

December 13, 2004

The Honorable David L. Landefeld
Fairfield County Prosecuting Attorney
201 South Broad Street, Fourth Floor
Lancaster, Ohio 43130

SYLLABUS:

2004-046

A county sheriff is not required to issue a license to carry a concealed handgun under R.C. 2923.125 to a person when the sheriff has reason to believe the person is in danger of becoming a drug dependent person or a chronic alcoholic.



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OPINION NO. 2004-046

The Honorable David L. Landefeld
Fairfield County Prosecuting Attorney
201 South Broad Street, Fourth Floor
Lancaster, Ohio 43130

Dear Prosecutor Landefeld:

You have requested an opinion whether a county sheriff may deny a person's application for a license to carry a concealed handgun under R.C. 2923.125 when the sheriff has reason to believe that the person is in danger of becoming a drug dependent person¹ or a chronic alcoholic.² It is our opinion that a county sheriff is not required to issue a license to carry a

¹ As used in the Revised Code, a "[p]erson in danger of becoming a drug dependent person" is "any person who, by reason of the person's habitual or incontinent use of any drug of abuse, is in imminent danger of becoming a drug dependent person." R.C. 3719.011(C). R.C. 3719.011(B), in turn, defines a "[d]rug dependent person" as "any person who, by reason of the use of any drug of abuse, is physically, psychologically, or physically and psychologically dependent upon the use of such drug, to the detriment of the person's health or welfare." *See generally State v. White*, Case No. 9-96-66, 1997 Ohio App. LEXIS 1598, at *13-14 (Marion County March 28, 1997) (the definitions in R.C. 3719.011 provide sufficient guidance for determining whether a person is drug dependent or in danger of becoming drug dependent). Whether a person is drug dependent or in danger of becoming drug dependent is a factual question that must be answered on a case-by-case basis. *State v. Bushong*, Case No. 02CA12, 2003-Ohio-2296, 2003 Ohio App. LEXIS 2127, at ¶¶41-42 (Guernsey County May 7, 2003), *appeal disallowed*, 100 Ohio St. 3d 1410, 2003-Ohio-4948, 796 N.E.2d 537 (2003).

² Although the term "chronic alcoholic" has not been defined by statute, in common, ordinary parlance this term denotes "a person who is addicted to the frequent, excessive use of alcohol." *State v. Hollar*, Case No. 7-158, 1980 Ohio App. LEXIS 13210, at *3 (Lake County July 7, 1980); *accord Tomlin v. Anderson*, No. 95-3385, 1997 U.S. App. LEXIS 1752, at *13 (6th Cir. Jan. 29, 1997); *see State v. Tomlin*, 63 Ohio St. 3d 724, 590 N.E.2d 1253 (1992); *Doyle v. Ohio Bur. of Motor Vehicles*, 51 Ohio St. 3d 46, 554 N.E.2d 97 (1990). *See generally* R.C. 3793.01 (for purposes of R.C. Chapter 3793 (alcohol and drug addiction services), an "[a]lcoholic" is a person who chronically and habitually uses alcoholic beverages to the extent that he no longer can control his use of alcohol or endangers the health, safety, or welfare of

concealed handgun to a person when the sheriff has reason to believe the person is in danger of becoming a drug dependent person or a chronic alcoholic.

R.C. 2923.125 sets forth the procedure whereby a person may apply for and obtain a license to carry a concealed handgun. A person who wishes to obtain a license to carry a concealed handgun is required to submit an application for the license to the sheriff of the county in which the person resides or to the sheriff of any county adjacent to the county in which the person resides.³ R.C. 2923.125(B). The person must also submit to the sheriff the supporting documentation described in R.C. 2923.125(B)(2)-(5)⁴ and, if not waived under R.C. 2923.125(B)(1), a nonrefundable license fee. R.C. 2923.125(B).

Upon receipt of a completed application form, supporting documentation, and license fee, if not waived, a county sheriff must conduct or cause to be conducted a criminal records check and an incompetency records check so as to determine whether a person qualifies for a license to carry a concealed handgun. R.C. 311.41(A)(1); R.C. 2923.125(C)-(D). Further, except as provided in R.C. 2923.125(D), a county sheriff “shall,” after making the information described in R.C. 2923.125(H) available through the law enforcement automated data system,⁵ issue to the person a license to carry a concealed handgun if all of the following apply:

himself or others). Whether a person is a chronic alcoholic is a question of fact. *State v. Tomlin*; *State v. Semenchuk*, 122 Ohio App. 3d 30, 701 N.E.2d 19 (Cuyahoga County 1997), *appeal not allowed*, 80 Ohio St. 3d 1425, 685 N.E.2d 238 (1997) and 80 Ohio St. 3d 1446, 686 N.E.2d 274 (1997); *State v. Hollar*.

