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Carrying a Concealed Weapon--Nature of the Offense in Kentucky

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STUDENT NOTES

CARRYING A CONCEALED WEAPON—NATURE OF THE OFFENSE
IN KENTUCKY

All forty-eight states have statutes in one form or another forbidding the carrying of concealed weapons. Many allow it if the person has a license. A few states only forbid it in settled places, and some states forbid the carrying of deadly weapons or pistols either openly or concealed.

The first statute enacted in Kentucky prohibiting the carrying of concealed weapons was declared unconstitutional in 1822. Following the adoption of a...
new constitution in 1850, the General Assembly enacted a new law on the subject in 1853 and reenacted it in 1871. The present statute is little changed from that enacted in 1871. In 1946, the offense was changed from a misdemeanor to a felony. The present statute says:

“(1) Any person, not expressly authorized by law, who carries concealed a deadly weapon, other than an ordinary pocket knife, on or about his person shall be confined in the penitentiary for not less than two nor more than five years. (2) Sheriffs, constables, marshals, policemen, and other ministerial officers, when necessary for their protection in the discharge of their official duties; United States mail carriers, when actually engaged in their duties; and agents and messengers of express companies, when necessary for their protection in the discharge of their official duties, may carry concealed deadly weapons on or about their persons.”

The active militia, National Guard officers, and conservation officers are also exempt from the provisions of this statute.

The basic purpose of these statutes is to prevent the carrying of deadly weapons without infringing upon the constitutional right to bear arms. The carrying of concealed weapons is the causa causans of perhaps three-fourths of the homicides which stain our jurisprudence. Could the legislatures and courts discover some method by which this ceaseless evil practice can be reformed, the result would be a vast saving of valuable lives. Since the carrying of deadly weapons could not be completely prohibited, requiring the open carrying of deadly weapons would at least warn others who came in contact with them that they were armed and dangerous persons, who were to be avoided in consequence. While it is true that the criminal who intends to commit a greater crime would not be deterred by such a statute, it does greatly reduce the danger that a deadly weapon will be used in a sudden quarrel or passion. The offense is one which the courts use every legitimate effort to suppress. That the offense is still deemed a serious one is evidenced by the changing of it, in 1946, from a misdemeanor to a felony, in Kentucky. Because

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7 KY. CONST. ART. XIII, SEC. 25 (1850): “That the rights of the citizens to bear arms in defense of themselves and the state, shall not be questioned; but the general assembly may pass laws to prevent persons from carrying concealed weapons.”
8 KY. CONST. SEC. 1 (7): “The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.”
9 KY. CONSTITUTION. ART. XIII, SEC. 25 (1853), c. 1, p. 186.
10 KY. CONSTITUTION. ART. XIII, SEC. 25 (1871), c. 1888, p. 89.
13 KY. R. S. SEC. 37.250 (1948).
14 KY. R. S. SEC. 38.420 (1948).
15 KY. R. S. SEC. 150.095 (1948).
16 KY. R. S. SEC. 150.095 (1948).
17 KY. R. S. SEC. 150.095 (1948).
18 STATE V. BIAS, 37 LA. ANN. 259, 260 (1885).
19 STRIPLING V. STATE, 114 GA. 538, 40 S.E. 733 (1902).
20 Ibid.
21 The purpose of such statutes is the prevention of crime. A large percentage of the homicides in this country is due to the carrying of concealed weapons.” 3 BURDICK. LAW OF CRIME SEC. 742 n. 1 (1st ed. 1946).
the courts recognize the gravity of the offense, they are generally inclined to extend the interpretation of these statutes to their reasonable limits.

“To constitute the offense [under the Kentucky statute] it must be established that the person was ‘carrying the weapon; that it was concealed’, that it was ‘deadly, that it was upon or about’ his person.”29 These, then, are the four most important problems raised in interpreting the statute: what is “carrying”, what is “concealed”, what constitutes a “deadly weapon”, and when is it “upon or about” the person.

