

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-P-0046
HARRY L. HENDERSON,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2009 CR 0341.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

George G. Keith, 135 Portage Trail, P.O. Box 374, Cuyahoga Falls, OH 44223 (For Defendant-Appellant).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, Harry L. Henderson, appeals his conviction in the Portage County Court of Common Pleas for improper handling of a firearm in a motor vehicle. Appellant claims the trial court should have granted his motion to dismiss the indictment. At issue is whether R.C. 2923.16(B) violates appellant’s right to bear arms embodied in the Ohio and United States Constitutions. For the reasons that follow, we affirm.

{¶2} The statement of facts that follows is based on a stipulation of the parties. On May 3, 2009, appellant, a resident of West Virginia, was operating a motor vehicle in Brimfield Township, Ohio, when he was stopped by a Brimfield Township Police Officer for a traffic violation. When the officer approached appellant's vehicle, appellant told the officer he had a loaded .22 caliber handgun on the floorboard beneath his feet. Appellant had a concealed carry permit from West Virginia, but the permit had expired. Appellant did not have a valid Ohio license to carry a concealed handgun and so was not authorized to transport a loaded handgun in his motor vehicle pursuant to Ohio law.

{¶3} As a result of the stop, appellant was indicted on one count of improperly handling a firearm in a motor vehicle, a felony of the fifth degree, in violation of R.C. 2923.16(B).

{¶4} Appellant filed a motion to dismiss, arguing the statute under which he was charged, R.C. 2923.16(B), is an "overbroad restriction" of his right to bear arms and defend himself in violation of the Ohio and United States Constitutions on its face and as applied to him. The state filed a brief in opposition, arguing that the Second Amendment of the United States Constitution does not apply to the states and that this court has previously held that R.C. 2923.16(B) is constitutional.

{¶5} The trial court denied appellant's motion to dismiss in light of *State v. Brown*, 168 Ohio App.3d 314, 2006-Ohio-4174, in which this court held that R.C. 2923.16(B) is constitutional.

{¶6} Appellant subsequently pled no contest to the charge and was found guilty, following which he was sentenced to community control sanctions.

{¶7} Appellant appeals the trial court's judgment, asserting the following as his sole assignment of error:

{¶8} "The trial court erred in failing to grant Mr. Henderson's motion to dismiss, as R.C. 2923.16(B) constitutes an unreasonable infringement on the right to bear arms for self-protection contained within the Ohio and United States Constitutions."

{¶9} Appellant concedes the right to bear arms is not absolute and may be limited by reasonable restrictions. However, he argues the trial court erred in denying his motion to dismiss because, he contends, R.C. 2923.16(B), which prohibits transporting a loaded firearm in a motor vehicle if it is accessible to the operator without leaving the vehicle, unreasonably infringes his right to bear arms. We do not agree.

{¶10} An appellate court reviews a trial court's denial of a motion to dismiss de novo. *State v. Perry*, 8th Dist. No. 89819, 2008-Ohio-2368, ¶20. Further, challenges to constitutionality are subject to de novo review. *Id.* at ¶22. De novo review is independent and without deference to the trial court's determination. *Id.*

{¶11} This court has held that "there is a strong presumption that all legislative enactments are constitutional." *State v. Ferraiolo*, 140 Ohio App.3d 585, 586 (11th Dist.2000), citing *State v. Collier*, 62 Ohio St.3d 267, 269 (1991). Before a court may declare a legislative enactment unconstitutional, the legislation and constitutional provisions must be clearly incompatible. *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142 (1955), paragraph one of the syllabus. "That presumption of validity of such legislative enactment cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the constitution." *Xenia v. Schmidt*, 101 Ohio St. 437 (1920), paragraph two of the

syllabus; *State ex rel. Durbin v. Smith*, 102 Ohio St. 591, 600-601 (1921); *Dickman, supra*, at 147. Moreover, the party alleging that a legislative enactment is unconstitutional must prove this assertion beyond a reasonable doubt in order to prevail. *Collier, supra*. Accordingly, we begin our analysis with the strong presumption that R.C. 2923.16(B) is constitutional.

