

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert A. Taylor, :
Petitioner :
v. :
Pennsylvania State Police, : No. 390 C.D. 2010
Respondent : Submitted: October 1, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: February 18, 2011

Robert Taylor (Taylor) petitions for review of the order of the Office of Attorney General (OAG) which denied Taylor's request for relief from the Pennsylvania State Police's (State Police) denial of Taylor's application to purchase a firearm, pursuant to Section 922(g) of the Federal Gun Control Act (GCA), 18 U.S.C. §922(g).

Taylor was arrested on or about April 27, 2004, and charged with a violation of the Uniform Firearms Act for having an unlicensed firearm in his motor vehicle, 18 Pa.C.S. §6106; a violation of the Uniform Firearms Act for having a firearm on the streets, 18 Pa.C.S. §6108; and terroristic threats, 18 Pa.C.S. §2706. On December 3, 2004, Taylor pled guilty to the crime of violating the Uniform Firearms Act, 18 Pa.C.S. §6106, which was downgraded to a misdemeanor of the first degree. Taylor was sentenced to two years probation and ordered to pay court costs of \$178.00.

On May 23, 2008, Taylor attempted to purchase a firearm from C&D Coin and Gun Shop, Inc. in Bethlehem, Pennsylvania. He submitted an application to the State Police on Pennsylvania Instant Check System (PICS) Challenge Form SP 4-197. Taylor received a letter from Lieutenant Gary L. Schuler (Lt. Schuler), director of the firearms division of the State Police dated June 4, 2008, which informed him:

Your recent PICS background check concerning a purchase/transfer of a firearm was placed in an undetermined status. The reason(s) for this determination are outlined on the attached sheet. This information is confidential and will be used only with regard to this challenge.

Your PICS background check/challenge will remain in an undeterminate status pending your response to this letter. No further action will be taken regarding this matter until that time.

Letter from Lieutenant Gary L. Schuler, June 4, 2008, (Letter) at 1; Reproduced Record (R.R.) at a42. The possible reasons for denial included a list of eighteen criminal charges against Taylor. The letter informed him that he had thirty days to provide supporting documentation relevant to the criminal charges including “police reports, medical records, court documents, military records, or correspondence containing your signature along with an explanation pertaining to the circumstances and/or outcome of the incident(s).” Letter at 1; R.R. at a42.

Taylor timely responded. By letter dated September 3, 2008, Lt. Schuler informed him that his application to purchase a firearm was denied:

Please be advised that the basis for your denial can be found under federal law, 18 USC § 922, which states that it shall be unlawful for any person to sell or otherwise

dispose of any firearm to any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year. This definition includes any State offense classified by the laws of the State as a misdemeanor for which the term of imprisonment is more than two years.

Your 2004 conviction for Firearms Carried without a License is prohibiting. Please be advised that regardless of any penalty you may have received, this decision is based on the maximum penalty you could have received for this offense.

Letter from Lieutenant Gary L. Schuler, September 3, 2008, at 1; R.R. at a44.

Taylor appealed to the Office of Attorney General. Taylor asserted that he pled guilty to the charge of carrying a firearm without a license but received only probation. Because he did not serve any jail time, he asserts that the denial was in error.

The Administrative Law Judge (ALJ) for the Office of Attorney General held a hearing on May 26, 2009. Taylor testified that he pled guilty to a violation of the Firearms Act, 18 Pa.C.S. §6106. He explained his arrest:

Police were responding to a disturbance. They searched people that were there . . . myself and other volunteers. They let me go. I was on my way back to my car . . . and they took my keys and went . . . to search my vehicle. In the vehicle was a family firearm. It was loaded. I was charged with 'carry' violations.

Notes of Testimony, May 26, 2009, at 8-9; R.R. at a8-a9.

Michael F. Kelly (Kelly), legal supervisor in the firearms division challenge unit of the State Police, testified that Taylor's application was denied

because of his conviction for violating Section 6106 of the Crimes Code, 18 Pa.C.S. §6106, for carrying a firearm without a license. Kelly testified that Taylor's conviction was for a first degree misdemeanor which carried a maximum prison term of up to five years. Kelly submitted into evidence the certified record from the Court of Common Pleas of Philadelphia County regarding the conviction. N.T. at 14; R.R. at a14. Kelly further testified that the crime for which Taylor was convicted was a prohibiting offense from purchasing a firearm under the Federal Gun Control Act (GCA), 18 U.S.C. §922(g)(1). N.T. at 17; R.R. at a17. On cross-examination, Kelly testified that Taylor was not charged with a federal crime and did not know whether Taylor was involved in any interstate commerce. N.T. at 20; R.R. at a20.

