LEXSEE 47 CAL. APP. 4TH 1068

THE PEOPLE, Plaintiff and Respondent, v. JAMES ALLEN DINGMAN, Defendant and Appellant.

No. H013433

COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

47 Cal. App. 4th 1068*; *55 Cal. Rptr. 2d 211*; *1996 Cal. App. LEXIS 710*; *96 Cal. Daily Op. Service 5541*; *96 Daily Journal DAR 8983

July 25, 1996, Filed

SUBSEQUENT HISTORY: [***1] Review Granted October 2, 1996 (S056079), Reported at: 1996 Cal. App. LEXIS 7356.

Reprinted without change in the January 2000 Review Granted Opinions Pamphlet to permit tracking pending review and disposition by the Supreme Court.

Review Dismissed September 27, 2000 and cause remanded to Ct. App., 6th Dist. (*rule 29.4(c), Cal. Rules of Ct.*), Reported at: *2000 Cal. LEXIS 7505*.

PRIOR HISTORY: Superior Court of Santa Clara County. Super. Ct. No. 172660. Joseph F. Biafore, Judge.

DISPOSITION: The judgment is affirmed.

COUNSEL: C.D. Michael, Esq., Law Offices of C.D. Michael for Defendant/Appellant

George W. Kennedy, District Attorney and Stanley Voyles, Deputy District Attorney for Plaintiff/Respondent.

JUDGES: WUNDERLICH, J., PREMO, Acting P.J., and ELIA, J., concurring.

OPINION BY: WUNDERLICH

OPINION

[*1071] [**212] WUNDERLICH, J.:

Defendant James Allen Dingman challenges his conviction for violation of *Penal Code section 12280, subdivision (b)*, possession of an unregistered assault rifle. He claims that the specific weapon he possessed was not prohibited by *Penal Code section 12276* [***2] , *subdivision (a)(11)* [SKS with detachable magazine]. We affirm.

STATEMENT OF FACTS

Viewed in accordance with the usual rules on appeal (*People v. Mincey (1992) 2 Cal. 4th 408, 432, 827 P.2d 388*), the record shows as follows: Around 8 p.m. on March 10, 1993, Officer Richard Campi of the Santa Clara Police Department responded to a call of a disturbance or fight at room 127 of the Vagabond Motel. Officer Campi knocked on the door; defendant opened the door and told the officer unnamed people were threatening and harassing him, including neighbors and voices he had been hearing. He said he checked into the motel to escape the voices in his head. [1] The officer was concerned about defendant's mental state and asked him if he had any weapons. Defendant consented to the officer entering to examine his weapons, including an SKS rifle with a detachable 30-round magazine attached to it, a separate 10-round fixed magazine, a loaded Ruger Black Hawk .45 caliber revolver, a loaded Colt .45 caliber semi-automatic pistol, 310 rounds of ammunition

for the SKS and 100 rounds of .45 caliber pistol ammunition. Officer Campi removed the 30-round magazine from the SKS simply by [***3] opening the bolt and pulling a latch. He checked the Penal Code and consulted with his supervisor and the police department armorer, and concluded defendant's rifle was a prohibited assault weapon.

1 Defendant told Officer Campi the people following him wanted to kill him, but he never actually saw them.

Edward Peterson, a firearms specialist with the Federal Bureau of Alcohol, Tobacco and Firearms and the Alameda and Santa Clara County crime labs, testified for the prosecution, and explained that the SKS rifle (a Chinese copy of the Russian AK-47) comes in two types: type 84 is [*1072] manufactured to have a detachable magazine, and type 56 is manufactured with a fixed 10-round magazine. According to Peterson, defendant's rifle was a type 56, with the fixed magazine removed, a fairly simple procedure, and a detachable magazine in place. The purpose of a detachable magazine is to fire quickly because the ammunition is already loaded outside the weapon.

Several defense experts testified: Eugene Wolberg, [***4] a criminalist from the San Diego Police Department, distinguished, in his parlance, a "removable" magazine from a true "detachable" magazine. He also described other technical differences between the SKS models. Stephen Helsley, the state liaison for the National Rifle Association and a former supervising criminalist for the Department of Justice, testified about his involvement in drafting the list of weapons proscribed by the AWCA, although he admitted that at that time, he was unaware of the detachability of the magazine for the SKS 56. He initially agreed that defendant's magazine was detachable, but at a later hearing adopted Wolberg's terminology of removable versus detachable. A Department of Justice employee (Torrey Johnson) testified about his involvement with the Attorney General's Assault Weapon Identification Guide.

