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Criminal Law--Concealed Weapons--Tear Gas Pen [*State v. Umbrello*, 106 N.H. 336, 211 A.2d 400 (1965)]

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throw of the national government;¹⁸ a lesser evil might not justify governmental abridgement of free speech. In the light of these facts, the Ohio Court of Appeals decided that under the "balancing" test the juvenile court's judgment would have to be reversed:

Whether we apply the 'clear and present danger' test as used in *Wood v. Georgia* . . . or the 'balancing of interest' test used in *Dennis v. United States* . . . to our present fact situation, we come to the same conclusion. The state does not have a substantial enough interest to restrict speech in cases where a mother, in the only way she knows how, instructs her child in ways to prevent conception before marriage. . . .

Can anyone argue that it is wrong for parents to attempt to educate their own children in areas which are grossly neglected by our school systems? This is not only a parental right; it is a duty. . . . We will not penalize a parent for not knowing how to be more discreet in a choice of words.¹⁹

The import of *State v. McLaughlin*²⁰ is that parents may now use their best efforts in counseling a child regarding matters of sex and birth prevention without incurring the risk of later prosecution for contributing to that child's delinquency. Ohio case law is thus enriched by a rule which upholds freedom of speech and which precludes needless state intrusion into the privacy of the home.

CARL F. GILLOMBARDO, JR.

CRIMINAL LAW — CONCEALED WEAPONS — TEAR GAS PEN

State v. Umbrello, 106 N.H. 336, 211 A.2d 400 (1965)

The second amendment to the United States Constitution guarantees that "the right of the people to keep and bear Arms shall not be infringed."¹ This guarantee assures each citizen the right to protect himself and his property; however, under modern social conditions this right has been severely restricted. Almost every state has enacted some legislation to control the use and possession of arms;² and such state legislation is supported by United States Supreme Court decisions³ which hold that the second amendment is binding on the federal government, but not on the states. Although

¹⁸ *State v. McLaughlin*, 4 Ohio App. 2d 327, 333, 212 N.E.2d 635, 639 (1965).

¹⁹ *Id.* at 334-35, 212 N.E.2d at 640. (Citations omitted.)

²⁰ 4 Ohio App. 2d 327, 212 N.E.2d 635 (1965).

specific state regulations differ, most jurisdictions prohibit and penalize the carrying of concealed weapons.⁴

In *State v. Umbrello*,⁵ a defendant was charged with carrying a loaded pistol on his person without a license, in violation of the New Hampshire concealed weapons statute.⁶ The defendant moved for dismissal of the complaint on the ground that his .410 gauge Hercules tear gas pencil was not a loaded pistol within the meaning of the statute. The motion was denied. On review, the New Hampshire Supreme Court held that since the pen in its unmodified form could not fire regulation ammunition without rupturing the barrel, it was not a pistol within the meaning of the statute.⁷

The New Hampshire Supreme Court analyzed the question in terms of more conventional weaponry, namely, the pistol or revolver, because of the nature of the statutory language.⁸ In so doing, the court adopted what might be called a "capability" test. Central to this test is the question of whether the device could, in the condition in which it was found, perform like a conventional pistol or revolver.⁹ Although the court considered the fact that one *could* fire a

¹ U.S. CONST. amend. II.

² See authorities cited in 56 AM. JUR. *Weapons* §§ 5-9 (1947).

³ E.g., *Miller v. Texas*, 153 U.S. 535 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); *United States v. Cruikshank*, 92 U.S. 542 (1875).

⁴ See, e.g., FLA. STAT. ANN. §§ 790.01-.05 (1965); OHIO REV. CODE § 2923.01; OKLA. STAT. ANN. tit. 21, §§ 1271, 1272 (1951). See generally Annot., 43 A.L.R.2d 492 (1955).

⁵ 106 N.H. 336, 211 A.2d 400 (1965).

