No. 89832

In the
Missouri Supreme Court

STATE OF MISSOURI,

Appellant,

v.

JOHN L. RICHARD,

Respondent.

Appeal from Mississippi County Circuit Court
The Honorable William H. Winchester, III, Judge

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the dismissal by the trial court of the state's information charging respondent, John L. Richard, under §571.030.1(5)[1] with one count of possession of a loaded firearm while intoxicated, a class D felony. The trial court dismissed the charge on the grounds that §571.030.1(5) is unconstitutional. Because this case raises an issue as to the constitutional validity of a Missouri statute, this Court has original jurisdiction. Article V, §3 Missouri Constitution (as amended 1982).

[1] All statutory citations are to RSMo Cum.Supp. 2008 unless otherwise noted.

STATEMENT OF FACTS

Respondent, John L. Richard, was charged in Scott County[2] with one count of the class D felony of possessing a loaded firearm while intoxicated (LF 8). According to the probable cause affidavit, respondent's wife told him that she was leaving him and respondent said that he was going to kill himself by "blowing his head off," and that if his wife called the police, he would go outside with a gun and make the police shoot him (LF 6). Respondent then took an unknown amount of morphine pills and an unknown amount of amitriptyline (LF 6). When the police arrived, respondent was in an unconscious state, seated in a chair in the residence; in his lap was a fully loaded Beretta 9mm semi-automatic handgun (LF 6). Respondent was wearing a shoulder holster containing a fully loaded spare clip for the Beretta (LF 7).

On September 25, 2008, counsel filed a motion to dismiss for violation of respondent's Second Amendment rights (LF 3). In his motion, respondent pled that he possessed the Beretta within his own home and did so for the legitimate purpose of self-defense (LF 15-16). Respondent asserted that §571.030.1(5) "effectively bans the possession of firearms in the home by anyone who is present in his/her own home while intoxicated," and that the statute thus violated respondent's Second Amendment right to possess a firearm within his own home for the purpose of self-defense (LF 16).

On October 9, 2008, the trial court took up Richard's motion and dismissed the State's case (LF 4; Tr. 2-11). The court held that §571.030.1(5) "is unconstitutional to the

[2] Venue was changed to Mississippi County (LF 9).

extent that it prevents a citizen from possessing a firearm, actual or constructive, in the confines of his home while he or she may be legally intoxicated." (LF 23). The state now appeals from the trial court's ruling.

POINT RELIED ON

The trial court erred in dismissing the state's information on the grounds that §571.030.1(5) is unconstitutional, because the statute does not run afoul of the Second Amendment of the United States Constitution or of Article I, Section 23 of the Missouri Constitution in that the statute is not facially unconstitutional because it is a valid exercise of the state's police power in regulating gun possession for the purpose of protecting the health, safety, and welfare of Missouri citizens; and the statute was not unconstitutional as applied to respondent in that he was intoxicated and in possession of a loaded firearm, had threatened himself and others, and was not using the gun in self-defense.

District of Columbia v. Heller, 128 S.Ct. 2783 (2008)

National Rifle Ass'n of America, Inc. v. City of Chicago, Illinois, Nos. 08-4241, 08-4243, & 08-4244, slip op. (7th Cir., June 2, 2009)

Maloney v. Cuomo, 554 F.3d 56 (2d Cir. 2009)

U.S. v. Cruikshank, 92 U.S. 542 (1875)

U.S. Constitution, Amendment II

Article I, §23, Missouri Constitution

§571.030, RSMo Cum. Supp. 2006

ARGUMENT

I.

The trial court erred in dismissing the state's information on the grounds that §571.030.1(5) is unconstitutional, because the statute does not run afoul of the Second Amendment of the United States Constitution or of Article I, Section 23 of the Missouri Constitution in that the statute is not facially unconstitutional because it is a valid exercise of the state's police power in regulating gun possession for the purpose of protecting the health, safety, and welfare of Missouri citizens; and the statute was not unconstitutional as applied to respondent in that he was intoxicated and in possession of a loaded firearm, had threatened himself and others, and was not using the gun in self-defense.

