

Legislative Analysis



FIREARMS: DEFINE BRANDISH

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House Bill 4160 (Reported from committee w/o amendment)
Sponsor: Rep. Joel Johnson

Analysis available at
<http://www.legislature.mi.gov>

House Bill 4161 (Reported from committee as Substitute H-1)
Sponsor: Rep. Holly Hughes

Committee: Judiciary
Complete to (2-24-15)

(Enacted as Public Acts 27 & 28 of 2016)

BRIEF SUMMARY: House Bill 4160 would revise the prohibition on brandishing a weapon in public. House Bill 4161 would define the term "brandish."

FISCAL IMPACT: The bills would not have fiscal implications for state or local units of government.

THE APPARENT PROBLEM:

Legislation enacted in 1990 prohibited "brandishing" a firearm in public, but did not define the term "brandishing." An analysis prepared by the former House Legislative Analysis Section (subsequently merged with the House Fiscal Agency) indicates that the legislation was part of a package of bills to strengthen gun control while at the same time taking away the authority of local units of government to enact local gun control ordinances, presumably in an attempt to create a uniform statewide policy rather than a confusing patchwork of local ordinances.

The question of "brandishing" came up again in 2002 and was addressed in an Attorney General Opinion that stated that a reserve police officer "when carrying a handgun in a holster in plain view is not waving or displaying the firearm in a threatening manner. Thus, such conduct does not constitute brandishing a firearm in violation of Section 234e of the Michigan Penal Code."

Several years later, the Michigan State Police published a Legal Update to familiarize law enforcement officers with Michigan laws regarding both open and concealed carrying of firearms. The Update states that Michigan statute does not specifically permit the open carrying of firearms in public, but it doesn't clearly prohibit it either. (There are limits on the premises where firearms can be carried and on the kind of weapons.) The Legal Update goes on to state that "it is legal for a person to carry a firearm in public as long as the person is carrying the firearm with lawful intent and the firearm is not concealed." (MSP Legal Update, No. 86, October 26, 2010)

Supporters of openly carrying firearms say that they are sometimes unduly harassed by members of the public and by law enforcement officers when carrying firearms in public, a right believed to be protected by the state and federal Constitutions. For instance, a gun

carried in a sling may inadvertently "point" towards another if the person carrying the gun bends over, or shifts in a chair. A clear definition of what it means to "brandish" a firearm could help the public and law enforcement officers in such situations to distinguish between conduct that is protected and conduct that crosses the line. Clarification would protect gun owners who want to openly carry firearms in public from undue prosecution.

THE CONTENT OF THE BILLS:

Currently, the Michigan Penal Code prohibits a person from knowingly brandishing a firearm in public, but does not define the term "brandish."

House Bill 4161 would amend the code to define the term "brandish" to mean to point, wave about, or display in a threatening manner with the intent to induce fear in another person. (MCL 750.222)

House Bill 4160 would amend the code to revise the prohibition on brandishing a firearm so as to prohibit a person from *willfully* and knowingly brandishing a firearm in public. (MCL 750.234e)

There is currently an exception from the brandishing prohibition for a peace officer lawfully performing duties as a peace officer and also for a person *lawfully engaged* in hunting; target practice; or the sale, purchase, repair, or transfer of that firearm. The bill would:

- Retain the exemption for a peace officer.
- Eliminate the exemptions for a person lawfully engaged in hunting; target practice; or the sale, purchase, repair, or transfer of that firearm.
- Add an exemption for a person lawfully acting in self-defense or defense of another under the Self-Defense Act (MCL 780.971-780.974)

Currently, a violation of the brandishing prohibition is a misdemeanor punishable by imprisonment for not more than 90 days and/or a fine of not more than \$100; the bill retains the current penalty.

The bills would take effect 90 days after enactment; they are tie-barred to each other, meaning that neither could take effect unless both are enacted into law.

BACKGROUND INFORMATION:

The bills are reintroductions of House Bills 5091 and 5092 of the 2013-2014 legislative session. House Bill 5091 passed both chambers but was subsequently vetoed by the governor. House Bill 5092 defined the term "brandish" but stalled in the Senate. The definition of "brandish" was subsequently placed in Senate Bill 965, which was also vetoed. Senate Bill 965 had been part of a larger bill package that redefined the term "firearm" to exclude pneumatic guns; the House bills that were part of that package did not make it all the way through the legislative process before the close of the Session last

December. The Senate Bills that had been ordered enrolled, which included Senate Bill 965, were vetoed since the governor believed that enacting only a portion of a larger bill package would create conflicts between statutes and confusion for residents and law enforcement. Since the bill containing the definition of "brandish" was vetoed, House Bill 5091 was also vetoed.

ARGUMENTS:

For:

Under House Bill 4161, the term "brandishing" would be defined in state law for the first time and in a manner consistent with dictionary definitions, federal court opinions, and a state AG opinion. In addition, House Bill 4160 would clearly authorize a person to point a firearm when acting in self-defense or when defending another from imminent harm. The bill also eliminates several current exceptions to the prohibition on brandishing because they are no longer needed under the definition of "brandishing" contained in House Bill 4161. Together, the bills should provide the clarity currently lacking in law and prevent harassment by law enforcement officers or prosecutors when law abiding citizens are carrying firearms in a lawful and non-threatening manner.

Against:

The bills appear to be in direct contradiction to the original intent of the prohibition on brandishing a firearm in public. Prior to legislation enacted in 1990, local governments had the authority to adopt and enforce gun control ordinances. The brandishing prohibition was included in legislation enacted to create a more uniform system of gun laws statewide and, according to an analysis at the time, meant to strengthen gun control. The only lawful carrying of firearms in public (non-brandishing) was when a person was hunting; target practicing; or actively engaged in the sale, repair, or purchase of a firearm. (The definition of what it meant to lawfully carry firearms was subsequently eliminated from statute in 2012.)

Response:

It should be noted, however, that public attitudes, legal interpretations, and the political climate regarding the issue of guns has changed considerably since 1990, and so the "original intent" of legislation from that era may not be relevant to definitions of "brandishing" or the carrying of firearms in general. This bill will represent the intent of the law and legislature as it stands today.

Against:

House Bill 4061 as amended in committee is problematic, as it is not clear if the definition of "brandishing" will resolve the current confusion exhibited by gun owners, the general public, and law enforcement as to the lawful carrying of firearms, or if instead it will make things worse. The definition of "brandishing" in the committee-passed version does not require that a firearm be enclosed in a holster or secured in any way, just that a person doesn't intend to make another person feel afraid. The wording clearly makes the threshold for a violation the intent of the person waving, pointing, or displaying a firearm or firearms, not whether or not the conduct involving the gun is menacing in and of itself or that the

person's actions are causing people to be afraid. This allows a person acting in a threatening or menacing manner to offer as a defense that they did not intend to do so.

At the very least, the penalty for a violation should be increased to a maximum penalty of 93 days imprisonment so to trigger a check of the FBI database and permanent retention of the person's fingerprints by the MSP. That way, if law enforcement is called by a citizen who felt threatened, there would be a way for the officers to ascertain if the person likely had no unlawful intent or to identify a person with prior criminal convictions that would make possessing a firearm unlawful or indicate that the person had an unlawful intent. It also would enable law enforcement agencies to track repeat offenders.

POSITIONS:

Representatives from the following entities testified in support of, or indicated support for, one or both of the bills on 2-17-15:

NRA-ILA

Freedom Firearms

Michigan Coalition of Responsible Gun Owners (MCRGO)

Michigan Open Carry

Legislative Analyst: Susan Stutzky

Fiscal Analyst: Robin Risko

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.