³ A person may obtain an application form for a license to carry a concealed handgun from a county sheriff. R.C. 2923.125(A). The application form, which is made available to county sheriffs by the Ohio Peace Officer Training Commission, must conform substantially to the form prescribed in R.C. 2923.1210. R.C. 109.731(A)(1).

⁴ R.C. 2923.125(B)(2)-(5) require a person applying for a license to carry a concealed handgun to submit to the county sheriff a color photograph of himself; a competency certification; a set of fingerprints; and a certification by the person that he has read the pamphlet prepared by the Ohio Peace Officer Training Commission pursuant to R.C. 109.731 that reviews the firearms laws of this state, instructs persons as to dispute resolution and the laws of this state related thereto, and provides information to persons regarding all aspects of the use of deadly force with a firearm.

⁵ R.C. 2923.125(H) provides that, upon deciding to issue a license to carry a concealed handgun, “and before actually issuing ... the license, the sheriff shall make available through the law enforcement automated data system all information contained on the license.”

Except as provided in division (D)(3), (4), or (5) of this section,⁶ within forty-five days after receipt of an applicant's completed application form for a license to carry a concealed handgun, the supporting documentation, and, if not waived, license fee, a sheriff shall make available through the law enforcement automated data system in accordance with division (H) of this section the information described in that division and, upon making the information available through the system, *shall issue to the applicant a license to carry a concealed handgun that shall expire four years after the date of issuance if all of the following apply:*

(a) The applicant has been a resident of this state for at least forty-five days and a resident of the county in which the person seeks the license or a county adjacent to the county in which the person seeks the license for at least thirty days.

(b) The applicant is at least twenty-one years of age.

(c) The applicant is not a fugitive from justice.

(d) The applicant is not under indictment for or otherwise charged with a felony; an offense under [R.C. Chapter 2925, 3719, or 4729] that involves the illegal possession, use, sale, administration, or distribution of or trafficking in a drug of abuse; a misdemeanor offense of violence; or a violation of [R.C. 2903.14 or R.C. 2923.1211].

(e) The applicant has not been convicted of or pleaded guilty to a felony or an offense under [R.C. Chapter 2925, 3719, or 4729] that involves the illegal possession, use, sale, administration, or distribution of or trafficking in a drug of abuse; has not been adjudicated a delinquent child for committing an act that if committed by an adult would be a felony or would be an offense under [R.C. Chapter 2925, 3719, or 4729] that involves the illegal possession, use, sale, administration, or distribution of or trafficking in a drug of abuse; and has not been convicted of, pleaded guilty to, or adjudicated a delinquent child for committing a violation of [R.C. 2903.13] when the victim of the violation is a peace officer, regardless of whether the applicant was sentenced under division (C)(3) of that section.

⁶ R.C. 2923.125(D)(3) states that a county sheriff who becomes aware that a person applying for a license to carry a concealed handgun has been arrested for or otherwise charged with an offense that would disqualify the person from holding the license is required to suspend the processing of the person's application until the disposition of the case arising from the arrest or charge. R.C. 2923.125(D)(4) provides that, if a person is a resident of the county in which he seeks a license to carry a concealed handgun or of an adjacent county "but does not yet meet the residency requirements described in [R.C. 2923.125(D)(1)(a)], the sheriff shall not deny the license because of the residency requirements but shall not issue the license until the [person] meets those residency requirements." R.C. 2923.125, as enacted by the General Assembly, does not have a division (D)(5). *See* Am. Sub. H.B. 12, 125th Gen. A. (2004) (eff. Apr. 8, 2004).

(f) The applicant, within three years of the date of the application, has not been convicted of or pleaded guilty to a misdemeanor offense of violence other than a misdemeanor violation of [R.C. 2921.33] or a violation of [R.C. 2903.13] when the victim of the violation is a peace officer, or a misdemeanor violation of [R.C. 2923.1211]; and has not been adjudicated a delinquent child for committing an act that if committed by an adult would be a misdemeanor offense of violence other than a misdemeanor violation of [R.C. 2921.33] or a violation of [R.C. 2903.13] when the victim of the violation is a peace officer or for committing an act that if committed by an adult would be a misdemeanor violation of [R.C. 2923.1211].

(g) Except as otherwise provided in division (D)(1)(e) of this section, the applicant, within five years of the date of the application, has not been convicted of, pleaded guilty to, or adjudicated a delinquent child for committing two or more violations of [R.C. 2903.13 or R.C. 2903.14].

