

December 19, 2017

The Honorable D. Vincent Faris
Clermont County Prosecuting Attorney
101 East Main Street
Batavia, Ohio 45103

SYLLABUS:

2017-045

A county sheriff may not issue a concealed handgun license pursuant to R.C. 2923.125 to a person who is not eligible under federal law to receive or possess a firearm. (2004 Op. Att'y Gen. No. 2004-038, overruled, on the basis of legislative amendment.)



December 19, 2017

OPINION NO. 2017-045

The Honorable D. Vincent Faris
Clermont County Prosecuting Attorney
101 East Main Street
Batavia, Ohio 45103

Dear Prosecutor Faris:

You have requested an opinion whether a county sheriff is required to issue a concealed handgun license pursuant to R.C. 2923.125 to a person who is not eligible under federal law to receive or possess a firearm.

In Ohio, subject to certain limited exceptions, it is unlawful for a person to carry a concealed handgun, unless the person has a valid concealed handgun license. R.C. 2923.12(A)(2), (C)(2). A person may obtain a concealed handgun license by following the procedure set forth in R.C. 2923.125. That statute requires a person to submit to the county sheriff an application, supporting documentation, and a nonrefundable license fee, unless the fee is waived pursuant to R.C. 2923.125(B)(1). R.C. 2923.125(B)(1)-(7). When a county sheriff receives an application, the supporting documentation, and, if applicable, the license fee, the county sheriff “shall conduct or cause to be conducted the criminal records check and incompetency records check described in [R.C. 311.41].” R.C. 2923.125(C). If all the requirements set forth in R.C. 2923.125(D)(1)(a) through (s) are satisfied, the county sheriff shall issue a concealed handgun license to the applicant. R.C. 2923.125(D)(1). Pursuant to R.C. 2923.125(D)(1), an applicant may receive a concealed handgun license, if, among other things, the county sheriff determines that:

(e) Except as otherwise provided in division (D)(4)¹ or (5)² of this section, the applicant has not been convicted of or pleaded guilty to a felony or an offense

¹ Pursuant to R.C. 2923.125(D)(4), in determining whether an applicant has satisfied the requirements of R.C. 2923.125(D)(1), a county sheriff shall not consider an applicant’s conviction for, or guilty plea to, an offense identified in R.C. 2923.125(D)(1)(e), (f), or (h) when the records of the guilty plea or conviction have been ordered by the court to be sealed or expunged, or “the applicant has been relieved under operation of law or legal process from the disability imposed pursuant to [R.C. 2923.13] relative to that conviction [or] guilty plea[.]”

under [R.C. Chapters 2925, 3719, or 4729] that involves the illegal possession, use, sale, administration, or distribution of or trafficking in a drug of abuse; ... has not been convicted of [or] pleaded guilty to ... a violation of [R.C. 2903.13 (assault)] when the victim of the violation is a peace officer, regardless of whether the applicant was sentenced under [R.C. 2903.13(C)(4)]; and has not been convicted of [or] pleaded guilty to ... any other offense that is not previously described in this division that is a misdemeanor punishable by imprisonment for a term exceeding one year.³

(f) Except as otherwise provided in division (D)(4) or (5) of this section, the applicant, within three years of the date of the application, has not been convicted of or pleaded guilty to a misdemeanor offense of violence other than a misdemeanor violation of [R.C. 2921.33 (resisting arrest)] or a violation of [R.C. 2903.13 (assault)] when the victim of the violation is a peace officer, or a misdemeanor violation of [R.C. 2923.1211 (falsification of a concealed handgun license or possessing a revoked or suspended concealed handgun license)]....

In the syllabus paragraph of 2004 Op. Att’y Gen. No. 2004-038, the Attorney General advised:

A county sheriff may not issue a license to carry a concealed handgun under R.C. 2923.125 to a person who has been convicted of or pleaded guilty to an offense described in either R.C. 2923.125(D)(1)(e) or R.C. 2923.125(D)(1)(f) even though a court has entered an order under R.C. 2953.32 sealing the official records pertaining to the conviction or guilty plea.

R.C. 2923.125 was amended in 2008 to include division (D)(5), the predecessor of R.C. 2923.125(D)(4). Sub. S.B. 184, 127th Gen. A. (2008) (eff. Sept. 9, 2008). The language of the current version of R.C. 2923.125(D)(4) was added by Am. Sub. H.B. 234, 130th Gen. A. (2014) (eff. March 23, 2015). In light of the amendment of R.C. 2923.125, the analysis and conclusion of 2004 Op. Att’y Gen. No. 2004-038 no longer accurately state the law. Therefore, 2004 Op. Att’y Gen. No. 2004-038 is overruled, on the basis of legislative amendment.

² R.C. 2923.125(D)(5) states that a county sheriff shall not consider an applicant’s conviction or guilty plea to a minor misdemeanor offense when determining whether the applicant satisfies the requirements of R.C. 2923.125(D)(1).

