

California Appellate Court Affirms 653k Exemption For One-hand Opening Knives

AKTI Seeks to Modify South Carolina Weapons Law *Proposed Change Would Protect at Least 2 Million Residents and Visitors*

South Carolina currently has one of the most stringent knife weapons laws in the country. If you possess "a knife with a blade over two inches long," you are in violation of the law.

At a December 14, 2007 conference call, the AKTI Executive Committee decided to hire a lobbyist to propose a statutory change that would remove "a knife with a blade over two inches long" from the list of prohibited weapons. AKTI will introduce the proposed modification in the 2008 legislative session, which begins in January 2008.

South Carolina has a current population of 4,321,249. The state's Department of Natural Resources has an ongoing website presence designed to entice out-of-state hunters and fishermen to visit the state. AKTI's estimate is that South Carolina residents who carry knives and knife-owning tourists and visiting sportsmen and women who carry knives with blades longer than two inches number in excess of two million people.

Here is the current South Carolina criminal statute that AKTI seeks to modify:

SECTION 16 23 405. Definition of "weapon"; confiscation and disposition of weapons used in commission or in furtherance of crime.

(1) Except for the provisions relating to rifles and shotguns in Section 16 23 460, as used in this chapter, 'weapon' means firearm (rifle, shotgun, pistol, or similar device that propels a projectile through the energy of an explosive), a knife with a blade over two inches long, a blackjack, a metal pipe or pole, or any other type of device or object which may be used to inflict bodily injury or death.

AKTI will also seek to specifically exempt knives from the following section:

SECTION 16 23 460. Carrying concealed weapons; forfeiture of weapons.

Any person carrying a deadly weapon usually used for the infliction of personal injury concealed about his person is guilty of a misdemeanor, must forfeit to the county, or, if convicted in a municipal court, to the municipality the concealed weapon, and must be fined not less than two hundred dollars nor more than five hundred dollars or imprisoned not less than thirty days nor more than ninety days. Nothing herein contained may be construed to apply to (1) persons carrying concealed weapons upon their own premises or pursuant to and in compliance with Article 4 of Chapter 31 of Title 23, or (2) peace officers in the actual discharge of their duties. The provisions of this section do not apply to rifles, shotguns, dirks, slingshots, metal knuckles, or razors unless they are used with the intent to commit a crime or in furtherance of a crime.

Persons who are interested and concerned about protecting the rights of individual knife owners, as AKTI has done for 10 years, should become an AKTI Grassroots Supporter. Membership is free. Simply go to www.akti.org to join.

As various committee hearings and votes occur in South Carolina, we will alert our Grassroots Supporters and Members, who could very well be traveling to South Carolina in the future, to forward your opinions about the proposed change to South Carolina lawmakers.

AKTI was asked to prepare an *amicus curiae* (friend of the court) brief on behalf of the defendant in the following case that was taken to the appellate level. We did so and also provided a representative when oral arguments were heard by the court.

In summary, the California First Appellate District upheld the 653k exemption for one-handers in the state's switchblade statute. This exemption was initiated and supported by AKTI in

**"Section 653k, ... exempts
... any knife that is
designed to open with
thumb pressure and is
equipped with a detent or
other mechanism providing
some resistance."**

2000/2001 but has been periodically challenged in various court cases, all of which have upheld 653k.

This case was an opportunity to argue the merits of the 653k exemption at the appellate level and, once again, the court agreed that the 653k exemption is valid. The opinion (with footnotes) is published here in its entirety. *Editor*

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

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Opens NOT Prohibited
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CA 653k continued

THE PEOPLE,
Plaintiff and Respondent,
v.
FERNANDO LOPEZ LOPEZ,
Defendant and Appellant.
A116300
(Sonoma County
Super. Ct. No. SCR-482358)

Defendant Fernando Lopez Lopez appeals from a judgment, following a court trial, finding him guilty of carrying concealed upon his person a dirk or dagger, a felony under Penal Code section 12020, subdivision (a)(4).¹ He contends, among other things, the prosecution did not prove the knife he concededly carried was a "dirk or dagger." It seems the superior court did not retain, or has lost, the knife in question.² Defendant also contends that its loss has deprived him of his due process right to an appellate record permitting meaningful review of the evidence leading to his conviction. We agree, and reverse the judgment for that reason.

