



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-064

August 28, 2015

The Honorable Jon Woods
State Senator
P. O. Box 8082
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The Honorable Nate Bell
State Representative
P. O. Box 2103
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The Honorable Tim Lemons
State Representative
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Gentlemen:

You have asked for my opinion about Act 746 of 2013, which amended Ark. Code Ann. § 5-73-120(a).¹ This section of the Code establishes the misdemeanor crime of “carrying a weapon.” Your questions address the effect of Act 746 on the ability of Arkansans to legally possess handguns on their persons and in their vehicles.

INTRODUCTION AND SUMMARY

Act 746 has created some confusion among both the people of Arkansas and law enforcement in Arkansas on these questions. Ordinary Arkansans want to know where and when they may legally possess a handgun. Arkansas law enforcement wants to understand what the law does and does not prohibit so that law enforcement can continue to keep us safe while respecting the rights of all Arkansans.

¹ Act 746 is codified at and amended both Ark. Code Ann. §§ 5-73-119 and -120 (Repl. 2013). Act 746’s amendments to § 5-73-120 are the ones relevant to the questions posed.

Ultimately, the confusion created would be best alleviated by additional legislative action to clarify what Act 746 was trying to accomplish. Nonetheless, my opinion below (and the attached addendum) is intended to provide as much clarity as possible to both law enforcement and ordinary citizens by explaining how I believe Act 746 currently bears on the ability of Arkansans to legally possess handguns on their persons and in their vehicles.

While I do not encourage “open carry,”² it is my opinion that if a person does not have the intent to “attempt to unlawfully employ a handgun...as a weapon against [another],” he or she may “possess a handgun...on or about his or her person, in a vehicle occupied by him or her, or otherwise readily available for use” without violating § 5-73-120(a) as amended by Act 746.³ That means in general merely possessing a handgun on your person or in your vehicle does not violate § 5-73-120(a) and may be done if it does not violate other laws or regulations. However, there are four critical caveats to my opinion:

First, any person who carries a handgun should be aware that a law enforcement officer might lawfully inquire into that person’s purpose. Determining culpability or potential culpability under § 5-73-120(a) is initially a matter for law enforcement following guidelines that routinely apply when investigating a misdemeanor involving the danger of forcible injury to persons. A law enforcement officer may stop and detain any person reasonably suspected of violating § 5-73-120(a) if necessary to identify the person or determine the lawfulness of his or her conduct.⁴

Whether an officer has reasonable suspicion will depend upon a number of circumstance-specific factors. Some of these factors are recounted in Ark. Code Ann. § 16-81-203 (Repl. 2005), including: (1) the demeanor of the suspect; (2) the

² “Open carry” is not a term used in Act 746 or § 5-73-120. For purposes this opinion we use it to refer to carrying a handgun in plain view without any type of license.

³ Ark. Code Ann. § 5-73-120(a) (Repl. 2013) (“A person commits the offense of carrying a weapon if he or she possesses a handgun, knife, or club on or about his or her person, in a vehicle occupied by him or her, or otherwise readily available for use with a purpose to attempt to unlawfully employ the handgun, knife, or club as a weapon against a person.”). Where my opinion discusses handguns under this statutory provision, I use it as shorthand for handguns, knives, or clubs.

⁴ See Ark. R. Crim. P. 3.1 (2014).

gait and manner of the suspect; (3) any information received from third persons; and (4) the suspect's proximity to known criminal conduct.

Second, other statutes prohibit possession of a handgun in certain circumstances regardless of whether a person has the intent to use a handgun unlawfully. Those statutes still have full force and effect. For example, Ark. Code Ann. § 5-73-122(a)(1) prohibits (with exceptions not relevant here) possessing a deadly weapon “in any publicly owned building or facility or on the State Capitol grounds.” So a person could not lawfully bring a handgun onto the State Capitol grounds even though doing so wouldn't necessarily cause a violation of § 5-73-120(a). I provide a non-exhaustive list of those statutes in an Addendum to this opinion. I have summarized the principal statutes that make it unlawful to carry a firearm, notwithstanding the absence of a purpose prohibited by § 5-73-120(a).

Third, a private property owner or occupant is still entitled to keep handguns (and other firearms) and persons with handguns (and other firearms) off his, her, or its property. If a person enters or stays on private property against the owner's or occupant's stated desire that he or she not enter or that he or she leaves, that person may be guilty of criminal trespass. *See* Ark. Code Ann. § 5-39-203 (Repl. 2013).

