

OPINION NO. 73-036

Syllabus:

1. A secret service officer, who is engaged in an investigation at the direction of the prosecuting attorney under circumstances which would lead a reasonably prudent man to believe that he may find it necessary to defend himself, may carry a concealed weapon under the provisions of R.C. 2945.76 despite the prohibition of R.C. 2923.01.

2. There is no requirement that a secret service officer give bond before carrying a concealed weapon, but he may do so if deemed advisable.

To: H. Michael Moser, Auglaize County Pros. Atty., Wapakoneta, Ohio
By: William J. Brown, Attorney General, April 20, 1973

Your request for my opinion reads as follows:

O.R.C. Sec. 309.07 provides for the appointment of secret service officers by the

Prosecuting Attorney. The statute provides that his duty shall be to aid the Prosecuting Attorney in the collection and discovery of evidence to be used in criminal cases and matter of a criminal nature.

I have recently appointed a secret service officer, and I feel it very desirable that he be allowed to carry a concealed weapon for his own protection.

However O.R.C. Sec. 2923.01, which makes the carrying of a pistol concealed on a person a crime, does not except a secret service officer from its application. Perhaps the "prudent man" test of O.R.C. Sec. 2945.76 would apply.

I would therefore request your opinion as to the legality of a duly appointed secret service officer of a prosecuting attorney carrying a concealed firearm. If he may, must he first give bond?

The rationale of 1966 O.A.G. No. 184 might prove helpful.

R.C. 309.07, which provides for the appointment of a secret service officer, reads as follows:

The prosecuting attorney may appoint secret service officers whose duty it shall be to aid him in the collection and discovery of evidence to be used in the trial of criminal cases and matters of a criminal nature. Such appointment shall be made for such term as the prosecuting attorney deems advisable, and subject to termination at any time by such prosecuting attorney. The compensation of said officers shall be fixed by the judge of the court of common pleas, or, if there is more than one judge, such compensation shall be fixed by the judges of such court in joint session, and shall not be less than one hundred twenty-five dollars per month for the time actually occupied in such service nor more than seventy-five per cent of the salary of the prosecuting attorney for a year. Such salary shall be payable monthly, out of the county fund, upon the warrant of the county auditor.

(Emphasis added.)

It should be noted that this Section gives the secret service officer no power to make arrests. He has, of course, the same right of arrest as an ordinary citizen, but his only specific statutory authority is to aid in the collection and discovery of evidence for criminal trials.

The prohibition against the carrying of concealed weapons appears in R.C. 2923.01, which specifically exempts certain officers from its coverage. It reads as follows:

No person shall carry a pistol, revolver, zipgun, other concealable firearm, or any concealable weapon or device capable of discharging a projectile, concealed on or about his person while such weapon or device is loaded, or while having on or about his person the ammunition or projectiles for any such weapon or device. This section does not affect the right of sheriffs, regularly appointed police officers of municipal corporations, regularly elected constables, and special officers as provided by sections 311.07, 737.10, 1717.06, 1721.14 and 2917.32 of the Revised Code, to go armed when on duty. Deputy sheriffs and specially appointed police officers, except as are appointed or called into service under said sections may go armed if they first give bond to this state, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them. Persons injured by such improper use may have recourse on said bond.

Whoever violates this section shall be imprisoned not less than one nor more than three years.

Whoever violates this section, having previously been convicted of or pleaded guilty to the commission of carrying a concealed weapon or of any felony contained in sections 2901.01 to 2901.06, inclusive, 2901.08 to 2901.13, inclusive, 2901.19 to 2901.34, inclusive, 2905.01, 2905.02, 2905.031, 2905.041, 2907.02 to 2907.21, inclusive, and section 3719.20 of the Revised Code, shall be imprisoned not less than three nor more than ten years. (Emphasis added.)

Since the secret service officer of a prosecuting attorney is not given any of the powers of a police officer under R.C. 309.07, I must conclude that such officer does not come within the specific exceptions enumerated in R.C. 2923.01.

