

CHAPTER 1. GENERAL CRIMINAL LAW

Ohio is a code law state, meaning Ohio does not have common-law criminal offenses. In order for conduct to be criminal, the conduct must be prohibited by some section of the Ohio Revised Code (R.C.) Unfortunately, there are several linear yards of shelf space taken up by the Ohio Revised Code.

For the most part, when something is referred to as “criminal”, what is meant is that the conduct is prohibited someplace within Title 29 of the Ohio Revised Code. However, criminal charges are contained throughout the Revised Code.

Most traffic offenses generally are not considered criminal, and most of these traffic offenses are set forth in Title 45 of the Revised Code. Ohio’s body of criminal law can be categorized broadly in two categories: whether the offense is a misdemeanor or a felony.

Felony offenses are the most severe, punishable by higher fines, actual time in prison (compared to county jail for misdemeanors) and loss of civil rights. Those convicted of a felony punishable by more than 12 months in prison (in Ohio a Fourth Degree Felony or higher) cannot own or possess firearms, unless a court has restored the convicted felon to their civil right to own firearms. (See later section on impending trouble with Ohio’s restoration of rights process.) However, as will be discussed in Chapter 2, the Ohio gun owner needs to be aware that not just felony convictions will disqualify a citizen from owning a firearm and/or getting a concealed carry license. Some misdemeanors and some fifth degree felonies also disqualify a citizen from owning a firearm.

Misdemeanors, or petty offenses, are punishable by fines and county jail time. The total possible penalty exposure for misdemeanors is lower than for felonies, and misdemeanors typically do not disqualify a citizen from firearm ownership. By way of illustration, the following chart illustrates the typical punishment ranges and the differences in penalties:

Category	Jail Time	Prison Time	Fine
F1	Possible	3-10 Years	Up to \$20,000
F2	Possible	2-8 Years	Up to \$15,000
F3	Possible	1-5 Years	Up to \$10,000
F4	Possible	6-18 Months	Up to \$5,000
F5	Possible	6-12 Months	Up to \$2,500
M1	Up to 6 Months	No	Up to \$1,000
M2	Up to 90 Days	No	Up to \$750
M3	Up to 60 Days	No	Up to \$500
M4	Up to 30 Days	No	Up to \$250
MM	No	No	Up to \$150

Firearm Specification

In addition, any felony that involves a firearm may be charged with a gun specification added. A gun specification is simply an “add-on” to an underlying criminal charge. A person can commit many felonies with or without a gun. A “specification” is an addition to the indictment where the grand jury adds to the underlying offense by specifying the offender possessed a firearm while committing the offense. A gun specification, if proven, adds mandatory prison time of varying lengths to any other penalty or sentence imposed by the Court for the underlying charge.

The gun owner in Ohio needs to be very aware of firearm speci-

fications existing within our laws. No one is against putting the screws to “Johnny Crackhead” who sticks up the local liquor store. However, great caution needs to be exercised in how this is accomplished. For instance, many of our concealed carry provisions are felonies if violated. In fact, during the negotiations on H.B. 347, there was substantial discussion about increasing to a felony the offense of failing to notify a law enforcement officer that you are a license holder. (Despite the fact the majority of states have no notification requirement at all.)

The easiest way to illustrate the peril faced by gun owners is with real world examples. I was contacted on a case where a bail agent (“bounty hunter”) was out working a warrant on one of his absconders. This bail recovery agent possessed a Concealed Handgun License (CHL) and was engaged in the process of bringing a criminal to justice when the vehicle he was in was stopped. Unfortunately, this person’s handgun was allegedly in his pocket versus being IN A HOLSTER in his pocket. (A holster is required in a vehicle if the handgun is on your person.) In addition to charging this person with improper transportation, a felony, the prosecutor obtained a gun specification, since a gun was used to improperly transport the gun. I am not making that logic up. In another case, a person with a CHL allegedly pointed their gun in an act of claimed self-defense while in a vehicle, and was charged with improper transportation (for touching the gun while in a vehicle) and similarly was charged with a gun specification.

