RIGHT TO BEAR ARMS LIMITED IN "SENSITIVE" PUBLIC FACILITIES

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In *District of Columbia v. Heller*, 554 U.S. 570; 128 S. Ct. 2783; 171 L. Ed. 2d 637 (6/26/2008), the Supreme Court of the United States held "a District of Columbia prohibition on the possession of usable handguns in the home violated the Second Amendment to the U.S. Constitution." In so doing, however, the opinion of the Court noted that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." Further, the Court stated that "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."

Two years later, in the case of *McDonald v. City of Chicago*, 130 S. Ct. 3020; 177 L. Ed. 2d 894 (2010), the Supreme Court reiterated "those assurances" made in *Heller* that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." Accordingly, the Court noted that the limited holding in *Heller* "does not imperil every law regulating firearms," particularly those forbidding "the carrying of firearms in sensitive places."

PARK GUN POLICY

Although the Supreme Court in *Heller* and *McDonald* did not directly address the issue, such "sensitive places" would presumably include public parks in a non-exclusive list of "places such as schools and government buildings." In the case of *Warden v. Nickels*, 697 F. Supp. 2d 1221 (W.D. Wash 3/11/2010), the federal district court found such "sensitive places" could reasonably include "certain parks facilities" where "children and youth are likely to be present."

In this case, plaintiff Robert Warden sued the City of Seattle and Mayor Greg Nickels, challenging the constitutionality of a rule created by the Seattle Parks Department that made it illegal to carry concealed firearms or display firearms at certain parks facilities where "children and youth are likely to be present and . . . appropriate signage has been posted to communicate to the public that firearms are not permitted at the facility." Department of Parks and Recreation Rule/Policy No. P 060-8.14(4.0) Oct. 14, 2009 ("Park Rule")

The Park Rule was created after Mayor Greg Nickels issued an executive order on June 6, 2008 directing city departments to create rules and policies to "prohibit the possession of dangerous weapons, including firearms, on City Property." Executive Order 07-08 The penalty for violating the Park Rule is ejectment. There are no criminal or other related penalties.

Warden alleged he entered the Seattle Southwest Community Center on November 14, 2009, a Saturday when the "facility was bustling with weekend activity." Warden further alleged he possesses a concealed pistol license and he carried his pistol under his jacket onto the park property. Warden had forewarned defendants he would enter the park carrying his concealed weapon. A parks security official was present on November 14, 2009 when Warden entered the Seattle Southwest Community Center. The official asked Warden to leave the park after determining that he was carrying a weapon and verifying that he was the man who had previously contacted the City.

In his complaint, Warden alleged that the Park Rule violated the Second Amendment, Equal Protection under the Fourteenth Amendment, and the Washington State Constitution.

The federal district court noted that the "Washington State Supreme Court recently relied on *Heller* as guidance as to assess the scope of the rights reserved to individuals in Article I, § 24 of the Washington State Constitution." In so doing, the court found "*Heller* provides limited guidance as to how to evaluate the constitutionality of gun regulations under the Second Amendment," specifically, the "sensitive place" limitation in the Second Amendment. In so doing, consistent with the Second Amendment, the court adopted the reasoning in *Heller* that "laws may fully prohibit the carrying of firearms in sensitive places such as schools and government buildings":

> As with a government building or school, a city-owned park where children and youth recreate is a "sensitive" place where it is permissible to ban possession of firearms. In this regard, the Court sees no logical distinction between a school on the one hand and a community center where educational and recreational programming for children is also provided on the other. Just as the Federal Courts do not want civilians entering into courthouses with weapons, the City does not want those with firearms entering certain parks where children and youth are likely present. The Park Rule is thus a perfectly acceptable prohibition on gun possession in a sensitive place and it passes state constitutional scrutiny.