Taylor's attorney argued that because Taylor did not commit a violation of federal law and was not engaged in any interstate commerce the federal prohibition in 18 U.S.C. §922(g)(1) did not apply. He also argued that Taylor's federal and Pennsylvania constitutional rights to bear arms were violated, he was subject to cruel and unusual punishment, and his equitable rights as a citizen of Pennsylvania were violated. N.T. at 24-26; R.R. at a24-a26.

By order dated March 4, 2010, the ALJ denied Taylor's request for relief. The ALJ determined that the firearm was manufactured in Florida and its history was "sufficient to connect the firearm to Petitioner [Taylor]." ALJ's Opinion (Opinion) at 9. The ALJ also determined that there was no violation of Taylor's constitutional rights to due process, equal protection, and to bear arms. The ALJ further determined that the denial of his application to purchase a firearm

did not constitute cruel and unusual punishment and was not an *ex post facto* application of the law:

The courts in Pennsylvania, specifically, *Lehman [v. Pennsylvania State Police, 576 Pa. 365, 839 A.2d 265 (2003)]* have, held that the prohibitions to firearms privileges imposed on an individual are the civil consequences that result from a criminal conviction. The purpose for this action, imposed by the application of 18 U.S.C. §922(g)(1) is ‘ . . . the promotion of public safety by . . . the protection of society from the risks associated with permitting the possession [of] firearms by those who have . . . criminal behavior and . . . difficulty conforming to the law.’ . . .

Since there are no punitive or penal consequences and no further criminal charges lodged against the Petitioner [Taylor] there can be no cruel or unusual punishment as suggested by Petitioner [Taylor].

. . . .
Petitioner [Taylor] maintains that the application of 922(g)(1) of the GCA amounts to an *ex post facto* application of the law. A proper characterization of the chain of events in this matter includes the following: Petitioner [Taylor] was duly convicted of a violation of the Crimes Code of Pennsylvania . . . that conviction triggered section 922(g)(1) of the GCA. This section of the Act does not . . . constitute an additional punishment for his conviction. The civil disability does not punish the Petitioner [Taylor]. Petitioner’s [Taylor] criminal conviction occurred well after the adoption of the GCA, therefore there can be no *ex post facto* application of the law to this matter. There is simply the application of civil consequent restrictions to Petitioner’s [Taylor] right to purchase/transfer firearms. (Footnotes and citation omitted).

Opinion at 12-13.

Taylor contends that the GCA does not apply, that Section 922(g)(1) of the GCA is unconstitutional and violates the Second Amendment of the United States Constitution, the Commerce Clause of the United States Constitution, the Equal Protection Clause of the United States Constitution, his due process rights under Article I, Section 21 of the Pennsylvania Constitution, and his right to bear arms under Article I, Section 21 of the Pennsylvania Constitution.¹

Initially, Taylor contends that the GCA is inapplicable to him. Taylor asserts that the purpose of the GCA was to eliminate the interstate traffic in firearms and ammunition, to deny access to firearms to certain congressionally defined groups, and to end the importation of all surplus military firearms and all other guns unless certified by the Secretary of the Treasury as particularly suitable for sporting purposes. Specifically, those prohibited from owning firearms under the GCA are minors, persons convicted of a state or federal felony, as well as fugitives and defendants under indictment covered by an earlier federal firearms act, adjudicated mental defectives and any other person who had been committed to a mental institution, persons who are unlawful users of or addicted to marijuana or any depressant or stimulant or narcotic drug. Additionally, it was unlawful for any person in the prohibited classes to receive any firearm or ammunition that had been shipped in interstate commerce.

Taylor argues that he comes under none of these restrictions.

¹ This Court's review is limited to determining whether necessary findings are supported by substantial evidence, whether an error of law was committed, or whether constitutional rights were violated. Lehman v. Pennsylvania State Police, 576 Pa. 365, 839 A.2d 265 (2003).

The key focus of this Court's inquiry is to look at the applicable language of the GCA. 18 U.S.C. §922 provides:

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

••••

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Here, it is undisputed that Taylor was convicted of 18 Pa.C.S. §6106 and was sentenced to serve two years probation. Reading the plain language of the GCA, Taylor became ineligible to possess, in commerce, any firearm because he was convicted of a crime punishable by imprisonment for a term exceeding one year.

