

Tenn. Op. Atty. Gen. No. 96-080 (Tenn.A.G.), 1996 WL 205453

Office of the Attorney General

State of Tennessee  
Opinion No. 96-080  
April 25, 1996

**Right to keep and bear arms as applied to certain statutes regulating firearms.**

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**QUESTIONS**

Article I, Section 26 of the Tennessee Constitution provides for the right to keep and bear arms for the common defense. Do the following statutes violate this provision?

1. Tenn. Code Ann. § 39-17-1307(a), making it an offense to carry a firearm with the intent to go armed;
2. Tenn. Code Ann. § 39-17-1309, making it an offense to carry a firearm on school property;
3. Tenn. Code Ann. § 39-17-1311, making it an offense to possess or carry a firearm with the intent to go armed in a public park or recreational facility; and
4. Tenn. Code Ann. § 39-17-1305, making it an offense to possess a firearm on any premises where alcoholic beverages are sold.

**OPINIONS**

Each of these statutes is a valid exercise of the state's regulatory authority under Article I, Section 26 of the Tennessee Constitution and is therefore constitutional.

**ANALYSIS**

Article I, Section 26 of the Tennessee Constitution states “That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.” Tennessee case law explains the purpose of the last clause.

The additional clause in the Constitution of 1870 was adopted to remove all doubt as to the power of the Legislature to regulate the use of the arms which the citizens had a right to keep. It was not intended that the keeping or using of such arms should be prohibited, but that the use thereof by wearing or carrying about the person might be so regulated by law as to prevent crime. It was crime resulting from the habit of wearing arms, or of going armed, which the Convention sought to prevent, by expressly conferring this power of the Legislature.

*The State v. Wilburn*, 66 Tenn. 47,62 (1872).

*Andrews v. The State*, 50 Tenn. 165 (1871) is probably the most important case on Article I, Section 26. The *Andrews* case explains that the object of the provision is the efficiency of the people as soldiers. The Court indicated that the use of these arms can be regulated in order to prevent crime. Their use can be “limited by the duties and proprieties of social life, and such arms are to be used in the ordinary mode in which used in the country, and at the usual times and places.” *Id.*, at 181-82. The Court explained that prohibitions against carrying arms to church or other public assemblages were valid since this was not an appropriate use for them or necessary for training.

So we may say, with reference to such arms, as we have held, he may keep and use in the ordinary mode known to the country, no law can punish [186] him for so doing, while he uses such arms at home or on his own premises; he may do with his own as he will, while doing no wrong to others. Yet, when he carries his property abroad, goes among the people in public assemblages where others are to be affected by his conduct, then he brings himself within the pale of public regulation, and must submit to such restriction on the mode of using or carrying his property as the people through their Legislature, shall see fit to impose for the general good.

\*2 *Id.*, at 185-86.

1. Tenn. Code Ann. § 39-17-1307(a)(1) states that “a person commits an offense who carries with the intent to go armed a firearm,” a certain kind of knife or a club. This statute does not prohibit owning or carrying a firearm. It prohibits the carrying of a firearm *with the intent to go armed*. Thus, the carrying of a firearm is prohibited only when it is carried in a manner so as to be “readily accessible and available for use in the carrying out of purposes either offensive or defensive.” *Kendall v. State*, 118 Tenn. 156, 101 S.W. 189 (1906). This statute does not, in the opinion of this Office, infringe upon the citizen's “right to keep and bear arms for their common defense.”

The right established by Article I, Section 26 does not apply to every type of arm. *Andrew v. The State, supra*, and *Aymette v. The State, supra*, clearly establish that the right applies only to arms that “make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the state.” *Andrews v. The State*, 50 Tenn. at 179. Weapons not falling in this description do not receive the protection of Article I, Section 26 at all.

Wearing constitutionally protected weapons can still be regulated as long as it is done “with a view to prevent crime.” *Andrews* indicates that such regulations must “bear some well defined relation to the prevention of crime....” *Id.*, at 181. This would include limiting the use of such arms to the ordinary mode and at the usual times and places. *Id.*, at 182. The right to keep and bear arms “is no more above regulation for the general good than any other right.” *Id.*, at 185, quoting *Aymette v. The State*, 21 Tenn. at 159. Tenn. Code Ann. § 39-17-1307(a)(1) is within the powers of the state and bears a well defined relation to the prevention of crime by regulating the manner in which firearms may be carried. A firearm carried without the intent to go armed is less likely to be used in a crime.

