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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

FOSTER CITY POLICE DEPARTMENT, Plaintiff and Respondent, v. MIKHAIL ILYIN, Defendant and Appellant.	A127399 (San Mateo County Super. Ct. No. CIV 480453)

I. INTRODUCTION

Appellant appeals from an order of the San Mateo County Superior Court denying his petition, brought under Welfare and Institutions Code section 8102,[1] to require respondent Foster City Police Department (hereafter Department) to return to him a gun it had taken from his home. The gun was taken when, pursuant to a request made by appellant's wife, the Department entered the couple's home to do a "welfare check" on appellant, found him apparently intoxicated and asleep on a couch with the gun, then loaded, under a pillow on the couch. The Department thereafter ordered appellant detained, pursuant to section 5150. We reject appellant's efforts to convince us that recent United States Supreme Court precedent applying the Second Amendment effectively renders invalid several opinions by this and other California appellate courts interpreting and applying section 8102. Accordingly, we affirm the order appealed from.

[1] All statutory references are to the Welfare and Institutions Code unless otherwise noted.

II. FACTUAL AND PROCEDURAL BACKGROUND

On the evening of December 30, 2008, appellant's wife, Tanya Ilyin, arrived at San Francisco Airport after she and their 11-year old son had been on a cruise for two weeks. Her husband, appellant, to whom she had been married for almost 13 years, was supposed to pick them up at the airport, but did not show up. She tried calling him at their home, but he did not answer the phone, as he had not during the time she was on her vacation cruise. As a result of that fact, and the fact that appellant had her car, she called her father, who picked her and her son up at the airport, and they stayed that night at her parents' house nearby.

The next day, December 31, she tried to call appellant again, but again there was no answer. She then went to the home she and appellant shared, found both of their cars in the garage, and knocked on the door. There was no answer, and Ms. Ilyin "got scared" because off a combination of these facts and, also, because appellant had (1) lost his job "shortly before Thanksgiving" the preceding month, (2) had then reverted to drinking again, which he had earlier done (although stopping in 2007), and (3) had also started taking anti-depressant medication. Accordingly, she went to the Foster City Police Department and made a "missing person's report."

The officer who took her report, Officer Monica Medrano, asked Ms. Ilyin if the Department could do a "welfare check" on appellant at the residence, and she agreed they could. Ms. Ilyin and her father drove to the residence and waited in a car while Medrano and another officer, Eric Egan, also drove there. While enroute, the officers learned that appellant had two guns registered to him.[2]

When they arrived at the couple's residence, the officers attempted to get a response at the front door, with no success. After banging on the door and announcing themselves several times, the officers were able to enter the residence through an unlocked sliding glass door near the rear of the house. They located appellant in a

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[2] Subsequent evidence established that only one gun—the one discussed hereafter—was found in the residence of appellant and his family; appellant testified that he gave the other gun to his wife's father.

"completely disheveled" house lying on a couch in a room apparently his den, unresponsive and apparently intoxicated. A loaded handgun was under a pillow on the couch on which appellant was lying. The officers took the gun and unloaded it. The gun had no safety on it, nor a trigger lock, and thus could, in the opinion of Officer Egan, be "accidentally discharged." When the officers reported this to appellant's wife, who was then in the house, she seemed "shocked" and responded: "Oh, my God."

The two officers then called fire department paramedics, who arrived and attended to appellant; he remained unresponsive until they sat him upright and then "stood him up." At that point, he became belligerent and "went over and pushed the paramedic in the chest," saying to him: "Get the fuck out of my house."

Appellant was then placed under "a [section] 5150 detention" and transported to San Mateo County General Hospital by ambulance, and then transferred to Fremont Hospital where he was kept for 72 hours.

On January 20, 2009, the Department filed a petition under section 8102 to permit confiscation and destruction of the weapon. A copy of that petition was served on appellant a few days later; he requested a hearing on the issue.