The Kentucky court, in the early case of Commonwealth v. Walker,23 said that “carry” is a synonym of “bear” and locomotion is not essential.24 In that case, the defendant, standing in his shirt sleeves, asked for his pistol. His wife brought him his coat, which he put on. He then put his hand into his coat pocket and pulled out a pistol. The court held that this was “carrying” within the meaning of the statute. It also appears from this decision that no certain length of time is required, and a mere instant of time is sufficient.25

In Avery v. Commonwealth,26 the court, in defining “carry” said: “To carry the weapon means that it must be on the person or so connected or annexed to the person that the weapon is carried along as the person moves. If it is in the pocket or in the clothing of the person, or if it is in some receptacle attached to or carried by the person as he moves, he is carrying the weapon.”27 In Commonwealth v. Nunnelly,28 the court applied the definition of the court in the Avery case to see if the weapon was “carried” when found under the front seat of the automobile of the accused. Chief Justice Dietzman, writing for the court in the Nunnelly case, said:

“In the second place, it is highly doubtful whether the accused was carrying the weapon. Whilst it is true that both he and the weapon moved along as the machine moved, yet appellant could move and in fact at the time of his arrest had moved away from the place of rest of the pistol without its moving and further, it was not impossible for the machine to have moved off without control or under someone else’s control, taking the revolver with it and the accused remaining stationary by the roadside or moving in some opposite direction.”29

Almost two years later, the same Justice Dietzman dissented in a case where the court held a man guilty of the offense although the weapon was in an automobile.30 In his opinion, he stated that the court had ignored the definition of “carry” given in the Avery case, and contended that “This definition does not include the movement of a deadly weapon caused by a vehicle even though such vehicle be controlled or operated by the person accused.”31

However, the Kentucky court has not accepted this view. It seems that

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29 Avery v. Commonwealth, 223 Ky. 248, 252, 3 S.W. 2d 624, 626 (1928).
31 Ibid.
32 Ibid.
33 Ibid.
34 Ibid.
35 Ibid.
36 194 Ark. 78, 105 S.W. 2d 537 (1937).
37 Ibid. at 252, 3 S.W. 2d at 626.
38 247 Ky. 109, 56 S.W. 2d 689 (1933).
39 Ibid. at 111, 59 S.W. 2d at 690.
40 Hampton v. Commonwealth, 257 Ky. 626, 78 S.W. 2d 749 (1934).
41 Ibid. at 631, 78 S.W. 2d at 751.
a weapon in a vehicle can be "carried" within the definition in the Avery case. While it is true that a person could move without the weapon, or the weapon could be moved without the person, the same is true of a weapon in a receptacle carried along by the person, which is an example given in the definition. Whether or not the weapon was carried depends upon the factual situation as it actually is, not as it might be. If a person is in an automobile with a weapon, then it could be "carried along as the person moves." Regardless of that, however, the definition given in the Avery case was dictum, and its application in the Nunnelly case was unnecessary to the decision. If the word "carry" is interpreted in its natural and popular meaning, it seems clear that a person may "carry" a weapon in an automobile. As will be seen, this conclusion is borne out by a number of cases wherein the court, without specifically adverting to the definition of "carry", upheld convictions of persons whose violations were based on weapons concealed in automobiles.

Most other states are in accord with Kentucky in their interpretation of the word "carry". It is a synonym of "bear", and locomotion is not essential. It is necessary only that the weapon be so connected with the person that the locomotion of the body would carry with it, the weapon as concealed. Most other courts, like Kentucky, have not restricted their definition so as to rule out weapons carried in automobiles. Such a restriction would seem to defeat the purpose of the statute, since the danger is just as great if the weapon is concealed, but readily accessible in an automobile as it would be if the same weapon were concealed in the clothes of the person.

To conceal means to "hide, secrete, screen, cover." The offense denounced and intended to be punished by the statute, manifestly is the practice of carrying deadly weapons concealed from ordinary and common observation, and not such open and visible arming of the person as would be readily seen and understood.

To establish that it is concealed, it must be shown that any one coming in contact with the person as is customary in the ordinary methods of living in society would not observe the weapon. Concealed does not mean that it must be so hidden that it can only be discovered by a person making a special investigation to ascertain whether the person has such a weapon. It is sufficient if it is so concealed that it would not be observed by persons making ordinary contact with him in associations such as are common in the everyday walks of life.

