Denver's Property Confiscation Ordinances: Good Targets for HB 1305

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Synopsis: House Bill 1305 would bring Colorado into line with most other states, by declaring that firearms laws must be made at the state level, and not by cities or counties. A leading example of why HB 1305 is needed are the abusive property confiscation ordinances currently in effect in Denver.

"Public Nuisance" Criminal Ordinance: Denver makes various "public nuisances" into a crime for which a person can be fined or jailed, and his property confiscated. According to the definition of "public nuisance," such a nuisance includes the mere possession of a so-called "assault weapon" or the unlawful carrying/transportation of any firearm.(1)

Thus, if a person keeps a semi-automatic M1 rifle in a safe in his home, and never even uses the rifle, the home can be confiscated. It is Orwellian to call private possession of a firearm a "public nuisance."

The ordinance makes no exception for owners who have lawful permits. Thus, under the ordinance, a person carrying a handgun in his car can have his car forfeited *even if he has a permit to carry a handgun.* The City Attorney claims not to use the ordinance against persons with permits, but this claim does not explain why the City Attorney and the Webb administration have resisted all efforts to modify the ordinance so that the ordinance does not apply to lawful gun carrying.

Under section 37-51 of the ordinance, there is a *mandatory* fine of $500 *per day* for violation of the ordinance. Under the current ordinance, simple possession in the home of one unregistered gun for one year would result in a *mandatory* criminal penalty of more than $180,000. This violates state law, which limits the amount of criminal fines which Denver can impose to $1,000.(2) The City Attorney argues out that if a fine grew too high, a defendant could invoke the U.S. Constitution's prohibition against cruel and unusual punishment. This claim ignores the fact that the U.S. Supreme Court has refused to apply the Eighth Amendment in any cases where prison sentences or monetary fines were challenged as being disproportionate to the underlying crime.(3)

Under section 37-53(c)(1) of the criminal ordinance, the mandatory fines may be suspended *only if* the defendant is evicted from his home. Thus, the punishment for not registering a semi-automatic rifle becomes eviction from the home.

"Public Nuisance" Civil Ordinance: Bad as the criminal ordinance is, it is a paragon of scrupulous fairness, compared to the civil ordinance. The first section of the civil ordinance, the "Policy for Civil Abatement," sets the tone, demanding confiscation and loss of property rights "without regard to...the culpability or innocence of those who hold these rights."(4)

The section dealing with "Civil Procedure" is astonishing. The property owner is not allowed to raise equitable defense, or to assert cross claims, or third-party claims. The ordinance even declares that the property owner is *not* an indispensable party to a court proceeding for the confiscation of the property! (5)

Another "Civil Procedure" provision states that it is no defense to confiscation that the property owner, after receiving notice that a nuisance existed on his property, took steps to abate nuisance.(6)

Automobile Seizures: Recall that an automobile may be confiscated if there is a gun in it. There is no exception for guns carried pursuant to a lawful permit (which current state law declares is to be valid throughout the state(7)). Seizure of a vehicle is allowed *without* a prior court hearing.(8) This is a huge hardship to impose on people who may lose their only mode of getting to work or to a doctor.

Once the vehicle is taken, the City Attorney has 30 days to wait to act.(9)

Hearsay Evidence: In contravention of normal American rules of evidence, court are *required* to admit hearsay evidence.(10)

Hearsay evidence is second-hand evidence. An example might be "John said that he heard from somebody that there is an unregistered gun at Smith's house."

The Colorado Rules of Evidence forbid the use of hearsay because it is by definition unreliable and untrustworthy. The Rules of Evidence also create certain exceptions, and allow use of hearsay evidence when there are special circumstances which would make it more reliable (e.g., the hearsay is contained in an official church record; the hearsay is contained in a medical record). The Colorado Rules of Evidence also allow the courts to admit hearsay evidence which is not covered by one of the specific exceptions to the rule against hearsay, when certain safeguards are met.(11)

The Denver ordinance does not come remotely close to qualifying for the exception under Colorado Rules of Evidence 803.

- First, the ordinance requires the admission of hearsay in general, rather than only when special circumstances exist.
- Second, the ordinance contradicts the Colorado Rules of Evidence by requiring the admission of hearsay even when the hearsay lacks the "circumstantial guarantees of trustworthiness" which the Colorado Rules of Evidence demand.

- Third, the ordinance shifts the burden of persuasion on evidentiary issues. Normally, the proponent of questionable evidence (such as hearsay) must show to the court why the evidence should be admitted. But the ordinance forces the admission of hearsay evidence, unless the property owner can prove that the hearsay is unreliable or untrustworthy.

A person's right to the possession of her guns, her car, and her home should not be violated based on rumors or third-hand denunciations. Hearsay evidence which does not meet the standards of the Colorado Rules of Evidence should never be allowed in Colorado courts. There is no reason that public nuisance cases should be based on evidentiary rules different from those applicable every day in Colorado courts.

