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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LOUIS HUMBERTO GONZALES, Appellant.	)	2 CA-CR 2010-0041 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20000257

Honorable Javier Chon-Lopez, Judge

AFFIRMED

Barbara LaWall, Pima County Attorney
By Amy S. Ruskin and Jacob R. Lines
Tucson
Attorneys for Appellee

Ronald Zack
Tucson
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E C K E R S T R O M, Judge.

¶1 Appellant Louis Gonzales was convicted pursuant to a plea agreement of second-degree sexual conduct with a minor, a dangerous crime against children, and attempted sexual abuse. The trial court placed him on seven years' probation in

November 2000. In this appeal, he challenges the court's order denying his request to restore his civil right to possess or carry a gun or firearm.

¶2 In May 2007, Gonzales filed a motion asking the trial court to terminate probation, designate the attempted sexual abuse offense as a misdemeanor, restore his rights, except the right to possess or carry a gun or firearm, and set aside the conviction. The court terminated probation at the end of May but did not restore his civil rights. In September 2008, Gonzales filed a motion to restore his civil rights, except the right to possess or carry a gun or firearm. In November 2008, the court designated the offense of attempted sexual abuse as a class one misdemeanor and restored Gonzales's civil rights, "except the right to possess or carry a gun or firearm." In October 2009, Gonzales filed a motion to restore that right. In its response to the motion, the state contended, as it does on appeal, that because Gonzales was convicted of a dangerous crime against children, based on § 13-905(C), he could not apply for the restoration of his right to possess or carry a gun or firearm until May 29, 2017, ten years after he was discharged from probation. In its January 2010 order, entered after a hearing, the court denied Gonzales's motion. This appeal followed.

¶3 We generally review a trial court's decision whether to restore a defendant's civil rights for an abuse of discretion. *See State v. Buonafede*, 168 Ariz. 444, 446, 814 P.2d 1381, 1383 (1991) (if person has been "convicted of two or more felonies" and petitions for restoration of civil rights after termination of probation, A.R.S. § 13-905 governs and gives trial court discretion to decide whether to grant application); *see also* A.R.S. § 13-908 ("Except as provided in [A.R.S.] § 13-912, the restoration of civil rights

. . . shall be in the discretion of the superior court judge by whom the person was sentenced or his successor in office."). But the issue raised in this appeal requires us to interpret § 13-905, and the interpretation of a statute is a question of law, which we review de novo. *See State v. Sepahi*, 206 Ariz. 321, ¶ 2, 78 P.3d 732, 732 (2003). So, too, is the question whether a statute is being applied retroactively and, if so, whether that application is impermissible. *See City of Tucson v. Clear Channel Outdoor, Inc*., 209 Ariz. 544, ¶ 8, 105 P.3d 1163, 1166 (2005).

¶4 In 1994, the legislature enacted subsection (A)(5) of A.R.S. § 13-904, which added the right to possess a gun or firearm to the list of civil rights automatically suspended upon conviction of a felony. *See* 1994 Ariz. Sess. Laws, ch. 200, § 5. Section 13-905 was also amended in 1994; subsection (C) was added, which currently provides as follows:

> If the person was convicted of a dangerous offense under § 13-704, the person may not file for the restoration of the right to possess or carry a gun or firearm. If the person was convicted of a serious offense as defined in § 13-706 the person may not file for the restoration of the right to possess or carry a gun or firearm for ten years from the date of his discharge from probation. If the person was convicted of any other felony offense, the person may not file for the restoration of the right to possess or carry a gun or firearm for two years from the date of the person's discharge from probation.

See 1994 Ariz. Sess. Laws, ch. 200, § 6.[1]

[1]The statute was amended in 1999 to reflect the correct subsection of another statutory reference within it, and that statute itself has been renumbered and reorganized since the 1999 addition. *See* 1999 Ariz. Sess. Laws, ch. 261, § 12; 2008 Ariz. Sess.

¶5 Gonzales does not dispute on appeal that second-degree sexual conduct with a minor is a serious offense for purposes of § 13-905(C). He contends that because he committed the offense of second-degree sexual conduct in 1990, before the statute was amended, the provision does not apply to his case. Relying on A.R.S. § 1-244, he argues that because the statute does not expressly state it is to be applied retroactively, it cannot be so applied. And, characterizing this as a criminal statute, he contends application of § 13-905(C) to him violates the prohibitions in the state and federal constitutions of the enactment of ex post facto laws. *See* U.S. Const. art. I, § 9; Ariz. Const., art. II, § 25.

¶6 In denying Gonzales's motion for the restoration of the right to possess or carry a gun or firearm, the trial court relied on the plain language of the provision and, to a large degree, this court's decision in *State v. Olvera*, 191 Ariz. 75, 952 P.2d 313 (App. 1997). In *Olvera*, 191 Ariz. at 77, 952 P.2d at 315, we found the purpose of § 13-904 was not punitive but regulatory. The trial court concluded that the fact that Gonzales committed the offense in 1990, before the statute was amended, did not make application of the provision to Gonzales retroactive. Finding the relevant event here was Gonzales's conviction and sentence, the court concluded the statute was not being applied retroactively because it was already in effect in 2000, when Gonzales was convicted and sentenced.

¶7 Gonzales contends on appeal, as he did below, that *Olvera* is distinguishable. He maintains that we based our decision in that case on the fact that

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Laws, ch. 301, § 28. Section 13-905 was amended again in 2008, but no substantive changes were made. *See* 2008 Ariz. Sess. Laws, ch. 301, § 44.