BACKGROUND

On February 26, 2006, police received a report of persons fighting at a location in Rohnert Park. Police Officers Paul Lawrence and Charles Larson were dispatched to the scene of the reported fighting, where they made contact with defendant. Officer Lawrence searched defendant and found a knife in his pocket. He described the knife as a folding knife with a five- to six-inch handle and four- to five-inch blade. The knife was in the closed position when the officer retrieved it. It was equipped with a metal stud or "thumb assist." A "thumb assist" is installed to enable a person to open the blade with his or her thumb. Officer Lawrence testified defendant's knife could be opened without the thumb assist, explaining it took only a simple flick of the wrist to open it. The blade, however, would not drop by its own weight. The court asked the officer to demonstrate. All agreed it took the officer more than one flick of the wrist to open the knife. Defendant testified he used the knife in his daily work as a truck accessory assembler, explaining he used it to cut into and through packaging materials. He stated he opened it using the thumb stud. Defendant testified he had purchased the

knife the previous year from Wal-Mart and had not altered it.

Section 12020, subdivision (c)(24) defines a "dirk or dagger" as "a knife or other instrument with or without a hand-guard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death." Section 12020, subdivision (c)(24) provides, further, "A nonlocking folding knife, a folding knife that is not prohibited by Section 653k, or a pocketknife is capable of ready use as a stabbing weapon that may inflict great bodily injury or death only if the blade of

Section 653k: "Switchblade knife does not include a knife that opens with one hand utilizing thumb pressure applied solely to the blade of the knife or a thumb stud attached to the blade."

the knife is exposed and locked into position." A folding knife, therefore, is a "dirk or dagger" only if the blade of the knife is exposed and locked into position. If the blade is not exposed and locked into position, it is a "dirk or dagger" if it is a knife that is prohibited by section 653k. (See generally *In re George W.* (1988) 68 Cal.App.4th 1208, 1211-1215, tracking and explaining the history leading to the current version of section 12020, subdivision (c)(24).)

Defendant's knife was a folding knife. As its blade was not exposed and locked into position it was not a "dirk" or a "dagger" unless it was a folding knife prohibited by section 653k. Section 653k defines "switchblade knife," providing, "[S]witchblade knife" means a knife having the appearance of a pocketknife and includes a spring-blade knife, snap-blade knife, gravity knife or any other similar type knife, the blade or blades of which are two or more inches in length and which can be released automatically by a flick of a button, pressure on the handle, flip of the wrist or other mechanical device, or is released by the weight of the blade or by any type of mechanism whatsoever." Section 653k contains an exemp-

tion, providing, " 'Switchblade knife' does not include a knife that opens with one hand utilizing thumb pressure applied solely to the blade of the knife or a thumb stud attached to the blade, provided that the knife has a detent or other mechanism that provides resistance that must be overcome in opening the blade, or that biases the blade back toward its closed position."

Defense counsel argued to the court that defendant's knife did not meet the statutory definition of switchblade, pointing out the knife did not spring open, nor would it simply drop open by gravity. Counsel asserted the knife was designed to open with one hand using thumb pressure and was equipped with a mechanism that provided resistance, which the officer had to overcome by flicking his wrist. The prosecutor did not contest this assertion, but countered that even if the knife might not have been a switchblade at the time of purchase, it had become a "gravity knife" by the time of defendant's arrest, because it could be opened with the flick of a wrist without the thumb assist. The prosecutor argued, further, it could be inferred defendant knew of the knife's condition. The court took the matter under submission, framing the question as whether, through wear and tear, the knife had become a gravity knife.