Accordingly, under both *Heller* and Washington law, the federal district court held the Park Rule was a constitutional restriction on the possession of firearms in a "sensitive" place. In so doing, unlike the plaintiff in *Heller*, Warden was "not prohibited from possessing a gun in his home," which *Heller* had characterized as a location "where the need for defense of self, family, and property is most acute." On the contrary, in the opinion of the federal district court, "[t]he need for self-defense is not 'most acute' at city parks and community centers where children and youth recreate." Moreover, the court acknowledged that Warden "may even bring firearms into those parks that are not designated by the Park Rule."

Warden had claimed that the Park Rule policy was unconstitutional because it was "incoherent and arbitrary." The court, however, found Warden had cited "no case law showing that he has a fundamental right to possess a pistol at a city park." Rather, the court found the ruling in *Heller* regarding a Second Amendment right to possess a hand gun was "limited to the home only." Further, the federal district court found the necessary "rational basis" existed for the City's policy to pass constitutional muster.

> Under rational basis analysis, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

Applying this principle to the facts of the case, the federal district court found "the Park Rule was created to ensure safe areas for children and youth to recreate without the threat of violence caused by or related to firearm possession on park grounds."

> The Park Rule cites the large number of children who recreate at designated parks, and the risk of children finding unattended firearms and hurting themselves or others, fights escalating through gun violence, and accidental discharges of firearms. The Park Rule's aim, to ensure the safety of children and youth, satisfies a core value of public safety that is consistently held to be a legitimate state interest.

Moreover, the court found the City had "narrowly tailored the Park Rule to include only those public parks and community centers where children and youth predominantly recreate."

> The Park Rule is simply a regulation on access, with a secondary impact on firearm possession. The Park Rule does not apply to every park; it leaves open parks to those who might wish to carry weapons if children and youth are not likely to be present or where signage barring gun possession has not been posted.

Accordingly, the federal district court concluded that the "Park Rule more than exceeds the requirements to pass rational basis review" and was, therefore, constitutional under the Second Amendment and state constitution, providing equal protection as well. The court, therefore, dismissed Warden's federal and state constitutional challenges to the Park Rule.

UNIVERSITY GUN REGULATION

Similarly, in the later case of *DiGiacinto v. Rector and Visitors of George Mason University* (Va. 1/13/2011), the Virginia state supreme court applied the same "sensitive place" reasoning from *Heller* in determining "whether 8 VAC § 35-60-20, a George Mason University (GMU) regulation governing the possession of weapons on its campus, violates the Constitution of Virginia or the United States Constitution." The challenged regulation provided as follows:

> Possession or carrying of any weapon by any person, except a police officer, is prohibited on university property in academic buildings, administrative office buildings, student residence buildings, dining facilities, or while attending sporting, entertainment or educational events. Entry upon the aforementioned university property in violation of this prohibition is expressly forbidden. 8 VAC § 35-60-20.

Plaintiff DiGiacinto was not a student or employee of GMU, but he visited and utilized the university's resources, including its libraries. He wanted to exercise his right to carry a firearm

not only onto the GMU campus but also into the buildings and at the events enumerated in 8 VAC § 35-60-20.

In his complaint, DiGiacinto argued "8 VAC § 35-60-20 violates his constitutional right to carry a firearm, that GMU lacks statutory authority to regulate firearms, and that the regulation conflicts with state law." Citing *Heller*, The state circuit court had held "8 VAC § 35-60-20 was constitutional under both the Constitution of Virginia and the United States Constitution":

> *Heller* does not define what constitutes a sensitive place, but the Supreme Court lists as examples schools, [and] government buildings, "[p]resumably because possessing firearms in such places risks harm to great numbers of defenseless people; that is, children," [and] the buildings are important to government functioning.
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> George Mason University notes there are 5,000 employees and 30,000 students enrolled, ranging from age 16 to even senior citizen age. Three-hundred fifty-two in the incoming Freshman class will be under the age of 18 beginning this semester. Approximately 50,000 elementary and high school students attend summer camps at the University. They use these academic buildings, which are part of the regulation. There is also a child development center in which approximately 130 student/employee children are enrolled [in the] preschool and . . . both the libraries and the Johnson Center . . . are regularly frequented by children ages two to five years old.
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> High school graduations, athletic games, concerts and circus performances are just a few of the family activities occurring on campus. The individuals who are part of this large community of interests clearly are the type of individuals whose safety concerns on a public university campus constitute a compelling State interest. The buildings and activities described in the regulations are those wherein the individuals gather: therefore, [they] are sensitive places as contemplated by [*Heller*] . . . . I find the regulation is constitutional.

