STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2010
v	No. 291313 Delta Circuit Court
DAVID LEONARD SCHWARTZ, Defendant-Appellant.	LC No. 08-007945-FH

Before: MURPHY, C.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Defendant David Leonard Schwartz appeals as of right his bench conviction of possessing a firearm while being ineligible to do so (felon-in-possession). See MCL 750.224f. The trial court sentenced Schwartz to serve five months in jail for his conviction. On appeal, Schwartz argues that his conviction violated his constitutional right to bear arms and violates the constitutional prohibition against the passage of ex post facto laws. For these reasons, he maintains that this Court must reverse and vacate his felon-in-possession conviction. Because we conclude that his conviction did not violate either his constitutional right to bear arms or the prohibition against ex post facto laws, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The present case has its origins in a violent altercation between Schwartz and a friend, Ian Goldi, at Schwartz's home. Police reports contained in the lower court record indicate that prior to the altercation Schwartz and Goldi had been drinking and smoking marijuana. [1] Later, Schwartz drove Goldi to the home of someone that neither Schwartz nor Goldi would identify. Goldi indicated that he had a discussion with that person about a drug debt that he owed to that person and that Schwartz seemed upset about it. They later went to Schwartz's home. Goldi related that they drank some more at Schwartz's house and, at some point, Schwartz retrieved a

[1] The police reports were not admitted at Schwartz's bench trial. Nevertheless, we have elected to use them solely to provide some limited background to the events that led to the present charge.

gun and fired a shot at him. He said they then began to struggle over the gun, which went off two more times. He said he took the gun and swung it like a baseball bat and struck Schwartz. According to Goldi, Schwartz then grabbed a knife and tried to cut his head off.

As reported by the police, Schwartz stated that Goldi was drunk and, after they arrived at Schwartz's house, Goldi began to punch him. Schwartz said he grabbed his rifle and ordered Goldi to leave, but Goldi obtained control of the gun and made him get on his knees in the kitchen and threatened to kill him. Schwartz said he took a filet knife and slashed Goldi. Goldi then took the knife from him and stabbed him in the side. Schwartz said he then went next door to his parent's house and called the police. The records show that both Schwartz and Goldi had stab wounds that required emergency medical care. Photos from the scene also show significant amounts of blood on the floor and wall.

After conducting an investigation into the incident, it was learned that Schwartz had been charged in 1992 with delivering marijuana in violation of MCL 333.7401. In April of that same year, Schwartz pleaded guilty to attempting to deliver marijuana, which was then considered a high misdemeanor. See MCL 750.92.

In April 2008, the prosecutor charged Schwartz with felon-in-possession on the basis of the evidence that he possessed a 30-30 caliber rifle during the altercation with Goldi. In September 2008, Schwartz's trial counsel moved to dismiss the charge on the ground that the Legislature could not retroactively elevate a misdemeanor to a felony. At oral arguments on the motion, his trial counsel also argued that, because Schwartz pleaded guilty to attempted delivery of marijuana several months before the Legislature enacted MCL 750.224f, it could not be applied to him without violating the prohibition against ex post facto laws. The trial court rejected that argument and denied the motion to dismiss. The case then proceeded to a bench trial in February 2009.

At Schwartz's trial, Trooper Scott White testified that he worked for the Michigan State Police and that he responded to a call at Schwartz's parent's house. Schwartz was there along with Goldi and both Schwartz and Goldi were injured. After he and his partner began to administer first aid, Schwartz told him that their injuries occurred in an altercation next door at his house. White said that he got Schwartz's permission to search his house and found a 30-30 rifle that had been broken into two pieces. Schwartz told White that he and Goldi initially fought over a knife and then over the gun. Schwartz said that he went to his bedroom to retrieve his cell phone and Goldi followed him. The gun was lying on the bed and they began to fight over it. However, White said that Schwartz's story changed and, in an alternate version, he said he went to the bedroom to get his rifle to get Goldi out of the house.

The register of deeds for Delta County testified that she keeps the records of felony convictions and the records for persons who have their gun privileges reinstated. She produced a copy of Schwartz's 1992 conviction of attempting to deliver marijuana and stated that she had no record that he had ever applied to have his gun privileged reinstated.

Schwartz testified that he pleaded guilty to the misdemeanor of attempting to deliver marijuana and that he had no idea that the Legislature subsequently enacted a law that barred him from possessing a gun. He admitted that he had owned the rifle since he was 16-years-old and that he possessed and held the rifle on the day at issue.