(h) The applicant, within ten years of the date of the application, has not been convicted of, pleaded guilty to, or adjudicated a delinquent child for committing a violation of [R.C. 2921.33].

(i) The applicant has not been adjudicated as a mental defective, has not been committed to any mental institution, is not under adjudication of mental incompetence, has not been found by a court to be a mentally ill person subject to hospitalization by court order, and is not an involuntary patient other than one who is a patient only for purposes of observation....

(j) The applicant is not currently subject to a civil protection order, a temporary protection order, or a protection order issued by a court of another state.

(k) The applicant certifies that the applicant desires a legal means to carry a concealed handgun for defense of the applicant or a member of the applicant's family while engaged in lawful activity.

(l) The applicant submits a competency certification of the type described in division (B)(3) of this section and submits a certification of the type described in division (B)(4) of this section regarding the applicant's reading of the pamphlet prepared by the Ohio peace officer training commission pursuant to [R.C. 109.731]. (Emphasis and footnote added.)

R.C. 2923.125(D)(1).

R.C. 2923.125(D)(1) plainly states that, except as otherwise provided in R.C. 2923.125(D), a county sheriff "shall issue" a license to carry a concealed handgun under R.C. 2923.125 to a person who meets the criteria described in R.C. 2923.125(D)(1). The use of the word "shall" in a statute setting forth the duties of a public officer renders the performance of the duties mandatory, unless there appears a clear and unequivocal legislative intent to the contrary. *Dep't of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St. 3d 532, 534, 605 N.E.2d 368 (1992); *State ex rel. City of Niles v. Bernard*, 53 Ohio St. 2d 31, 34, 372 N.E.2d 339 (1978); *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 107-08, 271 N.E.2d 834 (1971).

Although nothing in R.C. 2923.125 indicates a legislative intent to make the duties imposed upon a county sheriff under R.C. 2923.125(D)(1) permissive or discretionary, rather than mandatory, we believe that language in R.C. 2923.13(A)(4) makes such intention plain. R.C. 2923.13(A)(4) provides that, “[u]nless relieved from disability as provided in [R.C. 2923.14],⁷ no person shall knowingly acquire, have, carry, or use any firearm⁸ or dangerous ordnance, if ... [t]he person is drug dependent, in danger of drug dependence, or a chronic alcoholic.” (Footnotes added.) A person who violates R.C. 2923.13 “is guilty of having weapons while under disability, a felony of the third degree.”⁹ R.C. 2923.13(B). This statute thus unequivocally prohibits a person who is drug dependent, in danger of drug dependence, or a chronic alcoholic from acquiring, having, carrying, or using a handgun.

The manifest purpose of R.C. 2923.13(A)(4) is to prohibit a person from acquiring, having, carrying, or using a handgun when he “is drug dependent, in danger of drug dependence, or a chronic alcoholic.” *See generally State v. White*, Case No. 9-96-66, 1997 Ohio App. LEXIS 1598, at *7 (Marion County March 28, 1997) (“[c]learly, the legislative policy is to allow firearm access to responsible citizens in responsible circumstances, while limiting such access to persons and situations wherein substantial harm to the public’s safety and welfare will likely result. As manifested within R.C. 2923.13(A)(4), the General Assembly has identified firearms in the possession of those who are drug dependent, or in danger of becoming such, as a circumstance where substantial harm could result to the public”). *See generally also* R.C. 2923.15(A) (“[n]o person, while under the influence of alcohol or any drug of abuse, shall carry or use any firearm or dangerous ordnance”). Because a person who “is drug dependent, in danger of drug dependence, or a chronic alcoholic” is prohibited from acquiring, having, carrying, or using a handgun, it reasonably and pragmatically follows that the General Assembly does not intend that such person be able to obtain a license to carry a concealed handgun. *See generally Charles v.*

⁷ R.C. 2923.14(A) states that any person who solely by reason of his disability under R.C. 2923.13(A)(2) or R.C. 2923.13(A)(3) “is prohibited from acquiring, having, carrying, or using firearms, may apply to the court of common pleas in the county in which the person resides for relief from such prohibition.” R.C. 2923.14(A) does not, however, apply to any person who solely by reason of his disability under R.C. 2923.13(A)(4) is prohibited from acquiring, having, carrying, or using firearms.

⁸ As used in R.C. 2923.11-.24, the term “firearm” includes handguns. R.C. 2923.11(B)-(C).

⁹ Under R.C. 2923.23(A), a person who acquires, possesses, or carries a firearm or dangerous ordnance in violation of R.C. 2923.13 may not be prosecuted for such violation, if the person “reports his possession of firearms or dangerous ordnance to any law enforcement authority, describes the firearms [or] dangerous ordnance in his possession and where they may be found, and voluntarily surrenders the firearms or dangerous ordnance to the law enforcement authority.”

