

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 79-1211
	:	
of	:	<u>March 14, 1980</u>
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SUBJECT: "TEAR GAS" DEFINED-A vile-smelling liquid which may be sprayed from its container and which is manufactured and sold for use against humans as a self-defense weapon is "tear gas" within the meaning of Penal Code section 12401.

Nelson P. Kemskey, Director of the Division of Law Enforcement, Department of Justice, has requested an opinion on a question which we have rephrased as follows:

Is a vile-smelling liquid which may be sprayed from its container "tear gas" as defined in Penal Code section 12401 where it is manufactured and sold for use against humans as a self-defense weapon?

CONCLUSION

A vile-smelling liquid which may be sprayed from its container and which is manufactured and sold for use against humans as a self-defense weapon is "tear gas" within the meaning of Penal Code section 12401.

ANALYSIS

The possession and sale of tear gas and tear gas weapons are regulated by chapter 4, title 2 of part 4 of the Penal Code. (Pen. Code, § 12401 *et seq.*)¹

Tear gas for purposes of the chapter is defined by section 12401 as follows:

“‘Tear gas’ as used in this chapter shall apply to and include all liquid, gaseous, or solid substances intended to produce temporary physical discomfort or permanent injury through being vaporized or otherwise dispersed in the air, but does not apply to, and shall not include, any substance registered as an economic poison as provided in Chapter 2 (commencing with Section 12751) of Division 7 of the Agricultural Code provided that such substance is not intended to be used to produce discomfort or injury to human beings.”

The definition of tear gas in section 12401 expands the meaning of the term to include substances not ordinarily thought of as tear gas. It includes all liquid, gaseous, or solid substances “intended” to produce temporary physical discomfort or permanent injury when dispersed in the air. The definition “represents an attempt by the Legislature to keep pace with man’s continually developing capacity to inflict discomfort or harm on his fellow man, including the use of chemicals” (*People v. Horner* (1970) 9 Cal. App. 3d 23, 27.)

We initially note that the instant request concerns a product manufactured and sold as a weapon to repel would be human assailants. In *People v. Horner, supra*, 9 Cal. App. 3d 23, defendant Horner claimed that the phrase “intended to produce physical discomfort or permanent injury” in section 12401 (as it then read) was unconstitutionally vague. Horner argued it could not be ascertained from this definition whether or not the Legislature was referring to the intent of the manufacturer, the seller, or the buyer of the substance. The court conceded the possible existence of a constitutional issue in this regard, but rejected Horner’s contention since it was clear from the facts of the particular case that the substance possessed by Horner was tear gas in the traditional sense of the word and that Horner knew it. Accordingly, the court stated:

“We therefore do not decide whether section 12401, in failing to indicate whose intention determines guilt, is unconstitutionally vague. We should not hold the statute unconstitutional on the basis of a hypothetical situation not before us [citation omitted] so long as the statute as applied is constitutional.” (9 Cal. App. 3d at p. 28.)

¹ Hereinafter all unidentified section references are to the Penal Code.

Likewise, the constitutional issue of vagueness is not material to the present discussion. The question posits the fact that the manufacturer designed the device with the intent that the odor of the substance sprayed from it would be so offensive to human olfactory senses, that an aggressor upon smelling the odor would be persuaded to break off an assault and seek retreat. The device is sold as a weapon for use against a human aggressor. Thus, the device described by the requestor has only one “intended use”—as a weapon to repel a human aggressor. Accordingly, there is no constitutional issue of vagueness suggested by the instant question.

The question to be answered is whether a liquid designed to repel a human by virtue of a vile odor is “intended to produce temporary physical discomfort” within the meaning of section 12401.²

In construing the statute the cardinal rule of interpretation is to ascertain the intent of the Legislature so to effect the purpose of the law. (*Select Base Materials v. Board of Equalization* (1959) 51 Cal. 2d 640, 64.5.) In determining legislative intent, one should first look to the words of the statute and give effect to it according to the usual ordinary import of the language. (*Moyer v. Workmen’s Comp. Appeals Board* (1973) 10 Cal. 3d 222, 230.) Statutes relating to the same subject matter should be construed together and harmonized by considering the statutory framework as a whole and all statutory language should be given a practical and common sense interpretation. (*California Manufacturers Association v. Public Utilities Commission* (1979) 24 Cal. 3d 836, 846; *Moyer v. Workmen’s Comp. Appeals Board*, *supra*, at p. 230.)

