based on a different issue, the *Klein* court's conclusion that there is not a constitutional right to bear a concealed weapon does not preclude a determination that R.C. 2923.16(B) is unconstitutional.

Moreover, although this Court allowed regulation of concealed weapons, R.C. 2923.16(B) is even more restrictive of an individual's right to bear arms than concealed carry regulations. R.C. 2923.16(B) does not allow a firearm that is accessible to the operator within the vehicle in any manner, while the former concealed carry law, applicable in the present matter, allowed access to a handgun as long as it was in a closed container or a holster. See former R.C. 2923.16(E).

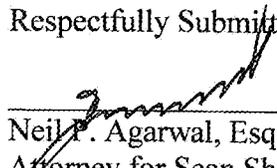
It is important to note that *Klein* was also decided prior to the former version of R.C. 2923.16, which expanded the rights of individuals to carry firearms within their cars, by adding R.C. 2923.16(E)(1) and (3). In addition, *Klein* was decided before *Heller* and *McDonald*, which, as discussed above, emphasizes the right to bear arms for self-defense.

Based on the foregoing analysis, it is respectfully argued that this Court should re-examine its previous holding in *Arnold* and *Klein*, and consider whether R.C. 2932.16(B) is an unconstitutional prohibition on an individual's right to bear arms as protected under the Ohio Const. Art. I, §4.

CONCLUSION

It is respectfully requested that this Court should accept jurisdiction and order the parties to brief the issue raised herein.

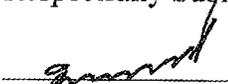
Respectfully Submitted,


Neil P. Agarwal, Esq. (0065921)
Attorney for Sean Shover
3766 Fishcreek Rd., #289
Stow, Ohio 44224-4379
(330) 554-7700 Phone
(330) 688-2268 Fax
Neil@AgarwalLaw.com

CERTIFICATE OF SERVICE

I, Neil P. Agarwal, Attorney-At-Law, certify that a true and correct copy of the foregoing was sent by First Class United States Mail to Appellee's attorney, Heaven R. Dimartino, Esq. at the Summit County Prosecutor's Office, 53 University Ave., Akron, Ohio 44308, on March 6, 2014.

Respectfully Submitted,


Neil P. Agarwal, Esq. (0065921)
Attorney for Sean Shover
3766 Fishcreek Rd., #289
Stow, Ohio 44224-4379
(330) 554-7700 Phone
(330) 688-2268 Fax
Neil@AgarwalLaw.com

STATE OF OHIO

COURT OF APPEALS
SAMUEL M. HOFFMAN

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COUNTY OF SUMMIT

)ss:
2014 FEB -5 AM 8:25

STATE OF OHIO

SUMMIT COUNTY
CLERK OF COURTS

C.A. No. 26800

Appellee

v.

SEAN SHOVER

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 2010 09 2587(B)

DECISION AND JOURNAL ENTRY

Dated: February 5, 2014

MOORE, Presiding Judge.

{¶1} Defendant-Appellant, Sean E. Shover, appeals from the February 14, 2013 judgment entry of the Summit County Court of Common Pleas. We affirm, in part, reverse, in part, and remand for further proceedings.

I.

{¶2} The facts and procedural history of this matter are set forth in *State v. Shover*, 9th Dist. Summit No. 25944, 2012-Ohio-3788, ¶ 2-3 ("*Shover I*") as follow:

* * *

Mr. Shover's father received a call from Mr. Shover's brother, who said that he owed a man \$20 and that the man had a gun. Mr. Shover and his father drove to Akron to give Mr. Shover's brother the money. As Mr. Shover's brother had been shot before, Mr. Shover's father brought a loaded gun along for protection. The two men arrived at a gas station, and Mr. Shover's brother entered the back seat of the car. Police, responding to a reported kidnapping, surrounded the vehicle and ordered the men out. After the men had exited the vehicle, one of the officers saw the gun between the seats of the car, and Mr. Shover, his father, and his brother were arrested.

A jury convicted Mr. Shover of improper handling of a firearm in a motor vehicle but acquitted him of resisting arrest. The jury could not reach a verdict on the charge of carrying a concealed weapon, which was subsequently dismissed at the State's request. The trial court sentenced Mr. Shover to 18 months of community control and ordered him to pay a \$500 fine as well as court costs.

