STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1296

State of Minnesota,
Respondent,

vs.

Dean Gordon Ryks,
Appellant.

Filed June 2, 2009
Affirmed; motion denied
Hudson, Judge

Kandiyohi County District Court
File No. 34-CR-07-1565

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134; and

Boyd Beccue, Kandiyohi County Attorney, 415 Southwest Sixth Street, P.O. Box 1126, Willmar, Minnesota 56201 (for respondent)

John E. Mack, Mack & Daby, P.A., 26 Main Street, P.O. Box 302, New London, Minnesota 56273 (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

On appeal from his conviction of ineligible person in possession of a firearm, appellant argues that Minn. Stat. § 624.713 (2006), as applied to him, violates due

process, and that section 624.713 is unconstitutional under the Second Amendment to the United States Constitution and Article XIII, section 12, of the Minnesota Constitution. We conclude that: (1) Minn. Stat. § 624.713, as applied to appellant, does not violate due process; (2) appellant's Second Amendment claim fails because the Second Amendment does not apply to the states; and (3) his challenge under the Minnesota Constitution is without merit. We, therefore, affirm. Additionally, we deny as moot respondent's motion to strike.

FACTS

In November 1995, appellant Dean Gordon Ryks was convicted of terroristic threats, a crime of violence, in violation of Minn. Stat. § 609.713, subd. 1 (1994). He was sentenced to 15 months, stayed, and placed on probation. His probation was discharged in March 1997.

When appellant's probation was discharged, Minnesota law prohibited individuals convicted of crimes of violence from possessing a firearm for ten years. Minn. Stat. § 624.713, subd. 1(b) (1996). Accordingly, appellant's probation-discharge order indicated that appellant was not permitted to possess a firearm "until 10 years has elapsed since you have been restored to civil rights."

In 2003, approximately six years after appellant's probation was discharged, the legislature amended Minn. Stat. § 624.713, and increased the ban from ten years to a lifetime. 2003 Minn. Laws ch. 28, art. 3, § 10.

In September 2007, appellant was charged with four counts of ineligible person in possession of a firearm, in violation of Minn. Stat. § 624.713. According to the

complaint, on August 7, 2007, a law-enforcement officer found four firearms, including one 12-gauge shotgun, at a residence where appellant had kept some of his personal property. Appellant initially claimed that the shotgun belonged to someone else but later admitted that it was his.

The parties agreed to submit the matter to the district court for a proceeding pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). Under the parties' agreement, the court only considered one count, namely appellant's possession of the 12-gauge shotgun. The other counts were dismissed.

Appellant argued that Minn. Stat. § 624.713, as applied to him, violated his due-process rights and the prohibition on ex post facto laws. He also contended that Minn. Stat. § 624.713 violated the Second Amendment of the United States Constitution and Article XIII, section 12, of the Minnesota Constitution. The district court rejected these arguments and found appellant guilty of ineligible person in possession of a firearm, in violation of Minn. Stat. § 624.713, subds. 1(b), 2(b).

Appellant subsequently filed a post-trial motion, arguing that, in light of the United States Supreme Court's recent decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), his conviction must be invalidated under the Second Amendment and under Article XIII, section 12, of the Minnesota Constitution. The district court denied the post-trial motion. The court then imposed a 60-month sentence, stayed, and placed appellant on probation for five years.

This appeal follows.

D E C I S I O N

I

We first address appellant's due-process claim. Appellant argues that, as applied to him, Minn. Stat. § 624.713, which now imposes a lifetime ban on firearm possession, violates his due-process rights, because his probation-discharge order indicated that the ban was only ten years.[1]

The United States and Minnesota Constitutions provide that no person shall be held to answer for a criminal offense without due process of law, "nor be deprived of life, liberty or property without due process of law." U.S. Const. amends. V, XIV; Minn. Const. art. I, § 7. "Due process prohibits state representatives from misleading individuals as to their legal obligations." *Whitten v. State*, 690 N.W.2d 561, 565 (Minn. App. 2005) (*citing McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 854 (Minn. 1991)), *review denied* (Minn. Aug. 20, 2002). Thus, "the state may be precluded from prosecuting a person who acts because of reliance on the state's representations." *Id.* (citations omitted).

