

San Diego District Attorney

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Robert O. Amador

(858) 974-2419

Deputy District Attorney

Robert.Amador@SDCDA.org

Another in a series of trainings designed for law enforcement to understand Court processes and evidentiary issues and other current topics. Please e-mail me with comments or questions.

DEALING WITH "OPEN CARRY" ISSUES: PENAL CODE 12031(a)

The "Open Carry" movement website is at <http://www.opencarry.org/>. It is very clear that this group of gun owners wishes to enjoy the full breadth of their Second Amendment rights and is more than willing to show how big their guns are in public. The website blog has over 10,000 Posts with over 400,000 comments. They enjoy detailing their interactions with law enforcement and encourage audio taping them. You tube has multiple videos on the subject. There is another website that has law enforcement memos regarding the open carry law. That website is located at <http://www.californiaopencarry.org/faq.html>. That website has law enforcement training and memorandums posted on it. It is clear that there are many law enforcement opinions of what the status of the law is and how an officer should deal with these individuals. The law as it relates to dealing with individuals with a gun in a holster that ends up being unloaded is not clear at this time. What is clear is that it will take a legislative change or an appellate decision to clear up the questions below. The importance of documenting your contact and how it was conducted on every one of these types of incidents will be critical to establishing a thorough record in Court; whether in a Civil or a Criminal case. The most important factor is officer safety. The Court, Prosecutors, the Community and your friends and loved ones want you to come home at the end of your shift.

Penal Code section 12031(a) *A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.*

12031(g) A firearm shall be deemed to be loaded for the purposes of this section when there is an unexpended cartridge or shell, consisting of a case that holds a charge of powder and a bullet or shot, in, or attached in any manner to, the firearm, including, but not limited to, in the firing chamber, magazine, or clip thereof attached to the firearm; except that a muzzle-loader firearm shall be deemed to be loaded when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinder.

Case law currently defines loaded as having a bullet in the chamber or a loaded magazine in the gun *People v Clark* (1996) 45 Cal.App.4th 1147. These individuals will openly carry semi-autos with an empty magazine in the well in a belt holster and with loaded magazines on their belt. What happens when that person is walking in a mall or other public place? Very often citizens will contact security who will call law enforcement or they will call in directly. In this day of school shootings, church shootings and a fear of violent crimes this is extremely upsetting to them and they want something done. That's when you arrive on the scene.

There are several issues to consider. The first is officer safety; you need to use appropriate tactics to insure your safety when dealing with an unknown person carrying a firearm. Various law enforcement training bulletins discuss options from a "low key" contact to

a high risk pedestrian stop. Under **12031 (e)** *In order to determine whether or not a firearm is loaded for the purpose of enforcing this section, peace officers are authorized to examine any firearm carried by anyone on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to this section constitutes probable cause for arrest for violation of this section.* If this is going to be a detention e.g. guns drawn, commands to freeze, raise your hands etc. then you need to write in your report why you are doing this. As foolish as it seems to you to have to justify this, it will be the key to your success if this results in a prosecution or a civil suit. Additionally **P.C. § 833.5**, provides a peace officer the authority to detain for investigation anyone who the officer has “reasonable cause” to believe illegally has in his or her possession a firearm or other deadly weapon.

You are now in the middle of a “Terry” stop (*Terry v Ohio* (1968) 392 U.S. 1) which includes the right to frisk for weapons if your investigative stop is lawful and you reasonably suspect that the person stopped is armed and dangerous. The legal purpose of the stop is to inspect the gun to determine if it is loaded. What else can you do? That area is legally unclear and you may run into the problem of a “prolonged detention.” A traffic stop (or any other detention) which is reasonable in its inception may become unreasonable if prolonged beyond that point reasonably necessary for the officer to complete the purposes of the stop or detention. (*People v. McGaughran* (1979) 25 Cal.3rd 577.)

Can you demand identification or run a records check on the person or the firearm?

If the serial number of the weapon comes into plain view during your inspection you may copy it to run against appropriate data bases at a later time or with permission. (*Arizona v Hicks* (1987) 480 U.S. 321) Running the criminal history of an individual to determine if the person is in one of the prohibited classes from possessing a firearm may also be done if justified or with the permission of the individual. However if the sole purpose of the stop is to check the loaded status of the firearm; are you unreasonably prolonging the stop? You can with permission but it is unclear whether you may do so as part of the stop. Again the reasons for your actions must be documented and the quality of your report may make a huge difference down the line.

