BOLO

Be On the Lookout

The Newsletter for The Los Angeles Airport Peace Officers Association

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Openly Carried Firearms

Scenario

You respond to a "man with a gun" call at a local shopping mall. You locate the suspect walking through the mall. He is armed with a handgun carried in a belt holster. You detain the individual and determine that the handgun is unloaded. The subject has two fully-loaded, high-capacity magazines for the weapon in his pocket. The subject explains that he is a believer in the Second Amendment and is carrying the weapon because he has a right to do so. What are your options as the handling deputy?

Discussion

Earlier this year, the U.S. Supreme Court ruled in *District of Columbia v. Heller (128 S.Ct 2783)* that the Second Amendment provided an individual right for persons to "keep and bear arms." Just as the right to free speech does not include the right to shout "fire" in a crowded theater, the *Heller* decision recognized reasonable limits on the exercise of that right. Prior to the *Heller* decision, case law in the 9th Federal Circuit (including California) held that the Second Amendment did not apply to individuals. In many respects, *Heller* is a landmark case. When a landmark decision is made, the Supreme Court does not decide all questions relating to the issue. It rules on the primary question, and then leaves it to lower courts to define the limits of the ruling through subsequent cases. *Heller* does not appear to impact any of California's weapons laws, but it does expose those laws to a new challenge. We have seen recent evidence of various gun rights advocacy groups attempting to raise those challenges.

In several recent events, law enforcement officers have been presented with situations similar to the one above. Some of these events were audio recorded (and possibly video recorded as well). It appears that the subjects were attempting to lure the officers into taking unfounded enforcement efforts to bring attention to their cause and/or to form the basis for court action.

This is also occurring at a time when law enforcement has been presented with several tragic events involving "active shooters." This presents a significant challenge to responding deputies. It is difficult to determine the intent of an armed person. If deputies casually approach an armed individual who proves to be an "active shooter," the consequences can be tragic for the deputy and public. On the other hand, appropriate officer safety measures in contacting armed persons may seem excessive to those who believe they are only securing a constitutional right. We are not aware of any instances involving armed persons where the proper use of officer safety measures has produced liability for the agency or officer/deputy.

Penal Code §12031(e) provides you with the authority to inspect *any* firearm carried in public to determine if it is loaded. Refusal to submit to an inspection is cause to arrest for a violation of §12031. This is an inspection authority and no probable cause is required to conduct an inspection. It should be noted that the purpose of this inspection is limited to a determination of whether or not the weapon is loaded.

You have the ability to run a records check of the weapon's serial number if it is visible to you during the course of the weapon inspection. Considerable case law holds that you are not required to "close your eyes" to things you observe during the lawful performance of your duties. Your authority to detain the subject while conducting the 12031(e) inspection is limited. Once it is established that the weapon is being lawfully carried, and there are no other circumstances justifying the detention of the subject, the detention must end.

As a general rule, with some exceptions discussed below, it is not illegal to carry an unloaded firearm in a public place. Here is a partial listing of circumstances where the simple possession of an unloaded firearm, in public, is prohibited:

- Within 1,000 feet of a public or private school (grades K-12) (626.9 PC). (*Notes: Specific exceptions exist for residences, and for the transportation of firearms within containers. Senate Bill 1666 extended the "safe school zone" to 1,500 feet effective January 1, 2009. The firearms penalty provision was not incorporated. Corrective legislation is pending.*)
- Upon the grounds of a university or college (626.9 PC).
- By persons with felony convictions or by drug addicts (12021(a)(1) PC).
- By persons with specified misdemeanor convictions (12021(a)(2) + 12021(c)(1) PC). (*Note: The specified crimes are primarily assaults, batteries, domestic violence and weapons violations.*)
- In connection with street gang activity (12021.5 PC).

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- With the intent of committing a felony (12023 PC).
- While wearing a mask to conceal identity (12040 PC).
- Possession of a concealable firearm by a minor (12101 PC).
- By persons adjudicated with mental disorders under specified conditions (8103(a)(1) WIC).
- By persons who have been detained under 5150 WIC as a danger to self or others within the preceding five years (8103(f)(1) WIC).

When is a Firearm Considered Loaded?

The short answer is that it depends on the circumstances. Ordinarily, a firearm is loaded if the ammunition is placed into the weapon in a manner that it could be fired. If the suspect is being charged with carrying the firearm with the intent to commit a felony (12023 PC), then a special definition of "loaded" applies. The firearm is considered "loaded" if the weapon, and ammunition capable of being fired in the weapon, are in the immediate possession of the subject (12001(j) PC). Penal Code § 171e provides a similar definition of "loaded" for firearms carried in the state capitol or offices (171c PC), and in the residences of designated elected officials (171d PC). Deputies should be familiar with this special definition, and be careful not to apply it to circumstances not involving a violation of sections 171c, 171d or 12023.

The majority of offenses involving the carrying of a loaded weapon fall under 12031 PC. Section 12031(g) defines a weapon as being loaded when the ammunition is in, or attached to, the firearm. It specifically provides that a weapon is loaded if there is ammunition in the firing chamber, magazine or clip.