At trial (and at the hearing on his Motion to Withdraw Plea), defendant denied that he told the officer he heard voices. He explained that earlier in the day he had fired his rifle at a gun range in Los Gatos. He discovered his car had brake problems so he went to the motel instead of his nearby home. Defendant also testified that he bought his SKS in June [***5] 1992 with the fixed 10-round magazine in it. He claimed he [**213] bought the 30-round magazine from the same gun store in December 1992, [2] and insisted it was not detachable. He believed the police officer hammered the weapon on a table to make it detachable.

2 The gun shop owner testified he did not sell the detachable magazine defendant possessed.

STATEMENT OF PROCEDURE

Defendant initially pleaded nolo contendere to one count of violating *Penal Code section 12280, subdivision (b),* with an understanding that probation would be granted. At sentencing, defendant had new counsel and requested to withdraw his plea. [3] The case was remanded back to the Municipal Court, and the motion was denied.

3 Apparently the National Rifle Association had become involved in defendant's case.

On a return to Superior [***6] Court for sentencing, the court (Judge Ball) issued an order on its own motion setting aside defendant's plea and returning the case to Municipal Court for a preliminary examination. Defendant was held to answer.

[*1073] At a court trial in September 1994, testimony was presented and the court considered the transcripts from both the preliminary hearing and the motion to withdraw plea. The court determined defendant's rifle was prohibited by the Penal Code and found defendant guilty as charged. He was sentenced to three years formal probation, with conditions of community service work and various fines.

DISCUSSION

The question presented on appeal is whether or not the weapon defendant possessed is prohibited by the Assault Weapons Control Act (AWCA). (*Pen. Code, § 12275 et seq.*)

In enacting the AWCA in 1989, the Legislature stated its intent "to place restrictions on the use of assault weapons and to establish a registration and permit procedure for their lawful sale and possession." (*Pen. Code, § 12275.5.*) The Legislature declared that "the proliferation and use of assault weapons poses a threat to the health, safety, [***7] and security of all citizens of this state. The Legislature has restricted the assault weapons specified in *Section 12276* based upon finding

that each firearm has such a high rate of fire and capacity for firepower that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings." (*Pen. Code, § 12275.5*.) *Penal Code section 12276, subdivision (a)* lists specific weapons that are restricted, including subdivision (a)(11) [hereafter subdivision (a)(11)] "SKS with detachable magazine." It is undisputed that defendant's rifle was an SKS and testimony established that the 30-round magazine was detachable. However, defendant insists that the correct interpretation of subdivision (a)(11) is an SKS manufactured with a detachable magazine. We agree with the People that the plain meaning of the statute is simply an SKS with a detachable magazine. "The Legislature is presumed to have meant what it said, and the plain meaning of the language will govern the interpretation of the statute. [Citation.]" (*In re Khalid H. (1992) 6 Cal. App. 4th 733, 736*.) [***8]

The rules for statutory interpretation are well established: "Our role as an appellate court is to ascertain the intent of the Legislature so as to effectuate the purpose of the statute. In ascertaining legislative intent, a court must look to the language of the statute and accord words their usual, ordinary, and common sense meaning based on the language used and the evident purpose for which the statute was adopted. In doing so, we must presume that the Legislature did not intend absurd results." (*People v. Arnold (1992) 6 Cal. App. 4th 18, 24* [internal quotation marks and citations omitted]; see also *Burden v. Snowden (1992) 2 Cal. 4th 556, 562, 7 Cal. Rptr. 2d* [*1074] *531, 828 P.2d 672*.) "The major consideration in interpreting a criminal statute is legislative purpose. We read the statute in light of the evils which prompted its enactment and the method of control which the Legislature chose. [Citation.]" (*People v. Vega (1995) 33 Cal. App. 4th 706, 709-710*.)

