"Open Carry" Detentions

For the past few years, officers in California have occasionally encountered people in public places who are carrying holstered handguns in plain view. It appears that most of these people are law-abiding citizens who are merely demonstrating their right to bear arms. And yet, while criminals do not ordinarily carry their firearms in plain view, officers can never be sure what an armed person intends to do with the weapon.

Furthermore, officers do not know whether the firearm is loaded, whether the person is a felon who is prohibited from possessing any weapon, whether the gun has been stolen, whether the serial number has been obliterated, or whether the gun is unregistered—all of which are matters that would seemingly call for immediate investigation.

So, the question has arisen: What may officers do when they encounter such people? Ordinarily, such a question would be silly because—given the number of people who are shot and killed each day, and the prevalence of handguns among the criminal element—officers are expected to detain and investigate anyone on the street who is carrying a handgun. Moreover, the Supreme Court has ruled that Second Amendment rights are "not unlimited,"[1] which apparently means that all of the California statutes pertaining to handgun control are constitutional and, therefore, enforceable.[2]

But the issue is not so simple when the person's objective is to exercise a constitutional right, raise public awareness of the right to bear arms, and sometimes provoke officers into taking action that can be used to generate a Second Amendment test case. The problem is that the only way officers can distinguish between armed demonstrators and armed criminals is to engage in profiling—which is prohibited.

So the situation is confusing, which means that, until the courts clear it up, officers will just have to try the best they can to resolve these matters safely and efficiently. In the meantime, here are some thoughts:

It is apparent that officers may detain any person who is carrying a handgun in a public place—even if he appears to be an upstanding citizen. For example, in *Schubert* v. *City of Springfield*[3] an officer in Springfield, Massachusetts saw Schubert walking toward the courthouse with a holstered handgun under his coat. It turned out that Schubert was not a criminal—he was a "prominent" criminal defense attorney. But it appears the officer was unaware of that or he didn't care, because he detained Schubert at gunpoint and pat searched him after securing the weapon. Finding no other weapons, and confirming that Schubert was licensed to carry the weapon, the officer released him.

Naturally, Schubert sued him. For one thing, he contended that an officer who sees a person carrying a handgun in public cannot detain him unless he has reason to believe the person is carrying the weapon for some criminal enterprise. The court disagreed, ruling that mere possession of the handgun in a public place "provided a sufficient basis for [the officer's] concern that Schubert may have been about to commit a serious criminal act, or, at the very least, was openly carrying a firearm without a license to do so." The court also pointed out the absurdity of requiring officers to guess at a person's intentions based on his physical appearance. Said the court:

> Schubert contends that his clothing, his age, and the fact that he was carrying a briefcase are factors that should undercut the reasonableness of [the officer's] suspicion. We are not persuaded. A *Terry* stop is intended for just such a situation, where the officer has a reasonable concern about potential criminal activity based on his "on-the-spot observations," and where immediate action is required to ensure that any criminal activity is stopped or prevented.

The court also rejected Schubert's argument that, by detaining him at gunpoint and conducting a pat search, the officer had convered the detention into an illegal de facto arrest. As the court pointed out, these actions "were related in scope to the circumstances that justified the initial stop, namely, Schubert's open possession of a weapon."

Finally, Schubert complained that the officer was required to release him immediatly after he had inspected Schubert's concealed weapon permit, and that the officer unreasonably prolonged the deten-

tion for "several minutes" to confirm that the permit was valid. Said the court, "Just as an officer is justified in attempting to confirm the validity of a driver's license, such a routine check is also valid and prudent regarding a gun license."