³ As used in R.C. 2923.125(D)(1)(e), a “misdemeanor punishable by imprisonment for a term exceeding one year” is not: “(1) Any federal or state offense pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices; [or] (2) Any misdemeanor offense punishable by a term of imprisonment of two years or less.” R.C. 2923.11(P).

(g) Except as otherwise provided in division (D)(1)(e) of this section, the applicant, within five years of the date of the application, has not been convicted of [or] pleaded guilty to... two or more violations of [R.C. 2903.13 (assault)] or [R.C. 2903.14 (negligent assault)].

(h) Except as otherwise provided in division (D)(4) or (5) of this section, the applicant, within ten years of the date of the application, has not been convicted of [or] pleaded guilty to ... a violation of [R.C. 2921.33 (resisting arrest)]. (Footnotes added.)

In addition, “[i]f an applicant has been convicted of or pleaded guilty to a minor misdemeanor offense or has been adjudicated a delinquent child for committing an act or violation that is a minor misdemeanor offense, the sheriff with whom the application was submitted shall not consider the conviction, guilty plea, or adjudication in making a determination under division (D)(1)[.]” R.C. 2923.125(D)(5).

Your request for an Attorney General opinion relates to the application of R.C. 2923.125(D)(5). You have provided examples of two instances in which R.C. 2923.125(D)(5) appears to require a county sheriff to issue an Ohio concealed handgun license to an applicant who is prohibited from possessing a firearm under 18 U.S.C.A. § 922 (Thomson Reuters 2015).⁴ The first instance occurs with respect to an applicant who has been convicted of a minor misdemeanor drug

⁴ For the purpose of 18 U.S.C.A. § 921 *et seq.*, “firearm” is defined as:

(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

18 U.S.C.A. § 921(a)(3) (Thomson Reuters 2015). In addition, for the purpose of 18 U.S.C.A. § 921 *et seq.*, “handgun” is defined as “(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and (B) any combination of parts from which a firearm described in subparagraph (A) can be assembled.” 18 U.S.C.A. § 921(a)(29).

As used in R.C. 2923.11-.24, a “firearm” is “any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant” and “includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable.” R.C. 2923.11(B)(1). In addition, for the purposes of R.C. 2921.11-.24, a “handgun” is “(1) Any firearm that has a short stock and is designed to be held and fired by the use of a single hand; [or] (2) Any combination of parts from which a firearm of a type described in [R.C. 2923.11(C)(1)] can be assembled.” R.C. 2923.11(C). Thus, for the purpose of this opinion, we understand a “firearm” to include a “handgun,” regardless of whether we are using the term in the context of federal statutes or the Ohio statutes.

possession charge under R.C. 2925.11(C)(3) (possession of marihuana). R.C. 2923.125(D)(5) directs a county sheriff not to consider a conviction for a minor misdemeanor offense in determining whether the applicant has satisfied the requirements of R.C. 2923.125(D)(1). However, 18 U.S.C.A. § 922(g)(3) states that it is unlawful for a person “who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) ... to receive any firearm ... which has been shipped or transported in interstate or foreign commerce.” Thus, it appears that an applicant who has been convicted of a minor misdemeanor drug offense under R.C. 2925.11(C)(3) may be prohibited from possessing a firearm under federal law, while a county sheriff is required to issue that applicant a concealed handgun license under R.C. 2923.125 without considering the applicant’s conviction for that offense.⁵

The second instance in which R.C. 2923.125 appears to require a county sheriff to issue a concealed handgun license to an applicant who is prohibited from possessing a firearm under federal law occurs with respect to an applicant who has been convicted of a minor misdemeanor offense that originated as a domestic violence charge. R.C. 2923.125(D)(5) directs a county sheriff not to consider a conviction for a minor misdemeanor offense when determining whether the applicant has satisfied the requirements of R.C. 2923.125(D)(1). In addition, under R.C. 2923.125(D)(1)(f), an applicant who has been convicted of a misdemeanor offense of violence, other than a misdemeanor violation of R.C. 2921.33 (resisting arrest) or a violation of R.C. 2903.13 (assault) when the victim is a peace officer, is eligible to receive a concealed handgun license so long as the conviction did not occur within three years of the date of the application for the concealed handgun license. However, 18 U.S.C.A. § 922(g)(9) states that it shall be unlawful for a person “who has been convicted in any court of a misdemeanor crime of domestic violence” to receive a firearm.

As used in 18 U.S.C.A. § 922, a “misdemeanor crime of domestic violence” is an offense that:

- (i) is a misdemeanor under Federal, State, or Tribal law; and
- (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in

⁵ This opinion does not consider whether a person who was convicted of a minor misdemeanor drug possession charge under R.C. 2925.11(C)(3) is a person “who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))” for the purpose of 18 U.S.C.A. § 922(g)(3) (Thomson Reuters 2015). *See U.S. v. Ocampo*, 402 Fed. Appx. 90, 103 (6th Cir. 2010) (“[t]o prove a violation of [18 U.S.C.A. § 922(g)(3)], the Government must establish that a defendant ‘was engaged in a pattern of regular and repeated use of a controlled substance during a period that reasonably covers the time a firearm was possessed’” (quoting *U.S. v. Burchard*, 580 F.3d 341, 352 (6th Cir. 2009))); *U.S. v. Grover*, 364 F. Supp. 2d 1298, 1303 (D. Utah 2005) (“an unlawful user of any controlled substance, for purposes of 18 U.S.C. § 922(g)(3), is an individual who regularly and unlawfully uses any controlled substance over an extended period of time that is contemporaneous with the possession of a firearm”).

