

Criminal

Felon In Possession: No Man's Land



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It goes without saying that federal and Ohio state felony convictions carry with them all sorts of collateral consequences. One of the most complicated to understand is the possession of firearms prohibition.



"disability." R.C. 2923.13(A)(2) prohibits possession if one has been convicted of an "felony offense of violence" and (A)(3) possession if one has been convicted of a felony level drug offense.

So for instance, if one convicted of a felony possession of criminal tools is not prohibited under Ohio law from possessing a firearm.¹ Similarly, misdemeanor domestic violence is not a disability under Ohio law.² Although federal law is something different.

This definition of "disability" may create absurd results. R.C. 2923.14 allows a person to apply for relief of disability. Section (A) provides, "[a]ny person who is prohibited from acquiring, having, carrying, or using firearms may apply to the court of common pleas in the county in which the person resides for relief from such prohibition." In *In re Application of Douglas Wells*, defendant had been convicted of felony five possession of drugs and felony five possessing criminal tools. The 11th District Court of Appeals concluded that R.C. 2923.14 only applies to relief of a disability as defined in R.C. 2923.13. While a felony of the fifth degree drug case is a disability for which he could get relief, the fifth degree felony possession of criminal tools was not. Hence, he could only get relief from arguably the more dangerous of the two.

The same awkward result was reached in *Terry v. State*.³ Mr. Terry was convicted of misdemeanor domestic violence. He had hoped for a concealed handgun license so applied for relief from disability pursuant to R.C. 2923.14. The court reasoned that "Ohio's statutes on being unable to possess a firearm and being unable to conceal a firearm are different, and the inability to obtain a concealed carry permit because of R.C. 2923.125(D)(1)(s) does not equate to a disability under R.C. 2923.13."⁴

A deeper reading of *Wells*, the court arguably ignored some plain language in subsection (A) of R.C. 2923.14 which refers to a "prohibition" and not "disability." It reads that it is designed to give relief to persons who are prohibited from possessing a firearm.

R.C. 2923.14 previously read that it applied to "[a]ny person who, solely by reason of the person's disability under division (A) (2) or (3) of section 2923.13 of the Revised Code[.]" That language was expressly removed by HB54 in 2011. The uncodified law explains that:

The General Assembly is explicitly making this amendment to clarify that relief from a weapons disability granted under section 2923.14 of the Revised Code restores a person's civil firearm rights to such an extent that the uniform federal ban on possessing any firearms at all, 18 U.S.C. 922(g)(1), does not apply to that person, in correlation with the U.S. Supreme Court's Interpretation of 18 U.S.C. 921(a)(20) in *Caron v. U.S.* (1998), 524 U.S. 308.⁵

This is only part of the question as federal law does not use the language "disability" in its felon in possession prohibition at 18 U.S.C. 922. 18 U.S.C. 922(g)(1) prohibits anyone who has been convicted of an offense which carries a potential term in excess of one year from possessing a firearm. It is direct: 18 U.S.C. 921(a)(20) defines what constitutes a crime punishable in excess of one year. And, (g)(20) prohibits possession if convicted of a misdemeanor crime of violence.

18 U.S.C. 921(a)(20) specifically indicates it will be governed by the law of the state.⁶ Looking at just the felony question, it specifically reads:



person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.⁷ (Emphasis added.)

Zellars explained that, "[i]f state law has restored civil rights to a felon, without expressly limiting the felon's firearms privileges, that felon is not subject to federal firearms disabilities."⁸ We look to the whole of state law to determine whether a convicted felon has had his civil rights restored and to determine whether he is entitled to exercise the privilege of possessing a firearm.⁹

"Civil complaints challenging the prohibition as unconstitutional as applied to a specific defendant seem to offer the best path to hope."

The entire purpose of R.C. 2923.14, 18 U.S.C. 921(a)(20), and Zellars is to find a venue to return to convicted persons their "civil rights." While admittedly in 1994, *Beecham v. United States*¹⁰ concluded that only federal courts can restore rights from a federal conviction, the status is absurd. Congress enacted 18 U.S.C. 925(c) to allow convicted persons to apply for relief from Federal convictions but there is no process to effectuate the relief.

While 18 U.S.C. 925(c) allows a person to petition for relief from a federal conviction, "**such relief is not currently possible under § 925(c) because Congress has not provided funding in appropriations for the application program.**"¹¹ (emphasis added) The Bureau of Alcohol, Tobacco and Firearms (ATF) will simply return any application. And "[t]he absence of an actual denial by ATF of a felon's petition precludes judicial review under § 925(c)."¹² When the ATF simply returns any application without a determination, no appeal is available.