Accordingly, the circuit court dismissed DiGiacinto's complaint and ordered that GMU's regulation be sustained. DiGiacinto appealed to the state supreme court.

On appeal, DiGiacinto argued "8 VAC § 35-60-20 violates Article I, § 13 of the Constitution of Virginia and the Second and Fourteenth Amendments of the United States Constitution." Specifically, DiGiacinto characterized 8 VAC § 35-60-20 as "effectually a total ban" on the right to bear arms on GMU's campus. In so doing, DiGiacinto argued that "the regulation is not narrowly tailored and violates the historic understanding of the right to bear arms."

In response, GMU argued that "the right to keep and bear arms is not an absolute right." Citing *Heller*, GMU contended "the Second Amendment does not prevent the government from prohibiting firearms in sensitive places, which includes GMU's university buildings and widely attended university events." Moreover, GMU claimed 8 VAC § 35-60-20 was "narrowly tailored because it allows individuals to lawfully carry firearms on the open grounds of GMU's campus."

As cited by the state supreme court, the Second Amendment provides: "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. Similar to the United States Constitution, the court noted further that the Constitution of Virginia also protects the right to bear arms:

> That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power. Va. Const. art. I, § 13.

According to the state supreme court, the language in Article I, § 13 concerning the right to bear arms is "substantially identical to the rights founded in the Second Amendment." As a result, the court agreed with GMU's contention that "the rights are co-extensive" and should "be afforded the same meaning."

Distinguishing the scope and applicability of the *Heller* opinion, the state supreme court noted that "[t]he Supreme Court of the United States has held that the Second Amendment protects the right to carry and possess handguns in the home for self-defense." Moreover, in *Heller*, the Supreme Court had found individual self-defense is "the central component of the right itself." In so doing, however, the Supreme Court had "clearly stated in *Heller* that the right to carry a firearm is not unlimited":

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. *Heller*, 554 U.S. at 625-626, 128 S.Ct. at 2816-17.

Moreover, the Virginia high court reiterated the Supreme Court's qualification in *Heller* that "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive":

> It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as "prohibitions on the possession of firearms by felons and the mentally ill," "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." We repeat those assurances here.

As a result, the state supreme court concluded that the Supreme Court's holding in ***Heller*** "does not cast doubt on laws or regulations restricting the carrying of firearms in sensitive places, such as schools and government buildings." On the contrary, under *Heller*, the Virginia supreme court found "such restrictions are presumptively legal."

Applying the principles enunciated in *Heller* to the facts of this case, the state supreme court found that "GMU is a sensitive place" in which 8 VAC § 35-60-20 could restrict firearm possession consistent with the state constitution and the Second Amendment of the federal constitution:

> GMU has 30,000 students enrolled ranging from age 16 to senior citizens, and that over 350 members of the incoming freshman class would be under the age of 18. Also approximately 50,000 elementary and high school students attend summer camps at GMU and approximately 130 children attend the child study center preschool there. All of these individuals use GMU's buildings and attend events on campus. The fact that GMU is a school and that its buildings are owned by the government indicates that GMU is a "sensitive place."

Further, the state supreme court noted the challenged regulation did "not impose a total ban of weapons on campus." As a result, the court found "the regulation is tailored, restricting weapons only in those places where people congregate and are most vulnerable — inside campus buildings and at campus events." In so doing, the state supreme court acknowledged that "[i]ndividuals may still carry or possess weapons on the open grounds of GMU, and in other places on campus not enumerated in the regulation."

As a result, the state supreme court affirmed the circuit court's judgment that GMU could promulgate 8 VAC § 35-60-20 "to restrict the possession or carrying of weapons in its facilities or at university events by individuals other than police officers" consistent with the right to bear arms under the state and federal constitutions.

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