{¶12} A statute may be challenged on constitutional grounds in two ways: (1) that the statute is unconstitutional on its face, or (2) that it is unconstitutional as applied to the facts of the case. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶37, citing *Belden v. Union Central Life Ins. Co.*, 143 Ohio St. 329 (1944), paragraph four of the syllabus. To mount a successful facial challenge, the party challenging the statute must demonstrate that there is no set of facts under which the statute would be valid, i.e., that the law is unconstitutional in all of its applications. *Id.*, citing *United States v. Salerno*, 481 U.S. 739, 745 (1987). A facial challenge permits a defendant to challenge a statute due to its effect on conduct other than the conduct for which the defendant is charged, thus protecting the right to engage in conduct not directly before the court. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). Where it is claimed that a statute is unconstitutional as applied, the challenger must present clear and convincing evidence of a presently existing set of facts that makes the statute unconstitutional when applied to those facts. *Id.*, citing *Belden, supra*.

{¶13} Section 4, Article I of the Ohio Constitution provides: “*The people have the right to bear arms for their defense and security*; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.” (Emphasis added.)

{¶14} Further, the Second Amendment to the United States Constitution provides: “A well regulated Militia, being necessary to the security of a free State, *the right of the people to keep and bear Arms, shall not be infringed.*” (Emphasis added.)

{¶15} The statute at issue here is R.C. 2923.16(B), the applicable version of which was enacted effective September 9, 2008, which provides: “(B) No person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle.”

{¶16} The Supreme Court of Ohio has considered the parameters of the right to bear arms in a series of cases, which, as pertinent to our analysis, began with *Arnold v. Cleveland*, 67 Ohio St.3d 35 (1993). In *Arnold*, the Supreme Court considered a challenge based on an alleged violation of the Ohio Constitution to a Cleveland ordinance that banned the possession and sale of assault weapons.

{¶17} The court in *Arnold* held that “Section 4, Article I of the Ohio Constitution confers upon the people of Ohio the fundamental right to bear arms. However, this right is not absolute.” *Id.* at 46. The court explained that “[t]he authority to regulate or limit constitutional guarantees has been commonly referred to as the police power.” *Id.* “Laws or ordinances passed by virtue of the police power which limit or abrogate constitutionally guaranteed rights must not be arbitrary, discriminatory, capricious or unreasonable and must bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public.” *Id.*, quoting *Cincinnati v. Correll*, 141 Ohio St. 535, 539 (1943). Specifically, the court in *Arnold* held that “firearm controls are within the ambit of the police power.” *Id.* at 47. Consequently, the court held:

{¶18} To meet the divergent needs and evolving conditions of society, legislation pursuant to the police power needs to be enacted. Almost every exercise of this authority will, in most if not all instances, interfere with a personal * * * liberty. Therefore, the test is one of reasonableness. * * * Here, the question is whether the legislation is a reasonable regulation, promoting the welfare and safety of the people of Cleveland. (Footnote omitted.) *Id.* at 47-48.

{¶19} In upholding the Cleveland ordinance, the court in *Arnold* held:

{¶20} [W]e believe that the ordinance, while admittedly broad in its scope, is a reasonable exercise of the municipality's police power. The ultimate objective of the legislation appears to be public safety. To reach this end, the municipality is attempting to limit the accessibility of certain generally recognized dangerous firearms. *Id.* at 48.

{¶21} The court in *Arnold* held that, although the ordinance at issue prohibited the possession and sale of all assault weapons, the police power includes the power to prohibit, and, since the city did not ban all firearms, the ordinance was a proper exercise of the police power and did not violate the Ohio Constitution. *Id.* at 49.

{¶22} Ten years later, in *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, the plaintiffs, who sought an injunction to prevent enforcement of R.C. 2923.12, 2923.16(B), and 2923.16(C), argued that these statutes infringed the right to bear arms pursuant to the Ohio Constitution by prohibiting the carrying of concealed weapons. They also argued these statutes were void for vagueness.

