

IN THE MUNICIPAL COURT FOR ANDALUSIA, ALABAMA

CITY OF ANDALUSIA

VS

VICTOR ANDREW MATHIS

DEFENDANT

§
§
§
§
§
§
§
§
§

MC-07-144

MOTION TO DISMISS

COMES Now Defendant, by and through counsel, and moves this Honorable court to dismiss this case and shows as justification for this motion as follows:

Defendant is charge with carrying a pistol on the property of another under Code of Alabama (1975) §13A-11-52 which states:

Section 13A-11-52

Carrying pistol on premises not his own; who may carry pistol.

[Except as otherwise provided in this article, no person shall carry a pistol about his person on premises not his own or under his control; but this section shall not apply to any sheriff or his deputy or police officer of an incorporated town or city in the lawful discharge of the duties of his office, or to United States marshal or his deputies, rural free delivery mail carriers in the discharge of their duties as such, bonded constables in the discharge of their duties as such, conductors, railway mail clerks and express messengers in the discharge of their duties.]

This code section has been repealed or superseded by:

Section 13A-11-73

License to carry pistol in vehicle or concealed on person - Required.

[No person shall carry a pistol in any vehicle or concealed on or about his person, except on his land, in his own abode or fixed place of business, without a license therefor as hereinafter provided.]

Defendant at the time of the event and the date of his arrest was holding a pistol permit duly authorized by the Sheriff of Covington County, Alabama (Exhibit "A")

Defendant further includes in support of this motion to dismiss the most current Attorney General's opinion addressing this point in (Exhibit "B") which supports the fact that

Defendant was carrying a pistol on his person and did have a pistol permit duly authorized by the Sheriff of Covington County, Alabama.

Further, the premises where this event took place is Wal-Mart. There are no warning signs or other notices to the public anywhere on the property that certain weapons are not allowed in the store or on the premises. Further, Wal-Mart sells certain weapons and ammunitions to the public.

KJ v. State, 690 So.2d 541 (1997)

R. Wendell Sheffield, Birmingham, for appellant.

Bill Prvor, Atty. Gen., and Gail Ingram Hampton, Asst. Atty. Gen., for appellee.

TAYLOR, Presiding Judge.

The appellant was adjudicated delinquent on the underlying offenses of possessing a pistol about his person on premises not his own or under his control, a violation of § 13A-11-52, Code of Alabama 1975, and of receiving stolen property in the second degree, a violation of § 13A-8-18, Code of Alabama 1975. He was committed to the Department of Youth Services. The appellant presents three issues on appeal.

I

The appellant first contends that the court erred in adjudicating him delinquent under § 13A-11-52 because, he says, this Code section is no longer the law. Specifically, the appellant asserts that § 13A-11-52 was repealed or superseded by § 13A-11-73, Code of Alabama 1975.

Section 13A-11-52 states:

"Except as otherwise provided in this article, no person shall carry a pistol about his person on premises not his own or under his control; but this section shall not apply to any sheriff or his deputy or police officer of an Section 13A-11-73 states:

"No person shall carry a pistol in any vehicle or concealed on or about his persons, except on his land, in his own abode or fixed place of business, without a license therefor as hereinafter provided."

As authority for his contention, the appellant cites Stinson v. State, 190 So. 303, 304, 28 Ala.App. 559, 560 (Ala.App.), cert. denied, 238 Ala. 272, 190 So. 305 (Ala.1939), in which the Court stated:

"[The Uniform Firearms] Act prescribes punishments and penalties for violations of any of the provisions of the Act, and in Section 22 thereof is provided: 'This Act is intended as an entire revision of the subject matter contained herein and all laws or parts of laws inconsistent herewith are hereby repealed.'

"It would appear, therefore, that Section 3487 of the Code of 1923 [now § 13A-11-52] has been repealed and Form 32, of Section 4556, ceases to be the form prescribed in charging a defendant with a violation of Section 5 of the Acts of the Legislature, Extra Session of 1936, page 52. § 13A-11-73], which reads as follows: 'No person shall carry a pistol in any vehicle or concealed on or about his person, except in his place of abode or fixed place of business, without a license therefor as hereinafter provided.' It will be seen that this is an entire change of the former law on the subject."

This Court is cognizant of the fact that the court's holding in *Stinson* seems to infer that the precursor to § 13A-11-52 was repealed by the enactment of the Uniform Firearms Act; however, the legislative history of the current § 13A-11-52 shows that the Legislature re-

codified that section on two separate occasions following this Court's holding in *Stinson*, in 1940 and 1975. "It is a fundamental principle of statutory construction that in enacting [a] statute the legislature had full knowledge and information as to prior and existing law and legislation on the subject of the statute." *Miller v. State*, 349 So.2d 129, 131 (Ala.Cr.App.1977).

