

# Gun Lawyer -- Episode 57 Transcript

## SUMMARY KEYWORDS

firearm, paintball markers, weapon, home, gun, new jersey, pepper spray, carry, law, court, tro, restraining order, victim, stun gun, due process, question, domestic violence, lawyer, case, streets

## SPEAKERS

Evan Nappen, Speaker 3

### **Evan Nappen** 00:19

I'm Evan Nappen, and welcome to Gun Lawyer. I received an email from a person who has a very interesting question that I want to share with you. Now, it does have to do with New Jersey's approach and New Jersey's law. But even if you're not in New Jersey, it is interesting to see how this applies, how Jersey views this question, and changes that are coming. Remember when it comes to the absolute, idiotic approach that New Jersey takes to firearms, weapons and self-defense, you want to be aware of it, so you do not let it happen in whatever jurisdiction you're in.

### **Evan Nappen** 01:06

So, here is the email. It's from Bob, and Bob says, "My friends and I have followed you for a long time. I recently purchased the Bryna weapon. (We'll talk about that in a moment.) I'm sure you're familiar with it (and I am). Do you have any guidance on where and how we can carry or transport it legally in New Jersey? I'm getting confusing information." Not surprising. It is complicated out there. "It's not a gun as you know. It shoots pellets or tear gas and pepper spray mix with an air cartridge but looks like a gun. It came with a holster and a bag to transport it in. So, can we keep it in the car when we are in it? Or in my wife's pocketbook or holster it? Stuff like that. No rush, let me know."

### **Evan Nappen** 02:04

I appreciate the question very much. The Bryna weapon looks like a handgun-size firearm, but it's not a firearm. It uses CO2, and it is similar in function to a paintball marker. It uses .68 caliber balls that look similar to paint balls, which are also majority .68 caliber paintball. But these particular balls are filled with or can be filled with, depending on which version you purchase from the Bryna company, pepper spray or a combination of OC and CS. They have different ammunition, if you will, including some solids and some low-cost stuff that will fire out of this and give you some decent range with it. Essentially, it operates like a paintball marker.

### **Evan Nappen** 03:18

So, the question that first arises is, well, is it or isn't it a firearm in New Jersey? If we look to case law in Jersey on firearms and such, there is actually case law that has discussed paintball markers in New Jersey. Many of you play paintball in New Jersey and are probably aware that paint balls and markers, and I specifically call them paintball markers, not guns, because they are paintball markers. You want to be careful in your language. Painful markers have not been viewed as firearms. Now the Court in a

case, one of the more recent ones, relatively speaking, is called State of New Jersey In The Interest of GC, and it was from 2003. The court was dealing with a juvenile who shot a paintball, and the court calls it a gun, but paintball marker, at a car, and pled guilty. Then challenged on appeal whether that is in fact a firearm, and the court did hold that a paintball gun does not satisfy the statutory definition of a "firearm". But in the same case, the Court did hold that a paintball gun is a weapon, meaning under the statutory definition, and there has to be, in this case there was not, a sufficient support to show there was a threat to harm others to support the conviction. The bottom line here is New Jersey, via the courts, views, paintball markers, not as firearms. But in fact, it can be a weapon and what determines a weapon is essentially how you're going to be using it.

**Evan Nappen 05:20**

So, a kitchen knife or even the back of your shoe can be a weapon if you're using it in that manner. The question here in Jersey, comes down to: is that Bryna something that you can carry? Can you possess, etc? The fact is that since it's not arguably a firearm, and primarily one of the definitions in firearm has to do with size of the projectile, and it is a .68 caliber. It is a designed, of course, to be less than lethal, just like paintball markers. If any of you have played paintball, you know that they sting and they can leave a welt, but it's still not considered a firearm from that. But again, it can be viewed as a weapon. Possession of one of these in your home would come under the exemption under N.J.S. 2C:39-6.e which exempts your possession of firearms, as well as under subsection d of N.J.S. 2C:39-5, possession of other weapons.

