

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINSEVILLE DIVISION**

DANNY LANIER HANEY,)	
)	
Plaintiff,)	CIVIL ACTION FILE NO.
)	
v.)	
)	2:08-CV-0256-WCO
UNITED STATES OF AMERICA,)	
)	
Defendant.)	EMERGENCY MOTION

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S MOTION FOR
A PRELIMINARY INJUNCTION**

Introduction

Plaintiff commenced this action against Defendant United States of America after the Federal Bureau of Investigation’s (“FBI’s”) National Instant Criminal Background Check System (“NICS”) denied a request by Plaintiff to receive a firearm in interstate commerce and, when Plaintiff appealed, NICS further declared that Plaintiff is prohibited under federal law from possessing firearms. Plaintiff seeks an order allowing the firearms transfer and a declaration that Plaintiff is not prohibited from possessing firearms. Because Plaintiff will be irreparably harmed during the pendency of this case if he is not able to possess firearms, Plaintiff now seeks a

preliminary injunction preventing Defendant from arresting or prosecuting Plaintiff for such possession.

Background

In 2006, Plaintiff attempted to purchase a firearm from a federally-licensed firearms dealer (“FFL”). Decl. of Danny Lanier Haney, ¶ 3. Under 18 U.S.C. § 922(t), FFLs are required to perform a background check on a prospective firearms purchaser, using the NICS. When the FFL ran the NICS check on Plaintiff, NICS denied the transfer. Haney Decl., ¶ 4. NICS has an internal appeal procedure in which a prospective transferee may challenge a denial. *Id.* Plaintiff availed himself of that process, and on appeal NICS reversed itself and permitted the transfer. *Id.*

In 2008, Plaintiff attempted to purchase a firearm from a different FFL. Haney Decl., ¶ 5. When that FFL ran a NICS check, NICS denied the transfer. *Id.* On appeal this time, however, NICS affirmed itself and denied the 2008 transfer again. *Id.* In a letter to the FFL explaining the reason for the denial, NICS asserted that Plaintiff is a convicted felon who is prohibited by 18 U.S.C. § 922(g)(1) from receiving or possessing a firearm. *Id.*

NICS acknowledged that Plaintiff was pardoned for his felony conviction, but nonetheless maintained that the pardon does not relieve Plaintiff of the disability of

the prohibition against possession. Haney Decl., ¶ 6. NICS specifically stated in the letter that Plaintiff “remains federally prohibited from possessing any firearm.” *Id.*

Plaintiff challenges Defendant’s legal conclusions.

Argument

There is a four part test for determining whether a court should issue a preliminary injunction: 1) Plaintiff has a substantial likelihood of success on the merits; 2) irreparable injury will be suffered unless the injunction issues; 3) the threatened injury to Plaintiff outweighs whatever damage the proposed injunction may cause Defendant; and 4) if issued, the injunction would not be adverse to the public interest. *Siegel v. Lepore*, 234 F.3d 1163, 1176 (11th Cir., *en banc*, 2000). Plaintiff will show below how each test weighs in his favor, indicating that the Motion must be granted.

Irreparable Harm

Defendant asserts that Plaintiff is prohibited under 18 U.S.C. § 922(g)(1) from possessing any firearms. Violations of 18 U.S.C. § 922 (g) are punishable by fine and imprisonment up to 10 years. 18 U.S.C. § 924(a)(2). Furthermore, the firearms involved are subject to seizure and forfeiture. 18 U.S.C. § 924(d)(1). Thus, Defendant has specifically identified Plaintiff as someone who is prohibited by law

from possessing firearms. Plaintiff owns firearms, but has dispossessed himself of them for fear of arrest and prosecution by Defendant.