Fourth, the laws requiring a license to carry a concealed handgun still have full force and effect. Nothing in Act 746, § 5-73-120(a), or this opinion is intended to suggest that a person may carry a concealed handgun in public without a properly issued concealed-carry license.⁵ A person may not lawfully carry a concealed handgun in public without a properly issued concealed-carry license. I believe this necessarily follows from the concealed-carry licensing scheme that predates Act 746 and that, in my opinion, was unaffected by Act 746.⁶

⁵ As discussed in further detail at pages 12–14 below, a person “upon a journey” may keep a handgun in his vehicle and this handgun may be concealed in his vehicle even without a concealed-carry license. But that person may not take the gun from the car and carry it on his or her person in a concealed manner unless he or she has a concealed-carry license.

⁶ The concealed-handgun licensing law is codified at Ark. Code Ann. § 5-73-301 *et seq.* (Repl. 2005 and Supp. 2013). “Concealed” means “to cover from observation so as to prevent public view.” Ark. Code Ann. § 5-7-301(2) (Supp. 2013). Concealed handgun licenses are issued by the Department of Arkansas State Police. Law enforcement officers and others of similar duties are exempt from the licensing requirements. Ark. Code Ann. § 5-7-304 (Supp. 2013).

QUESTIONS AND DETAILED RESPONSES

You have requested my opinion on three questions concerning Act 746 of 2013. Act 746 of 2013 amended two sections of the Arkansas Code, namely, §§ 5-73-119 and -120, that define offenses involving the possession of a weapon. Given the general focus of your questions, I will limit my analysis to § 5-73-120, which establishes the misdemeanor crime of “carrying a weapon.”

You asked whether Act 746 of 2013 permits a person not on a journey to openly carry or carry concealed a handgun or other weapon in public without violating the criminal offense of carrying a weapon, § 5-73-120, so long as he or she has no “purpose to attempt to unlawfully employ the...weapon against a person?”

Before its amendment by Act 746, § 5-73-120 made it unlawful to possess a handgun, knife, or club “with a purpose to employ the handgun, knife, or club as a weapon against a person.”⁷ The statute provided a number of affirmative defenses to prosecution, including for example carrying a weapon on a “journey” and carrying a concealed handgun with a license in a motor vehicle.⁸ Act 746 amended § 5-73-120 in two major respects relevant to this question.

First, Act 746 amended § 5-73-120(a) to provide that one commits the misdemeanor crime of “carrying a weapon”:

if he or she possesses a handgun, knife, or club on or about his or her person, in a vehicle occupied by him or her, or otherwise readily available for use with a purpose to **attempt to unlawfully** employ the handgun, knife, or club as a weapon against a person.⁹

⁷ Ark. Code Ann. § 5-73-120(a) (Repl. 2005). The statute includes definitions of “handgun,” “knife,” and “club.” “Handgun” is defined as “any firearm with a barrel length of less than twelve inches (12”) that is designed, made, or adapted to be fired with one (1) hand.” *Id.* at (b)(2). For the definitions of “knife” and “club,” see *id.* at (1) and (4). These definitions were not amended by Act 746.

⁸ *Id.* at (c)(4) and (8).

⁹ Ark. Code Ann. § 5-73-120(a) (Supp. 2013) (emphasis added).

By adding the words “attempt to unlawfully,” Act 746 partially altered the *mens rea* (i.e., mental state) element associated with the crime of “carrying a weapon.”¹⁰ Under the prior version of the statute, to commit the offense of “carrying a weapon,” a person had to possess a handgun, knife, or club with the intent to employ it as a weapon against a person.¹¹ After Act 746’s passage, a person now commits this crime only if he or she possesses a handgun, knife, or club with the intent to attempt to unlawfully employ it against a person.

Second, Act 746 reclassified what was the list of affirmative defenses to the crime of carrying a weapon to circumstances under which it is permissible to carry a handgun. Prior to its amendment by Act 746, the prefatory language to the list stated: “***It is a defense to prosecution*** under this section that at the time of the act of carrying a weapon...”¹² The prefatory language now states: “***It is permissible to carry a handgun*** under this section if at the time of the act of possessing a weapon...”¹³

In my opinion, Act 746’s amendments to § 5-73-120 mean that (1) the statute only criminalizes a person’s “possess[ing] a handgun on or about his or her person, in a vehicle occupied by the person, or otherwise readily available for use” *if* he or she simultaneously has the intent “to attempt to unlawfully employ the handgun...as a weapon” against a person, and (2) this unlawful intent may not be presumed simply because that person possesses a loaded handgun.

