***Shotgun News*, September 1, 2003, 18-20**

Victory On Many Fronts

Last month I wrote an article about an astonishing pair of victories concerning the concealed weapon permit laws: Alaska adopted "Vermont-carry"; and Oklahoma changed from a *reciprocal* policy about recognizing the permits of other states (meaning that other states had to agree to recognize Oklahoma permits), to recognizing permits from all other states, whether those other states recognized Oklahoma's permits or not. I thought, "That's the end of concealed weapon permit law coverage for a while—how many more victories could we get this year?" The year is young, it seems.

On June 14, North Carolina's Governor Mike Easly signed SB 33. This law recognizes concealed weapon permits issued by other states, if those other states recognize North Carolina permits, or if North Carolina residents can obtain a non-resident permit based on having a North Carolina permit.[1] If you live in a state that recognizes North Carolina's concealed handgun permits (*e.g.*, Idaho, Oklahoma), you should soon be able to carry concealed in North Carolina.

What if your permit is non-resident (you live in California, but have an Idaho non-resident permit)? As I read the law, what matters isn't what state you live in, but what state's permit you are carrying. California doesn't recognize North Carolina permits (or for that matter, any other state's permits but its own). The way SB 33 is written, however, what matters is that you are carrying an Idaho permit—and Idaho recognizes North Carolina's permits. Therefore, North Carolina will recognize your non-resident permit. The North Carolina Attorney-General's office still has to produce

the list of acceptable states, and distribute it to law enforcement, so you might to check before carrying concealed in North Carolina, but this change in the law is a clear win.

We had another victory in a somewhat surprising spot—Delaware. Governor Ruth Ann Minner signed HB 178 on July 11. This bill honors the concealed weapon permits of all other states "where those issuing states also give full faith and credit and otherwise honor the licenses issued by the State of Delaware…." Just like North Carolina, the Delaware Attorney-General must contact the other states and then publish a list for law enforcement,[2] but in practice, because so many states now recognize the permits of other states, this is a big win. Even more amazing: Delaware is *not* a shall-issue state, and Democrats control one house of the legislature—and this bill still sailed through, without a fight.

Another victory for our side was that New Hampshire passed a law, effective January 1, 2004, protecting gun makers and dealers from these predatory lawsuits that try to hold the manufacturer or dealer responsible for the criminal misuse of guns.[3] New Hampshire isn't the first state to pass such a law, but it's nice to have another join the parade. Until we can get Congress to pass a similar federal shield law, the gun makers will be subject to the same sort of absurd lawsuits currently being brought about fast food makers. ("What? You mean living on Big Macs and chocolate shakes could be bad for my health? I never would have guessed!")

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[1] N.C.G.S. § 14-415.24, available at http://www.ncga.state.nc.us/html2003/bills/AllVersions/Senate/S33vc.html, last accessed July 20, 2003.

[2] HB 178, available at http://www.legis.state.de.us/LIS/LIS142.NSF/vwLegislation/, last accessed July 20, 2003.

[3] Norma Love, "Benson signs gun legislation," *Concord* [N.H.] *Monitor*, July 16, 2003, available at http://www.cmonitor.com/stories/news/state2003/071603_gun_bill_2003.shtml, last accessed July 20, 2003.

Finally, the last piece of news isn't spectacularly good, but it isn't all bad, either. The Wisconsin Supreme Court handed down two decisions on the same day concerning the meaning of the state constitution's right to keep and bear arms provision. One of these decisions, *State of Wisconsin* v. *Cole* (Wisc. 2003), upheld the state's complete ban on concealed carry. The other decision, *State of Wisconsin* v. *Hamadan* (Wisc. 2003), created at least one useful exception to that law.

Wisconsin has prohibited concealed carrying of handguns since 1872, and there are no concealed handgun permits; there isn't even a discretionary permit process, like New York or California. In 1998, the voters of Wisconsin voted to amend the state constitution to include this new provision: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose." The goal was to keep some of the crazier cities in Wisconsin (and you know who you are) from adopting restrictive gun control laws.

