LEGAL DEFENSE TRUST
TRAINING BULLETIN

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JUDGE DECLARES LAW BANNING COPS FROM CARRYING FIREARMS UNCONSTITUTIONAL

Several years ago, in its effort to curb gun violence and to keep firearms out of the hands of criminals and others with violent propensities, the legislature expanded the scope of *Penal Code § 12021* to provide that persons convicted of enumerated crimes including simple battery (*Penal Code § 242*), cannot own, possess or use firearms for a period of ten years following the conviction.

The expansion of *§ 12021* worked a disproportionate penalty upon peace officers who must, of course, carry firearms as a part of their duties.

Initially, at least in the larger departments, attempts were made to locate jobs or positions that would not require affected peace officers to carry firearms. Those early attempts at accommodation of the affected peace officers gave way to the reality that law enforcement agencies cannot maintain positions for officers and deputies who are not permitted to carry firearms in the normal course of duties.

Some judges who were required to sentence law enforcement personnel convicted of one of the enumerated offenses in *§ 12021*, and who recognized the career-ending consequence of the convictions, attempted to draft orders, as part of the sentencing, based on special circumstances findings, which would permit the deputy or officer to own, possess and carry firearms while in the course and scope of employment, so as to preserve the careers of those involved. Other courts attempted to craft sentencing orders that eliminated the penalty in *§ 12021* completely, again based on findings of special circumstances and hardship. The validity of these special sentencing orders and findings are open to serious question because these courts likely did not have jurisdiction to alter the requirements of the statute in even exceptional cases.

In a decision reported on October 4, 1999, a San Diego Superior Court judge found these provisions of *§ 12021* unconstitutional as applied to police officers in violation of the equal protection clause of the Fourteenth Amendment.

In this case, *San Diego Police Officer's Association vs. San Diego County District Attorney, No. 727415*, the judge noted that while the firearms ban in *§12021*

would bar a peace officer convicted of simple battery from carrying a firearm, even on the job, it would not preclude a peace officer convicted of *Penal Code § 149*, assault under color of authority from owning, possessing or carrying firearms. Simple battery is a straight misdemeanor, while assault under color of authority is a "wobbler" and may be charged as a felony. Hence, the inconsistency in the law means that there is no rational relationship between the law and the important legislative objectives it seeks to serve. Put differently, it is irrational to deprive law enforcement personnel of their careers upon conviction of simple battery, while other law enforcement personnel who are convicted of the much more serious offense of assault under color of law, suffer no such disability. Of course, if a law enforcement officer is convicted of a felony assault under color of law, he or she would be barred from being a peace officer under *Penal Code § 1029.* However, in our practice, we have seen many cases where prosecutors decide to charge officers or deputies with a misdemeanor violation of *Penal Code § 149* rather than the felony. In this situation, the irrational application would apply.

After the initial application of *Penal Code § 12021* to working peace officers came to the attention of the legislature, a "one-time exception" was enacted into the law to permit a court to, in effect, relieve the affected peace officer from the firearm disability, but only if the offense charged was domestic violence. Here again, the court found this exception to be irrational. Peace officers convicted of domestic battery could escape the penalty of *§ 12021*, while those convicted of simple battery could not.

The question now arises, what effect does this decision have on California peace officers? The injunction issued by the court prohibits the District Attorney of San Diego County and the City Attorney of San Diego from seeking to enforce the firearms restrictions of this section in regard to police officers in San Diego who are convicted of simple battery. It would also prohibit the police department from attempting to discharge police officers on the grounds that they have been convicted of simple battery and are, therefore, precluded from carrying firearms, rendering them unfit. Of course, the battery conviction itself could be a basis for a misconduct charge under a "conduct unbecoming" theory.

Outside of the County of San Diego, however, this decision has no effect. A different result would obtain if this decision was that of an appellate court, rather than a trial court, and was certified for publication in the Official Reports. However, association counsel and lawyers who represent peace officers charged with simple battery would obviously call the decision of this judge to the attention of the court of jurisdiction and perhaps, seek the same relief as that obtained in San Diego County.

The legislature can cure this problem by rewriting or amending *§ 12021* to either eliminate simple battery from the list of covered offenses, or include *§ 149* as one of the enumerated offenses. Nevertheless, counsel representing peace officers in these situations would be prudent to look for irrational application of the statute in other cases.

We will be watching developments in this case and will keep you advised of its progress. Meanwhile, any peace officer who is facing criminal prosecution for any crime should alert his or her counsel to *§ 12021* because we find, even today, there are many lawyers who are unaware of the disastrous consequences of conviction of one of these offenses for peace officers.