

Chapter 166

Offenses Against Public Order; Firearms and Other Weapons

166.005

CASE CITATIONS: *State v. Hecker*, (1924) 109 Or 520, 533, 221 P 808.

LAW REVIEW CITATIONS: 16 OLR 278; 45 OLR 1-36.

166.015

NOTES OF DECISIONS

1. Under former similar statute

- (1) In general
- (2) Force or violence
- (3) Punishment

1. Under former similar statute

(1) **In general.** To constitute the crime of riot, there had to be: (1) the use of force or violence, or threats to use force or violence, accompanied by immediate power of execution; (2) the force or violence or threats had to be by three or more persons acting together (3) without authority of law. *State v. Mizis*, (1906) 48 Or 165, 85 P 611, 86 P 361; *State v. Allen*, (1936) 152 Or 422, 53 P2d 1054.

There need not be direct and positive proof of a common purpose, or that the persons engaged in the riot determined beforehand to do an unlawful act; the common purpose could be implied from the conduct of the parties. *State v. Mizis*, (1906) 48 Or 165, 85 P 611, 86 P 361; *State v. Seeley*, (1906) 51 Or 131, 94 P 37; *State v. Allen*, (1936) 152 Or 422, 53 P2d 1054.

To constitute an "acting together," it was enough if the persons had a common purpose to do the act complained of or were engaged in aiding and assisting one another to accomplish such common purpose, although the individual act of each might have been separate from that of each of the others. *State v. Mizis*, (1906) 48 Or 165, 85 P 611, 86 P 361; *State v. Allen*, (1936) 152 Or 422, 53 P2d 1054.

The indictment was sufficient to charge the crime of riot where it alleged that the defendants "did encourage the other persons participating" in said riot "to acts of violence and force." *State v. Tom Louey*, (1884) 11 Or 326, 8 P 353.

Evidence that a gang of workmen armed with rifles and pistols simultaneously attacked a train crew making like threats and firing shots was sufficient to prove a riot. *State v. Mizis*, (1906) 48 Or 165, 85 P 611, 86 P 31.

(2) **Force or violence.** Whether or not defendant was lawfully resisting arrest by a marshal in the back room of a tavern was immaterial since he broke away from the marshal to participate, with others, in an unlawful assault on the marshal's associates in an adjoining room and it was that unlawful assault for which he was indicted. *State v. Seeley*, (1908) 51 Or 131, 94 P 37.

Instructions relating to right of defendants to resist unlawful arrest were properly refused where unlawful assault occurred before the officer had attempted to take the defendant into custody. *State v. Allen*, (1936) 152 Or 422, 53 P2d 1054.

In an action to recover on a riot insurance policy, the burning of a box factory at night by three persons with

no one else present was not such force or violence as was contemplated by the statute. *Salem Mfg. Co. v. First Am. Fire Ins. Co.*, (1940) 111 F2d 797.

(3) **Punishment.** Every participant in a riot was liable to a penitentiary sentence if a felony was committed in the course of the riot. *State v. Mizis*, (1906) 48 Or 165, 182, 85 P 611, 86 P 361.

FURTHER CITATIONS: *State v. Stephanus*, (1909) 53 Or 135, 137, 99 P 428, 17 Ann Cas 1146; *Portland v. Goodwin*, (1949) 187 Or 409, 420, 210 P2d 577.

ATTY. GEN. OPINIONS: Applicability to persons parading in disguise under the name of Ku Klux Klan, 1920-22, p 564; describing crime of unlawful assembly, 1960-62, p 419.

LAW REVIEW CITATIONS: 18 OLR 254.

166.045

CASE CITATIONS: *Portland v. Parker*, (1914) 69 Or 271, 138 P 852; *In re Shaw*, (1918) 88 Or 174, 171 P 896; *Harlow v. Clow*, (1924) 110 Or 257, 223 P 541; *State v. Wood*, (1948) 183 Or 650, 659, 195 P2d 703; *State v. Gustin*, (1966) 244 Or 531, 419 P2d 429; *State v. Perry*, (1968) 249 Or 76, 436 P2d 252.