* * *

{¶3} Mr. Shover appealed, arguing that his conviction for improperly handling a firearm in a motor vehicle was unconstitutional in light of *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, ___ U.S. ___, 130 S.Ct. 3020 (2010). *Id.* at ¶ 4. This Court reversed and remanded for further proceedings to determine “whether the Second Amendment right to bear arms applie[d] in this case,” and, if so, directed the trial court to “consider and apply the appropriate level of scrutiny to R.C. 2923.16(B) to determine whether the statute violated Mr. Shover’s Second Amendment rights.” *Id.* at ¶ 14.

{¶4} On remand, the trial court reinstated Mr. Shover’s previous judgment, concluding that:

[T]he Second Amendment to the U.S. Constitution applies to the activity of [Mr. Shover] in this case. After considering [Mr. Shover’s] interests in his Second Amendment rights and the government’s objectives in enacting R.C. 2923.16, the court determines that R.C. 2923.16 is subject to an intermediate level of scrutiny. After applying intermediate scrutiny, the court concludes that R.C. 2923.16 is constitutional. * * *

{¶5} Mr. Shover appealed, raising seven assignments of error for our consideration.

To facilitate our discussion, we will address certain assignments of error together.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT DISMISSING [MR. SHOVER’S] CHARGE OR CONVICTION OF IMPROPERLY HANDLING FIREARMS IN A MOTOR VEHICLE BECAUSE THE CHARGE AND CONVICTION WERE UNCONSTITUTIONAL UNDER THE U.S. CONSTITUTION’S SECOND AMENDMENT AND ART. I, § 4 OF THE OHIO CONSTITUTION.

{¶6} In his first assignment of error, Mr. Shover challenges the constitutionality of R.C. 2923.16(B), which states that “[n]o person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle.” Specifically, Mr. Shover contends that he has a Second Amendment right to possess a firearm in his vehicle for self-protection and protection of others and that the statute infringes upon that right.

{¶7} According to the record, the trial court concluded that the Second Amendment applies in this case, that the rights conferred upon Mr. Shover by the Second Amendment extend outside the home, but that the statutory provision is an appropriate limitation or regulation of the right to bear arms. The trial court reasoned as follows:

* * *

In the present case, [Mr. Shover] also argues that the right to bear arms extends to his motor vehicle. The right to bear arms existed at common law before the Second Amendment was adopted. [Mr. Shover] argues that when the Second Amendment was drafted, it was intended to protect individual’s rights to carry arms in public. As [Mr. Shover] points out, the Revolution was not fought in the colonists’ kitchens and living rooms. When the Minutemen answered the call to arms on April 19, 1775, they carried arms. A home-bound Second Amendment right to bear arms would have been nonsensical because it would not have permitted the militia it purported to protect even to gather and train, let alone enter into active service.

Upon due consideration of the applicable case law and the parties’ arguments, the court concludes that [Mr. Shover] has a fundamental right to bear arms under the Second Amendment while occupying a motor vehicle. The right to keep and bear arms, recognized by the Second Amendment, was not intended to be limited to the home. Moreover, as noted in *McDonald* [], the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it to the states. As a result, state laws that limit the right to keep and bear arms must pass federal constitutional muster.

Further, the trial court applied intermediate scrutiny to R.C. 2923.16(B), and found it to be constitutional, stating:

* * *

As noted above, R.C. 2923.16 does not completely prohibit an individual from carrying arms in his or her motor vehicle. R.C. 2923.16(F)(5) renders the prohibitions set forth in divisions (B) and (C) of 2923.16 inapplicable to persons who have been issued a license or temporary emergency license, to carry a concealed handgun. This statute was enacted to preserve the safety of drivers on Ohio roads and the state's law enforcement personnel.

* * *

In *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, the [Supreme Court of Ohio] upheld the constitutionality of R.C. 2923.12, the concealed carry statute, albeit without articulating the standard of scrutiny it was applying in reaching that conclusion. If it was constitutional for the state legislature to restrict the Second Amendment rights of Ohio citizens to carry loaded firearms by way of the concealed carry law, it is no less appropriate for the legislature to require citizens who wish to have loaded handguns in their cars to have such permits.

* * *

For these reasons, the court determines that there is a reasonable fit between R.C. 2923.16 and the substantial governmental interest of preserving the safety of drivers and passengers in motor vehicles, and police officers. Accordingly, R.C. 2923.16 is constitutional.

