HISTORY JUSTIFIES "GUN FREE" PUBLIC PARK RESOURCES?

James C. Kozlowski, J.D., Ph.D.

In the case of *Siegel v. Platkin*, 2023 U.S. Dist. LEXIS 15096 (Dist. N.J. 1/30/2023), several licensed gun carriers challenged a number of provisions in a recently enacted statute (Chapter 131 of the 2022 Laws of New Jersey) which had added "sensitive place" designations to include public park and recreation resources. Chapter 13 was enacted in response to the United States Supreme Court decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, which had held "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." 142 S.Ct. 2111, 2122, 213 L. Ed. 2d 387 (2022).

In *Bruen*, the Supreme Court struck down a New York statute that had required an applicant for a concealed carry permit to demonstrate "proper cause" to obtain a license to carry a firearm in public. In so doing, the Court acknowledged the unconstitutionality of analogous statutes in other states that required a "showing of some additional special need," such as New Jersey's law requiring that an applicant show "justifiable need" to obtain a license to carry.

According to the Court, *Bruen* "clarified" the applicable legal standard for applying the Second Amendment to governmental firearm regulation as follows:

> When the Second Amendment plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The Government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition.

In response to *Bruen*, the New Jersey Legislature passed sweeping legislation. On December 22, 2022, New Jersey Governor Phil Murphy signed into law Chapter 131 of the 2022 Laws of New Jersey that imposed a new set of requirements, many of which became effective immediately, including declaring certain locations as "sensitive places" where handguns are prohibited even by licensed carriers.

SECOND AMENDMENT STANDING

Plaintiffs, licensed carriers, filed motions for a temporary restraining order and preliminary injunction to block enforcement of this new legislation pending further trial proceedings and a final judgment on their constitutional law claims. Plaintiffs alleged several provisions of the newly-enacted legislation deprived them of their constitutional rights under the Second Amendment. In particular, Plaintiffs argued the new legislation "renders nearly the entire State of New Jersey a 'sensitive place' where handgun carry is prohibited."

In order to have a federal district court consider the merits of their Second Amendment claims, Plaintiffs had to first establish legal standing to bring their lawsuit. In so doing, Plaintiffs had to have suffered an "injury in fact," meaning that the injury is of a legally protected interest which

is concrete and particularized and actual or imminent. To establish standing, the alleged injury must be likely, rather than speculative, that a favorable decision by the court will redress the injury.

In this case, the federal district was satisfied that Plaintiffs, as licensed carriers of firearms, had legal standing to bring their Second Amendment lawsuit because "such places are clearly part of at least one Plaintiffs' daily life":

> With regard to parks and beaches, the Court is satisfied that such places are part of several of the Plaintiffs' daily lives. Plaintiff Siegel avers that he frequently hikes and walks in public parks near his home; he also goes to publicly owned beaches including the Wildwood, New Jersey beach. Plaintiff Cook enjoys walking trails in State parks several times per month. Plaintiff DeLuca "regularly" enjoys walking his dog in State parks and on public beaches.

Having "shown an immediate threat of injury if they were to resume carrying their concealed handguns with them as they did prior to the law's enactment," including possible fines and imprisonment for criminal violations, the federal district court held "Plaintiffs have standing as to some of the challenged restrictions."

BRUEN STANDARD APPLICATION

In applying the clarified Second Amendment standard of judicial review under *Bruen* to the newly enacted New Jersey legislation, the federal district court found its role was "a straightforward one":

> First, does the conduct being challenged fall within the text of the Second Amendment? If so, is there historical support for the conduct being restricted? Defendants must justify the provisions of Chapter 131 by demonstrating that the regulation is consistent with this Nation's historical tradition of firearm regulation.

Defendants, several New Jersey government officials, maintained the challenged provisions were supported by a historical tradition of firearm regulation consistent with the dictates of *Bruen.* The federal district court, however, rejected Defendants' position, finding "no basis in this country's history and tradition of firearms regulation":

> In the colonial and Founding era in particular, restrictions on the right to carry firearms in public appears to have been quite limited. The settlers had the liberty to carry their privately-owned arms openly or concealed in a "peaceable manner," and nine of the thirteen original colonies declined to regulate the keeping or bearing of arms whatsoever.
>
> Following Independence from Britain and throughout the 19th Century, some states began to experiment with gun-free zones, but aside from the categories outlined above, many of these restrictions were short-lived.