ATTY. GEN. OPINIONS: Applicability to persons parading in disguise under the name of the Ku Klux Klan, 1920-22, p 564; violation of blackout as disorderly conduct, 1940-42, p 507; right of citizen to enter school premises, 1964-66, p 194; constitutionality of vagrancy by loitering about public premises, (1970) Vol 34, p 1146.

166.075

NOTES OF DECISIONS

1. Under former similar statute

The statute made no requirement that an actual or threatened breach of the peace be shown. *State v. Sinniger*, (1971) 92 Or App Adv Sh 1825, 486 P2d 1303, Sup Ct review denied.

Use of the flag on the seat of a motor vehicle being operated on a public street was done publicly. *Id.*

The statute made the act of defilement *malum prohibi-tum*. *Id.*

ATTY. GEN. OPINIONS: Use of representation of flag on stationery, 1936-38, p 82.

166.085

NOTES OF DECISIONS

Under a former similar statute an acquittal of a charge of malicious destruction of personal property of another was no bar to a prosecution for illegal disinterment of a human body, though the former prosecution related to the casket in which the body was inclosed. *State v. Magone*, (1899) 33 Or 570, 56 P 648.

ATTY. GEN. OPINIONS: Medical and dental schools claiming and using certain dead bodies of persons dying in public institutions, 1946-48, p 469; whether State Board of Health has authority to remove dead bodies, 1946-48, p 532.

166.190**NOTES OF DECISIONS**

"Toward" as used in this section means "in the direction of." *State v. Trent*, (1927) 122 Or 444, 252 P 975, 259 P 893.

The term "self defense" is employed in a broad sense in this section. *Id.*

One violating this section by purposely pointing a gun at another without intention to take life or do bodily harm is guilty of manslaughter if the latter is killed by the unintentional discharge of the gun. *Id.*

Drawing a gun upon another unnecessarily is involuntary manslaughter if the gun accidentally discharges and kills the person at whom the gun was pointed. *State v. Nodine*, (1953) 198 Or 679, 259 P2d 1056.

This section was constitutional. *Rose v. Gladden*, (1965) 241 Or 202, 405 P2d 543.

FURTHER CITATIONS: *Coghlan v. Miller*, (1922) 106 Or 46, 211 P 163; *Eldred v. Burns*, (1947) 182 Or 394, 416, 188 P2d 154; *State v. Wilson*, (1948) 182 Or 681, 189 P2d 403; *State v. Baker*, (1965) 242 Or 207, 408 P2d 928; *Hibbard v. Gladden*, (1966) 368 F2d 311; *State v. Dalebout*, (1971) 4 Or App 601, 480 P2d 451, Sup Ct review denied.

ATTY. GEN. OPINIONS: Application of section to careless firing of rifle, 1928-30, p 227.

166.210 to 166.480

ATTY. GEN. OPINIONS: Regulation of sale or possession of aerosol tear gas device, (1970) Vol 34, p 1059.

166.210

ATTY. GEN. OPINIONS: Duty of city or county to license firearms dealers, 1966-68, p 31.

166.220

CASE CITATIONS: *State v. Krause*, (1968) 251 Or 318, 445 P2d 500.

166.230**NOTES OF DECISIONS**

Facts constituting aggravation of an alleged offense must be set forth in the original indictment. *State v. Blacker*, (1963) 234 Or 131, 380 P2d 789; *State v. Mershon*, (1969) 1 Or App 314, 460 P2d 363, Sup Ct review denied.

This section is only an enhanced penalty statute. *State v. Engeman*, (1966) 245 Or 209, 420 P2d 389.

The burden is on the defendant to disprove the negative averment that he had no permit to carry a gun. *Id.*

An additional five-year sentence pursuant to this section was not unconstitutional as cruel and unusual punishment. *State v. Humphrey*, (1969) 253 Or 183, 452 P2d 755.

