

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA11-371
NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v.

Cabarrus County
No. 09 CRS 053476

JEFFREY DOUGLAS YUCKEL

Appeal by defendant from judgment entered 23 September 2010 by Judge Theodore S. Royster in Cabarrus County Superior Court. Heard in the Court of Appeals 28 September 2011.

Attorney General Roy Cooper, by Assistant Attorney General Kevin G. Mahoney, for the State.

Bushnaq Law Office, PLLC, by Faith S. Bushnaq, for Defendant-appellant.

ERVIN, Judge.

Defendant Jeffrey Douglas Yuckel appeals from a judgment sentencing him to a term of twelve to fifteen months imprisonment based upon his conviction for possession of a firearm by a felon, with this active sentence having been suspended and Defendant having been placed on supervised probation for a period of twenty-four months, subject to certain

terms and conditions. On appeal, Defendant contends that the North Carolina Felony Firearms Act, N.C. Gen. Stat. § 14-415.1 *et seq.*, is unconstitutional as applied to him. After careful consideration of Defendant's challenge to the trial court's judgment in light of the record and the applicable law, we conclude that Defendant is not entitled to any relief from the trial court's judgment on appeal.

I. Factual Background

A. Substantive Facts

On 9 October 2009, Defendant, who had previously been convicted of felonious larceny; his disabled wife, Margaret Yuckel; and Sue Ellen Castillo, a family friend, were eating dinner and having drinks at Defendant's home.¹ At that time, Defendant and his wife were allowing Ms. Castillo and her child to live at their home so that Ms. Castillo could get "on her feet." After dinner, Defendant and Ms. Castillo walked to the home of a neighbor named Patrick Borello. Mrs. Yuckel, who is confined to a wheelchair, remained behind with Wendy Safrit, her

¹On the evening in question, Defendant claimed to be under tremendous stress because of Mrs. Yuckel's physical condition, the treatment that Mrs. Yuckel had received from an insurance company, the loss of his business stemming from the need for Defendant to provide 24 hour care for Mrs. Yuckel, and the fact that the Yuckels had not received a payment that had been ordered by the Industrial Commission. (T125-26, 150)

home health care nurse. While at Mr. Borello's home, Defendant consumed additional alcoholic beverages.

At approximately 11:30 p.m., Mrs. Yuckel and Ms. Safrit went outside the house and into the garage so that Mrs. Yuckel could smoke a cigarette. At about the same time, Defendant and Ms. Castillo returned to the family home. Upon returning home, Defendant went upstairs to the master bedroom, with Ms. Castillo following him to that location shortly thereafter.²

After Mrs. Yuckel asked Ms. Safrit to get Ms. Castillo so that she could speak with her, Ms. Safrit went inside and yelled for Ms. Castillo. Ms. Castillo opened the bedroom door and said that she could not come downstairs. When Ms. Safrit told Ms. Castillo what Mrs. Yuckel wanted, Ms. Castillo replied, "Well, I'm not coming down," and shut the door in Ms. Safrit's face. At that point, Ms. Safrit told Mrs. Yuckel that Ms. Castillo was in the master bedroom with Defendant and had refused to speak with her.

After receiving this information, Mrs. Yuckel entered the house and, with the aid of Ms. Safrit, climbed the stairs to the master bedroom. Upon discovering that the bedroom door was

²According to Ms. Safrit, Ms. Castillo was trying to get Defendant to do something that he did not want to do. At trial, Mrs. Yuckel denied having any concern that there was some sort of emotional attachment between Defendant and Ms. Castillo.

locked, Mrs. Yuckel asked Ms. Safrit to retrieve a key. After helping Mrs. Yuckel unlock the bedroom door, Ms. Safrit went back downstairs. Ms. Safrit returned to the bedroom when she heard Mrs. Yuckel and Ms. Castillo speaking loudly. When she entered the bedroom, Ms. Safrit saw Defendant, Mrs. Yuckel, and Ms. Castillo stretched across the bed wrestling over a handgun, which discharged.³ After hearing the gunshot, Ms. Safrit fled the home and telephoned her sister, who called 911. One of Mrs. Yuckel's children was inside the home at the time of this incident.