The court later found defendant guilty, explaining, "I should tell you that . . . the Court handled the knife. With absolutely no effort, the knife opened and locked in place. I didn't do anything. I didn't even do a [West Side] Story kind of flick. It so easily slid open that it surprised me how quickly it did. So in the Court's mind that's what convinced me beyond a reasonable doubt . . . I don't use knives that fold. And it flicked open without any effort on my part, a lay person. And that's what convinced me beyond a reasonable doubt that it did qualify under the code and by the evidence that was presented to the Court."

DISCUSSION

It is clear from the record the finding of guilt was based on the trial judge's own experiment with the knife, conducted outside of the presence of defendant and his attorney. Defendant contends the judge's experiment amounted to judicial misconduct. A judge commits misconduct by conducting out-of-court experiments, abdicating his or her responsibility for

deciding the parties' dispute on the pleadings and evidence properly brought before the court. (*Guadalupe A. v. Superior Court* (1991) 234 Cal.App.3d 100, 108-109.) But even in the absence of misconduct, the judge's reliance on her own examination of the knife mandates reversal because that evidence cannot be meaningfully reviewed here.

A defendant's due process rights include an accurate record on appeal. (*In re Roderick S.* (1981) 125 Cal.App.3d 48, 53 (Roderick S.); and see *People v. Howard* (1992) 1 Cal.4th 1132, 1165 [a defendant is entitled to a record adequate to permit meaningful review].) The point was made in *Roderick S.* where, as here, the defendant was convicted of carrying a concealed dirk or dagger. (*Roderick S., supra*, at p. 50.) As here, the testimonial evidence did not clearly establish the knife was a dirk or dagger within the meaning of sections 12020, subdivision (c)(24) and 653k, and the trial judge, in deciding against the defendant, saw and examined the knife itself. (*Id.* at p. 52.) The knife was destroyed and therefore was not available to the appellate court, which found, "The effect of this unauthorized destruction of the knife is to preclude this court from making an examination on its own of the critical bit of evidence in this case. . . . Absent a testimonial description which would constitute evidence, substantial in nature before the juvenile court, and now absent the device itself, this court is unable to ascertain whether the judge's view of the knife was in fact substantial evidence supporting the trial court's finding. The unauthorized destruction of the knife denies [the defendant] the opportunity for a fair appellate review of the evidence and is a denial of due process." (*Id.* at p. 53.)

The People do not dispute that defendant's due process rights include an appellate record that allows meaningful review of the evidence considered by the trial court in determining guilt, including evidence of defendant's knife. They contend that the record is sufficient because, unlike the record in *Roderick S., supra*, 125 Cal.App.3d 48, it contains a testimonial description of the knife. The problem is that Officer Lawrence's testimonial description does not establish the knife was a dirk or dagger, and even if the trial judge's experiment and description are considered, they contradict the officer's description. The judge indicated there

was no resistance to overcome in opening the blade. That evidence is inconsistent with the evidence the knife did not open, at least at first, when the police officer attempted to open it with a simple flick of the wrist. It also is inconsistent with the officer's testimony that the blade did not simply fall out. It further appears the knife was equipped with the required safety mechanisms even if the court believed they were not operating correctly. On this record we have no way of reviewing whether those mechanisms were in fact inoperative or if, for example, the knife was not completely closed

"Although some one-handed opening knives can be opened with a strong flick of the wrist, so long as they contain a detent or similar mechanism that provides some resistance to opening the knife, then the exemption is triggered. These knives serve an important utility to many knife users, as well as firefighters, EMT personnel, hunters, fishermen, and others."

when the judge conducted her experiments so that the mechanisms were not engaged. The judge's conclusions appear to have been based on her own examination of the knife, which is exactly the evidence we are unable to review.

The problem is exacerbated by what appeared to be the view of the prosecution and the judge, that the knife would meet the definition of an illegal "switchblade knife" if it could be opened by the flick of the wrist without resort to the thumb assist. Section 653k, however, exempts from that definition any knife that is designed to open with thumb pressure and is equipped with a detent or other mechanism providing some resistance.³ That the knife might be opened

with the flick of a wrist does not, in and of itself, remove it from the exemption.

