# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellant/Cross-Appellee, | FOR PUBLICATION<br>January 29, 2013<br>9:00 a.m. |
| v | No. 304759<br>Oakland Circuit Court |
| CRAIG MICHAEL DEROCHE,<br><br>Defendant-Appellee/Cross-Appellant. | LC No. 2011-009319-AR |

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

This case presents a question of first impression, namely whether the Second Amendment to the United States Constitution precludes a prosecution for possession or use of a firearm by a person under the influence of alcoholic liquor, MCL 750.237, where the prosecutor's theory is one of constructive possession in the defendant's own home. We conclude that it does.

Two Novi police officers were dispatched to a call regarding a verbal altercation. Upon arrival at the scene, they were informed by a man identified as James Hamlin (a friend of defendant) that defendant had run off into the woods, that there had been an argument and that defendant had been drinking. The officers searched the area for defendant to do a "welfare check," but were unable to locate him and they ended their search.

Approximately two hours later, one of the officers, Officer Shea, along with other officers, was dispatched to a disturbance call at a home. Hamlin was again present, outside the home, and informed the officers that defendant was inside the house with a gun. But he also told Officer Shea that he could see defendant in the house, but did not see a gun.

The officers approached the house and spoke with defendant's mother-in-law at the door. The mother-in-law stated that defendant no longer had a gun and that she had taken it and hidden it in the house. She let the officers in, showed them the gun which she had hidden in the bottom of a garbage can in the laundry room with the clip found next to the gun. Officer Shea indicated that he wished to speak with defendant and was informed that defendant was upstairs.

The officers made their first contact with defendant while they were standing at the bottom of the stairs and defendant stood at the top of the stairs. Defendant initially refused to

come down, but eventually complied with the officers' request. They stepped outside onto the front porch. Defendant was arrested for the possession of a firearm while intoxicated charge.

Defendant moved in the district court both to suppress evidence based upon an unlawful entry into his home and to dismiss the charge under the Second Amendment. The trial court conducted an evidentiary hearing. The district court concluded that, while there was evidence that defendant was intoxicated based upon a blood alcohol test, no evidence was introduced to show that defendant was in actual physical possession of the gun. The district court dismissed the charge, primarily relying on the Second Amendment argument. But it also concluded that the officers' continued presence in the home after securing the weapon was unlawful.

The prosecutor appealed to the circuit court. The circuit court declined to address the Second Amendment issue, but did agree with the trial court that there had been a Fourth Amendment violation and, therefore, concluded that the district court properly dismissed the charge. The prosecutor now appeals and defendant cross-appeals by leave granted.

We take the opposite approach as the circuit court. We decline to address the search question and, instead, affirm the district court based upon the Second Amendment issue.

Defendant argues that MCL 750.237, as applied to defendant, is unconstitutional because it violates his federal and state right to bear arms in his home for purposes of self-defense. We agree. We review issues of constitutional construction de novo. *People v Yanna*, 297 Mich App 137; ____ NW2d ____ (Nos. 304293 and 306144, 6/26/2012), slip op at 3. And we presume statutes to be constitutional unless their unconstitutionality is clearly apparent and, if possible, the statute is to be construed as constitutional. *Id*. at _____ (slip op at 5).

Both the United States Constitution and Michigan Constitution "grant individuals a right to keep and bear arms for self-defense." *Yanna*, 297 Mich App at ____, slip op at 3. The Second Amendment to the United States Constitution provides, "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." US Const, AM II.[1] Article 1, § 6 of the 1963 Michigan Constitution, which is Michigan's equivalent to the Second Amendment, states, "Every person has a right to keep and bear arms for the defense of himself and the state." Const 1963, art 1, § 6. "The Second Amendment is fully applicable to the states through the Fourteenth Amendment." *Yanna*, 297 Mich App at ___ (slip op at 3); see also *McDonald v City of Chicago*, ___ US ____; 130 S Ct 3020, 3050; 177 L Ed 2d 894 (2010). Therefore, we review this issue within the parameters of the United States Supreme Court interpretation of the Second Amendment.

The Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation." *Dist of Columbia v Heller*, 554 US 570, 592; 128 S Ct 2783; 171 L Ed

[1]In addressing whether the rights protected by the Second Amendment extended to individuals, the Supreme Court concluded, "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an *individual* right to keep and bear arms." *Dist of Columbia v Heller*, 554 US 570, 595; 128 S Ct 2783; 171 L Ed 2d 637 (2008) (emphasis added).

