

STATE OF INDIANA
COUNTY OF LAKE

IN THE LAKE SUPERIOR COURT
CIVIL DIVISION ROOM ONE
HAMMOND, INDIANA

OSCAR MARTINEZ, JR., personally
and as Lake County Sheriff,
Plaintiff,

v.

CASE NO. **45D01-2211-PL-000649**

BERNARD A. CARTER in his
official capacity as Prosecuting
Attorney for the 31st Judicial Circuit,
and STANLEY M. LEVCO, in his
official capacity as Special Prosecuting
Attorney,

Defendants.

Filed in Open Court

MAY 19 2023

Lorenzo Arredondo
CLERK LAKE SUPERIOR COURT

**ORDER GRANTING MOTION TO STRIKE
ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

The plaintiff, Oscar Martinez, Jr., personally and as Lake County Sheriff appears by Attorneys James Woods, Peter Fouts and Paul Stracci and the defendants, Bernard A. Carter in his official capacity as Prosecuting Attorney for the 31st Judicial District and Stanley M. Levco in his official capacity as Special Prosecuting Attorney, appear by Attorneys Christopher Anderson, Hannah Deters and Blake Erickson for hearing on Martinez's Motion to Strike and Motion for Summary Judgment.

Martinez, the elected Sheriff of Lake County, Indiana, was indicted by a grand jury for Resisting Law Enforcement with Use of a Vehicle, a Level 6 Felony, and Reckless Driving, a Class C Misdemeanor.

IC 35-47-2-1.5(b)(6) provides:

...[T]he following persons may not knowingly or intentionally carry a handgun:

A person under indictment.

As a law enforcement officer, Martinez regularly carries a handgun during the course of the performance of his duties. He claims that IC 35-47-2-1.5(b)(6) violates both Article 1, Section 22 of the Indiana Constitution and the Second Amendment to the United States Constitution as applied to the State of Indiana through the Fourteenth Amendment. He argues Carter and Levco should be enjoined from enforcing the statute.¹

Martinez's Motion to Strike

On February 2, 2023, the court, at a status hearing with all counsel present, entered a Case Management Order. The Order required initial memoranda to be filed on or before March 2, 2023, responses to the initial memoranda to be filed on or before April 7, 2023 and replies to the responses on or before April 24, 2023.

Martinez timely filed his Motion for Summary Judgment, a Designation of Evidence, a Designation of Evidence with Exhibits Volume and supporting Memorandum on March 2, 2023. Carter and Levco filed a Cross-Motion for Summary Judgment, a Designation of Evidence and a Memorandum in Opposition to Martinez's Motion for Summary Judgment on April 10, 2023.

Trial Rule 56 of the Indiana Rules of Trial Procedure provides, in relevant part, as follows:

(C) Motion and proceedings thereon. -- The motion and any supporting affidavits shall be served in accordance with the provisions of Rule 5. An adverse party shall have thirty (30) days after service of the motion to serve a response and any opposing affidavits.

¹ Martinez has standing to challenge the constitutionality of this statute as his claim is ripe and his rights are directly and personally affected, particularly as Sheriff, while acting on his own behalf, *Holcomb v. Bray*, 187 N.E.3d 1268, 1284 (Ind.2022).

(I) Alteration of time. -- For cause found, the Court may alter any time limit set forth in this rule upon motion made within the applicable time limit.

As the Indiana Supreme Court held in *Mitchell v. 10th & The Bypass, LLC*, 3 N.E.3d 967,972-73 (Ind. 2014):

When a nonmoving party fails to respond to a motion for summary judgment within 30 days by either filing a response, requesting a continuance under Trial Rule 56(I), or filing an affidavit under Trial Rule 56(F), the Court cannot consider summary judgment filings of that party subsequent to the 30-day period...Now firmly entrenched as an article of faith in Indiana law, this bright-line rule provides clarity and certainty to an area of the law that for too long lacked both, *citations omitted*.

In violation of the Case Management Order, Carter and Levco filed no initial memorandum on or before March 2, 2023. Even if the court were to excuse this failure on the basis that:

“...there is not indication that a Cross-Motion for Summary Judgment is not permitted to be filed contemporaneously with a response, as is common practice for undersigned counsel,”
Defendants’ Response in Opposition to Plaintiff’s Motion to Strike, rhetorical paragraph 9, page 2,

the filing of the Cross-Motion and Response was not timely: by Court Order, it was due April 7, 2023. It was not filed until April 10, 2023. No extension of time was requested. The unforgiving nature of Trial Rule 56, “...now firmly entrenched as an article of faith in Indiana law...,” *Mitchell, id.* at 973, does not permit the court to deny Martinez’s Motion to Strike.

Martinez’s Motion for Summary Judgment

The standard of review for alleged constitutional violations is well established:

Every statute stands clothed with the presumption of constitutionality until clearly overcome by a contrary showing. The party challenging the constitutionality of the statute bears the burden of proof, and all doubts are resolved against that party. If two reasonable interpretations of a statute are available, one of which is constitutional and the other not, we will choose that path which permits upholding the statute because we will not presume that the legislature violated the constitution unless the unambiguous language of the statute requires that conclusion, *State Bd. Of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034, 1037 (Ind. 1998), citations omitted.

Article 1, Section 32 of the Indiana Constitution provides:

The people shall have a right to bear arms, for the defense of themselves and the State.