The first proposition is clear from the language of the amended statute and I need go no further than this to determine that the statute requires that the possession be “with a purpose to attempt to unlawfully employ” the handgun “as a weapon

¹⁰ In general, criminal offenses are composed by specifying the type of prohibited conduct (i.e. the *actus reus*) that must occur together with the type of mental state (i.e. *mens rea*). *E.g.*, 1 Wharton’s Criminal Law § 27 (15th ed.) (“Reduced to its simplest terms, a crime consists in the concurrence of prohibited conduct and a culpable mental state.”).

¹¹ Ark. Code Ann. § 5-73-120(a) (Repl. 2005).

¹² Ark. Code Ann. § 5-73-120(c) (Repl. 2005) (emphasis added).

¹³ Ark. Code Ann. § 5-73-120(c) (Supp. 2013) (emphasis added).

against a person.”¹⁴ In fact, on at least three occasions, the Arkansas Supreme Court has made clear that a person must have the intent required by the statute “in order to violate...§ 5-73-120(a).”¹⁵

The second proposition, however, requires a brief additional explanation. There are a line of Arkansas Supreme Court cases that arguably suggest (mostly in dicta) the existence of a presumption that the possession of a handgun (and certainly a loaded handgun) signifies that the handgun was intended to be employed as a weapon.¹⁶ In these cases, the Court was simply saying that the jury could (but did not have to) presume intent to employ the handgun as a weapon from the fact that the weapon was loaded. Whatever the propriety and effect of this permissive (but not mandatory) jury presumption might have been before Act 746, it does not appear that the presumption can be logically maintained in light of Act 746’s amendments. Even if a loaded handgun could give rise to a presumption that the handgun was possessed with the purpose of employing it as a weapon against another person, it is unclear how mere possession of a loaded handgun (without anything else) could give rise to a presumption that the handgun was possessed “with a purpose *to attempt to unlawfully employ*” the handgun “as a weapon against a person.”¹⁷ The logical leap that a person who has a loaded handgun intends to use it *unlawfully* as a weapon is far more strained than the logical leap

¹⁴ See *Hercules Inc. v. Pledger*, 319 Ark. 702, 706, 894 S.W.2d 576 (1995) (“The basic rule of statutory construction is to give effect to the intent of the legislature, and when a statute is clear, it is given its plain meaning.”).

¹⁵ *Stoner v. Watlington*, 735 F.3d 799, 804–05 (8th Cir. 2013) (citing three Arkansas Supreme Court cases and noting that “[g]iven this precedent, a reasonable officer would understand that a violation of Ark. Code Ann. § 5-73-120(a) is predicated upon a person having” the required intent under the statute).

¹⁶ See, e.g., *McGuire v. State*, 265 Ark. 621, 626, 580 S.W.2d 198 (1979) (“There was a presumption of fact that the loaded pistol was placed under the seat as a weapon.”); *Stephens v. City of Fort Smith*, 227 Ark. 609, 611, 300 S.W.2d 14 (1957) (where weapon “was loaded,” the “presumption is that it was placed in the glove compartment of the car as a weapon.”). These cases trace back to *Carr v. State*, 34 Ark. 448, 450, 36 Am.Rep. 15 (1879) (“If the state, in a given case, should show that pistols were worn concealed, the jury might well presume that they were loaded, and worn as weapons.”).

¹⁷ It is of course conceivable that the Court could, if ever asked, disagree with my analysis and determine that the carrying of a loaded handgun can be in and of itself the basis for a presumption of intent to unlawfully employ the handgun as a weapon against a person.

that a person who has a loaded handgun intends to use it as a weapon (either lawfully or unlawfully).

The inapplicability of the loaded handgun presumption is further evidenced and supported by the second change that Act 746 made to § 5-73-120: changing the list of affirmative defenses to a non-exhaustive list of circumstances under which it is permissible to carry a handgun. Reclassifying this list from affirmative defenses to permissible circumstances confirms that there are a number of permissible reasons to carry a loaded weapon and that the burden is not on the loaded handgun possessor to prove that he had a fair reason for possessing the handgun.¹⁸ Rather, the burden is intended to remain on the State to prove possession and unlawful intent. In light of this amendment, and certainly when coupled with alteration to the intent element noted above, a presumption of unlawful intent from the mere fact that a weapon was loaded (without anything more) is no longer tenable.

