

STAFF REPORT NO. 76-19

May 4, 1976

SUBJECT: POSSESSION OF HANDGUNS, KNIVES, CLUBS AND OTHER ARTICLES
CAPABLE OF BEING USED AS WEAPONS AGAINST PERSONS

PREPARED BY: Research Department, Arkansas Legislative Council

PREPARED FOR: Joint Interim Committee on Judiciary of the Arkansas
General Assembly

Interim Study Proposal No. 75-58 by Senator Patterson instructed
the Research Staff to study:

"the provisions of Act 696 of 1975 and all other laws of the
State relating to the possession of handguns, knives, clubs
and other articles capable of being used as weapons against
persons for the purpose of determining the need for legisla-
tion to revise such laws to clarify such laws and to render the
laws more enforceable."

OUTLINE

- I. Constitutional Provisions
 - A. Second Amendment, United States Constitution
 - B. Article 2, Section 5, Arkansas Constitution
 - C. Comment
- II. Act 696 of 1975
 - A. "As a weapon"
 - B. "On a journey"
 - C. Other problems
- III. Other Weapons Offenses
 - A. Possessing instrument of crime
 - B. Possession of firearms by felon or mental defective
 - C. Criminal use of prohibited weapons
 - D. Defacing a firearm
 - E. Criminal possession of explosives
 - F. Furnishing a deadly weapon to a minor
 - G. Sale or disposition of certain weapons
 - H. Uniform Machine Gun Act
 - I. Possession of tear gas
 - J. Carrying a knife as a weapon
 - K. Purchase of rifles, shotguns, and ammunition

Appendix

MICROFICHE

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I. Constitutional Provisions

A. United States Constitution, Amendment 2

"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."

B. Arkansas Constitution, Article 2, Section 5

"The citizens of this State shall have the right to keep and bear arms for their common defense."

C. Comment

It is generally recognized that the United States Constitution does not prohibit a state from restricting the right of its citizens to keep and bear arms.¹ This guarantee, instead, has been interpreted to mean only that the United States Congress shall make no law restricting the right of the people to keep and bear arms.

However, the Constitution of the State of Arkansas does provide that the citizens of this State shall have the right to keep and bear arms for their common defense.

A previous Arkansas gun control statute, which prohibited the carrying of pistols by civilians except army and navy pistols, and then, only when carried in the hand, was upheld as constitutional by the Arkansas Supreme Court.²

The Court said that the constitutional right to bear arms was not intended as a means of allowing private citizens to prosecute private arguments in a free government. This interpretation would seem to be supported by the fact that the phrase "the right to keep and bear arms" is modified by the phrase "for their common defense." In 1882, the Arkansas Supreme Court stated that the purpose of this right to bear arms is to prevent "the former tyrannical practice, on the part of governments, of disarming the subjects, so as to render them powerless against oppression."³

We make no judgment of the constitutionality of gun control legislation in Arkansas; however, for the purposes of the remainder of this discussion, we will assume that the statutes discussed are constitutional.

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ACQUISITIONS

II. Act 696 of 1975

A. § 41-3151 is the codification of Act 696 of 1975. It creates the offense of "carrying a weapon."

"A person commits the offense of carrying a weapon if he possesses a handgun, knife, or club on or about his person, in a vehicle occupied by him, or otherwise readily available for use with a purpose to employ it as a weapon against a person."

There are several defenses to carrying a weapon. In the course and scope of their duties, law enforcement officers, prison guards, licensed security guards, and members of the armed forces have a right to carry a weapon. Any person may possess a gun, knife, or club in his dwelling or on his property. Finally, one who is on a journey may carry a weapon.

The offense of carrying a weapon is a class A misdemeanor, which is punishable by not more than one year's imprisonment (§41-901) and a one thousand dollar (\$1,000) fine, or both (§41-803 (3)).