Tenn. Code Ann. §39-17-1308 lists a number of defenses to the application of Tenn. Code Ann. §39-17-1307. Included in the list is when the person is carrying a weapon that is unloaded and unconcealed about his person and the ammunition is not in the immediate vicinity; when the person is authorized to possess or carry a firearm pursuant to Tenn. Code Ann. §39-17-1315, the handgun permit statute; when the person is at home, at his place of business or on the premises; and when the person is lawfully hunting, trapping or engaged in other lawful activity. Thus the application of Tenn. Code Ann. §39-17-1307 is rather narrow. The statutory scheme envisions many situations when the carrying of a weapon does not violate this statute.

2. Under Tenn. Code Ann. § 39-17-1309(c)(1), it is an offense to possess or carry a firearm on public or private school property, with certain exceptions. *Andrews v. The State, supra*, recognized that even constitutionally protected weapons

could be prohibited in public assemblies since there was no appropriate use for them there. It is, therefore, the opinion of this Office that Tenn. Code Ann. § 39-17-1309(c)(1) was enacted with a view to prevent crime and is a valid exercise of the state's regulatory authority under Article I, Section 26 of the Tennessee Constitution.

\*3 3. Tenn. Code Ann. § 39-17-1311(a) makes it an offense to possess or carry a firearm, with the intent to go armed, with certain exceptions, in or on the grounds of any public park, playground, civic center or other building facility, area or property owned, used or operated by any municipal, county or state government, or instrumentality thereof, for recreational purposes. The analysis of this statute is the same as the analysis under question one. Only the possession or carrying with the intent to go armed in these designated places is prohibited. Furthermore, the statute merely regulates the carrying of these weapons in places of public assemblage. This is permitted by *Andrews v. The State, supra*. It is the opinion of this Office that this statute is a valid exercise of the state's regulatory authority under Article I, Section 26.

4. Tenn. Code Ann. § 39-17-1305(a) states: "It is an offense for a person to possess a firearm on the premises of a place open to the public when alcoholic beverages are served or in the confines of a building where alcoholic beverages are sold." A previous statute was more limited, prohibiting carrying certain weapons for the purpose of going armed while inside the confines of the building of any establishment licensed to sell beer, wine or any other alcoholic beverage. Tenn. Code Ann. § 39-6-1717 (repealed by 1989 Public Acts, Chapter 591). In *Gibbs v. Blount County Beer Board*, 664 S.W.2d 68 (Tenn. 1984), the Beer Board refused to issue a license to sell beer at a market which was also housed a gun shop. The same entrance was used for both businesses, the gun shop occupying a small area set off from the store by a glass display case and panel wall. The Beer Board refused to issue the license because the sale of beer in the same building where guns were bought, sold, traded and repaired interfered with the public health, safety and morals. The Tennessee Supreme Court quoted Tenn. Code Ann. § 39-6-1717 and stated:

If this license is granted the customers of the gun shop will clearly be "inside the confines of the building" where alcoholic beverages will be sold. We are entitled to assume that most, if not all of them, will be carrying weapons described in T.C.A. § 39-6-1701. The practical problem created is how can the public distinguish between those persons who are carrying weapons with intent to go armed, from those who have no intent to go armed. Obviously, it is an impossibility to make such distinction until after the fact of danger and potential harm to the public has occurred.

As the trial judge indicated, the Legislature in enacting T.C.A. §39-6-1717 has clearly said that it is against public policy to commingle persons carrying weapons with intent to go armed with other members of the public in places where alcoholic beverages are sold. When the public cannot distinguish the violators of that section from the non-violators, we think it follows as the night follows the day that the granting of a beer permit in the circumstances of this case would interfere with the public health, safety and morals.

\*4 *Gibbs v. Blount County Beer Board*, 664 S.W.2d at 69. The Court's observations clearly lay out the potential for danger and the difficulty of distinguishing between a mere possessor and a possessor having the intent to go armed. Although this case does not address the right to bear arms, it does indicate the justifications for statutes like Tenn. Code Ann. § 39-17-1305. Due to the limited application of the statute to a place of public assemblage, *see Andrews v. The State, supra*, and the clear purpose of the statute, to decrease the chance of an altercation involving firearms in an establishment that sells alcoholic beverages, it is the opinion of this Office that Tenn. Code Ann. § 39-17-1305 is a valid exercise of the state's regulatory authority under Article I, Section 26.

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