**Evan Nappen 06:29**

But here's where it gets very interesting in New Jersey. Can an individual carry a weapon outside the home for self-defense? That becomes the legal question. This also brings in stun guns, and tasers. Can a stun gun or a taser be carried outside the home for self-defense? As a matter of fact, what if any weapons can be carried outside the home for self-defense in New Jersey? See this is the problem that occurred with the Taser stun gun challenge that was brought in New Jersey by a pro Second Amendment group. They entered into a consent order challenging stun guns and tasers in response to the Supreme Court case on the Massachusetts challenge where they found that these less-than-lethal weapons are protected under the Second Amendment.

**Evan Nappen 07:49**

When the consent order was done, there was a memorandum regarding the consent, and it said that the ban under N.J.S. 2C:39-3 where it specifically names stun guns and banned them was invalid and no longer enforceable. So, that's a good thing. We were all happy to see that stun guns themselves are no longer per se prohibited. However, the same memoranda stated that N.J.S. 2C:39-5.d "remains in full force and effect and shall continue to be enforced. So, the N.J.S. 2C:39-5.d prohibition stayed. The N.J.S. 2C:39-5.d in New Jersey is the other weapons prohibition, and the other weapons prohibition is kind of like the garbage can clause for anything else that is a weapon that Jersey wants to ban. It is worded in such a way that it becomes very broad as to what it covers.

**Evan Nappen 09:08**

So, let me read you N.J.S. 2C:39-5.d Other Weapons. It says any person who knowingly has in his possession any other weapon, meaning non firearms, anything else knives, you name it, under

circumstances not manifestly appropriate for such lawful uses as it may have, is guilty of a crime of the fourth degree. Now that's subsection d. Other Weapons. There is an exemption to have other weapons in your home. We are not talking about in your home because you can have weapons in your home. We are talking about outside the home. If you are outside the home, the question is, if you have an Other Weapon, is it legal? Now rationally and logically an individual who doesn't know New Jersey's case law, law decided by the courts, on this might say, well look, the law just prohibits possession of any other weapon, under circumstances not manifestly appropriate for such lawful uses as it may have. You would say, hey, my lawful use is self-defense, baby. I want to have this self-defense, and it's legal. You know, self-defense is legal in Jersey and that is my lawful purpose. That is my lawful use. So, I should be good, right? Wrong.

**Evan Nappen 10:32**

Wrong. You see, that is where the wrong comes in, and that's where people go, what do you mean? This shows you the incredible bias, the incredible state of affairs in New Jersey, because there's a case and its State (of New Jersey) v. (Crisoforo) Montalvo. 162 A.3d 270 (2017). In the Montalvo case, police came to Montalvo's door, and he came to the door with a machete in his hand. He didn't know who was at the door. When the police saw him come to the door with a machete, they charged him with unlawful possession of a weapon. Now, under prior case law, you could not preemptively arm yourself with any weapon for self-defense, even in your home. This is how they tried to proceed.

**Evan Nappen 11:06**

But the court in Montalvo distinguished and said no, now with Heller and the Second Amendment. This is importance of Heller. The ability to have a weapon in your home for self-defense is constitutionally protected, but not outside your home. So, under Montalvo, the individual was legal to come to the threshold of his door with a machete. He was legal to preemptively arm himself for self-defense. But you cannot preemptively arm yourself for self-defense outside the home because that, according to the court, is not a manifestly appropriate for such lawful uses as it may have. And that's the rub. That's a problem. Because if you carry a taser or you carry a stun gun, outside your home for self-defense, you are in violation of N.J.S. 2C:39-5(d), which is crime of the fourth degree. You are looking at up to 18 months in State Prison. It carries over that year in jail; so, it makes you a felon. If you become a felon, you lose all your Second Amendment rights, because now you are a convicted felon. So, you cannot do it legally.