So, what does the foregoing actually mean for Arkansas law enforcement and for the people of Arkansas? While I do not encourage open carry, so long as a person has no intent “to attempt to unlawfully employ the handgun, knife, or club as a weapon against a person,” he or she may possess a handgun without violating § 5-73-120(a).¹⁹ That means in general merely possessing a handgun on your person

¹⁸ It is black-letter law that an affirmative defense requires the defendant to prove the matter, usually by a preponderance of the evidence. *See* Ark. Code. Ann. § 5-1-111(d)(1). The legislature’s reclassification of the list in Ark. Code Ann. § 5-73-120(c) signaled a shift of the burden of proof on these issues from the handgun possessor to the State.

¹⁹ A person may also possess a handgun without violating § 5-73-120(a) if: (1) the person is in his or her own dwelling or place of business or on property in which he or she has a possessory or proprietary interest; (2) the person is a law enforcement officer, correctional officer, or member of the armed forces acting in the course and scope of his or her official duties; (3) the person is assisting a law enforcement officer, correctional officer, or member of the armed forces acting in the course and scope of his or her official duties pursuant to the direction or request of the law enforcement officer, correctional officer, or member of the armed forces; (4) the person is carrying a weapon when upon a journey, unless the journey is through a commercial airport when presenting at the security checkpoint in the airport or is in the person’s checked baggage and is not a lawfully declared weapon; (5) the person is a registered commissioned security guard acting in the course and scope of his or her duties; (6) the person is hunting game with a handgun that may be hunted with a handgun under rules and regulations of the Arkansas State Game and Fish Commission or is en route to or from a hunting area for the purpose of hunting game with a handgun; (7) the person is a certified law enforcement officer; (8) the person is in possession of a concealed handgun and has a valid license to carry a concealed handgun under § 5-73-301 *et seq.*,

or in your occupied vehicle does not violate § 5-73-120(a) and may be done if it does not violate other laws or regulations. However, there are four critical caveats that should certainly be taken into consideration.

1. Any person who carries a handgun should be aware that a law enforcement officer might lawfully inquire into that person's purpose. Determining culpability or potential culpability under § 5-73-120(a) is initially a matter for law enforcement following guidelines that routinely apply when investigating a misdemeanor involving the danger of forcible injury to persons. A law enforcement officer may stop and detain any person reasonably suspected of violating section § 5-73-120(a) if necessary to identify the person or determine the lawfulness of his or her conduct.²⁰ Whether an officer has reasonable suspicion will depend upon a number of circumstance-specific factors. Some of these factors are recounted in Ark. Code Ann. § 16-81-203 (Repl. 2005), including:

(1) the demeanor of the suspect; (2) the gait and manner of the suspect; (3) any information received from third persons; and (4) the suspect's proximity to known criminal conduct.

While merely possessing a loaded handgun completely on its own is not enough for reasonable suspicion of a violation of § 5-73-120(a), possessing a loaded handgun in combination with just one additional factor may, depending on the circumstances, be enough to create reasonable suspicion of intent to unlawfully employ the handgun as a weapon (and thus reasonable suspicion of a violation of § 5-73-120(a)).

2. Other statutes prohibit possession of a handgun in certain circumstances regardless of whether a person has the intent to use the handgun unlawfully. Those statutes still have full force and effect. For example, § 5-73-122(a)(1) prohibits (with exceptions not relevant here) possessing a deadly weapon "in any publicly owned building or facility or on the State Capitol

or recognized under § 5-73-321 and is not in a prohibited place as defined by § 5-73-306; (9) the person is a prosecuting attorney or deputy prosecuting attorney carrying a firearm under § 16-21-147; or (10) the person is in possession of a handgun and is a retired law enforcement officer with a valid concealed carry authorization issued under federal or state law. *See* Ark. Code Ann. § 5-73-120(c).

²⁰ *See* Ark. R. Crim. P. 3.1 (2014).

grounds.” So a person could not lawfully bring a handgun with him or her to the State Capitol grounds even though doing so wouldn’t necessarily violate § 5-73-120(a). I provide a non-exhaustive list of those statutes in the Addendum to this opinion. I have summarized the principal statutes that make it unlawful to carry a firearm, notwithstanding the absence of a purpose prohibited by section § 5-73-120(a).

3. A private property owner or occupant is still entitled to keep handguns (and other firearms) and persons with handguns (and other firearms) off his, her, or its property. If a person enters or stays on private property against the owner’s or occupant’s stated desire that he or she not enter or that he or she leaves, that person may be guilty of criminal trespass. *See* Ark. Code Ann. § 5-39-203.
4. Nothing in Act 746, § 5-73-120(a), or this opinion is intended to suggest a person may carry a concealed handgun in public without a properly issued concealed-carry license.²¹ In fact, except during a journey, it is likely that the Arkansas Supreme Court would allow the presumption that a person who has flouted the concealed-carry regime in Arkansas law by possessing a concealed handgun without a concealed-carry license has the requisite unlawful intent for a violation of § 5-73-120(a).

