

STATE OF MICHIGAN
IN THE 16TH JUDICIAL DISTRICT COURT
CITY OF LIVONIA

CITY OF LIVONIA,

Plaintiff,

Case No.: 14L041850M
Hon. Kathleen J. McCann

-vs-

RONALD RAYMOND PONKEY,

Defendant.

PAUL A. BERNIER (P39119)
Attorney for Plaintiff
33000 Civic Center Drive, Floor 4
Livonia, MI 48154
(734) 466-2519

AKIVA GOLDMAN & ASSOCIATES
BY: AKIVA E. GOLDMAN (P39518)
MATTHEW M. SCHULTZ (P67679)
Attorneys for Defendant
2107 E. 14 Mile Rd., Ste. 140
Sterling Heights, MI 48310
(586) 268-2400
(586) 939-8266 fax

DEFENDANT'S MOTION TO DISMISS

Defendant, through counsel, states the following in support of his motion:

1. On or about September 9, 2014, Ronald Ponkey, a 62-year-old man with no criminal record, was arrested and cited for brandishing a firearm in public contrary to local ordinance 9.94.140.
2. Said ordinance makes it unlawful to "brandish a firearm in public." The code does not define "brandish."

3. Said ordinance mirrors MCL 750.234e, which makes it a 90-day misdemeanor for a person to “knowingly brandish a firearm in public.” “Brandish” is not defined in Michigan law and there are no reported Michigan cases that define the term.
4. There exists no jury instruction regarding brandishing a firearm.
5. Although Defendant disputes the officer’s narrative and witness statements, for the purpose of this motion, only, Defendant assumes the facts contained within them to be true.
6. The discovery documents/video provided by the Livonia Police Department on October 17, 2014 indicates that there was one witness to the incident, Kevin Mislevy.
7. Witness Mislevy is a manager at the Livonia Meijer located on Middle Belt in Livonia.
8. According to his statement, he was called to the front of the store to assist Defendant’s wife who was upset by the number of cashiers available for checkout. **Exhibit A – Witness Statement; Exhibit B – Police Report.**
9. Witness Mislevy then claims that Defendant’s wife made some derogatory remarks about the people shopping and working at Meijer. **See Ex. A.**
10. Finally, Witness Mislevy claims that Defendant approached him and said, “I know how to fix your cashier problem” before opening his jacket and showing Mr. Mislevy his gun. The witness also alleges that Defendant pointed to his gun. **See Ex. A.**

11. Defendant holds a valid license to carry a concealed pistol (License #266385J).

12. Michigan is an open carry state, and therefore it is lawful to carry a firearm in open and in public.

13. Even if all the allegations of fact purported by plaintiff are true, Defendant's actions do not give rise to the charged crime of brandishing a firearm in public.

14. As such, the charges against Mr. Ponkey must be dismissed.

15. Defendant incorporates the below Brief in Support herein.

WHEREFORE, Defendant respectfully requests that this honorable court grant his motion and dismiss the criminal charge against him.

Respectfully submitted,

AKIVA GOLDMAN & ASSOCIATES

By: Akiva E. Goldman (P39518)
Matthew M. Schultz (P67679)
Attorneys for Defendant
2107 E. 14 Mile Rd., Ste. 140
Sterling Heights, MI 48310
(586) 268-2400

Dated: October 20, 2014

BRIEF IN SUPPORT

Because the word "brandish" is not defined in Michigan law, the court must give it its plain and ordinary meaning, as clear and unambiguous language should be

enforced as written. *In re McLeod USA Telecommunications Services, Inc.* 277 Mich App 602, 609 (2008). An undefined term that is not a “legal term of art” is given the definition found in a lay dictionary. *Bracket v Focus Hope, Inc.*, 482 Mich 269, 275 (2008); MCL 8.3a. Blacks Law Dictionary does not define “brandish”. Therefore, it is necessary to define “brandish” by reviewing its dictionary definition.

In the Michigan State Police Legal Update No. 86 released on October 26, 2010, officers were pointed to Attorney General Opinion No. 7101 for guidance regarding brandishing a weapon. Attorney General Opinion No 7101 states:

Section 234e of the Michigan Penal Code does not define the crime of brandishing a firearm in public. The Michigan Criminal Jury Instructions, published by the Committee on Standard Criminal Jury Instructions, does not include a recommended jury instruction on brandishing a firearm. Research discloses that while the term "brandishing" appears in reported Michigan cases, none of the cases define the term.

In the absence of any reported Michigan appellate court decisions defining "brandishing," it is appropriate to rely upon dictionary definitions. *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). According to *The American Heritage Dictionary, Second College Edition (1982)*, at p 204, the term brandishing is defined as: "1. To wave or flourish menacingly, as a weapon. 2. To display ostentatiously. –n. A menacing or defiant wave or flourish." This definition comports with the meaning ascribed to this term by courts of other jurisdictions. For example, in *United States v Moerman*, 233 F3d 379, 380 (CA 6, 2000), the court recognized that in federal sentencing guidelines, "brandishing" a weapon is defined to mean "that the weapon was pointed or waved about, or displayed in a threatening manner."

Exhibit C – Attorney General Opinion 7101.

Therefore, in light of the fact that “brandishing” a weapon is to point or wave it about or display it in a threatening manner the charges against Defendant should be dismissed. Even if this court takes all of the facts presented by the People as true, Mr. Ponkey’s actions do not fall within that definition. He did not waive or point his gun

about. Nor did he display it in a threatening manner. The gun was displayed as all guns on individuals who choose to avail themselves of the law are displayed – in a holster attached to his body. In fact, the People’s evidence acknowledges that he never touched his gun.

Although reasonable persons in this state and across the country disagree upon what rights should be afforded individuals with guns, the fact is that Michigan is an open carry state that allows its citizens to walk around virtually anywhere they please with a weapon strapped to their body. We are confronted daily with stories of individuals walking their dogs through parks with assault rifles or handguns holstered/harnessed to their bodies. We are confronted with stories of individuals carrying deadly firearms while attending outdoor events with thousands of people present. While this may be foolhardy, it’s nonetheless legal. Frankly, if Mr. Ponkey had chosen to openly carry his gun instead of wearing it behind his vest, he would not have been charged with a crime.

For these reasons, Defendant respectfully requests that this matter be dismissed.

Respectfully submitted,

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