The People also point out defendant bears the burden of showing the deficiencies in the record are prejudicial to him (*People v. Osband* (1996) 13 Cal.4th 622, 663; *People v. Coley* (1997) 52 Cal.App.4th 964, 970), arguing he has not satisfied that burden because he has not attempted to reconstruct the missing exhibit by, for example, seeking a reconstruction proceeding. It is true that lost exhibits may be reconstructed in many instances, and if they can be reconstructed, the appellate court can review them as if they had not been lost. (*Ibid.*) The test is whether the exhibits can be reconstructed sufficiently to determine there was no prejudicial error at trial. (*Ibid.*) It also is true that, ordinarily, a defendant cannot show prejudice from the absence of exhibits without first moving for an order from the appellate court to the trial court to reconstruct the lost exhibit. (*Id.* at p. 972.) Nonetheless, we agree with defendant that such an order would be futile under the circumstances of this case. That it might be possible to purchase and observe the same make and model of knife is not helpful because the prosecution's case, and the court's decision, were based on the condition of the knife when it was found on defendant's person, not on its condition when new. Testimonial evidence would be of no help because the record already contains conflicting descriptions of the condition of the knife. Any additional evidence, in the form of further testimonial description, would only add to the inconclusive nature of the existing evidence.

For all of the above reasons, we find defendant has met his burden.

DISPOSITION

The judgment is reversed.

STEIN, J.

We concur:

MARCHIANO, P. J.

MARGULIES, J.

FOOTNOTES:

¹ All statutory references are to the Penal Code.

² The clerk of the superior court has certified that the knife cannot be located.

CA 653k continued

(See Clerk's Declaration, filed June 26, 2007.)

³ Prior to 2001, the exemption covered "a knife that opens with one hand utilizing thumb pressure applied solely to the blade of the knife or a thumb stud attached to the blade," an exemption that unquestionably would include defendant's knife. In 2001 the Legislature, by means of Senate Bill No. 274 (2001-2002 Reg. Sess.), added the language which, according to the prosecution, rendered defendant's knife illegal. Senator Betty Karnette, who authored Senate Bill No. 274, explained the legislative intent: "Section 653k makes it a misdemeanor to sell or possess upon one's person a switchblade in California. . . . Recently there has been concern that the language of the exemption is broadly interpreted to apply to knives that are essentially switchblades, but that are designed to fall under the language of the exemption. [¶] In order to ensure that only legitimate one-handed knives are covered, SB 274 narrows the language to only allow knives to fall under the exemption from the switchblade law if that one-handed opening knife contains a detent or similar mechanism. Such mechanisms ensure there is a measure of resistance (no matter how slight) that prevents the knife from being *easily* opened with a flick of the wrist [italics added]. Moreover, a detent or similar mechanism is prudent and a matter of public safety as it will ensure that a blade will not inadvertently come open. [¶] Although some one-handed opening knives can be opened with a strong flick of the wrist, so long as they contain a detent or similar mechanism that provides some resistance to opening the knife, then the exemption is triggered. These knives serve an important utility to many knife users, as well as firefighters, EMT personnel, hunters, fishermen, and others." (July 18, 2001 letter from Senator Karnette to Secretary of the Senate Gregory Schmidt.)

By all appearances, defendant's knife, at least when new, was exactly the kind of utility knife the Legislature did not mean to include in the definition of "switchblade," and even when it was taken from defendant, there seems to have been some resistance that had to be overcome before it would open.

Canadian Judge Declares Assisted Openers NOT Prohibited

A raid conducted by the Durham Regional Police Services on April 13, 2006 against Hero Army Surplus resulted in seizure of several hundred knives made and supplied by a wide variety of manufacturers. The knives were seized under authority of s. 117 (3) of the *Criminal Code of Canada* and charges filed under s. 117.05 C.C. against Hero Army Surplus in the Ontario Court of Justice - Her Majesty The Queen v. Hero Army Surplus.

The case was heard before Justice D. J. Halikowski on June 28, 2007, at Oshawa, Ontario, Canada. Case No. 06-04612-00 was decided in August 2007 and the transcript of judgment filed on August 22, 2007.