At the close of the trial, the trial court found that the prosecution had proven beyond a reasonable doubt that Schwartz had committed the crime of being a felon-in-possession. Thereafter, the trial court sentenced Schwartz to serve 5 months in jail. This appeal followed.

II. THE RIGHT TO BEAR ARMS

A. STANDARDS OF REVIEW

We shall first address Schwartz's claim that his conviction must be vacated because the statute criminalizing the possession of firearms by felons, MCL 750.224f, is unconstitutional as applied to him. Specifically, he argues that, under the Supreme Court of the United State's decision in *District of Columbia v Heller*, 554 US ___; 128 S Ct 2783; 171 L Ed 2d 637 (2008), the Legislature cannot prohibit non-violent offenders from bearing arms in self defense. He also argues that the same result arises under the right to bear arms protected by the Michigan Constitution, because that provision is even more broadly worded than its federal counterpart. This Court reviews de novo questions of law such as whether a statute violates a constitutionally protected right. *People v Bryant*, 483 Mich 132, 138; 768 NW2d 65 (2008). However, because Schwartz did not properly preserve this issue before the trial court, he has forfeited this claim of error. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). This Court reviews unpreserved claims of constitutional error for plain error affecting the defendant's substantial rights. *Id.* at 764.

B. PLAIN ERROR

In order to avoid forfeiture of an unpreserved claim of error, the defendant must show that there was an error that was plain—that is, clear or obvious—and that the error affected his or her substantial rights. *Id.* at 763. The last requirement generally requires a showing that the error affected the outcome of the lower court proceedings. *Id.* Finally, even if the defendant shows that there was a plain error that affected the outcome of the lower court proceedings, reversal will only be warranted where the plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Id.*

At the time of Schwartz's offense and conviction for being a felon-in-possession, it was well-settled that the right to bear arms under Michigan's Constitution, see Const 1963, art 1, § 6, did not guarantee felons the right to possess a firearm. See *People v Swint*, 225 Mich App 353, 362-363; 572 NW2d 666 (1997). The Court in *Swint* also determined that Michigan's ban on the possession of firearms by felons was consistent with similar longstanding bans in other states that had been upheld as reasonable limitations on the right to bear arms. *Id.* at 363-375. For that reason, it concluded that Michigan's ban was also a reasonable limitation on the right to bear arms. *Id.* at 375. Further, as Schwartz acknowledges on appeal, up until after his conviction, see *McDonald v City of Chicago*, ___ US ___, 130 S Ct 3020, 3050; 177 L Ed 2d 894 (2010)

(holding that the Due Process Clause of the Fourteenth Amendment incorporates the right recognized in *Heller* and, for that reason, the right applies to the states as well as the federal government), it was commonly understood that the Second Amendment to the Constitution of the United States did not apply to the States. See *Swint*, 225 Mich App at 360 , citing *Miller v Texas*, 153 US 535, 538; 14 S Ct 874; 38 L Ed 812 (1894). Because the law—as it existed at the time of Schwartz's conviction—plainly foreclosed any challenge to his prosecution under MCL 750.224f as a violation of the right to bear arms under either the state or federal constitutions, we cannot conclude that the claim of error was clear or obvious. Therefore, there was no plain error and Schwartz is not entitled to any relief. *Carines*, 460 Mich at 763. Moreover, even considering this claim of error on the merits, Schwartz is still not entitled to any relief.

B. THE RIGHT TO BEAR ARMS UNDER MICHIGAN'S CONSTITUTION

The Michigan Constitution protects the right of its citizens to bear arms for self defense: "Every person has a right to keep and bear arms for the defense of himself and the state." Const 1963, art 1, § 6. Our Supreme Court has long recognized that this provision, although stated in absolute terms, is not unlimited; rather, the Legislature retains the ability to reasonably regulate the right. See *People v Brown*, 253 Mich App 537, 538, 541; 235 NW 245 (1931) (stating that, notwithstanding the constitutional guarantee that "[e]very person has a right to bear arms for the defense of himself and the State," the Legislature may enact reasonable regulations of that right including categorical bans on weapons that are not by common opinion of the type legitimately to be kept for the protection of persons and property). Moreover, this Court has held that the Legislature's power to regulate this right includes the power to preclude certain types of criminal offenders from possessing firearms. *Swint*, 225 Mich App at 363. This is because it is a lethal combination to mix firearms with criminal offenders, "who have exhibited their disregard for ordered society and pose a threat to public safety." *Id.* at 374.

