

Maynard, J., Dissenting Opinion, Case No.23840 State of West Virginia ex rel. The West Virginia Division of Natural Resources, et al. v. Hon. Danny O. Cline, et al.

No. 23840 - State of West Virginia ex rel. the West Virginia Division of Natural Resources; Charles B. Felton, Jr., Director, West Virginia Division of Natural Resources; and James D. Fields, Chief, Law Enforcement Division, West Virginia Division of Natural Resources v. Honorable Danny O. Cline, Judge of the Circuit Court of Braxton County; Shelby L. DeMarino, Prosecuting Attorney for Gilmer County; and Ernest V. Morton, Jr., Prosecuting Attorney for Webster County

Maynard, Justice, dissenting:

A drunk driver in West Virginia is legally permitted to carry a loaded gun in his vehicle while a sober hunter, a sportsman experienced in handling guns, is not! Such is the curious result that necessarily follows this Court's holdings in *State ex rel. City of Princeton v. Buckner*, 180 W.Va. 457, 377 S.E.2d 139 (1988) and the majority opinion in this case.

In *Buckner*, the driver of a vehicle was arrested by a police officer for DUI. Upon searching the driver, the police officer discovered a .22 caliber automatic pistol inside the driver's jacket pocket. The driver informed the police officer that he did not have a license that allowed him to carry such a weapon. The police officer presented these facts to a magistrate and sought a warrant for the driver's arrest for the DUI offense. The magistrate advised the police officer that he would not issue a warrant for carrying a dangerous and deadly weapon against the driver based upon the magistrate's conclusion that W.Va. Code § 61-7-1 (1975)⁽¹⁾ violated W.Va. Const. art. III, § 22, the state's recently ratified Right to Keep and Bear Arms Amendment. In *Buckner*, this

Court concluded that W.Va. Code § 61-7-1 impermissibly infringed upon the constitutionally protected right to bear arms for defensive purposes. In the current case, this Court inexplicably concludes, however, that W.Va. Code § 20-2-5(10), which makes it a crime for a hunter to have a loaded gun in his vehicle, is constitutional. In reaching such a conclusion, this Court has befuddled the clear and succinct language of the Right to Keep and Bear Arms Amendment, and has approved a confusing and bewildering statutory scheme.

On November 4, 1986, the voters of West Virginia approved the Right to Keep and Bear Arms Amendment by a vote of 342,963 to 67,168.⁽²⁾ Thus, not only did 85% of those voting approve the amendment, but "[w]ith more than five votes in favor to every one vote opposed, the amendment passed in every county in the state."⁽³⁾ This amendment is necessary, in part, because the Second Amendment to the United States Constitution⁽⁴⁾ has not been applied to the states. The Second Amendment operates to protect from federal restraint the right of the people to keep and bear arms which is necessary for a well regulated militia. West Virginia's Right to Keep and Bear Arms Amendment provides that:

A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use.

Thus, unlike the Second Amendment, West Virginia's Amendment clearly guarantees the right of an individual to keep and bear arms for specifically enumerated purposes. This Amendment is the last clear word on the right to keep and bear arms in West Virginia.

In its majority opinion, this Court concludes that W.Va. Code § 20-2-5(10) (1994), prohibiting the vehicular transportation of a loaded firearm, does not violate the right to keep and bear arms for lawful hunting purposes. I believe that this holding muddies the water on the right to keep and bear arms, and raises many more questions than it answers. The first question that comes to mind is whether this statute prohibits the vehicular transportation of a loaded firearm only when hunting or is it prohibited universally, for example, when a

person is driving to or from work or the grocery store? The majority analyzes this statute solely in the context of hunting. If, however, this statute is to be applied universally and generally, I believe that it plainly constitutes an unreasonable regulation of the right of a person to keep and bear arms for the defense of self and family. A complete prohibition on the vehicular transportation of a loaded gun would, of course, eviscerate the right to keep and bear arms for defense of self and family while traveling in a vehicle, and would operate as a significant exception to the clear language of our constitutional amendment. Such a prohibition is even more stringent than that found to be unconstitutional in *Buckner*, which did allow a person to carry about his person a revolver or pistol provided he had a state license to do so.