The state has a right to offer evidence on a material averment in the indictment. *State v. Mershon*, (1969) 1 Or App 177, 460 P2d 371.

FURTHER CITATIONS: *State v. Burke*, (1964) 236 Or 366, 388 P2d 467; *Hammon v. Gladden*, (1968) 250 Or 174, 441 P2d 241.

ATTY. GEN. OPINIONS: Duty of city or county to license firearms dealers, 1966-68, p 31.

LAW REVIEW CITATIONS: 39 OLR 342.

166.240

CASE CITATIONS: *State v. Anderson*, (1965) 242 Or 368, 409 P2d 681; *State v. Hollingsworth*, (1970) 2 Or App 186, 465 P2d 490, Sup Ct review denied.

ATTY. GEN. OPINIONS: Regulation of sale or possession of aerosol tear gas device, (1970) Vol 34, p 1059.

166.250 to 166.270

ATTY. GEN. OPINIONS: Duty of city or county to license firearms dealers, 1966-68, p 31.

166.250

CASE CITATIONS: *State v. Blacker*, (1963) 234 Or 131, 380 P2d 789; *State v. Riley*, (1965) 240 Or 521, 402 P2d 741.

ATTY. GEN. OPINIONS: Possession, sale or use of "tear guns," 1928-30, p 399; carrying unconcealed weapon in a vehicle, 1938-40, p 742; area in which a license bestows upon the licensee the right to carry a concealed weapon, 1950-52, p 176.

166.260

ATTY. GEN. OPINIONS: Duties of deputy game wardens in enforcing this section, 1924-26, p 338; authority of person driving a school bus to carry a revolver, 1926-28, p 253.

166.270**NOTES OF DECISIONS**

1. In general
2. Ex-convict
3. Possession
4. Firearm

1. In general

This section does not violate the constitutional guarantees of equal protection or right to bear arms. *State v. Robinson*, (1959) 217 Or 612, 343 P2d 886; *State v. Cartwright*, (1966) 246 Or 120, 418 P2d 822, cert. denied, 386 US 937.

This section was not unconstitutional for vagueness. *State v. Hoover*, (1959) 219 Or 288, 347 P2d 69, 89 ALR2d 695.

Notwithstanding Ore. Const. Art. I, §27, the state, in the exercise of the police power, may provide that the ownership or possession of certain firearms by an ex-convict is a public offense. *State v. Cartwright*, (1966) 246 Or 120, 418 P2d 822, cert. denied, 386 US 937.

2. Ex-convict

Burglary and attempted burglary are offenses against property. *State v. Anderson*, (1965) 241 Or 18, 403 P2d 778.

This section does not require that the facts constituting the prior crime be established to the satisfaction of the jury. *Id.*

Conviction of defendant which was erroneously set aside could not be used as the basis for a conviction under this section. *State v. Latta*, (1965) 241 Or 250, 405 P2d 367.

Probation accompanied by suspension of imposition of sentence or suspension of sentence pronounced is a conviction within the meaning of this section. *State v. Cartwright*, (1966) 246 Or 120, 418 P2d 822, cert. denied, 386 US 937.

This statute is not limited to persons convicted in this state. *State v. Jones*, (1971) 4 Or App 447, 479 P2d 1020.

3. Possession

Knowledge by the driver of a car that there are concealed weapons in the car, available to the driver's use, is evidence of possession, custody or control of such weapons. *State v. Miller*, (1964) 238 Or 411, 395 P2d 159.

Where pistol was under the cushion of a couch 10 to 15 feet from place where defendant was arrested, firearm was in defendant's possession. *State v. Roisland*, (1969) 1 Or App 68, 459 P2d 555.

One may exercise control over what is not in his physical possession. *State v. Clipston*, (1970) 3 Or App 313, 473 P2d 682.

