UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:10-cv-3996-SVW-AJW	Date	July 31, 2013
Title	Eugene Evan Baker v. Eric H. Holder, Jr., et al.		

JS-6

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE	
Paul M. Cruz	N/A	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER Re MOTION TO DISMISS [36]

I. INTRODUCTION AND FACTUAL BACKGROUND

On September 29, 1997, Plaintiff pled *nolo contendre* to, and was convicted of, a single count of violating California Penal Code Section 273.5(a), Willful Infliction of Corporal Injury on Current or Former Spouse or Cohabitant.[1] FAC ¶ 14. Plaintiff was sentenced to a three-year probationary sentence with certain terms and conditions, including a condition that barred him from possessing, owning, or accessing a firearm or dangerous weapon for a period of ten years. Id.

In addition to the state-law bar on Plaintiff's ability to purchase a gun, Plaintiff's Section 273.5(a) conviction barred him from possessing or receiving a gun under federal law. Specifically, 18 U.S.C. § 922(g)(9) makes it unlawful

[1] Section 273.5(a) makes it a felony to "willfully inflict[] upon a person who is his or her spouse, former spouse, cohabitant, former cohabitation, or the mother or father of his or her child, corporal injury resuling in traumatic condition," and is punishable by "imprisonmen in the state prions for two, three of four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars ($6,000) or by both that fine and imprisonment." Cal. Penal Code § 273.5(a).

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> for any person . . . 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 commence.

18 U.S.C. § 922(g)(9). Under the statute, a person who has been convicted of California Penal Code Section 273.5(a) is been convicted of a "misdemeanor crime of domestic violence." See 18 U.S.C. § 921 (a)(33)(A) ("[T]he term 'misdemeanor crime of domestic violence' means an offense that is a misdemeanor under Federal, State, or Tribal law; and has an element, the use or attempted use of physical force . . . committed against a current of former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, 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 to a spouse, parent, or guardian of the victim."); see also Enos v. Holder, 855 F. Supp. 2d 1088, 1091 (E.D. Cal. 2012) (holding that a violation of Section 273.5(a) falls under the definition of misdemeanor crime of domestic violence).

Plaintiff completed his probation in 2002; at that time, he submitted an application to withdraw his plea and have the conviction set aside pursuant to California Penal Code § 1203.4.[2] On June 19, 2002, the Ventura County Superior Court granted his motion; however, the ten-year bar on owning a firearm remained in effect until October of 2007. FAC ¶¶ 15-16. Plaintiff has no criminal history other than his Section 273.5(a) conviction. FAC ¶ 16.

In May of 2009, Plaintiff attempted to purchase a firearm at Ojai Valley Surplus. FAC ¶17. Ojai Valley Surplus contacted the State of California's Department of Justice (Cal. DOJ) regarding Plaintiff's request; in response, Cal. DOJ sent a letter to Ojai Valley Surplus stating that Plaintiff is not a person eligible to possess a firearm," and ordered Ojai Valley Surplus that it was not to "release" the firearm to Plaintiff. Id.

Plaintiff then contacted Cal. DOJ directly, asking for an explanation as to why it had prevented Ojai Valley Surplus from selling him a firearm. FAC ¶18. In response, Cal. DOJ sent Plaintiff a letter explaining that it had "identified a record in a state or federal database which indicates that you are

[2] Section 1203.4 permits a court to allow a defendant to withdraw a plea of *nolo contedre* after he or she has fulfilled the conditions of probation for the entire period of probation; upon doing so, the defendant is "released from all penalties and disabilities resulting from the offense of which he or she has been convicted," with certain listed exceptions. Cal. Penal Code § 1203.4(a).

prohibited by state and/or federal law from purchasing or possessing firearms," namely, Section 922(g)(9). Id.

