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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2010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.

MURPHY, C.J. (*concurring*).

I concur with the majority in affirming defendant's felon-in-possession conviction, and I agree with the majority's analysis and conclusion rejecting defendant's argument that his conviction violates the constitutional prohibition against ex post facto laws. Further, while I agree with the majority that defendant has not established plain error regarding defendant's unpreserved argument that the conviction violated his state and federal constitutional rights to bear arms, I would stop the analysis at that point and not proceed any further, as it is unnecessary to do so.

As indicated by the majority, Const 1963, art 1, § 6, provides that "[e]very person has a right to keep and bear arms for the defense of himself and the state." In *People v Swint*, 225 Mich App 353, 375; 572 NW2d 666 (1997), this Court held that the right to bear arms under the Michigan Constitution "is not absolute and is subject to the reasonable limitations set forth in MCL 750.224f [felon-in-possession statute]." The Court upheld the constitutionality of the statute "as a reasonable exercise of the state's police power." *Id.*

With respect to the Second Amendment to the United States Constitution, up until the decision in *McDonald v City of Chicago*, __ US __; 130 S Ct 3020, 3050; 177 L Ed 2d 894 (2010), the Second Amendment had not been recognized as being applicable to the states, and *McDonald* held that the Due Process Clause of the Fourteenth Amendment incorporated the right to bear arms, thereby requiring the states to honor the Second Amendment. As acknowledged by the majority, *McDonald* had not yet been issued when the case at bar was decided below, and therefore, a Second Amendment challenge would necessarily have failed. Accordingly, the landmark decision in *Dist of Columbia v Heller*, 554 US __; 128 S Ct 2783; 171 L Ed 2d 637 (2008), relied on by defendant, could not have been applied by the trial court. Thus, as stated by the majority, "there was no plain error and [defendant] is not entitled to any relief." *Ante* at 6.

Nevertheless, the majority proceeds to engage in a thorough analysis of the issue. "[T]here exists a general presumption by this Court that we will not reach constitutional issues that are not necessary to resolve a case." *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). While I recognize that the majority is not absolutely prohibited from examining the merits of the constitutional argument, it is not necessary to reach the issue in order to resolve the case. I would decline to address the merits of the constitutional issue, especially in the context of an unpublished opinion and where the majority's analysis is arguably dicta. Accordingly, I respectfully concur.

/s/ William B. Murphy