⁶ N.H. REV. STAT. ANN. § 159.4 (1955). The statute states:

No person shall carry a loaded pistol or revolver in any vehicle or concealed upon his person, except in his dwelling house or place of business, without a license therefor as hereinafter provided. A loaded pistol or revolver shall include any pistol or revolver with a magazine, cylinder, chamber or clip in which there are loaded cartridges. Whoever violates the provisions of this section shall be fined not more than one hundred dollars, or imprisoned not more than one year, or both.

⁷ *State v. Umbrello*, 106 N.H. 336, 211 A.2d 400, 401 (1965). For the text of the New Hampshire statute, see note 6 *supra*. See also N.H. REV. STAT. ANN. § 159.1 (1955) where "pistol," as used in § 159.4, is defined as follows:

Pistol or revolver, as used herein means any firearm with barrel less than twelve inches in length. It does not include antique weapons incapable of use. *Ibid.*

⁸ N.H. REV. STAT. ANN. § 159.4 (1955). For the text of the statute, see note 6 *supra*. In particular, note the definition of "loaded pistol or revolver" contained within § 159.4.

⁹ The term "capability test," as used herein, is intended to designate the type of analysis utilized by a court to make a disposition on an uncommon weapon under a concealed weapons statute. Cases applying this test are rare; outside of the *Umbrello* case, the test has only been applied to the tear gas pen on two other occasions. See notes 15-16 *infra*.

.410 shotgun shell or a .45 caliber bullet from the pen by inserting a small steel adapter or auxiliary chamber, it was deemed controlling that such adaptation had not in fact been made.¹⁰ Further, the court seemed impressed by the fact that when the defendant was arrested, no live ammunition or adapter was found on his person or in his automobile.¹¹

The capability test utilized in *Umbrello* had been expounded earlier by a New York court in construing a similarly restrictive statute.¹² In *People v. Anderson*,¹³ it was held that a pen primarily intended for the discharge of tear gas was a pistol within the meaning of the New York statute under which the state had chosen to prosecute.¹⁴ Like the *Umbrello* court, the *Anderson* court chose to ignore the fact that the device did not resemble the more conventional weapons. However, in *Anderson* it was shown that .30 and .38 caliber shells could actually be fired from the pen in the condition in which it was found. The court encouraged a strict policy toward such devices because "to permit the sale or possession of such an instrument would be to encourage the carrying of concealed weapons by means of a very clever ruse."¹⁵

Thus, underlying the capability test utilized in the *Umbrello* decision is a policy to ferret out devices which, because of their unusual size or shape, might escape the provisions of the concealed weapons statute. That same policy was apparently applied in *United States v. Decker*.¹⁶ In that case, a tear gas gun, in its unaltered form, capable of firing a shotgun shell was held to be a firearm as defined by the National Firearms Act.¹⁷ Unlike *Umbrello*, it was shown that a .410 gauge shotgun shell could be fired from the unmodified gun without rupturing the barrel. On the other hand, the court clearly indicated that a tear gas gun, capable of discharging gas alone, would not be considered a firearm. Thus, the court implied that in future cases this same capability test would be applied to the tear gas pen, which differs from the more conven-

¹⁰ State v. *Umbrello*, 106 N.H. 336, 211 A.2d 400, 401 (1965).

¹¹ *Ibid.*

¹² N.Y. PEN. LAW § 1897(4). This section deals with the possession of firearms which may be concealed. For the relevant text of this section, see note 14 *infra*.

¹³ 236 App. Div. 586, 260 N.Y. Supp. 329 (1932).

¹⁴ N.Y. PEN. LAW § 1897(4). The statute applies to "any person over the age of sixteen years who shall have in his possession . . . any pistol, revolver or other firearm of a size which may be concealed. . . ."

¹⁵ *People v. Anderson*, 236 App. Div. 586, 589, 260 N.Y. Supp. 329, 332 (1932).

¹⁶ 292 F.2d 89 (6th Cir.), *cert. denied*, 368 U.S. 834 (1961).