**Evan Nappen 12:46**

Now, what about a pocketknife? Well, I'll tell you this. If you have a pocketknife outside your home and you are carrying it because you open boxes with it, because you cut rope and string with it, because you use it to cut the ends of your cigar off or whatever. If you have a lawful purpose for that knife, it is utilitarian and not self-defense. Then you are okay. So, of course, any pocketknife that I or others might be carrying, we have it for utilitarian reasons for opening boxes and letters and such. As a matter of fact, I do use it for that. But I would never carry such a thing for self-defense in New Jersey because you would not be allowed to do that. You would not be allowed to preemptively arm yourself even with a pocketknife for self-defense.

**Evan Nappen 13:38**

So, back to the stun gun or Taser question. Why are you carrying that outside your home? What are you herding cattle today? I don't think so. There is basically one purpose and one use for a taser and-or a stun gun and that's why you cannot carry it outside the home, even though they are legal to possess, legal to purchase, and legal to have in your home. Well, unfortunately, this Bryna less-than-lethal weapon, which is pretty cool, and I get where they are going with it, does not give New Jerseyans the ability to get around this and carry outside the home. What is your reason to have an essentially a scaled down, handy dandy paintball marker that fires pepper balls, if not for self-defense? That is your reason and therefore, it is not going to fly.

**Evan Nappen 14:40**

It also applies by the way to pepper spray. You cannot carry pepper spray with one exception. There is an exception under N.J.S. 2C:39-6, there is an exemption specifically for pepper spray as long as pepper spray has less than three quarters of an ounce in the container. So, if you have a handheld pepper spray canister or other device and it has under three quarters of an ounce. There is even a great product out there called Lipstick Bodyguard, and It is really cool. It looks like a lipstick, but it actually is a pepper spray canister that holds under three quarters of an ounce. So, you are legal in Jersey to carry it. It is the only weapon for self-defense that Jerseyans are allowed to carry. Other than that New Jersey has decided that when you leave your home, you are to be a victim, not a defender, but a victim of crime and not allowed to defend yourself unless three quarters of an ounce of pepper spray will do the trick.

**Evan Nappen 16:03**

So, this is the current state of affairs, but I say current because as you know and should be aware there's a case pending right now before the United States Supreme Court. The New York State Rifle & Pistol Association versus Bruen (Docket #20-843) is looking at this very issue even though it applies to carry licenses and the granting of permits to carry handguns and looking at the requirements and the law surrounding that. One of the questions that we are hopeful the court is going to finally address is, does the Second Amendment apply outside the home? And if the court says that it does, then that can be a game changer for all kinds of things, not just guns, but tasers and stun guns and Bryna weapons and all of that. So, you see, it can have a very important impact depending on what the court decides.

**Evan Nappen 17:07**

If you really think about this question, the question of whether the Second Amendment applies outside the home, you really get this phony, contrived, distinction that the antis are clinging to in trying to somehow stop Heller from having its broader application. That somehow the Second Amendment only applies to inside your home. Like the Patriots, the shot heard around the world at Lexington and Concord, like that was, fired from a Patriots bedroom? No. How do you think they got it? They got it by going to the place carrying it outside the home. Yeah, that is what our founding fathers knew and believed in. Hopefully the court will set this straight because then it will have a great impact, and we will be able to analyze its impact once that decision comes out. When we get back from the break, I am going to tell you about the BITS myth.

**Speaker 3 18:17**

For over 30 years, Attorney Evan Nappen has seen with rotten laws due to good people. That's why he's dedicated his life to fighting for the rights of America's gun owners. A fearsome courtroom litigator fighting for rights, justice, and freedom. An unrelenting gun rights spokesman tearing away at anti-gun propaganda to expose the truth. Author of six best-selling books on gun rights, including Nappen on Gun Law, a bright orange gun law Bible that sits atop the desk of virtually every lawyer, police chief, firearms dealer and savvy gun owner. That's what made Evan Nappen America's Gun Lawyer. Gun laws are designed to make you a criminal. Don't become the innocent victim of a vicious anti-gun legal system. This is the guy you want on your side. Keep his name and number in your wallet and hope you never have to use it. But if you live, work, or travel with a firearm, the deck is already stacked against you. You can find him on the web at [EvanNappen.com](http://EvanNappen.com) or follow the link on the Gun Lawyer resource page. Evan Nappen -America's Gun Lawyer.

