IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY
Criminal Division

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
v.	)	CP-14-CR-1569-2008
	)	
HOBSON MCKOWN	)	

OPINION

FACTUAL AND PROCEDURAL HISTORY

This opinion considers a Motion to Declare Statutes Unconstitutional and a Motion for Suppression of Evidence, both of which were filed by the Defendant in this matter.

On September 2, 2008, Defendant Hobson McKown had an appointment at the offices of Magisterial District Justice Jonathan Grine for a court proceeding unrelated to this matter. (Transcript of Preliminary Hearing, p. 18). On that day, around one p.m., Justice Grine's office received a phone call from a man asking if the court provided a lock box for concealed guns. (*Id.* at 6). According to Jennifer Carson, an employee of Justice Grine, Defendant showed up at the court offices around an hour after this phone call and took pictures of the door, affixed to which was a sign stating that no weapons are allowed in the building. (*Id.* at 7).

Defendant returned to the court office around four p.m. for his appointment on an unrelated matter. (*Id.* at 18). At that point Defendant encountered Robert Bradley, an officer with the State College Police Department, who was called to the offices after the one o'clock phone call. (*Id.* at 17). Officer Bradley met Defendant as he walked through the front door of the court offices. (*Id.* at 18). Officer Bradley asked Defendant if he was armed, and Defendant did not answer at first. *Id.* Then Defendant asked Officer Bradley if there was a check station on premises. (*Id.* at 19, 25). When Officer Bradley answered affirmatively, stating that he was

checking for weapons, Defendant admitted he did have a gun in his pocket. *Id.* Officer Bradley retrieved the gun from Defendant's pocket. (*Id.* at 20). Defendant told Officer Bradley that he (Defendant) had a New Hampshire concealed carry permit, and that it was in his car. (*Id.* at 21). Officer Bradley did not attempt to retrieve the New Hampshire permit. (*Id.* at 27). Defendant was arrested and charged with carrying a concealed weapon without a permit and carrying a weapon inside of a court facility. The courthouse did not have a check station for weapons at the time of this incident. *Id.* at 26.

Prior to the incident, Defendant had a Pennsylvania concealed carry license, issued by Centre County Sheriff Denny Nau on January 19, 2007. (*Id.* at 29). Then on April 6, 2008, Defendant was involved in an incident for which he was cited criminally. Because of this citation, the Centre County Sheriff revoked Defendant's Pennsylvania license on April 14, 2008. A letter providing notice was mailed out the next day, April 15, 2008. (*Id.* at 30). However, according to a certified mail receipt, Defendant did not receive the revocation notice until April 29, 2008. (*Id.* at 31). Also on April 15, 2008, Defendant applied for a New Hampshire concealed carry permit, which he subsequently received on May 19, 2008. (*Id.* at 55; Transcript of Habeas Corpus Hearing, p. 71). Under New Hampshire law, an out-of-state applicant for a concealed carry license must present a valid concealed carry license from his or her resident state. (Transcript of Preliminary Hearing, p. 52-53). After learning about the courthouse incident, and the revocation of Defendant's Pennsylvania license, New Hampshire officials stated they would take "action to suspend" Defendant's New Hampshire license. (Id. at 43).

A preliminary hearing was held before Centre County Magisterial District Justice Leslie Dutchcot on September 10, 2008. The three witnesses at this hearing were Jennifer Carson, officer Robert Bradley and Centre County Sheriff Denny Nau, who testified regarding his

knowledge of Pennsylvania gun laws. Justice Dutchcot found that there was a prima facie case against Defendant, and the case was sent to the Centre County Court of Common Pleas.

On November 17, 2008 Defendant made an omnibus motion petitioning for, among other things, a writ of habeas corpus regarding the findings from the preliminary hearing. Judge Bradley Lunsford denied the habeas petition, but allowed Defendant to make an interlocutory appeal, which he did on January 19, 2010. The Superior Court subsequently declined to consider the appeal. Judge Lunsford also granted a Motion in Limine by the Centre County District Attorney. This motion states that, for the purposes of trial, Defendant did not have a valid license to carry a concealed firearm on the date of the courthouse incident, September 2, 2008. Judge Lunsford intended this motion to exclude any evidence that Defendant had a valid New Hampshire license. (*See* Transcript of Habeas Corpus Hearing, p. 77-78).

On June 23, 2010, Defendant moved to recuse the Centre County judges, as Magisterial District Justice Jonathan Grine, a potential witness at trial, is the son of Centre County President Judge David Grine. Judge Thomas Kistler granted the recusal motion and the case was transferred to this court, for consideration by Judge Milliron. On September 8, 2010 Defendant filed his Motion to Suppress Evidence and on September 24, 2010 Defendant filed his Motion to Declare the Statutes Unconstitutional, which is the subject of this opinion. Briefs from both sides followed, the last of which was filed on November 29, 2010. These motions are now ripe for disposition.