{¶23} The Supreme Court of Ohio in *Klein* held that R.C. 2923.16(B) is not void for vagueness. *Id.* at ¶18. The court also held this statute does not infringe the right to bear arms. *Id.* at ¶3. The Supreme Court held:

{¶24} Section 4, Article I of the Ohio Constitution states: ‘The people have the right to bear arms for their defense and security * * *.’ Today we are asked to determine whether R.C. 2923.12, 2923.16(B) and (C) * * * infringe that right by prohibiting the carrying of concealed weapons. * * * [W]e conclude that R.C. 2923.12 and 2923.16 do not unconstitutionally infringe the right to bear arms. *Id.*

{¶25} Approximately one year after the court’s decision in *Klein* was released, on April 8, 2004, the General Assembly enacted Ohio’s concealed carry law. R.C. 2923.125, *et seq.* As part of the same legislation, the General Assembly expanded the right of Ohio’s citizens to bear arms in a motor vehicle by enacting R.C. 2923.16(E). As with R.C. 2923.16(B), the applicable version of R.C. 2923.16(E) was also enacted effective September 9, 2008, and provides, in pertinent part, as follows:

{¶26} (E) No person who has been issued a license * * * to carry a concealed handgun under section 2923.125 or 2923.1213 of the Revised Code shall do any of the following:

{¶27} (1) Knowingly transport or have a loaded handgun in a motor vehicle unless one of the following applies:

{¶28} (a) The loaded handgun is in a holster on the person’s person.

{¶29} (b) The loaded handgun is in a closed case, bag, box, or other container that is in plain sight and that has a lid, a cover, or a closing mechanism with a zipper, snap, or buckle, which lid, cover, or closing mechanism must be opened for a person to gain access to the handgun.

{¶30} (c) The loaded handgun is securely encased by being stored in a closed, locked glove compartment or vehicle console or in a case that is locked.

{¶31} * * *

{¶32} (3) If the person is the driver or an occupant of a motor vehicle that is stopped as a result of a traffic stop * * *, and if the person is transporting or has a loaded handgun in the motor vehicle * * * in any manner, fail to do any of the following that is applicable:

{¶33} (a) If the person is the driver or an occupant of a motor vehicle stopped as a result of a traffic stop * * *, fail to promptly inform any law enforcement officer who approaches the vehicle while stopped that the person has been issued a license * * * to carry a concealed handgun and that the person then possesses or has a loaded handgun in the motor vehicle * * *.

{¶34} In *State v. Brown*, 168 Ohio App.3d 314, 2006-Ohio-4174, the defendant argued that R.C. 2923.16(E)(1) and (3) “unnecessarily” infringed his right to bear arms under the Ohio Constitution. This court noted that the Supreme Court of Ohio in *Klein*,

supra, held that “R.C. 2923.16(B) and (C) do not unconstitutionally infringe the right to bear arms.” *Brown, supra*, at ¶17, quoting *Klein, supra*, at ¶3. This court stated:

{¶35} Following the Supreme Court of Ohio’s holding in *Klein*[, *supra*,] R.C. 2923.16 was amended, including the additions of current subsections (E)(1) and (3). These subsections were added due to the enactment of Ohio’s concealed carry law. See R.C. 2923.125, et seq. These subsections expanded the right to bear arms in a motor vehicle. Prior to the enactment of these subsections, a loaded firearm was not permitted in the passenger compartment of a motor vehicle. See R.C. 2923.16(B). R.C. 2923.16(E)(1) and (3) permit, with certain limitations, the holder of a concealed carry license to have a loaded firearm in the passenger compartment of a motor vehicle. Since R.C. 2923.16(E)(1) and (3) place less restrictions on the right to bear arms than the former version of the statute, which the Supreme Court of Ohio found to be constitutional, these subsections are constitutional. *Brown, supra*, at ¶18.

{¶36} Further, in holding that the prohibitions in R.C. 2923.16(E)(1) and (3) represent a reasonable exercise of the police power to control the manner in which loaded firearms are transported, this court stated:

{¶37} R.C. 2923.16(E)(1) requires a loaded handgun in the passenger compartment of a motor vehicle to be secured in plain sight in a holster on the licensee’s person, or locked in a glove compartment

or secured case. These restrictions reduce the possibility of the loaded firearm being acquired by a third person and increase safety for police officers approaching the vehicle. R.C. 2923.16(E)(3) requires the concealed carry licensee to promptly notify a law enforcement officer that a loaded firearm is in the vehicle. Likewise, this provision is designed to increase police officer safety by alerting the officer that a loaded firearm is in the vehicle. Both of these subsections are a reasonable use of the state's police power to control the manner in which loaded firearms are transported. *Brown, supra*, at ¶19.