In both of these cases, the first, last and only thing on the defense’s mind is getting rid of the mandatory prison time carried by the gun specification. That is why gun specifications are sought; the presence of mandatory prison time virtually eliminates any possibility of a trial versus a plea offer that dismisses the mandatory prison time. Thus, your gun owner is in a no-win situation: pays ten thousand dollars and more for a felony trial with the risk of mandatory

prison time if convicted, or takes a guaranteed plea to some lesser offense with no mandatory prison time.

THIS IS THE HIDDEN RISK OF CRACKING DOWN ON GUN CRIME. Anytime a law is proposed that will add additional/mandatory time for use of a gun in a crime, the Ohio gun owner needs to look very critically at just how that new law might be used against them should a self-defense encounter go wrong. Just one example, in 2008 a bill was introduced adding a mandatory 10 or more years in prison for anyone who uses a gun to kill a juvenile. Setting aside the logical fallacy of shooting a 17 year old being more heinous than burning them alive after torturing them, consider the situation where the 17 year old was shot in self-defense and a prosecutor moves the charges forward anyway, including the new 10+ mandatory prison sentence. This will amount to risking a life sentence for many people. Think this is an absurd “what if?” Most people thought the possibility of charging a gun specification on improper transportation was also preposterous, until shown how it happens in real life.

S.B. 184 made critical changes to Ohio’s gun specification statute, changes that mean that gun specifications will no longer be possible on charges that already include use of the firearm in the underlying offense, such as improper transportation of a firearm. At least one CHL holder has already benefitted from these changes in November 2008 when he found himself facing improper transportation with a gun specification added. The charges were filed after the effective date of S.B. 184, and thus the gun specification is ripe for dismissal.

Prosecution Process

Misdemeanors are charged by an individual swearing to a criminal complaint, which is then served on the individual charged and the

case proceeds to trial. A misdemeanor complaint often looks like a traffic ticket. Misdemeanors are prosecuted in municipal/county/mayor's courts.

Felonies may not be charged by an individual. All felony cases must be presented to the county grand jury. If the grand jury believes there is probable cause that the alleged offense has occurred, they will return an indictment. The indictment is served on the individual charged and the case proceeds to trial. Felonies are prosecuted in Common Pleas Court.

For all offenses above a minor misdemeanor, there is a right to a trial by jury and the right to court appointed counsel, if you cannot afford your own. For misdemeanors, the right to a jury trial must be demanded in writing. For felonies, the trial will automatically be a jury trial, unless the jury is waived in writing.

Waiving Jury

In any trial that carries the right to a jury trial, the defendant has the choice of proceeding with a jury or waiving that right and trying the case to a judge. In certain instances, it will make absolute sense to present the case to a jury and only a jury. In other instances, it will make sense to waive a jury and present the case to a judge. Only the defendant and their counsel, who is hopefully very familiar with the court, can make the decision on whether to try the case to a judge or to a jury. In almost all cases I am contacted on, I recommend the person obtain local counsel with me serving as co-counsel as needed, simply because it is critical to know the local customs.

Factors that go into this decision include: the facts of the case, the nature and character of the "victim," the character and nature of the defendant, the likely makeup of any jury pool and the inclina-

tions of the judge based upon past cases. People are fond of saying “I’d rather be judged by twelve than carried by six.” My response to them is always, “You clearly have never been judged by 12.” The jury process is imperfect, emotional and inherently biased by the juror’s life experiences. It is just the best process we have identified, nothing more, nothing less. Tomorrow someone might design the perfect computer to judge cases. In your particular case you might guess that the jury process, warts and all, benefits you. In another case, no way.

