MISSOURI CIRCUIT COURT
TWENTY-SECOND CIRCUIT
(City of St. Louis)

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1422-CR02936-01
	)	Div. 18
RAYMOND ROBINSON,	)	
	)	
Defendant.	)	

MEMORANDUM, ORDER AND JUDGMENT

Justice Story once wrote that the right to keep and bear arms is the "palladium of the liberties of a republic," and the people of Missouri echoed that sentiment by a substantial margin in 2014, when they amended the Bill of Rights of their constitution, art. I, §23, to read as follows:

> That the right of every citizen to keep and bear arms, **ammunition, and accessories typical to the normal function of such arms**, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. **The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.**

The language quoted above in bold type is the language added by the 2014 revision.

Section 571.070.1(1), RSMo, provides that a person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and "has been convicted of a

felony under the laws of this state." Defendant Raymond Robinson is charged with violating §571.070.1. Defendant has moved to dismiss the indictment, arguing that the statute is unconstitutional in light of the amendment to Mo.Const. art. I, §23. Reserving the motion to dismiss, the defendant entered a plea of guilty to the charge of felon in possession of a firearm, and the Court deferred acceptance of the plea and sentencing until it could dispose of the motion to dismiss. The Court also ordered a pre-sentence investigation or sentencing assessment report, which has been received and filed.

In light of the guilty plea, the facts are not in dispute. Defendant, a partially disabled man in his fifties, who supports himself by doing odd jobs in his community, was detained by St. Louis police officers during the evening of July 28, 2014. The officers were acting on an anonymous tip that defendant was in possession of a firearm as well as pursuant to an outstanding warrant for defendant's arrest on a minor municipal charge. Defendant admitted that he had a pistol in his car and permitted the officer to search the car. The officer found the weapon, a .380 automatic pistol. A complaint alleging violation of §571.070 was filed on July 29, 2014. The information was filed on November 5, 2014, following preliminary hearing.

Judging by his statements during the plea and by the sentencing assessment report, defendant has not been a model citizen. He was previously convicted of unlawful use of a weapon by carrying a concealed weapon in 2003. He served time in the penitentiary after failing on shock probation. His parole record was not stellar.

However, he has no record of violent felonies or mentally unstable behavior, although he does have prior arrests involving assault and resisting arrest and he admits to beating an individual who allegedly stole his tools. He reported to the author of the assessment report that he carries a gun for protection due to the cash basis on which he does work. His over-all risk assessment score (i.e., a gauge of the likelihood of re-offending) is above average, meaning that he is less likely to re-offend.

In the Court's view, the motion to dismiss raises several issues: first, whether defendant has standing to attack the constitutionality of the statute; second, whether the revised art. I, §23 applies to this prosecution, which commenced prior to the adoption of the revision; third, if the current version of §23 is applicable, whether it renders §571.070.1(1) unconstitutional on its face; and fourth, if §571.070.1(1) is not unconstitutional on its face, whether it is unconstitutional as applied to defendant Robinson under the circumstances of this case. The constitutional questions import a subsidiary question, to wit, can §571.070.1(1) withstand strict scrutiny, either on its face or as applied?

At the outset, the Court observes that defendant invokes the Second Amendment, but does not rest his argument on it. Both parties allude to the Supreme Court decisions of *McDonald v. City of Chicago,* 561 U.S. 742 (2010) and *District of Columbia v. Heller,* 554 U.S. 570 (2008), but both parties argue only the application of Mo.Const. art. I, §23 as amended in 2014. In the Court's view, the parties' approach is consistent with the purport of revised §23, which plainly seeks to

address the critical question left open in *McDonald* and *Heller*, i.e., whether the right to keep and bear arms is a "fundamental right," which can be subject to legislative regulation only under carefully defined circumstances, or is merely akin to a property right, which (notwithstanding express protection in the constitution) is subject to all manner of "reasonable regulation."

The first question before the Court is the defendant's standing. Section 23 applies only to citizens. Defendant's citizenship is not readily apparent from the face of the record, but the sentencing assessment report reflects that he was born and raised in the St. Louis metropolitan area. The Court's file also reflects that defendant has a Social Security number. Given the family history in the sentencing assessment report, the record of his prior guilty plea, the recitation of his employment history, the absence of any suggestion of alienage, and the other circumstances of record, the Court infers that he is a citizen and so has standing to invoke §23.