Respondent was charged under §571.030.1(5) with possession of a firearm while intoxicated. Upon respondent's motion, the trial court dismissed the state's charge, finding §571.030.1(5) violated respondent's Second Amendment rights and his rights under Article I, Section 23 of the Missouri Constitution because the statute "prevents a citizen from possessing a firearm, actual or constructive, in the confines of his home while he or she may be legally intoxicated." (LF 27). This ruling was erroneous because the statute does not violate either the Second Amendment or Article I, Section 23 of the Missouri Constitution, in that the statute is not facially unconstitutional because it is a valid exercise of the state's police power in regulating gun possession for the purpose of protecting the health, safety, and welfare of Missouri citizens. Nor was the statute unconstitutionally applied to

respondent as he was intoxicated and in possession of a loaded firearm, had threatened himself and others, and was not using the gun in self-defense.

A. Standard of review.

Challenges to the constitutionality of a statute are legal issues that are reviewed *de novo. Board of Educ. of City of St. Louis v. Missouri State Bd. of Educ.*, 271 S.W.3d 1, 7 (Mo.banc 2008). A statute is presumed to be constitutional and will not be invalidated unless it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution. *Id.* The person challenging the validity of the statute has the burden of proving the act clearly and undoubtedly violates the constitutional limitations. *State v. Salter*, 250 S.W.3d 705, 709 (Mo.banc 2008). Any doubt concerning a statute's constitutionality must be resolved in favor of its validity. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo.banc 2007). When a constitutional and unconstitutional reading of a statute are equally possible, the court must choose the constitutional one. *Id.*

B. Analysis.

Respondent, in the trial court below, argued that §571.030.1(5) was unconstitutional, based on the Second Amendment and *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), the most recent United States Supreme Court decision addressing Second Amendment rights. The trial court found §571.030.1(5) to be unconstitutional because it prevented "a citizen from possessing a firearm, actual or constructive, in the confines of his home while he or she may be legally intoxicated," citing both the Second Amendment and Article I, Section 23 of

the Missouri Constitution[3] (although respondent never asserted that the statute violated the Missouri Constitution). (LF 27). But §571.030.1(5) is valid under both the Second Amendment and the Missouri Constitution, as well as under the analysis in *District of Columbia v. Heller*.

1. The United States Supreme Court has never held that the Second Amendment is applicable to the states.

The Second Amendment to the United States Constitution guarantees that the Congress of the United States shall not infringe upon the individual right to possess and carry weapons in case of confrontation. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2797 (2008); U.S. CONST. amend. II. But the United States Supreme Court has never held that the Second Amendment is applicable to the states. On the contrary, the United States Supreme Court has held that the Second Amendment is not applicable to the states; states are free to restrict or protect the right to bear arms under their police powers. *Heller*, 128 S.Ct. at 2813; *U.S. v. Cruikshank*, 92 U.S. 542, 553 (1875); *Presser v. Illinois*, 116 U.S. 252, 264-265 (1886); *Miller v. Texas*, 153 U.S. 535, 538 (1894). In *Heller*, the Court was not faced with the question of whether the Second Amendment was applicable to the states, but recognized the holdings of *Cruikshank*, *Presser*, and *Miller*, which stated that the Second Amendment

[3] Article I, §23 of the Missouri Constitution states as follows: "That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons."

applies only to the Federal Government. *Heller*, 128 S.Ct. at 1213, n. 23. Many courts have followed *Cruikshank* and *Presser* and held that the Second Amendment is not applicable because it has not been incorporated by the Fourteenth Amendment and made applicable to the states. *See, e.g., Thomas v. Members of the City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984); *Bach v. Pataki*, 408 F.3d 75 (2nd Cir. 2005); *Love v. Pepersack*, 47 F.3d 120 (4th Cir. 1995); *People's Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522 (6th Cir. 1998); and *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982).

