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NO. COA13-252
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

MICHAEL ROBERT PACE,
Plaintiff,

v.

Henderson County
No. 12 CVD 1400

STATE OF NORTH CAROLINA,
Defendant.

Appeal by plaintiff from order entered 5 December 2012 by Judge Peter Knight in Henderson County District Court. Heard in the Court of Appeals 29 August 2013.

McLean Law Firm, P.A., by Russell L. McLean, III, for plaintiff-appellant.

Roy Cooper, Attorney General, by William P. Hart, Jr., Assistant Attorney General, for the State.

DAVIS, Judge.

Michael Robert Pace ("Plaintiff") appeals from the trial court's 5 December 2012 order granting summary judgment in favor of the State. On appeal, he argues that he was entitled to judgment as a matter of law because his evidence established that N.C. Gen. Stat. § 14-415.1 was unconstitutional as applied to him. After careful review, we affirm.

Factual Background

On 12 November 2010, Plaintiff filed a complaint in Haywood County District Court seeking (1) a declaratory judgment that N.C. Gen. Stat. § 14-415.1 - the statute prohibiting possession of firearms by felons - was unconstitutional as applied to him; and (2) the restoration of his right to possess firearms. Specifically, his complaint alleged that Plaintiff had been convicted of three felonies in the State of California and had been "released without further probation and paroled in 1995." The complaint further asserted that "none of these felonies were violent offense felonies or involved the use of a firearm." Plaintiff also alleged that "[a]t the time of [his] release from parole his right to possess a long gun was automatically restored to him and that constitutional right fit within the category provided under N.C.G.S. § 14-415.1 at the time of his residency and domicile in North Carolina" but that "[a]s a result of the amendment of December 1, 2004 to N.C.G.S. § 14-415.1, the State took away his constitutional right to possess the firearm which had been lawfully restored to him by [the] State legislature."

Upon the State's motion to dismiss for improper venue, the case was removed from Haywood County District Court to Henderson

County District Court. On 18 January 2011, Plaintiff filed a motion for summary judgment. The State submitted a memorandum of law both opposing Plaintiff's motion for summary judgment and seeking an order granting summary judgment in its favor. The trial court heard the parties' respective motions for summary judgment on 9 November 2012 and entered an order granting summary judgment in favor of the State on 5 December 2012. Plaintiff filed a notice of appeal to this Court.

Analysis

Plaintiff argues that the trial court erred in denying his motion for summary judgment and in granting summary judgment in favor of the State. "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

N.C. Gen. Stat. § 14-415.1, in its present form, makes it "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm" N.C. Gen. Stat. § 14-415.1(a) (2011). Plaintiff's as-applied challenge to N.C. Gen. Stat. § 14-415.1 is

based on our Supreme Court's decision in *Britt v. State*, 363 N.C. 546, 681 S.E.2d 320 (2009). The plaintiff in *Britt* argued that the General Assembly's 2004 amendment to that statute – which extended the prohibition on possession “to *all* firearms by any person convicted of any felony” and eliminated the provision allowing felons to possess firearms in their homes and places of business – violated his rights under the United States and North Carolina Constitutions. *Id.* at 548, 681 S.E.2d at 321 (emphasis in original). In its analysis, the Supreme Court explained that while “regulation of the right to bear arms is a proper exercise of the General Assembly's police power, . . . any regulation must be at least reasonable and not prohibitive, and must bear a fair relation to the preservation of the public peace and safety.” *Id.* at 549, 681 S.E.2d at 322 (citation and quotation marks omitted). Accordingly, the question at issue in *Britt* was whether N.C. Gen. Stat. § 14-415.1, as amended, was a reasonable regulation as applied to the plaintiff. *Id.*

The Court concluded that N.C. Gen. Stat. § 14-415.1 was, as applied to the plaintiff, an unreasonable regulation because “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. at 550, 681 S.E.2d at 323.

