



michigan municipal league

# Law Enforcement Action Forum Newsletter



April 2009 Edition

Volume 16, Issue 1

## OPEN CARRY: A Potential Nightmare?

By Gene King, LEAF Coordinator



### OPEN CARRY:

Goes against our culture!

Flies in the face of good judgment!

Is against every officer's instinct for survival!

Is contrary to every officer's safety principle that is taught when confronting armed individuals!

**Is a constitutional right when done in accordance with the law!**



In the Wild West, everyone knew who was armed because most people carried their guns on their hips or in ways that were obvious. Those that concealed their guns were considered scoundrels, ne'er-do-wells, or connivers. Today, because of the numerous shooting incidents in schools and public gathering places, the public has become very sensitive to the presence of firearms and is wary of anyone carrying a gun who does not have a uniform or some badge of authority. That is why officers are trained to keep their firearms concealed when off duty or working out of uniform. In fact, until the past few years, a person carrying a handgun was a law enforcement officer, a person licensed under the law, or a criminal. No longer!

Current law allows people to carry guns openly or concealed except where it is specifically prohibited. Therefore, the public is going to have to get used to private citizens carrying guns, and law enforcement will need to change its perceptions of individuals who choose to do so. No longer are guns the mark of a 'bad' guy. Officers will encounter plain clothes and off-duty officers, retired criminal justice employees under the Law Enforcement Officers Safety Act, those licensed under the Concealed Pistol License Act, those that choose to Open Carry, and the occasional 'bad' guy, carrying guns. This issue of the LEAF Newsletter is going to explore the new trend of people exercising their constitutional right to carry firearms openly in both public or private places and its impact on law enforcement officers.

Traditional training for officers on how to handle gun situations is obsolete. True, officers still need to use care and size up each situation to protect themselves, but the mere existence of a gun today does not allow for the aggressive take control action of the past. Criminal justice employees have rules to follow. People covered by LEOSA and CPL have to follow the law and conditions of the license. They also have to surrender their gun to a law enforcement officer upon demand. The Open Carry people must follow the law and so does the officer who may end up dealing with them.

## State of the Law

The Second Amendment to the United States Constitution 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." The Michigan Constitution, Article 1, Section 6, reads, "Every person has a right to keep and bear arms for the defense of himself and the state." This means that, other than where it is prohibited, a person can carry a handgun fully exposed in the State of Michigan.

As recently as 2008, the U.S. Supreme Court examined the issue of the right to bear arms in *District of Columbia v Heller*, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). In this case, the Court ruled that the District of Columbia's law prohibiting the possession of pistols in homes and requiring rifles and shotguns to be disassembled or trigger locked was unconstitutional under the Second Amendment. The Court said a person has a constitutional right to possess a handgun in their home for self-defense when necessary. There are many who believe this signals that the Supreme Court fully supports people's right to have a handgun in their homes for self-defense. This case could bring a significant change on firearms laws going forward.

In Michigan, there are many laws that regulate the ownership and possession of firearms. You can easily find these in the Michigan State Police publication, *Firearms Laws of Michigan*, available on their web site at

[http://www.michigan.gov/msp/0,1607,7-123-1591\\_3503\\_4654---,00.html](http://www.michigan.gov/msp/0,1607,7-123-1591_3503_4654---,00.html). It is important to note that Michigan law has a large number of restrictions on who cannot possess or own a firearm. The law does allow anyone who is not restricted but is 18 years or older and a juvenile, supervised by someone 18 years or older, to carry a firearm. Importantly there were numerous changes made to the firearms law that became effective in January of 2009. Check the MSP Legal Update No. 71, January 15, 2009 for the information.

Under MCL 750.234d, the law outlines specific places where persons other than law enforcement officers, CPL holders or owner/agents cannot possess a firearm under any circumstance. MCL 750.237 a (4) establishes weapon-free school zones which also prohibits any firearms except those exceptions found in MCL 750.237a (5). A school is defined in section MCL 750.237a (6)(d), as "school property and a vehicle used by a school to transport students to or from school property."

The federal Gun Free School Zones Act, (18 USC § 922), §(2)(A) states "It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone." This zone extends 1,000 feet from the school property in all directions. The term "school zone" means in, or on the grounds of, a public, parochial or private school; or within a distance of 1,000 feet from the grounds of a public, parochial or private school. There are exemptions to the law under MCL 750.234d, and federal law adds even more. The key for the CPL holder is that the license must be issued in the same state where the school is. The federal law includes elementary and secondary education. College buildings and dorm rooms are included in MCL 28.4250 as prohibited places under the Michigan CPL Act, but Michigan law also allows individual colleges to establish their own regulations.