* * *

{¶8} We review constitutional challenges de novo. *State v. Honey*, 9th Dist. Medina No. 08CA0018-M, 2008-Ohio-4943, ¶ 4. Additionally, “[t]his Court recognizes a strong presumption that legislative enactments are constitutional, and before we will declare a statute unconstitutional, ‘it must appear beyond a reasonable doubt that the legislation and constitutional provision are clearly incapable of coexisting.’” *Id.*, quoting *State v. Gill*, 63 Ohio St.3d 53, 55 (1992), citing *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142 (1955), paragraph one of the syllabus. This Court has also recognized that “courts decide constitutional issues only when absolutely necessary.” *State v. Bales*, 9th Dist. Lorain No. 11CA010126, 2012-Ohio-4426, ¶ 18, quoting *Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, ¶ 54. However, “such necessity is

absent where other issues are apparent in the record which will dispose of the case on its merits.”

Greenhills Home Owners Corp. v. Village of Greenhills, 5 Ohio St.2d 207, 212 (1966).

{¶9} The Second Amendment to the United States Constitution provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

{¶10} In *Heller*, the United States Supreme Court “considered a Second Amendment challenge to three ordinances enacted by the District of Columbia, which (1) totally banned the possession of handguns in the home and (2) required that any lawfully-owned firearms in the home be disassembled or bound by a trigger lock at all times, rendering them inoperable.” *State v. Henderson*, 11 Dist. Portage No. 2010-P-0046, 2012-Ohio-1268, ¶ 42. After an historical analysis of the Second Amendment, the *Heller* majority held that “the Second Amendment confers an individual right to keep and bear arms * * *.” *Heller* at 622. Further, the *Heller* majority held that the District of Columbia’s “ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.” *Id.* at 635. The Court explained its reasoning as follows:

There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not. Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*.

* * *

As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of “arms” that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is

most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family, would fail constitutional muster.

(Emphasis sic.) (Quotations and citations omitted.) *Id.* at 595, 628-29. While the *Heller* majority did not define the outer limits of the Second Amendment right to keep and bear arms, it indicated certain limitations, stating:

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. *Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment*, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

(Emphasis added.) *Id.* at 626-27.

{¶11} Then, approximately two years later, in *McDonald*, 130 S.Ct. 3026, the United States Supreme Court reaffirmed its decision in *Heller*, and extended the Second Amendment right to keep and bear arms to the States through the Fourteenth Amendment, stating:

Two years ago, in *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home. The city of Chicago (City) and the village of Oak Park, a Chicago suburb, have laws that are similar to the District of Columbia's, but Chicago and Oak Park argue that their laws are constitutional because the Second Amendment has no application to the States. We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.

The *Heller* and *McDonald* decisions, however, left unanswered questions as to whether the Second Amendment right to keep and bear arms exists outside the home, and, if it does, to what

extent. Further, neither *Heller*, nor *McDonald*, set forth the level of scrutiny to apply to laws that burden Second Amendment rights.

{¶12} In *U.S. v. Masciandaro*, 638 F.3d 458, 471 (4th Cir.2011), the Fourth Circuit Court of Appeals applied intermediate scrutiny to a regulation making it illegal for a person to carry or possess a loaded weapon in a vehicle within national park areas. However, the Fourth Circuit declined to decide whether the Second Amendment right to keep and bear arms extends outside the home. The Fourth Circuit stated its reasoning as follows:

This case underscores the dilemma faced by lower courts in the post-*Heller* world: how far to push *Heller* beyond its undisputed core holding. On the question of *Heller's* applicability outside the home environment, we think it prudent to await direction from the [United States Supreme] Court itself. * * *

There may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions. * * * The whole matter strikes us as a vast [unknown land] that courts should enter only upon necessity and only then by small degree.

There is no such necessity here. We have no reason to expound on where the *Heller* right may or may not apply outside the home because * * * intermediate scrutiny of any burden on the alleged right would plainly lead the court to uphold the * * * regulation.

* * *

Masciandaro at 475.

{¶13} Here, we follow the Fourth Circuit's reasoning, and decline to address whether the Second Amendment right to keep and bear arms applies outside the home. As in *Masciandaro*, this matter does not necessitate that we reach beyond the law set forth in *Heller* and *McDonald*. Assuming without deciding, that the Second Amendment extends outside the home, and specifically to motor vehicles, we agree with the trial court's well-reasoned conclusion that intermediate scrutiny should apply to R.C. 2923.16(B) because it acts as a regulation to preserve the safety of Ohio drivers and the state's law enforcement personnel.