Point 4 requires additional explanation. In my opinion, a person may not lawfully carry a concealed handgun in public without a properly issued concealed-carry license. I believe this necessarily follows from the concealed-carry licensing scheme that predates Act 746 and that, in my opinion, was unaffected by Act 746.²² The licensing requirement is recognized in the “concealed handgun” exception under § 5-73-120:

²¹ As discussed in further detail at pages 12-14 below, a person “upon a journey” may keep a handgun in his vehicle, and this handgun may be concealed in his vehicle even without a concealed-carry license. But that person may not take the gun from the car and carry it on his or her person in a concealed manner unless he or she has a concealed-carry license.

²² The concealed-handgun licensing law is codified at Ark. Code Ann. § 5-73-301 *et seq.* (Repl. 2005 and Supp. 2013). “Concealed” means “to cover from observation so as to prevent public view.” Ark. Code Ann. § 5-73-301(2) (Supp. 2013). Concealed handgun licenses are issued by the Department of Arkansas State Police. Law enforcement officers and others of similar duties are exempt from the licensing requirements. Ark. Code Ann. § 5-73-304 (Supp. 2013).

It is permissible to carry a handgun under this section if at the time of the act of carrying a weapon....[t]he person is in possession of a concealed handgun and has a valid license to carry a concealed handgun under § 5-73-301 et seq., or recognized under § 5-73-321 and is not in a prohibited place as defined by § 5-73-306.²³

Among the many requirements for obtaining a concealed-carry license is a statement under oath that the applicant “desires a legal means to carry a concealed handgun to defend himself or herself.”²⁴ In my opinion, these licensing requirements were unaffected by Act 746. To conclude otherwise would essentially nullify the concealed-carry law’s oath requirement, contrary to established rules of statutory construction.²⁵

You asked me to verify that a person who carries a handgun or other weapon in public, open or concealed, who is simply minding his or her own business, would not be violating the criminal offense of carrying a weapon if he or she has not demonstrated a “purpose to attempt to unlawfully employ” the handgun or other weapon against another person.

As I have explained in the previous section of this opinion, while open carry is not encouraged, so long as a person has no intent “to attempt to unlawfully employ the handgun, knife, or club as a weapon against a person,” he or she may possess a handgun without violating § 5-73-120(a). That means in general merely possessing a handgun on your person or in your occupied vehicle does not violate § 5-73-120(a), and may be done if it does not violate other laws or regulations.

However, I have also made clear that any person who carries a handgun should be aware that a law enforcement officer might lawfully inquire into that person’s purpose. Determining culpability or potential culpability under Ark. Code Ann. § 5-73-120 is initially a matter for law enforcement following guidelines that

²³ Ark. Code Ann. § 5-73-120(c)(8). The referenced § 5-73-321 provides license reciprocity for those with valid concealed-carry licenses issued by another state.

²⁴ Ark. Code. Ann. § 5-73-310(7) (Repl. 2005).

²⁵ It is well established that amendments or repeals by implication are not favored in construing statutes. *E.g., Cummings v. Washington County Election Com’n*, 291 Ark. 354, 724 S.W.2d 486 (1987).

routinely apply when investigating a misdemeanor involving the danger of forcible injury to persons. A law enforcement officer may stop and detain any person reasonably suspected of violating § 5-73-120 if necessary to identify the person or determine the lawfulness of his or her conduct.²⁶

Whether an officer has reasonable suspicion will depend upon a number of circumstance-specific factors. Some of these factors are recounted in Ark. Code Ann. § 16-81-203 (Repl. 2005), including: (1) the demeanor of the suspect; (2) the gait and manner of the suspect; (3) any information received from third persons; and (4) the suspect's proximity to known criminal conduct. While merely possessing a loaded handgun completely on its own is not enough for reasonable suspicion of a violation of § 5-73-120(a), possessing a loaded handgun in combination with just one additional factor may, depending on the circumstances, be enough to create reasonable suspicion of intent to unlawfully employ the handgun as a weapon (and thus reasonable suspicion of a violation of § 5-73-120(a)).