**Speaker 3** 19:32

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**Evan Nappen** 19:47

Welcome back to Gun Lawyer. I really appreciate that you listen and particularly subscribe to this podcast. It's really our voice, and it's a way to beat all the algorithms and shadow bans and get the word out about our rights and helping to protect you and helping you to protect yourself. So, tell your friends and keep on listening. I appreciate it.

**Evan Nappen** 20:13

Let me tell you about BITS. It is an acronym for Blood In The Streets. It's the Blood In The Streets myth, man. I am so sick of hearing that every time like right now they are fighting. They just passed constitutional carry in both houses of Pennsylvania. Now it seems likely that their anti-Governor will veto it unfortunately. It is still great to pass both houses. But what do you hear every time, oh, if you pass this, there will be blood in the streets, blood in the streets, the Wild West. Every time. From the first "shall issue" carry license in modern time, in Florida to every battle for carry. The other side is always shouting Blood In The Streets from this. They've said it so much that we should need canoes to get around in the streets if there is all this frickin blood out there from all their yappin about it. And what do we really have? There is no blood in the streets. It isn't the Wild West, which of course itself is all blown out of proportion. The West wasn't as wild as the 50s westerns and our mythology presents it. But the fact is, none of that comes true. It's always shown to be false.

**Evan Nappen** 21:44

Look at the Constitutional carry states. We don't have that happening. No, what you have is citizens being safer, you have crime going down, you have people no longer being victims, but defenders. And that's the truth. The BITS myth just needs to go. Every time you hear someone say that, just tell him the BITS myth, please, is thoroughly discredited. Don't go there. Once you can nail somebody with the label of what they're claiming as being false, you cut them off at the knees on their argument. So, remember that about BITS. I just get sick of hearing it, and I'm sure you've heard it as well. It's nonsense.

**Evan Nappen 22:29**

In fact, I once had a case where my client had been charged with possession of an assault firearm. I didn't represent him at the time he was convicted. He had even done some time. It was crazy. He came to me, and he is now a convicted felon over this. He asked, Evan, is there anything we can do here? I look at this and I said wait a minute, the gun was not even an assault firearm. It did not meet the definition. It was actually an Olympic Arms, and I said it isn't the case. We brought a post-conviction relief motion. In so doing, the gun was long gone. They did not have it in evidence anymore. The Olympic Arms company had a fire, and there were no records of this. The state didn't even have it anymore to even point to, and what they did have on record it was remaining was clearly demonstration that it did not meet definition of assault firearm.

**Evan Nappen 23:33**

But what I always remember is the judge. This judge, out of Jersey City, oh my god, was just total anti-gun and ignorant on guns. In sentencing this poor guy saying, you had an assault firearm. There's blood in the streets, and I'm literally walking over bodies in the street. Literally walking over bodies in the street, with blood in the streets, from this semi-auto. Give me a break. So, I was able to actually reverse his conviction. They challenged it, but we won on, even when they brought it up on the PCR (Post Conviction Relief) after we set it aside. Then the State tried to appeal the reversal, and the Appellate Court said no. We saved this guy and reversed it. I was so happy for him. Here's the really interesting part. He later became a law enforcement officer serving his community and was always incredibly thankful and sent me Christmas cards and such for giving him his life back and letting him pursue what his love was and what he wanted to pursue. That is always a good thing, but I never forgot that judge, just railing with this absolute BITS myth. This was absolute garbage and putting it into his sentencing was just outrageous.