common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C.A. § 921(a)(33)(A) (Thomson Reuters 2015) (footnotes omitted). The United States Supreme Court has held that 18 U.S.C.A. § 921(a)(33)(A) does not require that the domestic relationship is an element of a misdemeanor offense in order for the misdemeanor offense to constitute a “misdemeanor crime of domestic violence” for the purpose of 18 U.S.C.A. § 922(g)(9). *U.S. v. Hayes*, 555 U.S. 415, 421, 129 S.Ct. 1079 (2009). The Court concluded:

To obtain a conviction in a § 922(g)(9) prosecution, the Government must prove beyond a reasonable doubt that the victim of the predicate offense was the defendant’s current or former spouse or was related to the defendant in another specified way. But that relationship, while it must be established, need not be denominated an element of the predicate offense.

U.S. v. Hayes, 555 U.S. at 426 (footnote omitted). This means that any misdemeanor offense, in which the use of force or attempted use of force is an element of the offense, constitutes a “misdemeanor crime of domestic violence” for the purpose of 18 U.S.C.A. § 922(g)(9), when the offense was committed by “a current or former spouse, parent, or guardian of the victim,” or by a person who is related to the victim in one of the other specified ways. Thus, if the minor misdemeanor offense, of which the applicant for a concealed handgun license was convicted, constitutes “a misdemeanor crime of domestic violence” for the purpose of 18 U.S.C.A. § 922(g)(9), it appears that R.C. 2923.125 permits the applicant to receive a concealed handgun license even though the federal law prohibits the applicant from possessing or receiving a firearm.

Although the provisions of R.C. 2923.125 appear to conflict with the prohibitions of 18 U.S.C.A. § 922 in the foregoing situations, the General Assembly has expressly declared its intent that a person who is not permitted to possess or receive a firearm under federal law shall also not be permitted to obtain a concealed handgun license under R.C. 2923.125. R.C. 9.68(A) states, in pertinent part, that, “[e]xcept as specifically provided by the *United States Constitution*, Ohio Constitution, state law, or *federal law*, a person, without further license, permission, restriction, delay, or process, may own, possess, purchase, sell, transfer, transport, store, or keep any firearm, part of a firearm, its components, and its ammunition.” (Emphasis added.) In addition, the first paragraph of R.C. 2923.125 states, in pertinent part, that “[i]t is the intent of the general assembly ... that no person shall be eligible to receive a concealed handgun license permit under [R.C. 2923.125] ... unless the person is eligible lawfully to receive or possess a firearm in the United States.” R.C. 9.68 and R.C. 2923.125 are unequivocal statements by the General Assembly that Ohio’s firearm laws integrate the requirements of federal law that authorize a person to possess or receive a firearm. *See City of Cleveland v. State*, 128 Ohio St. 3d 135, 2010-Ohio-6318, 942 N.E.2d 370, at ¶ 20 (“our state firearm laws ... integrate federal firearm laws”). The effect of these statements is to add the prohibitions of federal law concerning a person’s possession or receipt of a firearm to Ohio’s concealed handgun

license laws.⁶ Accordingly, when applying the provisions of R.C. 2923.125 to determine whether to issue a concealed handgun license to an applicant, the prohibitions of 18 U.S.C.A. § 922 also apply. Therefore, a county sheriff may not issue a concealed handgun license pursuant to R.C. 2923.125 to an applicant who is not eligible to receive or possess a firearm under 18 U.S.C.A. § 922.⁷

Based on the foregoing, it is my opinion, and you are hereby advised that a county sheriff may not issue a concealed handgun license pursuant to R.C. 2923.125 to a person who is not eligible under federal law to receive or possess a firearm. (2004 Op. Att’y Gen. No. 2004-038, overruled, on the basis of legislative amendment.)

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General

⁶ Further support for our conclusion that the prohibitions of 18 U.S.C.A. § 922 apply when determining whether a person may lawfully possess a firearm in Ohio is found in R.C. 2943.033(C), which states, in pertinent part:

Prior to accepting a guilty plea or plea of no contest to an indictment, information, or complaint that charges a person with a misdemeanor offense of violence, the court shall inform the defendant either personally or in writing that under 18 U.S.C. 922(g)(9) it may be unlawful for the person to ship, transport, purchase, or possess a firearm or ammunition as a result of any conviction for a misdemeanor offense of violence.

⁷ This opinion does not draw any conclusions about whether a particular conviction disqualifies a person from receiving or possessing a firearm under 18 U.S.C.A. § 922. Our conclusion in this opinion is limited to the rule of law that when a person is prohibited from possessing or receiving a firearm under federal law, the person may not obtain a concealed handgun license under R.C. 2923.125.