It is also important to note that there are other statutes that prohibit possession of a handgun in certain circumstances regardless of whether a person has the intent to use the handgun unlawfully. Those statutes still have full force and effect. For example, Ark Code Ann. § 5-73-122(a)(1) prohibits (with exceptions not relevant here) possessing a deadly weapon "in any publicly owned building or facility or on the State Capitol grounds." So a person could not lawfully bring a handgun to the State Capitol grounds even though doing so wouldn't necessarily place him or her in violation of § 5-73-120(a). I provide a non-exhaustive list of those statutes in the Addendum to this opinion. The point as it relates to your instant question is that Arkansas law enforcement could also as appropriate make lawful inquiries as to whether a person is violating one of those statutes.

I also want to reiterate that neither Act 746 nor § 5-73-120 gives a person the right to be on private property where owners or occupants want to keep handguns (and other firearms) and persons with handguns (and other firearms) off their property. If a person enters or stays on private property against the owner's or occupant's stated desire that he or she not enter or that he or she leaves, that person may be guilty of criminal trespass. *See* Ark. Code Ann. § 5-39-203 (Repl. 2013).

²⁶ *See* Ark. R. Crim. P. 3.1 (2014).

Finally, from what I have already said, it should be clear that someone who possesses a concealed handgun (without a concealed-carry permit) may well, by that fact alone, be found to have violated § 5-73-120(a). The laws requiring a license to carry a concealed handgun still have full force and effect. Nothing in Act 746, § 5-73-120(a), or this opinion is intended to suggest a person may carry a concealed handgun without a properly issued concealed-carry license.²⁷ In fact, it is likely that the Arkansas Supreme Court would allow the presumption that a person who has flouted the concealed-carry regime in Arkansas law by possessing a concealed handgun without a concealed-carry license has the requisite unlawful intent for a violation of § 5-73-120(a). At the very least, except in the most unusual of circumstances, possessing a concealed handgun without a concealed-carry license would on its own provide an officer with reasonable suspicion and probable cause that a person has the unlawful intent necessary to be (and thus is) in violation of § 5-73-120(a).

You asked whether it is my opinion that Act 746 of 2013 permits a person to carry a handgun or other weapon, in plain view or concealed, without a concealed handgun license if he or she leaves his or her county so long as he or she is not otherwise prohibited by state or federal law?

Your question implicates what is commonly known as “the journey exception.” Under § 5-73-120(c)(4), as amended by Act 746, it is “permissible” to “[carry] a weapon when upon a journey.” In my opinion, this means that the offense of “carrying a weapon” simply does not apply to a person who is “upon a journey.” By changing the journey exception from an affirmative defense to a “permissible” activity, Act 746 removed this activity completely from the circumstances in which a person might be found guilty of the offense of “carrying a weapon.”

Some questions may remain, however, regarding the scope of the journey exception. Prior to Act 746, “journey” had not been statutorily defined, although the Arkansas Supreme Court had provided several guideposts concerning what did

²⁷ As discussed in further detail at pages 12-14 below, a person “upon a journey” may keep a handgun in his vehicle and this handgun may be concealed in his vehicle even without a concealed-carry license. But that person may not take the gun from the car and carry it on his or her person in a concealed manner unless he or she has a concealed-carry license.

and did not qualify as a journey.²⁸ Act 746 defined the term “journey” as “travel beyond the county in which a person lives.” What qualifies as a journey under this new statutory definition remains, at least in certain situations, unclear. Consider just two example questions: (1) Does a person who lives two miles from the county line and every day drives one mile into the adjacent county to visit his mother, or go to work, or fill up at a preferred gas station qualify for the journey exception because he is driving outside his county? (2) Does a person who just embarked on a trip across five counties qualify for the journey exception while he is driving towards the border of his home county?

In my opinion, the phrase “travel beyond the county in which a person lives” is ambiguous because the word “travel” is ambiguous. The Merriam-Webster Online Dictionary defines “travel” variously, including the following: “to go on a trip or journey,” “to go to a place and especially one that is far away,” or “to move from one place to another.”²⁹ It is not clear from the statute whether the legislature was using travel to require some type of special or at least elongated trip, or was simply referring to any outing over a county line no matter how short, quick, or routine.

Because the meaning of “travel” is somewhat ambiguous in the context of this statute, I turn to the journey exception’s historic purpose³⁰ “to permit [the carrying of weapons] when necessary to defend against perils of the highway....”³¹ Consistent with this history, one legal commentator has observed: “The purpose behind the [journey] exception is to allow individuals to travel with a firearm in

²⁸ See, e.g., *Ackerson v. State*, 76 Ark. 301, 301, 205 S.W. 981 (1918); *Hathcote v. State*, 55 Ark. 181, 181, 17 S.W. 721 (1891) (and cases cited); *Carr v. State*, 34 Ark. 448, 449, 36 Am.Rep. 15 (1879).