The next question is whether, absent §571.070.1(1), defendant's possession of the pistol comes within the purview of §23. The wording of §23 (unchanged in this respect by the 2014 amendment) is that the citizen's right to bear arms is a limited right, i.e., the right to bear arms in defense of home, person, family, and property. The Supreme Court has described the contours of the Missouri constitutional right as follows, *State v. White,* 253 S.W. 724, 727 (Mo. 1923):

> The evident purpose of Section 17, of Article II [the predecessor to §23] is to render the citizen secure in his home, his person and his property. Its purpose is to deny to the Legislature the power to take away the right of the citizen to resist aggression,

> force and wrong at the hands of another. By no possible construction can that section of the Constitution be held to guarantee to the citizen the right to keep and bear arms for the purpose of his own aggression, wrong or assault upon the person or property of another. The right of the citizen to keep and bear arms for his own protection or in aid of the civil power, when thereto legally summoned, is the only right guaranteed to the citizen. The moment the citizen ceases to act in protection of his home, his person or his property, unless acting in aid of the civil power, he steps out from under the protection of the Constitution and his right to bear arms may be taken away or limited by reasonable restrictions.

In light of the plain language of the constitution, the Missouri Court of Appeals has held that, because the citizen's right to keep and bear arms in Missouri is limited, a defendant who invokes the right is pleading justification for otherwise illegal conduct. Consequently, the burden is on the defendant to inject the issue of his purpose in possessing a weapon when legislation criminalizes that possession. *City of Cape Girardeau v. Joyce,* 884 S.W.2d 33 (Mo.App.E.D. 1994)(rejecting a constitutional challenge to a city ordinance forbidding the "open carry" of weapons).

The defendant reported to the writer of the assessment report that he carried a sidearm for protection due to his carrying amounts of cash paid to him for his odd-job work. In this Court's view, this is sufficient to inject the issue of the defendant's purpose. There is nothing in the record in this case otherwise to indicate that the defendant had an illegal purpose in keeping the pistol in his car. Hence, the reasoning of *Joyce,* if still good law, seems to have been satisfied.

One further observation on the reasoning of *Joyce*: although this Court considers *Joyce's* desideratum to have been fulfilled, this Court is also of the opinion that *Joyce* has been superseded by the amendment

of §23. If the right to keep and bear arms is "fundamental" and "unalienable," and restrictions are subject to strict scrutiny, it follows that the burden must always be on the State to establish that the defendant's conduct is outside the protection of the constitution, not the other way around. In defending against an obscenity prosecution, publishers are not obliged to prove that a publication is not obscene; rather, the State must prove that the publication is not protected by the First Amendment. Similarly, in defending against a charge of unlawful possession of a firearm, a defendant who invokes his constitutional right to keep and bear arms surely cannot be required to prove that his conduct is protected, or that his keeping and bearing arms at any given point in time is in response to some specific threat to home, person, family or property. Instead, the State must be required to prove that possession was for an unlawful purpose or was otherwise not protected.

In any event, it seems to the Court that the issue of defendant's purpose in possessing the pistol in his car is a false issue. Section 571.070.1(1) makes no exceptions for a convicted felon to possess a weapon for one of the purposes identified in §23. The question is whether the unqualified prohibition in the statute is constitutional. In this case, the possession of the pistol in one's car by any other citizen would be lawful, without the necessity of proving a lawful purpose in possessing it. Cf. *Taylor v. McNeal,* 523 S.W.2d 148 (Mo.App.St.L. 1975)(possession of concealable firearm in one's home is lawful in Missouri); see also §571.030.3 (transporting firearm in automobile). It would be sophistry to hold that, because the

defendant presented no evidence of a lawful purpose for possession of the pistol, the constitutional claim concerning the statute's blanket prohibition must fail.

The next question is the application of §23 to a prosecution that commenced before its effective date. Constitutional amendments take effect thirty days after their approval by the voters; in this case, the revised §23 took effect on September 4, 2014. Obviously, the complaint was filed prior to the adoption of the revised §23, but the information was filed subsequently. Given that felony prosecutions can be initiated by complaint, Mo.R.Ct. 22.01, the Court deems that this case had commenced prior to the effective date of revised §23.