Citing *Bruen*, in general, the court found "the historical practice of establishing sensitive place designations, or 'gun-free zones,' has centered on a few distinct locations," including:

> government buildings (such as legislative assemblies or courthouses or where the State is acting within the heartland of its authority), polling places, and schools.

The question before the federal district court was, therefore, whether the newly enacted legislation, consistent with *Bruen*, could also expressly establish public park and recreation resources as designated sensitive places or gun-free zones.

SUBPART 10 FIREARM REGULATION

As cited by the federal district court, Section 7(a)(10) of the New Jersey legislation prohibited carrying a firearm onto the following public places:

> a park, beach, recreation facility or area or playground owned or controlled by a State, county or local government unit, or any part of such a place, which is designated as a gun free zone by the governing authority based on considerations of public safety. 2022 N.J. Laws c. 131 § 7(a)(10).

In their complaint, Plaintiffs contended "Subpart 10 violates their right to public carry." In the opinion of the federal district court, Plaintiffs had met "the threshold inquiry articulated in *Bruen*," i.e., "the Second Amendment's plain text covers the conduct in question (carrying a firearm in public for self-defense in the places identified in Subpart 10)."

Accordingly, consistent with *Bruen*, the court acknowledged: "Defendants must be able to rebut the presumption of protection against this regulation by demonstrating that the regulation is consistent with this Nation's historical tradition of firearm regulation."

PLAYGROUNDS

In this case, the federal district court refused to "grant the restraints Plaintiffs seek with respect to playgrounds." In so doing, the court noted the Supreme Court in *Bruen* "expressly identified restrictions at certain sensitive places (such as schools) to be well-settled, even though the 18th- and 19th-century evidence has revealed few categories in number." Further, the court found *Bruen* "further instructs courts to consider analogies to such sensitive places when considering whether the Government can meet its burden of showing that a given regulation is constitutionally permissible."

In this case, Defendants had argued that a statutory firearm prohibition in playgrounds was analogous to "historical statutes that regulate firearms where crowds gather and where the vulnerable or incapacitated are located." The federal district court, however, found Defendants had failed to satisfy the *Bruen* standard:

> Unfortunately, Defendants neither point to a particular or analogous prohibition on carrying firearms at playgrounds nor provide a more meaningful analysis, despite this Court's persistent invitation.
>
> In particular, Defendants have done no analysis to answer the question *Bruen* leaves open: is it "settled" that this is a location where firearms-carrying could be prohibited consistent with the Second Amendment? Where the right to self-defense and sensitive place designations could be read in harmony under the Second Amendment? For that matter, nor have Plaintiffs.

Despite these "shortcomings" in the Defendants' argument, the federal district court concluded "schools and playgrounds intersect, that is, playgrounds fall within the sphere of schools." Consistent with *Bruen,* the court therefore, assumed it was "settled that playgrounds are a sensitive place." As a result, the court rejected Plaintiffs' Second Amendment challenge to playgrounds in Subpart 10.

PUBLIC BEACHES

Similarly, the federal district court found the Defendants had "not come forward with any historical evidence at all to suggest that the right to public carry for self-defense on beaches is within our history or tradition." Moreover, the court noted Defendants had failed to "put forward an analogue from which this Court could conclude that Subpart 10 is constitutional with respect to beaches." As a result, the court held Plaintiffs had "shown a likelihood of success on the merits as to beaches" in support of their motion for a temporary restraining order to block beach enforcement of Subpart 10 prior to further trial proceedings.

PUBLIC PARKS

With regard to public parks, the federal district court found the "the State has provided something more for the Court to consider," including "historical analogues for the State's authority to restrict firearms in parks that are publicly owned or controlled." In so doing, the court noted the Defendants had relied upon "a Central Park Ordinance in New York from 1861":

> In that Ordinance, the Board of Commissioners of Central Park forbade all persons "to carry firearms or to throw stones or other missiles within the park." The Ordinance set forth other prohibited activities as well, such as no climbing or walking up on the wall; no livestock; entry by gateways only; and no injury to any parts of the park.