It has been argued that the decision in *Cruikshank* and *Presser*, which held that the Second Amendment was not incorporated via through the Privileges or Immunities Clause, does not bar incorporation of the Second Amendment via selective incorporation through the Due Process Clause of the Fourteenth Amendment. Thus, in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), the Ninth Circuit recently held that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local government. *Nordyke*, 563 F.3d at 457.

Other courts, however, have declined to so hold, finding instead that they are bound by the United States Supreme Court's decisions. Thus, in *National Rifle Ass'n of America, Inc. v. City of Chicago, Illinois*, Nos. 08-4241, 08-4243, & 08-4244, slip op. (7th Cir., June 2, 2009), the 7th Circuit rejected the reasoning of *Nordyke* and refused to incorporate the Second Amendment, holding that such a decision is for the United States Supreme Court, "not a court of appeals." *National Rifle Ass'n of America, Inc. v. City of Chicago, Illinois*, slip op. at 9. The Second Circuit reached a similar decision in *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009). Therein, the Second Circuit found that it was "settled law" that the

Second Amendment applies only to limitations the federal government seeks to impose on the right to bear arms. *Id.* at 58. The Court further found that it was bound to follow *Presser v. Illinois* because "[w]here, as here, a Supreme Court precedent 'has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions." *Id.* at 59.

The trial court herein engaged in no analysis whatsoever as to whether the Second Amendment is applicable and indeed, if it is not, then the trial court's decision is clearly erroneous. Here, ultimately, it is unnecessary to determine whether the Second Amendment is applicable to the states because, even if the Second Amendment is applicable to the states, §571.030.1(5) does not, either on its face or as applied, violate respondent's Second Amendment rights.

2. Section 571.030.1(5) is not facially unconstitutional under either the Second Amendment or the Missouri Constitution.

Respondent's argument to the trial court below was that §571.030.1(5) "effectively prevents the possession of firearms within one's home." (LF 20). The trial court, in its order and judgment, held that §571.030.1(5) "is unconstitutional to the extent that it prevents a citizen from possessing a firearm, actual or constructive, in the confines of his home while he or she is legally intoxicated." (LF 23). It thus appears that the trial court ruled that the statute was facially unconstitutional because it was overly broad.

To the extent that the court's ruling was that the statute was facially unconstitutional, such a ruling is erroneous. To show facial unconstitutionality, respondent had to show that

there was no conceivable set of circumstances under which §571.030.1(5) would be valid. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *State v. Perry*, 275 S.W.3d 237, 243 (Mo.banc 2009), citing *United States v. Salerno*, 481 U.S. 739, 745 (1987). The mere fact that an act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since the Supreme Court has not recognized an "overbreadth" doctrine outside the limited context of the First Amendment. *Salerno, supra.* In the present case, there was no showing in the trial court that there was no set of circumstances under which the statute in question would be valid.

The State has the inherent power to regulate the carrying of firearms as a proper exercise of the State's police power. *State v. Horne*, 622 S.W.2d 956, 957 (Mo.banc 1981). The right to keep and bear arms under the Second Amendment "is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 128 S.Ct. at 2816. Thus, for example, in *Heller*, the Supreme Court did not question "long standing prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 2816-2817. And the Supreme Court expressly stated that the above list was not exhaustive. *Id.* at 2817, n. 26. Similarly, Article I, §23 of the Missouri Constitution has never been held to deprive the legislature of authority to enact laws which regulate the time, place and manner of bearing firearms. *City of Cape Girardeau v. Joyce*, 884 S.W.2d 33, 34

(Mo.App.E.D. 1994). The right to keep and bear arms does not trump the State's police power. *Heidbrink v. Swope*, 170 S.W.3d 13, 16 (Mo.App.E.D. 2005). Rather, it is the function of the courts to determine whether a statute purporting to constitute an exercise of the police power has a real and substantial relationship to the protection of the public health, safety, morals or welfare and whether it unjustifiably invades rights secured by the Constitution. *Id.*