Federal law also prohibits firearms in federal facilities under 18 USC §930, Possession of

Firearms and Dangerous Weapons in a Federal Facility. The term “federal facility” means a building or part thereof owned or leased by the federal government, where federal employees are regularly present for the purpose of performing their official duties. This includes federal court facilities. To be convicted, notice of the provisions must be posted conspicuously at each public entrance to each federal facility and each federal court facility or the person must have had cause to be notified of such restriction. The exceptions include law enforcement officers performing official duties, federal officials or members of the armed forces or for hunting or other official duties. No off duty carry in any federal building! That includes post offices. On duty officers can only be armed in a federal building when they are doing their official duties.

In Michigan, individual governmental entities are restricted from passing ordinances that regulate firearms more than the federal or state laws do. The Michigan Court of Appeals ruled in *MCRGO v Ferndale*, 256 Mich. App. 401, (2003) that an ordinance passed by the City of Ferndale prohibiting the possession or concealment of weapons in all buildings owned or controlled by the City was invalid. The Court ruled that MCL 123.1102 barred local units of government from enacting and enforcing ordinances that make local public buildings gun-free zones.

Therefore, in Michigan, other than those places that are prohibited, and/or as dictated by the hunting and sporting laws, a person can carry a gun openly exposed.

### **Get Over the Outrage!**

The March 2008 edition of the LEAF Newsletter, *Yes, Cops Can Practice “Catch and Release” with a Subject They Have Taken into Custody* was a comprehensive analysis of what parameters the law outlines for officers when encountering a subject who, for what ever reason, becomes “of interest.” That content of that newsletter has relevance for this discussion.

**The most important point to remember when involved with subjects who are openly carrying firearms in non-prohibited places is that if they comply with the law, they are exercising their constitutional right.** No matter how concerned citizens may become and no matter what an officer’s personal or professional opinion is, these people can do what they are doing. If the subjects are on private property and the property owners or their representatives do not object or have not posted notices prohibiting firearms, the subjects are complying with the law.

This is one of the most frustrating aspects of open carry for officers because it flies in the face of everything they have been taught. But if they handle the situation as a normal “man with a gun” incident, they and the department are going get in trouble well beyond the point of rescue. This is especially true given the high degree of publicity this issue has received and the absolute fact that officers should have received training on the issue and instruction on how to handle it. A Sixth Circuit case, *Gregory v City of Louisville*, 444 F.3rd 725 (6th Circuit, 2006) is directly on point. In *Gregory*, the Sixth Circuit pointed to *City of Canton v. Harris*, 109 S.Ct. 1197 (1989) “deliberate indifference” standard in assessing liability because a municipality failed to train officers in their duty and that failure had a “**highly predictable consequence**” of being a moving force in a constitutional violation.

### **The Law’s Protection**

LEAF’s legal advisor, Audrey Forbush of Plunkett Cooney, PC, said that this type of incident is the classic “Terry Stop” scenario. She strongly encourages officers to review the March 2008, LEAF Newsletter for a more comprehensive discussion of the dynamics of *Terry v Ohio* and the related cases because the discussion in this newsletter is going to be narrowly applied to Open Carry situations.

“*Terry Stop*” originates from the Supreme Court case of *Terry v. Ohio*, 392 U.S. 1; 88 S.Ct. 1868; 20 L.Ed.2d 889, 899 (1968). In *Terry*, an officer

observed some males watching a store, and coming and going in a manner that led the officer to believe that they were casing a place to rob. He watched as all of the men walked away in different directions. He followed one and watched as he and the others gathered for more discussion. Approaching the group, he identified himself as a police officer and began to ask questions. Since he was concerned that the subjects were going to commit a robbery, he also searched them and found a gun on Terry. The U.S. Supreme Court ruled that the stop was justified and the search was for the protection of the officer. The ruling said that when an officer makes a *Terry Stop*, **the officer must have a reasonable suspicion that the person has committed a crime, is about to commit a crime, or is committing a crime.** The reasonable suspicion has to be more than a "hunch." It has to be based on specific, articulable facts that when put together with the officer's experience or other knowledge justifies an investigatory stop. The court evaluated the officer's conduct by an objective standard: "Would the facts that the officer had at the moment of the seizure warrant a man of reasonable caution to believe the action was appropriate." In Michigan, this is supported in *People v. Champion* 452 Mich 92, 549 NW2d 849 (1996).

The bolded area above is at the core of the ability of an officer to detain a subject who is openly carrying a firearm. **The mere presence of the gun is not a violation of the law; it alone, does not provide reasonable suspicion or probable cause.** Carrying a gun itself does not support disorderly conduct and brandishing occurs only when the person is waving the gun around in a threatening manner. The fear another person has of the mere presence of a gun does not make an assault. Also, do not rely on the enforcement of a local ordinance to trump the Constitution.

If the person is committing a crime or is in a prohibited place, or if the owner/agent wants the individual to leave, then officers have a legal reason to stop the subject and enforce the law. Otherwise, the person is no different from any other person in the same environment.

