

***Taff v. State*: The Logical Albeit Delayed Conclusion to the Legislature's 2013 Amendments to Arkansas's Carrying-a-Weapon Statute.**

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In the 2019 legislative session, both houses of the Arkansas General Assembly passed resolutions declaring that Arkansas is a constitutional-carry state in light of the Arkansas Court of Appeals' 2018 decision in *Taff v. State*.¹ On February 14, 2019, the Arkansas House of Representatives adopted a resolution declaring:

Whereas, the citizens of the state deserve clarity in regard to gun rights and gun laws; and

Whereas, in the recent *Jamie Taff v. State of Arkansas* (2018 Ark. App. 488) case, the Court of Appeals gave judicial clarity and affirmed that Arkansas is a constitutional carry state, with no permit required to carry a handgun, either *unconcealed* or concealed,

Now therefore, be it resolved...that the House of Representatives acknowledge[s] this decision for the clarity it provides to the citizens of the state in regard to gun rights.²

The Resolution's impetus was not any recent enactment of the General Assembly or some new decision from the Supreme Court of the United States, but rather from a decision of the Arkansas Court of Appeals in *Taff v. State*.³ According to the resolution, this decision from Arkansas's intermediate appellate

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1. 2018 Ark. App. 488, 562 S.W.3d 877.

2. H.R. Res. 1013, 92d Gen. Assemb., Reg. Sess. (Ark. 2019) (emphases in original).

3. 2018 Ark. App. 488, 562 S.W.3d 877.

court “gave judicial clarity and affirmed” Arkansas’s status as a “constitutional carry state.”⁴ On March 26, 2019, the Arkansas Senate adopted an identical resolution.⁵

However, far from announcing any sort of “constitutional carry” revolution, *Taff* merely affirmed the clear language of the legislature’s 2013 amendment to the statute defining the crime of carrying a weapon.⁶ *Taff* is no more a Second Amendment case than Arkansas a Canadian province. Rather than legislating its preferred path regarding the right to carry—constitutional or otherwise—the Arkansas General Assembly chose political expediency over substantive change. Far from clarifying Arkansas’s gun laws as the resolutions intended, these resolutions only further muddied the already murky depths of Arkansas law regarding the carrying of weapons.

I. The Crime of Carrying a Weapon in Arkansas

Carrying a weapon has been proscribed in Arkansas since 1838. The earliest version of the law against carrying weapons barred carrying “any pistol, dirk,^[7] butcher or large knife, or a sword in a cane, concealed as a weapon, unless upon a journey.”⁸ The penalty was one to six months in the county jail and a fine of \$25 to \$100.⁹ Half the fine was paid to the “informer” who turned in the defendant.¹⁰ In 1860 the jail time was dropped from the penalty, and the bounty paid to the informer was also removed.¹¹ So, from 1860 to 1875, the concealed-weapons law thus read:

4. Ark. H.R. Res. 1013.

5. S. Res. 18, 92d Gen. Assemb., Reg. Sess. (Ark. 2019).

6. Act of Apr. 4, 2013, No. 746, § 2, 2013 Ark. Acts 2783, 2785–87 (codified at ARK. CODE ANN. § 5–73–120).

7. “[A] long straight-bladed dagger formerly carried esp[ecially] by the Scottish Highlanders.” *Dirk* ¶ I.1, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1961) [hereinafter WEBSTER’S THIRD].

8. WILLIAM MCK. BALL & SAMUEL C. ROANE, REVISED STATUTES OF THE STATE OF ARKANSAS c. 44, div. 8, art. 1, § 13, p. 280 (1838), *reprinted in* E. H. ENGLISH, A DIGEST OF THE STATUTES OF ARKANSAS c. 51, pt. 9, art. 3, § 13, p. 377 (1848); *and reprinted in* JOSIAH GOULD, A DIGEST OF THE STATUTES OF ARKANSAS c. 51, pt. 9, art. 3, § 13, pp. 381–82 (1858) [hereinafter GOULD’S DIGEST].

9. GOULD’S DIGEST, *supra* note 8, c. 51, pt. 9, art. 3, § 13, pp. 381–82.

10. GOULD’S DIGEST, *supra* note 8, c. 51, pt. 9, art. 3, § 13, pp. 381–82.

11. Act of Nov. 29, 1860, unnumbered, 1860 Ark. Acts 5, 5–6, *reprinted in* EDWARD W. GANTT, A DIGEST OF THE STATUTES OF ARKANSAS § 1517, p. 367 (1874) [hereinafter GANTT’S DIGEST].

