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NO. 60552-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

R. P. H.

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE JUDGE CAROL SCHAPIRA

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Does the recent United States Supreme Court decision in District of Columbia v. Heller, 128 S.Ct. 2783, ___ U.S. ___, ___ L.Ed.3d ___, (2008) change the analysis in this case?

B. STATEMENT OF THE CASE

The defendant challenges his inability to lawfully possess a firearm because he is a convicted sex offender. The defendant filed an opening brief and the State filed a response brief, the State's response brief being filed on June 18, 2008. On June 26, 2008, the United States Supreme Court issued an opinion in District of Columbia v. Heller, a case the defendant says re-opened the entire area of Second Amendment jurisprudence. Def. Reply Br. at 12. The defendant, in his reply brief, relies heavily on Heller and makes new arguments regarding his claims. Because of the timing of the Heller decision, the State's brief did not, and could not, address Heller. This brief is limited to addressing the application of Heller to this case.

C. ARGUMENT

THE SECOND AMENDMENT DOES NOT PROVIDE THE DEFENDANT ANY GREATER PROTECTION THAN WASHINGTON'S CONSTITUTION. IN FACT, THE DECISION IN DISTRICT OF COLUMBIA V. HELLER, SHOWS THAT THE APPLICABLE FIREARMS LAW HERE IS LAWFUL AND THAT THE DEFENDANT HAS NO CONSTITUTIONAL RIGHT TO BEAR ARMS UNDER THE SECOND AMENDMENT OR THE WASHINGTON CONSTITUTION.

The defendant claims that District of Columbia v. Heller, completely changes the analytical framework necessary in evaluating his claim. It does not. In fact, Heller supports the State's position that States have the power and right to prohibit the possession of firearms by convicted felons, regardless of their age, and that convicted felons are not protected by the Second Amendment or Article 1, § 24 of the Washington State Constitution.

The District of Columbia generally prohibits the possession of handguns, makes it a crime to carry an unregistered firearm, prohibits the registration of handguns, and requires that residents keep their lawfully owned firearms unloaded and disassembled or bound by a trigger lock. Heller, 128 S.Ct. at 2788. Heller applied for a registration certificate for a handgun and was refused. Heller appealed and argued that the District of Columbia gun control

statutes violated the Second Amendment. The below arguments are based upon the Supreme Court's Second Amendment analysis in Heller.

1. THE SECOND AMENDMENT LIMITS ONLY ACTS OF CONGRESS.

The Second Amendment 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." The defendant asserts that after Heller, there can be no question but that the Second Amendment applies to the states through the Fourteenth Amendment. This is incorrect and in direct conflict with Supreme Court precedent. The Supreme Court has never held--in Heller or any other case--that the Second Amendment means anything more than that Congress shall not infringe upon the right to bear arms. Heller, at 2812-13. In United States v. Cruikshank, 92 U.S. 542, 23 L.Ed 588 (1875), the Court held that the Second Amendment applies only to the Federal Government. While Justice Scalia in Heller, in a footnote, questioned the limited analysis done in Cruikshank, he also noted that "[o]ur later decisions¹ . .

¹ Citing to Presser v. Illinois, 116 U.S. 252, 265, 6 S.Ct. 580, 29 L.Ed. 615 (1886) and Miller v. Texas, 153 U.S. 535, 538, 14 S.Ct. 874, 38 L.Ed 812 (1894).

.reaffirmed that the Second Amendment applies only to the Federal Government." Heller, at 2813 n. 23.

The United States Supreme Court is the final arbiter of controversies arising under the Federal Constitution and their decision is binding on this Court. State v. Chrisman, 100 Wn.2d 814, 816, 676 P.2d 419 (1984); State v. Laviollette, 118 Wn.2d 670, 826 P.2d 684 (1992), overruled on other grounds, State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995). The defendant's request that this Court find that the Second Amendment applies to him through the Fourteen Amendment is contrary to United States Supreme Court precedent, and is misguided. Only the United States Supreme Court can make such a finding; a finding that would require they overrule their own precedent.

2. NEITHER THE SECOND AMENDMENT, NOR ARTICLE 1, § 24, CREATES A RIGHT TO POSSESS A FIREARM.

In deciding Heller's claim, the Supreme Court had to determine whether there existed an individual right to possess a firearm, and, if there was such a right, where that right emanated from. The Second Amendment did not create a new individual right to possess a firearm. Heller, at 2798. Rather, the right to possess a firearm was "a pre-existing right," that did not belong to all. Id.