The recent decisions by the Supreme Court of the United States do not implicate the proper interpretation and scope of this state's guarantee of the right to bear arms; the courts of this state are free to interpret our own constitution without regard to the interpretation of analogous provisions of the United States Constitution. See *People v Goldston*, 470 Mich 523, 534; 682 NW2d 479 (2004).[2] And, until our Supreme Court reexamines the proper scope of this state's guarantee of the right to bear arms, this Court is bound to follow the decision in *Swint*. MCR 7.215(C)(2). Therefore, Schwartz's claim that his conviction under MCL 750.224f violates his right under Const 1963, art 1, § 6 necessarily fails.

[2] This is not to say that, if the Supreme Court of the United States recognized a right under the United States Constitution that provides greater protection than an analogous clause in our Constitution, this Court would not be bound by that interpretation. Rather, we simply recognize that we would not be enforcing a right guaranteed under our constitution—we would be enforcing a right guaranteed under the federal constitution.

C. THE SECOND AMENDMENT

We also do not agree that Schwartz's conviction under MCL 750.224f violated his right to bear arms under the Second Amendment to the Constitution of the United States. In asserting otherwise, Schwartz relies heavily on the recent decision in *Heller*, 554 US ___.

In *Heller*, the Supreme Court addressed the constitutionality of a general ban on the ownership of handguns within the District of Columbia. *Heller*, 554 US, slip op at 1. After examining the language of the Second Amendment and the history underlying its ratification, the Court held that the Second Amendment guaranteed an individual's right to keep and bear arms. *Id.*, slip op at 22. Although it declined to elucidate the full extent of the constitutional right to keep and bear arms, the Court stated that the core of the right included "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.*, slip op at 63. It also took pains to clarify that the right was not unlimited:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, 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. [*Id.*, slip op at 54-55.]

In examining the continuing validity of statutes that ban the possession of firearms by certain classes of criminal offenders after the Supreme Court's decision in *Heller*, several federal courts have determined that the Supreme Court's statement that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons" required them to uphold statutes criminalizing the possession of firearms by felons. See *United States v White*, 593 F3d 1199, 1205-1206 (CA 11, 2010) (stating that a statute that prohibits the possession of firearms by persons convicted of misdemeanor domestic violence was presumptively valid under *Heller*); *United States v McCane*, 573 F3d 1037, 1047 (CA 10, 2009); *Anderson*, 559 F3d 348, 352 & n6 (CA 5, 2009) (noting that precedent prior to *Heller* had upheld the validity of a statute prohibiting the possession of firearms under the Second Amendment and, because the Court in *Heller* stated that its decision did not cast doubt on the validity of those statutes, there was no reason under *Heller* to revisit the prior decision). Although Schwartz acknowledges that the Supreme Court has stated that its opinion should not be understood to cast doubt on such statutes, he contends that this statement is non-binding dicta and urges this Court to take guidance from the concurring opinion in *McCane* and hold that the Second Amendment protects the right of non-violent offenders to bear arms in self-defense. See *McCane*, 573 F3d at 1047-1050 (TYMKOVICH, J). We decline to follow Schwartz's request. We note that Judge TYMKOVICH only wrote in concurrence to make two points. First, he explained that there was conflicting evidence concerning the historical scope of the protections afforded under the Second Amendment; there was evidence that both supported and undermined the proposition that persons convicted of crimes were outside the protection of the Second Amendment. See *id.* at 1048-1049. Second, he argued that the Supreme Court's dictum imprudently foreclosed the lower courts from developing a framework within which to analyze challenges based on the Second Amendment, such as whether non-violent felons could be precluded from bearing arms

in self-defense. *Id.* at 1049-1050. Although he lamented the fact, Judge TYMKOVICH clearly recognized that the Supreme Court's dictum was binding:

> Rather than seriously wrestling with how to apply this new Second Amendment rule, therefore, courts will continue to simply reference the applicable *Heller* dictum and move on. And in light of the Supreme Court's clear direction, this is perhaps how it should be. After all, "our job as a federal appellate court is to follow the Supreme Court's directions, not pick and choose among them as if ordering from a menu." [*Id.* at 1050 (citation omitted).]