That hearing was ultimately held on August 19, 2009. At it, the Department introduced the testimony from Officers Medrano and Egan summarized above, and also called as a witness Foster City firefighter Loren Moore, one of the fire paramedics who had also responded to the scene. Moore testified that she detected a "very strong odor of alcohol coming from" appellant when he was sleeping, unresponsive to them, on his couch. She also testified that she had to assist appellant "to a seated position" on the couch to check his vital signs. She also testified that there was "some vomit in the residence" (a point confirmed by Officer Egan), which she considered an additional cause for concern, and that the paramedic team located four separate prescription drugs in the house.

In addition to her testimony summarized above, Officer Medrano also testified that appellant's wife told them that appellant: (1) had previously had a "serious problem" with alcohol; (2) was taking anti-depressants; and (3) "always sleeps with a gun under his

pillow." That officer concluded her direct examination by saying that she "would be concerned with the red flags that were presented to me that day . . . for him to have this gun back." Similarly, Officer Egan testified that, in his opinion, it was not safe for a person "to fall asleep with a loaded handgun under [his] pillow near [his] head."

Appellant's witnesses were himself and his wife. Ms. Ilyin testified that: (1) appellant often slept with the gun under his pillow; otherwise, he kept it locked in his desk; (2) in her opinion, her husband was neither homicidal nor suicidal, and did not present a danger to their 11-year old son; (3) after she returned from the cruise, her husband accused her of cheating on him, and cited that as the reason he was again drinking; and (4) she had told the officers on December 31 that her husband was taking anti-depressants.[3]

Appellant testified that he was a former citizen of the Soviet Union, in whose military he had served, and had come to this country in 1991 under a grant of political asylum. He had, he testified, received extensive training with handguns in the Soviet military, where he also learned to sleep with a gun under his pillow. He denied that the gun taken from him did not have a safety, and explained that he slept with the loaded gun under his pillow when he slept alone in his den because that room was easily accessible to the outside, and that he always wrapped the gun in a paper towel before placing it under the pillow. Otherwise, he confirmed his wife's testimony that he kept the gun locked in a desk drawer.

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[3] At the hearing, counsel for appellant and the Department stipulated that two of the four drugs found by the paramedics in the house, Trazodone and Levitra were not anti-depressants. But there was no stipulation concerning the other two, namely Vicodin and Oxazepan [sic: Oxazepam]. The Department never offered any expert medical testimony regarding these two drugs. However, it is clear that Oxazepam is prescribed for those attempting to withdraw from alcohol addiction and that Vicodin is a commonly used pain relief medication. We can and do take judicial notice of those facts. (See Evid. Code, §§ 452, subd. (h) & 459, subd. (a); 1 Witkin, Cal. Evidence (4th ed. 2000) Judicial Notice, § 33, pp. 128-129; *People v. Archerd* (1970) 3 Cal.3d 615, 638; *People v. Arthur* (1934) 1 Cal.App.2d Supp. 768, 772-773.)

Appellant denied that he was an alcoholic, although confirming that he had found some mail exchanges between his wife and "somebody else" that had "completely upset" him. He declined to confirm that he had told the officers he was "depressed," but confirmed he was "upset and stressed out" because of his discovery of evidence that made him suspect his wife was "cheating on" him. This was the reason, he testified, that he did not answer the phone when his wife called him while on the cruise and from the San Francisco Airport. He also confirmed that he had lost his job a month or so before the encounter in question.

Appellant testified that he had consumed about one and a half bottles of wine the day before the police arrived, but denied taking any pills with it. In contrast to his wife's testimony, he denied ever having "any drinking problems." He said he did not become aware of the paramedics and police in his home until they "started pushing and shoving me." The reason he became angry with, and hence shoved, one of the paramedics was because "[h]e didn't introduce himself. I couldn't know who he was. There were a lot of people inside the house and that particular person did not introduce himself to make it more clear. . . . [¶] They didn't do a lot of explanation."