Circumstantial evidence is sufficient to prove possession. *State v. Smith*, (1970) 3 Or App 606, 475 P2d 433, Sup Ct review denied.

4. Firearm

The burden of the state to prove that the weapon was a pistol within the meaning of this section was discharged when the weapon, in apparently good condition, was introduced in evidence, without a further showing that it was in a condition to fire. *State v. Cartwright*, (1966) 246 Or 120, 418 P2d 822, cert. denied, 386 US 937.

FURTHER CITATIONS: *State v. Wood*, (1948) 183 Or 650, 195 P2d 703; *State v. Marshall*, (1963) 234 Or 183, 380 P2d 799; *State v. Burke*, (1964) 236 Or 366, 388 P2d 467; *State v. Turner*, (1964) 237 Or 609, 390 P2d 177; *State v. Riley*, (1965) 240 Or 521, 402 P2d 741; *State v. Thomas*, (1966) 244 Or 377, 418 P2d 837; *State v. Glenn*, (1966) 245 Or 70, 420 P2d 60; *State v. Saunders*, (1970) 1 Or App 620, 464 P2d 712, Sup Ct review denied; *State v. Erickson*, (1970) 1 Or App 546, 464 P2d 707; *State v. Newcomer*, (1970) 2 Or App 181, 465 P2d 916, Sup Ct review denied; *State v. Hall*, (1970) 4 Or App 30, 476 P2d 930; *State v. Miller*, (1971) 5 Or App 501, 484 P2d 1132.

ATTY. GEN. OPINIONS: Applicability to person convicted of felony in another state, 1944-46, p 378; burglary as a felony against the person or property of another, 1946-48, p 245; applicability of this section to a "gopher gun," 1948-50, p 220.

LAW REVIEW CITATIONS: 39 OLR 172; 40 OLR 230.

166.280

ATTY. GEN. OPINIONS: Carrying unconcealed weapon in a vehicle, 1938-40, p 742; duty of city or county to license firearms dealers, 1966-68, p 31.

166.290

ATTY. GEN. OPINIONS: Authority for the issuance of licenses to carry concealed firearms, 1946-48, p 245; area in which a license bestows upon the licensee the right to

carry a concealed weapon, 1950-52, p 176; duty of city or county to license firearms dealers, 1966-68, p 31.

166.300

ATTY. GEN. OPINIONS: Applicability to person who wounded another while hunting deer when a cocked gun accidentally discharged, 1924-26, p 117; injury to someone as essential to a violation of this section, 1928-30, p 227; issuance of hunting license to one who has killed another by the use of firearms but was exonerated from criminal intent, 1930-32, p 147, 1936-38, p 70; length of time prohibition attaches, 1944-46, p 134; restoration of civil rights as abolishing the prohibition, 1944-46, p 149.

166.320

NOTES OF DECISIONS

In an action to recover damages for injuries caused by discharge of spring gun, an instruction stating the provisions of this section was relevant upon the question of punitive damages. *Weis v. Allen*, (1934) 147 Or 670, 35 P2d 478.

LAW REVIEW CITATIONS: 14 OLR 292.

166.410 to 166.470

ATTY. GEN. OPINIONS: Duty of city or county to license firearms dealers, 1966-68, p 31.

166.410

ATTY. GEN. OPINIONS: Possession, use or sale of "tear guns," 1928-30, p 399.

166.420

ATTY. GEN. OPINIONS: Applicability of this section to a "gopher gun," 1948-1950, p 220.

166.440

ATTY. GEN. OPINIONS: Applicability of this section to a "gopher gun," 1948-50, p 220.

166.480

ATTY. GEN. OPINIONS: Furnishing a gun to any child between the ages of 12 and 14 years, (1968) Vol 34, p 350.

166.630

ATTY. GEN. OPINIONS: Penalty for shooting from a public highway, 1922-24, p 799; construction of the word "highway," 1942-44, p 318, 1946-48, p 375.