There can be little question that preventing intoxicated people from possessing firearms has a real and substantial relationship to the protection of the public health, safety, and welfare. It is clearly reasonable to seek to keep firearms out of the hands of persons whose judgment has been impaired by alcohol or drugs.[4] This is certainly true where the intoxicated person is out in public with a firearm. But it is equally true if the intoxicated person is at home. People who handle firearms while intoxicated, even in their own homes, still pose a significant threat to the health and safety of their family members, their neighbors and themselves. *See, e.g.*, *State v. Erwin*, 848 S.W.2d 476 (Mo.banc 1993) (drunken houseguest shot and killed his best friend with a 12-gauge pump action shotgun); *State v. Donahue*, 280 S.W.3d 700 (Mo.App.W.D., 2009) (defendant, who had been drinking, smoking marijuana, and taking Ecstacy, took a rifle from the house, stepped out into the backyard and fired it into the adjoining parking lot "just to scare people," killing the victim); *State v. Tabor*, 193 S.W.3d 873 (Mo.App.S.D. 2006) (defendant, while intoxicated,

[4] Just as it is reasonable to keep firearms out of the hands of persons whose judgment is impaired by mental illness.

threatened his roommates with a shotgun, offering to "blow [them] away"); *Vicory v. State*, 81 S.W.3d 725 (Mo.App.S.D. 2002) (defendant, who had been drinking with his brother, fired a shot from the window of his house, killing his brother who was outside the home); *State v. Moore*, 949 S.W.2d 629 (Mo.App.W.D. 1997) (defendant, intoxicated on PCP, shot his aunt's boyfriend twice in the back of the head at their residence); *State v. Whitley*, 750 S.W.2d 728 (Mo.App.E.D. 1988) (drunken defendant pointed gun at police officer who knocked on defendant's door in response to a call to respond); *State v. Rainwater*, 602 S.W.2d 233 (Mo.App.S.D. 1980) (intoxicated husband, allegedly trying to strike his wife with a gun "to teach her a lesson," killed her when she allegedly grabbed the gun, causing it to go off);. Section 571.030.1(5) is a constitutionally valid exercise of the state's police power, designed to protect the health and welfare of Missouri citizens, whether at home or in public.

Respondent, in his motion to the trial court, suggested §571.030.1(5) was unconstitutional because its effect was "to almost completely ban the possession of firearms in Missouri." (LF 20). Respondent asserted that because the law criminalizes possession, one could be guilty under §571.030.1(5) if a person, while out for the evening, had "a few cocktails" and had constructive possession of a loaded gun in a lockbox in their closet at home. The trial court was concerned about the hypothetical person who was at home and had a few drinks and then pulled out a gun to defend himself when someone invaded his home (Tr. 4). But neither respondent's arguments nor the trial court's concerns establish that §571.030.1(5) is unconstitutional.

Under either of the above hypotheticals, the gun owner would not be guilty under the statute. By the express terms of subsequent subsections, section 571.030.1(5) does not apply if the weapon is not readily accessible: "Subdivision . . . (5) of subsection 1 of this section do[es] not apply . . . when such weapons are not readily accessible." §571.030.3. Thus, contrary to respondent's assertion below, the person who is out at a bar or tavern drinking is not guilty of a felony merely because he or she constructively possesses a gun at his or her home.

Nor does §571.030.1(5) apply to persons who are engaged in a lawful act of self-defense: "Subdivision[] . . . (5) . . . of subsection 1 of this section shall not apply to persons who are engaged in a lawful act of defense pursuant to section 563.031, RSMo." §575.030.5. Thus, contrary to the trial court's concern, the person who is intoxicated in his home and who finds the need to defend himself from an intruder also would not be guilty, despite the fact that he possessed a gun while intoxicated. This is consistent with the language of Article I, §23 of the Missouri Constitution, which does not purport to convey an entirely unfettered right to bear arms at any time under any circumstances, but expressly

limits the right to the defense of home, person or property. *Heidbrink v. Swope*, 170 S.W.3d 13, 16 (Mo.App.E.D. 2005).[5]

The thrust of the respondent's motion, and the trial court's ruling, appears to be that §571.030.1(5) is unconstitutional as applied as to persons who possess guns in their homes. Respondent's argument below was that under *District of Columbia v. Heller*, the Second Amendment protects one's right to possess a firearm within one's house for self-defense, and that §571.030.1(5) functions "as a nearly absolute ban on the possession of firearms within one's home." (LF 21). But to the extent that *Heller* is even applicable to respondent's case, it does not render §571.030.1(5) unconstitutional because §571.030.1(5) does not infringe upon one's right to bear a weapon in the home for self-defense.