Defendants had also cited provisions similar to the Central Park Ordinance contained in an 1870 Ordinance regarding Fairmount Park in Philadelphia, including:

> No persons shall carry firearms, or shoot birds in the Park, or within fifty yards thereof, or throw stones or missiles therein.

In addition, Defendants had presented historical evidence that firearms were prohibited in parks in St. Louis, Missouri (1881), Chicago, Illinois (1881), St. Paul, Minnesota (1888), and Pittsburgh, Pennsylvania (1893).

CITY PARKS

Based upon these historical analogues, the federal district court acknowledged Defendants had "attempted to comply with *Bruen*" by providing the court with some evidence that "Subpart 10 accords with our historical tradition of firearm regulation, as it relates to public parks." The federal district court, however, held "Defendants' evidence is not convincing" because "the statutes Defendants cite all refer to public parks in a city (i.e., New York, Philadelphia, St. Louis, Chicago, St. Paul, and Pittsburgh." As a result, the federal district court would grant Plaintiffs' motion and "temporarily enjoin the prohibition on carrying in public parks."

In so doing, the federal district court acknowledged "there may be some historical precedent for restricting public carry in parks located in densely populated areas." The court, however, found "Subpart 10 goes much further," prohibiting "firearms in any park owned or controlled by a State, county or local government unit." 2022 N.J. Laws c. 131 § 7(a)(10). As a result, the court held "Subpart 10 is not constitutional as drafted."

In particular, the federal district court found "the evidence cited does not support the sweeping proposition that New Jersey may prohibit law-abiding firearm owners from carrying their firearms in all public parks." Further, in the opinion of the court, "Defendants' city laws do not establish a historical tradition of restricting firearms in all public parks because the practice of restricting firearms in city parks is not representative of the nation":

> Six cities do not speak for, what was by 1893, 44 states. Under *Bruen*, the state's evidence is not sufficient for the broader proposition that carrying firearms can be forbidden in all public parks in the State of New Jersey.

In so doing, the court noted: "The New Jersey State Park Service alone administers over 452,000 acres of land comprising parks, forests, historic sites, and other recreation areas."

Prior to *Bruen*, the federal district court acknowledged "other courts have recognized that overbroad restrictions on carrying a firearm in or near public parks for self-defense may violate the Second Amendment," in particular *Bridgeville Rifle & Pistol Club v. Small*, 176 A. 3d 632, 654 (Del. 2017). As described by the court, the *Bridgeville* decision had held "the State's designation of public parks as gun-free zones did not just infringe, but destroyed, the core right of self-defense for ordinary citizens" under the Delaware Constitution.

Re "Bridgeville" SEE:
Gun Permitees Challenge Park Firearm Regulations
James C. Kozlowski, Parks & Recreation, Mar 2017 Vol. 51, Iss. 3
http://mason.gmu.edu/~jkozlows/lawarts/03MAR17.pdf

Based upon these cases and a review of above cited historical urban park ordinances, the federal district court concluded “Defendants' have not put forward sufficient evidence at this juncture to justify their regulation of firearms in public parks.”

Accordingly, unlike playgrounds, the federal district held Plaintiffs had met their burden for a temporary restraining order at this preliminary pretrial stage of the proceedings by showing “a likelihood of success that the restrictions of Subpart 10 are unconstitutional” as to public parks and beaches.

SUBPART 11 YOUTH SPORTS EVENTS

Plaintiffs also challenged Section 7(a), subpart 11, which bans handguns "at youth sports events, as defined in N.J.S.A. 5:17-1, during and immediately preceding and following the conduct of event." 2022 N.J. Laws c. 131 § 7(a)(11).

As defined in Section 5:17-1, a "youth sports event" means “a competition, practice or instructional event involving one or more interscholastic sports teams or sports teams organized pursuant to a nonprofit or similar charter or which are member teams in a league organized by or affiliated with a county or municipal recreation department.”