{¶38} Two other Ohio Appellate Districts have also relied on the Supreme Court of Ohio's decision in *Klein, supra*, in holding that R.C. 2923.16(B) does not violate the right to bear arms. In *State v. King*, 2d Dist. No. 24141, 2011-Ohio-3417, the Second District held:

{¶39} Interpreting Ohio's Constitution, the Supreme Court of Ohio has held that R.C. 2923.16(B) does not constitutionally infringe on an individual's right to bear arms. *Klein*[, *supra*.] We see no reason for a different conclusion when applying the Second Amendment of the United States Constitution. *Id.* at ¶25.

{¶40} Likewise, in *State v. Watson*, 157 Ohio App.3d 217, 2004-Ohio-2628 (4th Dist.), the defendant argued that R.C. 2923.16(C), the misdemeanor version of the statute, was unconstitutional because it impermissibly restricted his right to bear arms and was vague. The Fourth District overruled both arguments, stating at ¶20: "In *Klein*,

the Supreme Court of Ohio explicitly rejected both of defendant's arguments, holding that '[R.C.] 2923.16(B) and (C) do not unconstitutionally infringe the right to bear arms' and that 'the affirmative defenses of R.C. 2923.16(C) * * * are not vague.' *Id.*, at ¶3, 18."

{¶41} Further, the United States Supreme Court recently addressed the constitutional right to bear arms in two landmark cases, *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. Chicago*, 130 S.Ct. 3020 (2010). Appellant bases his constitutional challenge on these cases.

{¶42} In *Heller, supra*, the United States Supreme Court considered a Second Amendment challenge to three ordinances enacted by the District of Columbia, which (1) totally banned the possession of handguns in the home and (2) required that any lawfully-owned firearms in the home be disassembled or bound by a trigger lock at all times, rendering them inoperable. The Supreme Court held that "the Second Amendment confers an individual right to keep and bear arms * * *." *Id.* at 622. In explaining this right, the Court held:

{¶43} In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that *Heller* is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home. *Id.* at 635.

{¶44} Further, the Court in *Heller* held that the right to bear arms is not unlimited:

{¶45} Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. * * * For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. *Id.* at 626.

{¶46} Two years later, in *McDonald, supra*, the United States Supreme Court reaffirmed that *Heller* stands for the proposition that “the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense.” *Id.* at 3050. The Court in *McDonald* further held that “the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller.*” *Id.*

{¶47} One issue left unanswered in the foregoing cases is the appropriate standard of review for courts to apply in considering legislation that affects the right to bear arms. While the United States Supreme Court in *Heller* held that the presumption of constitutionality must be more narrow than that provided by the rational basis test, the Court did not specify the appropriate standard of review. *Id.* at 628, fn. 27.

{¶48} We note, however, that, while the Supreme Court of Ohio in *Klein, supra*, did not address the appropriate standard of review, in that case, then-Justice O’Connor, in her dissenting opinion, considered the issue. She stated that, while infringements on fundamental rights, such as the right to bear arms for one’s security and defense, are

generally subject to strict scrutiny, because R.C. 2923.12 merely restricts the manner of exercising the right, the lesser standard of “intermediate scrutiny” is applicable. *Klein, supra*, at ¶23 (O’Connor, J., dissenting). That standard was described by the United States Supreme Court in *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45 (1983) in addressing legislation that regulated free speech. (“The State may * * * enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”)

{¶49} Although appellant argues that R.C. 2923.16(B) infringes the right to bear arms, the statute merely regulates the *manner* in which a person may transport or have a firearm in a motor vehicle *without prohibiting all transportation of such weapons*. Consequently, the intermediate standard of review is the appropriate test to apply in considering R.C. 2923.16(B).

