

IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION
CUYAHOGA COUNTY, OHIO

STATE OF OHIO : CASE NO. 526776
Plaintiff, : JUDGE BRIAN J. CORRIGAN
vs. : **DECISION**
MARINKO TOMAS :
Defendant. :

BRIAN J. CORRIGAN, JUDGE

Background

Defendant Marinko Tomas is charged in a two-count indictment of Having Weapons While Under Disability in violation of R.C. §2923.13(A)(3) (Count 1) and Possessing Criminal Tools in violation of R.C. §2923.24(A) (Count 2).

Defendant filed a Motion to Dismiss and an Evidentiary Hearing was held on July 24, 2007.¹

Revised Code §2923.13(A)(3), the Having Weapons While Under Disability statute, reads as follows:

“(A) Unless relieved from disability as provided in Section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordinance, if any of the following apply:

“ * * * * *

(3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale,

¹ Defendant was originally charged in a single-count indictment of Having Weapons While Under Disability in Case No. CR 477028. That case was dismissed and Defendant was re-indicted under Case No. 526776 adding a count of Possessing Criminal Tools. The evidentiary hearing was held under the old case number.

administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been an offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.”

Defendant Tomas was convicted in 1991 of Attempted Trafficking of Marijuana, a first-degree misdemeanor. This conviction provided the basis for charging the Defendant with Having Weapons While Under Disability.

Evidentiary Hearing

The July 24, 2007 hearing established that Defendant owned a business located in a neighborhood known for its high amount of crime. Two Cleveland Police Officers testified to the prevalent violent crime in the neighborhood.

The business also served as a residence for the Defendant, his girlfriend and his young child. Defendant’s girlfriend testified that she is often alone in the store while Defendant is working at a site. She testified to incidents when she feared for her safety and the safety of her child when operating the store alone.

The Defendant also presented evidence he purchased the firearms in question for self-defense purposes.

Constitutional Issues

The Second Amendment of the Federal 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.

Defendant argues that the Having Weapons While Under Disability statute, as applied to him, is unconstitutional because it infringes on his right to possess firearms in his home for self-defense purposes. Defendant cites two recent Supreme Court decisions to bolster his argument.

In *District of Columbia v. Heller*, 128 S.Ct. 2783, 171 L.Ed.2d 637(2008), in striking down the District of Columbia's comprehensive prohibition on handgun possession, the United States Supreme Court held "that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." In *dicta*, the Court explained that their decision should not be taken to "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill...." *Id* at 2816.

On June 28, 2010, the Supreme Court held in *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3050, 177 L.Ed.2d 894 (2010) that the Second Amendment "applies equally to the Federal Government and the States."

Conclusion

The *Heller* and *McDonald* cases establish that the Defendant has a fundamental right to bear arms for the purpose of self-defense. This Court recognizes that this right is not absolute and under the States' police power these rights can be limited.

However, applying a strict scrutiny review, the State has no compelling interest in prohibiting this particular defendant from possessing firearms in his place of business and home. In *Heller*, the Supreme Court stated prohibitions on the possession of firearms by **felons** are constitutional.

The record shows that Defendant was convicted in 1991 of a **non-violent misdemeanor** drug offense. The evidence establishes that Defendant makes his home and runs his business in a dangerous violent neighborhood and to protect himself and his family from the inherent violence, he keeps guns on the premises.

This Court therefore narrowly holds that R.C. §2923.13 is unconstitutional when a Defendant with no felony convictions, possesses firearms in his home or business, for the limited purpose of self-defense.

Defendant's Motion to Dismiss is granted and Count 1 of the Indictment is dismissed. Count 2 of the Indictment, Possessing Criminal Tools is likewise dismissed since the underlying felony has been dismissed.

IT IS SO ORDERED.

BRIAN J. CORRIGAN, JUDGE

Date: December _____, 2010.

CERTIFICATE OF SERVICE

A copy of the foregoing Decision has been sent via U.S. Mail this 7th day of December, 2010 to:

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BRIAN J. CORRIGAN, JUDGE