The first case began almost exactly one year later, on November 6, 1999. A Philip Cole was arrested during a traffic stop, carrying marijuana and two concealed handguns. Cole's argument was that the concealed handgun law was contrary to the new right to keep and bear arms provision.[4] Now, I'm not thrilled with *how* the Wisconsin Supreme Court upheld the ban on carrying concealed handguns in *Cole*, but I think that they came to the right result. The wrong method, however, created a foolish and (at least in Wisconsin) probably dangerous precedent.

Like most questions about gun control and the right to keep and bear arms, this question has come up before. The Indiana Supreme Court had exactly this sort of

question before it in *McIntyre* v. *State* (1908). The Indiana Constitution of 1850 had a right to keep and bear arms provision in it, and when the state adopted this document, Indiana also had a ban on concealed carrying of handguns, upheld in an 1831 decision. The Indiana Supreme Court decided that "when a clause or provision of a constitution or statute has been readopted after the same has been construed by the courts of such state, it will be concluded that it was adopted with the interpretation and construction which said courts had enunciated."[5]

McIntyre would have been a good case for the Wisconsin Supreme Court to cite to justify their position, upholding the ban on concealed carry. When Wisconsin's voters added that right to keep and bear arms provision in 1998, there was an existing ban on concealed carrying of firearms. It is, I think, perfectly reasonable to assume that when the legislature passed this constitutional guarantee, they did *not* intend to overturn the existing carrying concealed weapon law. If that had been their intent, the legislature would have repealed the law before adopting this new constitutional provision.

Instead, the Wisconsin Supreme Court cited a decision from the Wyoming Supreme Court involving the *opposite* situation: the concealed weapon law was enacted many years *after* the Wyoming Constitution's right to keep and bear arms provision. The defendant was a cocktail waitress who was pulled over for a traffic violation, carrying a concealed knife for self-defense. She argued that because concealed carry was lawful when Wyoming adopted its right to keep and bear arms provision, and the concealed carry law was more recent, that the constitutional provision should override the concealed

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[4] *State of Wisconsin* v. *Cole*, 01-0350-CR, (Wisc. 2003), 2-6, available at http://www.wisconsinconcealedcarry.com/01-0350.pdf, last accessed July 20, 2003.

[5] *McIntyre* v. *State*, 170 Ind. 163, 83 N.E. 1005 (1908).

carry law. The Wyoming Supreme Court "solved" the problem by simply denying that there was a right to carry concealed when Wyoming adopted its first state constitution.[6] The Wyoming Supreme Court ruled incorrectly about the facts—and the Wisconsin Supreme Court cited this nonsensical precedent.

Instead of using the *McIntyre* precedent from Indiana, the Wisconsin Supreme Court went down the same dangerous path that the Wyoming Supreme Court did in *McAdams.* The Wisconsin Supreme Court decided that while the right to keep and bear arms was a "fundamental right," not all fundamental rights deserve what lawyers call "strict scrutiny."

What is "strict scrutiny"? Strict scrutiny means that to justify a particular law that seems to conflict with some provision of the constitution, there must be a compelling governmental interest in what the government is trying to do. It isn't enough to say, "The legislature has decided that we don't like people doing X, therefore we are banning X." Instead, the government must demonstrate that banning X solves some serious problem of public health or safety.

Often, the courts have held that even if the government's interest in regulating an activity is compelling, the law must be the least restrictive or least intrusive method of achieving the government's legitimate goals. Yes, we could reduce rape rates by imposing a dusk to dawn curfew on all men, but there are less restrictive and intrusive methods of achieving that same goal.[7]

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[6] *State* v. *McAdams*, 714 P.2d 1236, 1237 (Wyo. 1986).