{¶50} We note that R.C. 2923.16(B) involves firearm control and therefore is within the ambit of the police power. *Arnold, supra*, at 47. Because the statute promotes the legislative concern for public safety by limiting the accessibility of dangerous firearms, we hold it is reasonable and therefore a valid exercise of the police power. *Id.*

{¶51} As noted above, appellant has asserted an as-applied and a facial challenge to R.C. 2923.16(B). The analysis of an as-applied challenge properly begins with a review of the elements of the statute being challenged. This is so because where, as here, a defendant is convicted of a “general” charge that is “framed in the words of the statute,” a constitutional challenge to that conviction must focus on the

statute's elements because a "[c]onviction upon a charge not made would be sheer denial of due process." *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940), quoting *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937). R.C. 2923.16(B) required the state to prove that appellant (1) knowingly transported or had (2) a loaded firearm (3) in a motor vehicle (4) in such a manner that the firearm was accessible to him without leaving the vehicle. Thus, the question presented is whether appellant's conviction based on conduct satisfying the foregoing elements violates his Second Amendment right to keep and bear arms, as that right was expressed by the Supreme Court in *Heller*. Otherwise stated, the issue is whether appellant has a Second Amendment right to carry a loaded firearm in his motor vehicle while the firearm is accessible to him without leaving his vehicle.

{¶52} As noted above, in applying the intermediate scrutiny standard to legislation that regulates the Second Amendment, such legislation (1) must be narrowly tailored to serve a significant government interest, and further, it (2) must leave open alternative means of exercising the right. *Perry Ed. Assn., supra*. We apply the same test with regard to the challenge under the Ohio Constitution Article 1, Section 4.

{¶53} Applying these principles here, first, R.C. 2923.16(B) is substantially related to furthering public safety. In order to achieve this goal, R.C. 2923.16(B) prohibits, any person from transporting " * * * a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle." This restriction prevents an operator or passenger from using the loaded firearm as a weapon from inside the car for such criminal activities as drive-by shootings, narcotics transactions, or assaults on police officers. It also reduces the

likelihood that the loaded firearm will be acquired by a third person and increases the safety of police officers approaching the vehicle. For those with a concealed carry permit, there are exceptions and defenses set forth in R.C. 2923.16(E) and (F)(4).

{¶54} In addition, R.C. 2923.16(B) is narrowly tailored to promote public safety. In this respect, R.C. 2923.16(B) does not prohibit possession of a loaded firearm outside motor vehicles, nor does this section prohibit having or transporting loaded firearms in motor vehicles as long as they are only accessible by leaving the vehicle. Rather, R.C. 2923.16(B) is limited only to those individuals, like appellant, who do not have concealed carry permits and who elect to have or transport a loaded firearm in a motor vehicle in such a way that they have access to it without leaving the vehicle. Given these limitations, it is obvious that R.C. 2923.16(B) does not have the purpose or effect of placing a substantial obstacle in the path of appellant's exercise of his Second Amendment right, as announced in *Heller*, "to use arms in defense of hearth and home." *Heller, supra*, at 635.

{¶55} Further, subsequent to the Supreme Court's holding in *Klein, supra*, that R.C. 2923.16(B) does not unconstitutionally infringe the right to bear arms, *id.* at ¶3, the General Assembly enacted R.C. 2923.16(E)(1) and (3), which broadened the right to bear arms in one's vehicle. Under these provisions, several options are made available to vehicle operators with concealed carry permits to transport loaded handguns in a motor vehicle, including the right to carry a loaded handgun in a holster on the operator's person. Since R.C. 2923.16(E)(1) and (3) impose less restrictions on the right to bear arms than the former version of the statute, which the Supreme Court of

Ohio found to be constitutional in *Klein*, we reject appellant's contention that R.C. 2923.16(B) unreasonably interferes with the right to bear arms.

{¶56} Applying the intermediate scrutiny analysis, appellant has failed to establish that R.C. 2923.16(B) violates his constitutional right to bear arms under the Second Amendment or the Ohio Constitution. Consequently, his as-applied challenge fails.