DISCUSSION

I. Motion to Declare Statutes Unconstitutional

On September 24, 2010, Defendant submitted a brief in support of his motion to declare the following Pennsylvania statutes unconstitutional: 18 Pa. C.S. § 6106(a)(1), 18 Pa. C.S. §

6106(a)(2) and 18 Pa. C.S. § 913(a)(1). These statutes encompass all the charges against the Defendant in this matter. Defendant is charged with carrying a firearm without a license, in violation of 6106(a)(1) and (a)(2). He is also charged with possessing a firearm in a court facility, in violation of § 913(a)(1). Defendant's brief argues that these statutes facially violate his right to bear arms under the Second Amendment of the U.S. Constitution and Article I, § 21 of the Pennsylvania Constitution (Brief in Support of Def. Motion to Declare Statutes Unconstitutional, unnumbered p. 19, 21-22). He also argues that these statutes are unconstitutionally vague as-applied, in violation of his due process rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, § 9 of the Pennsylvania Constitution. (*Id.*, unnumbered p. 2-3).

a. There is no facial violation of Defendant's right to bear arms under the U.S. Constitution.

Regarding his right to bear arms claims, Defendant facially challenges §§ 6106 and 913. (Brief in Support of Def. Motion to Declare Statutes Unconstitutional, unnumbered p. 19). Unlike an as-applied challenge, a facial attack challenges the text of the statute as written, and does not address the particular facts and circumstances of the case. *United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010); *U.S. v. Huet*, 2010 WL 4853847, slip op. at 7 (W.D. Pa. Nov. 22, 2010).

In *District of Columbia v. Heller*, the U.S. Supreme Court rejected a Washington, D.C. law banning handguns, holding that an individual does have a Second Amendment right to possess a handgun in his or her home. 554 U.S. 570, 635 (2008). In *McDonald v. City of Chicago*, the U.S. Supreme Court incorporated the Second Amendment right to bear arms, rendering it effective against state and local governments. 130 S.Ct. 3020, 3026 (2010). In

Heller, the Supreme Court noted that there are constitutionally valid limitations on an individual's right to possess a handgun. The Court stated:

> [N]othing 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. 554 U.S. at 626-27.[1]

Although the Court in Heller did not set forth an explicit framework for deciding these types of Second Amendment claims, the U.S. Court of Appeals for the Third Circuit recently relied on Heller to devise a two-pronged approach. *See U.S. v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). First, a court must determine whether the statute burdens conduct which falls within the scope of Second Amendment protection. *Id.* If it does not, the analysis is over. *Id.* If it does, the court must apply an intermediate level of scrutiny to the statute at issue. *Id.* at 97-99. Under this level of scrutiny, the governmental objective must be "significant," "substantial," or "important" and the statutory means must reasonably relate to the government objective, although the fit does not need to be perfect. *Id.* at 98.

We now turn to Defendant's arguments regarding 18 Pa. C.S. §§ 913(a)(1), 6106(a)(1) and (a)(2). Applying the first prong of the *Marzzarella* test, this Court finds that § 913 does not burden conduct protected by the Second Amendment. Section 913 prohibits carrying firearms in a court facility and is therefore within the category of constitutionally valid laws which restrict the carrying of firearms in sensitive places. *See Heller*, 554 U.S. at 626-27.

Section 6106(a) prohibits carrying concealed firearms without a Pennsylvania license. It is unlikely that the Second Amendment protects the unlicensed carry of a concealed firearm

[1] Although this language may be considered dicta, it nevertheless requires serious consideration. *See U.S. v. Marzzarella*, 614 F.3d 85, 90 n.5 (3d Cir. 2010).

outside of the home. Therefore, this Court is inclined to hold that the first prong of *Marzzarella* exempts § 6106 from further scrutiny. However, the statute also survives the intermediate scrutiny test. The government has a significant, substantial and important end in enforcing the statute: namely, protecting the public from individuals who carry concealed firearms for unlawful purposes. The statutory language also reasonably relates to this end, offering sixteen exceptions to the general rule (see 18 Pa. C.S. § 6106(b)), each of which allows a specific lawful form of concealed carry.

Therefore, neither § 913 nor § 6106 facially violates the Second Amendment to the U.S. Constitution.

b. There is no facial violation of Defendant's right to bear arms under the Pennsylvania Constitution.