After hearing this testimony and the arguments of counsel, and also considering briefing received from the parties, the trial court (the Honorable Norman Gatzert) first denied appellant's request to convert the hearing into one under section 8103. It then granted the Department's petition, ruling that it had proved by a preponderance of the evidence that "the return of the firearm in question [to appellant] would likely endanger [appellant] or others." It ordered the sale of the weapon, with the proceeds to be given to appellant.

Appellant filed a timely notice of appeal.

III. DISCUSSION

As noted above, appellant challenges the outcome reached in the trial court, contending that, although section 8102 is not now unconstitutional, due to two recent opinions of the United States Supreme Court, i.e., *District of Columbia v. Heller* (2008) 554 U.S. 570 (*Heller*) and *McDonald v. City of Chicago* (2010) 561 U.S. ____ [130 S.Ct.

3020] (*McDonald*), California courts must now, as a matter of law, apply a "clear and convincing" standard of proof to cases brought under section 8102, and if such is not done, that portion of section 8102 designating the standard of proof (i.e., "likely") is "clearly unconstitutional."

In so arguing, appellant urges us to overrule our opinion in *Rupf v. Yan* (2000) 85 Cal.App.4th 411 (*Rupf*), in which we held that section 8102 was not facially invalid because (1) it did not deny an individual gun owner his or her due process rights nor (2) was it unconstitutionally vague. (*Id.* at pp. 419-428.) He also urges us to disregard, as contrary to the recent holdings in *Heller* and *McDonald*, even more recent decisions by our colleagues in the Second and Fourth Districts holding essentially to the same effect as we did in *Rupf* regarding both sections 8102 and 8103,[4] i.e., *People v. Keil* (2008) 161 Cal.App.4th 34 (*Keil*), and *People v. Jason K.* (2010) 188 Cal.App.4th 1545 (*Jason*). We decline to do either.

Appellant's principal arguments as to why we should reinterpret section 8102 and—among other things—now declare that any application of that statute requires a "clear and convincing" standard of proof derive from his interpretations of *Heller* and *McDonald.* Those recent United States Supreme Court decisions, he contends, require us—and indeed all state appellate courts—to now rigidly apply state statutes regulating the ownership and control of guns by the populace.

First of all, he contends, because of the 2008 and 2010 decisions of the United States Supreme Court in *Heller* and *McDonald*, this court's 2000 decision in *Rupf* is no longer valid: "In *Rupf*, this Court, applying the obsolete 'collective rights' model of the

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[4] Section 8103 is a lengthy statute providing a methodology for the state to deny gun-ownership rights to various and sundry individuals, e.g., those suffering from mental disorders or illnesses, under conservatorships, designated chronic alcoholics, etc., and a procedure whereby any such action may be challenged by the targeted individual and thereafter litigated and resolved in court. (§ 8103.) Because that statute was not utilized and hence is not directly at issue here, appellant is not challenging it in this appeal. However, because the (correct, we believe) analyses of the *Keil* and *Jason* courts involve that statute and do so in a manner which is equally applicable to section 8102, section 8103 becomes somewhat relevant to what follows.

Second Amendment, refused to apply a strict scrutiny analysis to the way WIC § 8102 impacted the gun-owner's rights in that case."[5]

More importantly, appellant goes on to summarize the arguments as to why, post-*Heller* and *McDonald*, section 8102 must now be interpreted and applied differently than it has been by this and several other California appellate courts: "In this case, Appellant is seeking to establish the following due process rights for any future hearings under WIC § 8102: [¶] 1. Evidence of a mental condition that makes a person ineligible to purchase/possess firearms must meet a 'clear and convincing' standard of proof in the trial court. [¶] 2. Competent medical/psychiatric evidence of the gun-owner's 'mental condition' must be produced at the hearing and the gun-owner must have a meaningful opportunity to conduct expert discovery and produce his own expert at trial. [¶] 3. The 'mental condition' of the gun-owner must be assessed at or near the time of trial."