Affirmative Defenses Don't Count: Under current Colorado law, it is illegal to carry a concealed weapon, but it is an "affirmative defense" if the carrier has a permit, or is carrying in his auto while traveling, his home, or his place of business for lawful protection.(12) In defiance of statewide law, the ordinance specifies: "In determining whether there is probable cause, the Court shall not consider whether any affirmative defenses exist."(13)

Thus, if a person with a lawful concealed carry permit drives through Denver, the City can confiscate the gun and the car, and keep them thirty days without even filing a legal motion. When the car owner finally gets a court hearing, he is not allowed to tell the court that his conduct was lawful!

The City Attorney's office has explained the rationale for this provision:

1. Consideration of affirmative defenses would slow down the proceedings, and make case preparation more difficult for the City Attorney.

This claim is certainly plausible, but it is unpersuasive. Any recognition of the legitimate property rights of people who behave lawfully will slow down administrative seizures of property. But ensuring due process is more important than maximizing convenience of the property-seizing staff.

2. The City Attorney claims to always voluntarily release the cars of people who have legitimate affirmative defenses.

But there is no guarantee that the next City Attorney, or the next Administration, will follow this voluntary policy. The City government has the authority to go as far as the text of the law allows. Besides, why should the car and the gun be confiscated in the first place, when the owner was obeying the law?

Now suppose that the innocent citizen finally gets his car and his gun back. But both have been trashed while in the City of Denver's custody. The citizen has no remedy, since the ordinance requires that even an innocent owner, in order to get his property back, must unconditionally release the City from all damage claims before return of the property.(14)

Can the ordinance be fixed in Denver? This was the question asked by the Senate Judiciary Committee last year, when a predecessor of H.B. 1305 was narrowly defeated. The answer is "no." Last August, the Denver government's Sunset Committee heard extensive testimony about whether the confiscation ordinances should be renewed,(15) and whether they should be modified. In response to statements from attorneys and citizens about the egregiously unfair provisions of the ordinances, the standard response of the representative from the Denver City Attorney was to claim that he enforced the law reasonably. Nevertheless, the City Attorney's office insisted on the retention of every single one of the powers which it claimed never to use.

The City of Denver, at taxpayer expense, sent out alerts to various neighborhood groups urging them to show up to testify against the swarm of "NRA lobbyists" who would be present. (Actually, there were not even any NRA employees or contract lobbyists in the State of Colorado on the day of the hearing.) Although greatly outnumbered by opponents of the ordinances, some citizens who liked the ordinances testified about how the ordinance had been used to shut down various nuisances (such as crack houses) in their neighborhoods, which had been problems for years. In response to questions from the Sunset Committee, none of the citizens were able to explain why the City Attorney or the District Attorney had not used the statewide Public Nuisance Forfeiture laws to address these problems. The statewide laws are powerful and severe, and were drafted specifically for the types of problems about which the citizens testified.

When the Sunset Committee next met, several members, such as Councilwoman Susan Barnes-Gelt (who had not attended the hearing, and who had often been absent from earlier committee meetings) showed up, and insisted that the Committee refuse to consider *any* changes in the ordinance.

The same process took place when the ordinances were re-enacted by the Denver City Council. Citizens were ignored, and the City Council made the ordinances permanent, rejecting all suggestions about at least putting some due process in the ordinances. The only changes made were those drafted by the City Attorney, to make the ordinances even more severe.

The City of Denver's government is under the uncontested control of the Webb administration. The same administration that takes so much property though the confiscation ordinances is not going to allow even small reforms in the ordinances.

Fortunately, there is a remedy. City and county governments are mere creatures of the state government, created for the convenience of the state government. When local governments assault the rights of the citizens of Colorado, it is the duty of the State Government of Colorado, acting through the legislature, to stop those abuses.

HB 1305 fixes the Denver confiscation laws insofar as they apply to firearms, and is therefore an overdue restoration of the lost rights of people who live in or travel through Denver. But HB 1305 only affects one of the many reasons that the Denver government uses to confiscate property. Beyond HB 1305, the legislature should seriously consider legislation to pre-empt *all* local confiscation laws which do not contain the due process protections of the statewide public nuisance laws.

Endnotes

1. Denver Revised Municipal Code, § 37-50(c)9.

2. The fines in the Denver zoning laws are similarly structured, and the State Legislature should take steps to correct these illegal fines as well.

3. *E.g.*, Harmelin v. Michigan, 501 U.S. 957 (1991).

4. Denver R.M.C. § 37-70(a).

5. Denver R.M.C. § 37-72.

6. Denver R.M.C. § 37-72.

7. C.R.S. § 18-12-105.1 ("Any such permit shall be effective in all areas of the state.")

8. Denver R.M.C. § 37-73.

9. Denver R.M.C. § 37-73(c). The City Attorney's office states that is usually acts in a few weeks; but there is no legal requirement that future City Attorneys take one day less than 30 days.

10. The court must admit the evidence "unless the court finds that it is not reasonably reliable and trustworthy." 37-76(b)(5); 37-77(c)(6).

11. Colorado Rules of Evidence 803(24):

Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

12. C.R.S. § 18-12-105.

13. 37-77(b)(5) & 37-77(c)(6).

14. Denver R.M.C. § 37-78(a)(1) & (2).

15. The ordinances were originally enacted to apply for a trial period only. My father, former State Representative Jerry Kopel, was chair of the Committee.

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