Although the State argues otherwise, the Court concludes that the revised §23 governs this case. "If a previous law conflicts with a new constitutional provision, the law withers and decays and stands for naught, as fully as if it had been specifically repealed." *State ex rel. Goldman v. Hiller,* 278 S.W. 708, 709 (Mo.banc 1926); accord, *Pogue v. Swink,* 261 S.W.2d 40 (Mo. 1953); *Curators of Central College v. Rose,* 182 S.W.2d 145 (Mo.), appeal dismissed, 65 S.Ct. 269 (1944). This principle was recognized in the criminal prosecution context in *Marsh v. Bartlett,* 121 S.W.2d 737 (Mo.banc 1938), where the Court held that a pre-existing criminal statute punishing violations of the game laws survived the constitutional amendment establishing the Conservation Commission and clothing it with regulatory authority, because the criminal statute was not inconsistent with the intervening constitutional amendment. Thus, a defendant who caught fish out of season under Commission rules could be convicted of violating the

statute which applied to all violations of game laws. By a parity of reasoning, §571.070 can support the instant prosecution only if it is consistent with the revised §23. In other words, to the extent that §571.070 is inconsistent with the revised §23, the defendant cannot be convicted under that statute.

Turning now to the question of the validity of §571.070.1(1), the Court is mindful of the general principles governing construction of constitutional provisions and evaluation of facial attacks on the validity of statutes. In brief, the Court is to construe §23 in keeping with its plain meaning so as to give effect to the intention of the voters in approving it. Unless the constitutional or statutory provisions at issue are ambiguous, there is no need to resort to the various canons of construction. Absent a specific definition in the constitution, the words used are to be given their ordinary meaning, as they would have been understood by the voters or the legislators. In case of ambiguity, the courts may resort to maxims of construction, taking into account the context of the words used and other aids, such as evidence of the drafters' intent, and historical context. See generally, *Neske v. City of St. Louis,* 218 S.W.3d 417 (Mo.banc 2007); *State v. Martin,* 644 S.W.2d 359 (Mo.banc 1983)(incidentally, *Martin* also supports the proposition that an intervening constitutional amendment affects pending cases).

Statutes generally are presumed constitutional, and, where possible, they will be construed to avoid constitutional questions. A facial constitutional attack on a statute faces a high barrier and will succeed only if there is no set of circumstances under which the

statute can constitutionally be applied. E.g., *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442 (2008). However, when a statute impinges on fundamental rights, it is subject to "strict scrutiny." In constitutional law, "strict scrutiny" has a well defined meaning: the court will closely examine the statute to determine if it is justified by a compelling state interest and is narrowly drawn to serve precisely that interest. E.g., *Arizona Free Enterprise Club v. Bennett,* 131 S.Ct. 2806 (2011); *Brown v. Entertainment Merchants Ass'n,* 131 S.Ct. 2729 (2011); *Weinschenk v. State,* 203 S.W.3d 201 (Mo.banc 2006).

In the case at bar, it is readily apparent that §571.070.1(1) survives facial challenge. Albeit, in the Court's view, revised §23 places the fundamental nature of the right to keep and bear arms beyond cavil, the amendment nevertheless contains a very explicit proviso permitting statutory restriction of the rights of convicted violent felons to keep and bear arms. Thus, the constitution itself defines a set of circumstances in which §571.070.1(1) can be constitutionally applied, and the predicate for a facial challenge evanesces.

The motion to dismiss does not, however, limit itself to a claim of facial invalidity. To be sure, defendant asserts that §571.070.1(1) is unconstitutional on its face; but in the penultimate sentence of the motion, defendant argues: "Given that Mr. Robinson's prior felony is the least serious class of a felony, the significant length of time before the prior felony and the current charge, and the fact that there is nothing about Mr. Robinson's prior felony that puts

him into a category as a dangerous or violent felon, the constitutional amendment should cover Mr. Robinson's right to carry a firearm despite the fact that he has previously plead [sic] guilty to a felony." The Court therefore construes the motion as broaching an "as applied" attack on the statute in this case.