[**214] Here, the stated purpose of the legislation was to restrict firearms with a high rate of fire and capacity for firepower. (*Pen. Code, § 12275.5* [***9] .) Testimony established that detachable magazines promote the high rate of fire and capacity for firepower in assault rifles. Thus an assault weapon with a detachable magazine, whether manufactured as part of the weapon or otherwise attachable, is an evil the Legislature attempted to control. "When the language of a statute is clear, the court should follow its plain meaning. [Citation.]" (*People v. Vessell (1995) 36 Cal. App. 4th 285, 289*.)

Defendant points out two "ambiguities" in the statute: that no specific model number is listed in subdivision (a)(11), as it is in other subdivisions for other weapons, and that the word "detachable" is not defined. First, the word "detachable" has a common and reasonably understood meaning, which is not limited, as defendant prefers, to a magazine "detachable as manufactured." Moreover, defendant misreads the statute, because certain other subdivisions list weapons by "series, including, but not limited to," specific models. (See for example, *§ 12276, subds. (a)(1), (a)(5)*.) "We recognize that where a penal statute is reasonably susceptible of two constructions, '. . . the court must ordinarily adopt the construction more favorable [***10] to the offender.' This principle, however, '"is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable." . . .' Courts will not construe an ambiguity in favor of the accused if 'such a construction is contrary to the public interest, sound sense, and wise policy.' Rather, 'the major consideration in interpreting a criminal statute is legislative purpose. We read the statute in light of the evils which prompted its enactment and the method of control which the Legislature chose.' The rule of construction favorable to the accused 'applies only when some doubt exists as to the legislative purpose in enacting the law.'" (*In re Ramon A. (1995) 40 Cal. App. 4th 935, 941* [citations omitted].) The People cite *People v. Corkrean (1984) 152 Cal. App. 3d 35, 199 Cal. Rptr. 375*, wherein the court determined that *Penal Code section 12220*, prohibiting possession of machine guns, did not require a defendant to have knowledge of the character of the weapon as an element of the offense. Defendant replies that in [***11] the statute at issue in Corkrean all machine guns were banned [*1075] and thus there was no confusion as to what was prohibited. [4] But certainly here, the detachable magazine attached to defendant's weapon was not the original magazine, and he offered no evidence that he had not made the change.

4 Defendant also insists that Corkrean is overruled by *Staples v. U.S. (1994) 511 U.S. 600 (128 L. Ed. 2d 608, 114 S. Ct. 1793*). In Staples, the United States Supreme Court concluded that the trial court erred in refusing to instruct the jury that the government was required to prove that defendant knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun. (*114 S. Ct. at p. 1795*

.) The continued viability of Corkrean is not a question for us at this time. Here, the trial court implicitly found defendant was aware of the character of his weapon. (See also *In re Ramon A., supra, 40 Cal. App. 4th 935* [prosecution need not prove defendant knew gun was loaded where crime of knowingly permitting another person to bring firearm into vehicle was charged]; U.S. v. Ives (9th Cir. 1996) 96 D.A.R. 3931 [prosecution need not prove defendant knew characteristics of sawed-off shotgun he knowingly possessed].)

[***12] We have granted the People's request to take judicial notice of Assembly Bill 132 from the 1995-1996 Regular Session and the analysis for that bill prepared by the Senate Committee on Judicial Procedure. (See *People v. Hall (1994) 8 Cal. 4th 950, 959, fn. 5, 883 P.2d 974*.) This bill proposed an amendment to subdivision (a)(11) based on the litigation in this case and the NRA's preferred interpretation of the subdivision, i.e., to amend the subdivision to read "SKS that was originally manufactured to accept AK series magazines." The bill was not enacted.

We recognize that unpassed bills, as evidence of legislative intent, have little value (*Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 238, 902 P.2d 225*), but here the relationship is more direct than most successive legislation, i.e., the proposed [**215] amendment arose directly out of the controversy in this case. (Cf. *People v. Superior Court (Romero) (1996) 13 Cal. 4th 497, 520, 917 P.2d 628* ["That the amendment was not adopted makes it difficult to view the final wording of section 667(f)(2), including the reference to section 1385, as anything [***13] but a purposeful choice."].) In addition, the legislative analysis prepared by the Senate Committee on Criminal Procedure explained in part why the confusion exists: the SKS with the fixed 10-round magazine was considered a war souvenir or collector's piece and there was no need or desire to regulate it. However, if it "was converted to a detachable magazine, whatever relic collectors status it had would have been destroyed by alteration and that in a configuration with a detachable magazine, the firearm would be the kind of 'assault weapon' which the authors of the two bills were trying to regulate." (See Senate Committee on Criminal Procedure (1995-96 Session) AB 132 "Assault Weapons - Definition of SKS Firearms Subject to Prohibitions and Restrictions at p. 3.)