In *Whitten*, we reversed a conviction of unlawful possession of a firearm because the conviction violated the appellant's due-process rights. *Id.* at 565–66. In that case, the

[1] Appellant also argued before the district court that his conviction violates the prohibition on ex post facto laws. The district court rejected this argument. This argument was not fully briefed on appeal or addressed at oral argument. We therefore conclude that appellant has waived that argument, and we do not address it further. *See State v. Butcher*, 563 N.W.2d 776, 780–81 (Minn. App. 1997) (noting that issues not briefed on appeal are deemed waived), *review denied* (Minn. Aug. 5, 1997); *see also State Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to reach issues in the absence of adequate briefing).

appellant had signed probation agreements acknowledging that he could not possess a firearm until his civil rights were restored. *Id.* at 562. In addition, Whitten's probation-discharge order informed him that his civil rights were restored, and the district court failed to indicate, by checking a box on the probation-discharge order, that Whitten was ineligible to possess a firearm for another ten years. *Id.* at 565. We concluded that, under these circumstances, a subsequent conviction of unlawful possession of a firearm violated Whitten's due-process rights because the probation-discharge order effectively advised him that he had the right to possess firearms. *Id.* at 566.

Our holding in *Whitten* distinguished our earlier decision in *State v. Grillo*, 661 N.W.2d 641 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). *Id.* at 565–66. In *Grillo*, we rejected a claim that prosecution under Minn. Stat. § 624.713 violated Grillo's due-process rights because he had not received "effective notice of the firearms restriction." 661 N.W.2d at 645. In that case, Grillo's prior juvenile delinquency adjudication for felony theft of a motor vehicle did not initially prohibit him from possessing a firearm. *Id.* at 643. But subsequent amendments to the statute made Minn. Stat. § 624.713 applicable to him and prohibited him from possessing a firearm. *Id.* After these amendments, Grillo was arrested and convicted of illegally possessing a firearm. *Id.* at 643–44.

On appeal, we upheld the conviction despite the due-process challenge. *Id.* at 645. We reasoned that it was not possible to provide Grillo with notice of the firearms restriction at the time of his discharge because, when he was adjudicated delinquent, the restriction did not apply to him, and that under Minn. Stat. § 624.713, subd. 3(a) (2000),

failure to give notice did not affect the applicability of the statute. *Id.* We further stated that Grillo's ignorance of the prohibition was no excuse because he could have learned of it had he made an effort to do so. *Id.* ("[I]t is a long-held principle in Minnesota that ignorance of the law is not a defense when it would have been possible, had appellant made the effort to do so, to learn of the existence of the prohibition." (citing *State v. King*, 257 N.W.2d 693, 697–98 (Minn. 1977))).

Appellant asserts that *Whitten* and *Grillo* are irreconcilable. In *Whitten*, we acknowledged that the facts presented were different from those presented by *Grillo*, because in *Whitten*, the "state not only failed to communicate the prohibition [on possessing a firearm], but told [the appellant that] he would be eligible to own a firearm." *Whitten*, 690 N.W.2d at 566. We have subsequently explained that "the *Whitten* and *Grillo* holdings are reconciled on the basis of what the state communicated to the defendant concerning his eligibility to possess firearms." *State v. Linville*, 755 N.W.2d 314, 316 (Minn. App. 2008), *review denied* (Minn. Nov. 18, 2008).

Keeping this distinction in mind, we conclude that the facts of appellant's case are more similar to *Grillo* than to *Whitten.* Like the appellant in *Grillo*, appellant herein was prohibited from possessing a firearm at the time of the offense because of subsequent legislative changes, and, as in *Grillo*, the state simply did not communicate the new prohibition.