{¶57} We next address appellant's facial challenge. Because neither the Second Amendment nor the Ohio Constitution grants an absolute right to carry a loaded firearm in one's vehicle and appellant has not successfully asserted an as-applied challenge, it necessarily follows that R.C. 2923.16(B) has at least some applications that withstand constitutional scrutiny. Appellant has therefore failed to demonstrate that there is no set of circumstances under which R.C. 2923.16(B) could be found to be valid, a necessary requirement for a successful facial challenge. Since there are occasions when R.C. 2923.16(B) can be constitutionally applied, such as the instant case, appellant's facial challenge to the statute likewise fails.

{¶58} We therefore hold the trial court did not err in granting appellant's motion to dismiss the indictment.

{¶59} For the reasons stated in the opinion of this court, the assignment of error is not well taken. It is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is affirmed.

THOMAS R. WRIGHT, J., concurs in judgment only with Concurring Opinion,

DIANE V. GRENDALL, J., dissents with Dissenting Opinion.

THOMAS R. WRIGHT, J., concurs in judgment only with Concurring Opinion.

{¶60} R.C. 2923.16(B), when viewed in isolation, prohibits transporting a loaded firearm in a motor vehicle if it is accessible to the operator or any passenger without leaving the vehicle. However, R.C. 2923.16(E) expressly permits a person with a license to carry a concealed handgun to transport a loaded handgun within a vehicle provided: (1) the loaded handgun is in a holster on the person; (2) the loaded handgun is in a closed case, bag, box, or other container that is in plain sight and that has a lid, a cover, or a closing mechanism with a zipper, snap, or buckle, which lid, cover, or closing mechanism must be opened for a person to gain access to the handgun; or (3) the loaded handgun is securely encased by being stored in a closed glove compartment or vehicle console or in a case that is locked. Moreover, R.C. 2923.16(F)(5)(a)-(c) states that, except in situations not relevant to this case, anyone with a concealed carry license that is in compliance with R.C. 2923.16(E) cannot be convicted of R.C. 2923.16(B).

{¶61} Viewed in its entirety, therefore, the statutory scheme does not amount to a complete unconditional ban on loaded firearms for use in self defense within a vehicle. This conclusion is especially patent given the code's express allowance for license holders to carry a loaded handgun in a holster on their person for potential use in the event of emergent danger.

{¶62} This court is required to presume the constitutionality of this statute. *Klein v. Leis*, 99 Ohio St.3d 537 (2003); *Arnold v. Cleveland*, 62 Ohio St.3d 35 (1993); *Hilton v. Toledo*, 62 Ohio St.2d 394 (1980). Moreover, legislation "will not be invalidated

unless the challenger establishes that it is unconstitutional beyond a reasonable doubt.”
Arnold, at 39.

{¶63} Appellant has not argued that the licensure requirement is unconstitutional or that all of the available permitted options for transporting a loaded handgun within a vehicle fail to secure his second amendment rights under the United States and Ohio Constitutions. Thus, the constitutional presumption prevails and for this reason alone, appellant’s argument lacks merit.

{¶64} In deciding the case in this manner, simply applying the long standing principle that statutes are presumed constitutional and upholding the statute due to a complete lack of argumentation and briefing on the determinative licensure requirement, the precedential value would be intentionally limited. Thus, the opinion could not be cited for the proposition that the statute either withstood or failed to withstand a substantive constitutional challenge on the licensure requirement.

{¶65} I write further because I disagree with the lead opinion’s express declaration that the statute is substantively constitutional and the dissent’s express declaration that the statute is substantively unconstitutional.

{¶66} The lead opinion’s conclusion is based primarily upon *Brown*. While the lead opinion accurately states both the *Brown* court’s holding and rationale, *Brown*’s rationale is fatally flawed and should be overruled.

{¶67} *Brown* did not expressly examine or analyze whether the licensure requirement is constitutional. Instead, it reasoned that because the Supreme Court of Ohio, in *Klein*, upheld as constitutional the prior version of the statute at issue in which “*** a loaded firearm was not permitted in the passenger compartment of a motor

vehicle,” and because under the current version “R.C 2923.16(E)(1) and (3) permit, with certain limitations, the holder of a concealed carry license to have a loaded firearm in the passenger compartment of a motor vehicle” and because “R.C. 2923.16(E)(1) and (3) place less restrictions on the right to bear arms than the former version of the statute which the Supreme Court of Ohio found to be constitutional, these subsections are constitutional.” *Brown*, 168 Ohio App.3d at 317-318.

