

Concealed Carry

When Can A Minor Carry A Pistol? Sean P. Healy, TSRA General Counsel

1/28/13

I recently received an interesting question from a 17-year old Texan. He asked two questions. First, is it legal for a minor to use a handgun for self-defense? Second, would it be legal for him to carry a handgun, without his parent(s) being present, when he goes camping in remote locations? He cited the specific section of federal law that governs minors' possession of handguns. By the way, this is a very obscure provision, and few attorneys know it exists. His question is good enough I thought I'd share the answer with everyone.

Broad Principles

The first thing you must understand is that we live under a system of dual sovereignty. That means we live under two governments and two sets of laws, state and federal. If there is any conflict between the two (assuming the federal law is valid), federal law prevails under the Supremacy Clause of the U.S. Constitution. This means you can do something that is lawful under Texas law, and still be arrested, prosecuted, and punished if you violate federal law (and vice versa). These principles apply to all laws, not just the ones discussed in this column. The gun laws in Texas are often different from federal law. Watch your step!

General Prohibition on Minors Possessing Handguns/Guns

Federal law generally prohibits anyone under 18 years of age from possessing a handgun, or handgun ammunition. 18 U.S.C. § 922(x). The same law also prohibits adults from providing a handgun to a minor, so if you run afoul of this law you may land the whole family in trouble. Texas law has a similar provision prohibiting anyone from allowing anyone under 17 years of age to gain access to a "readily dischargeable firearm." Texas Penal Code Sec. 46.13. Fortunately both laws include exceptions.

Self-Defense

The Federal law allows a minor to defend his residence (or a residence where he is an invited guest) against intruders. Otherwise a minor could go to prison for saving his family member's lives. Texas law also allows minors to lawfully defend people or property. There is also a general legal principle of necessity that in some circumstances allows someone to break the law, if it is necessary to avoid a greater harm. So it is legal for a minor to use a handgun for defense, if he or she meets the requirements of both state and federal law.

Camping

The camping question is more difficult. The federal law allows minors to possess handguns for employment, farming and ranching duties (under adult direction), target practice, hunting, and shooting education. The law also allows the minor to travel directly to and from one of those activities, if it is unloaded and in a locked container. The minor must have written permission of his parent or guardian in his possession at all times. There are other requirements. Note that "camping" is not the same as "target practice" or "hunting." This might get you in trouble, if someone decides that the exception ends when you stop shooting or hunting and start camping.

Unlawful Carrying Weapon and Exemptions

Texas law is also unclear. The best way is to explain the analysis an attorney must perform, if his client is charged with Unlawful Carrying Weapon (UCW), defined in Texas Penal Code Sec. 46.02. This omits procedural requirements like probable cause, a lawful arrest, and a lawful search and seizure. Here is the analysis:

1. Basic Elements: Is the person guilty of the basic offense? The government must prove each element of its case. Texas law generally makes it illegal for anyone to "carry" a handgun. The basic elements of proving a violation include:

- a. The person intentionally, knowingly, or recklessly . . .
- b. . . carried a handgun (or illegal knife or club) . . .
- c. . . on or about his person (including in a vehicle with you where it is accessible).

2. Not on own premises: In addition, the government must prove that the person was not on premises which he owned or controlled. This includes both land and RV's used as living quarters.

3. Motorist Protection Act: The most significant protection is the Motorist Protection Act (MPA), codified in Penal Code Sec. 46.02. TSRA pushed this bill, and I testified as the expert witness for NRA and TSRA in support of an earlier version of it in 2005. I believe it is the single most significant reform of the Texas gun laws ever. It probably protects half of the law-abiding citizens in Texas (the ones with guns in their cars), while the concealed handgun law protects about 2%. The MPA requires the government to prove the MPA does not apply (until it was clarified, some agencies and prosecutors required the person accused of the crime to prove this). The MPA applies if the person was:

- a. Inside of or directly en route to a motor vehicle or watercraft owned or controlled by the person; and
- b. The handgun was not in plain view; and

- c. The person was not engaged in criminal activity other than a Class C misdemeanor traffic or boating offense; and
- d. The person was not prohibited by law from possessing a firearm; and
- e. The person was not a member of a criminal street gang.

In other words, the government can avoid the MPA if it proves the person violated any one of the preceding five requirements.