If a weapon is carried in such a manner that it can be seen by a person approaching from one direction, but cannot be seen by a person approaching from another...
from another direction, it is not concealed. Nor is a weapon concealed if enough of it can be seen to positively identify it. But if the weapon is completely covered by the person's clothes, even though its form can be seen well enough to identify it, it is, nevertheless, concealed. Nor does the fact that all those who are in a person's presence know that he is carrying a concealed weapon excuse him.

The interpretation of concealment by the Kentucky court, in theory and in application, is in harmony with the interpretation of most American courts. It has been held that if only part of the weapon is visible, the weapon is concealed. A few states, by statute, require the weapon to be fully exposed. If the legislature desires that to be the law, it is better that it be included in the statute, rather than supplied by the courts by extending "concealment" beyond its natural meaning. The similarity between partial concealment and the situation where the outline and identity of the weapon can be seen through a person's clothes raises the question whether or not the latter situation should constitute concealment. However, it would be almost impossible to ascertain objectively when the weapon is actually capable of positive identification and when there is only a reasonably probable belief as to the identity of the weapon. In addition, while the form may be visible as a certain moment, the weapon is probably being carried with intent to conceal, and it is likely that there is effective concealment much of the time. It is submitted that if the weapon is completely covered, or if enough of it is not actually exposed to view as to enable it to be seen and positively identified by a person making ordinary contacts, then the weapon should be held to be concealed. But if it is entirely exposed to view, or if enough of it is exposed to view so that it can be seen and positively identified, the weapon should not be held to be concealed.

The statutes of several states forbid the carrying concealed of only stated weapons, such as pistols, brass knuckles, dirks, swords in canes, spears, and bowie knives. The majority of the statutes list certain weapons, with the added provision that also included in the statute are any other deadly or dangerous weapons. The Kentucky statute does not name any specific weapon. The Court of Appeals has defined a "deadly weapon" as intended by this statute to be: any weapon which is or could be habitually so carried and with which personal injury could be inflicted it was not intended to restrict

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27 Reid v. Commonwealth, 298 Ky. 800, 184 S.W. 2d 101 (1944); Williams v. Commonwealth, 18 Ky. L. Rep. 663, 37 S.W. 680 (1896); accord, Stripling v. State, 114 Ga. 538, 10 S.E. 733 (1902).
30 Hall v. Commonwealth, 309 Ky. 74, 215 S.W. 2d 840 (1948).
35 Supra note 10.
this list to such weapons or instruments as are made and designated for offensive or defensive purposes, or for the destruction of life.\footnote{Truax v. Commonwealth, 14 Ky. L. Rep. 299 (Super. Ct. 1892).}

It is clear that a pistol is a deadly weapon. But if an essential part is missing so that the pistol is incapable of being fired, it is not a deadly weapon if that missing part is not on or about the person carrying the pistol.\footnote{Jarvis v. Commonwealth, 306 Ky. 190, 206 S.W. 2d 831 (1947). The writer did not find any Kentucky case which discussed whether or not an unloaded pistol is a deadly weapon. In Cutsinger v. Commonwealth, 7 Bush 392 (Ky. 1870), it appears from the facts that the pistol may have been unloaded, and there was a conviction. There is dictum in Ewing v. Commonwealth, 129 Ky. 297, 216, 111 S.W. 352, 355 (1908), that an unloaded pistol is a deadly weapon within the meaning of a statute prohibiting the pointing of a deadly weapon at another.\footnote{Evins v. State, 46 Ala. 88 (1871); Smith v. State, 89 Tex. Cr. R. 606, 232 S.W. 811 (1921).} That court based its statement upon Commonwealth v. Sturgeon.\footnote{Avery v. Commonwealth, 223 Ky. 248, 9 S.W. 2d 624 (1928).} In this case, as can be seen, the court did not fully adopt the view that there need be no physical connection between the weapon and the person—just such close proximity as that the weapon may be readily secured.\footnote{Williams v. Commonwealth, 301 Ky. 761, 202 S.W. 2d 408 (1917); Commonwealth v. Hart, 14 Ky. L. Rep. 862 (Super. Ct. 1893) (abstract): Triax v. Commonwealth, 14 Ky. L. Rep. 299 (Super. Ct. 1892).}}

In interpreting the concealed weapon statute, the problem which has given the courts the most difficulty is deciding what is meant by "on or about" the person. If the weapon is "on" the person, that is, concealed in his clothes, there is no doubt that the statute applies. But what is meant by "about" the person?