2d 637 (2008). "At the 'core' of the Second Amendment is the right of 'law-abiding, responsible citizens to use arms in defense of hearth and home.'" *United States v Barton*, 633 F3d 168, 170 (CA 3, 2011), quoting *Heller*, 554 US at 635. In striking down a statute that banned the possession of handguns in the District of Colombia, the Supreme Court held:

> The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose [of self-defense]. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for the protection of one's home and family," [*Parker v DC*, 375 US App DC 140, 170;] 478 F 3d [370 (2007)], would fail constitutional muster. [*Heller*, 554 US at 628-629.]

Thus, the Supreme Court concluded that the "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Heller*, 554 US at 635.

While acknowledging "the problem of handgun violence in this country," the Supreme Court stressed that the "Constitution leaves . . . a variety of tools for combating that problem, including some measures regulating handguns. . . . But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home." *Id*. at 636 (emphasis added). The Supreme Court, therefore, recognized that the right to carry and bear arms under the Second Amendment is not unlimited. *Id*. at 626-627. Specifically, the Supreme Court stated that, "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." *Heller*, 554 US at 626-627.

Notably, the Supreme Court clarified in an accompanying footnote that in providing these examples, "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id*. at 627 n 26. Such language suggests and has been interpreted to mean that "the Second Amendment permits categorical regulation of gun possession by classes of persons—e.g., felons and the mentally ill." *US v Booker*, 644 F3d 12, 23 (CA 1, 2011); see *United States v Skoien*, 614 F3d 638, 640 (CA 7, 2010) ("statutory prohibitions on the possession of weapons by some persons are proper—and, importantly for current purposes, that the legislative role did not end in 1791. That *some* categorical limits are proper is part of the original meaning, leaving to the people's elected representatives the filling in of details."); see also *United States v Yancey*, 621 F3d 681, 683 (CA 7 2010) ("We have already concluded, based on our understanding of *Heller* and *McDonald*, that some categorical firearms bans are permissible; Congress is not limited to case-by-case exclusions.")

It follows that a statute, such as the statute here, could fall within the categories of presumptively lawful regulatory measures.[2] Like the restrictions preventing felons, the mentally ill, or illegal drug users from possessing firearms because they are viewed as at risk people in society that should not bear arms, individuals under the influence of alcoholic liquor may also pose a serious danger to society if permitted to possess or carry firearms because such individuals will have "difficulty exercising self-control, making it dangerous for them to possess firearms." *Yancey*, 621 F 2d at 685. At this juncture, assuming that the statute at hand is facially constitutional, *Yanna*, 297 Mich App at ___ (slip op at 5), the issue is whether the statute, as applied to defendant, is unconstitutional.

MCL 750.237, restricts the possession of a firearm as follows:

> (1) An individual shall not carry, have in possession or under control, or use in any manner or discharge a firearm under any of the following circumstances:
>
> (a) The individual is under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.
>
> (b) The individual has an alcohol content of 0.08 or more grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
>
> (c) Because of the consumption of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance, the individual's ability to use a firearm is visibly impaired.

Turning to whether this statute is unconstitutional as applied, various United States Courts of Appeal, including the Sixth Circuit, have adopted the following two-prong approach in addressing Second Amendment challenges:

> Under the first prong, the court asks whether the challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood. [*United States v Chester*, 628 F3d 673, 680 (CA 4, 2010).] As the *Seventh Circuit* recognized, "*Heller* suggests that some federal gun laws will survive Second Amendment challenge because they regulate activity falling outside the terms of the right as publicly understood when the Bill of Rights was ratified." [*Ezell v City of Chicago*, 651 F3d 684, 702 (CA 7, 2011).] If the Government demonstrates that the challenged statute "regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment—1791 [Bill of Rights ratification] or 1868 [Fourteenth

[2] Recently, a few federal courts have concluded that it is constitutionally permissible to prohibit individuals who have been convicted of a crime of domestic violence from possessing, shipping or receiving firearms or prohibiting illegal drug users from firearm possession. *Booker*, 644 F3d 12; *Skoien*, 614 F3d 638; *Yancey*, 621 F3d 681.