COMMENT:

Act 696 of 1975 provides that it is an offense to carry a handgun, knife, or club "as a weapon against a person." The previous weapons control statute, Act 96 of 1881, as amended (§ 41-4501), provided that it was an offense to carry a pistol, sword, dirk and other items "as a weapon." A 1975 Attorney General's opinion said that the language "as a weapon against a person" of Act 696 of 1975 does not impose an additional burden of proof upon the State, but merely restates the law as set forth by decisions of the Arkansas Supreme Court, that is, the State must show beyond a reasonable doubt that the person charged possessed the instrument in question with the purpose of employing it as a weapon against a person.⁴ Let us examine the previous case law in light of this opinion.

A. "As a weapon"

Whether a knife, gun, or club is carried as a weapon is a question for the jury,⁵ and different juries are likely to give different answers on similar fact situations. Case law indicates that possession of a weapon for self-defense against persons is a violation of Act 96 of 1881, which Act 696 of 1975 replaced.⁶ However, whether the handgun, knife, or club

is carried in self-defense is also a question for the jury. A pistol under the seat of a car⁷ or in the glove compartment⁸ is presumed to be possessed as a weapon, but this presumption may be overcome by proof.

The statute does not provide police officers much guidance in determining when an arrest should be made. If the policeman arrests a person carrying a pistol, knife or club who is not carrying it as a weapon, or else who is on a journey, the person arrested is put to a great deal of inconvenience and expense although he is innocent of any crime.

At the request of Senator Patterson, the Judicial Department sent out a questionnaire to municipal and circuit court judges with criminal jurisdiction. This questionnaire asked for the opinions and comments of the judges about Act 696 of 1975.⁹ Forty-seven (67%) of the seventy judges who responded thought the provisions of the Act vague and indefinite; twenty-one did not think so. Fifty-four (77%) judges thought it would be difficult to convict a person under the Act. One of the judges suggested that all laws regulating ownership and bearing of arms be repealed but that severe penalties be imposed upon those who commit crimes with those arms.

Responses to the questionnaire indicate that other judges wanted to impose stricter gun control laws. Their suggestions included deleting the requirements that the gun, knife, or club be possessed "as a weapon" and "against a person". One response was to specifically prohibit the carrying of a weapon in self-defense.

One judge suggested the absolute prohibition of the possession of weapons while a person is under the influence of alcohol or drugs, or in public places such as bars, places of entertainment, and licensed clubs.

B. "On a journey"

One defense to prosecution under § 41-3151 is that the person carrying the weapon for use against a person is on a journey. The purpose of this defense to prosecution is to protect "against the perils of the highway : to which strangers are exposed, and which are not supposed to exist among one's neighbors."¹⁰ Whether one is on a journey is a question of fact to be resolved by the jury,¹¹ and different juries may come to different conclusions on similar facts. Specific questions which have arisen in case law include when a journey begins and ends¹² and how long a trip must be before it becomes a journey.¹³ A journey may be as short as fifteen miles.¹⁴ When one who is on a journey comes into a city and remains at a place within that city for several hours, he ceases to be upon a journey.¹⁵

It may be difficult for a citizen who is on a journey to avoid being arrested for carrying a pistol. If so, his defense to prosecution is small consolation for his arrest, lawyer's fees, and possible conviction.

The judges surveyed by the Judicial Department made several suggestions on this point. One judge suggested legislation which would allow persons to keep weapons at home and on trips of one hundred miles or more. Otherwise, the person would be required to get a permit from the sheriff, circuit judge or municipal judge.

C. Other problems

The present law provides a defense for possession of a handgun, knife, or club as a weapon in one's own dwelling, or upon property in which he has a possessory or proprietary interest. The law does not specifically cover transporting a handgun from a person's home to a target range, wooded area, or a "strange environment". One judge suggested that the statute should specifically allow these activities.