In Audrey's opinion, the Michigan courts have not left officers without guidance on the issue of open carry. In fact, they offer encouragement for officers to think through their actions clearly and prepare to specifically outline their logic as to why they chose the course of action they did when dealing with an incident in their reports. This is clear in *People v Oliver*, 464 Mich 184, 627 NW2d 297 (2001). In this case, the court ruled "the reasonableness of the officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances...", and went on to say, "In determining the existence of reasonable suspicion, the trial court should consider the objective facts and defer to the experience of law enforcement officers and their assessments of criminal modes and patterns of behavior."

Clearly, Audrey said, the courts have signaled that they know each situation is different. They also know that officers have training and experience that enables them to rapidly assess a situation and identify subtle behaviors and movements that indicate that something criminal could very likely be happening. She said the signal here is that the court is willing to give officers the benefit of the doubt, but that officers had darn well better be able to specifically explain and point to facts that led them to the conclusion. Otherwise, the case is bounced!

### A Friendly Chat

The courts have also indicated that officers should stay away from Fourth Amendment violations when their observations do not support the requirements of a "Terry Stop." Audrey points to the language in *Florida v Royer*, 460 U.S. 491, 497 (1983) where the court said that:

[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by

offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification.

They also went on to say:

The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.

In short, a consensual encounter does not amount to a seizure, and a police officer does not need reasonable suspicion or probable cause before approaching a person to ask questions. Audrey cautions officers to remember that **in Michigan, the subject does not have to answer the questions and can walk away and the officer cannot use that action as a reason to arrest.**

Audrey points to *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998) as a Michigan case that supports *Royer*. She also adds that a general discussion with the subject could very well lead to reasonable suspicion if the subject's behavior is off or the subject is furtive or evasive while speaking with the officer. It does not violate a person's rights to stand around and ask occasional questions while watching what that person is doing. The key is that the officer should never give the impression that he intends to detain or obstruct the free will of the person to move about.

LEAF wants every officer to know that the most important factor in any encounter with an armed person is that the officer be able to go home at the end of the day in the same or better health than when they arrived for work. Be Safe!

The LEAF Committee of the Michigan Municipal League Liability and Property Pool and Workers' Compensation Fund has formulated policy language that fits most departments' operations. You can find these and the most recently updated policies in the [Manual for Law Enforcement Risk Control](#) on the MML Web site. Click on Insurance and then LEAF. Sign in at the manual web page under Member Sign In.

### Staying out of Trouble

Audrey Forbush, LEAF's legal advisor, recommends executives review the following suggestions to protect their officers and the department when encountering subjects openly carrying firearms. She also recommends that departments add this training to the MCOLES Firearms Standard mandatory training requirements.

### Officer Training

- Remember that openly carrying a firearm is not by itself threatening, nor does it cause a hazardous or physically offensive condition.
- Know the Michigan Statutes on Concealed Pistol License and what gun free or restricted areas are.
- Have a detailed understanding of *Terry v Ohio*.
  - Reasonable Suspicion
  - Probable Cause
  - Limitations of Search
  - Clearly defining a subject's behavior/actions that establish reasonable suspicion.
  - Report writing that requires officers to use specific and plain language when defining probable cause.

## Dispatch

If a complaint comes through dispatch, officers need to ask for more information.

- Ask what the specific behavior the subject engaged in led to the complaint.
- Ask what the subject is specifically doing at the location.
- Ask if other people are with the subject.
- Ask if other people are behaving in what the caller considers normal behavior.
- Ask if the caller is on private property and are they the owner/agent.
- Ask the caller if the reason for the call is only that the subject is armed.

## Officer

- If available, wait for backup.
- Question the complainant to see if the reason for the call is that the subject is armed.
- If possible, from concealment, observe the behavior of the subject.
- Contact the property owner/agent for policy on firearms on premises and their wishes.
- If nothing seems suspicious, unusual or criminal then approach normally keeping aware of cover and a tactical advantage. With second officer use Cover/Contact tactic.
- Be aware of others in close proximity of the subject.

- Identify yourself right away, even if in uniform, and explain why you are there.
- Remember the subject is not obliged to be cooperative.
- Be polite, ask questions, and make requests; do not give commands.
- Do not make the contact a test of will.
- Speak how you would like to be spoken to.
- Do not voice your political opinion or your view on open carry. Do not lecture or be judgmental.
- Remember many people openly carrying a firearm are making a political statement.
- Do not become a victim because you allowed your ego to override your good judgment.
- Always thank subjects for their cooperation.
- If the contact is an arrest situation follow department policy.

---

LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

*While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our reader's are encouraged to consult with their attorneys for specific legal advice.*

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

*Sponsored by the Michigan Municipal League Liability & Property Pool and Workers' Compensation Fund  
1675 Green Road, Ann Arbor, MI 48106 ph - 800-653-2483*

*Contact information: Gene King, leaf@mml.org ph - 800-482-0626 ext. 8036*