Olvera was already a convicted felon in 1992 and, therefore, the amendment to the statute simply changed his status as a felon. *Olvera*, 191 Ariz. at 77, 952 P.2d at 315. Gonzales contends that when § 13-905(C) was enacted, "the offense for which [he] was later charged had been committed, but he had not been charged or convicted and he was not a convicted felon." Additionally, although Gonzales acknowledges this court held in *Olvera* that the statutes are regulatory in nature, not punitive, he argues § 13-905(C) is punitive as applied to him because the offense of which he was convicted is "in no way indicative of unfitness to possess a firearm." And, he asserts, given that "[f]irearms had been a significant part of [his] life prior to his conviction . . . the deprivation of that right was clearly punitive in effect under these facts." Relying on the Second Amendment to the United States Constitution, he maintains that as an American, he had the vested, substantive right to bear arms and "[a]s such, retroactive application of A.R.S. § 13-905([C]) which changed the law that applied to one's right to possess and carry guns and firearms was impermissible."

¶8 "A statute is not impermissibly retroactive if it is merely procedural and does not affect an earlier established substantive right." *State v. Gum*, 214 Ariz. 397, ¶ 23, 153 P.3d 418, 424 (App. 2007). Criminal laws that define an offense or prescribe the punishment are substantive. *Id*. ¶ 24.

¶9 The defendant in *Olvera* had argued that, as applied to him, the 1994 amendment of § 13-904 to add the right to possess a gun or firearm to the list of civil rights that are automatically suspended when a person is convicted of a felony, resulted in an impermissible retroactive application of the statute. 191 Ariz. at 76, 952 P.2d at 314.

He argued that this violated the constitutional prohibitions against ex post facto laws because he had already been convicted at the time of the amendment. *Id.* Among the reasons we rejected the defendant's argument was that "the amendments are not punishing him for his past offenses, nor did they criminalize conduct committed prior to the amendments' enactment." *Id*. at 77, 952 P.2d at 315. Thus, we rejected the defendant's argument that this was an ex post facto law—even assuming the relevant "conduct" or event was the date of the offense, and we reached the same conclusion based on what the statute identified as the relevant "conduct," which was the date of the conviction. Although the conviction in that case had occurred before the statute was enacted, we nevertheless concluded "a felony conviction . . . can reasonably be found to indicate unfitness to engage in the future activity of possession of a firearm." *Id.* Consequently, "the entire legislative scheme" reflects "that the legislature's intent was to restrict firearm possession from those likely to engage in felonious conduct in order to secure the safety of the state's citizens." *Id*. It was not designed to punish.

¶10 *Olvera* is not meaningfully distinguishable from the case now before us. We reiterate what we said in *Olvera*; Gonzales is not being punished for the conduct that gave rise to the offense. And, we are not persuaded by his contention that the statute is punitive when applied to him because of the importance firearms have played in his life and because the offense of attempted sexual conduct with a minor purportedly does not reflect his unfitness to possess a firearm. There is simply no support for these propositions.

¶11 Moreover, the very thing that Gonzales points to as distinguishing this case from *Olvera* makes Gonzales's argument far less compelling, not more. That § 13-905(C) was already in effect when Gonzales was convicted necessarily negates any claim that the statute affected rights he held as a convicted felon before its enactment, an argument the defendant in *Olvera* was able to make. We rejected the defendant's arguments in *Olvera* despite the fact that his conviction was before the statute's enactment, not because of it. And if § 13-905(C) could never apply to persons convicted after 1994, then to whom could it apply? Clearly, such an interpretation of the statute's applicability would be ludicrous and we do not interpret statutes in a manner that would make them illogical and engender nonsensical results. *See Linda V. v. Ariz. Dep't of Econ. Sec*., 211 Ariz. 76, ¶ 11, 117 P.3d 795, 798 (App. 2005) (we will not interpret statutes to create absurd, illogical result); *State v. Baca*, 187 Ariz. 61, 63, 926 P.2d 528, 530 (App.1996) (in construing statute, appellate court presumes legislature did not intend absurd result and we attempt to avoid such consequence).

¶12 Finally, for the same reasons that we have rejected Gonzales's other arguments, we reject his contention that the statute divested him of the vested right to possess a firearm. The crucial inquiry is not whether a statute affects a substantive right but whether it affects a vested right. *Hall v. A.N.R. Freight Sys., Inc*., 149 Ariz. 130, 139-40, 717 P.2d 434, 443-44 (1986). Because the application of the statute to Gonzales is not a retroactive application, but merely regulates his status as a convicted felon, Gonzales's argument necessarily fails. Moreover, the right Gonzales had to possess a firearm was never an unconditional right; rather, pursuant to § 13-904(A)(5) it is a right

that was automatically suspended when he was convicted in November 2000, long after the statute was enacted. Section 13-905 prescribes the procedure by which a convicted felon may apply for the restoration of the right to possess a firearm. The only vested right, if any, created by the statute is the right to apply for the restoration of his rights ten years after his discharge from probation; he has not been divested of that right.[2]

¶13 For the reasons stated, we affirm the trial court's order.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

[2]Arguably, any right created by the statute has not yet vested because he may not seek restoration of the right to possess or carry a gun or firearm until May 29, 2017. Again, he has not been divested of that right.