{¶14} “[I]n applying the intermediate scrutiny standard to legislation that regulates the Second Amendment, such legislation (1) must be narrowly tailored to serve a significant government interest, and further, it (2) must leave open alternative means of exercising the right.” *State v. Henderson*, 11th Dist. Portage No. 2010-P-0046, 2012-Ohio-1268, ¶ 52, citing *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37 (1983). In *Henderson* at ¶ 53-54, the Eleventh District Court of Appeals applied intermediate scrutiny to R.C. 2923.16(B), and concluded that it passed constitutional muster. First, the court stated that R.C. 2923.16(B) “is substantially related to furthering public safety,” by preventing “an operator or passenger from using the loaded firearm as a weapon from inside the car for such criminal activities as drive-by shootings, narcotics transactions, or assaults on police officers.” *Id.* at ¶ 53. Further, the court stated that R.C. 2923.16(B) is narrowly tailored to promote public safety because it is limited to those individuals who do not have concealed carry permits and who transport loaded firearms in motor vehicles in such a way that they have access to those firearms without having to leave their vehicle. *Id.* at ¶ 54. Finally, the court indicated that R.C. 2923.16 leaves open alternative means to keep and bear arms in a motor vehicle through R.C. 2923.16(E)(1) and (3), which create exceptions for those individuals having concealed carry permits pursuant to R.C. 2923.12. *Id.* at ¶ 55.

{¶15} Based upon this reasoning, we conclude that *if* the Second Amendment right to keep and bear arms does extend to motor vehicles, intermediate scrutiny would apply to R.C. 2923.16(B), and R.C. 2923.16(B) would pass constitutional muster.

{¶16} Accordingly, Mr. Shover’s first assignment of error is overruled.

ASSIGNMENT OF ERROR II

UNDER THE “LAW OF THE CASE” DOCTRINE, [MR.] SHOVER’S CONVICTION FOR IMPROPERLY HANDLING FIREARMS IN A MOTOR VEHICLE IS INVALID AND A LEGAL NULLITY.

{¶17} In his second assignment of error, Mr. Shover argues that pursuant to the “law of the case” doctrine, his conviction for improperly handling firearms in a motor vehicle is a legal nullity because the proceedings must begin anew from the original denial of his motion to dismiss. As such, Mr. Shover argues that he should be granted a new trial in this matter.

{¶18} The State responds by arguing that, in *Shover I*, this Court only issued a limited remand to determine whether the Second Amendment applies, and if so, to further determine the level of scrutiny with which to analyze R.C. 2923.16(B). According to the State, the trial court complied with this Court’s limited remand by determining that the Second Amendment applied, and reviewing R.C. 2923.16(B) under an intermediate level of scrutiny. Upon making the determination that R.C. 2923.16(B) passed constitutional muster, the State contends that the trial court properly reinstated Mr. Shover’s conviction for improperly handling firearms in a motor vehicle.

{¶19} “A limited remand without retrial is permissible, and oftentimes necessary, when dispositive issues are unaddressed by the trial court.” *State v. Hogan*, 10th Dist. Franklin No. 11AP-644, 2012-Ohio-1421, ¶ 14. (See also *State v. Keith*, 10th Dist. Franklin No. 08AP-28, 2008-Ohio-6122, ¶ 40, where 10th District Court of Appeals issued limited remand to trial court instructing it to address the merits of the appellant’s motion to suppress and reinstate the verdict if motion is denied). In *Shover I*, this Court reversed, *in part*, and remanded to the trial court to determine (1) whether the Second Amendment applied to R.C. 2923.16(B), and, if it did apply, (2) the appropriate level of scrutiny to analyze the statute’s constitutionality. However, this

Court's decision in *Shover I* did not grant a new trial to Mr. Shover if R.C. 2923.16(B), in fact, passed constitutional muster. Therefore, similar to *Hogan* and *Keith*, we conclude that the trial court properly reinstated Mr. Shover's conviction for improperly handling firearms in a motor vehicle after following this Court's instructions on remand, and determining that R.C. 2923.16(B) is constitutional.

{¶20} Accordingly, Mr. Shover's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED GIVING A JURY INSTRUCTION ON THE DEFENSE OF NECESSITY.

{¶21} In his third assignment of error, Mr. Shover argues that the trial court erred in denying his request to give a jury instruction on the affirmative defense of necessity, along with the jury instruction for improperly handling a firearm in a motor vehicle.

