

FEDERAL CONSEQUENCES OF STATE COURT CONVICTIONS:
PROHIBITED PERSONS AND FIREARMS

Introduction

18 U.S.C. § 922(g) prohibits specified categories of persons from shipping or transporting in interstate or foreign commerce or from receiving any firearm or ammunition which has been shipped or transported in interstate or foreign commerce or from possessing, in or affecting interstate commerce, any firearm or ammunition. A violation of 922(g) can lead to a maximum term of 10 years imprisonment, unless the statutory enhancements of the Armed Career Criminal Act apply.

18 U.S.C. § 922(g) states:

It shall be unlawful for any person—

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally and unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) *who is subject to a court order that—*

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the intimate partner or child; and

(C) by its terms explicitly prohibits the use, or attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

I. Relevant Categories of Prohibited Persons

A. “Felon in Possession”

1. What constitutes a felony?

- Generally, any crime *punishable* by imprisonment for a term exceeding one year. The predicate offense need not have actually resulted in a sentence exceeding one year. *United States v. Jones*, 195 F.3d 205 (4th Cir. 1999), *see also, Dickerson v. New Banner Institute*, 460 U.S. 103 (1983).
- N.C. Structured Sentencing: When determining whether an offense is punishable by a term exceeding one year, look to the maximum allowable sentence for any

individual. *United States v. Jones*, 195 F.3d 205, 207 (4th Cir. 1999) (“[S]ection 922(g)(1)’s language can comfortably be reconciled with North Carolina’s sentencing scheme by viewing the offense statutory maximum as the statutory maximum for the crime, regardless of the prior criminal record status of the defendant.”).

- Exceptions, 18 U.S.C. § 921(a)(20):
 - any federal or state offense pertaining to antitrust violations, unfair trade practices, restraints of trade or similar offenses relating to the regulation of business practices, or
 - any state offense classified by the laws of that state as a misdemeanor AND punishable by a term of imprisonment of two years or less.

B. Fugitive from Justice

1. The term “fugitive from justice” is defined at 18 U.S.C. § 921(a)(15) as:

[A]ny person who has fled from any state to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding.

-- includes those fleeing to avoid state prosecution

2. The government need only prove knowledge of the facts that created the fugitive status, NOT knowledge that the fugitive status existed. *United States v. Ballentine*, 4 F.3d 504 (7th Cir. 1993).

3. The government does not need to show that the defendant absented himself from the prosecuting jurisdiction with the intent to avoid prosecution. It is sufficient that the defendant left the jurisdiction for a collateral reason, and later declined to return in order to avoid

prosecution. *United States v. Spillane*, 913 F.2d 1079 (4th Cir. 1990).

4. A defendant need only know that charges are pending against him, that he has refused to answer those charges and that he has left the jurisdiction where the charges are pending.

C. Unlawful User/Addict

1. “Unlawful user” is not defined.

2. Drug use and firearm possession do not have to be simultaneous. *United States v. Jackson*, 280 F.3d 403 (4th Cir. 2002).

3. The scope of the statute is not without limits. *Jackson* indicates that the government must demonstrate “a pattern of use and recency of use.” Evidence of drug use months prior to the firearm possession is insufficient. *Id.*

- *United States v. Edwards*, 38 Fed. Appx. 134 (4th Cir. 2002) (unpublished): defendant’s drug use must be sufficiently consistent, “prolonged,” and close in time to gun possession.
- A pattern of drug use may be established by proof of state drug offense convictions.
- *United States v. Williams*, 216 F.Supp. 2d 568 (E.D.Va. 2002): drug use immediately prior to arrest but at no other time is insufficient to establish that defendant is a “user.”

D. Mental Defective

1. The statute does not define the term “committed.”

2. The statute does not refer to state law so the question of what constitutes “committed” remains one of federal law.

3. Look at the substance of the state procedure used, not the terminology of that procedure. *United States v. Midgett*, 198 F.3d 143 (4th Cir. 1999)(Determination that defendant was not competent to stand trial and an order that he be confined in a state facility for restoration of competency constituted a commitment despite a lack of adherence to state statutory requirements for civil commitment proceedings.)

E. One Subject to a Domestic Violence Protective Order (DVPO)

1. Requirements of predicate court order:

- issued after a hearing of which the defendant received **actual notice** and an opportunity to participate;
- order must restrain such person from harassing, stalking, or threatening an intimate partner or his/her child, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury; and
- have one of the following characteristics:
 - a finding that such person represents a credible threat to the physical safety of the intimate partner or child, OR
 - by its terms explicitly prohibits the use, attempted use, or threatened use of physical force that would reasonably be expected to result in bodily injury.

2. “Intimate partner” means “the spouse of the person, a former spouse of the person, an individual who is the parent of a child of the person, and an individual who cohabitates or has cohabitated with the person.” 18 U.S.C. § 921(a)(32).

3. A finding that a person presents a credible threat may be inferred from findings of fact contained in the DVPO. For example, if a DVPO contains findings that a person battered his intimate partner, the order is sufficient.

4. Where a DVPO prohibits specific acts which would be considered physical force, the order is sufficient for use as a predicate. *See United States v. Bostic*, 168 F.3d 718 (4th Cir. 1999)(Order prohibiting

defendant from “abusing” his estranged wife satisfied the statutory prerequisites for a DVPO).

F. One Convicted of a Misdemeanor Crime of Domestic Violence (MCDV)

1. MCDV is defined at 18 U.S.C. § 921(a)(33)(C) as an offense which

- is a misdemeanor at federal or state law, AND
- has as an element the use or attempted use of physical force, **or** the threatened use of a deadly weapon, AND
- – is committed by
 - * by a current or former spouse, parent, or guardian of the victim,
 - * by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or
 - * by a person similarly situated (Note that this is more expansive than the definition of “intimate partner” used in the DVPO context).

2. This provision applies even where the MCDV and the firearm purchase occurred prior to enactment of the provision in 1996. *United States v. Mitchell*, 209 F.3d 319 (4th Cir. 2000).

II. Restoration

A. 18 U.S.C. § 921(a)(20) states

*What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had his 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.

B. The law of the jurisdiction in which the predicate conviction was obtained controls the restoration of civil rights. *United States v. Jones*, 993 F.2d 1131 (4th Cir. 1993).

C. All or nothing approach: If a state places any restriction on a felon's ability to possess a firearm, then his rights have not been restored for purposes of §922(g). *Caron v. United States*, 524 U.S. 308 (1998).

E. In determining whether a defendant's restoration expressly provides that he may possess firearms, a court must consider not only the certificate granting the restoration, but also the actual effect of the restoration under the state's laws. *United States v. Essick*, 935 F.2d 28 (4th Cir. 1991).

F. North Carolina restoration

1. N.C. Gen. Stat. § 14-415.1 codifies the restoration of firearms rights. North Carolina permits limited firearm possession by a felon.

2. Under the all or nothing approach, North Carolina felons are still prohibited persons. *See e.g., United States v. Farmer*, 49 Fed. Appx. 487, 2002 U.S. App. LEXIS 22819 (4th Cir. 2002).

G. Special considerations for MCDV

1. The definition of MCDV excludes any conviction which has been expunged or set aside, or for which a person has been pardoned or has his civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) **unless** the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.” 18 U.S.C. § 921(a)(33)(B)(ii).

2. If the law of the applicable jurisdiction does not provide for the loss of civil rights, a person may not use on the exception. *United States v. Jennings*, 2003 U.S. App. LEXIS 4941 (4th Cir. 2003).