In addition to *Schubert*, Penal Code § 833.5 specifically states that officers who have reasonable suspicion to believe that a person is unlawfully carrying a firearm in a public place may detain the person "to determine whether a crime relating to firearms or deadly weapons has been committed." Furthermore, the court in *U.S.* v. *Stewart* ruled that officers who are questioning a detainee about his possession of a weapon may briefly inquire into matters that do not directly pertain to whether the weapon is possessed lawfully; e.g., whether the gun is loaded.[4]

It would appear, therefore, that officers who detain a person for carrying a handgun in a public place should be able to do the following:

DETERMINE IF WEAPON IS LOADED: Officers may inspect the weapon to determine if it is loaded in violation of Penal Code § 12031(a).[5] A firearm is "loaded" when "a shell or cartridge has been placed into a position from which it can be fired."[6]

DETERMINE IF DETAINEE IS A MINOR: If the person appears to be a minor, they may seek to determine if he is violating Penal Code § 12101 which prohibits possession of concealable firearms by minors.

ARREST FOR PC 626: Officers may arrest the person for a violation of Penal Code § 626.9 if he should have known that he was within 1000 feet of a school.

The more difficult—and currently unresolved—question is whether officers who have detained a person for the sole purpose of determining whether his possession of a firearm is lawful are permitted to do the things they normally do in the course of detentions, especially the following:

- **DETERMINE AND CONFIRM ID**: Officers have a legal right to determine and confirm the identity of every person they detain.[7] As the court observed in *People* v. *Loudermilk*, "Without question, an officer conducting a lawful *Terry* stop must have the right to make this limited inquiry, otherwise the officer's right to conduct an investigative detention would be a mere fiction."[8] This is also the view of the Supreme Court which pointed out that "[o]btaining a suspect's name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder."[9]
- **ARREST FOR REFUSAL TO ID**: If the detainee refuses to identify himself, officers may ordinarily arrest him for willfully delaying or obstructing.[10]
- **PAT SEARCH**: Under current law, officers who reasonably believe that a detainee is armed with a firearm may conduct a pat search to determine if he possesses any other weapons.[11]
- **RUN RAP SHEET**: When officers detain a person who possesses a handgun, they may ordinarily check the detainee's criminal history to determine if he is a felon and is therefore in violation of Penal Code § 12021(a)(1).
- **CHECK SERIAL NUMBER**: Officers who have temporarily seized a handgun may ordinarily examine the weapon to determine whether the serial number is in plain view. If so, it would seem they could briefly prolong the detention to determine whether the weapon had been stolen. And, if the serial number is not in plain view, they should nevertheless be able to closely examine the weapon (i.e. "search" it) to locate the serial number for the purpose of running the serial number, and determining whether the detainee is carrying a weapon with an obliterated serial number in violation of Penal Code §§ 537e or 12094(a). POV

[1] *District of Columbia* v. *Heller* (2008) __ U.S. __ [128 S.Ct. 2783, 2816].
[2] See *District of Columbia* v. *Heller* (2008) 128 S.Ct. 2783, 2822.
[3] (1st Cir. 2009) 589 F.3d 496.
[4] (10th Cir. 2007) 473 F.3d 1265, 1269.
[5] See Penal Code § 12031(e) [to determine whether a firearm is loaded, " peace officers are authorized to examine any firearm carried by anyone on his or her person"].
[6] *People* v. *Clark* (1996) 45 Cal.App.4th 1147, 1153-54. ALSO SEE Pen. Code §§ 626.9(j); 12031(g).
[7] See *People* v. *Long* (1987) 189 Cal.App.3d 77, 89 [court notes the "law enforcement need to confirm identity"].
[8] (1987) 195 Cal.App.3d 996, 1002.
[9] See *Hiibel* v. *Nevada* (2004) 542 U.S. 177, 186. ALSO SEE *People* v. *Loudermilk* (1987) 195 Cal.App.3d 996, 1002 ["Inquiries of the suspect's identity, address and his reason for being in the area are usually the first questions to be asked"].
[10] See Penal Code § 148(a)(1); *Hiibel* v. *Nevada* (2004) 542 U.S. 177, 187 ["The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop."].
[11] See *Arizona* v. *Johnson* (2009) __U.S.__ [pat search of detainee lawful "upon reasonable suspicion that [the detainee] may be armed and dangerous"]; *Terry* v. *Ohio* (1968) 392 U.S. 1, 27-28.