First of all, we will deal with the burden of proof issue briefly. California precedent even prior to either *Heller* or *McDonald* made clear that, in a proceeding held under section 8102, the burden of proof lies with the law enforcement agency to establish that, as provided in section 8102, subdivision (c), "the return of a firearm or other deadly weapon would likely result in endangering the person or others." (*People v. One Ruger .22-Caliber Pistol* (2000) 84 Cal.App.4th 310, 314, and *Keil, supra,* 161 Cal.App.4th at p. 38.)

The issue of the standard of proof, the issue appellant concentrates on mainly, cannot be dealt with quite so briefly. As noted above, appellant's position is that, post-*Heller* and *McDonald*, that standard of proof is no longer a preponderance of the

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[5] In his reply brief, appellant elaborates a bit more on why our *Rupf* decision is obsolete: "But the *Rupf* case specifically relied for its analysis on the now discredited 'collective rights' interpretation of the Second Amendment when it applied a rational basis standard for review. *Id.* at 420-421." For the reasons that follow above, we need not and will not debate here if this court would, post-*Heller* and *McDonald*, write *Rupf* in the same way. But we will say that we find nothing in Presiding Justice Kline's decision in that case, especially in the pages cited by appellant above, adopting anything entitled or even resembling a "collective rights" interpretation of the Second Amendment.

evidence, but now, more or less automatically per those decisions, "clear and convincing." We do not agree, as we find nothing in either of those United States Supreme Court decisions mandating such a change in the standard of proof.

Heller and *McDonald* were both 5-4 decisions of the United States Supreme Court, the first dealing with the constitutionality of a District of Columbia ordinance restricting the carrying of concealed handguns and the second dealing with the same issue in the city of Chicago under an ordinance of that city. Both of these lengthy decisions came to the conclusion that the Second Amendment of the United States Constitution did, indeed, protect the right of common citizens (and not just a narrowly-defined "militia") to own and possess guns, with *McDonald* then holding that that constitutional right also applied to the states under the Fourteenth Amendment. (*Heller, supra,* 554 U.S. at pp. 592-595; *McDonald, supra,* 130 S.Ct. at pp. 3036-3044.)

But *both* opinions made clear that this constitutional right is subject to regulation by, as the case may be, the federal government (e.g., in the District of Columbia) or the states. Thus, the *McDonald* court specifically stated: "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.' [Citation.] We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms." (*McDonald, supra,* 130 S.Ct. at p. 3047; see also *Heller, supra,* at 554 U.S. at pp. 626-627, 636.)

Thus, nothing in either *Heller* or *McDonald* suggests, even in the slightest, the enormous interpretative changes in a state law such as section 8102 that appellant asserts they mandate. And on this point, we are aided by a recent unanimous decision of our colleagues in Division One of the Fourth District, i.e., the *Jason* decision. Although the issue there was the constitutionality, post-*Heller* and *McDonald*, of section 8103, the arguments presented by the appellants there and that court's answers to them provide a

relatively easy way for us to explain why we, too, reject this appellant's similar arguments regarding section 8102.

In *Jason*, Justice Haller, joined by both of her two colleagues, directly addressed – and rejected—the same argument being made here, i.e., that the California courts *must* now convert to the "clear and convincing" standard of proof in an action under section 8103. She wrote: "An individual has a constitutional right to procedural due process when the government deprives an individual of a liberty or property interest. [Citation.] One component of procedural due process is the standard of proof used to support the deprivation. [Citation.] The standard of proof must satisfy ' "the constitutional minimum of 'fundamental fairness.' " ' [Citation.] To determine whether a proof standard meets this constitutional minimum, the courts evaluate three factors: (1) the private interest affected by the proceeding; (2) the risk of an erroneous deprivation of the interest created by the state's chosen procedure; and (3) the countervailing governmental interest supporting use of the challenged procedure. [Citations.]