Act 457 of 1961 (§§ 41-3171 to 41-3173) provides it is illegal to carry a knife as a weapon except when on a journey or when on one's premises, and that carrying a knife with a blade of 3-1/2 inches or longer is prima facie proof that the knife is carried as a weapon. However, the Supreme Court has held that if one is charged with carrying a knife under § 41-3151, the presumption of § 41-3173 that a knife 3-1/2 inches or longer is a weapon does not apply.¹⁶ Due to the apparent conflict, the General Assembly may wish to clarify the law by consolidating these two provisions concerning knives, or by having a provision uniform to both acts.

The replies to the questionnaire from the judges also indicate some problem of interpretation of the word "club", one judge suggested the substitution of the term "striking instrument".

In summary, there appear to be some practical problems with Act 696 of 1975. The use of a handgun "as a weapon against a person" may need clarification, and the term "on a journey" may require further definition. The legislature may also wish to clarify the apparent conflict between statutes dealing with knife-blades and knives.

III. Other Weapons Offenses

Up to this point this discussion has been confined to the provisions of Act 696 of 1975. The remainder of this memorandum will discuss other provisions of the Arkansas Criminal Code which regulate the possession and use of firearms and other weapons.

A. § 41-3102 creates the offense of "possessing an instrument of crime", a class A misdemeanor, which occurs if a person "possesses any instrument of crime with a purpose to employ it criminally."

COMMENT:

An "instrument of crime" means "anything manifestly designed, made, adapted, or commonly used for criminal purposes." § 41-3101. This could mean just about anything. This law, being so vague, could raise the constitutional question of due process.

B. § 41-3103 provides that possession or ownership of a firearm by any felon, or any person adjudicated a mental defective, or any person committed involuntarily to a mental institution is a class A misdemeanor.

C. § 41-3104 creates the offense of "criminal use of prohibited weapons", which occurs if a person, except as authorized by law, possesses, uses, makes, repairs, sells, or otherwise deals with any

1. Bomb
2. Machine gun
3. Sawed-off shotgun
4. Firearm specially made or adapted for silent discharge
5. Metal knuckles, or
6. "Any other implement for the infliction of serious physical injury or death which serves no common lawful purpose".

A person has a defense to prosecution under this section [i.e. is authorized by law to possess these weapons] if:

"(a) the person was a law enforcement officer, prison guard, or member of the armed forces acting in the course and scope of his duty at the time he used or possessed the prohibited weapon. (§41-3104 (2) (a)).

(b) the defendant used, possessed, made, repaired, sold, or otherwise dealt in any of the above enumerated articles under circumstances negating any likelihood that the weapon could be used unlawfully." (§41-3104 (2) (b)).

Unauthorized possession of a bomb, machine gun, or silenced firearm is a class B felony and is punishable by from 3 to 20 years imprisonment, up to a \$15,000 fine, or both. Possession of a sawed-off shotgun, brass knucks, or any other implement for the infliction of serious physical injury or death which serves no common lawful purpose is a class D felony and is punishable by imprisonment not exceeding 3 years, or by a \$10,000 fine, or both.

D. § 41-3106 creates the offense of defacing a firearm, a class D felony, which occurs when one destroys the serial number of a firearm. Knowing possession of a defaced firearm is a class A misdemeanor.

E. § 41-3108 prohibits criminal possession of explosives, a class B felony. This offense occurs if the possessor of an "explosive substance" or "incendiary device" has the purpose of using that substance to commit an offense, or if he knows that some other person intends to use that substance to commit an offense.

F. § 41-3109 states that a person who in any way transfers a firearm or other deadly weapon to a minor is guilty of the class A misdemeanor of "furnishing a deadly weapon to a minor." § 41-3110 provides that a policeman may confiscate weapons from a minor or mental defective.

G. § 41-3152 prohibits the sale or other transfer of a dirk (short straight dagger), sword, spear in cane, or metal or brass knucks. The penalty for violation is a fine of \$50 to \$200 and imprisonment from thirty days to three months. (§ 41-3153). A justice of the peace or law enforcement officer who knows of such a violation but does nothing is subject to the same penalties as one who commits the crime.