There is, however, another exception in R.C. 2945.76. That Section reads as follows:

Upon the trial of an indictment or information for carrying a concealed weapon, as defined in section 2923.01 to 2923.012 of the Revised Code, the jury shall acquit the defendant if it appears that he was at the time engaged in a lawful business, calling, or employment, and that the circumstances in which he was placed justified a prudent man in carrying such weapon for the defense of his person, property, or family. (Emphasis added.)

The predecessor of this Section, G.C. 13693 (see also G.C. 13448-4), has been considered by the Supreme Court in two cases. State v. Nieto, 101 Ohio St. 409 (1920); and Porello v. State, 121

Ohio St. 280 (1929). In neither case did the defendant come within the coverage of the Section. Neither defendant was, "at the time" he was carrying a concealed weapon, "engaged in a lawful business" under circumstances which would justify "a prudent man in carrying such weapon." In Porello, however, the Court said that G.C. 13693 "makes ample provision for the necessities of self-defense." 121 Ohio St. at 290. Consequently, if the undisputed facts in the two cases had been that the defendants were engaged in lawful businesses under circumstances which required the carrying of a weapon in self-defense, the trial courts would have had no choice but to direct verdicts of acquittal since G.C. 13693, and its successor, R.C. 2945.76, provide that the jury shall acquit the defendant under such circumstances. I conclude, therefore, that R.C. 2945.76 provides an additional exception to the prohibition against carrying a concealed weapon in R.C. 2923.01 over and above the exceptions already enumerated in the latter Section.

My predecessors have dealt with various issues, more or less closely related to your question. The closest appears to be Opinion No. 65-177, Opinions of the Attorney General for 1965, which held in Branch 10 of the Syllabus:

A private detective is not justified in carrying a concealed weapon within the meaning of Section 2945.76 of the Ohio Revised Code, just by virtue of the nature of his employment. The circumstances must justify the carrying of a concealed weapon, and the fact that a person is legally employed is not justification.

Several others, which upheld the right to carry concealed weapons, relied upon the power of the officer in question to make arrests and are, therefore, not in point here. See the other parts of Opinion No. 65-177, *supra*; Opinion No. 69-151, Opinions of the Attorney General for 1969; Opinion No. 66-184, Opinions of the Attorney General for 1966; Opinion No. 4832, Opinions of the Attorney General for 1942; Opinion No. 508, Opinions of the Attorney General for 1929. Two other Opinions, Opinion No. 1668, Opinions of the Attorney General for 1933, and Opinion No. 912, Opinions of the Attorney General for 1949, appear to reach conclusions contrary to that reached here, but neither considered the effect of the predecessor of R.C. 2945.76.

It is not difficult to envisage many possible situations in which a secret service officer, while engaged in investigatory work at the direction of the prosecuting attorney, will find it prudent to carry a concealed weapon in order to defend himself. I conclude, therefore, that in such circumstances the officer is exempted from the prohibition of R.C. 2923.01. I emphasize, however, that he must be engaged in the performance of his official duties, and that the circumstances must be such as to lead a reasonably prudent man to believe that he will be called upon to defend himself.

You also ask whether the secret service officer must give bond before he may carry a weapon. I have reviewed the various bonding statutes and I can find none to require a bond in this particular situation. However, the officer may obtain a bond if

he so desires or you deem it advisable. This is a policy decision that rests with your Office.

In specific answer to your questions it is my opinion, and you are so advised, that:

1. A secret service officer, who is engaged in an investigation at the direction of the prosecuting attorney under circumstances which would lead a reasonably prudent man to believe that he may find it necessary to defend himself, may carry a concealed weapon under the provisions of R.C. 2945.76 despite the prohibition of R.C. 2923.01.

2. There is no requirement that a secret service officer give bond before carrying a concealed weapon, but he may do so if deemed advisable.