

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

LOWELL DISTRICT COURT  
NO. 2211CR2835

COMMONWEALTH )  
VS. )  
DEAN F. DONNELL )  
\_\_\_\_\_ )

MEMORANDUM OF DECISION ON DEFENDANT’S MOTION TO DISMISS

The defendant Dean Donnell is charged in the Lowell District Court with carrying a firearm without a license under *G.L. 269 §10(a)*<sup>1</sup>. The defendant has filed a motion to dismiss the charge in the complaint claiming that:

1. *G.L. 269 §10(a)* is unconstitutional on its face.
2. *G.L. 269 §10(a)* is unconstitutional as applied to the defendant, and
3. *G.L. 269 §10(a)* violated the defendant’s right to be free from cruel and unusual punishment.<sup>2</sup>

The defendant in his memorandum in support advances arguments that; 1. *G.L. 269 §10(a)* impermissibly infringes on the Second Amendment of the U.S. Constitution; 2.

1 The defendant is also charged in a separate complaint #2111CR4759 with possession of a firearm, possession of ammunition and operating under the influence of alcohol.

2 The Court finds that pursuant to *Commonwealth v. Jackson 369 Mass. 904 (1976) GL 269, sec 10(a)* does not constitute cruel and unusual punishment and nothing in the Bruen decision changes that holding.

*G.L. 296 §10(a)* impermissibly shifts the burden of proof onto the defendant to prove he was in fact licensed; 3. Requiring non-residents to obtain licenses to carry firearms violates the Second Amendment because there is no historical analogue burdening the right to interstate travel; 4. The holding of *Commonwealth v Harris* 481 Mass. 767 (2019) does not survive Constitutional muster and is inapplicable to the defendant's case; and 5. The defendant's right to equal protection and the right to travel has been violated.

The facts leading up the issuance of the complaint are not in dispute and for the purposes of this motion, the Court accepts them. Those facts are contained in both the Commonwealth's Memorandum in Opposition to the Motion to Dismiss as well as the Defendant's Memorandum in Support of Addendum to the Motion to Dismiss.

There is no question that the holding of the U.S. Supreme Court in *New York State Rifle and Pistol Association, Inc. v. Bruen*, 141 S. Ct. 2111 (2022), has changed the legal landscape on how the second amendment of the Constitution is interpreted, particularly how it affects existing firearm statutes and challenges to their constitutionality. In fact, the Supreme Judicial Court in *Commonwealth v. Guardado*, 491 Mass. 666 (2023) recognized for the first time that the Second Amendment to the U.S. Constitution guarantees an individual's right to possess and carry a firearm outside of his home. *Id. at 690*. Prior to *Guardado*, Massachusetts treated the possession or carrying a firearm outside of one's home as a "privilege" that was conferred on a person by the state. *Harris supra at 767*. It was against the *Bruen* backdrop that the SJC reversed the longstanding law in Massachusetts that licensure to possess a firearm was not an essential element of the felony of unlawful possession of a firearm outside of the home. Massachusetts had previously

required that holding a valid license to carry a firearm was an exception to the otherwise prohibition of carrying a firearm and that requiring a defendant to produce a license at trial did not infringe on Constitutionally protected conduct.

Because the SJC has already addressed the burden shifting claim made by the defendant, the five remaining arguments of the defendant can be summarized as follows;

What affect does the Bruen decision have on the status of an ordinary, law-abiding resident of the state of New Hampshire who exercises his Constitutional right under the Second Amendment while traveling in Massachusetts.

*Bruen* articulated a two-step analysis in determining whether a law or regulation of constitutionally protected conduct is unconstitutional. First, courts must determine whether "the Second Amendment's plain text covers an individual's conduct[.]" *Bruen supra at 2129-30*. If so, then the "Constitution presumptively protects that conduct," and the Government "must justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id. at 2130*. To carry its burden, the Government must point to "historical precedent from before, during, and even after the founding [that] evinces a comparable tradition of regulation." *Id.* "Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Id.*

The conduct of the defendant in the instant case clearly is covered by the Second Amendment. Therefore, the burden falls on the Commonwealth to justify the law showing that it is consistent with the Country's tradition of firearm regulation.

As the defendant in the instant case is not a resident of Massachusetts and was in

compliance with his home states laws on the possession of the firearm, the Commonwealth needed to show some historical analogue relating to disparate treatment of nonresidents and must point to some "historical precedent from before, during, and even after the founding [that] evinces a comparable tradition of regulation." Bruen Id. at 2131-32.

The Commonwealth argues that under the holding in Commonwealth v. Harris, supra, Massachusetts is not obligated to recognize an out of state resident right to carry a firearm under the Full Faith and Credit clause of the Constitution. They claim that the Commonwealth is not required to substitute its statutes for those of New Hampshire. See Harris supra at 776 and Bruen does not affect the ability of states to require a license as long as the license criteria are objective.

This argument is not persuasive because at the time of the Harris decision, carrying a firearm outside of the home was a privilege, and the Harris Court held that Massachusetts didn't have to give Full Faith and Credit to New Hampshire laws conferring that same privilege. Harris, supra. The Commonwealth is correct that a concurring opinion<sup>3</sup> in Bruen did state that the ability of States to require a license is not affected, but the holding in Bruen basically took away all subjective criteria for the issuance of such a license. The Commonwealth points to no historical precedent limiting the reach of one's exercise to a federal constitutional right to only within that resident's states borders.

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<sup>3</sup> Thomas B. Bennett et al., *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 839 (2018) ("[L]ower courts should follow the majority opinion . . . . [They] must follow binding precedent and ignore concurring opinions . . . ."). Justices Alito, Kavanaugh (joined by Chief Justice Roberts), and Barrett filed concurring opinions. Because they all joined the majority opinion, however, these "vanilla concurrences" have "no impact" and "count[] for nothing" legally. *Id.* at 847.