By importing the phrase "strict scrutiny" into §23, the 2014 amendment cannot be read as authorizing the courts merely to invent standards of such scrutiny as an original proposition. When the constitution utilizes a phrase having a well-defined legal meaning, the courts necessarily must conclude that the drafters and the voters intended that meaning. Cf. *State ex rel. Ashcroft v. Blunt,* 813 S.W.2d 849 (Mo.banc 1991); *Rathjen v. Reorganized School Dist. R-II,* 284 S.W.2d 516 (Mo.banc 1955). Thus, by the plain terms of revised §23, the statute under which defendant is being prosecuted must be subjected to strict scrutiny, in order to determine its validity as applied here.

Again, "strict scrutiny" requires that a statute must be the least restrictive means of achieving a compelling state interest. Indeed, even if a regulation is proffered as a "reasonable time, place and manner" regulation, it must nonetheless be "narrowly tailored" so as not to burden a fundamental right more than is necessary to further the government's legitimate interests. *McCullen v. Coakley,* 134 S.Ct. 2518, 2530 (2014). "Narrow tailoring" requires a "close fit" between ends and means. *Id.*

In seeking to support the application of the statute to defendant, the State relies on statements made by a member of the

Missouri Senate who asserts special knowledge with regard to the intent of revised §23. While such evidence (for present purposes, the Court assumes that the State's representations as to Senator Schaeffer's views are accurate) may be of some value in construing an ambiguous constitutional provision, it is of no consequence in dealing with an unambiguous constitutional command. "Strict scrutiny," like "just compensation," is a judicial question, and the Court has concluded that the phrase, while recondite in application, has the long-established meaning as delineated above. Hence, Senator Schaeffer's opinion as to whether §571.070.1(1) should survive strict scrutiny is of no more assistance than the views of any other respected member of the General Assembly. Cf. *Akin v. Missouri Gaming Comm.*, 956 S.W.2d 261 (Mo.banc 1997).

The State's reliance on prevention of crime and protection of public safety as compelling interests justifying §571.070.1(1) is undeniably a weighty argument in favor of applying that statute to defendant. Public safety is a legitimate governmental concern, *McCullen v. Coakley,* supra, and the government's interest in preventing crime has been recognized as compelling. *United States v. Salerno*, 481 U.S. 739 (1987). The problem, however, lies in the quintessential requirement of strict scrutiny: that any statutory restriction on a fundamental right must be "narrowly tailored." The case most heavily relied on by the State, *United States v. Salerno,* illustrates the point. In *Salerno,* pretrial detention was authorized by the federal Bail Reform Act, but only under stringently defined circumstances. To deny bail to an arrestee, the trial court was

obliged to find by clear and convincing evidence that no conditions of release of a particular arrestee would reasonably ensure the safety of any other person and the community. In particular, the government was obliged to prove, and the court to find after a plenary evidentiary hearing, that the arrestee presented a "demonstrable danger" to the community. 481 U.S. at 750. (Notably, the *Salerno* Court also declined to hold categorically that pretrial liberty of a criminal defendant was a "fundamental" right.)

It is obvious that §571.070.1.(1) is not a "time, place and manner" regulation. It is a blanket prohibition on possession of a firearm by any convicted felon. As a substantive restriction on a fundamental right, therefore, it must be closely scrutinized to determine if it is narrowly drawn to serve the compelling state interest in public safety and crime prevention.

It is difficult to see how the statute's undifferentiated prohibition on possession of firearms by all convicted felons is narrowly drawn to achieve the State's legitimate objectives. The State cites "studies" purporting to show a correlation between prior criminal convictions and subsequent violent offenses, and a "reduction in risk for later criminal activity of approximately 20% to 30%" from denying handgun purchases to convicted felons. At the same time, the State cites a study which purports to link prior misdemeanor convictions with violent or firearm related criminal activity, suggesting that the prohibition applicable only to convicted felons is underinclusive. Regardless, none of the State's studies appears to establish more than a correlation, and correlation is not causation.

The problem with the studies cited by the State--assuming that they are of any evidentiary value--is that they do no more than show a rational basis for the prohibition at issue here. They do not establish that the prohibition is "narrowly tailored." Further, the State does not show that its studies controlled for variables such as the precise nature of prior offenses, the age or personal circumstances of the defendant at the time of the weapons offense and at the time of the later violent offense, or any of the other myriad factors that may be characteristic of future dangerousness. As was demonstrated in the context of the death penalty, statistics shed little light on the propriety of a penalty in the concrete case of an individual defendant. *McCleskey v. Kemp,* 481 U.S. 279 (1987).