The right to bear arms guaranteed under the Pennsylvania Constitution "may be restricted in the exercise of the police power for the good order of society and the protection of citizens." *Minich v. County of Jefferson*, 919 A.2d 356, 361 (Pa. Cmwlth. Ct. 2007). In *Minich*, the court found that a county ordinance requiring individuals entering a courthouse to submit to a metal detector screening did not violate Pennsylvania's right to bear arms. *Id.*

Section 913 limits the right to bear arms for the protection of citizens using courthouses. Section 6106 limits the right to bear arms for the protection of the public at large. Therefore, these sections do not facially violate Article I, Section 21 of the Pennsylvania Constitution.

c. Section 6106 is not unconstitutionally vague.

The void for vagueness doctrine derives from the due process clause of the Fourteenth Amendment of the Constitution. The doctrine requires that a penal statute define a criminal offense with sufficient clarity so that ordinary people can understand what conduct is prohibited. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Com. v. Bullock*, 913 A.2d 207, 212 (Pa.

2006). A statute is also unconstitutionally vague if it allows, authorizes or encourages arbitrary and discriminatory enforcement by local officials. *Id.* However, the constitutional prohibition against vagueness does not invalidate every statute which could have been drafted with greater precision. *Com. v. Highhawk*, 687 A.2d 1123, 1128 (Pa. Super. Ct. 1997). Due process requires only that a statute is written in such a way as to allow individuals to conform their conduct in order to avoid that which the law forbids. *Id.*

A plaintiff who engages in conduct that is clearly proscribed by statute cannot complain that the statute is vague as applied to the conduct of others. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). Therefore, in examining vagueness challenges the court should first look to the Defendant's conduct before analyzing other hypothetical applications of the law. *Id.*

Mr. McKown argues that 18 Pa. C.S. § 6106 is vague due to a contradictory provision at 18 Pa. C.S. § 6109(b). Section 6109(b) states:

> **(b) Place of Application.**-- An individual who is 21 years of age or older may apply to a sheriff for a license to carry a firearm on or about his person or in a vehicle within this Commonwealth. **If the applicant is a resident of this Commonwealth, he shall make application with the sheriff of the county in which he resides** or, if a resident of a city of the first class, with the chief of police of that city. (emphasis added)

Section 6106 penalizes the carrying of a concealed firearm without a license. Section 6106 states, in relevant part:

> **(a) Offense defined.**—
>
> (1) Except as provided in paragraph (2), any person who carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid

> and lawfully issued license under this chapter commits a felony of the third degree.
>
> (2) A person who is otherwise eligible to possess a valid license under this chapter but carries a firearm in any vehicle or any person who carries a firearm concealed on or about his person, except in his place of abode or fixed place of business, without a valid and lawfully issued license and has not committed any other criminal violation commits a misdemeanor of the first degree.
>
> **(b) Exceptions.—The provisions of subsection (a) shall not apply to...**
>
> (15) **Any person who possesses a valid and lawfully issued license or permit to carry a firearm which has been issued under the laws of another state**, regardless of whether a reciprocity agreement exists between the Commonwealth and the state under section 6109(k), provided:
>
> (i) The state provides a reciprocal privilege for individuals licensed to carry firearms under section 6109.
>
> (ii) The Attorney General has determined that the firearm laws of the state are similar to the firearm laws of this Commonwealth. (emphasis added)

The above statutory language is not vague. Although it is a crime to carry a concealed firearm without a Pennsylvania license, this does not apply to a person who has a "valid and lawfully issued license" from a reciprocal state. Pennsylvania does recognize valid New Hampshire licenses under a reciprocity agreement. (Preliminary Hearing Transcript, p. 39). In his Petition for Writ of Habeas Corpus, Defendant argued that he came within the reciprocity exception because he held a valid New Hampshire concealed carry license at the time of his arrest. Now he argues that the statute is vague because it did not give him notice that his New Hampshire license would not be honored.

Defendant overlooks the possibility that he never had a "valid and lawfully issued" New Hampshire license, as Judge Lunsford has previously indicated. (*See* Transcript of Habeas Corpus Hearing, p. 77-78). When Defendant applied for his New Hampshire license on April 15, 2008, he represented to New Hampshire officials that he had a valid Pennsylvania license. (*Id.* at 52-53). However, his Pennsylvania license had been revoked the day before, because of a criminal citation stemming from an incident on April 6, 2008. Therefore, his New Hampshire application included misleading information. Defendant never took any steps to correct this omission, even after he received formal notice of the revocation of his Pennsylvania license, on April 29, 2008. New Hampshire issued his concealed carry license on May 19, 2008. But the record indicates that this license was issued as the result of misleading statements and administrative inefficiencies, rather than valid and lawful means. The exception at § 6106(b)(15) applies only to "valid and lawfully issued" out-of-state licenses. Because Defendant's New Hampshire permit was not validly or lawfully issued, Defendant did not come within the unambiguous language of that exception. His conduct was clearly proscribed under § 6106(a). His vagueness challenge necessarily fails.

d. Section 913(a)(1) is not vague.

