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RENDERED: MARCH 24, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000009-MR

WILLIAM MUCKER — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU ALFREDO STEVENS, JUDGE
NO. 07-CR-003884

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING, IN PART, AND REVERSING AND REMANDING, IN PART

I. Introduction

A Jefferson Circuit Court jury found Appellant, William Mucker, guilty of possession of a handgun by a convicted felon, possession of a firearm by a convicted felon, possession of a defaced firearm, and carrying a concealed deadly weapon. The jury also found him to be a first-degree persistent felony offender (PFO). For these crimes, Appellant received a twenty-year prison sentence. He now appeals as a matter of right. Ky. Const. § 110(2)(b).

II. Background

Around midnight on October 14, 2007, Officer Kenneth Martin of the Shively Police Department responded to a call regarding a fight in the parking lot of the local Veterans of Foreign Wars (VFW) post. While in transit, he

received a second call advising him that there was a black male with a gun on the premises.

Upon arrival, a witness approached Officer Martin, informing him that an African-American male, who was driving a maroon sport-utility vehicle (SUV), was waving a handgun. The officers found a maroon SUV with an unidentified female sitting in the passenger's seat. Upon inquiring, the passenger told Officer Martin that the SUV belonged to her boyfriend, Appellant. Approximately ten minutes after reaching the SUV, the witness who previously approached Officer Martin pointed out Appellant near a Taurus in the parking lot.

Officer Martin then detained Appellant as he attempted to enter the backseat of the Taurus. Then, when they patted him down, they found a loaded semi-automatic handgun on Appellant's person. Officer Martin then arrested Appellant, handcuffing him and placing him in a patrol car.

When a license plate check connected the maroon SUV to Appellant, he admitted ownership, but refused consent to a search of the vehicle. Although they lacked consent and had never actually seen Appellant in the vehicle (but were told by his girlfriend that it was his), the officers nonetheless commenced a vehicle search, discovering a modified, sawed-off shotgun (with serial numbers filed off and the shoulder stock removed), in addition to a holster, shotgun shells, and a loaded magazine fitting the handgun previously found on Appellant.

A grand jury later indicted Appellant for possession of a handgun by a convicted felon, possession of a firearm by a convicted felon, possession of a defaced firearm, carrying a concealed deadly weapon, resisting arrest, disorderly conduct in the second degree, and first-degree PFO. Therefore, Appellant moved to suppress the searches of both his person and his vehicle. The trial court approved both searches.

At trial, the jury found Appellant guilty on four counts: possession of a handgun by a convicted felon, possession of a firearm by a convicted felon, possession of a defaced firearm, and carrying a concealed deadly weapon. In the combined PFO/Truth in Sentencing phase, the jury also found Appellant guilty of being a first-degree PFO. They then recommended that Appellant's eight-year sentence for possession of a handgun by a convicted felon be enhanced to seventeen years and his five-year sentence for possession of a firearm by a convicted felon be enhanced to thirteen years, to be served consecutively. The trial court reduced the recommended sentence to twenty years pursuant to KRS 532.110(1)(c).[1] This appeal followed.

Appellant now argues that KRS 527.040, which prohibits convicted felons from possessing firearms, violates the Kentucky Constitution and that the trial court erred by: denying his motion to exclude evidence obtained in the

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[1] KRS 532.110(1)(c) reads, in pertinent part:

> The aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed.

Pursuant to this statute, Appellant can serve no more than twenty years in this case.

vehicle search; refusing to give a non-testifying defendant instruction; allowing the prosecutor to request a sentence in excess of the statutory maximum; and allowing cell phones in the jury room during penalty phase deliberations.

For the following reasons, we reverse the PFO conviction, vacate the resulting enhanced sentences, and affirm the remainder of Appellant's convictions and sentences. We remand this case to the trial court for further proceedings consistent with this opinion.

III. Analysis

A. Constitutionality of KRS 527.040

Appellant first argues that KRS 527.040[2] is unconstitutional because it violates Sections 1(1) and 1(7) of the Kentucky Constitution. The Commonwealth responds that this Court should follow its previous decisions in *Eary v. Commonwealth*, 659 S.W.2d 198 (Ky. 1983), and *Posey v. Commonwealth*, 185 S.W.3d 170 (Ky. 2006), which upheld the constitutionality of the statute. We agree with the Commonwealth.