{¶22} Because Mr. Shover did not object to the jury instructions, he has forfeited all but plain error. *See State v. Eafford*, 132 Ohio St.3d 159, 2012-Ohio-2224, ¶ 11. Pursuant to Crim.R. 52, plain error will only be found if it affects a substantial right. "There are three requirements to finding plain error." *State v. Proctor*, 9th Dist. Summit No. 26740, 2013-Ohio-4577, ¶ 4, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 15-16. "First, there must be an error." *Proctor* at ¶ 4, citing *Payne* at ¶ 16. "Second, the error must be obvious." *Proctor* at ¶ 4. "Lastly, the error must have affected the outcome of the trial." *Id.*, citing *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). "The plain error rule should be applied with caution and should be invoked only to avoid a clear miscarriage of justice." *Proctor* at ¶ 4, quoting *State v. Long*, 53 Ohio St.2d 91, 95 (1978).

{¶23} Upon careful review of the record, we conclude that the trial court did not commit plain error in charging the jury without an instruction on the affirmative defense of necessity. In his appellate brief, Mr. Shover argues that the jury instructions for *improperly handling a firearm*, in violation of R.C. 2923.16, should have included the affirmative defense of necessity as set forth in OJI 523.12(C). However, OJI 523.12(C) applies to R.C. 2923.12, *carrying concealed weapons*. According to the record, Mr. Shover was acquitted of the charge of carrying concealed weapons, and the State later dismissed this count from the indictment. As such, Mr. Shover was not prejudiced by the fact that the trial court denied his request for including this instruction to the jury.

{¶24} Further, we note that Mr. Shover does not present an argument on appeal as to OJI 523.16, the jury instruction for improperly handling a firearm. Specifically, Mr. Shover fails to show how OJI 523.16(D)(1) and (2) apply to the facts in this case. As such, the trial court did not commit plain error by excluding these instructions from its charge to the jury.

{¶25} Accordingly, Mr. Shover's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR IN ASSESSING COURT COSTS AGAINST [MR. SHOVER] WITHOUT COMPLYING WITH R.C. 2947.23(A)(1)(a).

ASSIGNMENT OF ERROR V

[MR. SHOVER] WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHEN HIS TRIAL COUNSEL FAILED TO ARGUE THAT THE TRIAL COURT'S IMPOSITION OF COURT COSTS UNDER R.C. 2947.23(A)(1)(a) WAS DEFECTIVE.

{¶26} In his fourth and fifth assignments of error, Mr. Shover argues that at the April 5, 2011 sentencing hearing, the trial court failed to substantially comply with R.C. 2947.23(A)(1)(a), and he was denied the effective assistance of trial counsel because his attorney

failed to argue that the trial court's imposition of court costs was defective. Specifically, Mr. Shover argues that R.C. 2947.23(A)(1)(a)(i) and (ii) required the trial court to notify him that (1) his failure to pay court costs could result in the imposition of community service of not more than forty hours a month, and (2) he would receive credit toward the court costs for each hour of community service performed.

{¶27} R.C. 2947.23 (A)(1)(a) states that:

In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution, including any costs under section 2947.231 of the Revised Code, and render a judgment against the defendant for such costs. If the judge or magistrate imposes a community control sanction or other nonresidential sanction, the judge or magistrate, when imposing the sanction, shall notify the defendant of both of the following:

- (i) If the defendant fails to pay that judgment or fails to timely make payments towards that judgment under a payment schedule approved by the court, the court may order the defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the court is satisfied that the defendant is in compliance with the approved payment schedule.
- (ii) If the court orders the defendant to perform community service, the defendant will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour of community service performed will reduce the judgment by that amount.

{¶28} This Court has held that "it is reversible error for a trial court to fail to comply with the community service notifications of R.C. 2947.23(A)(1)(a) & (A)(1)(b) * * *." *State v. Flint*, 9th Dist. Summit No. 26308, 2012-Ohio-5268, ¶ 13, quoting *State v. Ross*, 9th Dist. Summit No. 25778, 2012-Ohio-1389, ¶ 28.

