

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
Criminal Division

COMMONWEALTH OF PENNSYLVANIA)
)
v.)
)
HOBSON MCKOWN)

CP-14-CR-1569-2008

DEBRA C. J. HEL
PROthono
RY
CENTRE COUNTY
PA

FILED FOR RECORD
2010 OCT 25 P 4:32
COPY

**BRIEF IN OPPOSITION TO MOTION
TO DECLARE STATUTES UNCONSTITUTIONAL**

To the Honorable Daniel Milliron, Specially Presiding:

INTRODUCTION

In District of Columbia v. Heller, 554 U.S. ___, 128 S.Ct. 2783, the United States Supreme Court reviewed a Second Amendment challenge to several District of Columbia laws restricting the possession and use of firearms. The District of Columbia restrictions were extremely severe and contained apparently contradictory provisions: Carrying an unregistered firearm in the District of Columbia was a crime, yet the District of Columbia also prohibited the registration of handguns. So far as the District of Columbia permitted the mere possession of firearms, it required that they generally be kept "unloaded and disassembled" or otherwise functionally disabled. Heller, 128 S.Ct. at 2788.

In reviewing these restrictions, the Supreme Court held that the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation," Heller, 128 S.Ct. at 2797. The Court did not identify, however, the constitutional standard for reviewing alleged Second Amendment violations and instead merely noted that the challenged regulations failed "[u]nder any of the standards of scrutiny ... applied to enumerated constitutional rights."

Heller, 128 S.Ct. at 2818.

In McDonald v. City of Chicago, 130 S.Ct. 3020 (2010), the Supreme Court made Heller's Second Amendment right to bear arms effective against the states by operation of the Due Process Clause of the Fourteenth Amendment. McDonald, 130 S.Ct. at 3026. McDonald's holding was limited to the incorporation of the Second Amendment into the Due Process protected by the Fourteenth Amendment; the Court did not pass on the validity of the challenged firearms laws, but instead remanded to the lower court for this determination. McDonald, 130 S.Ct. at 3050. As did the Heller court, the McDonald court declined to define the standard of review applicable to alleged Second Amendment violations.

Although this case raises Second Amendment challenges to the statutes on which the present criminal action is based, this Court need not decide the question of the proper level of constitutional scrutiny, for the firearms laws here at issue fall within a class of "presumptively lawful regulatory measures" immune to Second Amendment attack. Nonetheless, should this Court engage in Second Amendment review, the proper standard has been articulated by the Third Circuit Court of Appeals in United States v. Marzzarella, 614 F.3d 85 (2010). Under that intermediate scrutiny standard, the statutes under which Defendant stands charged pass constitutional muster.

ARGUMENT

"[T]here is a strong presumption that legislation is constitutional. A party challenging legislation bears a heavy burden to prove otherwise." Commonwealth v. Thur, 906 A.2d 552, 560-561 (Pa.Super. 2006) (citations omitted). Our appellate courts will strike a statute only if the challenger proves that it "clearly, palpably, and plainly violates the federal or state constitutions."

Id. For the reasons that follow, Defendant has failed to meet this heavy burden of proof.

- I. **Heller and McDonald do not broadly invalidate firearms regulations and recognize that certain prohibitions, including those at bar, are presumptively immune to Second Amendment challenge.**

Heller was clear that "the right secured by the Second Amendment is not unlimited," id., 128 S.Ct. at 2816, and noted in particular that prohibitions on carrying concealed weapons have, historically, been upheld. Id. The Court further assured that

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 128 S.Ct. at 2816-2817. McDonald again emphasized that the Court's novel Second Amendment jurisprudence does not imperil the "longstanding regulatory measures" identified in Heller. McDonald, 130 S.Ct. at 3047.

Defendant is charged with carrying a concealed weapon under 18 Pa.C.S. §6106(a) and possessing a firearm in a court facility under 18 Pa.C.S. §913. These laws are the longstanding, "presumptively lawful regulatory measures" identified by Heller/ McDonald. For this reason, Defendant's challenge to their constitutionality fails in the first instance.