In *Eary*, we opined that a statute prohibiting felons from possessing firearms "is reasonable legislation in the interest of public welfare and safety and that such regulation is constitutionally permissible as a reasonable and legitimate exercise of police power." 659 S.W.2d at 200. We thoroughly revisited this issue in *Posey*, ultimately reaching the same conclusion.

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[2] KRS 527.040(1) reads, in pertinent part:

> A person is guilty of possession of a firearm by a convicted felon when he possesses, manufactures, or transports a firearm when he has been convicted of a felony, as defined by the laws of the jurisdiction in which he was convicted.

Our decisions in *Eary* and *Posey* establish clear precedent as to the constitutionality of KRS 527.040. Precedent must be given considerable weight because *stare decisis* is "an ever-present guidepost" in appellate review and requires "deference to precedent." *Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 795 (Ky. 2009). *Stare decisis* ensures that the law will "develop in a principled and intelligible fashion" rather than "merely change erratically." *Chestnut v. Commonwealth*, 250 S.W.3d 288, 295 (Ky. 2008).

We see no sound reason for ignoring our precedent in this case. *See Saleba v. Schrand*, 300 S.W.3d 177, 183 (Ky. 2009) (stating that we ignore *stare decisis* only for "sound reasons to the contrary"). Accordingly, we once again affirm the constitutionality of KRS 527.040.

B. Validity of Search Incident to Arrest

Appellant next argues that the trial court erred by refusing to suppress the evidence obtained from the SUV as fruits of an unconstitutional search. A court presented with a motion to suppress must "enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling." RCr 9.78. And when reviewing an order denying a motion to suppress, the trial court's findings of fact are "conclusive" if they are "supported by substantial evidence." *Id.* "Using those facts [if supported], the reviewing court then conducts a *de novo* review of the trial court's application of the law to those facts to determine whether the decision

is correct as a matter of law." *Commonwealth v. Jones*, 217 S.W.3d 190, 193 (Ky. 2006).

As we must with all suppression issues, we begin by noting that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). A search incident to arrest is one of these established and well-delineated exceptions.[3] *United States v. Robinson*, 414 U.S. 218, 230-234 (1973).

The United States Supreme Court set forth the appropriate standard for applying the search incident to arrest exception in the context of automobiles in *Arizona v. Gant*, 129 S.Ct. 1710; *See also Rose v. Commonwealth*, 322 S.W.3d 76, 79 (Ky. 2010) (adopting the *Gant* standard, as it was "necessary to bring the jurisprudence of this Commonwealth into compliance with that of our nation's highest court"). In *Gant*, the Court held that police may search a vehicle incident to the arrest of a recent occupant[4] only in two circumstances:

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[3] Another exception, though only touched on at the suppression hearing by the Commonwealth and not briefed, is the warrantless "inventory" search under the inevitable discovery doctrine. Seventh Circuit Judge Posner discussed this exception in *United States v. Pittman*, 411 F.3d 813, 817 (7th Cir. 2005), wherein he stated that "[w]arrantless inventory searches of vehicles are lawful if conducted pursuant to standard police procedures aimed at protecting the owner's property and protecting the police from the owner's charging them with having stolen, lost, or damaged his property." (Citation omitted).

[4] Before determining if the arrestee could have reached into the vehicle or police officers reasonably believed relevant evidence might be found in the vehicle, a trial court must evaluate whether the arrestee was a "recent occupant" of the vehicle. *See Thornton v. United States*, 541 U.S. 615 (2004); *Rainey v. Commonwealth*, 197 S.W.3d 89 (Ky. 2006), *overruled on other grounds by Rose v. Commonwealth*, 322

(1) "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or (2) "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" 129 S.Ct. at 1719 (*quoting Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in judgment)).