Title 18 Pa. C.S. § 913(a)(1) penalizes an individual who carries a firearm in a court facility. The section states:

> (a) Offense defined.—A person commits an offense if he:
>
> > (1) knowingly possesses a firearm or other dangerous weapon in a court facility or knowingly causes a firearm or other dangerous weapon to be present in a court facility.

A court facility includes, *inter alia*, "The courtroom of a magisterial district judge...and any adjoining corridors." 18 Pa. C.S. § 913(f). Additionally, § 913(e) states, "Each county shall

make available **at or within the building containing a court facility** by July 1, 2002, lockers or similar facilities at no charge or cost for the temporary checking of firearms by persons carrying firearms under section 6106(b) or 6109…" (emphasis added). Defendant argues that § 913 is vague because one subsection allows a person to check his or her concealed firearms within at a court facility, while another subsection penalizes a person for bringing concealed weapons inside a court facility.

Defendant was not carrying a firearm under § 6109 because he did not have a valid Pennsylvania concealed carry license at the time of the incident. He was not carrying under the § 6106(b)(15) exception because, as explained above, he did not have a valid New Hampshire license. Defendant was not eligible to check his weapons under § 913(e). Consequently, he was in violation of § 913(a). A vagueness challenge will not survive when the Defendant's acts are clearly proscribed by statute. *Hoffman Estates*, 455 U.S. at 495. Because Defendant's vagueness challenge depends on his eligibility to check a firearm under 913(e), his challenge fails.

e. The revocation of Defendant's Pennsylvania license did not violate his procedural due process rights.

Defendant argues that he had a property interest in his Pennsylvania concealed carry license, and that Centre County's failure to cite specific statutory provisions of § 913(e) in the letter revoking his license was in violation of his Fourteenth Amendment procedural due process rights. This court disagrees.

The U.S. District Court for the Eastern District of Pennsylvania has held there is no property interest in a Pennsylvania license to carry a concealed firearm, for the purposes of procedural due process. *Potts v. City of Philadelphia*, 224 F.Supp. 2d 919, 942 (E.D. Pa. 2002).

Additionally, a letter explaining the reason for the revocation is sufficient to satisfy procedural due process under the Fourteenth Amendment to the United States Constitution. *Id.*

This Court agrees with the analysis and holding in *Potts*. Because Pennsylvania authorities have far-reaching discretion to revoke concealed carry licenses, Defendant had no property interest in his license. *See Id.* Therefore, he can raise no procedural due process challenge to the revocation of his license.

II. Motion to Suppress

Under Rule 578 of the Pennsylvania Rules of Criminal Procedure, a motion for the suppression of evidence must be included in an omnibus pretrial motion for relief. Under Rule 579 of the Pennsylvania Rules of Criminal Procedure an "omnibus pretrial motion for relief shall be filed and served within 30 days after arraingment, unless ... defense attorney ... was not aware of the grounds for the motion."

Defendant was arraigned in September 2008. Defendant filed a motion for suppression of evidence on September 8, 2010. He argues that the manner in which Officer Bradley retrieved Defendant's gun was an unlawful search and seizure, in that it violated Defendant's Second Amendment right to bear arms. (Motion for Suppression, ¶ 29-31; Reply to Commonwealth's Motion to Quash, unnumbered p. 6). Although not stated explicitly, Defendant appears to argue that the timeframe for filing his motion should be extended, as the Supreme Court recently incorporated the Second Amendment to the states, in *McDonald v. City of Chicago*, creating new grounds for the motion.

To the extent Defendant's motion to suppress depends on the violation of his right to bear arms under the Second Amendment, this motion is denied. As explained above, Defendant had no Second Amendment right to carry a firearm on court property or to carry a concealed firearm

without a Pennsylvania license. To the extent the motion depends on other theories, it is denied as it is untimely under Rule 579, filed two years after Defendant's arraignment.

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COMMONWEALTH OF PENNSYLVANIA	)	
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v.	)	CP-14-CR-1569-2008
	)	
HOBSON MCKOWN	)	

ORDER

AND NOW, this 18th day of March, 2011, it is hereby ORDERED, DIRECTED and DECREED:

1. Defendant's Motion to Declare Statutes Unconstitutional is DENIED.

2. Defendant's Motion to Suppress Evidence is DENIED.

BY THE COURT:

Daniel J. Milliron, J.