Every person who shall wear any pistol, dirk, butcher or large knife, or a sword in a cane, concealed as a weapon, unless upon a journey, shall be adjudged guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars.¹²

In 1875 the General Assembly passed “[a]n act to prohibit the carrying of side-arms, and other deadly weapons.”¹³ Notably the legislature made it a crime to carry any of the named weapons openly or concealed. It is thus the earliest ancestor to the modern statute. It amended the existing statute as follows (additions are underlined, excisions struck):

Every [A]ny person who shall wear or carry any pistol of any kind whatever, or any dirk, butcher or ~~large~~ bowie knife^[14], or a sword or a spear in a cane, brass or metal knucks,^[15] or a razor, ~~concealed~~ as a weapon, shall be adjudged guilty of a misdemeanor, and upon conviction thereof . . . shall be fined in any sum not less than twenty-five nor more than one hundred dollars . . .¹⁶

The law did not apply when a person was on his own premises or on a journey, and it also did not apply to “officers of the law”:

Provided, That nothing herein contained shall be so construed as [a] to prohibit any person, wearing or carrying any weapon aforesaid on his own premises, [b] or to prohibit persons traveling through the country carrying such weapons while on a journey with their baggage [c] or to prohibit any officer of the law wearing or carrying such weapons when engaged in the discharge of his official duties, or any person summoned by any such officer to assist in the execution of any legal process, or any private person legally authorized to execute any legal process to him directed.¹⁷

In 1881 the General Assembly amended the law to exclude “such pistols as are used in the army or navy of the United

12. GANTT’S DIGEST, *supra* note 11, § 1517, p. 367.

13. Act of Feb. 16, 1875, unnumbered, § 1, 1875 Ark. Acts *155, *155 (1882 reprint).

14. “[A] large hunting knife adapted especially for knife-fighting . . .” *Bowie* ¶ II, WEBSTER’S THIRD, *supra* note 7.

15. That is, brass knuckles. *Brass knucks*, WEBSTER’S THIRD, *supra* note 7.

16. Act of Feb. 16, 1875, unnumbered, § 1, 1875 Ark. Acts at *115–16 (1882 reprint).

17. Act of Feb. 16, 1875, unnumbered, § 1, 1875 Ark. Acts at *115–16 (1882 reprint).

States.”¹⁸ A person could now carry an army or navy pistol, but only if “uncovered, and in his hand.”¹⁹ The special treatment was apparently born of the idea that the Second Amendment prohibited the states from restricting possession of firearms that were commonly used by the armed forces.²⁰

The law was amended slightly in 1909 but otherwise remained unchanged until 1941.²¹ At that time the General Assembly expanded the list of forbidden weapons to include “blackjack,²² billie,²³ sap,²⁴ or ice-pick.”²⁵

The new criminal code of 1975 did not include the offense of carrying a weapon.²⁶ But the legislature did replace the carrying-a-weapon statute later in the same session:

(1) A person commits the offense of carrying a weapon if he possesses a handgun, knife, or club on or about his person, in a vehicle occupied by him, or otherwise readily available for use with a purpose to employ it as a weapon against a person.

(2) For purposes of this section:

18. See Act of Apr. 1, 1881, No. 96, §§ 1–2, 1881 ARK. ACTS 191, 191–92, *reprinted in* W. W. MANSFIELD, A DIGEST OF THE STATUTES OF ARKANSAS §§ 1907–1908, p. 490 (1884); *and reprinted in* L. P. SANDELS & JOSEPH M. HILL, A DIGEST OF THE STATUTES OF ARKANSAS §§ 1498–1499, pp. 505–506 (1894); *and reprinted in* WILLIAM F. KIRBY, A DIGEST OF THE STATUTES OF ARKANSAS §§ 1609–1610, pp. 496–97 (1904) [hereinafter KIRBY’S DIGEST].

19. KIRBY’S DIGEST, *supra* note 18, §§ 1609–1610, pp. 496–97.

20. Charles Nestrud, Legislative Note, *Act 696: Robbing the Hunter, or Hunting the Robber?*, 29 ARK. L. REV. 570, 573 & n.21 (1976) (citing ARK. CRIM. CODE § 3103 cmt. (Proposed Official Draft, Dec. 1974); *Fife v. State*, 31 Ark. 455 (1876)).

