

Open Carry

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Date : March 5, 2013

Do law-abiding North Carolina residents have a right to carry a gun openly in public? Generally, yes.

Federal constitutional right? The Supreme Court has recently ruled that the Second Amendment protects an individual right to bear arms, including handguns, *District of Columbia v. Heller*, 554 U.S. 570 (2008), and that it protects that right from infringement by state and local governments as well as the federal government, *McDonald v. Chicago*, 561 U.S. 3025 (2010). *Heller* makes clear that the Second Amendment encompasses the right to have a gun in one's home, but whether the Amendment also guarantees a right to carry a gun in public, and if so, whether it guarantees a right to carry a gun openly as opposed to concealed, is a matter of debate. As a judge of the Seventh Circuit recently observed, "[t]he Supreme Court has not yet decided whether the post- *Heller* individual right to keep and bear arms at home under the Second Amendment extends beyond the home." *Moore v. Madigan*, ___ F.3d ___, 2013 WL 656749 (7th Cir. Feb. 22, 2013) (Hamilton, J.). See also James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry after Heller*, 97 Cornell L. Rev. 907 (2012) (discussing the widely varying approaches of the states to this issue). I won't speculate here about how the Supreme Court might, or should, rule when presented with the issue.

State constitutional right. There's no need for such speculation, because the Supreme Court of North Carolina has already ruled on open carry under the state constitution. *State v. Kerner*, 181 N.C. 574 (1921). The defendant in *Kerner* got in a confrontation with another man. The defendant went to his workplace, grabbed his gun, and came back to the fight. He was charged with, among other things, "carrying a pistol off his premises unconcealed," which violated a local act applicable to Forsyth County and was a misdemeanor. The trial judge dismissed the charge as unconstitutional. The state appealed, and the supreme court affirmed.

In keeping with prevailing federal constitutional doctrine at the time, the court first stated that the Second Amendment didn't apply because "the first ten amendments to the United States Constitution are restrictions upon the federal authority and not upon the states." Therefore it focused on the state constitution, which mimicked the Second Amendment, providing in Article I, Section 24 that: "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." (The quoted language now appears, after the constitutional overhaul of 1971, in Article I, Section 30 of the North Carolina Constitution.)

The court clearly viewed the provision as protecting the right to carry arms in public, condemning the Forsyth County local act as "especially objectionable" because it limited a person's right "to carry a pistol off his own premises, even openly, and for a lawful purpose." Indeed, the court found that the people have a "sacred right . . . to bear arms and [be] ready to use them for the protection of their liberties or their country when occasion serves." It also specifically ruled that the state constitution protects right to carry pistols, as "[t]he historical use of pistols as 'arms' of offense and defense is beyond controversy."

State laws relevant to open carry. *Kerner* does not preclude all regulations regarding the carrying of firearms. The court noted several types of regulations that would be consistent with the state constitution, such as:

- Prohibiting the carrying of concealed weapons. (In fact, the state's authority to do so is expressly mentioned in Article I, Section 30.)

- “[P]rohibit[ing] the carrying of deadly weapons when under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror.”
- “[R]equir[ing] that a pistol shall not be under a certain length, which if reasonable will prevent the use of pistols of small size which are not borne as arms but which are easily and ordinarily carried concealed.”

We now have on the books a number of state laws that limit the scope of the right to open carry, such as the ban on guns on school grounds, G.S. 14-269.2, the ban on guns in “any assembly where a fee has been charged for admission . . . or into any establishment in which alcoholic beverages are sold and consumed,” G.S. 14-269.3, the ban on guns in courthouses and certain state buildings, G.S. 14-269.4, and the ban on guns at parades and demonstrations, G.S. 14-277.2. Obviously, those statutes don’t neatly track the regulations that *Kerner* said were permissible. Therefore, while some of the state’s gun laws have been upheld over constitutional challenges, *see, e.g., State v. Sullivan*, 202 N.C. App 553 (2010) (upholding ban on guns in courthouses); *State v. Fennell*, 95 N.C. App. 140 (1989) (upholding ban on sawed-off shotguns), it’s possible that other existing regulations could be challenged on constitutional grounds. Still, they illustrate the general idea that the right to open carry is not unlimited.

One issue that comes up in connection with open carry is the common law offense North Carolina of going armed to the terror of the people. (Jessie Smith discusses the elements of the crime [here](#).) As relevant to open carry, the law prohibits a person from carrying a gun for the purpose of terrorizing others and in a manner that is likely to cause terror. Generally, a person doesn’t commit this offense by carrying a weapon in a non-threatening and orderly manner, such as going about one’s daily business with a handgun in a hip holster.

Local regulations regarding open carry. In addition to state law, local governments also have some authority to limit open carry rights. However, local government authority is limited by the pre-emption statutes that, with some exceptions, make gun regulation a matter of state rather than local concern. (I previously discussed those statutes [here](#).)

An example of a regulation that is within the power of local government is the power to prohibit open carry in “public?owned buildings, on the grounds or parking areas of those buildings, or in public parks or recreation areas.” G.S. 14-409.40(f). (Concealed carry in some of those areas may be permissible, but that’s a subject for another day.)

However, it appears that local governments do not have the authority to ban open carry completely, even on public property such as streets and sidewalks. One could argue that such authority exists under two statutes, both of which are recognized as exceptions to the statewide pre-emption laws:

- G.S. 160A-189, which allows cities to “by ordinance regulate, restrict, or prohibit the discharge of firearms at any time or place within the city except when used in defense of person or property or pursuant to lawful directions of law?enforcement officers, and [to] regulate the display of firearms on the streets, sidewalks, alleys, or other public property.”
- G.S. 153A-129, which allows counties to “by ordinance regulate, restrict, or prohibit the discharge of firearms . . . except when used to take birds or animals . . . when used in defense of person or property, or when used pursuant to lawful directions of law?enforcement officers. A county may also regulate the display of firearms on the public roads, sidewalks, alleys, or other public property.”

But reading the power to “regulate the display of firearms” to allow local governments to ban open carry in public is probably wrong for two reasons. First, it would be unconstitutional under *Kerner*. As the court noted, “[t]o exclude all pistols, however, is not a regulation, but a prohibition, of arms which come under the designation of ‘arms’ which the people are entitled to bear.” Second, such a reading ignores the fact that both statutes allow local governments to “regulate . . . or prohibit” the discharge of firearms, but only to “regulate” the display of firearms. The lack of parallelism appears to be intentional. Therefore, although the precise extent of local government authority isn’t clear, and a variety of local regulations might be permissible, a complete ban on public open carry does not appear to be.

Gun law webinar. Those interested in the law of gun rights and gun control may wish to participate in an upcoming webinar on the subject. I'm the presenter. The webinar will take place on Wednesday, March 20, from 10:00-11:15 a.m. It's free, and we've applied for CLE credit. Registration is required. Details are [here](#).