LA DDA Devallis Rutledge, in his “One Minute Brief” training bulletin dated 12/23/2008 cites *Hibel v. Sixth Judicial District* (2004) 542 US 177 and states that “the incidental detention of the armed individual justifies a demand for ID, allowing age verification and a data-base check for information about any disqualification to possess firearms.” The problem is that Nevada has a specific statute that essentially makes it a PC 148 if you don’t identify yourself during a lawful detention. California does not have such a statute and there is case law (*In re Gregory S.* (1980) 112 Cal.App.3d 764) which suggests that it is not a PC 148 to fail to identify oneself during an investigative stop. If you decide that the situation demands a series of database checks to ensure the individual may legally carry this gun then you need to document the reasons for doing so making sure you describe your observations and conclusions.

Can you impound the weapon if there is no arrest made?

No. Gov’t. Code § 8571.5 provides that a police officer may not seize or confiscate any firearm or ammunition from an individual who is lawfully carrying or possessing the firearm or ammunition. However, the officer may temporarily disarm an individual if the officer reasonably believes it is immediately necessary for the protection of the officer or another individual. An officer who disarms an individual is to return the firearm before discharging the individual unless the officer arrests the individual or seizes the firearm as evidence of the commission of a crime.

BOTTOM LINE: This is a gray area where the conduct and professionalism of the law enforcement officers will be tested until Courts decide these issues. The character and quality of the reports and the documentation of the reasons why you took the actions that you did will be critically important in establishing good case law and avoiding civil liability.

You must assume that any contact with any "open carry" advocates will be recorded by the individuals or their associates. At this time, I would recommend that a full and complete report detailing your actions during the contact be written whether an arrest is made or not. I would also recommend that law enforcement agencies establish policies regarding these issues and provide specific training regarding this issue.

Other Relevant Laws

Local Ordinances: City or County governments can adopt more stringent laws regarding the carrying of firearms. Check to see if you have a local ordinance prohibiting "open carry."

PC 537e.: Possession of a firearm with the serial number removed, defaced, covered, altered or destroyed.

PC 626.9: Possession of a firearm within 1000 feet of a school zone which includes public or private schools kindergarten and grades 1-12 or on a college campus or property.

PC 626.95: Possession of a firearm on a playground or youth center

PC 171b: Possession of a firearm in public buildings.

PC 171.5: Possession of a firearm in airport and passenger vessel terminal "sterile areas".

PC 12021.5: Carrying a firearm during the commission or attempt to commit a gang crime.

PC 12023: Carrying a loaded firearm with the intent to commit a felony.

PC 12024: Carrying a deadly weapon with the intent to assault another.

PC12040: Possessing a firearm in a public place while masked to hide their identity

PC417(a)(2): In the presence of any other person, draws or exhibits any firearm, whether loaded or unloaded, in a rude, angry or threatening manner.

PC 12101: Possession of a concealable firearm by a minor.

12021(a)(1): Possesses a firearm and is a convicted felon or addicted to drugs or has been convicted of PC 245(a)(2), 245(a)(3), 245(d), 246, 417(c).

12021(a)(2): Possesses a firearm and has two convictions for PC 417(a)(2)

12021(c)(1): Possesses a firearm and has a misdemeanor conviction for Section 71, 76, 136.1, 136.5, or 140, subdivision (d) of Section 148, Section 171b, 171e, 171d, 186.28, 240, 241, 242, 243, 244.5, 245, 245.5, 246.3, 247, 273.5, 273.6, 417, 417.6, 422, 626.9, 646.9, 12023, or 12024, subdivision (b) or (d) of Section 12034, Section 12040, subdivision (b) of Section 12072, subdivision (a) of former Section 12100, Section 12220, 12320, or 12590, or Section 8100, 8101, or 8103 of the Welfare and Institutions Code, any firearm-related offense pursuant to Sections 871.5 and 1001.5 of the Welfare and Institutions Code...

12021(d)(1): Possesses a firearm when they have an express condition of probation prohibiting possessing firearm. A juvenile probation order is that prohibits possessing a firearm is included.(*In Re Reyes P.* (1994) 24 Cal.App.4th 1468)

12021(g)(1): Possesses a firearm when they have when they are prohibited from doing so by a temporary restraining order or injunction issued pursuant to Section 527.6 or 527.8 of the Code of Civil Procedure, a protective order as defined in Section 6218 of the Family Code, a protective order issued pursuant to Section 136.2 or 646.91 of this code, or a protective order issued pursuant to Section 15657.03 of the Welfare and Institutions Code.

This list is not all inclusive for gun related violations and some of the sections contain exceptions which may make possession legal under certain circumstances.