Act 96 of 1881 originally contained the prohibition against carrying handguns, knives and clubs. The penalty for violation was set out in § 4 of Act 96 of 1881, now compiled as § 41-3153. However, Act 696 of 1975 classifies the offense of carrying a handgun, knife, or club as a class A misdemeanor, and repeals all laws in conflict. Therefore, the \$50-\$200 fine and 30 days to 3 months imprisonment apparently applies only to the sale of dirks, swords, spears-in-canes, or brass knucks.

H. §§ 41-3157 through 41-3167 is the Uniform Machine Gun Act, which makes the possession or use of a machine gun in the perpetration or attempted perpetration of a crime of violence a felony punishable by imprisonment in

the state penitentiary for not less than twenty years. Furthermore, possession of a machine gun for offensive or aggressive purposes is a felony punishable by not less than ten years imprisonment. Machine guns are to be registered with the secretary of state upon acquisition, and failure to register raises the presumption that the gun is possessed for an offensive and aggressive purpose.

Of course, it is legal to manufacture machine guns for the armed forces or law enforcement.

I. § 41-3168 provides that carrying or possessing tear gas in any form whatever, is a misdemeanor. However, banks and peace officers may legally possess tear gas.

J. § 41-3171 states that carrying a knife as a weapon, except when upon a journey, shall be punished as provided by Act 96 § 4 of 1881 (§ 41-3153), that is by a \$50-\$200 fine or 30 days to 3 months imprisonment or both. If the blade of the knife is 3-1/2 inches or longer, it is prima facie proof the knife is carried as a weapon.

K. § 41-3174 provides that residents of adjacent states may purchase rifles, shotguns, and ammunition in Arkansas. § 41-3175 provides that Arkansas residents may purchase rifles, shotguns, and ammunition in adjacent states.

FOOTNOTES

¹79 Am Jur 2d., WEAPONS AND FIREARMS § 4 (1975).

²Haille v. State, 38 Ark. 566 (1882).

³Id.

⁴Arkansas Attorney General's Opinion 75-75, July 18, 1975.

⁵Allison v. State, 161 Ark. 304 (1924).

⁶Id.

⁷Clark v. State, 253 Ark. 454, 486 S.W. 2d 677 (1972).

⁸Stephens v. Fort Smith, 227 Ark. 609, 300 S.W. 2d 14 (1957).

⁹See Appendix

¹⁰Hathcote v. State, 55 Ark. 181, 17 S.W. 721 (1891).

¹¹Id.

¹²Holland v. State, 73 Ark. 425, 84 S.W. 468 (1905).

¹³Hathcote v. State, 55 Ark. 181, 17 S.W. 721 (1891).

¹⁴Ellington v. Denning, 99 Ark. 236, 138 S.W. 453 (1911).

¹⁵Carr v. State, 34 Ark. 450 (Nov. Term 1879).

¹⁶Rowland v. State, 255 Ark. 215, 499 S.W. 2d 623 (1973).

A P P E N D I X



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September 2, 1975

Honorable Ralph M. Patterson
Senator, 2nd District
Pulaski County
2900 Percy Machin Drive
North Little Rock, AR 72114

Dear Senator Patterson:

Re: Study of Act 696 of 1975

As per your request the Judicial Department has conducted a study of Act 696 of 1975. The following is the result of the survey.

We mailed out 111 questionnaires to Municipal Court Judges and Circuit Court Judges with criminal jurisdiction. Seventy of the Judges, or 63% returned the questionnaire.

Of the 70 Judges who returned the questionnaire, 25 of them or 35.7% had adjudicated cases where Act 696 was applicable. The total number of cases handled by the 25 Judges was 151 or an average of 6 cases per Judge.

Forty-Seven or 67.1% of the 70 Judges thought the provisions of the Act to be vague and indefinite. Twenty-One of them or 30% did not think so and 2 or 2.9% of them did not respond to that question.

Fifty-Four or 77.2% of the 70 Judges thought it would be difficult to convict a person under the Act. Fifteen or 21.4% thought there would be no difficulty and 1 or 1.4% did not respond to the question.

