



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

June 14, 1988

Honorable David Brabham  
Criminal District Attorney  
Gregg County  
P. O. Box 3403  
Longview, Texas 75606

LO-88-70

Dear Mr. Brabham:

You ask that we advise you by letter or opinion whether a justice of the peace may possess a gun within his courtroom.

Article 46.02 of the Penal Code provides that a person commits an offense if he intentionally, knowingly, or recklessly carries on or about his person a handgun.

Article 46.03 of the Penal Code provides in pertinent part:

(a) The provisions of Section 46.02 of this code do not apply to a person:

. . . .

(2) on his own premises or premises under his control unless he an employee or agent of the owner of the premises and his primary responsibility is to act in the capacity of a security guard to protect persons or property, in which event he must comply with Subdivision (5) of this subsection;

. . . .

(6) who is a peace officer, other than a person commissioned by the Texas State Board of Pharmacy.

Court of Criminal Appeals opinions predating section (6) as it now appears in article 46.03 appear to have included justices of the peace within the definition of "peace officer." In Jones v. State, 65 S.W. 92 (Tx. Crim. App. 1901) the court construed section 15 of article IV of the Texas Constitution making "all judges of courts of this state, by virtue of their office, -- conservators of the peace throughout the state" to include all judges within the definition of "peace officer." The practice commentary following section 46.03 reflects that such construction is no longer valid under the present statute. The practice commentary provides in pertinent part, as follows:

Previously, peace officers generally were exempt, and Court of Criminal Appeals reluctantly concluded that Tex. Const. art. V, § 12, made all magistrates peace officers and that the general term 'peace officer' did not exclude them. Thus justices of the peace, municipal judges, and other judges could carry handguns legally, Patton v. State, 86 S.W.2d 774 Cr.App.1935); Jones v. State, 65 S.W. 92 (Cr.App.1901). The court expressly stated its preference for limiting the exemption to those defined as peace officers by statute, see Tippett v. State, 189 S.W. 485 (Cr.App.1916), and the new code finally has adopted the court's early suggestion. Peace officers for purposes of the code are limited to those specified in C.C.P. art. 2.12, see the definition of 'peace officer' in Section 1.07, and magistrates are not included.

Article 2.12 of the Code of Criminal Procedure does not include justices of the peace or magistrates within the definition of "peace officer." Thus, justices of the peace do not come within the "peace officer" exclusion allowing them to carry a gun.

The issue appears to narrow to the question of whether a justice of the peace may possess a gun within his courtroom under subsection (a)(2) of section 46.03 allowing a person to possess a gun on "premises under his control."

Control has been defined as "the power to control, regulate or guide." Carter v. Carter, 359 S.W.2d 184, 187 (Tex. Civ. App. - Waco 1962, writ dismiss'd. w.o.j.); Attorney General Opinion H-185 (1973). Clearly, the courtroom is under control of the judge. Insofar as who may possess a weapon in the courtroom it appears that this is a matter within the control of the judge as provided in article 46.04 of the Penal Code. Article 46.04 provides in pertinent part as follows:

(a) A person commits an offense if, with a firearm, or explosive weapon, or illegal knife, he intentionally, knowingly, or recklessly goes:

. . . .

(3) in any government court or offices utilized by the court, unless pursuant to written regulations or written authorization of the court.

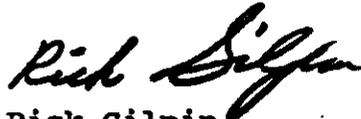
Since the judge has control of the courtroom and the authority to permit others to bring a gun into the courtroom, it would appear that the judge has authority to possess a gun in the courtroom.

Any judge who possesses a gun in a courtroom should be aware that a defendant may claim that such fact constitutes a deprivation of due process. In Caraway v. State, 550 S.W.2d 699 (Tex. Crim. App. 1977) the defendant complained on appeal that the trial judge, district attorney, and various law enforcement officers possessed pistols through the trial. The court in denying the appellant's complaint that he was denied due process found that the court out of the presence of the jury noted that it had information that the defendants intended "to make a break at the courthouse and possibly take the district attorney with them as a hostage." Id. at 703. The trial judge had directed the district attorney and law enforcement officers not to display their weapons and stated that the court would keep his gun in a drawer of his bench. The Court of Criminal Appeals found that the jury was not aware of the security measures taken and concluded that such measures were justified in the case.

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Given the responsibilities imposed on the justice of the peace in the course of a trial it would appear to be a safer practice to secure a peace officer to deter any threat to the security of the court and any participants in the trial. The presence of such officer in the courtroom would be especially desirable in the event of a threat to security since the legislature has seen fit to require peace officers to demonstrate weapons proficiency. See article 4413 (29aa), V.T.C.S.

Very truly yours,



Rick Gilpin  
Chairman  
Opinion Committee

Prepared by Tom G. Davis  
APPROVED: OPINION COMMITTEE

RG/TGD/bc

2145

FINAL

ID#2145

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Drafted By

Tom G. Davis

*OKTB*

DATE OF REQUEST LETTER: 9/22/87

Opinion Committee

Rick Gilpin, Chairman	Yes	
Steve Aragon	Yes	
Donald Bustion	Yes	
Tom G. Davis	Yes	
Susan Garrison	Yes	
Karen Gladney	Yes	
F. Scott McCown	Yes	
Jim Moellinger	Yes	
William Walker		Abstain
Sarah Woelk	Yes	
Bruce Youngblood		Abstain

*OK/MS*