{¶68} *Brown* is simply wrong when it states that the Ohio Supreme Court in *Klein* upheld as constitutional the prior version of this statute in which a loaded firearm was not permitted in the passenger compartment of a motor vehicle. In fact, the statutory scheme upheld in *Klein* permitted loaded firearms in a passenger compartment albeit under limited circumstances. See R.C. 2923.16(E) and R.C. 2923.12(C)(1) and (2).

{¶69} “The first affirmative defense is that a citizen may carry a concealed weapon provided that it is (1) carried for defensive purposes, (2) while the citizen is engaged in a lawful business, (3) when it is necessary to conduct a business at a time and place that renders the citizen ‘particularly susceptible to criminal attack,’ such that (4) a ‘prudent person’ would be justified in going armed. R.C. 2923.12(C)(1).

{¶70} “A second affirmative defense to the crime of carrying a concealed weapon may be asserted when the weapon is carried (1) for defensive purposes, (2) while the citizen is engaged in lawful activity, (3) and he has a ‘reasonable cause’ to fear a criminal attack upon himself, a member of his family, or his home, (4) that would justify a ‘prudent person’ in going armed.” R.C. 2923.12(C)(2). *Klein v. Leis*, 146 Ohio App.3d 526, 536, 2002-Ohio-1634.

{¶71} Moreover, *Brown*'s conclusion that R.C. 2923.16(E)(1) and (3) place less restrictions on the right to bear arms is likewise erroneous. The present version broadens the class of persons permitted to have a loaded handgun in the passenger compartment and to that extent is less restrictive. However, it also now requires a license for all persons possessing a loaded firearm, whereas, in the prior version, those who could satisfy the affirmative defenses were not required to have a concealed carry permit. Accordingly, to that extent it is more restrictive.

{¶72} I cannot endorse the lead opinion's reliance on *Brown*. *Brown*'s analysis is based on an erroneous reading of the law and its rationale is logically flawed. Far from relying on *Brown*, I would therefore overrule it.

{¶73} Finally, the lead opinion does not address whether the licensure requirement amounts to a valid constitutional exercise of the state's police power to regulate but expressly declares the statute substantively constitutional. The licensure requirement is not just a pivotal issue, it is dispositive of the statute's constitutionality.

{¶74} Regarding the dissent, it is clear that the statute permits the operator or occupant of a car to have a loaded handgun on his person thus satisfying the self-defense concerns expressed. Accordingly, this statute, presumed constitutional, cannot be declared unconstitutional unless the licensure requirement is unconstitutional. *Klein*, citing *Arnold*. Like the lead opinion, the dissent has not addressed the licensure issue yet expressly declares the statutory scheme unconstitutional on substantive grounds.

{¶75} The constitutional issue in this case, licensure, was not briefed or argued. For this reason alone, appellant's assignment of error lacks merit. Moreover, for the reasons previously stated, this court should overrule *Brown* and address the

constitutionality of the licensure requirement when fully briefed in a future case rather than make a substantive pronouncement one way or the other. Accordingly, I concur in judgment only with the lead opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶76} I respectfully dissent from the majority’s holding that R.C. 2923.16(B) is constitutional and that an individual does not have the right to carry a loaded firearm in his motor vehicle while the firearm is accessible to him without leaving his vehicle.

