COMMONWEALTH OF KENTUCKY

JUDGE MELISSA LOGAN BELLOWS JEFFERSON CIRCUIT COURT

NO. 22-CR-000450 DIVISION SEVEN (7)

COMMONWEALTH OF KENTUCKY PLAINTIFF

vs. **OPINION AND ORDER**

JECORY LAMONT FRAZIER DEFENDANTS

*** *** ***

The Defendant, Jecory Lamont Frazier, has moved the Court to dismiss the charge of Convicted Felon in Possession of a Handgun pursuant to KRS 527.040. Mr. Frazier argues that this charge is unconstitutional under the Second Amendment following the Supreme Court's decision in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). For the reasons below, this motion to dismiss is GRANTED.

OPINION

The Second Amendment provides that "[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." U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court interpreted the Second Amendment to protect an individual's right to keep and bear arms for self-defense. Despite the use of a textual and historical analysis in *Heller*, circuit courts across the country later coalesced around a "two-step" test for Second Amendment challenges, typically utilizing means-end scrutiny.

The Supreme Court rejected any notion of scrutiny in *Bruen*, instead focusing solely on history and tradition test consistent with *Heller*. The Court held that "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct" and the Government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. 142 S. Ct. at 2126. At times, *Bruen* instructed that the historical inquiry would be "fairly straightforward." *Id*. at 2131. "For instance, when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Id*. The Court also allowed for the use of analogies, stating that "analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin. So even if a modern day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id*. at 2133. Finally, the Court instructs that "when it comes to interpreting the Constitution, not all history is created equal. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them. The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates or postdates either time may not illuminate the scope of the right." *Id*. at 2119. With this background in mind, Mr. Frazier argues that there is no historical basis for KRS 527.040, thereby making it unconstitutional. The Commonwealth responds, first by arguing that *Bruen* reaffirmed prohibitions on the possession of firearms by felons, and second by arguing that even if Bruen did apply, the Nation's historical tradition supports disarming "non-virtuous" citizens.

The Commonwealth first urges the Court to apply *Bruen's* historical analysis in a different manner than Defendant altogether by arguing that Second Amendment protections apply only to "law-abiding citizens" as referenced in *Bruen*. However, this argument does not consider that the individuals in the *Bruen* case were in fact law-abiding – the issue of whether non law-abiding individuals received Second Amendment protections was not before the Court. The Court simply stated that being law abiding was sufficient to receive Second Amendment protections, it did not hold that being law abiding was necessary.

In *Heller*, the Court stated that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . ." 554 U.S. at 627. The majority opinion in *Bruen* makes no mention of *Heller's* reference to felon in possession laws. Instead, the admonition appeared in a concurring opinion. 142 S. Ct. 2162 (Kavanaugh, J., concurring). As stated by the Sixth Circuit in Tyler v. Hillsdale Cnty. Sheriff's Dep't 837 F.3d 678, 686 (6th Cir. 2016) (en banc) regarding the federal felon in possession of a firearm statute, Section 922(g)(4), "Heller only established a presumption that such bans were lawful; it did not invite courts onto an analytical off-ramp to avoid constitutional analysis." Thus, it is necessary to continue on to *Bruen's* historical analysis.

The first step of *Bruen* asks whether the plain text of the Second Amendment covers an individual's conduct. As the Court stated in Heller, there is "a strong presumption that the Second Amendment right is exercised individually and belongs to *all* Americans." 554 U.S. 570, 581 (emphasis added). While the Commonwealth urges the Court to exclude felons from Second Amendment protections, this would be inconsistent not only with the language in Heller, but also with other constitutional amendments, such as the Fourth Amendment, which clearly applies to

felons. *See Bell v. Wolfish*, 441 U.S. 520, 545 (1979). Therefore, it is clear that felons are included in the Second Amendment's protection of "the people."

The Commonwealth's primary argument centers around the concept that the Second Amendment was understood to be a civic right, meaning that "the right to arms was inextricably and multifariously tied to the virtuous citizen." *United States v. Coombes*, 629 F. Supp. 3d 1149, 1157 (N.D. Okla. 2022) citing Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 Tenn. L. Rev. 461, 480 (1995). Drawing upon this notion, the Commonwealth insists that the Nation has consistently disarmed those who it deems to be unvirtuous, such as felons. As the Commonwealth points out, the Kentucky Supreme Court supports this argument. As the court stated in *Posey v. Commonwealth*, 185 S.W.3d 170, 180 (Ky. 2006) "One implication of this emphasis on the virtuous citizen is that the right to arms does not preclude laws disarming the unvirtuous citizens (i.e. criminals) or those, who, like children or the mentally unbalanced, are deemed incapable of virtue." With this being said, the Court is not convinced that the constitutional right to bear arms should be premised upon a virtue requirement.