Appellant's situation is significantly different from *Whitten*. First, in *Whitten*, the probation-discharge order told the appellant that he was discharged from probation and "restored to all civil rights and to full citizenship with full right to vote and hold office

the same as if said conviction had not taken place." 690 N.W.2d at 565. The box on the probation-discharge order, which would have indicated to Whitten that he could not possess a firearm until ten years had elapsed since restoration of civil rights, was not checked. *Id.*

Here, in contrast, the statement indicating that appellant's civil rights were restored *was not* checked, and the statement indicating that he may not possess a firearm for ten years after the restoration of his civil rights *was* checked. Thus, unlike the appellant in *Whitten*, appellant herein was never told, directly or implicitly through omission, that he was eligible to possess a firearm. Furthermore, unlike *Whitten*, there was no mistake and appellant was not misinformed of his eligibility to possess a firearm; rather, appellant was correctly informed of the duration of the firearm prohibition at that time.

We further observe that appellant's claimed lack of awareness of the amendment and lifetime ban on firearm possession is irrelevant. Appellant's ignorance is no excuse because he could have learned of the prohibition if he had made an effort to do so. *Grillo*, 661 N.W.2d at 645.

Under these circumstances, we conclude that Minn. Stat. § 624.713 does not, as applied, violate appellant's due-process rights.

II

We turn next to appellant's claim that his conviction for ineligible person in possession of a firearm must be reversed because Minn. Stat. § 624.713 is unconstitutional under the Second Amendment to the United States Constitution.

The constitutionality of a statute presents a question of law, which we review de novo. *State v. Bussman*, 741 N.W.2d 79, 82 (Minn. 2007). In conducting this review, we recognize that "Minnesota statutes are presumed constitutional, and our power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). The party challenging the statute's constitutionality must "demonstrate[ ] beyond a reasonable doubt that the statute violates some constitutional provision." *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979).

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.

Appellant relies on the United States Supreme Court's recent decision in *Heller* to support his claim that Minn. Stat. § 624.713 is unconstitutional. There, the Court determined that "the Second Amendment conferred an individual right to keep and bear arms." *Heller*, 128 S. Ct. at 2799. Based on this conclusion, the Court struck down the District of Columbia's ban on handgun possession in the home and its "prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 2821–22.

But our determination in this case does not turn on *Heller's* holding. It is settled law that the Second Amendment applies only to limitations the federal government seeks to impose on this right. *See Miller v. Texas*, 153 U.S. 535, 538, 14 S. Ct. 874, 875 (1894) (recognizing that it is "well settled" that the restrictions of the Second Amendment

"operate only upon the federal power"); *Presser v. Illinois*, 116 U.S. 252, 265, 6 S. Ct. 580, 584 (1886) (reasoning that the Second Amendment "is a limitation only upon the power of [C]ongress and the [N]ational government, and not upon that of the state"); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (stating that the Second Amendment "is one of the amendments that has no other effect than to restrict the powers of the national government"). *Heller* "did not address the question whether the Second Amendment is incorporated through the Fourteenth Amendment and thus applicable to the states." *United States v. Fincher*, 538 F.3d 868, 873 n.2 (8th Cir. 2008). In fact, in *Heller*, the Court referred to *Cruikshank*, *Presser*, and *Miller*, stating:

> With respect to *Cruikshank's* continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases. Our later decisions in *Presser* . . . and *Miller* . . . reaffirmed that the Second Amendment applies only to the Federal Government.