With that, Congress has expressly decided by way of 925(c) that not all felons should be prohibited from owning a firearm. In fact, a procedure is in place to allow a petition for relief, but the absence of procurement to the ATF denied those persons the ability to apply for relief to protect their Second Amendment constitutional right to bear arms. Moreover, the opinions in the Wells and Terry cases make it next to impossible to file for relief for convictions that are not considered a disability under R.C. 2913.13. Hence, even Ohio has decided that some felony convictions are not so dangerous as to cause the loss of the Second Amendment right.

Civil complaints challenging the prohibition as unconstitutional as applied to a specific defendant seem to offer the best path to hope. The 3rd Circuit Federal Court of Appeals in *Binderup v. AG of United States*¹³ provides the framework to understand as applied challenges to this framework.¹⁴ The court reasoned that, "[T]he right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm 'unvirtuous citizens.'" Ultimately, the court found that Mr. Binderup's Pennsylvania state misdemeanor conviction for corruption of a minor as a result of a consensual sexual relationship was not the type of conviction contemplated by the felon in possession ban; the court found the ban unconstitutional as applied to him.



the permanent deprivation of his Second Amendment right. The court concluded that the crime was not the type of serious crime contemplated by the ban; it violated his Second Amendment right to bear arms as applied.¹⁶

As it stands, there is currently a split among federal appellate courts on how to address these challenges. The United States Supreme Court, just days ago, rejected petition for a writ of certiorari in the matter of *Folajtar v. Rosen*.¹⁷ Most gun rights advocates were expecting the high court to accept the case. Petitioner was hoping the court would settle the as-applied challenge dispute among appellate districts.¹⁸ Therein, Ms. Folajtar was convicted of one count of false tax returns and received straight probation. The district court and the 3rd Circuit Court of Appeals considered the as-applied challenge, but found the \$250,000 in taxes a serious enough crime to find her an "unvirtuous citizen."¹⁹

Congress made its statement too that not all felons are undeserving of relief when it enacted 18 U.S.C. 92925(c). That provision expressly allows a person to petition for relief from a federal conviction, but again, "such relief is not currently possible under § 925(c) because Congress has not provided funding in appropriations for the application program."²⁰ The Folajtar court reasoned that the legislature should fill that void. So too has Ohio decided by R.C. 2923.13 and 14 that not all felons should be denied their Second Amendment right. Unfortunately, there are convicted persons with no simple method of finding relief from the prohibition.

Endnotes

¹*In re Application of Douglas Wells*, 2015-Ohio-2606

²*Terry v. State*, 2017-Ohio-7805

³*Id.*

⁴*Terry v. State*, 2017-Ohio-7805, ¶ 9

⁵Ohio Rev. Code Ann. § 2923.14 (West)

⁶*U.S. v. Zellars* 334 F. App'x742, 744 (6th Cir. 2009)

⁷18 U.S.C.A. § 921 (West) There remains a question as to whether this 18 U.S.C. 921(a)(20) state law provision applies to misdemeanor crimes of violence such that state relief would remove the federal disability.

⁸*United States v. Cassidy*, 899 F.2d 543, 546 (6th Cir.1990)

⁹*Id.* at 549 and 334 F. App'x 742, 744 (6th Cir. 2009)

¹⁰*Beecham v. United States*, 511 U.S. 368 (1994)

¹¹*Keyes v. Lynch*, No. 1:15-CV-457, 2015 WL 13594907, at *9 (M.D. Pa. Nov. 9, 2015)

¹²*United States v. Bean*, 537 U.S. 71, 123 S. Ct. 584, 584, 154 L. Ed. 2d 483 (2002)



¹⁴*Binderup* explained: In *United States v. Marzarella* we adopted a framework for deciding facial and as-applied Second Amendment challenges. 614 F.3d 85 (3d Cir. 2010). Then in *United States v. Barton* we held that the prohibition of § 922(g)(1) does not violate the Second Amendment on its face, but we stated that it remains subject to as-applied constitutional challenges. 633 F.3d 168 (3d Cir. 2011). *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 339 (3d Cir. 2016)

¹⁵*Miller v. Sessions*, 356 F. Supp. 3d 472 (E.D. Pa. 2019)

¹⁶*Id.*

¹⁷*Folajtar v. Rosen, Acting A.G., et al.* 20-812

¹⁸*Folajtar v. Rosen, Acting A.G., et al.*, 980 F.3d 897, 899

¹⁹The United States Supreme Court also days ago rejected the certiorari in *Holloway v. Attorney Gen. United States*, 948 F.3d 164, 168 (3d Cir. 2020). Therein the question was whether PA's D.U.I. at the highest B.A.C. a first-degree misdemeanor that carries a maximum penalty of five years' imprisonment, see 18 Pa. Cons. Stat. Ann. § 1104; 75 Pa. Cons. Stat. Ann. §§ 3802(c), 3803(b)(4), constitutes a serious crime that requires disarmament.

²⁰*Keyes v. Lynch*, No. 1:15-CV-457, 2015 WL 13594907, at *9 (M.D. Pa. Nov. 9, 2015)

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