"In addition, the courts consider the purpose underlying the proof standard, which is to delineate ' " 'the degree of confidence our society thinks [a fact finder] should have in the correctness of factual conclusions for a particular type of adjudication.' " ' [Citations.] The required minimum standard reflects a 'societal judgment about how the risk of error should be distributed between the litigants.' [Citation.] When the preponderance of the evidence standard of proof is used, the risk of an erroneous deprivation of the interest is shared 'in roughly equal fashion' between the parties. [Citation.] The beyond a reasonable doubt standard is 'designed to exclude as nearly as possible the likelihood of an erroneous judgment' and 'imposes almost the entire risk of error upon [the government].' [Citation.] The clear and convincing evidence standard represents an intermediate standard that 'reduce[s] the risk to the [individual] . . . by increasing the [government's] burden of proof.' [Citation.]

"Under this constitutional framework, proof by a preponderance of the evidence generally suffices to satisfy due process in civil cases. [Citations.] However, when 'the government seeks to take unusual coercive action . . . against an individual,' the clear and

convincing evidence standard may be required. [Citation.] Courts have thus applied the clear and convincing evidence standard in civil cases 'when necessary to protect important rights' [citation], such as when the proceedings involve ' "a significant deprivation of liberty" ' or ' "stigma" ' [Citation.] For example, courts have required the clear and convincing evidence standard in proceedings leading to the termination of parental rights [citations], involuntarily civil commitment [citation], deportation [citation], a conservator's decision to withhold artificial nutrition and hydration [citation], and a conservator's decision to authorize sterilization of a developmentally disabled conservatee [citation].

"But the fact that a proceeding may result in a loss of an important constitutional right does not necessarily mean that the preponderance of the evidence standard violates due process. For example, in *Jones v. United States* (1983) 463 U.S. 354, the United States Supreme Court upheld a statute permitting the automatic civil commitment of a criminal defendant who had obtained a verdict of not guilty by reason of insanity by proving his mental illness in the criminal case by a preponderance of the evidence. The *Jones* court noted that the clear and convincing evidence standard was generally required to civilly commit a person because it was 'inappropriate to ask the individual "to share equally with society the risk" ' of an erroneous adjudication of mental illness. [Citation.] But the court found there was a diminished risk of error when the individual had affirmatively advanced and proven the mental illness as a defense in a criminal proceeding, and accordingly the preponderance of the evidence standard comported with due process for commitment of insanity acquittees. [Citation.] . . . .

"Applying the applicable legal principles, we conclude section 8103, subdivision (f)'s preponderance of the evidence standard preserves fundamental fairness and properly allocates the risk of an erroneous judgment pertaining to firearm use between the government and an individual who was hospitalized after a finding that he or she presented a danger to himself or others [citations].

"First, with respect to the private interest element of the due process test, an individual's right to possess firearms is of fundamental constitutional stature. [Citing

Heller and *McDonald.*] However, this constitutional right is subject to the state's traditional authority to regulate firearm use by individuals who have a mental illness. [Citations.] Moreover, the length of the threatened loss is a relevant factor in analyzing the nature of the private interest. [Citation.] Under section 8103, the deprivation of the right is lengthy, but temporary, lasting for five years. Further, the infringement concerns the loss of property, and does not involve deprivation of physical liberty or severance of familial ties. The deprivation is thus not akin to the types of cases such as termination of parental rights, civil commitment, withholding of nutrition/hydration, forced sterilization, or deportation where a clear and convincing evidence standard is typically imposed. Additionally, although the loss of the right to possess firearms can impact an individual's ability to defend himself or herself, the deprivation does not leave the individual exposed to danger without recourse to other defensive measures, such as installing home security devices and summoning the police.

"Balanced against the individual's temporary loss of the right to possess firearms is the state's strong interest in protecting society from the potential misuse of firearms by a mentally unstable person. [Citations.] Section 8103 (and its counterpart § 8102 which permits confiscation of firearms) are preventative in design; the fundamental purpose is to protect 'firearm owners and the public from the consequences of firearm possession by people whose mental state endangers themselves or others.' [Citation.] These protective statutes 'limit the availability of handguns to persons with a history of mental disturbance . . . to protect those persons or others in the event their judgment or mental balance remains or again becomes impaired.' [Citation.]