Applying these rules to the definition of rear gas we first note that the Legislature used the words “temporary physical discomfort or permanent injury” in describing the intended effects of substances falling within the definition. It is clear from this language that the Legislature had something in mind other than temporary physical injury when it used the word “discomfort.” The word discomfort is defined to include “mental or physical uneasiness less intense and less localized than pain” (Webster’s Third New Internat. Dict., unabridged 1961, p. 645.) The word denotes the “lack of comfort.” (*Id.*) The word “comfort” is defined to include “contented enjoyment in physical or mental well-being.” (*Id.*, p. 454.)

An odor sufficiently vile to repel a human aggressor clearly would cause “physical discomfort” in the ordinary meaning of the word to the aggressor. Such a vile smell could cause choking, coughing, inability to breathe normally and nausea. If such a substance is

² We assume by the use of the word “sprayed” in the question that the liquid is “vaporized or otherwise dispersed in the air” within the meaning of section 12401. (See definition of “spray” in Webster’s Third New Internat. Dict., unabridged 1961 p. 2208.)

designed to be sprayed at a human and thus to repel him, its “intended” purpose is “to produce temporary physical discomfort.”

When section 12401 is read in conjunction with the other provisions of chapter 4, it becomes even more clear that the Legislature intended to include substances such as the one described in the request. Section 12420 specifies that it is a felony to possess tear gas or a tear gas weapon except as permitted under the provisions of chapter 4. Besides certain specific exemptions from the prohibition of section 12420 (§§ 12403–12403.7), the chapter also includes the procedures for the issuance of permits to possess tear gas and tear gas weapons (§§ 12403.7, 12423–12426) and for the granting of licenses to sell tear gas and tear gas weapons (§ 12435).

Article 2 of chapter 4 (§§ 12450–12458) deals with the certification by the Department of Justice of the acceptability of tear gas and tear gas weapons. In Section 12450 prohibits the possession, sale or transportation of any tear gas or tear gas weapons unless the Department of Justice has certified that the particular type and brand of tear gas or tear gas weapon is “acceptable.” Section 12451 defines “acceptable” to mean “that such tear gas or tear gas weapon is reasonably free from any undue hazard when used by, or upon a human being” Factors to be considered in making this determination include the reasonable safety, availability and effectiveness of other tear gas and tear gas weapons to be used under similar circumstances, the amount of hazard inherent in the use of the particular tear gas or tear gas weapon when weighed against the amount of hazard inherent in the kinds of conduct the tear gas or tear gas weapon is designed to control, and the manner in which the tear gas or tear gas weapon is expected to be used as well as the manner in which the manufacturer or seller thereof has recommended that it be used. (§ 12451.)

Section 12455 provides that the Department of Justice may issue an order refusing to certify or recertify or terminating a previously granted certification of any tear gas or tear gas weapon as being acceptable if the department finds the tear gas or tear gas weapon not acceptable for any reason. It lists some reasons for finding a tear gas or a tear gas weapon unacceptable. The reasons include the fact that the item creates a risk of unreasonable danger to human beings which outweighs the social utility of the product, that the product’s effective life does not meet department criteria, and that the product is found to be nonfunctioning or otherwise ineffective. Section 12457.1 authorizes the department to conduct various tests of tear gas and tear gas weapons in connection with its certification function. Section 12458 provides a procedure by which the State Department of Health prepares and transmits a report on any particular type or brand of tear gas for the purposes of determining whether the material would be harmful, toxic or would present any health hazard to human beings.

The statutory scheme of chapter 4 evidences a legislative intent to regulate not only traditional tear gas and tear gas-type weapons, but other substances and weapons which are designed to be used as traditional tear gas substitutes. The certification provisions demonstrate legislative concern that such products may be hazardous because they are either toxic, ineffective or would otherwise cause physical harm.

To use as an example the product described in the instant request, it is possible that contrary to the manufacturer's claims the odor would not be sufficient to repel an aggressor. The odor might only motivate the aggressor to inflict even greater injury upon the user than he had originally intended. On the other hand, the substance in the capsule might be toxic or otherwise might cause un contemplated harm. For a specific example, the requestor has provided us with a copy of an advertisement of a product such as the one described in the request. While the advertisement represents that the product works on the basis of the odor in a dye, it contains a warning in fine print that "the liquid deterrent contains alcohol which if it gets in the eyes may cause severe, temporary eye irritation and vision distortion."³

Thus, it is clear that the definition of tear gas in section 12401 would include a vile-smelling liquid which may be sprayed from its container and which is manufactured and sold and distributed for the purpose of being used as a weapon to repel a human aggressor.

³ By way of this example we do not represent that such a product would be found to be unacceptable under the certification procedures of chapter 4. We merely illustrate the reason for applying for certification procedure to products of that type.