4. Statutory Exemptions: Penal Code Section 46.15 establishes a number of other situations where the handgun prohibition is "nonapplicable." The leading court case says this means the government must prove they don't apply. In addition to exemptions that apply only to government officials, this section includes:

- a. The famous "traveling" exemption. Unfortunately I don't know how you can determine what the word means when the Court of Criminal Appeals hasn't been able to figure it out.
- b. Engaging in "lawful hunting, fishing, or other sporting activity," "on the immediate premises where the activity is conducted," or en route between the premises and your residence, motor vehicle, or watercraft. This exemption only applies if "the weapon is a type commonly used in the activity."
- c. For persons with a valid concealed handgun license, carrying a concealed handgun of a category (SA or NSA) authorized by your license.

. Case law exemptions: There are court cases decided over the last century and a half that recognize other exceptions. These include bringing the gun home after purchasing it, taking it to buy parts or get it repaired, or buying ammunition for it. When a statute changes, we can find out about it by looking it up or following the news. The only way to find out if the case law has changed is to violate the law, then rely on the cases to stay out of jail.

Believe all these exceptions are still good law. There is nothing in the MPA or the CHL that repealed any of the older exceptions. The statutory ones were left in the Penal Code, and there was nothing in either law saying that they overruled the old court cases. A person caught with a handgun might claim the protection of the concealed handgun license under the MPA, "traveling," hunting or sporting activities, being "en route," or any of the other exceptions in the case law. He or she should only run into trouble if none of these exemptions applies.

Other Laws

- The above analysis only covers UCW. Here are some of other prohibited acts:
- Displaying a firearm in a public place in a manner calculated to alarm (disorderly conduct);
- Discharging a firearm on or across a public road (disorderly conduct);
- Recklessly engaging in conduct that places another person in imminent danger of serious bodily injury, including pointing a gun at someone, regardless of whether you knew it was loaded (deadly conduct);
- Intentionally or knowingly threatening another with imminent bodily injury (assault);
- Committing assault and using or exhibiting a deadly weapon during the commission of an assault (aggravated assault);
- Discharging a firearm in a public place other than a public road or a sport shooting range (disorderly conduct);
- Discharging a firearm inside a municipality of 100,000 or more;
- Discharging a firearm recklessly or negligently at one or more persons, or at a habitation,

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Texas Concealed Handgun License Information

Issuing authority:
Texas Department of Public Safety

Contact agency for out-of-state
resident license:

Permits will be granted to qualified
applicants from states other than
Texas. Call (800) 224-5744 or (512)
424-7293.

States that recognize the
Texas license:

Alabama*, Alaska*, Arizona,
Arkansas, Colorado*, Delaware*,
Florida*, Georgia*, Idaho*, Indiana*,
Iowa, Kansas*, Kentucky*,
Louisiana*, Michigan*,
Minnesota, Mississippi*, Missouri*,
Montana*, Nebraska*, New Mexico*,
North Carolina*, North Dakota*,
Oklahoma*, Pennsylvania*, South
Carolina*, South Dakota*,
Tennessee*, Utah*, Virginia*, West
Virginia, Vermont, Wyoming*

*States With Official Reciprocity
Agreements

Texas recognizes licenses from ALL
STATES that issue permits EXCEPT
District of Columbia, Illinois, Maine,
Minnesota, New Hampshire, Ohio,
Oregon, Vermont, and Wisconsin

For applications and renewals,
contact:

Concealed Handgun Licensing
Section, Texas Department of Public
Safety, P O Box 4143, Austin, Texas
78765-4143

Phone: (512) 424-7293 or (512)
424-7294; Helpline: (800)
224-5744. Email DPS at
chl@txdps.state.tx.us.

NOTE TO READERS: *Right To
Carry reciprocity and recognition
between the various states is subject to
frequent change through legislative
action and regulatory interpretation.
This information is the best available at
the time of publication. This summary is
not intended as legal advice or
restatement of law.*

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building, or vehicle (deadly conduct, or aggravated assault if it causes serious bodily injury to any person);

9. Possessing a firearm in a prohibited place; and

10. Possessing a firearm on the premises of a "federal facility" (possibly including the parking lots and other outside areas at places like the Post Office).

You must comply with all the applicable laws, both state and federal.