21. Act of May 31, 1909, No. 322, § 1, 1909 Ark. Acts 949, 949–50, *reprinted in* JOHN T. CASTLE, SUPPLEMENT TO KIRBY’S DIGEST OF THE STATUTES OF ARKANSAS § 1609, pp. 154–55 (1911); *and reprinted in* WILLIAM F. KIRBY & JOHN T. CASTLE, DIGEST OF THE STATUTES OF ARKANSAS § 1697, pp. 580–81 (1916); *and reprinted in* T. D. CRAWFORD & HAMILTON MOSES, DIGEST OF THE STATUTES OF ARKANSAS § 2804, pp. 862–63 (1921); *and reprinted in* WALTER L. POPE, DIGEST OF THE STATUTES OF ARKANSAS § 3508, p. 1112 (1937).

22. A bludgeon whose striking end consists of a piece of lead or other metal covered in leather. *Blackjack* ¶ II.4, WEBSTER’S THIRD, *supra* note 7.

23. A wooden club. *Billy* ¶ II.2, WEBSTER’S THIRD, *supra* note 7.

24. A bludgeoning weapon like a blackjack. *Sap* ¶ I.5, WEBSTER’S THIRD, *supra* note 7.

25. Act of Feb. 13, 1941, No. 39, § 1, 1941 Ark. Acts 75, 75, *reprinted in* 1944 CUMULATED ANNOTATED SUPPLEMENT TO POPE’S DIGEST OF THE STATUTES OF ARKANSAS 1937, § 3508, p. 140 (1944).

26. See generally Arkansas Criminal Code, No. 280, 1975 Ark. Acts 500 (codified at ARK. STATS. ANN. tit. 41).

(a) “handgun” means any firearm with a barrel length of less than twelve (12) inches that is designed, made, or adapted to be fired with one hand.

(b) “knife” means any bladed hand instrument that is capable of inflicting serious physical injury or death by cutting or stabbing; it includes a dirk, sword or spear in a cane, razor, and ice pick.

(c) “club” means any instrument that is specially designed, made, or adapted for the purpose of inflicting serious physical injury or death by striking; it includes a blackjack, billie, and sap.

(3) It is a defense to a prosecution under this section that at the time of the act of carrying:

(a) the person is in his own dwelling or place of business or on property in which he has a possessory or proprietary interest; or

(b) the person is a law enforcement officer, prison guard, or member of the armed forces, acting in the course and scope of his official duties; or

(c) the person is assisting a law enforcement officer, prison guard, or member of the armed forces acting the course and scope of official duties pursuant to the direction or request of such law enforcement officer, prison guard, or member of the armed forces.

(d) the person is carrying a weapon when upon a journey; or

(e) the person is a licensed security guard acting in the course and scope of his duties.

(4) Carrying a weapon is a class A misdemeanor.²⁷

In 1981 the legislature added a defense for hunting game with a handgun.²⁸ In 1987 there were three minor changes made to the law. First, law enforcement officers were allowed to carry a weapon at any time.²⁹ Second, the list of knives was expanded

27. Act of Apr. 3, 1975, No. 696, § 1, 1975 Ark. Acts 1872, 1872–73 (codified at ARK. STATS. ANN. § 41–3151). *See generally* Nestrud, *supra* note 20, at 572.

28. Act of Mar. 28, 1981, No. 813, sec. 1, § 3, 1981 Ark. Acts 1835, 1835–36 (codified at ARK. STATS. ANN. § 41–3151).

29. Act of Apr. 7, 1987, No. 734, sec. 1, § 3, 1987 Ark. Acts 1672, 1672–74 (codified at ARK. STATS. ANN. § 41–3151).

to “include throwing stars, switchblades, and butterfly knives.”³⁰ And third, the penalty was increased for carrying a weapon into “an establishment that sells alcoholic beverages.”³¹

In 1995 the law was changed to allow carrying a handgun in a car if the driver or passenger had a concealed-carry license.³² The “journey” exception was narrowed in 2003 to exclude carrying a weapon “through a commercial airport when presenting at the security checkpoint in the airport” and to exclude carrying a weapon in a flier’s checked baggage if the weapon is not “lawfully declared.”³³ Superficial changes were made to the statutory language in 2005.³⁴

In 2013 the legislature passed a minor amendment and a major one. The minor amendment allowed prosecuting attorneys and their deputies to carry weapons if allowed by office policy.³⁵

The major change was made by Act 746 of 2013 (additions are underlined, deletions struck):

(a) A person commits the offense of carrying a weapon if he or she *possesses* a handgun, knife, or club on or about his or her person, in a vehicle occupied by him or her, or otherwise readily available for use with a purpose to attempt to unlawfully employ the handgun, knife, or club as a weapon against a person.