"A 'prohibited weapon' means a knife that has a blade that opens automatically by gravity or centrifugal force or by hand pressure applied to a button, spring, or other device in or attached to the handle of the knife."

AKTI thanks Mr. Jeff Goddard, Kershaw Knives, Tualatin, OR (USA) for providing transcripts of the judgment and permission to print it. Kershaw also paid for the legal representation of the defendants by barrister Doug Gosbee.

Judge Halikowski examined all the knives and determined whether they violated Canada's weapons statute ("prohibited weapon" is defined in section 84 (1) of the *Canadian Criminal Code*). Because of their current condition of blade tightness, many knives did not pass his test (identified in list). Others, including all the assisted-openers, were declared not in violation.

We present significant portions of Judge Halikowski's opinion here. If you would like a copy of the entire opinion, as well as the list of seized and examined

knives, please contact AKTI and we will provide that material for a donation to AKTI of \$35.00 (U.S.). *Editor*

Reasons For Judgment

... Under the authority of subsection 117(1), officers of the Durham Regional Police Services entered upon the premises of this business and observed a quantity of knives of different configurations that they believed might be prohibited weapons, and after testing their operability they found, in their view at least, that various numbers of these items were in fact prohibited.

The knives were produced in Court. Their operation was demonstrated in Court, and the trier of fact took the additional opportunity to review their operation following the conclusion of the hearing.

The devices can be generally broken down into three categories.... Shuriken and Push-Daggers ... may be described for our purposes as Category 1.

Category 2 ... will be described as Flick Knives....

And, finally, Category 3 items will be described as Kershaw Speed Safe and variants thereof,...

Category 2 items, again referred to as Flick Knives, were further listed as being either presently prohibited under law in the opinion of the investigating officer, or capable of being prohibited by some adjustment to the screw or rivet holding the blade to the handle of the device. In Court, this meant that if the blade could be flicked open with the use of centrifugal force at that time, it met the definition of Prohibited Weapon in the opinion of the officer(s), but if it could not be so opened at the time it was operated, it was

"A knife being an instrument that is universally used for utilitarian, peaceful purposes, is not prima facie designed to be used as a weapon."

"A strict and ordinary reading and interpretation of that legislation is necessary to ensure that the public can understand and predict with a high degree of certainty what is expected of it in the conduct of its day-day personal and business affairs."

termed to be only capable of becoming a Prohibited Weapon.

The issue on this application is whether or not the items seized by the Durham Regional Police for the respondent were Prohibited Weapons within the *Criminal Code of Canada* definition.

In the case of Category 1 items, again the alleged Shuriken devices are governed by Paragraph 3 of Part 3 of the regulations authorized under s. 84 of the *Criminal Code*. Paragraph [3] reads in part as follows:

"Any instrument or device commonly known as 'shuriken,' being a hard, non-flexible plate having three or more radiating points with one or more sharp edges in the shape of a polygon, trefoil, cross, star, diamond or other geometrical shape, and any similar instrument or device."

Alleged Push-Dagger devices and similar devices are governed by Paragraph 9 of the same Regulation, which reads in part as follows:

"Any knife commonly known as 'push-dagger' that is designed in such a fashion that the handle is placed perpendicular to the main cutting edge of the blade, and any other similar device other than the aboriginal 'ulu' knife."

Category 2 items (referred to as Flick Knives) and Category 3 items (known as Kershaw Knives or derivatives) to be declared Prohibited Weapons must fall within the strict definition of Prohibited Weapon as defined by s. 84(1) of the *Criminal Code*.

"A 'prohibited weapon' means a knife that has a blade that opens automatically by gravity or centrifugal force or by hand pressure applied to a button, spring, or other device in or attached to the handle

of the knife."

The case law in this area is well settled. A knife being an instrument that is universally used for utilitarian, peaceful purposes, is not prima facie designed to be used as a weapon notwithstanding that a knife, like a multitude of other things such as baseball bats, hatchets, or ice picks, can on occasion be used effectively in fighting aggressively or defensively.