[*1076] Defendant also insists that according to the Attorney General, the particular weapon he possessed is not prohibited by the AWCA. Defendant has no direct support for this proposition. [5]

5 Defendant points out that the Attorney General refused to register his weapon when he attempted to do so. But the registration procedure applies to specifically banned weapons owned before the enactment of the legislation.

[***14] He first asserts that the Attorney General's refusal to handle this appeal is evidence that the Attorney General supports his position. There is simply no authority for this claim. No documentary or other evidence reflects a specific decision by the Attorney General or any stated reason for the district attorney's prosecution of this appeal.

The California Constitution gives the Attorney General certain supervisory powers over the various district attorneys and authorizes the Attorney General to prosecute crimes instead of the district attorney. (*Cal. Const., art. 5, § 13*.) *Government Code section 12550* is the legislative enactment of this authority. But the district attorney is also a constitutionally mandated office. (*Cal. Const., art. 11, § 1, subd. (b)*; *Gov. Code, § 26500*.) And defendant has cited no constitutional or legislative provision that authorizes the Attorney General to forbid or block the prosecution of a crime by a district attorney.

The AWCA itemizes certain duties of the Attorney General in relation to the legislation, including: registering the prohibited weapons, issuing permits, petitioning the courts for orders [***15] banning other versions of the prohibited weapons, compiling a complete list of weapons, promulgating rules, and preparing a guide with descriptions and pictures of the prohibited weapons, known as the Assault Weapons Identification Guide (AWIG). (See *Pen. Code, §§ 12276.5, subd (a),(g),(h)*; *12285, subd. (a)*; *12286* and *12289*.) Defendant argues that these duties required of the Attorney General make him the most qualified official to render an opinion on which weapons are prohibited by the statute, and that the AWIG, which illustrates only the model 84, should be considered dispositive.

But the duties listed in the statutory provisions are essentially administrative, and the AWIG is a tool for law enforcement officials to aid in recognition of the prohibited weapons. [6] The actual interpretation of the

statute, i.e., what weapons are prohibited thereby, is a function for the courts once the Legislature has spoken. (*Burden v. Snowden, supra, 2 Cal. 4th at p. 562*.)

6 Defendant bought his rifle in June 1993, so the AWIA could not have misled defendant.

[***16] Recently, the Fifth District struck down a trial court ruling that a certain weapon was an assault weapon within the meaning of the AWCA. In Harrott [*1077] v. County of Kings (1996) 96 D.A.R. 7089, the appellate court concluded that the Attorney General is vested with exclusive authority to bring actions augmenting the list of banned assault rifles. The trial court had ruled that the seized rifle (a Clayco brand) was the functional equivalent of an AK series weapon [**216] specifically banned by the statute. In reversing the judgment, the Harrott court noted that the Clayco weapon was not specifically listed in the act. This case does not aid defendant here because he was charged with possession of a rifle specifically banned by the statute.

Even if this picture guide of weapons is taken to be an official opinion of the Attorney General as to what weapons are covered, it is well established that such an opinion is advisory only. (See *People v. United National Life Ins. Co. (1967) 66 Cal. 2d 577, 58 Cal. Rptr. 599, 427 P.2d 199*, *Mallett v. Superior Court (1992) 6 Cal. App. 4th 1853, 1869*.)

Defendant further asserts that subdivision (a)(11) is [***17] unconstitutionally vague on its face and as applied to him. We disagree.

"'The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well established element of the guarantee of due process of law. . . . '"[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" [Citations.] . . .' [Citation.]" (*People v. Mirmirani (1981) 30 Cal. 3d 375, 382, 178 Cal. Rptr. 792, 636 P.2d 1130*.) "Among the implications of this constitutional command [of due process of law] is that the state must give its citizenry fair notice of potentially criminal conduct. This requirement has two components: 'due process requires a statute to be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt.' [Citations.]" (*Walker v. Superior Court (1988) 47 Cal. 3d 112, 141, 253 Cal. Rptr. 1, 763 P.2d 852*.)