(b) As used in this section:

(1) “Club” means any instrument that is specially designed, made, or adapted for the purpose of inflicting serious physical injury or death by striking, including a blackjack, billie, and sap;

(2) “Handgun” means any firearm with a barrel length of less than twelve inches (12”) that is designed, made, or adapted to be fired with one (1) hand; ~~and~~

30. Act of Mar. 17, 1987, No. 266, § 1, 1987 Ark. Acts 523, 524 (codified at ARK. STATS. ANN. § 41-3151).

31. Act of Apr. 2, 1987, No. 556, sec. 1, § 4, 1987 Ark. Acts 1230, 1230 (codified at ARK. STATS. ANN. § 41-3151).

32. Act of Mar. 31, 1995, No. 832, § 1, 1995 Ark. Acts 3644, 3646 (codified at ARK. CODE ANN. § 5-73-120(c)(8)).

33. Act of Apr. 10, 2003, No. 1267, § 2, 2003 Ark. Acts 4366, 4369 (codified at ARK. CODE ANN. § 5-73-120(c)(4)).

34. Act of Apr. 11, 2005, No. 1994, § 293, 2005 Ark. Acts 6932, 7198-99 (codified at ARK. CODE ANN. § 5-73-120).

35. Act of Mar. 28, 2013, No. 539, § 2, 2013 ARK. ACTS 2063, 2064 (codified at ARK. CODE ANN. § 5-73-120(c)(9)).

(3) “Journey” means travel beyond the county in which a person lives; and

~~(3)(A)~~ (4) “Knife” means any bladed hand instrument three inches (3”) or longer that is capable of inflicting serious physical injury or death by cutting or stabbing;

~~(B) “Knife” includes~~ including a dirk, a sword or spear in a cane, a razor, an ice pick, a throwing star, a switchblade, and a butterfly knife.

~~(c) It is a defense to a prosecution~~ permissible to carry a handgun under this section ~~that~~ if at the time of the act of carrying a weapon:

(1) The person is in his or her own dwelling, or place of business, or on property in which he or she has a possessory or proprietary interest;

(2) The person is a law enforcement officer, correctional officer, or member of the armed forces acting in the course and scope of his or her official duties;

(3) The person is assisting a law enforcement officer, correctional officer, or member of the armed forces acting in the course and scope of his or her official duties pursuant to the direction or request of the law enforcement officer, correctional officer, or member of the armed forces;

(4) The person is carrying a weapon when upon a journey, unless the journey is through a commercial airport when presenting at the security checkpoint in the airport or is in the person’s checked baggage and is not a lawfully declared weapon;

(5) The person is a ~~licensed~~ registered commissioned security guard acting in the course and scope of his or her duties;

(6) The person is hunting game with a handgun that may be hunted with a handgun under rules and regulations of the Arkansas State Game and Fish Commission or is en route to or from a hunting area for the purpose of hunting game with a handgun;

(7) The person is a certified law enforcement officer;
or

(8) The person ~~is in a motor vehicle~~ is in possession of a concealed handgun and ~~the person~~ has a valid license to carry a concealed ~~weapon pursuant to~~ handgun under § 5-73-

301 et seq., or recognized under § 5-73-321 and is not in a prohibited place as defined by § 5-73-306; or

(9) The person is in possession of a handgun and is a retired law enforcement officer with a valid concealed carry authorization issued under federal or state law.

~~(d) (1) Any person who carries a weapon into an establishment that sells alcoholic beverages is guilty of a misdemeanor and subject to a fine of not more than two thousand five hundred dollars (\$2,500) or imprisonment for not more than one (1) year, or both.~~

~~(2) Otherwise, carrying~~ Carrying a weapon is a Class A misdemeanor.³⁶

The Court of Appeals in *Taff v. State* interpreted subsection (a) as amended by Act 746 of 2013.³⁷ In particular, the court addressed the new requirement that the person possess a handgun or other weapon “with a purpose . . . to *unlawfully* employ the handgun, knife, or club as a weapon against a person.”³⁸

II. The Prosecution of Jamie Taff in Montgomery County Circuit Court.

A. The Facts

On April 4, 2017, the sheriff’s office in Montgomery County, Arkansas, got a call from a convenience store clerk in Joplin.³⁹ The clerk said a man wearing a white shirt (Jamie Taff) had a pistol in his waistband, was acting suspicious, and was repeatedly walking in and out of the store.⁴⁰ The clerk soon called again, and told the dispatcher that the man had left the store and was walking east.⁴¹ Officers soon found a man wearing a white shirt a couple of miles east of the store, walking along the highway.⁴²

36. Act of Apr. 4, 2013, No. 746, § 2, 2013 Ark. Acts 2783, 2785–87 (codified at ARK. CODE ANN. § 5–73–120).

37. 2018 Ark. App. 488, 562 S.W.3d 877.