Possession of firearms in the home is a constitutional right. *U.S. v. Heller*, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). While *Heller* emphasized that prohibition on firearm possession by felons is constitutionally permissible, 128 S.Ct. at 2817, that is not the issue in this case. The issue in this case is that Plaintiff does not fall into a classification that Congress has chosen to restrict from firearm possession. If there is no restriction imposed by Congress, Defendant cannot enforce others. *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). “The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach.” *Viereck v. United States*, 318 U.S. 236, 243-245 (1943).

Thus, Defendant asserts that Plaintiff is subject to severe criminal penalties if Plaintiff exercises his Second Amendment right to possess firearms in his home. In order to avoid exposure to these severe penalties, Plaintiff has had to dispossess himself of firearms in his home and business. Because Defendant is incorrect in its assessment of Plaintiff’s legal standing (as will be discussed below in the section on likelihood of success on the merits), the fear of arrest and prosecution brought about

by Defendant's assertion has had the effect of depriving Plaintiff of a fundamental constitutional right ("By the time of the founding, the right to have arms had become fundamental for English subjects." *Heller*, 128 S.Ct. at 2798).

"[A] plaintiff can demonstrate that a denial of an injunction will cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights." *Overstreet v. Lexington-Fayette Urban County Government*, 305 F.3d 566, 578 (6th Cir. 2002). Defendant's deprivation of Plaintiff's constitutional right to keep arms in his home is therefore causing Plaintiff irreparable harm.

In addition, Plaintiff possesses a valid Georgia firearms license ("GFL"), issued pursuant to O.C.G.A. § 16-11-129. Haney Decl., ¶¶ 9-10. A license issued by the state is property. *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971). A GFL is valuable to its holder in that it exempts him or her from prosecution for carrying a concealed weapon, in violation of O.C.G.A. § 16-11-126, carrying a pistol without a license, in violation of O.C.G.A. § 16-11-128, carrying a firearm in a state park or historic area, in violation of O.C.G.A. § 12-3-10, carrying a firearm in a wildlife management area, in violation of O.C.G.A. § 27-3-1.1, carrying a firearm in a restaurant that serves alcohol and carrying a firearm in an airport, in violation of O.C.G.A. §§ 16-11-127 and 16-12-127, certain provisions of carrying a firearm in a

school zone, in violation of O.C.G.A. § 16-11-127.1, and carrying a firearm in a federal school zone, in violation of the Gun Free School Zone Act. 18 U.S.C. § 922(q)(2)(B)(ii). Because Plaintiff cannot possess a firearm without fear of arrest and prosecution by Defendant, Defendant has effectively deprived Plaintiff of his property interest in his GFL. The deprivation without due process of such intangible property cannot be compensated.

Harm to Defendant

Defendant's only potential interest in is whether it is lawful for Plaintiff to possess firearms. If it is lawful, Defendant cannot claim to be harmed at all in Plaintiff's possession of firearms. If it is unlawful, then Defendant has an interest in enforcing the criminal code. Thus, the question of the lawfulness of Plaintiff's firearms possession largely subsumes this test.

Assuming, *arguendo*, that Plaintiff ultimately loses his case and is not determined to be eligible to possess firearms. As unlikely as that may be (*see* "Likelihood of Success on the Merits" below), it is the only scenario under which issuance of the preliminary injunction could be seen as harming Defendant. The question becomes, what is the extent of that theoretical (and highly unlikely) harm? Under Defendant's view, Plaintiff's possession of firearms would be a (technical)

violation of the prohibition against felons possessing firearms. If permitted under an injunction, this condition could persist for several months while this action is pending.

Possession of firearms by itself is a non-violent, non-harm-producing, victimless crime. It generally is detectable only when the subject commits some other action that brings himself to the attention of the police. Absent a separate crime being committed with the firearm, the mere possession of the firearm is a non-event. That is not to say it is not a crime for a felon to possess firearms, for it clearly is. The point, however, is that no true harm befalls society from the naked possession of firearms. Thus, the only harm that Defendant can assert stems from a general interest in seeing the law enforced.