In his FAC, Plaintiff asserts two causes of action against both the Cal. DOJ and the federal Department of Justice: first, that Section 922(g)(9), as-applied to him,[3] violates his Second Amendment rights under the Supreme Court's decision in District of Columbia v. Heller, 554, U.S. 570 (2008). Second, Plaintiff alleges that Defendants denial of his request to own a gun violates the Equal Protection Clause of the Fifth Amendment.[4]

II. LEGAL STANDARD[5]

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. See Fed. R. Civ. Proc. 12(b)(6). To survive a motion to dismiss, the plaintiff's complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its

[3] In his opposition to Defendants' motion to dismiss, Plaintiff clarified that he was *only* alleging an as-applied, and not facial, challenge to Section 922(g)(9).

[4] In his original complaint, Plaintiff asserted that he was entitled to possess a gun pursuant to 18 U.S.C. § 921(a)(33)(B)(ii), which provides that a person is *not* considered to have been convicted of an offense of domestic violence for purposes of Section 922(g)(9) if the operative conviction has been "expunged or set aside." Plaintiff argued that the Ventura County Superior Court's ruling that his conviction was to be set aside pursuant to California Penal Code § 1203.4 meant that his conviction was "expunged" within the meaning of the federal statute; however, as this Court ruled, and the Ninth Circuit affirmed, this argument is foreclosed by the Ninth Circuit's decision in Jennings v. Mukasey, 511 F.3d 894, 899 (9th Cir. 2007) ("[A]lthough Jennings obtained relief under section 1203.4 by the 1999 State court order, that relief did not expunge his conviction for purposes of 18 U.S.C. § 922(g)(9)."). The Ninth Circuit specifically remanded this case to this Court to address Plaintiff's Second Amendment argument; upon remand, Plaintiff filed his FAC in which he alleges both Second Amendment and Equal Protection claims.

[5] At this Court's October 15, 2012 status conference, this Court ordered the parties to file simultaneous opening briefs and simultaneous responding briefs. The Court construes Defendants' opening brief as a motion to dismiss. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988) ("Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.").

face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Id.; see also Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (citing Iqbal, 129 S. Ct. at 1951).

In reviewing a Rule 12(b)(6) motion, the Court must accept all allegations of material fact as true and construe the allegations in the light most favorable to the nonmoving party. Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002). Accordingly, while a court is not required to accept a pleader's legal conclusions as true, the court must "draw all reasonable inferences in favor of the plaintiff, accepting the complaint's [factual] allegations as true." Knievel v. ESPN, 393 F.3d 1068, 1080 (9th Cir. 2005).

The court may grant a plaintiff leave to amend a deficient claim "when justice so requires." Fed. R. Civ. P. 15(a)(2). "Five factors are frequently used to assess the propriety of a motion for leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his Complaint." Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990) (citing Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989)).

Where a motion to dismiss is granted, "leave to amend should be granted 'unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992) (quoting Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986)). In other words, where leave to amend would be futile, the Court may deny leave to amend. See Desoto, 957 F.2d at 658; Schreiber, 806 F.2d at 1401.

III. THE SECOND AMENDMENT

A. Legal Standard

The Second Amendment to the United States Constitution 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. In Heller, "the Supreme Court struck down the District of

Columbia's ban on handgun possession[.]" United States v. Henry, 688 F.3d 637, 639-40 (9th Cir. 2012). After conducting a thorough analysis of the Second Amendment's history, "the Court held 'that the Second Amendment conferred an individual right to keep and bear arms.'" United States v. Vongxay, 594 F.3d 1111, 1115 (9th Cir. 2010) (quoting Heller, 128 S.Ct. at 2799). Without articulating a level of scrutiny,[6] the Supreme Court found the two statues at issue "fail[ed] to pass constitutional muster." Heller, 554 U.S. at 629-630.

However, the Supreme Court noted that the Second Amendment

> "leaves the District of Columbia a variety of tools for combating [the problem of handgun violence in this country], *including some measures regulating handguns.* But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the *absolute* prohibition of *handguns held and used for self-defense in the home*."

Vongxay, 594 F.3d at 1115 (quoting Heller, 554 U.S. at 636). The Court expanded upon the "policy choices" that the Second Amendment left on the table, noting that

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose . . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, *nothing in our opinion should be taken to cast doubt on the 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.

[6] The Court noted only "'[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights," the statutes at issue failed to pass constitutional muster. Heller 554 U.S. at 628-629. In a footnote, the Court suggested that rational basis would *not* be the appropriate standard. Id. at 628 n. 27 ("Obviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.").