The Louisiana court has stated that Kentucky holds that "on" and "about" are synonymous.\footnote{Hutchinson v. State, 62 Ala. 3 (1878).} That court based its statement upon Commonwealth v. Sturgeon.\footnote{Id. at 111, 56 S.W. 2d at 690.} In that case, the defendant was accused of carrying a pistol concealed in a small satchel under the wagon seat upon which he was sitting. There were two other people in the wagon, and the court reversed the defendant's conviction on the grounds that there had been no evidence that the satchel belonged to the defendant. The court expressly reserved the question whether it was carried "about" his person. In the Avery case, it was said that the statement by the Louisiana court was unjustified, but the court again expressly declined to give any opinion as to whether a physical connection is necessary before a weapon is "about" the person.\footnote{Truax v. Commonwealth, 14 Ky. L. Rep. 299 (Super. Ct. 1892).} In Commonwealth v. Nunnelly,\footnote{Williams v. Commonwealth, 223 Ky. 248, 9 S.W. 2d 624 (1928).} the accused was arrested while outside of his car, and a pistol was found under the front seat of his car by the arresting officers. The court said that in order to get the pistol, the accused would have had to get out of the car and raise the seat, and thus, "it was not in such close proximity to the person of the accused as that he could have readily secured it and used it should occasion have arisen. The pistol was not, therefore, in such close proximity to the person of the accused as that it could be said to be on or about his person; conceding arguendo that there need be some physical connection between the weapon and the person—just such close proximity as that the weapon may be readily secured."\footnote{18 Ky. L. Rep. 613, 37 S.W. 680 (1896).} In this case, as can be seen, the court did not fully adopt the view that there need be no...
physical connection, but rather said that even if it did accept such a view, the weapon would, nevertheless, not be "about" his person on the basis of the particular facts. The Kentucky court did definitely adopt such a view, however, in *Hampton v. Commonwealth*. A black-jack, a pistol, and a rifle were concealed under some clothes on the shelf immediately behind the defendant driver in a coupe type automobile. The court felt that "...the weapon in question was in such close proximity to him that he could reach it more easily and could use it more promptly than if it had been concealed on his person." The court defined "about his person" as "convenience of access and within immediate physical reach." The only subsequent case in which the court has been called upon to apply this holding was *Turley v. Commonwealth*. In that case, it was claimed by the defendant that his pistol was locked in the glove compartment of his automobile and that the key to the compartment was in the ignition switch. The court considered the ease with which the weapon could be reached and the promptness with which it could be used and decided that if the facts were as defendant claimed, then the pistol was not "about" his person. This test used by the court might be called the *accessibility and convenience of use test*.

The Kentucky view is in accord with that taken by a majority of the courts. Weapons concealed in a "basket" or "suitcase" carried by the person, underneath a buggy seat, on the floor of an automobile, in the door pocket of an automobile and even in a satchel on the running board, have been held to be "about" the person. To hold that "on" and "about" are synonymous would defeat the basic purpose of the statute. While it is apparently legal to carry a weapon in an automobile, if it is uncovered and capable of being seen by a person casually looking into the automobile, it is illegal to conceal the weapon in an automobile unless it is put where it cannot be easily reached and used. The difficulty now facing the courts in automobile cases is where to draw the line. There is a wide area between a shelf back of the driver's seat and a locked glove compartment with the keys in the ignition switch which is still open to question. Just when a weapon reaches the point that it becomes so accessible and convenient to use as to be "about" the person is far from certain. The length of time before the weapon can be used seems to be an important factor if not the controlling factor. It would seem from the decisions that the weapon must be capable of being used

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54 257 Ky. 626, 78 S.W. 2d 745 (1934).
55 Id. at 630, 78 S.W. 2d at 750.
56 Id. at 628, 78 S.W. 2d at 750.
57 307 Ky. 89, 209 S.W. 2d 843 (1948).
58 Boles v. State, 86 Ga. 255, 12 S.E. 361 (1890); State v. Jones, 168 La. 55, 121 So. 300 (1929) (knapsack); State v. McManus, 89 N. C. 559 (1893).
61 Brown v. United States, 30 F. 2d 474 (App. D. C. 1929); Clark v. City of Jackson, 155 Miss. 668, 124 So. 807 (1929); State v. Renard, 273 S.W. 1058 (Mo. 1925).
64 Hampton v. Commonwealth, 257 Ky. 626, 632, 78 S.W. 2d 745, 751 (1934) (dissenting opinion).
almost immediately. Despite its uncertainty, the *accessibility and convenience of use test* seems to be the most desirable solution to the problem.