The California Court of Appeal considered the question of when a weapon is loaded in the case of *People v. Harvey Lee Clark (45 Cal App. 4 1147)*. The defendant had a single-shot shotgun that had no shell in the chamber. It had a buttstock shell holder that held live rounds. The court clarified the "attached to" language of 12031(g) holding that the weapon was **unloaded** since the rounds could not be fired from the buttstock holder.

High Capacity Magazines (More Than 10 Rounds)

Effective January 1, 2000, it became a felony to manufacture, import, sell, keep for sale, give or lend a high-capacity magazine. There is no prohibition on the simple *possession* of a high capacity magazine.

Conclusion

Law enforcement officers have the duty to protect the safety and rights of all members of our society. The "open carry" movement

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ONE MINUTE BRIEF

NUMBER: 2011-15 **DATE**: 09-23-11 **BY**: Devallis Rutledge **TOPIC**: Entrapment

What are the general rules on law enforcement use of stings and decoys to catch criminals by means of direct or indirect official involvement?

"Entrapment" is neither an immunity from arrest, nor a bar to prosecution; instead it is a **defense** that may be asserted by a defendant at trial, and one which **he** has the burden of proving **to the jury** by a **preponderance of the evidence**. *People v. Sherow* (2011) 196 Cal.App.4th 1296, 1307. In *California* courts (the federal doctrine is different), a defendant can escape conviction for a crime he in fact committed by proving that he did so in response to law enforcement conduct that was so overbearing it was ***"likely to induce a normally law-abiding person to commit the crime."*** *People v. Barraza* (1979) 23 Cal.3d 675, 690.

Defendant need not admit the crime to assert an entrapment defense, *Id.*, at 692, and his criminal predisposition is irrelevant. *Id.*, at 688-89. Entrapment must be raised at trial, not for the first time on appeal. *People v. Pijal* (1973) 33 Cal.App.3d 682, 692.

"The law does not recognize a defense of vicarious entrapment." People v. Vo (1989) 213 Cal.App.3d 689, 695 (Officer pressures agent-A to get B to commit a crime, but A uses no pressure against B: no entrapment). However, if the agent does use overbearing techniques to induce a third party to commit a crime, the defense of entrapment lies. *People v. McIntyre* (1979) 23 Cal.3d 742, 747-748 (Officer does not pressure agent-A, but A pressures B to commit the crime: B is entrapped). In California, *"We reject the doctrine of sentencing entrapment." People v. Smith* (2003) 31 Cal.4th 1207, 1216 (OK for undercover agent to supply enough drugs to invoke enhancement).

"Overbearing conduct" could include an appeal to sympathies or emotions, a guarantee that the act was not illegal or would go undetected, an offer of exorbitant gain, or other inducement that would make the crime **unusually attractive** to a normally law-abiding person. *Barraza*, at 690. Examples: repeatedly cajoling a reluctant, recovering addict to arrange a drug sale (*Barraza*); exploiting familial relationships during times of family problems to generate an intra-family drug transfer (*McIntyre*, at 747).

If officers merely arrange an **opportunity** for a crime to occur, or do no more than assure a suspect he is not being "set up," there is no entrapment. Police may use undercover officers, stings, decoys and similar means of apprehending criminals who succumb to temptations a law-abiding person would resist. *Barraza*, at 690 and fn. 4.

Examples:

- *People v. Watson* (2000) 22 Cal.4th 220 (no entrapment where police parked an unlocked "bait car" with keys inside, in a high-crime area, and defendant took it).
- *People v. Federico* (2011) 191 Cal.App.4th 1418 (no entrapment when volunteer at "Perverted Justice" pretended to be a child, responding to defendant's sexual emails).
- *ABC v. ABC Appeals Board* (2002) 100 Cal.App.4th 1094 (exotic dancer in ABC-licensed establishment was not entrapped by u/c agent's $5 tip to show "more skin").
- *People v. Towery* (1985) 174 Cal.App.3d 1114 (receiving stolen property).
- *People v. Slatton* (1985) 173 Cal.App.3d 487 (sale of narcotics to u/c officer).
- *People v. Bottger* (1983) 142 Cal.App.3d 974 (solicitation for murder).
- *Douglass v. BMQA* (1983) 141 Cal.App.3d 645 (over-prescribing drugs).
- *People v. Peppars* (1983) 140 Cal.App.3d 677 (conspiracy/attempted burglary).

BOTTOM LINE: ***"As a general rule, the use of decoys to expose illicit activity does not constitute entrapment, so long as no pressure or overbearing conduct is employed by the decoy. ... [T]he rule is clear that ruses, stings and decoys are permissible stratagems in the enforcement of criminal law. ..." Provigo Corp. v. ABC Appeals Board*** **(1994) 7 Cal.4th 561, 568-69.**

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provides a very unique situation where a lawfully armed person will present an apparent threat to others. Penal Code § 12031(e) is your primary tool to resolve these cases. It is also very important to remain cognizant of the agendas that various advocacy groups may possess. The best advice for dealing with any individual who may be trying to test you is: *Remain professional, know the law and enforce it fairly.*

Editor's Note: This article was taken from the Los Angeles County Sheriff's Department Newsletter, Field Operations Support Services, Volume 09, Number 01, January 15, 2009.

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