Defendant may claim that the potential exists for Plaintiff to commit some violent act with a firearm. Such a claim is unfounded and unsupportable by anything before this Court. Plaintiff has no record of committing any violent crimes. Haney Decl., ¶ 11. In fact, his only non-traffic offenses in his nearly 60 years is the teenage drug possession charge for which he has been pardoned. *Id.*

Public Interest

The public has an interest in seeing its duly-enacted Constitution preserved. In that Constitution, the public guaranteed to itself the right to keep and bear arms. The

public interest cannot be harmed by enforcement of that guarantee. The only other public interest that might be of interest in this case is the same general interest that Defendant has in seeing the criminal laws obeyed. Again, however, the high likelihood of success on the merits (see below) makes this a tenuous interest at best.

Likelihood of Success on the Merits

Defendant's entire premise upon which its position rests is a house of cards. As Plaintiff will show in this section, Plaintiff is highly likely to succeed on the merits.

Plaintiff was convicted in 1969 of possession of marijuana in violation of O.C.G.A. § 16-13-30(A), which is a felony. *Id.* In 1995, Plaintiff obtained a "Pardon Including Restoration of the Right to Bear Arms" from the Georgia State Board of Pardons and Paroles. Haney Dec., ¶ 12. In the Pardon Order, the Board said that it "hereby unconditionally fully pardons [Plaintiff]...." The Board further ordered "that all disabilities resulting from [the conviction] be and each and all are hereby removed...." The Board further ordered "that all civil and political rights, including the right to receive, possess, or transport in commerce a firearm, lost as a result of [the conviction]... are hereby restored." *Id.*

Were it not for Plaintiff's pardon, he would be federally prohibited under 18 U.S.C. § 922(g) from possessing firearms. His pardon, however, changes everything. 18 U.S.C. § 921(20) provides:

What constitutes a conviction of [a felony for purposes of § 922(g)] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction ... for which a person has been pardoned or has had 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.

[Emphasis supplied]. Success on the merits thus comes down to a single issue: In light of Plaintiff's pardon, is he considered "convicted" under 18 U.S.C. § 921(20)? If he is, then he will lose this case. If he is not, then he will win. Unfortunately, the question of the meaning of the pardon becomes embroiled in several issues through which the Court must wade before emerging with the conclusion that Plaintiff is not "convicted."

The Supreme Court has referred to the final clause of 921(20) as the "unless" clause. *Caron v. United States*, 524 U.S. 308, 309, 118 S.Ct. 2007, 2009, 141 L.Ed. 303, 307 (1998). In *Caron*, the Court was faced with a very different factual situation. Mr. Caron had been convicted of a felony in Massachusetts. By operation of state law, he was permitted to carry rifles and shotguns (but not handguns) outside of his

home or business. The Supreme Court ruled that, because the instrument that permitted him some firearms rights was the law itself, and the law contained some restrictions, the “unless” clause was triggered and Mr. Caron was federally prohibited from possessing *any* firearms.

The facts of the instant case are, as noted, very different. Plaintiff received a pardon, and the pardon does not contain anything remotely triggering the “unless” clause. In fact, the pardon has just the opposite of the “unless” clause trigger. Rather than containing language that *expressly* provides that Plaintiff may not ship, transport, possess or receive firearms, the pardon *expressly* provides that Plaintiff may receive, possess, or transport firearms.

Defendant claims (incorrectly), however, that Plaintiff retains a firearms disability. According to Defendant, Plaintiff is ineligible for a GFL. As support for this position, Defendant relies on O.C.G.A. § 16-11-129(b)(5)(A) and an unofficial Attorney General (of Georgia) opinion on that statute.

Subsection (b)(5)(A) makes ineligible for a GFL:

Any person who has been convicted of an offense arising out of the unlawful manufacture, distribution, possession, or use of a controlled substance or other dangerous drug.