> Amendment ratification]—then the analysis can stop there; the regulated activity is categorically unprotected, and the law is not subject to further Second Amendment review." *Id.* at 702–[7]03.
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> "If the government cannot establish this—if the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected—then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights." *Id.* at 703. Under this prong, the court applies the appropriate level of scrutiny. [*United States v Marzzarella*, 614 F3d 85, 89 (CA 3, 2010), cert den 131 S Ct 958; 178 L Ed 2d 790; 79 USLW 3401 (2011).] If the law satisfies the applicable standard, it is constitutional. *Id.* If it does not, "it is invalid." *Id.* [*United States v Greeno*, 679 F3d 510, 518 (CA 6, 2012).]

In applying this approach to the issue presented on appeal, the threshold inquiry is whether MCL 750.237 regulates conduct that falls within the scope of the Second Amendment right as historically understood. *Greeno*, 679 F3d at 518. The Second Amendment protects a "law-abiding" person's right to bear arms in his home as a means of self-defense. *Heller*, 554 US at 635. A right to possess a handgun in one's home as a means of self-defense is a constitutional right that is at the core of Second Amendment protection.

While Second Amendment rights are not unlimited, this conduct is protected. Aside from the statute at issue, defendant was not engaging in an unlawful behavior nor were there any facts to suggest that defendant possessed the handgun for any unlawful purposes. Further, it was not established that this is the case where someone was unlawfully allowed to own or possess a handgun in the first instance. Additionally, the prosecution has failed to establish that the conduct at issue had been historically outside of the scope of Second Amendment protection. *Greeno*, 679 F3d at 518. Given the above discussion, defendant's conduct fell within the protections of the Second Amendment. While the perceived danger associated with intoxicated individuals and handguns is real and important, these issues are addressed by analyzing the conduct under the second prong of the *Greeno* test as discussed below.

Upon finding that defendant's conduct falls within Second Amendment protections, the next inquiry is whether the government can justify by some standard of scrutiny the burden that it wishes to impose on defendant. While defendant argues that the appropriate standard of constitutional scrutiny should be strict scrutiny, the intermediate scrutiny standard is most appropriate.[3] Under this standard, the government bears the burden of establishing that there is a

[3] Because the burden here does not amount to a severe burden on one's Second Amendment rights, i.e., a complete ban on possession of a firearm in one's home, but rather, it amounts to a lesser burden that relates to the manner in which a person may lawfully exercise his or her Second Amendment rights, as in First Amendment jurisprudence, intermediate scrutiny applies. See *Marzzarella*, 614 F3d at 95-98. Additionally, defendant has not presented any state or federal cases since *Heller* that used a strict standard when evaluating Second Amendment challenges.

reasonable fit between the asserted substantial or important governmental objective and the burden placed on the individual. See *Marzzarella*, 614 F3d at 97-98. The prosecution has failed to meet this burden.

While preventing intoxicated individuals from committing crimes involving handguns is an important government objective, the infringement on defendant's right in the instant case was not substantially related to that objective. We initially note that, at the time of the officers' entry into the home, and at the time they were actually able to establish the level of defendant's intoxication, defendant's possession was constructive rather than actual. Thus, to allow application of this statute to defendant under these circumstances, we would in essence be forcing a person to choose between possessing a firearm in his home and consuming alcohol. But to force such a choice is unreasonable. As the facts illustrate, there was no sign of unlawful behavior or any perceived threat that a crime involving a handgun would be committed. We note that the Legislature, in crafting the concealed pistol license statute, recognized both the concern with an intoxicated person carrying a firearm and that it is unnecessary to prohibit an intoxicated person from merely being in the vicinity of a firearm. Under MCL 28.425k(2), it is an offense for a person to carry a concealed pistol while under the influence of alcohol.[4] But MCL 28.425k(3) provides for the intoxicated person to have the pistol secured in a vehicle in which the person is an occupant without violating the provisions of subsection 2. In other words, the government's legitimate concern is not that a person who has consumed alcohol is in the vicinity of a firearm, but that he actually has it in his physical possession.

In conclusion, the government cannot justify infringing on defendant's Second Amendment right to possess a handgun in his home simply because defendant was intoxicated in the general vicinity of the firearm. Accordingly, the district court did not err in finding that MCL 750.237, as applied to defendant, was unconstitutional.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood

[4] And we note that the blood alcohol level proscribed under the concealed pistol statute is much lower than that under the possession of a firearm while intoxicated statute. Cf. MCL 28.425k(2)(c) and MCL 750.237(1)(b).