Moreover, both respondent and the trial court ignored the language in *Heller*, which points out that the right to bear arms, like most rights, is not unlimited. *Heller*, 128 S.Ct. at 2816. The right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* Thus, as stated above, the question that must be resolved in analyzing whether a statute designed to protect the public health, safety and

[5] Moreover, caselaw recognizes that where a defendant claims that he possessed a firearm for the purpose of defending home, person, or property, this is properly raised as a justification defense. *Heidbrink, supra*. And of course, it should be up to the finder of fact in the course of a trial to determine whether a defendant had such an affirmative defense.

welfare is constitutional is whether the statute unjustifiably invades rights secured by the Constitution.

In *Heller*, the Supreme Court found the District of Columbia ban against handguns unconstitutional because it prohibited an entire class of weapons (handguns) that was "overwhelmingly chosen by American society" for the lawful purpose of self-defense. *Heller*, 128 S.Ct. at 2817. The Supreme Court also faulted the District of Columbia's gun law because it required that all firearms in the home be rendered and kept inoperable, thus making it "impossible for citizens to use them for the core lawful purpose of self-defense." *Id.* at 2818. Thus, the District's gun ban was unconstitutional because it served to completely obviate the protections of the Second Amendment.

But again, these problems are not presented by §571.030.1(5). In fact, §571.030 protects the "core lawful purpose of self-defense" because it does not apply when the person is acting in self-defense. §571.030.5. Unlike the law at issue in *Heller*, §571.030.1(5) does not effectively prevent the possession of firearms within one's home for the purpose of self-defense. Nor does it directly impede the efficacy of self-defense or limit self-defense in the home. Section 571.030.5 is not unconstitutional under *Heller*.

Finally, even if there were not statutory provisions to address both respondent's and the trial court's concerns, the statute cannot be found facially unconstitutional simply because there might be some conceivable set of facts where the act would operate unconstitutionally. As noted above, "The fact that [an] Act might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First

Amendment." *United States v. Salerno*, 481 U.S. at 745. And in fact, neither respondent below nor the trial court proposed a conceivable set of circumstances wherein the statute could be deemed invalid. The trial court's ruling was thus erroneous.

3. Section 571.030.1(5) is not unconstitutional as applied to respondent.

The statute also was not unconstitutional as applied to respondent. Respondent did not expressly make such an argument in the trial court, nor could he have successfully done so, as the statute is constitutional as applied to him based on the alleged facts in the case. According to the probable cause statement, respondent was intoxicated on morphine and had in his immediate possession, readily accessible, a fully loaded 9 mm. semi-automatic handgun, as well as an additional fully loaded clip. He had threatened to shoot himself or to threaten police officers with the gun to provoke them into shooting him. He was clearly a danger to himself and others, and this is precisely the type of risk to public health, safety, and welfare that the state's police power, and this statute in particular, is designed to address.

C. Conclusion.

In sum, the trial court erred in finding §571.030.1(5) unconstitutional and dismissing the state's information on those grounds, because the statute is not facially unconstitutional or unconstitutionally applied to respondent. Rather, §571.030.1(5) is a valid exercise of the state's police power in regulating gun possession for the purpose of protecting the health, safety, and welfare of Missouri citizens.

CONCLUSION

In view of the foregoing, the dismissal of the state's information should be reversed and the charge reinstated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains _____ words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this _____ day of June, 2009, to:

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_____
KAREN L. KRAMER

APPENDIX

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