We hold that § 13A-11-52 is still in effect as evidenced by the following cases where defendants were charged under this section: *C.D.J. v. State*, 671 So.2d 139 (Ala.Cr.App.1995), and *A.M. v. State*, 623 So.2d 421 (Ala.Cr.App.1993).

II

The appellant next contends that the court erred in adjudicating him delinquent because, he says, the State failed to prove that he possessed a pistol, a violation of § 13A-11-52. Thus, the appellant contends that the evidence was insufficient to find him delinquent.

"In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution. *Faircloth v. State*, 471 So.2d 485 (Ala.Cr.App.1984), *aff'd*, 471 So.2d 493 (Ala.1985).

Furthermore, a judgment of conviction will not be set aside on the ground of insufficiency of the evidence unless, allowing all reasonable presumptions for its correctness, the preponderance of the evidence against the judgment is so decided as to clearly convince the reviewing court that it was wrong and unjust. *Jackson v. State*, 516 So.2d 726 (Ala.Cr.App.1985)."

Powe v. State, 597 So.2d 721, 724 (Ala.), on remand, 597 So.2d 730 (Ala.Cr.App.1992).

The State's evidence tended to show that, on July 9, 1996, two Birmingham police officers pulled into a parking lot in front of a grocery store. As the officers were pulling into a parking place, Officer Kelvin Dudley noticed five males, one of whom was the appellant, standing near some vending machines. While the testimony is not clear, it appears that the machines were located § 13A-11-52, must prove, in accordance with § 13A-11-73, that a defendant, charged under § 13A-11-52, has not been issued a license to carry a concealed weapon on the person.

In *C.D.J.*, this Court stated as follows:

"The appellant contends that this statute conflicts with § 13A-11-73, Code of Alabama 1975, Section 13A-11-73 states:

" 'No person shall carry a pistol in any vehicle or concealed on or about his person, except on his own land, in his own abode or fixed place of business, without a license therefor as hereinafter provided.' § 13A-11-52 should be read *in pari materia* with § 13A-11-73 so as to require proof that the accused had no license before § 13A-11-52 could be violated. He cites the holding of this court in *Braxton v. State*, 350 So.2d 753 (Ala.Cr.App.1977), as authority for this proposition. In *Braxton*, this court addressed a similar conflict between § 13A-11-73 and § 13A-11-50. Section 13A-11-50 states:

" 'Except as otherwise provided in this Code, a person who carries concealed about his person a bowie knife or knife or instrument of like kind or description or a pistol or firearm of any other kind or an air gun shall, on conviction, be fined not less than \$50.00 nor more than \$500.00, and may also be imprisoned in the county jail or sentenced to hard labor for more than six months.'

"In construing the conflict between the two sections, this court stated in *Braxton*:

" 'Section 175 [now codified at § 13A-11-73] applies to carrying an unlicensed pistol concealed on the person or in a vehicle, whereas § 161 [now codified at § 13A-11-50], *supra*, applies to carrying certain enumerated weapons concealed upon the person. Section 161

makes no exception for carrying a *licensed* pistol and thus insofar as they conflict, § 175 would prevail, it being the later statute and being a complete revision of the subject matter. Stinson v. State, 28 Ala.App. 559, 190 So. 303 (1939). Braxton, 350 So.2d at 755. (Emphasis supplied.)

"Here, as in *Braxton*, there is a conflict between the two statutes. Section 13A-11-52, like § 13A-11-50, does not permit the carrying of a pistol outside of a person's own premises under any circumstances. However, that section does begin with the phrase '[e]xcept as otherwise provided in this article.' Section 13A-11-73 clearly allows a person with a pistol license to carry a pistol in a vehicle or concealed on the person. Furthermore, in *Morris v. State, 342 So.2d 417, 418 (Ala.Cr.App.1977)*, and *Looney v. State, 41 Ala.App. 582, 141 So.2d 535, 536 (1962)* § 13A-11-73 does not prohibit carrying an unlicensed pistol if the pistol is unconcealed and the person is on foot.

