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Summary of Pohlable v. State, 128 Nev. Adv. Op. 1

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CONSTITUTIONAL LAW – RIGHT TO POSSESS FIREARMS

Summary

The Court considers an appeal from a felony conviction for a felon in possession of a firearm under NRS 202.360.²

Disposition/Outcome

The Court concludes that the petitioner’s conviction of felon in possession of a firearm for carrying a black powder rifle does not violate the right to keep and bear arms under either the United States Constitution or the Nevada Constitution.

Factual and Procedural History

The State charged Michael Pohlabel, a convicted felon, with a felony for carrying a black powder rifle in the back of his vehicle. Pohlabel moved to dismiss the charge on the basis that black powder rifles pose little threat and cannot constitutionally be forbidden. The district court denied Pohlabel’s motion. Pohlabel pled guilty but reserved the right to challenge the constitutionality of the conviction upon appeal. This appeal followed.

Discussion

Justice Pickering wrote for the unanimous Court, sitting en banc. First, the Court rejected the argument that the right to keep and bear arms applies equally to felons as it does to other citizens. Although the United States Supreme Court has held that the Second Amendment “confer[s] an individual right to keep and bear arms” for the purpose of self defense³ it has also explained that this right is not unlimited and that the government can prohibit felons from possessing firearms.⁴

Furthermore, the Court explained that it did not need to engage in any means-end scrutiny because the Supreme Court’s approach excluded felons from Second Amendment protection altogether, rather than giving them qualified Second Amendment rights.⁵ Because Pohlabel did not fall within the protection of the Second Amendment, it was irrelevant whether

¹ By Jamie Combs.

² It is a felony in Nevada for a convicted felon to “own or have in his or her possession . . . any firearm.” NEV. REV. STAT. § 202.360(1)(a) (2007).

³ *Dist. of Columbia v. Heller*, 554 U.S. 570, 595, 630 (2008). This right has been incorporated to the states through the Due Process Clause of the 14th Amendment. *McDonald v. Chicago*, 130 S. Ct. 3020, 3050 (2010).

⁴ *Id.* at 626.

⁵ *Pohlabel v. State*, 128 Nev. Adv. Op. 1, 8 (Jan. 26, 2012).

the firearm he possessed was a particularly dangerous one or not.⁶ Even so, the fact that a black-powder rifle could not be easily used for self-defense made Pohlbel's argument illogical.⁷

Next, the Court explained that although the felon-in-possession law under which Pohlbel was convicted recognizes that rehabilitated felons can have the right to bear arms restored, the person must first receive a pardon from the pardons board.⁸ Furthermore, the Court held that the mere fact that federal law allows felons to possess black powder rifles does not prevent Nevada from prohibiting the same.⁹ Congress did not intend "to occupy the field . . . to the exclusion of the law of any State."¹⁰

Finally, the Court rejected the argument that Article 1, Section 11(1) of the Nevada Constitution protects even a felon's right to possess a firearm because it provides that "[e]very citizen has the right to keep and bear arms"¹¹ The Court reviewed the context, background, and legislative history and concluded that the word "citizen" excluded unpardoned felons. As such, Pohlbel was not a "citizen" within the meaning of the Nevada Constitution and so did not qualify for protection under Article 1 Section 11(1).

Conclusion

Nevada's prohibition of felons from possessing *any* type of firearm, including black powder rifles which pose little threat of danger, does not violate the United States Constitution or the Nevada State Constitution.

⁶ *Id.* at 10-11.

⁷ *Id.*

⁸ *Id.* at 9.

⁹ *Id.* at 11.

¹⁰ 18 U.S.C. § 927 (2006).

¹¹ NEV. CONST. art. I, § 11(1) (emphasis added).