Chapter 61, Article 7 of the W.Va. Code concerns the regulation of "dangerous weapons" generally. In light of the ratification of the Right to Keep and Bear Arms Amendment and this Court's holding in *Buckner*, Chapter 61, Article 7 was extensively amended. W.Va. Code § 61-7-1 (1989) states:

The Legislature finds that the overwhelming support of the citizens of West Virginia for article three, section twenty-two of the Constitution of this State, commonly known as the "Right to Keep and Bear Arms Amendment", combined with the obligation of the state to reasonably regulate the right of persons to keep and bear arms for self-defense requires the reenactment of this article.

The general prohibition on carrying a firearm without a license found constitutionally unacceptable in *Buckner* has been replaced with a prohibition on carrying a "concealed deadly weapon" without a state license or other lawful authorization.⁽⁵⁾ Chapter 61, Article 7, specifically tailored to accommodate the Right to Keep and Bear Arms Amendment, does not contain a general prohibition on the vehicular transportation of a loaded firearm.⁽⁶⁾

Chapter 20, Article 2 of the W.Va. Code, concerns "wildlife resources", and W.Va. Code § 20-2-5 is titled "[U]nlawful methods of hunting and fishing and other unlawful acts." This code section does not specifically refer to the Right to Keep and Bear Arms Amendment; nevertheless, it contains numerous firearm restrictions besides the one at issue. In fact, if these provisions were applied generally and not only to hunters, they would significantly restrict the right to keep and bear arms.

For example, W.Va. Code § 20-2-5(8) (1994) provides that "it is unlawful at any time for any person,"

Except as provided in section six [§ 20-2-6] of this article, [to] carry an uncased or loaded gun in any of the woods of this state except during the open firearms hunting season for wild animals and nonmigratory wild birds within any county of the state, unless he has in his possession a permit in writing issued to him by the director: Provided, That this section shall not prohibit hunting or taking of unprotected species of wild animals and wild birds and migratory wild birds, during the open season, in the open fields, open water and open marshes of the state[.] (Emphasis added).

Does this mean that the Constitution and the Right to Keep and Bear Arms Amendment is suspended in the woods of West Virginia, but not in the cities?

W.Va. Code § 20-2-5(9) makes it unlawful:

Except as provided in subdivision (11) below or in section six of this article, [to] carry an uncased or loaded gun after the hour of five o'clock antemeridian on Sunday in any woods or on any highway, railroad right-of-way, public road, field or stream of this state, except at a regularly used rifle, pistol, skeet, target or trapshooting ground or range[.]

Does this mean the Constitution and the Right to Keep and Bear Arms is repealed every

Sunday at 5:00 o'clock a.m.? And, is that standard time or daylight savings time?

The specific provision at issue here, W.Va. Code § 20-2-5(10), makes it unlawful for any person to:

Have in his possession a loaded firearm or a firearm from the magazine of which all shells and cartridges have not been removed, in or on any vehicle or conveyance, or its attachments, within the state, except as may otherwise be provided by law or regulation. Except as hereinafter provided, between five o'clock postmeridian of one day and seven o'clock antemeridian, eastern standard time of the day following, any unloaded firearm, being lawfully carried in accordance with the foregoing provisions, shall be so carried only when in a case or taken apart and securely wrapped. During the period from the first day of July to the thirtieth day of September, inclusive, of each year, the foregoing requirements relative to carrying certain unloaded firearms shall be permissible only from eight-thirty o'clock postmeridian to five o'clock antemeridian, eastern standard time[.]

Rube Goldberg must have written this! For this one, before you carry a gun, you better have, along with the gun, a calendar, a watch and a lawyer (if you can find one who understands the statute and can reconcile it with the Right to Keep and Bear Arms Amendment) to explain this statute.