"Based on the phrase '[e]xcept as otherwise provided in this article' and this court's reasoning in *Braxton*, we hold that § 13A-11-73 is the correct charge for possession of an unlicensed pistol. Section 13A-11-52 applies only the extent that it is consistent with § 13A-11-73 because it is 'the later statute and a complete revision of the subject matter.' *Braxton, 350 So.2d at 755.* Therefore, the state should have been required § 13A-11-73. This court has repeatedly held that the state must prove that the defendant was not issued a pistol license by the sheriff of the defendant's county of residence. *D.K.F. v. Sellers v. State, 507 So.2d 540 (Ala.Cr.App.1985)*, rev'd on other grounds, 507 So.2d 544 (Ala.1986), on remand, 507 So.2d 545 (Ala.Cr.App.1987); *Bagony v. City of Birmingham, 371 So.2d 80 (Ala.Cr.App.1979)* tate, 651 So.2d 48 (Ala.Cr.App.1994); . The state did not present proof that the appellant did not have a license to carry a pistol issued by the sheriff of Jefferson County. Therefore, the state did not meet its burden on this charge."

Although it appears from the holding in *C.D.J.* that a prosecutor's failure to prove that a defendant does not have a license is fatal to a charge under § 13A-11-52 or § 13A-11-73, this is not the case under present caselaw. To the contrary, when such a charge is brought against a *juvenile defendant*, the State is required to show that the defendant was under the age of 18 at the time of the offense and, therefore, could not legally have been issued a license to carry a pistol on the person. *E.M. v. State, 675 So.2d 90 (Ala.Cr.App.1995)* (Taylor, P.J. dissenting).

CONCLUSION

The above case law, attorney's general opinion, the fact that Defendant was holding a valid pistol permit, is conclusive that Defendant did not violate Code of Alabama (1975) § 13A-11-52 and this charge is due to be DISMISSED.

Respectfully submitted this the 13 day of September 2007.


J. Scott Hooper, HOO027

of counsel:
The Hooper Law Firm, PC
P.O. Box 241493
Montgomery, AL 36124-1493
334-271-1555 Office
334-271-1552 Facsimile
jshooper@knology.net

Certificate of Service

I hereby certify that I have served a copy of the foregoing this the 13 day
of September 2007 upon the party shown below by hand delivery or US Mail
properly addressed to the following:

Ben Bowden
Albrittons, Clifton, Alverson, Moody & Bowden
P.O. Box 880
Andalusia, AL 36420



J. Scott Hooper

Exhibit "A"

STATE OF ALABAMA PISTOL LICENSE

Issue Date: 2007-01-26 Expires: 2008-01-26 Fee: \$10.00

License to CARRY A REVOLVER or PISTOL CONCEALED ON THE PERSON or IN A VEHICLE is hereby granted to:

VICTOR ANDREW MATHIS
167 DR. MLK DRIVE
OPP AL 36467

SSN: 424-29-1312
DOB (AGE): 1988-05-21 (018)
Race: WHITE
Weight: 160
Complexion:

Sex: M Height: 5' 05"
Hair: BLOND/STRB Eyes: GREEN

Issued by me this 26th day of January, 2007
Dennis Meeks, Sheriff of COVINGTON County

Number: 070000200

This DOES NOT permit you to carry a gun openly as an officer. This permit is void if holder is under the influence of alcohol or drugs. Federal laws regulate possession of firearms in certain areas of air terminals If you have any questions please feel free to contact this office at (334) 428-2642

Signature of Licensee

STATE OF ALABAMA PISTOL LICENSE

Issue Date: 2007-01-26 Expires: 2008-01-26 Fee: \$10.00

License to CARRY A REVOLVER or PISTOL CONCEALED ON THE PERSON or IN A VEHICLE is hereby granted to:

VICTOR ANDREW MATHIS
167 DR. MLK DRIVE
OPP AL 36467

SSN: 424-29-1312
DOB (AGE): 1988-05-21 (018)
Race: WHITE
Weight: 160
Complexion:

Sex: M Height: 5' 05"
Hair: BLOND/STRB Eyes: GREEN

Issued by me this 26th day of January, 2007
Dennis Meeks, Sheriff of COVINGTON County

Number: 070000200

This DOES NOT permit you to carry a gun openly as an officer. This permit is void if holder is under the influence of alcohol or drugs. Federal laws regulate possession of firearms in certain areas of air terminals If you have any questions please feel free to contact this office at (334) 428-2642

Signature of Licensee

STATE OF ALABAMA PISTOL LICENSE

Issue Date: 2007-01-26 Expires: 2008-01-26 Fee: \$10.00

License to CARRY A REVOLVER or PISTOL CONCEALED ON THE PERSON or IN A VEHICLE is hereby granted to:

VICTOR ANDREW MATHIS
167 DR. MLK DRIVE
OPP AL 36467

SSN: 424-29-1312
DOB (AGE): 1988-05-21 (018)
Race: WHITE
Weight: 160
Complexion:

Sex: M Height: 5' 05"
Hair: BLOND/STRB Eyes: GREEN

Issued by me this 26th day of January, 2007
Dennis Meeks, Sheriff of COVINGTON County

Number: 070000200

This DOES NOT permit you to carry a gun openly as an officer. This permit is void if holder is under the influence of alcohol or drugs. Federal laws regulate possession of firearms in certain areas of air terminals If you have any questions please feel free to contact this office at (334) 428-2642

Signature of Licensee

*This is a true & correct copy
of normal ~~copy~~ record
in my office*

May 29-2007

*Patricia Sweet
Notary Public
1-24-09*

Rachel Eddins

Exhibit "B"

84-00205
OFFICE OF THE ATTORNEY GENERAL



CHARLES A. GRADDICK
ATTORNEY GENERAL
STATE OF ALABAMA

LEE L. HALE
DEPUTY ATTORNEY GENERAL
WILLIAM M. BEKURS, JR.
EXECUTIVE ASSISTANT
WALTER S. TURNER
CHIEF ASSISTANT ATTORNEY GENERAL
JANIE NOBLES
ADMINISTRATIVE ASSISTANT

ADMINISTRATIVE BUILDING
64 NORTH UNION STREET
MONTGOMERY, ALABAMA 36130
AREA (205) 834-5130

MAR 22 1984

Honorable Van C. Gholston
District Attorney
Second Judicial Circuit
Butler County Courthouse
Greenville, Alabama 36037-2393

Firearms, Permits, Drugs,
Alcoholic Beverages.

A permit is not required
when a person afoot carries
an unconcealed pistol.

Dear Sir:

Your inquiry dated February 21, 1984 is in part as follows:

- "1. Is a person required to have a permit to carry a pistol when he is afoot and the pistol is being carried in an unconcealed manner? (Provided this person is not a drug addict, an habitual drunkard or has not been convicted of a crime of violence.)
- "2. May a person carry an unlicensed and unconcealed pistol anywhere, either on his own property, on the public highways, public property or on the land of another person without violating §13A-11-52 or §13A-11-73? (Providing he is not riding in a vehicle.)

- "3. Are §13A-11-52 and §13A-11-73 in conflict with each other? If so, which law takes precedence over the other and would Looney v. State, 41 Ala. App. 583 have any bearing on this question or any of the above questions?"

Your inquiry numbered one is answered, no. Looney v. State, cited in your inquiry. This opinion states: "Thus, a permit is not required when a person afoot carries an unconcealed pistol."

Your second question is answered, yes, generally, however, "anywhere" is a broad term. There may be individual or specific restrictions, for example: airline passenger planes, etc., sports stadiums; landowners or residents may exclude licensees or invitees who do not comply with their rules prohibiting firearms.

Your inquiry numbered three is also answered, yes, and the latter statute, Section 13A-11-73, takes precedence. Braxton v. State, 350 So.2d 753 (1977).

In Braxton, supra, it is stated:

Title 14, §175, Code of Alabama 1940, states:

"No person shall carry a pistol in any vehicle, or concealed on or about his person, except on his land, in his own abode or fixed place of business, without a license therefor as hereinafter provided."

[1] Section 175 applies to carrying an unlicensed pistol concealed on the person or in a vehicle, whereas §161, supra, applies to carrying certain enumerated weapons concealed upon the person. Section 161 makes no exception for carrying a licensed pistol and thus insofar as they conflict, §175 would prevail, it

being the later statute and being a complete revision of the subject matter. Stinson v. State, 28 Ala. App. 559, 190 So. 303 (1939). Aside from the question of whether §175 pro tanto repealed §161, it is abundantly clear that §161 never covered the subject of carrying an unlicensed pistol in a vehicle. Section 175, supra, is the only statute which could have been applicable to the instant situation."

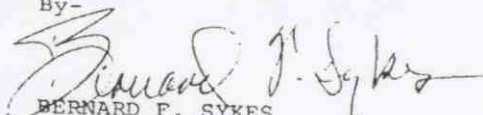
Looney, supra, has a bearing on some of your questions in that it holds that:

1. A person afoot carrying an unconcealed pistol needs no license or permit.
2. A license is required to carry a pistol in a vehicle.
3. A license is required to carry a concealed pistol on or about the person.
4. It is an offense for a person who has no license therefor (except on his land, abode or place of business):
 - a) to carry a pistol in any vehicle; or
 - b) to carry a pistol concealed on or about his person.

Very truly yours,

CHARLES A. GRADDICK
ATTORNEY GENERAL

By-


BERNARD F. SYKES
ASSISTANT ATTORNEY GENERAL