After the handgun discharged, Defendant took the firearm to Mr. Borello's house and asked him to "hide this for me." Shortly thereafter, investigating officers came to Defendant's home and questioned him about the incident. Although Defendant initially denied that a gun had been fired in his residence, the officers located a bullet hole in the master bedroom. At that point, one of the investigating officers went to Mr. Borello's house, where Mr. Borello informed them that Defendant had been at his home earlier that evening and had left a handgun there. After the officer retrieved the handgun and confronted Defendant

³At trial, Defendant claimed that the handgun belonged to Mrs. Yuckel, who had brought it to her marriage with Defendant. According to Defendant, he saw Mrs. Yuckel remove the handgun from under the pillow and grabbed her hand because he did not know what her intentions were, at which point the gun fired.

with it, Defendant admitted that he kept the firearm under a bedroom pillow and that it had discharged earlier that evening.

B. Procedural History

On 13 October 2009, a Warrant for Arrest charging Defendant with possession of a firearm by a convicted felon was issued. On 28 June 2010, the Cabarrus County grand jury returned a bill of indictment charging Defendant with possession of a firearm by a felon. The charges against Defendant came on for trial before the trial court and a jury at the 21 September 2010 criminal session of the Cabarrus County Superior Court. On 23 September 2010, the jury returned a verdict finding Defendant guilty as charged. At the ensuing sentencing hearing, the trial court determined that Defendant had accumulated three prior record points and should be sentenced as a Level II offender. Based upon this determination, the trial court sentenced Defendant to a minimum term of twelve months and a maximum term of fifteen months imprisonment in the custody of the North Carolina Department of Correction, with this sentence being suspended and Defendant being placed on supervised probation for a period of twenty-four months, subject to certain terms and conditions. Defendant noted an appeal to this Court from the trial court's judgment.

II. Legal Analysis

On appeal, Defendant contends that his conviction for possession of a firearm by a convicted felon should be overturned because N.C. Gen. Stat. § 14-415.1 is unconstitutional as applied to him. In seeking to persuade us of the merits of this contention, Defendant points to the fact that the 2004 amendments to N.C. Gen. Stat. § 14-415.1, which banned any and all firearm possession by convicted felons, had not become effective at the time of his prior conviction or the end of the period during which he was subject to probationary supervision; that his previous felony conviction occurred more than a decade prior to the incident that led to the entry of the trial court's judgment; that Defendant had a post-conviction history of lawful and non-violent conduct; and that Defendant had provided exemplary care for his disabled wife. We do not find Defendant's argument persuasive.

According to Article I, Section 30 of the North Carolina Constitution, "[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." Article I, Section 19 of the North Carolina Constitution recognizes both an individual and a collective right to firearms possession, subject to appropriate regulation. *State v. Dawson*, 272 N.C. 535, 546, 159 S.E.2d 1, 9 (1968). As a result, the ultimate issue raised by Defendant's

challenge to his conviction is the extent, if any, to which applying the total prohibition on gun possession by a convicted felon worked by N.C. Gen. Stat. § 14-415.1 to a person in Defendant's position is "reasonable and not prohibitive" and "bear[s] a fair relation to the preservation of the public peace and safety." *Britt v. State*, 363 N.C. 546, 549, 681 S.E.2d 320, 322 (2009).