This is the specific statute this Court has just upheld in the majority opinion. Let's see now if we can apply this statute in a sensible way. It says you cannot carry a loaded gun in a vehicle anywhere at anytime, and if it is unloaded, it

must also be cased or wrapped, from 5:00 p.m., eastern standard time of each day until 7:00 a.m. eastern standard time of the next day, except during the period from July 1 to September 30 each year, then it must be cased from 8:30 p.m. each day until 5:00 a.m., eastern standard time, the next day. What about the period from spring to fall when daylight savings time is in effect? The statute provides only for eastern standard time? Do we expect people to make their own calculations and adjust the time?--in a criminal statute? Further, does this apply to police officers? They are not excepted and the statute says it is "unlawful for any person."

The most bizarre provision, however, must be W.Va. Code § 20-2-6 (1961) which provides:

Notwithstanding any other provisions of this chapter, it shall be lawful for a bona fide resident of this State, any member of said landowner's family and any bona fide tenant of said landowner, to carry an uncased gun at any time, whether accompanied by or without a dog, in their regular pursuits in caring for and looking after such landowner's livestock or poultry on his land and on any lands leased or rented by him for livestock or poultry husbandry purposes. (Emphasis added).

Does this mean if a landowner is hauling livestock in a vehicle to the market he can carry

a loaded firearm in that vehicle? What if he is hauling only feed for the livestock from a store to his land, can he carry a loaded gun? If so, do the after 5:00 p.m. (or 8:30 p.m.) rules apply to him, or is he exempt? If not exempt, what does the phrase "at any time" mean? If applied generally to the right to keep and bear arms, these provisions apparently mean that a citizen of West Virginia has the right to keep and bear arms for the defense of self, family, home and state except in his or her vehicle; *except* in the woods of the state unless it is open firearms hunting season; *except* on any highway, railroad right-of-way, public road, field or stream after 5:00 a.m. on Sunday until who knows when; and *except* on his or her own property, unless in the pursuit of looking after and caring for livestock and poultry. (At least the law

does not make him keep the dog with him all the time!) What, then, remains of the constitutional right to keep and bear arms.

Apparently, the public thinks a person without a permit may still carry a gun that is not concealed anytime on a public city street, or in a bank, bookstore, convenience store, restaurant, record store, pawn shop, bike shop, and grocery store. [\(7\)](#)

A very interesting story recently appeared in the Sunday Gazette-Mail. A news reporter openly carrying a gun in downtown Charleston went into all those locations and got almost no reaction!

Also, W.Va. Code § 20-2-6 appears to be at variance with W.Va. Code § 61-7-6 (1996), which provides that any person carrying a deadly weapon upon his own premises is excepted from the prohibition against carrying concealed deadly weapons without a license, and W.Va. Code § 61-7-8 (1989), which provides that "a minor may possess a firearm upon premises owned by said minor or his family[.]" These code sections do not make carrying a firearm on one's own property contingent upon caring for and looking after livestock or poultry.

In sum, I believe that W.Va. Code § 20-2-5(10), as well as all the other provisions mentioned above, if applied universally and generally, are unreasonable. Also, these provisions effectively stifle the right to keep and bear arms for defensive purposes, and, thus violate the Right to Keep and Bear Arms Amendment.

As noted above, however, the majority opinion deals solely with whether W.Va. Code § 20-2-5(10) violates the right to keep and bears arms for lawful

hunting purposes. It is possible that W.Va. Code §20-2-5(10) and its accompanying provisions apply only to hunting. But, if this is true, my second question concerns why hunters are singled out as the target of such restrictive and muddled provisions, and drunk drivers are not. As noted in the opening paragraph of this dissent, applying these provisions only to hunters gives rise to a variety of anomalous results. For example, let's say two vehicles are traveling down the road, one immediately in front of the other. Both vehicles are stopped by law enforcement officers and both are found to contain loaded firearms. The driver of the first vehicle informs the officer that he is not going hunting, rather, he is going to the grocery store and is exercising his constitutional right to carry a gun for defense of self. Driver number one is clearly not, therefore, in violation of W.Va. Code § 20-2-5(10), since that provision does not apply to him. He is allowed to go on his way. The driver of the second vehicle, however, informs the officer that he is going hunting, and is therefore in violation of W.Va. Code § 20-2-5(10), and he goes to jail for a hundred days. Of course, as more and more drivers become sophisticated in the ways of West Virginia law, they will understand the importance of carrying a loaded gun in their vehicles solely for the purpose of defense, and the law enforcement officer's task of deciding whether W.Va. Code § 20-2-5(10) is applicable in any given situation will become increasingly more difficult. Certainly, all of this points to the preposterous situation of applying more stringent firearm restrictions to hunters than to the general population, especially considering the fact that hunters are far more likely to be experienced in firearm use and safety.