A knife may be a "Prohibited Weapon" even if it was not designed to be used as such if its blade, through wear and tear or alteration, can be opened automatically by applying centrifugal force or gravity to its blade or by applying pressure to a button, spring, or device in or attached to the handle.

The time to determine the nature of the knife in question is when the item is inspected by the authorities. The mischief being addressed by the legislation is the possession of knives that have a blade that can be opened by gravity or centrifugal force, immediately making the knife available for use as a weapon. A knife is not open in this sense unless the blade has fully emerged from the handle giving it the capacity to be used as a cutting or stabbing instrument.

When interpreting the governing legislation in cases where a citizen's liberty or property may be jeopardized by state intervention, a strict and ordinary reading and interpretation of that legislation is necessary to ensure that the public can understand and predict with a high degree of certainty what is expected of it in the conduct of its day-day personal and business affairs.

Dealing with the Category 1 devices, items 1 through to 19 fall within the strict interpretation of Paragraph 3, of Part 3 of the Regulation authorized under s. 84 of the *Criminal Code*. Each of these devices is based on a hard, non-flexible plate that is either pre-cast or constructed by attaching sections of the device together in a fashion prescribed by its design. Attached to the plate are three or more blades meant to be deployed with sharp edges exposed, and once this is done the device takes on a geometrical shape.

The devices described as "Push-Daggers" and appearing as items 20, 21, 492 and 493 fit within the definition outlined in Paragraph 9 of the same Regulation. These devices are not aboriginal "ulu" knives being much smaller in size and purpose. Each device has a han-

dle perpendicular to the main cutting edge of the blade. The definition is very broad in nature, but clearly encompasses the devices before this Court. There has been no Charter challenge to this broad encompassing legislation, so the section remains operative catching the devices before this Court as Prohibited Weapons.

The Category 2 devices, which are referred to generally as Flick Knives, were demonstrated in Court, and those capable of being opened by way of centrifugal force alone are found to fit within the definition of Prohibited Weapon as defined by s. 84 of the Code. If the item on the date it is tested by the State is a knife that opens automatically by centrifugal force or by hand pressure applied to a button, spring, or other device in or attached to the handle of the knife, then it

"The Category 3 items [assisted-openers] ... can be opened with one hand by applying pressure with one's thumb or finger onto a metal stud located on or integral to the blade. Once this pressure moves the blade into a position about 20 degrees from the handle, a spring device accelerates the blade forward until it locks in the open position."

fits within the definition of Prohibited Weapon and will be found to be so....

In each case on the date that the knife was tested in Court its blade opened due to centrifugal force. All remaining items ... did not open on that date by prohibited means and are therefore found not to be Prohibited Weapons under the section.

The Category 3 items constitute items 462 to 489 and can be described as knives which can be opened with one hand by applying pressure with one's thumb or finger onto a metal stud located on or integral to the blade. Once this pressure moves the blade into a position about 20 degrees from the handle, a

"Hand pressure is not applied to a device in the handle [of assisted-openers] or on it. Nor is pressure applied to a spring. If anything, pressure is released from the spring in these devices once it is operated. The legislation as presently in force and restrictively interpreted does not prohibit the possession of these devices."

spring device accelerates the blade forward until it locks in the open position. Again, the question remains as to whether or not this means of opening the device falls within the prohibited definition under s. 84 (1) of the Code. The Court finds that it does not. On an ordinary reading of the legislation the blade does not open automatically by gravity or centrifugal force. Hand pressure is applied to a device on or integral to the blade. Hand pressure is not applied to a device in the handle or on it. Nor is pressure applied to a spring. If anything, pressure is released from the spring in these devices once it is operated. The legislation as presently in force and restrictively interpreted does not prohibit the possession of these devices.

In summary, the following items as they relate to all three categories listed are found to be Prohibited Weapons and will be confiscated to the Crown and disposed of according to law:...

All other items presently held as exhibits are found not to be Prohibited Weapons and will be returned to the Respondent forthwith. Matter Adjourned.

"Category 3 items will be described as Kershaw Speed Safe and variants thereof."

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2000 AKTI bill saves 12 million Californians; 653k exempts
one-hand openers in switchblade statute.

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