[7] Harold J. Spaeth, "Strict Scrutiny," in Kermit L. Hall, ed., *The Oxford Companion to the Supreme Court of the United States* (New York: Oxford University Press, 1992), 845.

The Wisconsin Supreme Court decided that the correct test was not strict scrutiny, as the courts usually apply to free speech questions, but "whether or not the restriction upon the carrying of concealed weapons is a reasonable exercise of the State's inherent police powers."[8] What's "reasonable"? The Court relied on decisions of other state supreme courts that limiting, or even prohibiting concealed carry, was "reasonable."[9] This argument doesn't persuade me, because there is no clear-cut line that distinguishes "reasonable" from "unreasonable," at least as the Court wrote the *Cole* decision.

The second case the Wisconsin Supreme Court decided is an example of the abuse of police power that is why so many states have adopted non-discretionary concealed weapon permits laws these last few years. A few weeks after Cole's arrest for marijuana possession and concealed carry of a handgun, Munir Hamadan, the owner of a small grocery store in a very rough section of Milwaukee, was charged with carrying a concealed handgun in his own store. Police detectives came to the store, asked to see a copy of the store's licenses (I presume, liquor licenses), and asked Hamadan if he kept a gun in the store. He said yes, and showed them that he had a gun in his pocket—at which point, the police confiscated the gun, and started the paperwork rolling for a criminal charge.[10]

Hamadan's had been the victim of four armed robberies in the preceding six years; Hamadan had killed one of these robbers in self-defense in February of 1997. He was not allowed to introduce any of this information at trial. While the jury convicted him of carrying a concealed handgun, the jury fined him $1, and the judge expressed his

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[8] *State of Wisconsin* v. *Hamadan*, 01-0056-CR,(Wisc. 2003).
[9] *State of Wisconsin* v. *Cole*, 01-0350-CR, (Wisc. 2003), 24-26.

desire that the appeals courts would clarify whether the new right to keep and bear arms provision changed anything.[11]

The Wisconsin Supreme Court clearly recognized the absurdity of Hamadan's conviction. Yet they were unwilling to strike down the entire concealed weapon law. Instead, they argued, much as they had in the *Cole* decision, that the new constitutional provision limited police power. After an enormous of writing designed to justify why concealed weapon regulation is *usually* in the public interest, the Court finally did what they clearly wanted to do: declare that what Hamadan had done was "reasonable," because a ban on carrying concealed in a store in a high crime neighborhood does *not* increase public safety—but does make the shopkeeper less safe. "Anyone who enters a business premises, including a person with criminal intent, should presume that the owner possesses a weapon, even if the weapon is not visible."[12] Many, many pages later, the decision finally stated "we conclude that a citizen's desire to exercise the right to keep and bear arms for purposes of security is at its apex when undertaken to secure one's home or privately owned business."[13]

It's a baby step, and Wisconsin needs a non-discretionary concealed weapon permit law. (If you want to help, I'm sure that the folks at http://www.wisconsinconcealedcarry.com/ would love to hear from you.) But it would have been very easy for the Wisconsin Supreme Court to have applied the rule it used in *Cole* to uphold Wisconsin's absurd ban on concealed carry *even in your own home or*

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[10] *State of Wisconsin* v. *Hamadan*, 01-0056-CR, (Wisc. 2003), available at http://www.wisconsinconcealedcarry.com/01-0056.pdf, last accessed July 20, 2003.

[11] *State of Wisconsin* v. *Hamadan* (Wisc. 2003), 7-8.

[12] *State of Wisconsin* v. *Hamadan* (Wisc. 2003), 26-35.

[13] *State of Wisconsin* v. *Hamadan* (Wisc. 2003), 41-42.

business. Instead, they wiggled back and forth until they came up with a way to strike the most grossly absurd part of the law.

Progress. We're making it, big steps in some states, baby steps in others—and a few steps backward in a few backwaters like California and Massachusetts—but throughout America as a whole, we are making progress.

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