Fawley, 71 Ohio St. 50, 53, 72 N.E. 294 (1904) (the General Assembly is presumed to have acted with knowledge of existing statutes); *Eggleston v. Harrison*, 61 Ohio St. 397, 404, 55 N.E. 993 (1900) (“[t]he presumption is that laws are passed with deliberation and with knowledge of all existing ones on the subject”).

Indeed, it is illogical for a county sheriff to issue a license to carry a concealed handgun to a person who is prohibited by statute from acquiring, having, carrying, or using a handgun. As stated in numerous cases, the law does not require a public official to do a vain or useless act. See *State ex rel. Rodriguez v. Indus. Comm’n*, 67 Ohio St. 3d 210, 214, 616 N.E.2d 929 (1993); *State ex rel. Garnett v. Lyons*, 44 Ohio St. 2d 125, 127, 339 N.E.2d 628 (1975); *State ex rel. McLeary v. Hilty*, 139 Ohio St. 39, 45, 38 N.E.2d 198 (1941); *Mattingly v. Emahiser*, No. OT-96-026, 1996 Ohio App. LEXIS 1843, at *2 (Ottawa County May 2, 1996); *Bd. of Comm’rs of Butler County v. State ex rel. Davis*, 9 Ohio App. 105, 109, 1918 Ohio App. LEXIS 157 (Butler County 1918). See generally *State ex rel. Cotton v. Ghee*, 84 Ohio St. 3d 54, 55, 701 N.E.2d 989 (1998) (“[m]andamus will not issue to compel a vain act”). The issuance of a license to carry a concealed handgun to a person the county sheriff has reason to believe is in danger of becoming a drug dependent person or a chronic alcoholic is clearly a vain and pointless act since that same person may not acquire, have, carry, or use a handgun.

Moreover, it is unreasonable to presume that the General Assembly would want a county sheriff to issue a license to carry a concealed handgun to a person the sheriff has reason to believe is drug dependent, in danger of drug dependence, or a chronic alcoholic, while at the same time prohibiting the person from acquiring, having, carrying, or using a handgun. It is a basic tenet of statutory construction that “[t]he General Assembly will not be presumed to have intended to enact a law producing unreasonable or absurd consequences.” *Canton v. Imperial Bowling Lanes, Inc.*, 16 Ohio St. 2d 47, 242 N.E.2d 566 (1968) (syllabus, paragraph four); accord *Superior’s Brand Meats, Inc. v. Lindley*, 62 Ohio St. 2d 133, 136, 403 N.E.2d 996 (1980). See generally R.C. 1.47(C) (in enacting a statute, it is presumed that the General Assembly intended a just and reasonable result). Hence, “if the language of a statute fairly permits or unless restrained by the clear language thereof,” the statute must be construed so as to avoid unreasonable or absurd consequences. *Canton v. Imperial Bowling Lanes, Inc.* (syllabus, paragraph four).

Nothing in R.C. 2923.125 or R.C. 2923.13 compels us to interpret R.C. 2923.125(D) as requiring a county sheriff to issue a license to carry a concealed handgun to a person the sheriff has reason to believe is in danger of becoming a drug dependent person or a chronic alcoholic. Rather, as explained previously, it is apparent that the General Assembly intends to keep handguns and other firearms out of the hands of persons who manifest a propensity to drug dependency or chronic alcoholism. Accordingly, in light of this clear legislative intent, it is our opinion that the use of the word “shall” in R.C. 2923.125(D)(1) does not impose a mandatory duty upon a county sheriff to issue a license to carry a concealed handgun to a person when the sheriff has reason to believe the person is in danger of becoming a drug dependent person or a chronic alcoholic. See generally *Henry v. Cent. Nat’l Bank*, 16 Ohio St. 2d 16, 242 N.E.2d 342 (1968) (syllabus, paragraph two) (the primary purpose of statutory interpretation is to determine

and give effect to the legislative intent); *Chesapeake & Ohio Ry. Co. v. W.G. Ward Lumber Co.*, 1 Ohio App. 164, 172, 1913 Ohio App. LEXIS 147 (Lawrence County 1913) (a court may look to the mischief to be prevented when interpreting a statute).

Based on the foregoing, it is my opinion, and you are hereby advised that, a county sheriff is not required to issue a license to carry a concealed handgun under R.C. 2923.125 to a person when the sheriff has reason to believe the person is in danger of becoming a drug dependent person or a chronic alcoholic.

Respectfully,

A handwritten signature in black ink, appearing to read "Jim Petro", written in a cursive style.

JIM PETRO
Attorney General