38. ARK. CODE ANN. § 5–73–120(a) (1987) (amended 2013) (emphasis added).

39. *Taff*, 2018 Ark. App. 488, at *1, 562 S.W.3d at 879.

40. *Id.* at *1–2, 562 S.W.3d at 879.

41. *Id.* at *2, 562 S.W.3d at 879.

42. *Id.* at *2, 562 S.W.3d at 879.

The officer turned on his blue lights and made a U-turn toward the same side of the highway as Taff.⁴³ In his arrest report, the officer said that he saw what he thought was the outline of a pistol in Taff's right pants pocket with his shirt covering the handle.⁴⁴ Taff turned toward the officers' vehicle, squared up, reached in his left pocket and then started to reach around to the right side.⁴⁵ Officer Davis drew his weapon and ordered Taff to put his hands up.⁴⁶ Officers then searched Taff's clothing and found a handgun and about two ounces of methamphetamine.⁴⁷

Taff was arrested and charged with two felony offenses: simultaneous possession of drugs and a firearm, a Class Y felony for which he faced life in prison, and possession of more than ten grams but less than 200 grams of methamphetamine with the purpose to deliver, a Class A felony.⁴⁸ Taff was not charged with the offense of "carrying a weapon."⁴⁹

After he was arraigned in the Montgomery County Circuit Court, Taff filed a motion to suppress the methamphetamine and the handgun seized by officers.⁵⁰ At the pretrial hearing on that motion,⁵¹ "Officer Davis testified that he pulled over to make contact with Taff to 'investigate suspicious behavior' and 'to see what was going on' in order to 'protect the community.'"⁵² Davis acknowledged he did not see Taff commit any traffic violations or other crimes before turning on his blue lights. Moreover the officer denied that he was investigating a crime when he initiated his blue lights; he said that he was investigating "a suspicious person, the way [Taff] was acting."⁵³ Davis admitted that the information he received about Taff's conduct in the convenience

43. *Id.* at *2, 562 S.W.3d at 879.

44. *Id.* at *2, 562 S.W.3d at 879.

45. *Taff*, 2018 Ark. App. 488, at *2, 562 S.W.3d at 879.

46. *Id.* at *2, 562 S.W.3d at 879.

47. *Id.* at *2, 562 S.W.3d at 879.

48. *See id.* at *2, 562 S.W.3d at 879; ARK. CODE ANN. § 5-74-106 (1993) (amended 2011); ARK. CODE ANN. § 5-64-420(b)(3) (2011). A Class Y felony is punishable by imprisonment for ten to forty years, or life. ARK. CODE ANN. § 5-4-401(a)(1) (1987). A Class A felony is punishable by imprisonment for six to forty years, or a fine up to \$15,000, or both imprisonment and a fine. ARK. CODE ANN. § 5-4-201(a)(1), -401(a)(2).

49. ARK. CODE ANN. § 5-73-120 (1987) (amended 2013).

50. *Taff*, 2018 Ark. App. 488, at *2-3, 562 S.W.3d at 879.

51. *Id.* at *3, 562 S.W.3d at 879.

52. *Id.* at *3, 562 S.W.3d at 879.

53. *Id.* at *3, 562 S.W.3d at 879-80.

store did not involve the commission of any crime: he had no reason to think that Taff had threatened anyone, or stolen anything, or brandished his handgun, or intended to do fight anyone, or intended to use his handgun at anyone.⁵⁴ Davis also acknowledged that he heard on the second call from dispatch that Taff had left the vicinity of the store and that Taff had walked two miles away from the store along Highway 270 heading toward the county line when officers reached him.⁵⁵

B. Procedural History

The circuit court judge found that Taff was “seized” for Fourth Amendment purposes when the officer turned on his car’s blue lights. But the court found this seizure was allowed by Rule 3.1 of the Arkansas Rules of Criminal Procedure because it was reasonable for the officer to detain Taff to “verif[y] his identification and to determine the lawfulness of his conduct.”⁵⁶ The trial court therefore denied Taff’s suppression motion. Having lost the suppression motion, Taff’s attorneys negotiated a “conditional plea” agreement with the prosecuting attorney, which allows a defendant to plead guilty to an offense and still get appellate review of an underlying suppression issue.⁵⁷ Taff’s conditional plea to both charges was approved by the circuit court, and Taff was sentenced to fifteen years’ imprisonment.⁵⁸

C. Briefing in the Arkansas Court of Appeals

On appeal, Taff argued that law enforcement’s initial contact with him was an unconstitutional seizure such that all evidence seized during a subsequent search of his clothing was “fruit of the poisonous tree.”⁵⁹ Specifically, Taff argued that his mere

54. *Id.* at *3, 562 S.W.3d at 880.