Notwithstanding his reservations, we agree with Judge TYMKOVICH and the other courts that have determined that, on the basis of the Supreme Court's statement in *Heller* where it clarified that its holding does not "cast doubt" on "longstanding prohibitions on the possession of firearms by felons," such statutes are presumptively valid. Consequently, absent further guidance from the Supreme Court, we hold that MCL 750.224f does not violate the rights guaranteed under the Second Amendment. Further, even if we were to ignore the Supreme Court's direction on the continuing validity of such statutes, we would still conclude that MCL 750.224f passes constitutional muster.

In *Heller*, the Supreme Court determined that the core right protected under the Second Amendment was the "right of *law-abiding, responsible* citizens to use arms in defense of hearth and home." *Heller*, 554 US, slip op at 63 (emphasis added). And, in its holding, the Supreme Court stated that the District of Columbia must permit Heller to register his handgun and issue him a license, assuming that he was "not disqualified from the exercise of Second Amendment rights." *Id.*, slip op at 64. Thus, the Supreme Court recognized that certain classes of persons are already or can be disqualified from the exercise of Second Amendment rights. When these statements are read together with the Supreme Court's admonition that its opinion should not be read to cast doubt on "longstanding prohibitions on the possession of firearms by felons and the mentally ill," it is clear that the Supreme Court understood that persons who were not "law-abiding" or "responsible," such as felons, or persons who were "mentally ill" could be precluded from possessing firearms without violating the Second Amendment. Indeed, several federal courts have determined that, because the core right under the Second Amendment applies to *law-abiding citizens*, citizens who have criminal convictions are not entitled to the same level of protection under the Second Amendment as citizens who have not been so convicted. For that reason, those courts have applied intermediate scrutiny to statutes that criminalize the possession of firearms by criminal offenders. See, e.g., *United States v Walker*, ___ F Supp 2d ___ (2010) (applying intermediate scrutiny to review a statute that indefinitely prohibits persons who commit misdemeanor domestic assaults from possessing firearms and concluding that it is constitutional). Given the strong indication by the Supreme Court that felons are not subject to

the full protection of the Second Amendment, we agree that statutes criminalizing the possession of firearms by felons should be examined using this intermediate level of scrutiny.[3]

Under the intermediate level of scrutiny, courts will uphold a statute if the government establishes that the statue in question is substantially related to an important governmental objective. *Clark v Jeter*, 486 US 456, 461; 108 S Ct 1910; 100 L Ed 2d 465 (1988). A statute will be deemed substantially related to the governmental objective where there is a reasonable fit between the Legislature's ends and the means chosen to accomplish those ends. See *Bd of Trustees of State University of New York v Fox*, 492 US 469, 480; 109 S Ct 3028; 106 L Ed 388 (1989). The State's interest in reducing gun crimes is an important governmental interest. See *United States v Salerno*, 481 US 739, 749; 107 S Ct 2095; 95 L Ed 2d 697 (1987) (stating that the state has a legitimate and compelling interest in the prevention of crime). Thus, our only concern is whether—as applied to Schwartz—there is a reasonable fit between the Legislature's ends and the means chosen to accomplish those ends.

The purpose behind the prohibition against the possession of firearms by felons is "to ensure that those persons who are more likely to misuse firearms do not maintain ready possession of them." *People v Dupree*, 284 Mich App 89, 106; 771 NW2d 470 (2009) (M. J. KELLY, J.). To that end, the Legislature has prohibited the possession, use, transportation, sale, purchase, carrying, shipping, receiving, or distribution of firearms by persons who have been convicted of a felony or a specified felony for a period of years. MCL 750.224f(1), (2). And, in crafting its prohibition, the Legislature carefully defined the term felony to include only serious violations of law—that is, the Legislature implicitly recognized that persons who commit such serious offenses are more likely to unlawfully use guns. See MCL 750.224f(5) (defining felony to include violations of "a law of this state, or another state, or of the United States that is punishable by imprisonment for 4 years or more, or an attempt to violate such a law."). It is also noteworthy that the Legislature did not permanently proscribe felons from possessing firearms; rather, persons convicted of felonies will regain the right to possess a firearm three years after they pay all the fines imposed for the felony, serve all terms of imprisonment, and successfully complete the conditions of probation or parole. See MCL 750.224f(1). Finally, the Legislature clearly recognized that certain types of felonies were even stronger indicators of the offender's