A few states, in their statutes,\(^7\) require a criminal intent before there can be a conviction for carrying a concealed weapon. There is no such requirement in the Kentucky statute, and the Kentucky court has held that the intent with which the weapon is carried is immaterial.\(^8\) It is the carrying itself and not the intent with which it is carried that constitutes the offense. Even if it is clear that the weapon is carried for a harmless purpose, such as carrying it to someone else after buying it for him, the statute is violated.\(^9\) In *Swincher v. Commonwealth,*\(^10\) the defendant had carried a concealed weapon while working as a special policeman. The statute creating this special police force was held unconstitutional, and as a result, defendant’s conviction was affirmed, the court saying that his intent was immaterial except to mitigate the punishment.\(^2\)

The courts in jurisdictions whose statutes do not specifically require intent are divided on whether or not intent is material.\(^3\) In almost all those states where the statutes expressly require intent, and in those states that have interpreted their statutes to require intent, the carrying of a deadly weapon concealed raises a presumption or inference of unlawful intent which the defendant may rebut. This interpretation of the statutes seems to be the better one. There would not be the great difficulty of affirmatively proving the intent, since intent would be presumed unless the defendant proved otherwise.

Several states, in their statutes, exempt people on their own premises.\(^4\) There is no such exemption in Kentucky’s statute, and the court holds that the statute applies to a person while on his own premises.\(^5\) This is in accord with the prevailing view.

As has been seen, a rather complete interpretation of the various elements in the Kentucky statute had been built up by the Court of Appeals prior to 1946, when the General Assembly increased the punishment for its violation. If the General Assembly had felt that the court’s interpretations were incorrect or undesirable, it would, presumably, have made such changes as it desired in the statute at the same time. Since the statute remains, in substance, as it was before, one is entitled to assume that the decisions of the court under the earlier statute are still applicable under the present statute.

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\(^{67}\) E.g., LA. CODE OF CRIM. LAW, art. 740-95 (Bart, 1943); N. D. COMP. LAWS Sec. 9803bl (Supp. 1925); PA. STAT., tit. 18, Sec. 401 (Purdon, 1936); TENN. CODE ANN. Sec. 11007 (Williams, 1943); VT. Pub. LAWS Sec. 8409 (1933).


\(^{69}\) *Id.* at 1898, 72 S.W. at 306.

\(^{70}\) That it is: State v. Lanucci, 4 Penn. 193, 55 Atl. 336 (Del. 1908); State v. Roberts, 39 Mo. App. 47 (1890); State v. Gilbert, 87 N.C. 527 (1882); Page v. State, 50 Tenn. 198 (1871); see State v. Williams, 70 Iowa 52, 22 N.W. 801 (1885). That it is not: Goldsmith v. State, 99 Ga. 253, 25 S.E. 624 (1896); Redinour v. State, 65 Ind. 41 (1879); People v. Williamson, 200 Mich. 342, 166 N.W. 917 (1918); Strahan v. State, 68 Miss. 547, 6 So. 844 (1891).

\(^{71}\) E.g., ALA. CODE, tit. 14, Sec. 161 (1940); ARK. STAT. ANN. Sec. 41-150 (1947); IOWA CODE Sec. 695.2 (1946); MICH. COMP. LAWS, art. 16753 (1929); N. M. STAT. ANN. Sec. 41-1761 (1941); N. J. REV. STAT. Sec. 2:176-41 (1937); N. C. GEN. STAT. ANN. Sec. 14269 (1943); W. VA. CODE ANN. Sec. 6043 (1943).

\(^{72}\) State v. Puckett, 277 Ky. 131, 125 S.W. 2d 1011 (1939); Commonwealth v. Walker, 7 Ky. L. Rep. 218 (Super. Ct. 1885) (abstract).