55. *Id.* at *4, 562 S.W.3d at 880.

56. *Taff*, 2018 Ark. App. 488, at *4, 562 S.W.3d at 880.

57. ARK. R. CRIM. P. 24.3(b)(i).

58. *Taff*, 2018 Ark. App. 488, at *5, 562 S.W.3d at 880.

59. Brief for Appellant at Arg. 1, *Taff*, 2018 Ark. App. 488, 562 S.W.3d 877 (No. CR–18–353). “Fruit of the poisonous tree” refers to evidence derived, even indirectly, from official misconduct. For example, suppose police detain a person and he incriminates himself under questioning. Based on what he says, the officers might ask for permission to then search his house. Even if the detainee consents to the search, the evidence found in the house might still be objectionable. For a similar fact pattern, *see* *Summers v. State*, 90 Ark. App.

possession of a pistol did not constitute reasonable suspicion of any crime under Arkansas law following the 2013 amendment to the statute defining the crime of carrying a weapon.⁶⁰ Taff also quoted a 2015 opinion by the attorney general that carrying a handgun, without more, is not a crime in Arkansas.⁶¹

The State argued that Taff was not seized when Officer Davis activated his blue lights because Taff did not actually submit to the officers' show of authority.⁶² The State spent a majority of its brief arguing this point.⁶³ The State further argued that because Taff was not seized because he did not submit to officers' show of authority, the encounter between Officer Davis and Taff was reasonable under Rule 2.2 of the Arkansas Rules of Criminal Procedure.⁶⁴ The State conceived of Taff's "potential criminal activity" as "a man with a gun who was acting suspiciously."⁶⁵ Lastly, the State argued that even if the court found that Officer Davis seized Taff, the encounter was still reasonable under Rule 3.1 of the Arkansas Rules of Criminal Procedure.⁶⁶ The State argued that Taff "misrepresented the point of the Attorney General's opinion."⁶⁷ The State argued that carrying a gun in one's waistband and acting "suspiciously" are enough to establish reasonable suspicion—even if the officer is not investigating a particular crime.⁶⁸

In his reply brief Taff argued that the State wanted "to have its cake and eat it too, [by] claiming to espouse an 'open-carry'

25, 36–37, 203 S.W.3d 638, 645 (2005). The test is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 36, 203 S.W.3d at 645 (quoting *Keenom v. State*, 349 Ark. 381, 390–91, 80 S.W.3d 743, 748–49 (2002)); *see also* ARK. R. CRIM. P. 16.2(a)(4) (suppression of evidence obtained as a result of other evidence that was itself discovered by means of an illegal search, an involuntary confession, etc.).

60. Brief for Appellant, *supra* note 59, at Arg. 6–7 (citing ARK. CODE ANN. § 5–73–120 (1987) (amended 2013)).

61. *Id.* (citing Ark. Att'y Gen. Op. 2015–064 (Aug. 28, 2015)).

62. Brief for Appellee at 6, *Taff*, 2018 Ark. App. 488, 562 S.W.3d 877 (No. CR–18–353).

63. *Id.* at 6–10.

64. *Id.* at 10.

65. *Id.* at 12.

66. *Id.* at 13.

67. *Id.* at 14 n.3.

68. Brief for Appellee at 15, *Taff*, 2018 Ark. App. 488, 572 S.W.3d 877 (No. CR–18–353).

position while working to wither away individual gun rights in cases such as this. Open-carry principles apply to all Arkansans, even those later found to be in possession of alleged controlled substances.”⁶⁹

III. The Court of Appeals’ Decision in *Taff v. State*

The Arkansas Court of Appeals reversed Taff’s conviction and remanded his case for a new trial on October 17, 2018.⁷⁰ The court noted that “by Officer Davis’s own testimony, he was not investigating a crime at the time he engaged the blue lights.”⁷¹ The Court found that “[m]erely possessing a weapon is not a crime in the State of Arkansas.”⁷² In construing the carrying a weapon statute, the *Taff* court found that:

[u]nder the clear language of section 5-73-120(a), the possessor of a handgun must have an unlawful intent to employ it as a weapon against a person in order to make that possession a criminal act. Under the rule of lenity, any doubts as to the interpretation of a criminal statute are resolved in favor of the defendant.⁷³

Further, the *Taff* court held that “[m]erely acting suspicious does not equate to reasonable suspicion under either the Fourth Amendment or Arkansas law.”⁷⁴

Ultimately, the Court of Appeals found that the initial seizure was unconstitutional and all evidence seized as a result of that initial illegality should have been suppressed.⁷⁵ On remand, all charges against Taff were dismissed.⁷⁶

69. Reply Brief for Appellant at 6, *Taff*, 2018 Ark. App. 488, 572 S.W.3d 877 (No. CR–18–353) (citing Ark. Att’y Gen. Op. 2015–064 (Aug. 28, 2015)).