¹⁷ INT. REV. CODE OF 1954, §§ 5841, 5851.

tional tear gas gun only in that the pen usually fires a much smaller container of gas.¹⁸

If there is proof that the weapon, itself, is capable of firing live ammunition, a strict adherence to the capability test adopted in *Umbrello* does not allow a court to consider the purpose for which the device is actually used. Nor does it allow a court to consider the fact that the defendant had no knowledge that the weapon could fire live ammunition.¹⁹

Nevertheless, the capability test utilized in *Umbrello* is meritorious in many respects. For example, it acknowledges the constitutionally guaranteed right to bear arms, while attempting to modify that right to render it compatible with modern social conditions. Further, this view prescribes practical guidelines for future rulings on other dangerous weapons.

However, tied as this test is to a comparison with the more conventional "pistol and revolver," it cannot escape inherent weaknesses. Foremost among these weaknesses is the fact that a majority of purchasers of such devices as the tear gas pen, like the women who carry them in their purses for an emergency, have neither knowledge of nor interest in its criminal adaptability or capability. Thus, one buyer may find himself exposed to criminal liability, while another equally unsophisticated buyer may be immune to such liability merely because the device he purchased was so thinly fabricated as to be unable to withstand the percussion of live ammunition. A second weakness in the capability test is that as these modern devices come to respond less and less like the conventional pistol or revolver, the comparison between them, as a basis of criminal liability, becomes more and more irrational. Thus, the *Umbrello* court, having determined that the tear gas pen was not a "pistol or revolver" within the meaning of the New Hampshire statute,²⁰ was forced to dismiss the complaint. In so doing, the court was unable to consider that a tear gas pen, even though inca-

¹⁸ The court stated:

If the weapon could discharge a shot through the energy of an explosive, then it was covered by the statute. In other words, a tear gas gun capable only of discharging tear gas would not be considered as a firearm. It was a firearm only if it could discharge a shot through the energy of an explosive. *United States v. Decker*, 292 F.2d 89, 90 (6th Cir. 1961).

¹⁹ See, e.g., *United States v. Fogarty*, 344 F.2d 475 (6th Cir. 1965); *Sipes v. United States*, 321 F.2d 174 (8th Cir. 1963), *cert. denied*, 375 U.S. 913 (1963); *State v. Wheeler*, 195 Kan. 184, 403 P.2d 1015 (1965).

²⁰ N.H. REV. STAT. ANN. §§ 159.1-4 (1955).

pable of firing or of being adapted to fire conventional bullets, may be used with devastating effect by an assailant at close range.

The tear gas pen is only one of the many new devices being carried by individuals, especially in urban areas, for self defense. Because of the relative popularity of these devices, the ease in procuring them, and their low cost, the amount of litigation involving them will probably increase as police departments attempt to minimize the use of these devices. But if the capability test is applied by the courts, many of these new devices, which are dangerous and can be used for criminal purposes, will escape regulation. The solution to this problem lies in the question left unanswered by the *Umbrello* decision:²¹ whether or not the carrying of a concealed tear gas pen was a violation of the state's dangerous weapon statute,²² even though it was not a violation of the concealed weapon statute.

Like New Hampshire, many states have prohibited the carrying of dangerous weapons, either as part of their general concealed weapons statute²³ or as a separate enactment.²⁴ A dangerous weapon has been variously defined²⁵ as an article of offense which, in its intent or easily adapted use, is likely to produce death or serious bodily harm. Included among the dangerous weapons are the dirk, bowie knife, sling shot, razor, billy, false knuckles, and other like weapons.²⁶ To determine if a device constitutes a dangerous weapon, a court will examine the following factors: (1) the general purpose of the device; (2) its potential for death or bodily harm; (3) the ease with which it may be adapted to a more criminal purpose; and

²¹ *State v. Umbrello*, 106 N.H. 336, 211 A.2d 400, 401 (1965).

²² N.H. REV. STAT. ANN. §§ 585.26-27 (1955).