Heller, 128 S. Ct. 2813 n.23. The Court declined to revisit the issue because it was "not presented by this case." *Id.*

Numerous courts, relying on *Cruikshank*, *Presser*, and *Miller*, have held that the Second Amendment is *not* incorporated through the Fourteenth Amendment and, therefore, does not apply to the states. *See, e.g.*, *Bach v. Pataki*, 408 F.3d 75, 84 (2d Cir. 2005) ("[W]e hold that the Second Amendment's 'right to keep and bear arms' imposes a limitation on only federal, not state, legislative efforts."); *Edwards v. City of Goldsboro*, 178 F.3d 231, 252 (4th Cir. 1999) ("[T]he law is settled in our circuit that the Second

Amendment does not apply to the States."); *State v. Mendoza*, 920 P.2d 357, 360 (Haw. 1996) ("[T]he Second Amendment does not apply to the States through the fourteenth amendment to the United States Constitution."); *People v. Swint*, 572 N.W.2d 666, 669 (Mich. Ct. App. 1997) ("[T]he Second Amendment is not applicable to the states through the Fourteenth Amendment.").

Despite the foregoing, appellant asks this court to hold that the Second Amendment *is* incorporated to the states through the Fourteenth Amendment. But appellant cites no authority directly supporting this assertion, arguing, instead, that *Heller* "hints" that the incorporation doctrine will be applied to the Second Amendment in future cases and that the traditional test of incorporation suggests that the Second Amendment is subject to the same treatment as other rights found applicable to the states through the Fourteenth Amendment.

Even if we were to agree with appellant's claim that *Heller* casts doubt upon the continuing validity of *Cruikshank*, *Presser*, and *Miller*, those cases remain the law of the land until the Supreme Court says otherwise. Under the current state of the law, the Second Amendment is not incorporated to the states. *See Maloney v. Cuomo*, 554 F.3d 56, 59 (2d Cir. 2009) (concluding, post-*Heller*, that *Presser* still controls, because other courts "should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions" (quotation omitted)). *But see Nordyke v. King*, No. 07-15763, 2009 WL 1036086, at *13 (9th Cir. Apr. 20, 2009) (concluding that the Fourteenth Amendment's Due Process Clause incorporates the Second Amendment and applies it against the states and local governments). Accordingly, we reject

appellant's claim that Minn. Stat. § 624.713 is unconstitutional under the Second Amendment.

III

Appellant also argues that Minn. Stat. § 624.713 is unconstitutional under Article XIII, section 12, of the Minnesota Constitution, which provides: "Hunting and fishing and the taking of game and fish are a valued part of our heritage that shall be forever preserved for the people and shall be managed by law and regulation for the public good." We review this claim de novo. *Bussman*, 741 N.W.2d at 82. And, in doing so, we keep in mind that Minnesota statutes are presumed constitutional, *Haggerty*, 448 N.W.2d at 364, and that the party challenging the statute bears the burden of demonstrating beyond a reasonable doubt that it is unconstitutional, *Miller Brewing*, 284 N.W.2d at 356.

Appellant cites no Minnesota or federal authority supporting his argument. On its face, section 12 says nothing about an individual's right to possess a firearm. As the district court noted, appellant's "ineligibility to possess a firearm does not necessarily foreclose all methods of hunting and no methods of fishing." Furthermore, even if we were to conclude that section 12 implies a right to possess a firearm, the clear text of the provision mandates regulation, stating that hunting and fishing *shall be managed by law and regulation* for the public good.

Appellant has not met his burden of demonstrating beyond a reasonable doubt that Minn. Stat. § 624.713 is unconstitutional under Minn. Const. Art. XIII, § 12. We conclude that his claim is without merit.

IV

Finally, we address respondent's motion to strike certain statements in the appellant's brief as being outside the record. Respondent argues that this court should strike certain statements in appellant's brief indicating that appellant was unaware of the statutory amendment increasing the prohibition on possessing a firearm from ten years to a lifetime. Respondent claims that these statements are not supported by citations to the record as required by Minn. R. Civ. App. P. 128.03 and are not supported by evidence in the record. Appellant's knowledge, or lack thereof, is irrelevant. *Grillo*, 661 N.W.2d at 645. We therefore conclude that it is unnecessary to further consider respondent's motion to strike, and we deny the motion as moot. *See Drewitz v. Motorwerks, Inc*., 728 N.W.2d 231, 233 n.2 (Minn. 2007) (motion to strike denied as moot when court did not rely on materials).

Affirmed; motion denied.