"Although the preponderance of the evidence standard requires the individual to share equally in the risk of an erroneous adjudication, this risk sharing is justified under circumstances where an individual exhibited a mental disorder sufficient to warrant hospitalization because of facts showing the individual may endanger himself or others. This includes situations, such as here, where the hospitalization occurred after the individual held a loaded gun and threatened to use the gun during an emotional argument while others were present and his two-year-old son slept in the next room. The statute

places the burden on the government to show the individual would not be likely to use the weapons in a safe manner. (§ 8103, subd. (f)(6).) But if the government was required to satisfy this burden by clear and convincing evidence, this would increase the possibility that a person might be gravely injured or killed if the government failed to meet this rigorous proof burden. When the gravity of the potential consequences of allowing possession of guns by an individual with a history of a manifested mental disturbance is balanced against the temporary deprivation of access to these weapons, the balance weighs in favor of permitting proof by a preponderance of the evidence.

"We conclude section 8103, subdivision (f)(6)'s preponderance of the evidence standard comports with due process and did not unduly violate Jason's constitutional rights." (*Jason, supra,* 188 Cal.App.4th at pp. 1556-1559.)

We endorse and adopt Justice Haller's convincing reasoning and conclusions in *Jason* regarding section 8103, and hold that they are equally applicable to section 8102. In so doing, we categorically reject appellant's accusation that the *Jason* court engaged in gratuitous "denigration" of the United States Supreme Court's recent *Heller* and *McDonald* opinions. As we point out above, and as the *Jason* court did also (see *Jason, supra,* 188 Cal.App.4th at pp. 1555, 1558), the fact that it has now been established that the Second Amendment (plus the Fourteenth Amendment with regard to the states) generally protects the rights of citizens to own and possess handguns does not denigrate the power (indeed *duty*) of the states to make sure that such guns are not in the possession or control of those who might use them dangerously.

But we would add to our adoption of the *Jason* court's rationale two additional points pertinent to appellant's arguments to us. First of all, appellant argues that the unanimous decision[6] of the United States Supreme Court in *Addington v. Texas* (1979) 441 U.S. 418 also requires us to convert the standard of proof from a preponderance of the evidence to clear and convincing evidence. In that case, "the court held unconstitutional a civil involuntary commitment statute that authorized an indefinite

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[6] Justice Powell did not participate in this case, so it was actually an 8-0 decision.

commitment when the state proved by a preponderance of the evidence that the individual was mentally incompetent." (*People v. McKee* (2010) 47 Cal.4th 1172, 1188.) It further held that "due process required proof by clear and convincing evidence at the appellant's initial civil commitment hearing." (*Id.* at p. 1189.) However, the rule of *Addington* does not apply when, under California's Sexually Violent Predators Act (§ 6600 et seq.), one already adjudged to be a sexually violent predator and committed under that statute seeks, via a new petition, to undue that finding. (*Id.* at p. 1191; see also *Jones v. United States* (1983) 463 U.S. 354, 364-368.) That being the case, the *Addington* Court's ruling regarding the clear and convincing evidence standard of proof is simply inapplicable to the seizure of a person's handgun when the authorities have reason to conclude that his or her possession of such "would be likely to result in endangering the person or others." (§ 8102, subd. (c); see also *Jason, supra,* 188 Cal.App.4th at p. 1557.)

Finally, this leaves only appellant's argument that *Heller* and *McDonald* mandate that section 8102 be interpreted and applied in a manner requiring the State to adduce "[c]ompetent medical/psychiatric evidence of the gun-owner's mental condition . . . at the hearing" and that such evidence must pertain to that condition "at or near the time of trial." Our reply to these contentions is simple: nothing in either *Heller* or *McDonald* pertains even slightly to such matters. If appellant and his allies wish to petition the California Legislature to amend sections 8102 and 8103 to so require, they are absolutely free to do so; we will not (now or, hopefully, ever) undertake to engage in such a patent exercise of judicial legislation.

IV. DISPOSITION

The order appealed from is affirmed.

Haerle, J.

We concur:

Kline, P.J.

Richman, J.

A127399, *Foster City Police Department v. Ilyin*