{¶29} Here, the record reflects that the trial court imposed court costs at Mr. Shover's sentencing hearing. The record also reflects that the trial court did not inform Mr. Shover that his failure to pay court costs could result in the imposition of community service or that he would receive credit toward the court costs from any community service ordered and performed. As such, the trial court failed to comply with the community service notifications set forth in

R.C. 2947.23. The “proper remedy” for a trial court’s failure to comply with the notification provisions of R.C. 2947.23 “is to reverse the trial court’s imposition of court costs and remand for the proper imposition of court costs in accordance with the requirements set forth in [the statute].” *Flint* at ¶ 14, quoting *State v. Debruce*, 9th Dist. Summit No. 25574, 2012-Ohio-454, ¶ 38.

{¶30} Accordingly, Mr. Shover’s fourth assignment of error is sustained.

{¶31} Further, in sustaining Mr. Shover’s fourth assignment of error, we conclude that his fifth assignment of error regarding ineffective assistance of trial counsel on the same issue is moot. *See* App.R. 12 (A)(1)(c).

ASSIGNMENT OF ERROR VI

THE TRIAL COURT COMMITTED REVERSIBLE AND PLAIN ERROR IN ASSESSING A FINE AGAINST [MR. SHOVER] WITHOUT COMPLYING WITH R.C. 2929.19(B)(6).

ASSIGNMENT OF ERROR VII

[MR. SHOVER] WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL WHEN HIS TRIAL COUNSEL FAILED TO ARGUE THAT THE TRIAL COURT’S IMPOSITION OF A FINE WAS IMPROPER WITHOUT CONSIDERING [MR. SHOVER’S] ABILITY TO PAY THE AMOUNT OF THE FINE.

{¶32} In his sixth and seventh assignments of error, Mr. Shover argues that the trial court erred in assessing a \$500 fine against him without complying with R.C. 2929.19(B)(5)¹, and that his trial counsel was ineffective for failing to raise this issue below. Specifically, Mr. Shover argues that prior to issuing the \$500 fine, the trial court did not consider Mr. Shover’s present or future ability to pay the amount of the fine.

¹ As of September 30, 2011, R.C. 2929.19(B)(6) was renumbered to R.C. 2929.19(B)(5). Both code sections are identical.

{¶33} R.C. 2929.19(B)(5) states that “[b]efore imposing a financial sanction under section 2929.18 of the Revised Code or a fine under section 2929.32 of the Revised Code, the court shall consider the offender’s present and future ability to pay the amount of the sanction or fine.” “[T]here are no express factors that must be taken into consideration or findings regarding the offender’s ability to pay that must be made on the record.” *State v. Williams*, 9th Dist. Summit No. 26014, 2012-Ohio-5873, ¶ 17, quoting *State v. Martin*, 140 Ohio App.3d 326, 327 (4th Dist.2000). However, the record must reflect that the trial court actually considered a defendant’s ability to pay. *Williams* at ¶ 17. “A trial court commits plain error by ordering a defendant to pay restitution without first considering his ability to pay.” *Id.* citing *State v. Andrews*, 1st Dist. Hamilton No. C-110735, 2012-Ohio-4664, ¶ 32.

{¶34} Here, without first considering Mr. Shover’s present or future ability to pay, the trial court stated that “[t]he [c]ourt is going to impose a monetary fine upon you in the amount of \$500.” The record indicates that after the trial court imposed the fine, there was no further discussion regarding this issue. Additionally, the sentencing entry does not reflect that the trial court had previously considered Mr. Shover’s present or future ability to pay the \$500 fine. *See Williams* at ¶ 19. Therefore, because the record is completely silent on whether the trial court considered Mr. Shover’s present or future ability to pay the fine before imposing it, the trial court committed plain error. *See id.*

{¶35} Accordingly, Mr. Shover’s sixth assignment of error is sustained.

{¶36} Further, in sustaining Mr. Shover’s sixth assignment of error, we conclude that his seventh assignment of error regarding ineffective assistance of trial counsel on the same issue is moot. *See App.R. 12 (A)(1)(c).*

III.

{¶37} In overruling Mr. Shover's first, second, and third assignments of error, sustaining Mr. Shover's fourth and sixth assignments of error, and deeming Mr. Shover's fifth and seventh assignments of error moot, this Court affirms, in part, reverses, in part, the judgment of the Summit County Court of Common Pleas and remands this matter for further proceedings consistent with this decision.

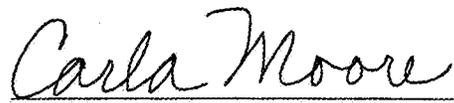
Judgment affirmed in part,
reversed in part,
and remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.