70. *Taff*, 2018 Ark. App. 488, *10, 572 S.W.3d 877, 883.

71. *Id.* at *9, 562 S.W.3d at 882.

72. *Id.* at *9, 562 S.W.3d at 882 (citing ARK. CODE ANN. § 5–73–120(a); Ark. Att’y Gen. Op. 2015–064 (Aug. 28, 2015)).

73. *Id.* at *9–10, 562 S.W.3d at 882–83 (citing *Williams v. State*, 364 Ark. 203, 208, 217 S.W.3d 817, 819–20 (2005)).

74. *Id.* at *9, 562 S.W.3d at 882.

75. *Id.* at *10, 562 S.W.3d at 883.

76. Order to Dismiss, *State v. Taff*, No. 49CR–17–35 (Cir. Ct. Montgomery Cty., Ark., Feb. 5, 2019), available at <http://caseinfo.arcourts.gov> (click “Display Case Information and Activities,” then search Case ID “49CR–17–35”).

A. What Was Not Contained in the *Taff* Opinion

The terms “constitutional carry,” “open carry,” “unconcealed carry,” and “Second Amendment” do not appear once in the *Taff* opinion. Aside from a brief mention of the Second Amendment in the lower court,⁷⁷ none of these terms appear anywhere in the appellate briefing for the *Taff* case. Rather, *Taff* was a Fourth Amendment case, and a case involving statutory construction of a criminal statute.

Taff was the predictable result of an imperfect statute. As Professor Laurent Sacharoff and other legal commentators predicted as early as 2014, the rule of lenity dictated the result in *Taff* despite the legislative intent in enacting the 2013 amendments.⁷⁸

B. The Attorney General’s Reaction to *Taff*: Silence

The Attorney General filed neither a petition for review in the Arkansas Supreme Court nor a petition for rehearing in the Court of Appeals.⁷⁹ This is odd, because the Attorney General in 2018 lamented the clouded state of the law that supreme court review could have fixed.⁸⁰ In the 2018 opinion, the Attorney General advised that the courts may or may not apply a rebuttable presumption:

[I]t is my responsibility to advise that, based on the current state of precedent from the Arkansas Supreme Court, there is a real chance such an argument could fail, and the courts will apply a (rebuttable) presumption of mal-intent. Or, at least, the courts will allow the carrying of a concealed handgun without a concealed-carry license to be used as evidence of mal-intent. Given the foregoing, the courts may also conclude that carrying a concealed handgun without a concealed-carry license provides reasonable suspicion (and

77. See Brief for Appellant, *supra* note 59, at Ab. 5 (abstract of suppression hearing in trial court).

78. As early as 2014, legal commentators predicted the rule of lenity would dictate this very result. See Laurent Sacharoff & Jacob Worlow, *Open Carry in Arkansas: An Ambiguous Statute*, 2014 ARK. L. NOTES 1548, 1548; J. Harrison Berry, Comment, *Arkansas Open Carry: Understanding Law Enforcement’s Legal Capability Under a Difficult Statute*, 70 ARK. L. REV. 139, 163–65 (2017).

79. See, ARK. SUP. CT. R. 2–3, 2–4.

80. Ark. Att’y Gen. Op. 2018–002, at 2–3 (June 15, 2018).

potentially probable cause) for a law-enforcement officer to detain a citizen and make inquiries regarding his intent.⁸¹

Perhaps timing played a role. The day following the deadline for filing the petition for rehearing, Tuesday, November 6, 2018, was Election Day in the midterm elections, including in the contested race for Arkansas Attorney General between incumbent Republican Leslie Rutledge and her Democratic challenger Mike Lee.⁸²

C. The Legislature's Reaction to *Taff*: Adulation

At one point during discussion in the House Judiciary Committee related to the House resolution, Rep. Jamie Scott suggested waiting until the Arkansas Supreme Court issued a ruling on *Taff*.⁸³ Unfortunately, this is simply not a legal possibility. The State did not attempt to appeal the *Taff* by filing a petition for rehearing in the Court of Appeals or by filing a petition for review in the Arkansas Supreme Court.⁸⁴

Perhaps timing explains why. The *Taff* opinion issued on October 17, 2018. Under appellate rules in effect at the time, the State had 18 days to file an appeal of that decision.⁸⁵ The deadline for that filing was thus November 5, 2018, just one day before Election Day 2018.⁸⁶

Regardless of whether the Attorney General's to file a petition for review in the Supreme Court was politically motivated or not, it robbed everyday Arkansans of the very clarity that the General Assembly later sought to create via its resolutions.