The legal principles governing "as-applied" constitutional challenges to N.C. Gen. Stat. § 14-415.1 have been clearly enunciated in recent decisions by the Supreme Court and this Court. "Based on the facts of plaintiff's crime, his long post-conviction history of respect for the law, the absence of any evidence of violence by plaintiff, and the lack of any exception or possible relief from the statute's operation, as applied to plaintiff, the 2004 version of N.C. [Gen. Stat.] § 14-415.1 is an unreasonable regulation, not fairly related to the preservation of public peace and safety." *Britt*, 363 N.C. at 550, 681 S.E.2d at 323. Put another way, "it is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety." *Id.* In considering an "as-applied" challenge to the application of the

Felony Firearms Act to a specific individual, our analysis must “focus[] on five factors . . . : (1) the type of felony convictions, particularly whether they ‘involved violence or the threat of violence,’ (2) the remoteness in time of the felony convictions[,] (3) the felon’s history of ‘law-abiding conduct since [the] crime,’ (4) the felon’s history of ‘responsible, lawful firearm possession’ during a time period when possession of firearms was not prohibited, and (5) the felon’s ‘assiduous and proactive compliance with the 2004 amendment.’” *State v. Whitaker*, 201 N.C. App. 190, 205, 689 S.E.2d 395, 404 (2009) (quoting *Britt*, 363 N.C. at 550, 681 S.E.2d at 323), *aff’d on other grounds*, 364 N.C. 404, 700 S.E.2d 215 (2010). “In order for [a party] to prevail [based upon] an as-applied constitutional challenge to N.C. Gen. Stat. § 14-415.1, he must present evidence which would allow the trial court to make findings of fact” relating to the factors enunciated in *Britt* and *Whitaker*. *State v. Buddington*, __ N.C. App. __, __, 707 S.E.2d 655, 657 (2011). Here, as in *Britt* and *Whitaker*, the trial court did not make findings of fact regarding the extent to which Defendant’s “as-applied” challenge to N.C. Gen. Stat. § 14-415.1 had merit. However, given that the record contains uncontroverted evidence concerning the factors that must be considered in conducting the required analysis, we have

sufficient information for use in evaluating Defendant's constitutional claim on the merits and will now proceed to do so.

The analysis outlined in *Britt* and *Whitaker* is relatively straightforward. None of the factors specified in those decisions is determinative. On the contrary, the factors outlined in *Britt* and *Whitaker* constitute a set of criteria that must be considered as part of a "totality of the circumstances" approach in determining the validity of a litigant's "as-applied" challenge to the constitutionality of the Felony Firearms Act. After carefully examining the record in light of the criteria specified in *Britt* and *Whitaker*, we believe that N.C. Gen. Stat. § 14-415.1 "is a reasonable regulation which is 'fairly related to the preservation of public peace and safety,'" *Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 405 (quoting *Britt*, 363 N.C. at 550, 681 S.E.2d at 323), as applied to Defendant.

The record clearly reflects that Defendant was convicted of the non-violent offense of felony larceny in 1998. Although Defendant's prior felony larceny conviction stemmed from an event that occurred approximately ten years before the incident that resulted in his conviction in the present case, the record also indicates that, since being convicted of felonious larceny,

Defendant was convicted of driving while subject to an impairing substance in 2001. As a result, unlike Mr. Britt and like Mr. Whitaker, Defendant has not been able to remain free of further entanglements with the criminal law for an extended period of time.

In addition, the present record, unlike that before the Supreme Court in *Britt*, indicates that Defendant has not possessed firearms in a responsible and lawful manner. Although Defendant argues that he has an overall history of responsible and law-abiding behavior, including attending to the needs of his disabled wife, the facts disclosed in the present record demonstrate that he acted in a completely irresponsible manner on the occasion that led to the conviction at issue in this case. More specifically, Defendant spent the evening consuming alcohol before wrestling with his wife and a houseguest over a handgun in a house in which a child was present. After the handgun discharged during the struggle, Defendant, with an alcoholic beverage in hand, took the handgun to a neighbor and asked him to hide the weapon. Although Defendant ultimately admitted having possessed the handgun when investigating officers confronted him with the weapon, he initially denied that a handgun had been discharged in his home. As a result of the fact that this handgun was kept under a pillow on his bed,

it was readily accessible to others. Thus, rather than having had a history of lawful and responsible firearms possession, the record shows that Defendant engaged in reckless and irresponsible behavior relating to the firearm he unlawfully possessed on the date of the incident that led to his conviction for violating N.C. Gen. Stat. § 14-415.1.