Taylor attempts to argue that the State Police had to prove that the gun involved in his conviction was used in interstate commerce. In United States v. Leuschen, 395 F.3d 155, 158 (3d Cir. 2005), the Third Circuit of the United States Court of Appeals held that “the only qualification imposed by §922(g)(1) is that the predicate conviction carry a potential sentence of greater than one year of imprisonment.” There is no requirement that the disqualifying conviction involved a firearm with a connection to interstate commerce. The conviction just had to involve a potential sentence of greater than one year.

Taylor next contends that the GCA violates the Second Amendment of the United States Constitution. He concedes that the prohibition against the possession of firearms by convicted felons is constitutional, but asserts that he is not a convicted felon. Taylor does not really develop this argument to any great extent. While he was not convicted of a felony, the GCA does not specify a felony conviction. It prohibits possession of a firearm by an individual convicted in any court of, a crime punishable by imprisonment for a term exceeding one year. Courts have stated that “legislative prohibitions on the ownership of firearms by felons are not considered infringements on the historically understood right to bear arms protected by the Second Amendment.” U.S. v. Darrington, 351 F.3d 632, 634 (5th Cir. 2003). Though Taylor is not a convicted felon, he fails to cite any case law or make any argument as to why the GCA is unconstitutional. Clearly, there is a legitimate governmental interest in prohibiting convicted criminals from possessing firearms.

Taylor next contends that the GCA violates his rights of substantive due process and equal protection under Article I, Section 21 of the Pennsylvania Constitution and the Fourteenth Amendment of the United States Constitution. The basis of Taylor’s argument is that the applicability of the GCA to him was unfair and a deprivation because he did not violate any federal laws and was not involved in interstate commerce. He argues that there was no evidence in the record that he engaged in interstate commerce or that the gun that was confiscated when he was arrested was manufactured in another state. Once again, Taylor cites no statute or case law for support. Also, he again fails to realize that the GCA does not limit prohibiting offenses to federal laws and that there is no requirement that

the underlying offense which prohibits firearm possession must involve a firearm in interstate commerce.

As to the Pennsylvania Constitution, Taylor simply states that because he was not convicted of a crime of violence the denial of his right to purchase a firearm violates his right to bear arms. Taylor does not advance any legal argument other than this statement. This Court has held that “a mere claim of unconstitutionality, without more, cannot be addressed.” Wert v. Department of Transportation, 821 A.2d 182, 190 (Pa. Cmwlth. 2003). Taylor has failed to make an argument for this Court to address.²

² Taylor also complains that Footnote Number Three of the State Police’s brief to the ALJ contained hearsay evidence which was not admissible and was not produced or introduced into evidence before the ALJ and should not be considered on appeal. The footnote addresses where the firearm which Taylor sought to purchase was manufactured. Taylor did not list this issue in the Statement of Questions Involved in his brief. Therefore, he waived the issue. See Pa.R.A.P. 2116; See also, Mione v. Pennsylvania Board of Probation and Parole, 709 A.2d 440 (Pa. Cmwlth. 1998). Similarly, Taylor contends that his inability to purchase a firearm is a violation of the proscription against cruel and unusual punishment contained in Article I, Section 13 of the Pennsylvania Constitution and the Eighth Amendment to the United States Constitution. Again, Taylor failed to raise this issue in the Statement of Questions Involved, so it is waived. Taylor further asserts that his equitable rights as a citizen of the Commonwealth of Pennsylvania were violated when he was prohibited from purchasing a firearm. Once again, he failed to raise this issue in his Statement of Questions Involved, so it is waived. Assuming arguendo that Taylor preserved this issue, this Court is unable to determine what his equitable rights are and how they were violated.

Taylor also contends that the GCA violates the Commerce Clause and the Tenth Amendment of the United States Constitution. A review of the record reveals that Taylor did not raise this issue before the ALJ. Because he did not raise this issue before the ALJ, it is waived. Pa.R.A.P. 1551; Newsome v. Pennsylvania Board of Probation and Parole, 553 A.2d 1050 (Pa. Cmwlth. 1989).

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

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ORDER

AND NOW, this 18th day of February, 2011, the order of the Office of the Attorney General in the above-captioned matter is affirmed.

BERNARD L. McGINLEY, Judge

not apply to his conviction for a misdemeanor because the GCA only applies to felonies. However, section 921 of the GCA (“Definitions”) states that the phrase “crime punishable by imprisonment for a term exceeding one year” excludes “any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.” 18 U.S.C. §921(a)(20)² (emphasis

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

....