North Little Rock attorney Jeff Wankum spoke against the resolution on February 5, 2018, in the House Judiciary

81. *Id.*

82. John Moritz, *GOP's Rutledge Keeps AG Office*, ARK. DEMOCRAT-GAZETTE (Nov. 7, 2018, 4:30 AM), <https://www.arkansasonline.com/news/2018/nov/07/gop-s-rutledge-keeps-ag-office-20181107/?latest>.

83. Feb. 12, 2019, House Judiciary Committee, Comments, at 10:44:00, <https://sg001-harmony.sliq.net/00284/harmony/en/PowerBrowser/PowerBrowserV2/20160329/-1/16771?mediaStartTime=20190212101450#agenda>.

84. See ARK. SUP. CT. R. 2-3.

85. ARK. SUP. CT. R. 2-3(a).

86. See *2018 Election Dates*, MARK MARTIN, SEC'Y OF STATE, ELECTIONS DIV. 2 (2018), <https://www.sos.arkansas.gov/uploads/elections/2018ElectionCalendar.pdf>.

Committee.⁸⁷ “You have to *do* something,” Wankum implored, as opposed to passing a resolution.⁸⁸ As Wankum pointed out, the State’s time to appeal the *Taff* decision had long since passed, so an opinion from the Arkansas Supreme Court was not imminent.⁸⁹ Further, Wankum pointed out that the *Taff* case was not about the Second Amendment in any way, but rather statutory interpretation.⁹⁰ “It’s like a loud gong making a lot of noise and doing nothing.”⁹¹

D. Suggestions for Clarification

In seeking clarity of Arkansans’ gun rights, the legislature did nothing but muddy the already murky waters further by the passage of its two resolutions. Instead, the Legislature must pass a bill—one that ultimately becomes a statute, rather than a mere resolution—explicitly codifying whether Arkansas permits open carry or no, concealed carry without a permit or no.

It can hardly be said that the law is clear as to the status of open carry when two Attorneys General reach diametric conclusions regarding the same law in the span of just two years.⁹² The fact that it took more than five years to get a judicial confirmation of the 2013 amendment to the Carrying a Weapon statute ostensibly opening the proverbial open-carry gates shows the need for further (actual) clarity from the legislature.

Even the Attorney General agrees: “Legislative clarification is certainly warranted.”⁹³ The Attorney General went even further, claiming that:

Confusion surrounding how, when and where an individual may lawfully, freely exercise his or her Second Amendment right to bear arms has increased since the law was changed in 2013. Although confusion of this issue has remained since 2013, the legislature has not passed language during either

87. Feb. 12, 2019, House Judiciary Committee, Comments, *supra* note 83, at 10:44:00.

88. *Id.* at 10:44:48.

89. *Id.* at 10:45:22.

90. *Id.* at 10:45:46.

91. *Id.* at 10:46:18–22.

92. Compare Ark. Att’y Gen. Op. 2015–064, at 10 (Aug. 28, 2015) (Att’y Gen. Leslie Rutledge) (revised carrying-a-weapon statute permits “open carry”), with Ark. Att’y Gen. Op. 2013–047, at 7 (July 8, 2013) (Att’y Gen. Dustin McDaniel) (same statute does not permit “open carry”).

93. Ark. Att’y Gen. Op. 2018–002, at 1 (June 15, 2018).

the 2015 or 2017 legislative sessions to clarify the law. As Attorney General, I will continue to ask the legislature to do so, and I will work with them to ensure any law passed will be constitutional.⁹⁴

E. Looking Ahead

These developments in Arkansas have occurred alongside a national push toward expansion of open-carry or unconcealed-carry in recent years, as Americans may now open-carry handguns in more than 30 states without any sort of permit or license, and are only prevented from open-carrying entirely in five states and the District of Columbia.⁹⁵

Perhaps Arkansas can draw wisdom from one of these other jurisdictions. Alabama, for instance, added a section to the State's Disorderly Conduct statute creating "a rebuttable presumption that the mere carrying of a visible pistol, holstered or secured, in a public place, in and of itself, is not a violation of" the statute.⁹⁶

94. *Id.* at 3.

95. *Open Carry*, GIFFORDS L. CTR., <https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/open-carry/#state> (last visited Feb. 9, 2020).

96. ALA. CODE § 13A-11-7(c) (1975) (amended 2013).