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Vongxay, 594 F.3d at 1115 (quoting Heller, 554 U.S. at 626-27). This list of "presumptively lawful regulatory measures" served only as examples; it "[did] not purport to be exhaustive." Heller, 554 U.S. at 627 n. 26.

Since Heller, courts have addressed Second Amendment challenges to federal laws in two ways. Both begin by assessing whether or not the law at issue is "presumptively lawful." For some courts, this question is the beginning and end of the constitutional inquiry: if the statute is "presumptively lawful," it cannot be struck down under the Second Amendment. See, e.g. Vongxay, 594 F.3d at 1115, 1116 (finding a federal statute making it unlawful for any person convicted of a felony to possess, transport, or receive "any firearm or ammunition" presumptively constitutional under Heller, and upholding the constitutionality of the statute on that basis alone); United States v. White, 593 F.3d 1199, 1206 (11th Cir. 2010) (concluding that Section 922(g)(9) was "presumptively lawful" under Heller, and upholding a conviction for violating that provision without engaging in further scrutiny). Other courts, however, have applied a second step. After finding that the law at issue fell within the "presumptively constitutional" category, these courts have applied an additional layer of scrutiny. As the Seventh Circuit explained, applying such scrutiny is required by

> Heller itself. Heller referred to felon disarmament bans only as 'presumptively lawful,' which, by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge. Therefore, putting the government through its paces in proving the constitutionality of [the statute at issue] is only proper.

United States v. Williams, 616 F.3d 685, 692 (7th Cir. 2010). Those courts that have found that Heller requires a second step have applied "what some courts have called intermediate scrutiny." Id. "To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective." Id.

B. Analysis

Turning to the statute at issue here—Section 922(g)(9)—this Court need not decide which of these two methodologies is correct: using *either* methodology, Plaintiff's claim must be dismissed. *Every* single court that has ruled upon the constitutionality of Section 922(g)(9) has upheld it against Second Amendment challenges. The Tenth and Eleventh Circuits have found that the statute "presumptively constitutional," and rejected arguments that the statue should be found constitutional without further analysis. See White, 593 F.3d at 1206; In re U.S., 578 F.3d 1195, 1200 (10th Cir. 2009). Similarly, the only California district court to rule on Section 922(9)'s constitutionality upheld the

statute as presumptively constitutional without engaging in further analysis. See Enos v. Holder, 855 F. Supp. 2d 1088, 1099 (E.D. Cal. 2012).

The other three Court of Appeals which have ruled upon the constitutionality of Section 922(g)(9)—the First, Fourth, and Seventh circuits—have all upheld the statute, concluding that the law is "presumptively constitutional" and survives intermediate scrutiny. See United States v. Staten, 666 F.3d 154, 168 (4th Cir. 2011) ("§ 922(g)(9) satisfies the intermediate scrutiny standard."); United States v. Booker, 644 F.3d 12, 26 (1st Cir. 2011) ("[I]t is plain that § 922(g)(9) substantially promotes an important government interest in preventing domestic gun violence."); United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010) ("[N]o one doubts that the goal of § 922(g)(9), preventing armed mayhem, is an important governmental objective. Both logic and data establish a substantial relation between § 922(g)(9) and this objective.").

Plaintiff attempts to evade these precedents by arguing that he is different from the typical Section 922(g)(9) offender. According to Plaintiff, he has committed no crimes other than the 1997 charge of domestic violence (either before or since), and has maintained a "peaceful and amicable relationship" with the victim of that incident. In short, Plaintiff avers that the Second Amendment requires that Section 922(g)(9) be ruled unconstitutional as applied to him because of his law-abiding record.