The very text of the Second Amendment, the Supreme Court stated, "implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" Id. The right to bear arms "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." Id. at 2797 (citing Cruikshank, 92 U.S. at 553. To the extent the defendant relies upon Heller to assert that the United States Constitution has now been interpreted as providing a new right, or a right greater than exists under common law or under the Washington Constitution, this is incorrect. In fact, because the United States Constitution did not create a right to possess a firearm, for the defendant to argue that the Second Amendment provides him with some protection, he must show he had a preexisting right to possess a firearm.² Convicted felons have never had a right to possess a firearm, thus, convicted felons receive no special protection under either the Second Amendment or Article 1, § 24.

Felons were not endowed with the natural right to possess firearms. See United State v. Emerson, 270 F.3d 203, 227 n. 21

² He must make this same showing under the Article I, § 24. He has not attempted to do so.

(5th Cir. 2001) (citing numerous authorities which document the fact that "violent criminals, children, and those of unsound mind" were never intended to be conferred with the right to bear arms); State v. Hirsch, 117 Or. App. 441, 34 P.3d 1209, (2001) ("Felons simply did not fall within the benefits of the common law right to possess arms") (quoting Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L.Rev. 204, 266 (1983)); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn. L.Rev. 461, 480 (1995) (reporting that felons did not historically possess a right to possess arms).

The Second Amendment prohibits the Federal Government from infringing on the right to bear arms that existed at the time of the Constitution. Because convicted felons did not possess such a right, the Second Amendment provides no protection for this class of persons. The same would be true under Article 1, § 24, that by its very language, "The right of the individual citizen to bear arms in defense of himself, or the state, *shall not be impaired*," shows that Article 1, § 24 did not create a right, but recognized a pre-existing right, of which felons did not possess.

Further, in determining the scope of the pre-existing right that the Second Amendment did protect, the Supreme Court looked

at state constitutions that preceded and immediately followed adoption of the Second Amendment. Heller, at 2793, 2802. The constitutions of these states would be considered co-existent with the scope of the Second Amendment protection. Id. Thus, the ability of these states to prohibit the possession of firearms by convicted felons would demonstrate that the Second Amendment does not limit the government from proscribing this class of individuals--convicted felons--from possessing firearms.

The Supreme Court cited to a number of state constitutions in analyzing the Second Amendment. See Heller, at 2793-94, n. 8. A review of the law and cases from these states is instructive.

Kentucky permissibly prohibits all convicted felons, including "youthful offenders," from possessing a firearm. KRS § 527.040; Posey v. Kentucky, 185 S.W.3d 170, 175-180, 180 n. 10 (2006) ("finding nothing in the [Kentucky] constitution" that confers a right of convicted felons to possess a firearm) (citing other states similarly interpreting their right to bear arms constitutional provisions--Heidbrink v. Swope, 170 S.W.3d 13, 15 (Mo. App. 2005); Mosby v. Devine, 851 A.2d 1031, 1044 (R.I. 2004); Rohrbaugh v. State, 216 W.Va. 298, 607 S.E.2d 404 (2004);

Hirsch, supra; Mosher v. City of Dayton, 48 Ohio St.2d 243, 358 N.Ed.2d 540 (1976).

Ohio permissibly prohibits all felons convicted of a violent offense, including a "delinquent child," from possessing a firearm. R.C. § 2923.13; State v. Winkelman, 2 Ohio App.3d 465 (1981) (finding it a reasonable exercise of state police powers to enact law prohibiting convicted felons, and those under indictment of a felony, from possess firearms), overruled on other grounds recognized by State v. Varney, 62 Ohio St.3d 274 (1991).

Indiana permissibly prohibits all serious violent felons from possessing a firearm. Ind. Code § 35-47-4-5; Baker v. State, 747 N.E.2d 633, 637 (2001) (prohibiting serious violent felons from possessing a firearm is a reasonable regulation that does not violate the Indiana Constitution); Conrad v. State, 747 N.E.2d 575 (2001) (right to bear arms not violated by Indiana Code Section 35-47-4-5), superseded by statute on other grounds, Townsend v. State, 793 N.E.2d 1092 (2003).

Connecticut permissibly prohibits all adult felons, and all juveniles convicted of a serious offense, from possessing a firearm. General Statutes § 53a-217; State v. Banta, 15 Conn. App. 161, 184, 544 A.2d 1226 (1988) (even assuming there is a state

individual constitutional right to bear arms, prohibiting convicted felons from possessing firearms is a reasonable limitation).