This Court's cases interpreting *Britt* have focused on five factors as relevant in determining whether N.C. Gen. Stat. § 14-415.1 is unconstitutional as applied to a particular plaintiff:

(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 "lawabiding 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*, 364 N.C. 404, 700 S.E.2d 215 (2010).

This Court has held that in order to prevail on an as-applied constitutional challenge to N.C. Gen. Stat. § 14-415.1, the party challenging the statute must present evidence sufficient to allow the trial court to make findings of fact relevant to the five above-quoted factors enumerated in *Britt*. *State v. Buddington*, 210 N.C. App. 252, 255, 707 S.E.2d 655, 657 (2011); *Johnston v. State*, ___ N.C. App. ___, ___, 735 S.E.2d 859, 872 (2012), *aff'd per curiam*, ___ N.C. ___, ___ S.E.2d ___ (2013). We conclude that the trial court's entry of summary

judgment in favor of the State was proper because Plaintiff failed to either allege or offer evidence satisfying several of the *Britt* factors.

Neither Plaintiff's complaint nor his motion for summary judgment and supporting affidavit explain with any specificity the nature or type of his felony convictions. As noted above, North Carolina courts analyzing an as-applied challenge based on *Britt* have focused on whether the litigant's felonies involved the use or threat of violence. Here, other than his bare assertion that his felony convictions were non-violent, Plaintiff has provided no specific evidence regarding the nature or circumstances of these offenses.

Perhaps even more fatal to his claim is the complete lack of any evidence concerning the fourth and fifth *Britt* factors. Plaintiff neither alleged nor offered evidence to show that (1) he has a "history of 'responsible, lawful firearm possession' during a time period when possession of firearms was not prohibited;" or (2) that he assiduously and proactively complied with the 2004 amendment. *Whitaker*, 201 N.C. App. at 205, 689 S.E.2d at 404 (quoting *Britt*, 363 N.C. at 550, 681 S.E.2d at 323).

Although this Court has established that "none of the five

factors of the analysis in *Britt* is determinative," *Johnston*, ___ N.C. App. at ___, 735 S.E.2d at 872, we have also held that the party asserting the constitutional challenge must at least provide the requisite evidence to allow the trial court to consider and address these factors. *Buddington*, 210 N.C. App. at 256, 707 S.E.2d at 658. Because Plaintiff failed to provide evidence of (1) the nature of his felonies; (2) his history of responsible firearm ownership; and (3) his assiduous compliance with the 2004 amendment to N.C. Gen. Stat. § 14-415.1, the trial court properly denied Plaintiff's motion for summary judgment.

In determining that the trial court properly granted the State's motion for summary judgment, we are guided by our decision in *Buddington*. In *Buddington*, the defendant was indicted for possession of a firearm by a felon in violation of N.C. Gen. Stat. § 14-415.1. *Buddington*, 210 N.C. App. at 253, 707 S.E.2d at 656. The defendant moved to dismiss the charge, alleging that N.C. Gen. Stat. § 14-415.1 was unconstitutional as applied to him based on *Britt*. *Id.* The trial court dismissed the indictment, and the State appealed. *Id.* We reversed the trial court's ruling based on the defendant's failure to offer evidence upon which the trial court could adequately address the *Britt* factors. *Id.* at 255-56, 707 S.E.2d at 657-58.

In order for defendant to prevail in a motion to dismiss through 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 regarding (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 lawabiding 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.

Id. at 255, 707 S.E.2d at 657 (citation and quotation marks omitted). Likewise, in the present case, we believe that Plaintiff's analogous failure to offer evidence sufficient to allow the trial court to make factual findings regarding the five *Britt* factors mandated the entry of summary judgment in favor of the State. Accordingly, we affirm the trial court's order.

Conclusion

For the reasons stated above, we affirm the trial court's order granting the State's motion for summary judgment and denying Plaintiff's motion for summary judgment.

AFFIRMED.

Judges CALABRIA and STROUD concur.

Report per Rule 30(e).