However, every court to consider a similar argument has rejected it. See In re U.S., 578 F.3d at 1200 ("We have already rejected the notion that Heller mandates an individualized inquiry concerning felons pursuant to § 922(g)(1). Furthermore, we have rejected, albeit in a slightly different context, the idea that § 922(g)(9) allows for individual assessments of the risk of violence.") (internal citations and quotation marks omitted); Booker, 644 F.3d at 25 (holding that Section 992(g)(9) survived a Second Amendment challenge where the challenger's act of domestic violence occurred ten years before his possession of a gun, and the record contained no other incidents of illegal behavior); see also Enos, 855 F. Supp. 2d at 1099 (holding that Section 922(9)(g) withstood constitutional scrutiny as-applied to seven plaintiffs, each of whom had been convicted of a misdemeanor crime more than ten years before their attempts to purchase a gun); United States v. Smith, 742 F. Supp. 2d 855, 869 (S.D.W. Va. 2010) (upholding Section 922(g)(9) against an as-applied challenge where the defendant's domestic violence conviction occurred seven years before he was found in possession of a gun, and upholding the statute as constitutional "[e]ven assuming Defendant is permanently banned from future firearm possession").[7] As

[7] In Skoein, the Seventh Circuit left open the possibility that a domestic violence misdemeanant "who has been law abiding for an extended period of time must be allowed to carry guns again[.]"

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the Tenth Circuit concluded, "a defendant whose background includes domestic violence which advances to a criminal conviction has a demonstrated propensity for the use of physical violence against others." In re United States, 578 F.3d at 1200. Accordingly, Plaintiff's Second Amendment claim must be dismissed.

IV. EQUAL PROTECTION

Plaintiff further argues that Section 922(g)(9) violates his equal protection right under the Due Process clause of the Fifth Amendment by classifying him into a "class of firearms purchasers who have previously been convicted of a [misdemeanor crime of domestic violence] but have fulfilled the terms of their probation or have otherwise not been convicted of a crime for a period of ten years following their [conviction]." FAC ¶ 37.

The Ninth Circuit recently rejected a similar argument in Vongxay, 594 F.3d at 1118. There, a convicted felon argued that Section 922(g)(1)—which makes it unlawful for any person who has been "convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year"—should be subject to strict scrutiny because the "right to bear arms is a fundamental right." Id. While acknowledging that an equal protection claim can arise where a statue "unequal[ly] burden[ed] a fundamental right," the Ninth Circuit concluded that the Supreme Court "purposefully differentiated the right to bear arms generally from the more limited right held by felons." Id. As such, "whatever standard of review the Court implicitly applied to Heller's right to keep arms in his home is inapplicable to Vongxay, a felon who was explicitly excluded from Heller's holding." Id. Accordingly, because the felon in Vongxay was not protected by Heller's holding, the Ninth Circuit was "bound by pre-Heller case law involving equal protection challenges to § 922(g)[1]," which had upheld the statute against equal protection challenges. Id. at 1118-1119 (citing Lewis v. United States, 445 U.S. 55 (1980)).

Skoien, 614 F.3d at 645. However, Plaintiff has not identified—nor has this Court found—any case that has adopted Plaintiff's argument that the Second Amendment demands that an individual who has been convicted of a crime of domestic violence be permitted to own a gun if he or she remains law abiding for a certain period of time thereafter. Rather, courts have routinely rejected this argument. See Booker, 644 F.3d at 25; Enos, 855 F. Supp. 2d at 1099; Smith, 742 F. Supp. 2d at 869; see also In re U.S., 578 F.3d at 1200 (rejecting the "notion that Heller mandates an individualized inquiry concerning felons pursuant" to Section 922(g)(9)).

Similarly, as discussed above, *every* court that has ruled upon the constitutionality of Section 922(g)(9) has found that domestic violence misdemeants are *not* protected by the Second Amendment's to bear arms. Accordingly, this Court is bound by the pre-Heller equal protection case law as to Section 922(g)(9)'s constitutionality, at least as applied to Plaintiff. In U.S. v. Hancock, the Ninth Circuit upheld Section 922(g)(9) against an equal protection challenge, concluding that the statute survived rational basis review. 231 F.3d 557, 565-566 (2000). Like the felon in Vongxay, because Plaintiff is "explicitly excluded from Heller's holding," this Court is bound by Hancock's holding.

V. CONCLUSION

For the reasons put forward in this Order, Plaintiff's FAC is DISMISSED WITH PREJUDICE.

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