“Convicted” for the purpose of this subsection is defined as follows:

Convicted" means a plea of guilty, a finding of guilt by a court of competent jurisdiction, the acceptance of a plea of nolo contendere, or the affording of first offender treatment by a court of competent jurisdiction *irrespective of the pendency or availability of an appeal or an application for collateral relief.*

O.C.G.A. § 16-11-129(b)(5)(ii). [Emphasis supplied]. In Unofficial Opinion U2005-3), the Georgia Attorney General rendered the unofficial opinion that a pardoned drug felon in Georgia cannot receive a GFL because of the emphasized language in O.C.G.A. § 16-11-129(b)(5)(ii). The assistant attorney general that wrote that particular opinion apparently believed that the emphasized language applies to *pardons granted*, not just *pardons applied for*.

Presumably, “collateral relief” may include a pardon. But, in Plaintiff’s case, the issue is not whether Plaintiff has filed an *application* for such relief, which is what the statute discusses. The issue is that Plaintiff has *received* such relief. In the absence of judicial direction, one could debate the meaning of this language. Fortunately, however, that is not necessary.

Defendant took it upon itself, after denying Plaintiff’s NICS appeal, to suggest to the Probate Court of Forsyth County (the entity that issued Plaintiff his GFL in 2005) that Plaintiff’s GFL ought to be revoked, based on Defendant’s reading of the

statute. Haney Decl., ¶ 8. After hearings, motions, briefs, and oral arguments, the Probate Court issued a final, substantive order on this matter. Haney Decl., ¶ 9. The Probate Court ruled that O.C.G.A. § 16-11-129(b)(5) does *not* render Plaintiff ineligible for a GFL. The Probate Court ruled that the plain language of the statute only applies to potential future relief from a conviction, not to pardons that have been granted. By way of example, the Probate Court noted that a person who successfully overturns his conviction on appeal cannot possibly be considered “convicted.”

The Probate Court also noted that unofficial attorney general opinions are advisory in nature and not binding on the courts. Finally, the Probate Court ruled that, if the statute has the effect of rendering Plaintiff ineligible for a GFL, the statute is an unconstitutional (under Georgia’s Constitution) usurpation of the power of executive clemency, which is granted exclusively to the Board of Pardons and Paroles and which cannot be disturbed by the General Assembly. The Probate Court concluded by granting Plaintiff’s requested relief and issuing Plaintiff a new GFL.

This Court is obligated under 28 U.S.C. § 1738 to give full faith and credit to the Probate Court’s judgment. Moreover, under the “Rooker-Feldman doctrine,” only the Supreme Court may review final state court judgments. *District of Columbia*

Court of Appeals v. Feldman, 460 U.S. 462, 482, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

Thus, because Plaintiff is not, as asserted by Defendant, ineligible for a GFL, he has no disabilities under state law vis a vis his felony conviction and his firearms rights. Because he is perfectly entitled under state law to possess and carry any firearm to the same extent that a person who never was convicted of a crime can do so, the federal statute's "unless" clause cannot properly be invoked. Plaintiff is therefore fully entitled to possess a firearm under federal law.

Conclusion

Plaintiff has shown that he is virtually certain to succeed on the merits. The entire premise upon which Defendant's position rests is a matter of state law that has been adjudicated in a state court, and Defendant's position has been rejected by that state court. Assuming that Plaintiff is ineligible for a GFL, Defendant jumped to the conclusion that Plaintiff's pardon *expressly* provided that Plaintiff may not ship, transport, possess or receive firearms. On the contrary, however, Plaintiff is eligible for a GFL, he has been issued a GFL under lawful state authority, and a state court has ruled that he is statutorily and (state) constitutionally entitled to receive a GFL. Plaintiff is being irreparably harmed each and every day that passes where he is

CERTIFICATE OF SERVICE

I certify that on December 29, 2008, I filed the foregoing Memorandum of Law and the accompanying Motion using the ECF system. On the same day, a copy of the them were served via U.S. Mail upon (with additional fax service upon Atty. Nahmias):

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