Even assuming that the State's cited studies have evidentiary value, it does not follow that they establish that the blanket prohibition on felons' possession of firearms passes muster under §23. If the drafters and voters who approved the revised §23 considered that a blanket prohibition on felons in possession of firearms was unaffected by the revision, why include the express proviso regarding convicted violent felons? By including the express exception for violent felons, the people implicitly demanded something more to justify a prohibition applicable to all felons.

The State cites *State v. Eberhardt,* 145 So.3d 377 (La. 2014) for the proposition that statutes prohibiting felons to possess firearms withstand strict scrutiny. The State's reliance on *Eberhardt* is disingenuous. The Louisiana Supreme Court's construction of a similar revision to a constitutional protection of the right to keep and bear

arms is not inconsistent with the idea that §571.070.1(1) is unconstitutional as applied to defendant here. The Louisiana statute upheld in *Eberhardt* was dramatically different than the blanket prohibition of §571.070.1(1). The actual holding of the Louisiana Court, describing the sweep of the Louisiana statute, is worth quoting:

> We conclude that LSA-R.S. 14:95.1 serves a compelling governmental interest that has long been jurisprudentially recognized and is grounded in the legislature's intent to protect the safety of the general public from felons convicted of specified serious crimes, who have demonstrated a dangerous disregard for the law and the safety of others and who present a potential threat of further or future criminal activity. . . . Further, the law is narrowly tailored in its application to the possession of firearms or the carrying of concealed weapons for a period of only ten years from the date of completion of sentence, probation, parole, or suspension of sentence, and to only those convicted of the enumerated felonies determined by the legislature to be offenses having the actual or potential danger of harm to other members of the general public. Under these circumstances, we find "a long history, a substantial consensus, and simple common sense" to be sufficient evidence for even a strict scrutiny review. [145 So.3d 385, citations omitted.]

Manifestly, the Louisiana statute was indeed narrowly tailored to serve the State's interest in prevention of crime and protection of public safety. By contrast, the Missouri statute is, to repeat, an undifferentiated blanket prohibition on possession of firearms by all felons, whether forgers and embezzlers or robbers and rapists, and whether they possess a firearm for protection of themselves and their families or for the advancement of some criminal enterprise.

In the instant case, the evidence against the defendant is entirely that he possessed the pistol in his car, which would be a lawful act with or without proof of proper purpose. The State proffered no evidence that defendant's purpose in possessing the

pistol was to commit any illegal act or in furtherance of any criminal conduct, such as distribution of controlled substances. Nor is there any reason to find that the defendant presents a demonstrable risk to the safety of any individual or of the public. His single prior felony conviction was (ironically) for carrying a concealed weapon. There is nothing in the record to suggest any misuse of weapons within the last ten years, and his risk of re-offending is low. His age and physical condition militate against undertaking violent offenses such as robbery or assault.

Unlike the Bail Reform Act at issue in *Salerno*, or the Louisiana statute at issue in *Eberhardt*, the blanket prohibition on possession of firearms by convicted felons in §571.070.1(1) is not narrowly tailored to serve the State's interest in crime prevention and public safety. To survive strict scrutiny, a restriction on possession of firearms by non-violent felons requires more than the justification proffered by the State. Given that §571.070.1(1) fails to differentiate among classes of felonies, fails to define criteria whereby non-violent felons can be assessed for future dangerousness, and fails to impose any standard of proof before a non-violent felon can be stripped of his constitutional right to keep and bear arms, the Court concludes that the statute is unconstitutional as applied to defendant in this case.[1]

[1] The Court is not at liberty to rewrite statutes so as to supply criteria for denying the right to bear arms to persons convicted of non-violent felonies. See *State v. Hart,* 404 S.W.3d 232 (Mo.banc 2013). The Court does not mean to imply that, if the State proved future dangerousness, the defendant's constitutional attack would fail. The problem is that the statute simply does not afford any basis to differentiate among persons convicted of non-violent felonies.

ORDER

In light of the foregoing, it is

ORDERED that defendant's motion to dismiss be and the same is hereby granted, and the information herein is dismissed with prejudice.

SO ORDERED:

Robert H. Dierker
Circuit Judge

Dated: February 27, 2015
cc: Counsel/parties pro se