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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.¹ Many allow it if the person has a license.² A few states only forbid it in settled places,³ and some states forbid the carrying of deadly weapons⁴ or pistols either openly or concealed.

The first statute enacted in Kentucky prohibiting the carrying of concealed weapons was declared unconstitutional in 1822.⁵ Following the adoption of a


⁵ E.g., Ala. Code, tit. 14, Sec. 161 (1910); N. D. Comp. Laws Secs. 9803a6, 9803b1 (Supp. 1925).

⁶ Bliss v. Commonwealth, 2 Litt. 90 (Ky. 1822); Ky. Const. Art. X, Sec. 25 (1799): "That the rights of the citizens to bear arms in defense of themselves and the state, shall not be questioned."
new constitution in 1850," the General Assembly enacted a new law on the sub-
ject in 18538 and reenacted it in 1871.9 The present statute10 is little changed
from that enacted in 1871. In 1946, the offense was changed from a misde-
meanor to a felony11 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 peniten-
tiary 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."12

The active militia,12 National Guard officers,13 and conservation officers"14 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.15 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 causeless evil practice can be reformed, the re-
sult would be a vast saving of valuable lives "17 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."18 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."19 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

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 gen-
eral assembly may pass laws to prevent persons from carrying concealed weapons." 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."
10 Ky. R. S. Sec. 435.230 (1948).
12 Ky. R. S. Sec. 435.230 (1948).
13 Ky. R. S. Sec. 37.250 (1948).
14 Ky. R. S. Sec. 38.420 (1948).
15 Ky. R. S. Sec. 150.095 (1948).
18 Ibid.
19 "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,
20 Ibid.
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." 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, said that "carry" is a synonym of "bear" and locomotion is not essential. 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.

In Avery v. Commonwealth, 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." In Commonwealth v. Nunnelly, 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 some one else's control, taking the revolver with it and the accused remaining stationary by the roadside or moving in some opposite direction."

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. 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." 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.
34 223 Ky. 248, 3 S.W 2d 624 (1928).
35 Id. at 252, 3 S.W. 2d at 626.
36 247 Ky. 109, 56 S.W 2d 689 (1933).
37 Id. at 111, 59 S.W 2d at 690.
39 Id. 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". 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

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30 Owen v. State, 31 Ala. 387 (1858); Smith v. State, 79 Ala. 257 (1885).
33 Clark v. City of Jackson, 155 Miss. 668, 124 So. 807 (1929); Hall v. State, 102 Tex. Cr. R. 329, 277 S.W. 129 (1925).
36 Avery v. Commonwealth, 225 Ky. 248, 252, 2 S.W. 2d 624, 626 (1928).
37 "The test is, Was it carried so as not to be discernible by ordinary observation?" Mularkey v. State, 201 Wis. 420, — 230 N.W. 76, 77 (1930); accora, People v. Eutrice, 371 Ill. 159, 20 N.E. 2d 83, 85.
from another direction, it is not concealed. But a weapon concealed if enough of it can be seen to positively identify it. Nor is a weapon concealed if enough of it can be seen to positively 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 at 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 [concealed], and with which personal injury could be inflicted it was not intended to restrict

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. 723 (1902).
30 Hall v. Commonwealth, 309 Ky. 74, 215 S.W. 2d 840 (1948).
32 E.g., Miss. CODE ANN. Sec. 2079 (1942); MONT. REV. CODES ANN. Sec. 11007 (1935).
33 E.g., Ark. STAT. ANN. Sec. 41-150 (1917); GA. CODE ANN. Sec. 347 (Park, 1914); \N. J. REV. STAT. Sec. 2:176-11 (1937); R. I. GEN. LAWS, c. 612, Sec. 31 (1938); TENN. CODE ANN. Sec. 11007 (Williams, 1934).
34 E.g., ARIZ. CODE ANN. Sec. 13-2205 (1939); CONN. GEN. STAT. Sec. 6219 (1930); FLA. STAT. Sec. 790.01 (1941); KAN. GEN. STAT. ANN. Sec. 21-2411 (1935); MICH. COMPI. LAWS, art. 16753 (1925); MISS. CODE ANN. Sec. 2079 (1914); NEBU. REV. STAT. Sec. 28-1001 (1915); N. C. GEN. STAT. ANN. Sec. 14-269 (1913).
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."