²⁹ See Merriam-Webster, An Encyclopedia Britannica Company, The Online Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/travel> (last accessed August 27, 2015).

³⁰ *Faulkner v. Arkansas Children’s Hospital*, 347 Ark. 941, 952, 69 S.W.3d 393 (2002) (“Where the meaning [of a statute] is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject.”).

³¹ *Riggins v. State*, 17 Ark. App. 68, 70, 703 S.W.2d 463 (1986) (citations omitted).

order to protect themselves from the dangers of the open road.”³² The Arkansas Supreme Court has explained that “as generally understood,” the journey exception “signifies travel to a distance from home, and it is not used in reference to travel in one’s neighborhood or among one’s immediate acquaintances.”³³ If the legislature wanted to eliminate these judicial guideposts concerning what constitutes a journey or travel, it could have done so in a clear fashion. The legislature can of course in the future amend the statute further if it wishes. It is beyond the scope of an opinion from this office to legislate. Rather, I am limited to opining on what the law currently states as drafted by the legislature.

Bearing in mind the purpose of the journey exception and the case precedent serving as a backdrop for Act 746, I interpret the journey exception to generally apply when a person is in the process of traveling by vehicle outside his or her county (even if he is within his home county at the time en route to locations outside his county), but not to brief and routine outings (like a five minute drive to see one’s family or to work or to a restaurant in the adjacent county). In my opinion, a person carrying a handgun, knife, or club *in a vehicle* when traveling outside his or her county is not subject to § 5-73-120(a). This is so regardless of whether the weapon is concealed or in plain view in the vehicle and regardless of whether the person has a license to carry a concealed handgun. In my opinion, the journey exception stands separate and apart from the concealed-carry exception so long as the handgun is in the vehicle during the journey.

It is my opinion that, except for truly extraordinary and unique circumstances, the journey exception only applies while the handgun remains in the vehicle. Once the weapon leaves the vehicle, however, the journey exception is generally unavailable for the time the handgun is not in the vehicle, and the person risks violating § 5-73-120(a). Accordingly, from the perspective of potential liability under § 5-73-120(a), the better option is for a person upon a journey to leave the handgun in his or her vehicle.

Of course, I wish to reiterate that a person will not violate section § 5-73-120(a) as long as he or she has no intent to attempt to unlawfully employ the weapon against another person. In other words, if a person travels outside his or her county with a

³² John Thomas Shepherd, *Who Is The Arkansas Traveler?: Analyzing Arkansas’s “Journey” Exception to the Offense of Carrying a Weapon*, 66 Ark. L. Rev. 463, 482 (2013).

³³ *Hathcote v. State*, 55 Ark. 181, 17 S.W. 721 (1891).

handgun, knife, or club in the vehicle and wishes to take the weapon out of the vehicle and carry it in plain view, it is my opinion that he or she may lawfully do so if there is no purpose to unlawfully use the weapon against a person.³⁴

I also wish to reiterate that persons who are not eligible for the journey exception because they are driving solely in their own county (or making a very brief and routine trip to an adjacent county as described above) may still possess a handgun on their person or in their vehicle as long as (1) they have no intent to attempt to unlawfully employ the weapon against another person, and (2) they are not violating any other handgun-related laws. Other Arkansas laws restricting who may possess a handgun, what handguns may be possessed, and where such handguns may be brought still have full force and are not preempted by the “journey exception.” *See* Addendum to this opinion. The applicability of the journey exception only means that a violation § 5-73-120(a) cannot be found, not that the person is exempted from other gun-related laws. For example, a person cannot bring a handgun in their vehicle and park on the State Capitol grounds just because the person is “on a journey.” He or she could only do so if the qualifications provided in § 5-73-122 are met.

To summarize my opinion related to the “journey exception” question:

- A person is permitted to carry a handgun, knife, or club *in a vehicle* when traveling outside his or her county, regardless of whether the weapon is concealed or in plain view in the vehicle and regardless of whether the person has a license to carry a concealed handgun;
- If the person takes the weapon out of the vehicle, however, the journey exception no longer applies and the person will risk committing the offense of “carrying a weapon”;
- So long as he or she has no intent to unlawfully employ the handgun, knife, or club against another person, the person may lawfully carry the weapon outside the vehicle. To lawfully carry a concealed handgun, however, it will be necessary to obtain a concealed-carry license.