{¶77} The Second Amendment to the United States Constitution states that “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Moreover, Article I, Section 4 of the Ohio Constitution provides that “[t]he people have the right to bear arms for their defense and security.” Article I, Section 4 was “implemented to allow a person to possess certain firearms for defense of self and property.” *Arnold v. Cleveland*, 67 Ohio St.3d 35, 43, 616 N.E.2d 163 (1993). There is “a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.” *District of Columbia v. Heller*, 554 U.S. 570, 581, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

{¶78} R.C. 2923.16(B) prevents an individual from exercising his right of self-defense. Courts have frequently emphasized the right of an individual to defend himself, his property, and his family. See *Arnold* at 43-44 (“[t]he right of defense of self, property, and family is a fundamental part of our concept of ordered liberty”). The United States Supreme Court has stated that self-defense is a “basic right” and “is ‘the

central component' of the Second Amendment right.” (Citation omitted.) (Emphasis deleted.) *McDonald v. Chicago*, ___ U.S. ___, 130 S.Ct. 3020, 3036, 177 L. Ed. 2d 894 (2010); *Heller* at 592 (the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation”). This need for defense is presumably high when travelling in a vehicle, where an individual is often vulnerable to dangers, especially while stopped in traffic or entering and exiting the vehicle. Moreover, an individual is frequently accompanied by his family and may also be carrying property in his vehicle. The need for self-defense in these scenarios may be as great as the need for self-defense within the home.

{¶79} It is important to note that, as firearms should be allowable for self-defense within a vehicle, the occupant of the vehicle must be able to access the weapon, which is currently prevented by R.C. 2923.16(B), unless an individual possesses a concealed carry license. In *Heller*, although the court’s finding was specific to the use of firearms in the home, the court stated that the requirement that firearms be kept inoperable prevented them from being used for self-defense. See *Heller* at 630 (the requirement that firearms be kept inoperable “makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional”). While the majority notes the safety concerns associated with allowing an individual access to a firearm while inside a vehicle, this conclusion prevents individuals from exercising their right to use a firearm for their own defense. In that regard, it is difficult to say that the state’s regulation of firearms under R.C. 2923.16(B) is narrowly tailored, as the majority asserts.

{¶80} It must also be emphasized that the *Heller* court’s statement that “nothing in our opinion should be taken to cast doubt on * * * laws forbidding the carrying of firearms in sensitive places such as schools and government buildings” is inapplicable to vehicles. *Heller* at 627. There is no evidence that an individual’s *own* vehicle is more similar to a school or a government building than it is to an individual’s home. A vehicle is an individual’s own property and does not share the same characteristics as the “sensitive” areas listed by the *Heller* court. As noted previously, a vehicle is similar to a home because it contains personal property and may create dangerous circumstances which merit the use of self-defense. Therefore, a vehicle should be interpreted in the same manner as a home when it comes to the right discussed in *Heller* to have accessible and operable firearms for protection and defense.

{¶81} The majority cites *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633, for the proposition that R.C. 2923.16(B) is constitutional. However, the court in *Klein* found that R.C. 2923.12 was constitutional and that “there is no constitutional right to bear concealed weapons.” *Id.* at paragraph one of the syllabus. *Klein* refers to R.C. 2923.16(B) only in the context of determining whether it is vague. R.C. 2923.16(B) does not deal with concealed weapons but, instead, only with the improper handling of a firearm and states “[n]o person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle.” Therefore, since the *Klein* court’s holding was based on a different issue, the *Klein* court’s conclusion that there is not a constitutional right to bear a concealed weapon does not preclude a determination that R.C. 2923.16(B) is unconstitutional.

{¶82} Moreover, although the Ohio Supreme Court allowed regulation of concealed weapons, R.C. 2923.16(B) is even more restrictive of an individual's right to bear arms than concealed carry regulations. R.C. 2923.16(B) does not allow a firearm that is accessible to the operator within the vehicle in any manner, while the former concealed carry law, applicable in the present matter, allowed access to a handgun as long as it was in a closed container or a holster. See former R.C. 2923.16(E). It must be emphasized that I am not arguing the issue of whether licensure is necessary or required but simply that preventing *any* driver from accessing his firearm while in his vehicle is unconstitutional.

{¶83} It is important to note that *Klein* was also decided prior to the former version of R.C. 2923.16, which expanded the rights of individuals to carry firearms within their cars, by adding R.C. 2923.16 (E)(1) and (3). In addition, *Klein* was decided before *Heller*, which, as discussed above, emphasizes the right to bear arms for self-defense.

{¶84} Based on the foregoing analysis, I would reverse Henderson's conviction, as R.C. 2932.16(B) is an unconstitutional prohibition on an individual's Second Amendment right to bear arms.