(9) who has been convicted in any court of a misdemeanor crime of domestic violence,

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

²Section 921(a)(20) provides as follows:

(20) The term "crime punishable by imprisonment for a term exceeding one year" does not include—

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter,

added). Moreover, section 922(g)(9) of the GCA further applies the statutory prohibitions to any person “who has been convicted in any court of a misdemeanor crime of domestic violence.” 18 U.S.C. §922(g)(9). Based on the plain language of the GCA, convictions for misdemeanors for domestic violence, and those punishable by a term of imprisonment of two years or more, would be included. Since Taylor pled guilty to a misdemeanor of the first degree, which was punishable by a term of imprisonment of up to five years, he meets the requirements of sections 922(g)(1) and 921(a)(20), so his assertions in this regard are without merit.

It is also necessary to point out that the prohibitions in section 922(g) GCA make it unlawful for any person who, *inter alia*, has been convicted of a crime punishable by a term of imprisonment exceeding one year

to ship or transport in interstate or foreign commerce, or possessing or affecting commerce, any firearm or ammunition, or to *receive* any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

(Emphasis added.)

In order for the prohibition of section 922(g) to apply to the firearm Taylor attempted to purchase, the subject firearm must have been shipped or transported in interstate or foreign commerce. Unless the subject firearm moved in interstate or foreign commerce, the GCA would not apply, regardless of whether Taylor’s underlying criminal offense was punishable by imprisonment for a term exceeding one year.

unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Although this question appears to have been waived, I note that the requirement of interstate or foreign commerce was clearly satisfied in this case by the ALJ's determination that the firearm was, as the Majority noted, manufactured in Florida. (ALJ's Opinion (Opinion) at 9.)) (See also R.R. at a58-a67, which is Exhibit B to the Brief of the State Police filed in the proceedings before the Office of the Attorney General.) The Exhibit is a photocopy of the manufacturer's website showing that it is located in Cocoa, Florida. Such a determination is in keeping with United States v. Shambry, 392 F.3d 631, 634 (3d Cir. 2004), which held that proof that a firearm was manufactured in a state other than the state where the possession occurred is sufficient to establish that the possession was in or affecting interstate commerce. See also United States v. Leuschen, 395 F.3d 155 (3d Cir. 2005) (stating that evidence that firearms were manufactured outside Pennsylvania provided the requisite nexus to, and proof that the firearms traveled in, interstate commerce).

Consequently, Taylor's attempt, as set forth in his brief, to tie an interstate commerce component to the underlying criminal offense is incorrect and irrelevant in any event. For him to avoid application of section 922(g) of the GCA so as to prohibit him from purchasing a firearm, it had to be established that his underlying offense was not punishable for a term in excess of one year, and that there was not interstate movement associated with the firearm he sought to purchase. Neither condition was met in this case.

Additionally, the Majority's statement that "there is a legitimate governmental interest in prohibiting convicted criminals from possessing firearms" (Majority op. at 8), is overbroad and thus would raise serious constitutional questions. Although dicta, it impliedly expands the definitional section of the GCA into an impermissible ban on firearms by persons convicted of any crime, which clearly is

contrary to the GCA and the Second Amendment.³ See Leuschen (GCA prohibits firearm possession by a person convicted of crimes punishable by imprisonment in excess of one year); see also United States v. Carr, 513 F.3d 1164 (9th Cir. 2008) (discussing considerations for determining whether a conviction constitutes an offense for purposes of the GCA).

Finally, having addressed the statute, we would normally then review any sufficiently raised constitutional questions. However, in his brief, Taylor only cursorily mentions several of the Amendments to the United States Constitution, including the Second Amendment.⁴ I agree with the Majority's conclusions that since Taylor has failed to develop and/or preserve his constitutional arguments, they cannot be addressed and/or are deemed waived.⁵

PATRICIA A. McCULLOUGH, Judge

³In District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed. 2d 637 (2008), the U.S. Supreme Court held that the District of Columbia's ban on handgun possession in the home by law-abiding citizens violated the Second Amendment. Justice Scalia, writing for the Court noted that the decision "should not be taken to cast doubt" on "presumptively lawful regulatory measures." Nothing in Heller suggests that a ban on firearms by persons convicted of any crime would be such a "presumptively lawful measure." However, as noted above in the majority, Taylor has waived the ability to raise any issue as to whether the GCA's ban in this particular case is contrary to the Second Amendment.

⁴It is noted that Taylor did not raise any Fourth Amendment search and seizure issues with respect to the circumstances of his underlying arrest for unlawful possession of a firearm either before this Court or the Administrative Proceeding below.

⁵Nevertheless, in my view, non-frivolous constitutional arguments exist regarding, among other things, right to bear arms, the application of the GCA to convictions for non-violent offenses, and misdemeanors punishable by a term of imprisonment of more than two years. However, consideration of those questions must await a future case with fully developed arguments.