²³ *E.g.*, FLA. STAT. ANN. §§ 790.01-05 (1965); MICH. STAT. ANN. §§ 28.423-424 (1962); OHIO REV. CODE § 2923.01; WIS. STAT. ANN. § 941.23 (1958).

²⁴ See, *e.g.*, MASS. ANN. LAWS ch. 269, § 10 (Supp. 1964); N.H. REV. STAT. ANN. §§ 585.26-27 (1955); OKLA. STAT. ANN. tit. 21, §§ 1271, 1272 (1958). It should be noted that the Ohio courts have not ruled on the gas pen to date. Although the Ohio statutory structure parallels that of New Hampshire, the Ohio courts are free to follow the more desirable "dangerous weapons" approach.

²⁵ See, *e.g.*, *Hutton v. People*, 398 P.2d 973 (Colo. 1965); *Parman v. Lemmon*, 119 Kan. 323, 244 Pac. 227 (1925), *rev'd on other grounds*, 120 Kan. 370, 244 Pac. 232 (1926); *People v. Goolsby*, 284 Mich. 375, 279 N.W. 867 (1938); *Beeler v. State*, 334 P.2d 799 (Okla. Crim. App. 1959); *Commonwealth v. Festa*, 156 Pa. Super. 329, 40 A.2d 112 (1944). See generally *Annor.*, 92 A.L.R. 1098 (1934).

²⁶ *Smith v. Nussman*, 156 So. 2d 680 (Fla. 1963) (sling shot); *Jackson v. State*, 231 Md. 591, 191 A.2d 432 (1963) (.22 caliber starter's gun); *People v. Vaines*, 310 Mich. 500, 17 N.W.2d 729 (1945) (daggers, dirks, stilettos); *State v. Witcher*, 58 N.J. Super. 464, 156 A.2d 709 (App. Div. 1959) (billy); *State v. Vargas*, 42 N.M. 1, 74 P.2d 62 (1937) (large rock); *People v. Reinhardt*, 42 Misc. 2d 45, 247 N.Y.S.2d 708 (Sup. Ct. 1964) (blackjack).

(4) the circumstances under which it was used.²⁷ Applying such tests in a situation similar to the *Umbrello* case, a West Virginia court, as early as 1934, found a tear gas pen to be a dangerous weapon.²⁸ The court conceded that the conventional use of the pen was not as an offensive weapon but as a temporary defensive device. However, the court, in examining the probable effects of firing tear gas, recognized that under proper conditions the mixture of a small amount of gun powder and tear gas could do untold harm. Finally, the court looked at the potential adaptability of the pen into a weapon of a more lethal nature and found that, like a razor blade or tire iron, the gas pen, although associated with other uses, is easily converted into a formidable tool of destruction.

Had the state, in *Umbrello*, chosen to prosecute under the dangerous weapon statute,²⁹ the court would have been free to adopt a factorial analysis³⁰ of the gas pen instead of the restrictive capability test. The factorial analysis is not as simple or as concise as is the capability test; nor does this approach allow the individual any more freedom to bear arms. However, by analyzing each device separately, and not in relation to a pistol or revolver, the court is able to take cognizance of the fact that danger can exist apart from the traditional gun powder and shell. Further, the court promulgates a more objective standard to guide human conduct; for even the most unsophisticated buyer is likely to recognize inherent danger in a device, although he has no idea whether or not the device would rupture if fired as a gun. Thus, through a device-by-device analysis, the courts should experience little difficulty in adapting existing legislation to meet modern ingenuity.

GERALD B. CHATTMAN

²⁷ Village of Barboursville *ex rel.* Bates v. Taylor, 115 W. Va. 4, 174 S.E. 485 (1934).

²⁸ *Ibid.* It is interesting that there was a decision involving a tear gas pen as early as 1934. Research has disclosed no litigation between 1934 and 1965 involving the pen.

²⁹ N.H. REV. STAT. ANN. §§ 585.26-.27 (1955).

³⁰ See text accompanying note 27 *supra*.