Moving on to the defendant's claim that *GL 269, sec. 10(a)* violates the defendant's right to travel and equal protection, the Commonwealth also asserts that it does not violate the right to travel and equal protection clause because the Commonwealth's license requirements do not prohibit him from traveling in Massachusetts; they only prohibit him from carrying a firearm while traveling in Massachusetts. The Commonwealth further argues that the licensing requirements don't treat non-residents differently than a residents because they can apply for a temporary nonresident license to carry, or they can travel through the state while complying with statutory exemptions of unloading the firearm and storing it secured in a locked compartment and the travel is for a specific purpose such as training or competition. *See G.L.C. 140 § 131, 131F, 129 and 18 USC § 926A.*

The Commonwealth points to the Massachusetts firearm licensing scheme to argue that a nonresident can travel in Massachusetts with a firearm without a license if they are in compliance with the exceptions as listed. However, the exceptions miss the point of the Second Amendment. The Second Amendment and the right to possess firearms is for personal protection, self-defense. The exceptions strip away the right by disarming the individual while he is traveling within the state. The Commonwealth does not point to any historical precedent for this.

The Commonwealth's argument against the defendant's claim that *GL 269, sec. 10(a)* violates his rights under the equal protection clause because he can obtain a temporary nonresident license to carry is also unpersuasive. As stated above, prior to the *Bruen* decision, Massachusetts treated the carrying of a firearm as a privilege. While it allowed nonresidents to apply to obtain a license for that privilege, nonresidents were not

treated the same as residents. Residents of Massachusetts obtaining a license were granted the license for five years. A temporary non resident license was only valid for one year.

The Commonwealth next argues that the Massachusetts licensing scheme imposes a permissible burden because of the substantial state interest in preventing certain people from possessing firearms. However, under federal law, certain people are prohibited from obtaining/possessing firearms. *18 U.S.C. § 922(g)*, makes it unlawful for certain categories of persons to ship, transport, receive, or possess firearms or ammunition, to include any person:

- *convicted in any court of a crime punishable by imprisonment for a term exceeding one year;*
- *who is a fugitive from justice;*
- *who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act, codified at 21 U.S.C. § 802);*
- *who has been adjudicated as a mental defective or has been committed to any mental institution;*
- *who is an illegal alien;*
- *who has been discharged from the Armed Forces under dishonorable conditions;*
- *who has renounced his or her United States citizenship;*
- *who is subject to a court order restraining the person from harassing, stalking, or threatening an intimate partner or child of the intimate partner;<sup>4</sup> or*
- *who has been convicted of a misdemeanor crime of domestic violence.*

Nothing in the *Bruen* decision is contrary to the argument raised by the

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<sup>4</sup> The United States Supreme Court has agreed to hear the government's appeal of a decision from the 5<sup>th</sup> circuit *United States v. Rahimi*, 59 F.4th 163 (2023) holding that this provision of section 922 (g) does not survive post *Bruen*.

Commonwealth that there is a substantial interest in making it unlawful for certain individual to possess firearms. In fact, throughout the *Bruen* decision, reference is made to "ordinary, law-abiding" citizens when speaking of the rights under the second amendment. The logical conclusion to the Commonwealth's argument is that an "ordinary law abiding" resident of the state of New Hampshire can become a felon merely by traveling into the state of Massachusetts. Given that there is already a federal law applying to the entire country as to who is prohibited from possessing firearms, the Court is not persuaded by that argument.

### CONCLUSION

A law-abiding resident of New Hampshire who is exercising his Constitutional right should not become a felon by exercising that right while he is traveling thorough Massachusetts merely because he has not obtained a Massachusetts license to carry, which now, under the holding of *Bruen*, has to be issued to an applicant unless the applicant is otherwise disqualified. The standard for who is a disqualified individual must be the same. Otherwise, a state may decide to impose different requirements on the exercise of any Constitutional right. For example, some states could impose different age limits on voting in elections.<sup>5</sup>

This Court can think of no other constitutional right which a person loses simply by traveling beyond his home state's border into another state continuing to exercise that

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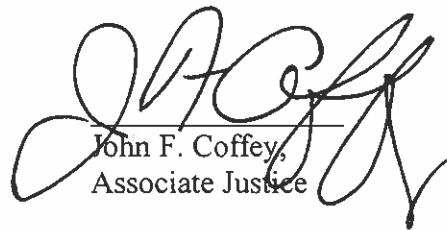
<sup>5</sup> While the Twenty Sixth Amendment to the US Constitution directly forbids this, the Court points this out to contrast this amendment with the Second Amendment's prohibition of the right to keep and bear arms **are not to be infringed**.

right and instantaneously becomes a felon subject to mandatory minimum sentence of incarceration. Anecdotally, a law abiding New Hampshire resident exercising his constitutional right to carry while shopping at the Pheasant Tree Mall in Nashua, New Hampshire would become a felon when he shops in a section of a store at that Mall, which happens to be in Tyngsborough, Massachusetts

An individual only loses a constitutional right if he commits an offense or is or has been engaged in certain behavior that is covered by *18 USC section 922*. He doesn't lose that right simply by traveling into an adjoining state whose statute mandate that *residents of that state* obtain a license prior to exercising their constitutional right. To hold otherwise would inexplicably treat Second Amendment rights differently than other individually held rights.

Therefore, the Court finds that *GL. 269, sec. 10(a)* is unconstitutional as applied to this particularly situated defendant and Allows the motion to dismiss on that ground.

**SO ORDERED.**

  
John F. Coffey,  
Associate Justice

Dated: 8-3-23