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Opinion No. 08-19

The Right to Keep and Bear Arms under Article I, Section 26 of the Tennessee Constitution

QUESTION

Does Art. I, §26, of the Tennessee Constitution confer an individual right on the citizens of Tennessee to keep and bear arms?

OPINION

Art. I, § 26, of the Tennessee Constitution confers an individual right on the citizens of Tennessee to keep and bear arms. That right, however, is restricted to the "bearing" and "keeping" of "arms" within the meaning of Art. I, § 26 of the Tennessee Constitution.

ANALYSIS

Art. I, § 26, of the Tennessee Constitution states:

> That the citizens of this state have a right to keep and bear arms for their common defense; but the Legislature shall have the power, by law, to regulate the wearing of arms with a view to prevent crime.

In *Andrews v. State,* 50 Tenn. 165 (1871), the Court held that the foregoing provision conferred an individual right upon the citizens of the state. It said:

> Bearing arms for the common defense may well be held to be a political right, or for protection and maintenance of such rights, intended to be guaranteed; but the right to keep them, with all that is implied fairly as an incident to this right, is a private right, guaranteed to the citizen, not the soldier.

Id. at 173.

The Court noted, however, that the right was limited to the keeping and bearing of arms, as opposed to the wearing and carrying of arms. The Court described the constitutionally protected activities of keeping and bearing arms, stating:

> The right to keep arms, necessarily involves the right to purchase them, to keep them

> in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home, and no one could claim that the Legislature had the right to punish him for it, without violating this clause of the Constitution.
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> But farther than this, it must be held, that the right to keep and bear arms involves, necessarily, the right to use such arms for all ordinary purposes, and in the ordinary modes used in the country, and to which arms are adapted, limited by the duties of a good citizen in times of peace; that in such use, he shall not use them for violation of the rights of others, or the paramount rights of the community of which he makes a part.

Id at 172.

The wearing and carrying or arms is another matter. Such activities, according to the Court, are not protected and therefore subject to regulation.[1] In describing the types of activities that are subject to regulation, the Court said:

> So we may say, with reference to such arms, as we have held, he may keep and use in the ordinary mode known to the country, no law can punish him for so doing, while he uses such arms at home or on his own premises; he may do with his own as he will, while doing no harm to others. Yet, when he carries his property abroad, goes among the people in public assemblages where others are to be affected by his conduct, then he brings himself within the pale of public regulation, and must submit to such restriction on the mode of using or carrying his property as the people through their Legislature, shall see fit to impose for the general good.
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> *Id.* at 175.

Andrews and subsequent cases also indicate that the rights afforded by Art. I, § 26, are further limited to the possession of arms.[2] Weapons that are not classified as "arms" are not protected under that provision.

Burks v. State, 162 Tenn. 406, 36 S.W.2d 892 (1931), is instructive. As that case shows, not all weapons are arms. In *Burks*, the Court stated that arms are weapons of a type that are kept by the citizen for his personal defense and the common defense of the state. The Court noted that protected arms include the musket, shotgun and repeating rifle. Other weapons, such as certain

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[1]Under the language of Art. I, § 26, the legislature's authority to regulate the wearing and carrying of arms is limited to measures that are intended to prevent crime.

[2]*See, e.g., State v. Callicutt*, 69 Tenn. 714 (1878); *Barton v. State*, 66 Tenn. 105 (1874); *State v. Wilburn* , 66 Tenn. 57 (1872).

types of pistols may or may not fall within the category of "arms" and might therefore fall within the area of permissible regulation.[3]

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[3]The foregoing cases show that examples of weapons that are not "arms" would include switchblades, sword canes and pocket pistols.