Finally, I believe that the firearm restrictions contained in W.Va. Code § 20-2-5(10) and its accompanying provisions quoted above, besides the fact that some are just silly, are so needlessly complex and confusing that they fail to plainly and adequately inform a person of what the law demands, and thus provide a dangerous trap for the unwary. In fact, our gun control law is so balkanized that most lawyers would have trouble unraveling the tangle of firearm provisions contained in W.Va. Code § 20-2-5,

W.Va. Code § 61-7-1 and the Constitution. A citizen of this state who desires to exercise his constitutional right to keep and bear arms must be informed of all the above-quoted provisions and their numerous confusing restrictions as to:

A. the manner in which he must carry his firearm (loaded/unloaded; cased/uncased; broken down/not broken down, etc.),

B. the place (his own property, woods, highway, railroad right-of-way, public road, field or stream, rifle, pistol, skeet, target or trapshooting ground or range),

C. the hour (between 5:00 p.m. of one day and 7:00 a.m. of the next or 8:30 p.m. of one day and 5:00 a.m. of the next),

D. the day (is it Sunday?),

E. the time of year (October 1 to June 30 or July 1 to September 30),

F. the activity (am I caring for or looking after livestock or poultry, or am I simply a person on my own premises?),

and how all of these work together and with other statutes and the Constitution.

This Court has stated that "[a] criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." Syllabus Point 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974). Also,

[i]t is elementary that an act creating a statutory offense, to be valid, must specify with reasonable certainty and definiteness the conduct which is commanded or prohibited, that is, what must be done or avoided, so that a person of ordinary intelligence may know what is thereby required of him * *

* The enactment should define the acts to be done or not to be done which constitute such offense with such certainty that a person may determine whether or not he has violated the law at the time he does or fails to do the act, which is charged to be a violation thereof[.]

Southern Railway v. Commonwealth, 135 S.E.2d 160, 164 (Va. 1964) (Citation omitted). To be really fair, the criminal law should be so simple and clear that the dumbest guy on the street can understand it. Unfortunately, those who would exercise their constitutional right to keep and bear arms for whatever lawful purpose are now confronted with numerous questions concerning the applicability of W.Va. Code § 20-2-5(10), and how it interacts with Chapter 61, Article 7 concerning the regulation of dangerous weapons in general. The majority opinion leaves these questions unanswered. Also, there remains the daunting task of deciphering W.Va. Code § 20-2-5(10) and the other provisions of W.Va. Code § 20-2-5 that concern the regulation of firearms.

In conclusion, I believe that the majority opinion upholds a statute that is unconstitutional and unreasonably restricts the right to keep and bear arms. According to W.Va. Code § 20-2-1 (1969), the policy underlying Chapter 20, Section 2 is the protection of the wildlife resources of the State "for the use and enjoyment of all the citizens of this State." Clearly, the detailed and complex firearm restrictions in this code section are unnecessary for the accomplishment of this purpose. The restrictions sweep too broadly and infringe on the constitutional right to keep and bear arms.

The overwhelming majority of the voters of this state desire the right to keep and bear arms for defense of self, family, home and state, for lawful hunting, and for recreational purposes. With this holding, however, this Court has flagrantly disregarded the will of the great majority and sided, instead, with the 15% who would interfere with those who keep and bear arms for lawful purposes. In so doing, this Court is only doing what courts all over America do: thwart democracy by ignoring the will of the people. While the will of the majority is regularly done by the executive and legislative branches of government, it is just as regularly ignored everywhere by the courts in favor of the wishes of special interest groups with radical agendas. These groups can only impose their will on the majority with the aid of the courts. That is not democratic. It does not matter if one is in favor of guns or not, we should all be in favor of democracy. On this issue in West Virginia the great majority has spoken. Democratic principles demand that this Court listen.