Appellant asserts that the search of his SUV did not constitute a valid vehicle search incident to arrest because it failed the second *Gant* exception.[5] Specifically, Appellant questions how police could reasonably believe evidence of the offense of arrest could be found in his SUV when discovery of a handgun upon his person satisfied all statutory elements of carrying a concealed deadly weapon.[6]

The Commonwealth responds that the trial court correctly denied the motion because the search was for evidence relevant to the crime of carrying a concealed deadly weapon. According to the Commonwealth, the *Gant* "offense of the arrest" exception is not limited to situations where an officer has not yet collected evidence necessary to satisfy all statutory elements. The Commonwealth analogizes carrying a concealed deadly weapon to drug offenses and offers *McCloud v. Commonwealth*, 286 S.W.3d 780 (Ky. 2009), in which

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S.W.3d 76 (Ky. 2010). While the record is unclear as to Appellant's temporal and spatial relationship to his SUV, Appellant failed to raise this issue on appeal and thus we will not address the issue at this juncture.

[5] Both parties agree that, because Appellant was handcuffed and in the patrol car, he could not have reached into the SUV. As a result, the only relevant determination is whether or not the officers possessed the requisite "reasonable belief" that the vehicle harbored evidence of the crime of arrest.

[6] One violates KRS 527.020(1) when "he or she carries a concealed firearm or other deadly weapon on or about his or her person."

this Court affirmed the search of a vehicle as a search for evidence of the offense of possession or trafficking in drugs, in support of its contention.

In outlining the second *Gant* exception, the Supreme Court emphasized the nature of the offense in assessing the requisite reasonable belief and established a dichotomy between drug offenses and routine traffic violations. The Court noted that "[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence." *Gant*, 129 S.Ct. at 1719. *Gant*, as well as our own decision in *Rose*, deemed searches incident to arrest for routine traffic violations unreasonable. *Gant*, 129 S.Ct. 1710 (finding search incident to arrest for driving with suspended license unreasonable); *Rose*, 322 S.W.3d 76 (finding search incident to arrest for traffic fines unreasonable). Moreover, the Court went on to state that, "in other [cases], including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." *Gant*, 129 S.Ct. at 1719. Notably, *Belton* and *Thornton* were both cases involving arrests for drug offenses. *New York v. Belton*, 453 U.S. 454, 456 (1981) (defendants arrested for "unlawful possession of marijuana"); *Thornton*, 541 U.S. at 618 (defendant arrested after police officer discovered "three bags of marijuana" and "a large amount of crack cocaine" on his person). A litany of cases reinforces

the Court's dichotomy, repeatedly affirming the reasonableness of vehicle searches pursuant to arrests for controlled substances.[7]

We liken the offense of carrying a concealed deadly weapon to the drug offenses which have consistently provided "a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." *Gant*, 129 S.Ct. at 1719. For example, in *United States v. Vinton*, the federal circuit court affirmed a search incident to arrest for the unlawful possession of a butterfly knife. 594 F.3d 14, 24-27 (D.C. Cir. 2009). There, police officers arrested the driver of a vehicle after finding a knife and subsequently searched a locked brief case found in the backseat. *Id.* at 21-22, 25. In analyzing the reasonableness of the search, the court in *Vinton* concluded that the unlawful possession of a weapon more closely resembles narcotics-possession offenses than routine traffic violations. *Id.* at 25-26 ("Indeed, it is difficult to imagine a principled basis for distinguishing the possession of narcotics from the possession of an unlawful weapon, where an arrest for the former makes it reasonable to believe additional narcotics remain in the car, but an arrest for the latter does not make it reasonable to believe additional weapons are in the car. In both cases, the defendant has been caught with a type of contraband

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[7] *See McCloud*, 286 S.W.3d at 783, 785 (affirming search incident to arrest for possession or trafficking in drugs); *United States v. Williams*, 616 F.3d 760 (8th Cir. 2010) (affirming search incident to arrest for a variety of drug offenses); *U.S. v. Page*, 679 F. Supp.2d 648 (E.D. Va. 2009) (affirming search incident to arrest for possession of marijuana); *State v. Snapp*, 219 P.3d 971 (Wash. Ct. App. 2009) (affirming search incident to arrest for possession of drug paraphernalia); *Hill v. State*, 303 S.W.3d 863 (Tex. Crim. App. 2009) (affirming search incident to arrest for possession of a controlled substance with intent to deliver).

sufficiently small to be hidden throughout a car and frequently possessed in multiple quantities.").[8]

Turning to the case at bar, Appellant admitted to owning the SUV, the passenger of the SUV indicated that the vehicle belonged to her boyfriend, Appellant, and a witness at the scene identified Appellant as the African-American male that was driving a maroon sport-utility vehicle (SUV) and waving a handgun. More importantly, officers arrested Appellant for carrying a concealed deadly weapon, an offense similar to drug offenses.

