

CRIMINAL LAW--CONCEALED WEAPONS: One traveling on a continuous journey peacefully through the State is not prohibited from carrying a concealed weapon.

August 29, 1936.

Honorable Maurice Hoffman  
Prosecuting Attorney  
Buchanan County  
St. Joseph, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated August 24, 1936, which reads as follows:

"As you have no doubt observed in the papers, we have been having a little controversy up here over a point of law. I would like to have an opinion from you upon the point at issue.

"Briefly the facts are these: A man by the name of Harris came down here from Des Moines late one Thursday afternoon, he transacted one or two items of business around town, had a meal and then went over to his automobile. While in his automobile, he was approached by ten or twelve men who threatened him with violence. They climbed on the running-board of his car and shook it as though with an intent to tip it over. He had a gun in the side pocket of his car and in this situation he drew it out and warned the men to leave him alone. A warrant was asked for his arrest for carrying a concealed weapon and flourishing a deadly weapon. There is in my mind no question but that he had a right to flourish the weapon in view of the threats that were made and the violence offered. The question is whether he had the right to have the gun. Under the section 4029 of the statutes a traveler is exempt from the provisions of the concealed weapons law. I should like to have your opinion as to whether this man in these circum-

stances was a traveler in contemplation of the law. Under the cases compiled in Corpus Juris from other states a man does not lose his character as a traveler upon immediately arriving in town but is given time to transact his little business, to have a meal, etc., while in that character. There does not seem to be any Missouri cases that are in point. "

Article II, Section 17, Missouri Constitution, provides:

"That the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called in question; but nothing herein contained is intended to justify the practice of wearing concealed weapons."

Section 4029, R. S. Mo. 1929, provides in part:

"If any person shall carry concealed upon or about his person a dangerous or deadly weapon of any kind or description, \* \* \* \* or shall, in the presence of one or more persons, exhibit any such weapon in a rude, angry or threatening manner, \* \* \* \* he shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding two years, or by a fine of not less than one hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than fifty days nor more than one year, or by both such fine and imprisonment: Provided, that nothing contained in this section shall apply to legally qualified sheriffs, police officers and other persons whose bona fide duty is to execute process, civil or criminal, make arrests, or aid in conserving the public peace, nor to persons traveling in a continuous journey peaceably through this state."

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The above statute was enacted in the Laws of 1909, p. 452. Prior to this enactment it was only a misdemeanor to carry concealed weapons or to flourish a deadly weapon.

Since enlarging the crime to a felony our Supreme Court has never construed the proviso relating to persons traveling continuously and peacefully through the State, but when the crime was but a misdemeanor the St. Louis Court of Appeals had this to say about said proviso in State v. Cousins 131 Mo. Ap. 617, l. c. 620:

"Persons traveling peaceably through the State are, as a class, exempt from the provisions of section 1862, and with reference to it stand on the same footing as police officers, constables, sheriffs and their deputies, and as the exempting section has no qualifications, if defendant was traveling peaceably through the State, section 1862 does not apply to him."

It now becomes our purpose to apply the law laid down in the Cousins case. The facts in the Cousins case are not the same as the facts outlined in your request. Let us look to the methods the Courts have used in construing facts under a Statute similar to the Missouri Statutes in determining criminal responsibilities.

Our neighbor, the State of Arkansas, had under consideration a statute exempting travelers from the mandates of their law relating to carrying concealed weapons, and in the case of Hathcote v. State 17 S. W. 721, l. c. 721; 55 Ark. 181, that Supreme Court said:

"The statute prohibits the carrying of weapons, but excepts from its operation 'all persons when upon a journey.' The alleged error in the court's charge relates to what constitutes a journey within the meaning of the exception. In its original acceptation a journey was a day's travel, but in use it has attained a broader though less definite meaning. As generally understood it signifies travel to a distance from home, and it

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is not used in reference to travel in one's neighborhood or among one's immediate acquaintances.

"The statute intends to prohibit the practice of carrying weapons when unnecessary and harmful, but to tolerate it in particular cases as necessary to defense; and such necessity is supposed to exist to persons when on a journey. This implies that such persons are then exposed to probable perils from which otherwise they are exempt, and in defining its scope the exception should be as broad as the reason for it, but not broader. Persons traveling within the circle of their general acquaintance are supposed to be within its protection, and exempt from perils of the highway to which they are exposed when they pass beyond it. So, within the circle of their general acquaintance they are held not to be on a journey, while beyond it they are on a journey."

In the case of Kemp v. State 31 S. W. (2d) 652, 1. c. 653; 116 Tex. Cr. 90, the Supreme Court of Texas reversing the case on grounds that the evidence showed the traveler within the exception, and said:

"Nothing in the evidence seems to warrant any conclusion other than that the appellant was on a journey from Comanche county to the ranch in Runnels county where his mother was visiting for the purpose of taking her back to her home in Comanche county, and the evidence, in our judgment, does not show any such deflection or turning aside from his journey as would forfeit his exemption as a traveler. According to all of the evidence before the court, the appellant, at nightfall, simply turned aside and went to a restaurant to eat a meal, leaving his pistol in

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the car while he was eating. The officers who arrested him testified, but stated no circumstance which would reflect upon the good faith of the appellant in his claim that he was a traveler. The precedents upon the subject are numerous. Many of them are cited in Branch's Ann. Tex. P. C. Sec. 977. They are to the effect that the cessation of the journey on some legitimate business incident to the journey would not make the defendant cease to be a person traveling. See Price v. State, 34 Tex. Cr. R. 102, 29 S. W. 473, and numerous other cases cited in the note mentioned.

"The evidence is not deemed such as to justify the conviction."

If your case were to be presented to the Supreme Court, the method of statutory construction applicable is well stated in State v. Bartley, 263 S. W. 95; 304 Mo. 58, l. c. 62:

"Criminal statutes are to be construed strictly; liberally in favor of the defendant and strictly against the State, both as to the charge and the proof. No one is to be made subject to such statutes by implication. Where one class of persons is designated as subject to its penalties, all others not mentioned are exonerated."

#### CONCLUSION.

This department is of the opinion that under the facts, as presented in your request, there has been no crime committed. Harris falls within the exception of the Missouri law relating to carrying concealed weapons, being a traveler in a continuous, peaceful journey through this State. The continuity of his journey was

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not brought without the exception by his pausing to eat and sleep. He was still among strangers. The peacefulness of his journey was not brought to an end when he took his gun from the pocket of his car and warned threatening strangers to leave him alone. The Missouri Constitution gives the right to bear arms in defense of person or property.

Respectfully submitted

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APPROVED:

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(Acting) Attorney General.

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