Defendant complains again that the statute [***18] contains no definition of the term "detachable" nor model number of the prohibited SKS rifle. The Supreme Court has noted that, "'A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.' [Citation.]" (*Walker v. Superior Court, supra, 47 Cal. 3d at p. 143*.) The statute must notify an ordinary person what conduct is prohibited [*1078] in a way that he or she can reasonably understand. "Fair notice requires only that a violation be described with a reasonable degree of certainty . . . so that ordinary people can understand what conduct is prohibited." (*People v. Superior Court (Elder) (1988) 201 Cal. App. 3d 1061, 1069, 247 Cal. Rptr. 647* [internal citations and quotation marks deleted].) Moreover, "'in determining the sufficiency of the notice, a statute must of necessity be examined in the light of the conduct with which the defendant is charged [citation].'" (*People v. Martin (1989) 211 Cal. App. 3d 699, 705, 259 Cal. Rptr. 770*.) [***19]

Here, we have no trouble reading the statute to mean what it says: that any SKS rifle with a magazine that "detaches," as defendant's did, is prohibited. Nor do we think any ordinary person of reasonable intelligence, or anyone familiar with gun parlance, would doubt that the weapon as possessed by defendant was prohibited. The arresting police officer, the gun shop owner, and most of the expert witnesses all readily concluded defendant's rifle had a detachable magazine. [7] And as such it is specifically prohibited by the AWCA.

7 Only one defense expert witness (Eugene Wolberg) attempted to make the distinction between "true detachable" and "removable" magazines. The Penal Code does not make such a distinction.

Defendant asserts that various law enforcement agencies do not agree on the definition of detachable, and many authorities do not prosecute possession of a weapon such as his weapon. But he offers no appropriate supporting documentation nor would any be particularly helpful in this context. It is for [***20] the court to interpret the law. [8]

8 Here, three different trial judges found the statutory language plainly banned defendant's rifle.

[**217] Defendant further argues, without benefit of supporting authority, that the subdivision is unconstitutional as applied to him. His convoluted argument is apparently that the AWCA as enacted was not meant to cover manufacturers' modifications to weapons without an administrative petition by the Attorney General and a determination by the court that the new model is also prohibited. [9] (Cf. Harrott v. County of Kings, supra, D.A.R. 7089.) But his weapon was not such a new model; rather it was a model that was sold with a fixed magazine, but with the capability of accepting a detachable magazine, which is prohibited. Citizens are required to apprise themselves of legislative history and purpose as well as of the statute itself. [*1079] (*People v. Heitzman (1994) 9 Cal. 4th 189, 200, 886 P.2d 1229*.)

9 Apparently the original bill (known as the Roberti bill) used an approach which allowed law enforcement agencies to determine whether or not new or modified weapons fell within the purview of the bill. The legislation as enacted (known originally as the Roos bill) uses the administrative determination, which defendant does not challenge.

[***21] Finally, defendant argues that his conviction should be reversed because of the doctrine of entrapment by estoppel: when a person has been induced into breaking the law by a misrepresentation of a public official. (See *Cox v. Louisiana (1965) 379 U.S. 559, 13 L. Ed. 2d 487, 85 S. Ct. 476* [defendants relied on police chief's statement that they could demonstrate in a certain area, but sheriff arrested them for doing so].) Defendant claims he bought his rifle from a federally licensed firearm dealer and the sale was approved by the Department of Justice. (Cf. *U.S. v. Tallmadge (9th Cir. 1987) 829 F.2d 767* [defendant relied on incorrect advice from federally licensed firearm dealer, regarding possession of weapons when his felony convictions had been reduced to misdemeanors].) However, this defense was not raised below, no evidence of advice or reliance was presented, and we do not consider it at this late date. (See *Green v. Superior Court (1985) 40 Cal. 3d 126, 138, 219 Cal. Rptr. 186, 707 P.2d 248*.) In any event, we note that the rifle was initially purchased with a fixed magazine; the detachable magazine which defendant had attached brought [***22] the rifle within the purview of the AWCA.

DISPOSITION

The judgment is affirmed.

PREMO, Acting P.J., and ELIA, J., concurring.