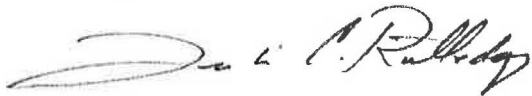
³⁴ It must be recognized that carrying a handgun is nevertheless unlawful in certain circumstances. The primary constraints in this regard are summarized in the Addendum to this opinion.

I will add, once again, that any person who carries a weapon should be aware that a law enforcement officer might inquire into that person's purpose. Determining culpability under § 5-73-120 is a matter that will be undertaken by law enforcement following guidelines that routinely apply when investigating a misdemeanor offense such as this involving the danger of forcible injury to persons. A law enforcement officer may stop and detain any person reasonably suspected of violating § 5-73-120 if necessary to identify the person or determine the lawfulness of his or her conduct.³⁵ Whether an officer has reasonable suspicion will depend upon a number of factors. Some of the factors are recounted in Ark. Code Ann. § 16-81-203 (Repl. 2005), including:

- The demeanor of the suspect;
- The gait and manner of the suspect;
- Any information received from third persons; and
- The suspect's proximity to known criminal conduct.

Officers will apply these guidelines in assessing the conduct of a person who is carrying a weapon and the danger of forcible injury to another person.

Sincerely,



LESLIE RUTLEDGE
Attorney General

LR:cyh

Enclosure

³⁵ See Ark. R. Crim. P. 3.1 (2014).

Principal Laws Limiting *OPEN CARRY* of *HANDGUNS**

Attorney General Opinion 2015-064 discusses how Act 746 of 2013 changed the crime of “carrying a weapon” (Ark. Code Ann. § 5-73-120) so that, generally speaking, merely possessing a handgun on your person or in your vehicle does not violate this law and may be done if it does not violate other laws or regulations.

As the opinion notes, however, **THERE ARE OTHER LAWS THAT LIMIT THE OPEN CARRYING OF HANDGUNS.** In an attempt to provide some clarity and additional information for both ordinary Arkansans and Arkansas law enforcement, I am providing a list of some of those laws that are most relevant to open carrying of handguns.

-Criminal Trespass

The owner of private property (such as the owner of a business), or someone authorized by the owner (such as a manager), may order a person to stay off the premises or to leave the premises; and if the person enters or does not leave, he or she may be guilty of “criminal trespass.” See Ark. Code Ann. § 5-39-203.

THIS MEANS THAT EVEN IF A PERSON MAY LAWFULLY OPENLY CARRY A HANDGUN, HE OR SHE MAY BE PREVENTED FROM DOING SO ON PRIVATE PROPERTY.

-Prohibited Places. Handguns are generally prohibited in the following places:

-Public or private school property or the property of a public or private institution of higher education. See Ark. Code Ann. § 5-73-119.

-Publicly-owned building or facility (including parks and outdoor recreational facilities) or on the State Capitol grounds. See Ark. Code Ann. § 5-73-122.**

THIS MEANS, FOR EXAMPLE, THAT A PERSON MAY NOT LAWFULLY BRING A HANDGUN TO THE STATE CAPITOL GROUNDS.

-Persons Excepted. The following persons may not possess a handgun:

-A person under age eighteen (18). See Ark. Code Ann. § 5-73-119.

-A person who has been convicted of a felony, adjudicated mentally ill, or committed involuntarily to a mental institution. See Ark. Code Ann. § 5-73-103.

-A person who is subject to an order of protection or convicted of a misdemeanor of domestic violence. See Ark. Code Ann. § 9-15-207.

-Prohibited Handguns. The following types of handguns are prohibited:

-A silenced handgun. See Ark. Code Ann. § 5-73-104.

-A handgun whose serial number has been removed or defaced. See Ark. Code Ann. § 5-73-107.

*This addendum is concerned only with open carry of handguns. It does not describe the law as it applies to concealed carry (see Ark. Code Ann. §§ 5-73-301 to -323) or to weapons other than handguns.

This addendum addresses only Arkansas law. Federal law – including but not limited to 18 USC § 922(g) – may also limit open carry of handguns in Arkansas.

** There are certain exceptions to each of these rules that are outside the scope of this Addendum. E.g., a law enforcement officer may lawfully carry a loaded firearm in any public building or on State Capitol grounds. See Ark. Code Ann. § 5-73-122. Individuals will have to determine the applicability of any exception.

This addendum speaks as of its date. The law may have changed after that date.