We thus hold that it was reasonable in this instance to believe evidence relevant to the crime of carrying a concealed weapon might be found in the SUV. Unlike the circumstances of *Rose* and *Gant*, in which arrests were predicated on warrants for routine traffic violations, the officers here initially arrested Appellant for carrying a concealed deadly weapon, arriving on the scene based on a tip that a person with a maroon SUV was brandishing a gun. The officers thus acted reasonably by searching Appellant's vehicle for additional evidence of the concealed deadly weapon upon discovery of the handgun. The discovery of additional evidence such as ammunition is relevant to show possession, can be used to rebut defenses,[9] and aids the

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[8] *See also* *People v. Osborne*, 96 Cal.Rptr.3d 696 (Cal. Ct. App. 2009) (affirming vehicle search incident to arrest for a felon in possession of a firearm because it was reasonable to believe that the vehicle might contain additional, relevant items such as more ammunition or a holster); *Johnson v. United States*, 7 A.3d 1030 (D.C. 2010) (affirming vehicle search incident to arrest for carrying a pistol without a license); *United States v. Leak*, No. 3:09-cr-81-W, 2010 WL 1418227 (W.D.N.C. April 5, 2010) (affirming vehicle search incident to arrest for carrying a concealed weapon).

[9] For instance, Carr, Appellant's girlfriend, testified that she put the handgun in his back pocket. The presence of the ammunition in his vehicle would help undermine

Commonwealth in prosecuting the crime of carrying a concealed deadly weapon to its full potential.

While we agree with the trial court's ultimate conclusion in this regard (its refusal to suppress the evidence obtained through the search of Appellant's vehicle), we note that the trial court inappropriately applied the *Belton* standard. In approving the search of Appellant's vehicle, the court stated: "[t]he discovery of a semi-automatic handgun on the Defendant's person provided Officer Martin with probable cause to arrest the Defendant. *Once the Defendant was lawfully arrested, the police could search his vehicle, without a warrant or his consent, as a search incident to a lawful arrest.*" (emphasis added). *Gant* rejected the notion that police possessed such an entitlement to search a vehicle incident to arrest. *Rose*, 322 S.W.3d at 80. As a result, a *Belton* analysis, justifying a vehicle search solely due to the arrest of a "recent occupant," will no longer suffice in this Commonwealth. *Id.* ("[A] broad application of *Belton*, which allows vehicle searches incident to any arrest, [is] 'anathema to the Fourth Amendment.'") (*citing Gant*, 129 S.Ct. at 1720). We reiterate that the *cart blanche* rule that a vehicle may be searched incident to arrest of a recent occupant is no more.

C. PFO/Truth in Sentencing Phase

Appellant also contests the trial court actions in his combined PFO/Truth in Sentencing proceeding, arguing that the trial court erred by

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that defense, although Carr basically claimed everything, including the shotgun and the magazine, belonged to her.

refusing to give a non-testifying defendant instruction, allowing the prosecutor to ask the jury to recommend a sentence in excess of the statutory maximum, and allowing cell phones into the jury room during penalty phase deliberations.

1. Non-Testifying Defendant Instruction

Appellant argues that the trial court erred in refusing to give a non-testifying defendant instruction as mandated by RCr 9.54[10] during the combined PFO/Truth in Sentencing phase. The Commonwealth concedes that failure to give such instruction constitutes reversible error unless *Hibbard v. Commonwealth*, 661 S.W.2d 473 (Ky. 1983), and *Watkins v. Commonwealth*, 105 S.W.3d 449 (Ky. 2003), are overruled. Finding no reason to overrule *Hibbard* and *Watkins*, we hold that Appellant is entitled to a new PFO/Truth in Sentencing proceeding.