Alabama permissibly prohibits all felons convicted of a crime of violence from possessing a firearm. Ala. Code 1975 § 13A-11-72; Dickerson v. State, 517 So.2d 625, 626-27 (1986)³ (right to bear arms of state constitution not violated by reasonable regulation of the statute); accord Bristow v. State, 418 So.2d 927, 930 (1982); Jackson v. State, 37 Ala. App. 335, 338 (1953).

Mississippi permissibly prohibits convicted felons from possessing a firearm. Miss. Code Ann. § 97-37-5; James v. State, 731 So.2d 1135 (1999) (finding statute did not violate state constitution's right to bear arms) (citing numerous other jurisdictions People v. Blue, 190 Colo. 95, 544 P.2d 385 (Colo. 1975); State v. Amos, 343 So.2d 166 (La. 1977); People v. Swint, 225 Mich. App. 353, 572 N.W.2d 666 (1997); State v. Ricehill, 415 N.W.2d 481, 484 (N.D. 1987); McGuire v. State, 537 S.W.2d 26, 28-29 (Tex. Crim. App. 1976); Carfield v. State, 649 P.2d 865 (Wyo. 1982).

In sum, each of these states, with constitutional provisions similar to the Second Amendment and relied upon by the Supreme

³ Dickerson was overruled on other grounds, Gholston v. State, 620 So.2d 715 (1992).

Court in Heller, has statutes prohibiting felons from possessing a firearm, and in each state, the statute has been found constitutional. Thus, any reliance upon Heller and the Second Amendment by the defendant is misguided.

3. THE SUPREME COURT REITERATED THAT FELON FIREARM STATUTES ARE PERMISSIBLE.

The Court in Heller specifically and repeatedly stated that existing laws that prohibit felons from possessing a firearm are permissible tool employable by the government and are unaffected by the decision in Heller. See Heller at 2815-16 ("We therefore read Miller⁴ to say only that the Second Amendment does not protect those weapons not typically possessed by *law-abiding* citizens"--emphasis added), at 2816-17 ("nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill"), at 2817 n. 26 (identifying felony firearm prohibitions as "presumptively lawful regulatory measures"), at 2822 (identifying the prohibition against felons possessing a firearm as an appropriate tool for combating the problem of gun violence).

⁴ Referring to United States v. Miller, supra.

4. THE SUPREME COURT DID NOT CREATE A NEW STANDARD FOR ANALYZING FELON FIREARM PROHIBITION STATUTES.

The defendant asserts that after Heller there can be no question but that felon firearm prohibition statutes must now pass a strict scrutiny test. This is incorrect.

First, the Court in Heller was examining a law that prohibited ordinary citizens from possessing a firearm--a class of persons who had a pre-existing right to bear arms. See section 2 above. The class of persons consisting of felons did not have a pre-existing right to bear arms. Thus, any application of any higher standard of review applicable in the Heller case would not be applicable here.

Second, while Justice Scalia, in a footnote, criticizes the rational basis test, he admits that he is not establishing any different level of scrutiny. Heller, at 34, n. 27; 37. Scalia notes that a different test is generally used to evaluate the extent to which a legislature may regulated a specific "enumerated right," of which, the right to bear arms is not. Heller, at 34, n. 27. The Court strikes down the District of Columbia statutes, saying they would fail scrutiny under any test. Heller, at 34.

Third, in all of the States that have constitutional provisions relied upon in Heller in interpreting the meaning of the Second

Amendment, felon firearm prohibition statutes have all be analyzed under a substantive due process reasonable regulation police power standard. See section 2 above.

In any event, the right of the Legislature to prohibit those persons convicted of committing violence crimes from possessing a firearm, regardless of their age (which has little to do with their dangerousness at the time of the offense--otherwise there would not be such a high level of violence juvenile crime), exists and is justifiable under any level of scrutiny.

D. CONCLUSION

For the reasons cited above, this Court should affirm the trial court's denial of Hunter's petition to reinstate his right to possess a firearm.

DATED this 3 day of September, 2008.

RESPECTFULLY submitted,

[KCPA]

By:



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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Neil Fox, the attorney for the appellant, at Cohen & Iaria, 1008 Western Ave. Suite 302, Seattle WA 98104, containing a copy of the Supplemental Brief, in STATE V. HUNTER, Cause No. 60552-6-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame
Name
Done in Seattle, Washington

9/4/08
Date

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