Once again. citing *Bruen*, the federal district court reiterated “the Second Amendment plain text covers the conduct in question (carrying a concealed handgun for self-defense in public).” In so doing, however, the court recognized that *Bruen* standard had made it clear that “schools are paradigmatic sensitive locations where firearms can be banned."

Accordingly, similar to playgrounds, Defendants had argued this same standard “should be more broadly applied to any place where "great numbers of defenseless people (e.g., children) gather," including youth sport events.

In an earlier case, prior to *Bruen*, the federal district court noted “the Supreme Court has recognized the permissibility of a restriction when it applies to "schools":

> Nothing in our opinion should be taken to cast doubt on long-standing prohibitions on laws forbidding the carrying of firearms in sensitive places such as schools.

Once again, however, the federal district court found it unfortunate that “Defendants have done no meaningful analysis to answer the question as to whether this is a location that already is, or should be considered, settled” under the *Bruen* standard.

The federal district court, however, concluded “schools and youth sports events intersect, that is, youth sports events fall within the sphere of schools.” Therefore, the court would “assume it settled" that youth sports events are a "sensitive place" under *Bruen.*

Having found “Plaintiffs cannot meet their likelihood of success burden regarding their challenge to the youth-sports-events restriction,” the federal district court denied Plaintiff’s motion for a

temporary restraining order and preliminary injunction to block enforcement of this particular statutory restriction. In so doing, as the case moves forward, the court indicated: "Both sides will need to explore this issue more fully at the preliminary injunction stage."

CONCLUSION

Under *Bruen*, the federal district court in this case recognized: "The State may regulate conduct squarely protected by the Second Amendment only if supported by a historical tradition of firearm regulation."

Applying this principle to the facts of this particular legislation, the federal district court concluded Plaintiffs had "demonstrated a probability of success on the merits of their Second Amendment challenge to certain provisions of Chapter 131 Section 7(a)," including Subparts 10 restrictions on public parks and beaches. In so doing, the court took particular note at this initial stage of the proceedings "Defendants cannot demonstrate a history of firearm regulation to support these challenged provisions."

> The threat of criminal prosecution for exercising their Second Amendment rights, as the holders of valid permits from the State to conceal carry handguns, constitutes irreparable injury on behalf of Plaintiffs, and neither the State nor the public has an interest in enforcing unconstitutional laws.

Having found Plaintiffs' had demonstrated irreparable injury and Defendants had failed to provide sufficient proof of a public interest in the newly enacted gun ban for public parks and beaches, the court granted Plaintiffs' motion for a temporary restraining order and preliminary injunction for these public places. The court, however, denied Plaintiffs' similar motions to enjoin enforcement of Chapter 31 with regard to public playgrounds and youth sporting events.

In further proceedings, Defendants would have another opportunity to "demonstrate a history of firearm regulation to support these challenged provisions" with regard to public parks and beaches. In so doing, Defendants would have to make a stronger argument for the challenged legislation, providing evidence to support constitutional gun free zones related to public parks and beaches closely associated with recognized "sensitive places", specifically schools, playgrounds and youth sporting events.

SEE ALSO:

Forest Preserve Gun Ban Second Amendment Challenge
James C. Kozlowski, Parks & Recreation, May 2022 Vol. 56, Iss. 5
https://mason.gmu.edu/~jkozlows/lawarts/05MAY22.pdf

Gun Rights Tested in Parks and Public Spaces
James C. Kozlowski, Parks & Recreation, Mar. 2016 Vol. 50, Iss. 3
http://mason.gmu.edu/~jkozlows/lawarts/03MAR16.pdf

Right to Bear Arms Limited in "Sensitive" Public Facilities
James C. Kozlowski. *Parks & Recreation*. Apr. 2011 Vol. 46, Iss. 4
http://mason.gmu.edu/~jkozlows/lawarts/04APR11.pdf

*****

James C. Kozlowski, J.D., Ph.D.**,** *is an Attorney and Emeritus Associate Professor in the School of Sport, Recreation and Tourism Management at George Mason University.* *Law review articles archive (1982 to present)*