Post Conviction Process

While Ohio does not have a formal expungement statute, Ohio does have a statute on the sealing of a criminal record. This is an area of constant confusion in the area of criminal law. While there is a statute available to seal a criminal conviction, it is only available to first time offenders who have completed their obligations in the underlying case. Additionally, there are specific, enumerated criminal offenses that cannot be sealed, regardless of whether the applicant is a first time offender or not. (See R.C. 2953.36. Not included in Appendix A.) To add in further confusion, Ohio’s practice is to allow the sealing of a number of non-first offense “bond forfeitures,” which are similar to a conviction. Finally, at least one potential firearm disability, minor misdemeanor marijuana possession, says explicitly within the statute that violation of that statute is not a criminal conviction, even though the defendant pleads, and is found, guilty.

There are numerous exceptions that allow officials to examine and use sealed records during background checks, and the true value of sealing a record is always being eroded. Perhaps this is why Ohio makes the application process inexpensive and amenable to self-representation; legislators might recognize that people shouldn’t have to spend lots of money on court costs and attorneys to obtain

something that is worth increasingly less as exceptions to the law continue to be added. Ohio previously counted disqualifying convictions against the CHL application, even if the conviction was sealed. (See Chapter 2 for firearm ownership disqualifications.) This is no longer the case, and the application form and the law now specify that sealed convictions do not count against the applicant.

Do not confuse sealed records with the restoration of civil rights. Someone can be restored to civil rights by a court, i.e., be allowed to own a firearm again, without having the conviction sealed. This is often the case where someone has a conviction that cannot be sealed because of Ohio's limited statute, yet the conviction is not one that would warrant long-term firearm disability. In these instances, the person will seek restoration of rights, as this will remove the firearm disqualification without needing to have the record sealed. If a record is sealed under Ohio's statute allowing for the sealing of a criminal conviction, the person is automatically restored to civil rights with regard to the sealed conviction without requiring a separate application for restoration of civil rights. Stated another way, sealing always grants restoration, restoration never grants sealing.

It is very important that the Ohio gun owner understand that the qualifications for a Concealed Handgun License (CHL) do not automatically equate with those set forth for the ownership of a firearm. The Ohio Supreme Court has previously ruled there is no right to carry a concealed weapon in Ohio. A CHL is a statutory privilege, not a right. As such, the qualifications for a CHL can be as strict or as loose as the General Assembly desires. Thus, even if all disabilities to firearm ownership are removed, the gun owner may still be ineligible for a CHL based upon some other remaining conviction.

A final, unfortunate note to this restoration/sealing section is that BATFE and/or FBI NICs has begun to take the position that Ohio's restoration/sealing laws do not COMPLETELY restore firearm rights to the applicant; thus the person is still under federal disability. This is based upon R.C. 2923.13(F)(3), which states that the restoration of firearm rights does not apply to "dangerous ordnance," or for relevant purposes, does not apply to automatic or sawed-off firearms. Since Ohio citizens can lawfully possess automatic or sawed-off shotguns if they go through the 6 months and tens of thousands of dollars involved in getting the tax stamp for a Class III gun, yet someone who is restored cannot, the BATFE concludes Ohio's restoration is not a complete restoration. This is important because BATFE and one Federal case say that federal disability law only recognizes a state's restoration if the state COMPLETELY restores firearm rights.

The Ohio General Assembly was made aware of this problem in time to include the fix in H.B. 450, but failed to do so. In the interim, everyone who has ever been restored to firearm rights in Ohio holds their breath hoping that federal law enforcement under Attorney General Eric "I hate guns" Holder does not become proactive under a new administration. Taken to a horrible, police-state extreme, it would be a true test of NICs and gun registration fears, since many if not most people who have been restored to firearm rights have sent a copy of that restoration to the government VOLUNTARILY and asked that the government make note of the restoration so the person is no longer denied the purchase of a firearm. It would not take much effort, or imagination, to pull together all of these restoration records for Ohio, which are already either legally in the hands of the feds through voluntary appeal files or are available by searching court dockets, a public record, and start a large gun sweep against people who thought they were legally owning a gun.