RCr 9.54 requires a "no adverse inference of guilt instruction" if requested by the defendant. In *Hibbard*, this Court held that RCr 9.54(3) applies to the PFO phase of a trial because a jury must determine the guilt of the person charged in such proceedings. 661 S.W.2d at 474. As a result, "although a 'no adverse inference instruction' is not required during the second phase of a trial where the jury is asked only to fix the defendant's punishment,"

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[10] RCr 9.54(3) reads:

> The instructions shall not make any reference to a defendant's failure to testify unless so requested by the defendant, in which event the court shall give an instruction to the effect that a defendant is not compelled to testify and that the jury shall not draw any inference of guilt from the defendant's election not to testify and shall not allow it to prejudice the defendant in any way.

we found that a trial court erred when it refused to give said instruction in a combined PFO/Truth in Sentencing phase. *Watkins*, 105 S.W.3d at 452.

Here, the trial court overruled Appellant's motion for additional language regarding his silence in the combined PFO/Truth in Sentencing jury instructions. As in *Watkins*, the jury should have been instructed in this case, as their duties included rendering a determination of guilt.

Because the trial court refused to include the additional language in Appellant's PFO/Truth in Sentencing proceeding, we must reverse the jury's PFO determination and the enhanced sentences it recommended as a result of that finding.

2. Sentence Exceeding Statutory Cap

Appellant next argues that the trial court erred by allowing the prosecutor to ask the jury to recommend a sentence in excess of the statutory maximum of twenty years. The Commonwealth responds that any error relating to the sentencing cap was harmless because the trial court reduced the sentence to comply with the cap. Because this issue is likely to resurface on remand, we find it necessary to address.

KRS 532.055(2) states that a jury is to "determine the punishment to be imposed within the range provided elsewhere by the law." A jury should thus be instructed about the sentencing cap. *Allen v. Commonwealth*, 276 S.W.3d 768, 773-774 (Ky. 2008). In *Allen*, although the trial court knew that the defendant could serve no more than seventy years, no instructions were given

to that effect, allowing the jury to "send a message" by recommending a one-hundred-thirty-year sentence. *Id.* We agreed with the appellant in that case that the recommendation violated the plain language of KRS 532.055(2) and, in light of our decision to reverse on alternative grounds, directed that the trial court instruct the jury in any subsequent proceeding as to the sentencing cap. *Id.*

In this case, the trial court allowed the prosecutor to describe a twenty-year sentence as the "middle-range" of punishments even though it was the longest term to which Appellant could be sentenced.[11] Defying the explicit limitation of KRS 532.055(2), the jury returned verdicts of eight years enhanced to seventeen for possession of a handgun and five years enhanced to thirteen for possession of a shotgun, to be served consecutively for a total of thirty years. The trial court subsequently reduced Appellant's time to be served to twenty years.

Failing to instruct the jurors regarding the relevant cap in this case constitutes error. On remand, the trial court should instruct the jury on the statutory twenty-year sentencing limit in any subsequent PFO/Truth in Sentencing proceeding.

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[11] Appellant stands convicted as a First Degree Persistent Felony Offender. KRS 532.110(1)(c) limits the total sentence to the "longest extended term" for which Appellant would qualify under KRS 532.080. The longest term would be a Class C felony with an enhanced penalty range of ten to twenty years. KRS 532.080(6)(b).

3. Cell Phones

Appellant finally contends that the trial court erred by allowing cell phones into the jury room during penalty phase deliberations. However, he did not preserve this issue for appellate review and thus asks this Court to perform palpable error review. RCr 10.26. The Commonwealth responds that no palpable error occurred, as jurors were admonished not to communicate prior to deliberations and Appellant cannot show that any juror used his or her cell phone. Because this issue is likely to resurface on remand, we find it necessary to address.

This Court recently addressed the issue of juror cell phone usage in *Winstead v. Commonwealth*, 327 S.W.3d 386 (Ky. 2010). In *Winstead*, we held that a trial judge must direct a court official to collect and store all cell phones or other electronic communication devices when jury deliberations begin and retain them until deliberations are complete. 327 S.W.3d at 401.

In this case, jurors were instructed to turn off their cell phones and not to make any calls during deliberations, as well as admonished to only discuss the case amongst themselves. However, the trial court did not collect and store cell phones.