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[3] We note that the Supreme Court's reference to whether Heller was disqualified from the exercise of Second Amendment rights leaves open the possibility that such persons are wholly outside the protection of the Second Amendment—that is, they might have no Second Amendment rights. If such were the case, the Legislature's decision to regulate such persons' possession of firearms would not implicate a fundamental right and, for that reason, would only have to pass the rational basis test. See *Kyser v Kasson Twp*, 486 Mich 514, 522 n2; 786 NW2d 543 (2010) (explaining that the rational basis test generally applies where there are no suspect factors or where no fundamental right is implicated). In any event, we reject the notion that the regulation of the possession of firearms by felons—whether violent or otherwise—should be evaluated under strict scrutiny given that the Supreme Court clearly identified the core protection under the Second Amendment as one that applies to *law-abiding* citizens.

propensity to misuse firearms and provided that persons who commit those felonies should be precluded from possessing firearms for a longer period of time and must apply to have their rights restored. MCL 750.224f(2), (6). This latter category of felonies includes offenders such as Schwartz who committed crimes involving controlled substances. MCL 750.224f(6)(ii).

This Court is well aware of the correlation between trafficking in illegal substances and gun violence. It is beyond reasonable dispute that a significant—even startling—portion of gun violence has some connection to the illegal use, manufacture, and distribution of controlled substances. For that reason, we cannot agree that merely "attempting" to distribute marijuana is not indicative of a likelihood that the person convicted will misuse firearms because the actual offense did not—on that occasion—ultimately involve physical violence. Indeed, the very events at issue here show that whenever controlled substances are mingled with ready access to firearms, there is a high potential for violence. Accordingly, the Legislature has compelling reasons for proscribing felons who commit drug offenses from having ready access to firearms.

The Legislature carefully crafted MCL 750.224f to target only offenders who committed serious offenses that have a high correlation with gun violence; it also limited the period of proscription such that offenders who demonstrate an ability to conform their conduct to the requirements of our laws can regain their right to keep and bear arms. Given these carefully tailored provisions, we conclude that there is a reasonable fit between the prohibitions provided under MCL 750.224f and the important governmental interest in preventing gun crimes. Consequently, as applied to him, Schwartz's conviction under MCL 750.224f did not violate his Second Amendment rights.

III. EX POST FACTO

Schwartz also argues that his conviction violates the prohibitions against the enactment of ex post facto laws under both the Michigan and United States Constitutions. He notes that, at the time he pleaded to attempting to deliver marijuana, the underlying marijuana offense carried a maximum sentence of 4 years in prison. See MCL 333.7401(2)(d)(*iii*).[4] For that reason, the attempt to commit that offense was a misdemeanor, not a felony. See MCL 750.92(3) (stating that an attempt to commit a felony punishable by less than five years in prison is a misdemeanor that may be punished by up to two years in prison or 1 year in jail). And, under the prohibition against ex post facto laws, he argues that the Legislature could not permissibly increase the penalty for his conviction of the misdemeanor offense of attempting to deliver marijuana by defining the term felony to include such an offense for purposes of the felon-in-possession statute. See MCL 750.224f(5) (defining the term felony for purposes of the felon-in-possession statute to include any offense that is punishable by a prison sentence of four or more years or an attempt to commit such an offense).

This Court has already addressed the application of the Ex Post Facto Clauses of the United States and Michigan Constitutions to MCL 750.224f. In *People v Tice*, 220 Mich App

[4] This provision was formerly codified at MCL 333.7401(2)(c).

47, 52; 558 NW2d 245 (1996), this Court determined that application of MCL 750.224f "to a person who is a convicted felon as a result of a conviction of a felony committed before the date that statute took effect does not violate the Ex Post Facto Clauses of the United States and Michigan Constitutions." This is because MCL 750.224f does not impose an additional penalty on the prior conduct, but rather punishes new conduct: the possession of firearms by persons who have demonstrated an inability to conform themselves to the law. *Id.* at 51. Although Schwartz acknowledges the decision in *Tice*, he contends that it was wrongly decided. However, we are not at liberty to disregard *Tice*. See MCR 7.215(C)(2). Therefore, because *Tice* controls here, we must conclude that Schwartz' conviction of felon-in-possession did not violate the prohibition against the enactment of ex post facto laws.

There were no errors warranting relief.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Kelly