II. Laws regulating firearms pass constitutional muster if they fit reasonably with a substantial or important government interest.

Assuming, arguendo, that 18 Pa.C.S. §6106 and 18 Pa.C.S. §913 do not fall within the "presumptively lawful regulatory measures" identified in Heller/ McDonald, those statutes are still valid exercises of legislative police powers.

As noted supra, the United States Supreme Court has not announced the proper level of scrutiny for review of Second Amendment claims. Moreover, Pennsylvania's appellate courts have never reviewed alleged violations of the Second Amendment right announced in Heller/ McDonald, and therefore have never confronted the question of the appropriate standard of scrutiny. Under such circumstances, it is appropriate to follow decisions of the Third Circuit Court of Appeals. See Garner v. Pennsylvania Department of Corrections, 851 A.2d 222, 226 n.9 (Pa. Cmwlth 2004).

In United States v. Marzzarella, 614 F.3d 85 (2010), the Third Circuit reviewed a Second Amendment challenge to 18 U.S.C. §922(k), making it an offense to convey, receive, or possess a firearm with a "removed, obliterated, or altered" serial number. The Court adopted the following two-pronged test:

First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it

fails, it is invalid.

Marzzarella, 614 F.3d at 89. Noting the analogy between Second Amendment and First Amendment interests, the Court held that Second Amendment challenges should be reviewed under an intermediate scrutiny standard requiring, first, that "the asserted government end ... be more than just legitimate, either 'significant,' 'substantial,' or 'important.'" Second, the "the fit between the challenged regulation and the asserted objective [must] be reasonable, not perfect." Id., 614 F.3d at 98 (citations omitted).

A. Section 6106 of the Crimes Code is reasonably related to a significant government interest.

Defendant stands charged with carrying a concealed firearm in violation of 18 Pa.C.S. §6106(a)(1) and (a)(2). Pennsylvania law has long recognized that the legislative objective in prohibiting the unlicensed carrying of concealed firearms "is a serious one," Commonwealth v. Butler, 198 Pa.Super. 399, 402, 150 A.2d 172, 173 (Pa. Super. 1959), because carrying unlicensed weapons poses an "inherent danger to human life and public peace." Id. This objective is, in essence, identical to the one upheld in Marzzarella, for the challenged regulation in that case was "to keep firearms away from persons Congress classified as potentially irresponsible and dangerous." Marzzarella, supra, 614 F.3d at 98.

Section 6106 does not unreasonably burden the Heller/ McDonald right to possess and carry weapons, for it enumerates sixteen distinct exceptions to its prohibition enabling firearms to be lawfully possessed. In particular, where a person possesses a firearms license pursuant to 18 Pa.C.S. §6109, there are no limitations on the right to carry a firearm concealed on one's person or in a vehicle. And, significantly, §6109 liberally permits the issuance of such a license.

B. Section 913 of the Crimes Code is reasonably related to a significant government interest.

Courts have the onerous task of resolving conflict, conflict that in many instances has profound implications for all concerned, such as the loss of liberty or property. In this respect, the courtroom is a volatile place. The legislature undoubtedly has a significant interest in taking measures to prevent courtroom conflict from escalating into violence, and a reasonable way of doing so is by prohibiting people from possessing weapons in courthouses and buildings housing court facilities. Section 913 clearly passes constitutional muster.

III. Defendant's "as applied" arguments fail.

State conduct enabled by statute can violate the constitution if it is applied in such a manner as to unreasonably work a deprivation of an enumerated constitutional right. For example, in Graham v. Florida, 130 S.Ct. 2011 (2010), the Supreme Court held that the Eighth Amendment was violated by the application of Florida sentencing law to impose a sentence of life imprisonment without parole on a juvenile offender who did not commit homicide.

Here, apparently, Defendant argues that sections 6106 and 913 of Pennsylvania's Crimes Code have been used by the state to unconstitutionally prevent him from (i) carrying a concealed firearm, and (ii) carrying a concealed firearm into a court facility.