According to scholarly text, the civic virtue concept is advanced by scholars who characterize the Second Amendment as a right "exercised by citizens, not individuals[,] . . . who act together in a collective manner, for a distinctly public purpose: participation in a well regulated militia." Cornell & DeDino, A Well Regulated Right: The Early American Origins of Gun Control, 73 Fordham L. Rev. 487, 491 (2004). Following this argument, the right to bear arms is comparable to other civic rights, such as voting, where states have traditionally imposed a virtuousness requirement. This notion, however, is inconsistent with *Heller*. Heller implicitly rejected the concept that the Second Amendment protects a purely civic right, instead assuring that the Second Amendment "confer[s] an *individual* right to keep and bear arms," 554 U.S. at

595 (emphasis added). *Heller* made it clear – "the right to bear arms is rooted in one's right to defend himself, not his right to serve in the militia. Kanter, 919 F.3d at 463 (Barrett, J., dissenting) (citing Heller, 554 U.S. at 582-86). As the Court asserted in *United States v. Goins*, No. 5:22-cr-00091-GFVT-MAS-1, 2022 U.S. Dist. LEXIS 229543, at *13 (E.D. Ky. Dec. 21, 2022)., "Heller leaves no room to use the reference to a well regulated militia to interpret the Second Amendment as a civic right." Therefore, the Court is reluctant to accept that the limits on the right protected by the Second Amendment are defined by a person's virtue or good character.

History also rejects the imposition of a virtuousness requirement upon the right to bear arms. When early state legislatures excluded individuals from civic rights, it was typically explicit. For example, by 1820, 10 states, including Kentucky, had adopted constitutions that excluded or permitted the exclusion of "those who had committed crimes, particularly felonies or so-called infamous crimes" from voting. *Id*. at 13, citing Alexander Keysar, The Right to Vote 62-63 & tbl. A.7) (listing Kentucky, Vermont, Ohio, Louisiana, Indiana, Mississippi, Connecticut, Illinois, Alabama, and Missouri). Likewise, early state legislatures passed laws that explicitly limited jurors to those "of good Moral Character" who had not been "convicted of any scandalous crime or be guilty of any gross immorality." (Acts and Laws of the Commonwealth of Massachusetts 173 (Wright & Potter 1898)); see also id. n.11 (citing Act of Dec. 17, 1796, § 52, in Acts for the Commonwealth of Kentucky 134 (Steward 1796) (jurors must "be of good demeanor"). Unlike the civic rights of voting and jury duty, states which protected the right to bear arms in their constitutions lacked any exception for criminals. By 1820, nine states had enshrined the right to bear arms in their constitution. *See* Eugene Volokh, State Constitutional Rights to Keep and Bear Arms, 11 Tex. Rev. L. & Pol. 191, 208 (2006). Of those nine states, none had any exception for criminals, while seven explicitly excluded or authorized the

exclusion of certain criminals from the right to vote. *Id*. Thus, there is no basis, historical or otherwise, which supports the idea that the right to bear arms was simply tied to whether the individual was virtuous or not.

Despite the potential consequences of placing a virtue requirement on an individual's ability to exercise their Second Amendment rights, as cited above, the Kentucky Supreme Court has previously accepted the civic virtue theory when analyzing a challenge of KRS 527.040 under the Kentucky Constitution. The Court in *Posey v. Commonwealth*, 185 S.W.3d 170, 180 (Ky. 2006) stated "[t]his concept of civic virtue is similarly reflected in other provisions contained in Section 1 of our Constitution, such as the rights of all persons to life, liberty, and the pursuit of happiness. Yet, neither party would claim that these rights are absolute or somehow immune from reasonable limitations in the interest of public safety and welfare." However, even accepting the civic virtue theory as true, the Commonwealth fails to present sufficient evidence to show a history and tradition of disarming felons.