On remand, the trial court should collect and store all cell phones or other electronic communication devices when penalty deliberations begin and retain them until these deliberations are complete, pursuant to *Winstead*, 327 S.W.3d 386.

Furthermore, due to our decision to remand on alternative grounds, the Commonwealth's motion to strike Appellant's reply argument pertaining to cell phones has been rendered moot and is thus denied.

IV. Conclusion

For the foregoing reasons, Appellant's convictions for possession of a handgun by a convicted felon, possession of a firearm by a convicted felon, possession of a defaced firearm, and carrying a concealed deadly weapon are affirmed. However, the PFO determination and the enhanced sentences resulting from that finding are reversed and this case is remanded to the trial court for further proceedings consistent with this opinion.

All sitting. Minton, C.J.; Abramson, Cunningham, Noble, and Venters, JJ., concur. Scott, J., concurs in result only by separate opinion in which Schroder, J., joins.

SCOTT, J., CONCURRING IN RESULT ONLY: While I fully concur with my esteemed colleagues as to the reasonableness of the search and PFO/Truth in Sentencing issues, I concur in result only regarding the constitutionality of KRS 527.040.

As noted in my dissent in *Posey*, "[i]t is simply wrong to arrest, charge and convict Kentuckians of 'felony crimes' for [having] a weapon . . . without any evidence the weapon was intended to be used for unlawful purposes." 185 S.W.3d 170, 183 (Ky. 2006) (Scott, J., concurring in part and dissenting in part). "Such a practice violates all of our rights to 'bear arms in defense of

[ourselves and others]' and our rights of self-defense." *Id.* (*citing* Ky Const. § 1 (1, 7)).

I am not alone in my viewpoint that some nonviolent felons may retain their right to keep weapons. For instance, a recent federal court of appeals decision suggested that a non-violent felon might prevail in an "as-applied" challenge to a felon-in-possession prohibition:

> [A]lthough we recognize that § 922(g)(1)[12] may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent, that is not the case for Williams. Even if the government may face a difficult burden of proving § 922(g)(1)'s 'strong showing' in future cases, it certainly satisfies its burden in this case, where Williams challenges § 922(g)(1) as it was applied to him. (Citation omitted). Williams, as a violent felon, is not the ideal candidate to challenge the constitutionality of § 922(g)(1).[13]

United States v. Williams, 616 F.3d 685, 693 (7th Cir. 2010) (O'Connor, J., sitting by designation).

Appellant, though, does not qualify for constitutional protection. As the record reveals, Appellant was a violent felon, previously convicted for first-

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[12] 18 U.S.C.A. § 922(g)(1) makes it unlawful for a person convicted for a crime punishable by imprisonment for a term greater than 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."

[13] *See also United States v. Abner*, No. 3:08cr51-MHT, 2009 WL 103172, at *1 (M.D. Ala. Jan. 14, 2009) (finding no constitutional violation as applied to the defendant because he was a violent felon); *United States v. McCane*, 573 F.3d 1037, 1049–50 (10th Cir. 2009) (Tymkovich, J., concurring) (opining that non-violent felons have the same right to self-defense in their homes as non-felons); *Britt v. State*, 681 S.E.2d 320 (N.C. 2009) (holding that a nonviolent felon whose crime was long in the past regained his state constitutional right to keep and bear arms); *Wilson v. State*, 207 P.3d 565, 570-593 (Alaska 2009) (Mannheimer, J., dissenting) (expressing the view that the state constitutional right to keep and bear arms limited the state's power to disarm felons in some situations).

degree robbery. Furthermore, the scope of the "right of self-defense" and "the right to bear arms" does not extend to "brandishing" a weapon. *Posey*, 185 S.W.3d at 202 (Scott, J., concurring in part and dissenting in part) ("[A] constitutional right may not be exercised to threaten, impede, or injure others in an unlawful manner; when it interferes with the lawful rights of others, it has no constitutional protection.") (*citing Ogles v. Commonwealth*, 11 S.W. 816 (Ky. 1889)).

Because I would affirm Appellant's convictions for possession of a handgun by a convicted felon and possession of a firearm by a convicted felon on alternative grounds, I concur in result only.

Schroder, J., joins.

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