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. This seems to be the prevailing view of the courts. There is dictum in the opinion of Jarvis v. Commonwealth that if a pistol taken apart is capable of being put together quickly, it would constitute a deadly weapon. A razor is also a deadly weapon within the meaning of the statute.

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. That court based its statement upon Commonwealth v. Sturgeon. 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. In Commonwealth v. Nunnelly, 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 not be some physical connection between the weapon and the person—just such close proximity as that the weapon may be readily secured." In this case, as can be seen, the court did not fully adopt the view that there need be no

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2 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. 237, 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.
4 Jarvis v. Commonwealth, 306 Ky. 190, 193, 206 S.W. 2d 831, 833 (1917); Hutchinson v. State, 62 Ala. 3 (1878).
8 Avery v. Commonwealth, 223 Ky. 248, 6 S.W. 2d 621 (1928).
9 217 Ky. 109, 56 S.W. 2d 689 (1933).
10 Id. at 111, 56 S.W. 2d at 690.
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 par-
ticular facts. The Kentucky court did definitely adopt such a view, however, in
Hampton v. Commonwealth.24 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."25 The court
defined "about his person" as "convenience of access and within immediate physical
reach."26 The only subsequent case in which the court has been called upon to
apply this holding was Turley v. Commonwealth.27 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 suitcase28 carried by the person, underneath
a buggy seat,29 on the floor of an automobile,30 in the door pocket of an automo-
bile31 and even in a satchel on the running board,32 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,33 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 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

24 257 Ky. 626, 78 S.W. 2d 748 (1934).
25 Id. at 630, 78 S.W. 2d at 750.
26 Id. at 628, 78 S.W. 2d at 750.
27 307 Ky. 89, 209 S.W. 2d 843 (1948).
28 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).
29 Warren v. State, 94 Ala. 79, 10 So. 838 (1892); Willis v. State, 105 Ga. 633,
32 S.E. 155 (1898) (on seat beside him on railroad car): Livesay v. Helbig, 87 N. J.
Law 308, 94 Atl. 47 (1915). Contra: Cunningham v. State, 76 Ala. 88 (1884) (saddle-
bag); State v. Watson, 108 S. C. 383, 94 S.E. 871 (1918).
State, 92 Ala. 58, 9 So. 401 (1891); Hayes v. State, 28 Ga. App. 67, 110 S.E. 320 (1922).
31 Brown v. United States, 30 F. 2d 474 (App. D. C. 1929); Clark v. City of Jack-
son, 155 Miss. 668, 124 So. 807 (1929); State v. Renard, 273 S.W. 1058 (Mo. 1925).
32 Porello v. State, 121 Ohio St. 280, 163 N.E. 135 (1929) (left door); Schraeder v.
State, 28 Ohio App. 248, 162 N.E. 647 (1928) (left door); Spears v. State, 112 Tex.
502, 111 So. 321 (1927) (left door).
34 Hampton v. Commonwealth, 257 Ky. 626, 632, 78 S.W. 2d 748, 751 (1934) (dis-
senting 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, 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. 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. In *Swincher v. Commonwealth,* 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.

The courts in jurisdictions whose statutes do not specifically require intent are divided on whether or not intent is material. 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. 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. 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 (Dart, 1943); N. D. COMP. LAWS Sec. 9803b1 (Supp. 1925); PA. STAT., tit. 18, Sec. 401 (Purdon, 1936); TENN. CODE ANN. Sec. 11007 (Williams, 1994); VT. PUB. LAWS Sec. 8409 (1993).
69 *Cutsinger v. Commonwealth,* supra note 68.
71 *Id.* at 1898, 72 S.W at 306.
72 *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, 29 N.W 801 (1886). 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).
73 E.g., ALA. CODE, tit. 14, Sec. 161 (1940); ARK. STAT. ANN Sec. 41-450 (1917); IOWA CODE Sec. 695.2 (1946); MICH. COMP. LAWS, art. 16753 (1929); N. M. STAT. ANN. Sec. 41-1701 (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).