Fifty-Six or 80% of the 70 Judges thought the Act needed to be revised. Eleven or 15.7% thought there was no need for revision and 3 or 4.3% did not respond to that question.

Senator Ralph Patterson

Page 2

September 2, 1975

Forty-Three or 61.4% of the 70 Judges returned their questionnaire with comments or remarks. The analysis of the 43 comments, remarks, and suggestions are summarized in the following 18 points.

1. Act should specifically define Journey (across town - 100 miles)
2. The question of intent is difficult to prove.
3. Repeal all laws regulating ownership and bearing of arms but - impose severe penalties on those using them to commit crimes.
4. Stronger gun control legislation - a new law to provide for the confiscation and destruction of illegally held weapons.
5. Provisions to allow the carrying of firearms when going to target practice, wooded areas or a strange environment.
6. Leave out "as a weapon"
7. Leave out "against a person"
8. Allow persons to keep weapons at home and on trips of 100 miles or more. If needed elsewhere get permit from Sheriff, Circuit Judge or Municipal Judge
9. Section 1 would apply even though it was being carried to be used only in self defense (attacks, robberies, etc.)
10. Length of blade of knife needs to be defined as to when illegal - (1½" - 2" etc.)
11. Rifles and shotguns should be included in Act.
12. Dislike legislation that has effect of restricting private citizens use of hand guns.
13. End Section 1 with - "readily available for use."
14. Old law preferable to new
15. Make it a misdemeanor to possess or carry a weapon except for (3) A, B, C, D, & E.

Senator Ralph Patterson

Page 3

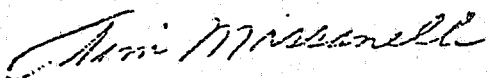
September 2, 1975

16. Re: (2) e. - delete club - use words striking instrument - this would include brass knucks, bicycle chains, etc.
17. In Section 1 add - "or any person who habitually or continually carries such a weapon."
18. Prohibit absolutely, the possession of a weapon while under the influence of alcohol or drugs, possession in public places bars, places of entertainment and licensed clubs.

Senator, we have the 70 returned questionnaires on file in our office for your inspection if you would like to review them. I am enclosing a copy of the blank questionnaire so that you will be aware of the exact questions that were asked each Judge. I am also enclosing a copy of a condensed summary of all the above statistics in case you may want to copy it and have it for distribution at the meeting of the Joint Interim Committee on the Judiciary at your next regular meeting. Copies of all the information that you are receiving will also be forwarded to Mr. Larry Chisenhall and Mr. Steve Collins of the Legislative Council staff.

If you have any questions or if our office can be of any more help please call us and I hope to see you at the Committee meeting on September 18.

Cordially,



Tim Massanelli
Inter-Agency Coordinator

TM/pap

cc: Judge C. R. Huie
Jack Jarrett
Larry Chisenhall
Steve Collins

Number of questionnaires mailed. 111

Number of questionnaires returned. 70

Percent 63%

Number of Judges who adjudicated cases where Act 696 was applicable.

25

Percent 35.7%

Number of cases adjudicated where Act 696 was applicable.

151

Average Number of cases per Judge. 6

In reading Act 696 of 1975 do you find the provisions, in your opinion, to be vague and indefinite?

Yes 47

No 21

No Response 2

Percent Yes 67.1%

Percent No 30%

Percent No Response 2.9%

In your opinion, would it be difficult to convict a person under Act 696 of 1975, particularly under the Amendments to the Acts setting forth "against a person"?

Yes 54

No 15

No Response 1

Percent Yes 77.2%

Percent No 21.4%

Percent No Response 1.4%

In your opinion does Act 696 of 1975 need to be revised?

Yes 56

No 11

No Response 3

Percent Yes 80%

Percent No 15.7%

Percent No Response 4.3%

Number of questionnaires with comments and remarks.

43

Percent 61.4%

END