The Second Amendment to the United States Constitution, as extended to the State of Indiana through the 14th Amendment, which provides:

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.

The right to bear arms is not unlimited. The State is permitted to exercise its police power for the benefit of the health, safety, comfort, morals and welfare of the public, *Price v. State*, 622 N.E.2d 954, 959 (Ind. 1993); *Lacy v. State*, 903 N.E.2d 486 (Ind Ct. App. 2009). Although considerable deference must be given to the judgment of the legislature, the propriety of the exercise of police power is a judicial question, focused upon the narrow role of determining whether or not the challenged statute bears a reasonable relation to the state's interests, *Price, id.* at 959, *Whittington v. State*, 669 N.E.2d 1363, 1369 (Ind. 1996). In addition, any exercise of police power is invalid if it "...materially burdens one of the core values..." *Price, id.* at 960 of the Indiana Constitution.

Does the State of Indiana have a legitimate interest in prohibiting anyone under indictment from carrying a handgun, or does it materially burden a core value of both Article I, Section 32 of the Indiana Constitution and the Second Amendment to the United States Constitution?

Ordinary, law-abiding citizens have the right for self-defense to possess handguns both inside and outside the home, *New York Rifle & Pistol Ass'n., Inc. v. Bruen*, 142 S.Ct. 2111 (2022). Nevertheless, there is no question that there is a legitimate governmental interest in providing a mechanism for the State to retain and seize firearms from persons it deems dangerous, such as the mentally ill; *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3027 (2010); *Redington v. State*, 992 N.E.2d 823, 833 (Ind. Ct. App. 2013); those showing a propensity toward violence; *Wilder v. State*, 91 N.E.3d 1016, 1026 (Ind. Ct. App. 2018); probationers convicted of violent crimes; *Carswell v. State*, 721 N.E.2d 1255, 1258 (Ind. Ct. App. 1999); and unlawful users of or ones addicted to any controlled substance, *United States v. Yancey*, 621 F. 3d 681, 682 (7th Cir. 2010).

The government must justify any law that prohibits, retains or seizes firearms by demonstrating that it is consistent with the historical tradition of firearm regulation in the United States, *Bruen, id.* at 2130. As specifically applied to the Indiana Constitution, its interpretation is controlled by "...the text itself, illuminated by history and by the purpose and structure of the constitution and the case law surrounding it..." *State v. Katz*, 179 N.E.3d 431, 443 (Ind. 2022) *quoting Price v. State*, 622 N.E.2d 954, 957 (Ind. 1993).

The holdings of *McDonald, id.*, *Redington, id.*, *Wilder, id.*, *Carswell, id.*, and *Yancey, id.* are consistent with this historical tradition of gun regulation in the United States and in Indiana, cited at length by both Martinez and Carter in their presentations. These cases upheld the prohibition of firearm possession in by specific individuals in specific situations that posed potential danger to law-abiding citizens.

IC 35-47-2-1.5(b)(6) fails to do so. It prohibits anyone under indictment from carrying a handgun without paying any regard to any

demonstrated danger to society. Even setting aside the presumption of innocence accorded to Martinez, this prohibition makes little rational sense: It extends only to those who are indicted. If Martinez were not indicted for Resisting Law Enforcement with Use of a Vehicle and Reckless Driving, but charged by information with Murder, IC 35-47-2-1.5(b)(6) would not prohibit him from carrying a handgun.

The statute also materially burdens a core value of Article I, Section 32 of the Indiana Constitution and the Second Amendment to the United States Constitution. It prevents Martinez from carrying a handgun for a concededly temporary but indeterminate period of time for a reason inconsistent with the historical tradition of firearm regulation, *Bruen, id.* at 2130. It also infringes upon and creates a substantial obstacle to the exercise of his constitutional right to bear arms as a citizen for his own defense and, as particularly illustrated by his occupation as Sheriff, the defense of the State, *Redington, id.* at 833; *Whittington v. State*, 669 N.E.2d 1363, 1370 (Ind. 1996).

The unambiguous language of IC 35-47-2-1.5(b)(6) that a person under indictment may not knowingly or intentionally carry a handgun requires the conclusion that the legislature, in enacting IC 35-47-2-1.5(b)(6), violated both the Indiana and United States Constitutions, *State Bd. Of Tax Comm'rs v. Town of St. John, id.* at 1037.

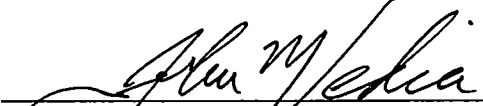
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. The Motion to Strike and Motion for Summary Judgment filed by the plaintiff, Oscar Martinez, Jr., personally and as Lake County Sheriff, are granted.
2. There being no just reason for delay, a final and appealable judgment is entered that IC 35-47-2-1.5(b)(6) is unconstitutional in violation of Article 1, Section 32 of the Indiana Constitution and the Second Amendment to the United States Constitution.

3. The enforcement of IC 35-47-2-1.5(b)(6) is permanently enjoined.

4. The enjoining of the enforcement of IC 35-47-2-1.5(b)(6) is stayed pending the decision of the Indiana Supreme Court after its mandatory review of this final judgment as required by Rule 4(A)(1)(b) of the Indiana Rules of Appellate Procedure.

Dated May 19, 2023



JOHN M. SEDIA, JUDGE
LAKE SUPERIOR COURT
CIVIL DIVISION, ROOM ONE