CARLA MOORE
FOR THE COURT

CARR, J.
CONCURRING IN JUDGMENT ONLY.

{¶38} I concur in judgment only on the basis that I would conclude that the individual right to bear arms contained in the Second Amendment extends to motor vehicles.

{¶39} In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court was confronted with the question of whether a District of Columbia statute prohibiting the possession of operable handguns within the home violated the Second Amendment to the U.S. Constitution. The high court answered that question in the affirmative and held that the Second Amendment conferred an individual right to keep and bear arms, principally for self-defense purposes. *Id.* Subsequently, in *McDonald v. Chicago*, 130 S.Ct. 3020 (2010), the Supreme Court addressed the question of whether Second Amendment was applicable to the States. The court also answered this question in the affirmative, holding that the Second Amendment right is “fully applicable” to the States. *McDonald*, 130 S.Ct. at 3026.

{¶40} Because the statutes at issue in both *Heller* and *McDonald* dealt specifically with handgun restrictions within the home, the court’s central holdings in those cases “did not define the outer limits of the Second Amendment right to keep and bear arms.” *U.S. v. Masciandaro*, 638 F.3d 458, 466 (4th Cir.2011). However, the *Heller* court did undertake a careful and deliberate analysis of the meaning of both the prefatory and operative clauses of the Second Amendment, and concluded that the amendment, at its core, ensured the individual right of all Americans to have and carry weapons in case of confrontation. *Heller*, 554 U.S. at 579-603. While the court acknowledged that the right was not unlimited, it repeatedly emphasized that the Second Amendment secured an individual right that existed outside the context of an organized militia, and that the individual right to bear arms existed for self-defense purposes. *Id.*

Undoubtedly, in light of the Supreme Court's decision in *Heller*, "[t]he Second Amendment * * * is now clearly an important individual right, which should not be given short shrift." *U.S. v. Tooley*, 717 F.Supp2d 580, 585 (S.D.W.V.2010).

{¶41} As the Seventh Circuit has observed, "one doesn't have to be an historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir.2012). It is axiomatic that the need to act in self-defense may arise outside the confines of one's home, and specifically in a motor vehicle. The Ohio General Assembly expressly acknowledged this reality by enacting R.C. 2901.09(B), which provides that a person who is lawfully an occupant of either a "residence" or "vehicle" has "no duty to retreat before using force in self-defense or defense of another." Though *Heller* and *McDonald* say that "'the need for defense of self, family, and property is *most acute*' in the home," that language does not mean that the need for defense of self, family and property never arises out of the home. *Moore*, 702 F.3d at 935. In fact, by using the modifier "most" in front of "acute," the court acknowledged the need for self-defense in places other than the home. As the Second Amendment primarily ensures the right of an individual to bear arms "in case of confrontation," surely the contours of that right would extend to situations where an individual would need to act in self-defense outside the individual's home. *Heller*, 554 U.S. at 592. Moreover, because the court identified reasonable restrictions such as "carrying[] firearms in sensitive places such as schools and government buildings," the court clearly acknowledged that the scope of the Second Amendment reaches beyond the home. *Heller*, 554 U.S. at 626-627. Otherwise, such "restrictions" need not be identified or examined. If the restrictions do not "impose[] a burden

on conduct falling within the scope of the Second Amendment's guarantee," the inquiry ends there. *U.S. v. Marzzarella*, 614 F.3d 85, 89 (3d Cir.2010).

{¶42} Furthermore, it is significant that the language of the Second Amendment protects the right of the people to both "keep *and bear* Arms." (emphasis added). I agree with the Seventh Circuit's observation that "The right to 'bear' as distinct from the right to 'keep' arms is unlikely to refer to the home. To speak of 'bearing' arms within one's home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home." *Moore*, 702 F.3d at 936.

{¶43} In the instant case, I would hold that the right to bear arms ensured by the Second Amendment does, in fact, extend to motor vehicles. I would further conclude that R.C. 2923.16(B) is narrowly tailored to serve a significant government interest, and that it adequately leaves open alternative means for an individual to assert his or her Second Amendment right to bear arms.

HENSAL, J.
CONCURRING IN JUDGMENT ONLY.

{¶44} I respectfully concur in judgment only on the same basis articulated in Judge Carr's separate opinion.

APPEARANCES:

NEIL P. AGARWAL, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN DIMARTINO, Assistant Prosecuting Attorney, for Appellee.