To satisfy its burden of showing a history and tradition of disarming felons, the Commonwealth relies upon a case out of the northern district of Oklahoma. In *United States v. Coombes*, 629 F. Supp. 3d 1149, 1157 (N.D. Okla. 2022), the court based their opinion upon the civic virtue theory – specifically relying on attainder statutes from the American Colonies and early Republic. These attainder bills targeted the "disaffected and "delinquents" – specifically Tories (colonists who supported the British side during the American Revolution), and colonists not associated with either side. See 1 Journals of the Provincial Congress, Provincial Convention, Committee of Safety and Council of Safety of the State of New York: 1775-1776-1777, 149-50 (1842). Violation of these bills of attainder resulted in the loss of civil rights along with the forfeiture of property, impliedly depriving individuals of their firearms. *United States v.*

Coombes, 629 F. Supp. 3d 1149, 1158 (N.D. Okla. 2022). In addition, the Coombes court makes reference to a single regulation, where in the province of New York, persons convicted of a felony could not own property or chattels. *Id*. (citing Julius Goebel, Jr. & T. Raymond Naughton, Law Enforcement in Colonial New York, 718-19 (1944).

In addition to the early Colonial attainder statutes, the court in *Coombes* cites proposed revisions to the Second Amendment raised by three states during conventions to ratify the Constitution. *United States v. Coombes*, 629 F. Supp. 3d 1149, 1158, 1159 (N.D. Okla. 2022). While the proposals of Pennsylvania, Massachusetts, and New Hampshire indicated a desire to limit the right to bear arms solely to law abiding citizens, these proposals were never implemented or adopted by the states. Instead, the states ultimately adopted the Second Amendment without any of the proposed limiting language. Thus, these proposals are of little significance when trying to find a historical tradition of firearm regulations.

Lastly, the Commonwealth urges the Court to apply *Bruen's* historical analysis in another fashion altogether, first by arguing that Second Amendment protections apply only to "law-abiding citizens" as referenced in *Bruen*. However, this argument does not consider that the individuals in the *Bruen* case were in fact law-abiding – the issue of whether non law-abiding individuals received Second Amendment protections was not before the Court. The Court simply stated that being law abiding was sufficient to receive Second Amendment protections, it did not hold that being law abiding was necessary.

The majority opinion in Bruen makes no mention of Heller's reference to felon in possession laws. Instead, the admonition appeared in a concurring and dissenting opinions. 142 S. Ct. at 2162 (Kavanaugh, J., concurring). *Id*. at 2162 (Kavanaugh, J, concurring, joined by Roberts, C.J.); *Id*. at 2189 (Breyer, J., dissenting, joined by Sotomayor and Kagan, JJ.). As stated

by the Sixth Circuit in *Tyler v. Hillsdale Cnty. Sheriff's Dep't* 837 F.3d 678, 686 (6th Cir. 2016) (en banc) regarding the federal felon in possession of a firearm statute, Section 922(g)(4), "Heller only established a presumption that such bans were lawful; it did not invite courts onto an analytical off-ramp to avoid constitutional analysis." Thus, it is necessary to continue on to *Bruen's* historical analysis.

Even if the Court were to accept the concept that the right to bear arms was inextricably tied to a virtuousness requirement, there is simply not a sufficient record to support a historical tradition of disarming felons. In *Bruen*, the Court doubted that "just three colonial regulations could suffice to show a tradition. . ." which suggests that the attainder statutes alone could support a history and tradition of disarming felons. 142 S. Ct. at 2119. Furthermore, the Commonwealth presents no evidence of regulations that there was a historical tradition of disarming felons after the Second Amendment was ratified in 1791, the most relevant time period according to *Bruen. Id*. at 2137.

Lastly, as noted in *Bruen*, a court is not obliged to sift the historical materials for evidence to sustain [the Government's] statute. *Id*. at 2150. Rather, the court's role is to decide the case based on the historical record compiled by the parties." *Id*.

ORDER

Finding that the Commonwealth has not met its burden to show that KRS 527.040 is consistent with this Nation's historical tradition of firearm regulation, Mr. Frazier's motion to dismiss the indictment as unconstitutional is GRANTED.

/s/ HON. MELISSA LOGAN BELLOWS
electronically signed
3/12/2024 2:46:30 PM ET

Melissa Logan Bellows, Judge

cc: all parties