Finally, Defendant failed to "assiduously and proactively" comply with the 2004 amendments to the Felony Firearms Act, which preclude convicted felons from possessing firearms at any location and under any set of circumstances. Unlike Mr. Britt, who consulted with his local sheriff after the enactment of the 2004 legislation and divested himself of all firearms in order to remain in compliance with the relevant statutory provisions, *Britt*, 363 N.C. at 548, 681 S.E.2d at 322, Defendant continued to possess a handgun after it became unlawful for him to do so and raised his constitutional challenge to N.C. Gen. Stat. § 14-415.1 only after having been charged with criminally possessing a firearm. Thus, Defendant's reaction to the enactment of the 2004 amendments to the Felony Firearms Act has been very different from Mr. Britt's "assiduous and proactive" compliance with N.C. Gen. Stat. § 14-415.1.

Thus, after conducting the required constitutional analysis, we conclude that N.C. Gen. Stat. § 14-415.1, as

applied to Defendant, "is a reasonable regulation which is 'fairly related to the preservation of public peace and safety.'" *Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 405 (quoting *Britt*, 363 N.C. at 550, 681 S.E.2d at 323). Simply put, we find nothing impermissible about prohibiting a convicted felon who has exhibited such reckless and irresponsible behavior from possessing firearms regardless of the extent to which he may have cared for his disabled wife or engaged in other commendable activities in recent years. As a result, we conclude that Defendant's "as-applied" constitutional challenge to N.C. Gen. Stat. § 14-415.1 lacks merit.

III. Conclusion

For the reasons set forth above, we conclude that N.C. Gen. Stat. § 14-415.1 is not unconstitutional as applied to Defendant. As a result, we find no error in the entry of the trial court's judgment.

NO ERROR.

Judge STEPHENS concurs.

Judge BEASLEY concurs in separate opinion.

Report per Rule 30(e).

NO. COA11-371

NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2011

STATE OF NORTH CAROLINA

v.

Cabarrus County
No. 09 CRS 053476

JEFFREY DOUGLAS YUCKEL

BEASLEY, Judge, concurring in separate opinion.

While I concur with the majority's decision that the North Carolina Felony Firearms Act is constitutional as applied to Defendant, I write separately to clarify a few issues raised by the majority.

First, it is important to note that laws enacted by our General Assembly are "presumed to be constitutional." See, e.g., *Wayne County Citizens Assn. v. Wayne County Bd. of Comrs.*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991). The majority fails to acknowledge this presumption, instead launching directly into a discussion of the legal principles governing as applied challenges to the Felony Firearms Act, and thus fails to make clear that the burden is on those challenging the law to prove it is unconstitutional.

Secondly, I am compelled to comment on the majority's reliance on statements made by our Supreme Court in *Britt v. State*, 363 N.C. 546, 681 S.E.2d 320 (2009). The Supreme Court's

description of the plaintiff, Barney Britt, was a fact-specific comment on that particular plaintiff. When reviewing an as applied challenge to the Felony Firearms Act, the question before this Court is whether the Act is a reasonable regulation as it operates with regard to the plaintiff at issue. Although the *Britt* opinion is instructive on what factors can be considered, it should not be construed as a complete statement of law on that point.

Finally, I recognize that although Plaintiff's claim was litigated at the trial level before the effective date of the 2010 amendments to the Felony Firearms Act, by the time the case came before this Court the amendments were effective. Thus, we can and should consider the Act, as amended, in deciding this case and others that come before this Court.