A. Defendant misrepresents the facts relevant to his "as applied" challenge to §6106.

Defendant argues that, because he "had a valid and lawfully issued license or permit to carry a firearm that was issued by the state of New Hampshire" and because "Pennsylvania has a reciprocity agreement with New Hampshire," he was lawfully entitled to carry a concealed

weapon. The record merely indicates that Defendant had a carry permit issued by New Hampshire, which he obtained after the Sheriff of Centre County revoked his firearms permit in April of 2008. N.T. 9/10/08 at 32-33. After a lengthy hearing held on September 28, 2009, this Court, per The Honorable Bradley Lunsford, entered an order declaring that "the defendant did not possess a valid license to carry a firearm on September 2, 2008." In the guise of an "as applied" challenge, Defendant advances a specious argument that has already been rejected by this Court.

B. Section 913 of the Crimes Code has not been unlawfully applied to deprive Defendant of a Second Amendment right.

As both Heller and McDonald emphasized, the Second Amendment right to possess and carry weapons is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Heller, 128 S.Ct. at 2816. Moreover, there is simply no Second Amendment right to possess a weapon "in sensitive places such as schools and government buildings." Id. at 2817. In his "as applied" challenge pertaining to §913, Defendant claims he was deprived of a right that simply does not exist.

Defendant's argument in this respect consists, in part, of a sufficiency claim in the guise of an "as applied" challenge. Defendant argues that the posting at the entrance to Judge Grine's court was insufficient under §913(d), which provides that "no person shall be convicted of an offense under subsection (a)(1) with respect to a court facility if the notice was not so posted at each public entrance... unless the person had actual notice of the provisions of subsection (a)." While that may, or may not, be the case, it is not a constitutional question. It is a question properly left to the trier of fact.

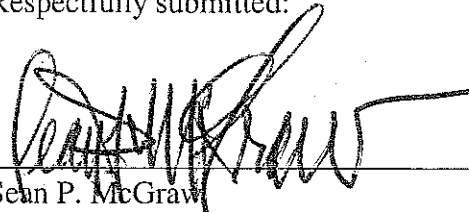
IV. Sections 6106 and 913 of the Crimes Code do not violate the Pennsylvania Constitution.

The Pennsylvania Constitution recognizes a right of the citizens to "bear arms in defense of themselves and the State." The right is "not unlimited" and "a reasonable regulation in a gun control law is a valid exercise of the police power of the Commonwealth." Commonwealth v. Ray, 218 Pa.Super. 72, 79, 272 A.2d 275, 279 (Pa. Super. 1970), vacated on other grounds, 448 Pa. 307, 292 A.2d 410 (1972). As argued in sections II, supra, the challenged laws are reasonable under even an intermediate standard of review.

CONCLUSION

Defendant's Motion to Declare Statutes Unconstitutional should be DENIED.

Respectfully submitted:



Sean P. McGraw
Assistant District Attorney
Attorney I.D. No. 81584
Centre County Courthouse, Room 404
Bellefonte, Pennsylvania 16823
Telephone: 814-355-6735

Date: 10-25-10

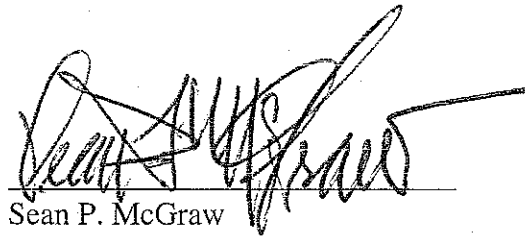
PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.Crim.P. 576:

Service by courthouse mail and electronic mail:

Jason S. Dunkle, Esquire
Telephone: 814-234-9500
Masorti & Sullivan, P.C.
302 Burrowes Street
State College, PA 16801
Counsel for Defendant

Date: 10-25-10



Sean P. McGraw
Assistant District Attorney
Attorney I.D. No. 81584
Centre County Courthouse, Room 404
Bellefonte, Pennsylvania 16823
Telephone: 814-355-6735