**Evan Nappen 25:02**

Lately, I've seen some other interesting things. I encountered a case where it really pointed out something very interesting about the domestic violence restraining order laws, and it brings up this disarmament without due process issue. We're seeing it pushed from ERPOs (Extreme Risk Protection Orders), where there is no due process. It is just based on one person's say, and they immediately seize your guns and revoke your license. This is before you even had one second to even talk to the court about it or have any say. Then you get your due process later, which of course isn't due process at all. It's just outrageous. We see this going on throughout the domestic violence laws.

**Evan Nappen 26:02**

If a Temporary Restraining Order (TRO) is filed, that temporary restraining order is also done ex parte, and built into every one of them in New Jersey and many other states as well is the order to seize firearms. So, immediately, even when it has nothing to do with guns, nothing whatsoever to do with guns in Jersey, it can simply be something as minor as a claim of harassment, a petty disorderly persons offense, the lowest level of offenses. If that TRO was issued on a claim of harassment, it does not matter. The guns get seized. This is how the law is set up, of course, to protect victims of domestic violence. Domestic violence is a serious thing, and I get it. No one should be abused by anybody. I am not pro domestic violence. I oppose domestic violence. But I'm also pro rights, and I think due process is important.

**Evan Nappen 26:57**

But here's something that recently occurred that really hammered home something interesting. And that is how the domestic violence laws themselves that remove due process before disarming somebody can be played against the victim. Because in this case, the victim filed a legitimate, 100% legitimate, restraining order against this defendant, and this defendant had a number of times violated this restraining order. The defendant is even being criminally prosecuted for contempt of the restraining order. After this happened to them and after the contempts and after being hit with a Final Restraining Order (FRO), because a TRO was found valid, and a final was issued. This person brings a temporary restraining order against the plaintiff on the original restraining order. Here, the plaintiff is a victim of the person who has violated the previous restraining order, has a Final Restraining Order against them, and just got out of jail, and then files the TRO against the plaintiff.

**Evan Nappen 28:40**

Guess what? The TRO ex parte issues by the judge on whatever claim this person's making up, doesn't matter. Now the victim, the one who was threatened, who has a Final Restraining Order, gets her gun seized, her protection that she was relying upon against the person that she has a restraining order, and that person is able to use the laws to disarm the victim. Now, the TRO, which has to have a hearing, is out a couple of months before that victim will have the day in court, will finally have the due process to get the restraining order that's essentially false dismissed, and then fight to get her gun back. All during this time that victim is vulnerable to the original defendant that she was successful in getting a restraining order against and even having this person go to jail on multiple violations.

**Evan Nappen 30:00**

Imagine this, folks. This shows you the flaw. It shows you how disarmament without due process is a danger to the public and the ability for even domestic violence victims, to be able to maintain their ability to defend themselves. Because as you know, when seconds count, the police are minutes away. The police try, and they are dedicated. They want to do what's right to help and protect us, but they can't always be there. They can't always be there when seconds count, and whose responsibility is to protect yourself? Your own, and here that gets denied. If you want to put a domestic violence law in place the way they constantly want to enhance domestic violence, I would seriously suggest putting in a domestic violence law that says someone who already is a domestic violence victim and plaintiff and has a restraining order on that other party, the other party cannot get the guns seized of that preexisting victim and plaintiff until after due process. After there is a hearing and the restraining order goes to a final and that victim and plaintiff are somehow shown to actually be guilty of domestic violence, because it's outrageous. It's a technique and a tactic that can turn the tables and make a domestic violence victim vulnerable and disarmed. Do you think that person who does that is going to care about the restraining order on them? No. Who's going to be the one to follow the law? You know who. The original victim that's who and that's who these ridiculous laws that deny due process, put at risk. So, think about that, folks. It's a real deal, and it's really happening.

**Evan Nappen 32:30**

Until next time, remember that gun laws don't protect honest citizens from criminals. They protect criminals from honest citizens.

**Speaker 3** 32:39

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