Making a Firearm Accessible to a Child

Texas Penal Code Sec. 46.13 may also be a problem for our young friend. This section generally prohibits making a firearm accessible to a child. Unlike the federal law [18 U.S.C. § 922(x)], this statute includes handguns, rifles, and shotguns. There is an affirmative defense if access to the gun was supervised by someone over 18, and it was for hunting, sporting, or other lawful purposes. I do not know if the "supervision" must be continuous and in person, or whether it just means "permission." There are other issues raised by the wording of that section ("readily dischargeable," "criminal negligence," etc.). All these technicalities make it hard to know in advance what is legal and what is illegal.

Bottom Line

This column only discusses these laws in general. If you look at the actual wording, you will see that they include numerous legal technicalities. You need to read and understand all these sections before relying on them!

You are taking a risk if you carry a handgun without a parent being present. If you choose to take that risk, I suggest carrying copies of these laws with you, to show to any peace officer who considers arresting you. Consider your options carefully. Some of the federal offenses are felonies carrying a ten-year prison term and a \$250,000 fine. Conviction of a felony would also permanently prohibit you from ever possessing a gun again.

Another thing to remember is that you will never be charged unless the gun is discovered. Do not EVER consent to a search. Do your best not to get arrested. If you have a gun in your vehicle, keep it and the gun case out of plain view.

You also have to consider the fact that many people will not support allowing "children" to carry pistols. This includes law enforcement officers, prosecutors, judges, and jurors, so it could affect whether you get arrested, prosecuted, or convicted. It also affects how open elected officials and the public will be to changing these laws. Remember, most of the gun laws are "strict liability" statutes. That means you can be punished severely if you violate any of them, even if it's an innocent mistake.

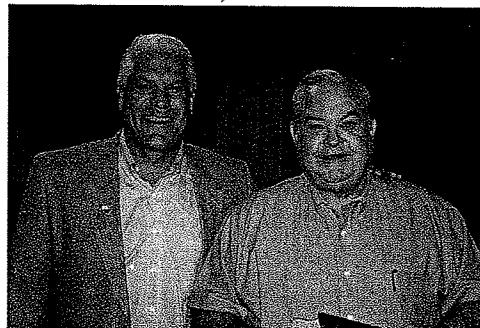
This is about as clear as the law gets. If you don't like it, please write to your state representative and state senator (or join TSRA and NRA and let us fight to defend your rights!). Definitely consult an attorney before taking this chance.

Finally, I need to remind everyone that this column is not to be used as legal advice. I cannot tell someone he can carry a pistol without having to fear any legal consequences, unless that person is a client and I know all relevant circumstances. If there is any question about the legality of what you want to do, I strongly suggest you consult with an attorney, before carrying the gun. Even then, you may still be arrested, charged, and even convicted because of some ambiguity in the law, or because you know more about the law than the officer, prosecutor, or judge.

Sean P. Healy
TSRA General Counsel

Longtime Hunter Education Coordinator Retires

Hunter Education Coordinator, D. Terry Erwin, retired from Texas Parks and Wildlife in January 2013 after serving most of 25 years as manager of the hunter safety education efforts in Texas. A TSRA Life Member, Erwin's legacy includes a stint as president of the International Hunter Education Association (IHEA), numerous awards including IHEA and Texas Hall of Fame Awards and the SCI Educator of the Year Award. On the international front, he assisted Latin American countries, South Africa and Mexico in improving their



Terry Erwin (R) is presented a custom Siler Stag big game knife from Steve Hall, TSRA Executive Director, for his efforts to spread safe, responsible, knowledge hunting & shooting practices during his 25 years with PTexas Parks and Wildlife

systems and training efforts. Nationally, he helped create and run a "Dream Hunt" program for hunter education graduates and instructors along with Winchester and Wayne Pearson's Ultimate Outdoors television show. In Texas, he greatly improved and expanded training for instructors, helped set up a Deferral program allowing adults to try hunting prior to having to complete hunter education, and oversaw a volunteer and teacher-led program that trained nearly one million students –most during his tenure. At his retirement, Erwin said, "My only regret is not being employed when the rifle is awarded to the one-millionth student..." – a rifle he personally secured from Henry Arms. That millionth student is due to be certified sometime this spring or summer. A hearty congratulations to Terry Erwin from TSRA – whose mission includes teaching of firearm responsibility and hunter education!