The Court's holding in this case leaves the right to keep and bear arms in an extremely vague and contradictory state. Considering the uncertainty and confusion now confronting gun owners, I am reminded of a fellow I once knew when in happier times I lived in southern West Virginia. His name was Jim Tom. Like most true West Virginians, Jim Tom really loved the outdoors and spent every possible minute in the woods and mountains. Unfortunately, however, Jim Tom was absolutely terrified of snakes. He was so afraid of snakes that all the time he spent outdoors was marred by the constant fear he would be bitten by a snake. Jim Tom continued to be absolutely obsessed with this unreasonable fear, until one day when his friend, who was also his doctor, gave him a bottle of rattlesnake anti-venom. Suddenly, his problem was solved. Jim Tom placed the bottle of anti-venom in the pocket of his hunting vest, and began to enjoy nature to its fullest, secure in the knowledge that if he were ever bitten, immediate help was at hand.

One day, however, Jim Tom's worst fears were realized when he stepped on a rotten log and was bitten by a huge rattlesnake. Sheer panic seized him but suddenly gave way to soothing relief, when Jim Tom remembered the bottle of anti-venom in his vest. He calmly and very carefully removed the bottle of anti-venom and slowly sat down to read the directions for use printed on the package. But it was with a sinking heart and a sense of doom that poor old Jim Tom realized that the directions had been written by the West Virginia Supreme Court of Appeals!

1. W.Va. Code § 61-7-1 (1975) provided in part:

If any person, without a state license therefor or except as provided elsewhere in this article and other provisions of this Code, carry about his person any revolver or pistol, dirk, bowie knife, slung shot, razor, billy, metallic or other false knuckles, or other dangerous or deadly weapon of like kind or character, he shall be guilty of a misdemeanor[.]

2. Michael O. Callaghan, *State v. Buckner and the Right to Keep and Bear Arms in West Virginia*, 91 W.Va. L. Rev. 425, 436 (1989).

3. *Id.* (footnote omitted).

4. The Second Amendment to the United States Constitution states that "[a] well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

5. According to W.Va. Code § 61-7-2(10) (1989):

"Concealed" means hidden from ordinary observation so as to prevent disclosure or recognition. A deadly weapon is concealed when it is carried on or about the person in such a manner that another person in the ordinary course of events would not be placed on notice that the deadly weapon was being carried.

6. W.Va. Code § 61-7-6 (1996), titled "Exceptions as to prohibitions against carrying concealed deadly weapons does state in part:

The licensure provisions set forth in this article shall not apply to:

(1) Any person carrying a deadly weapon upon his own premises; nor shall anything herein prevent a person from carrying any firearm, unloaded, from the place of purchase to his or her home, residence or place of business or to a place of repair and back to his or her home, residence or place of business, nor shall anything herein prohibit a person from possessing a firearm while hunting in a lawful manner or while traveling from his or her home, residence or place of business to a hunting site, and returning to his or her home, residence or place of business;

(2) Any person who is a member of a properly organized target-shooting club authorized by law to obtain firearms by purchase or requisition from this state, or from the United States for the purpose of target practice, from carrying any pistol, as defined in this article, unloaded, from his home, residence or place of business to a place of target practice, and from any such place of target practice back to his home, residence or place of business, for using any such weapon at such place of target practice in training and improving his skill in the use of such weapons[.] (emphasis added).

Even though this section refers to the transportation of unloaded weapons, it appears to specifically concern the transportation of concealed weapons as the title of the section suggests.

7. See Greg Stone, Packing Heat--And Few People React, *The Sunday Gazette-Mail*, July 7, 1996, at 1A.

Note, however, that W.Va. Code § 61-7-14 (1989) provides, in part, that "any owner, lessee or other person charged with the care, custody and control of real property may prohibit the carrying openly or concealing of any firearm or deadly weapon on property under his or her domain[.]"