

RENDERED: December 30, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2004-CA-000712-MR

MICHAEL COLLIER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 03-CR-002340 AND 04-CR-000061

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; BARBER, JUDGE; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Following a conditional guilty plea to possession of a firearm by a convicted felon, Michael Collier brings this appeal pursuant to Ky. R. Crim. P. 8.09. Collier reserved the right to appeal the trial court's rejection of his claim that the statute criminalizing the possession of a firearm

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

by a convicted felon, Kentucky Revised Statutes (KRS) 527.040, is unconstitutional. Because the Kentucky Supreme Court has previously decided this issue adversely to Collier's position, we affirm.

KRS 527.040, the statute under challenge, provides, in relevant part, as follows:

(1) A person is guilty of possession of a firearm by a convicted felon when he possesses, manufactures, or transports a firearm when he has been convicted of a felony, as defined by the laws of the jurisdiction in which he was convicted, in any state or federal court and has not:

(a) Been granted a full pardon by the Governor or by the President of the United States;

(b) Been granted relief by the United States Secretary of the Treasury pursuant to the Federal Gun Control Act of 1968, as amended.

Section 1(7) of the Kentucky Constitution, the provision Collier alleges invalidates KRS 527.040, states that

All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned:

Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.

Collier contends that since Section 1(7), by its plain language, permits the legislature to enact laws that restrict a citizen's right to bear weapons only insofar as the laws apply

to carrying a concealed weapon, it therefore follows that KRS 527.040 is unconstitutional because it imposes a restriction unrelated to the carrying of a concealed weapon, i.e., the restriction prohibiting a felon from possessing a weapon under all circumstances.

The Supreme Court addressed this issue squarely in Eary v. Commonwealth, Ky., 659 S.W.2d 198 (1983). The Supreme Court's disposition of the issue was as follows:

The remaining issue which we will confront is the contention of the movant that the statute in question -- KRS 527.040 -- is unconstitutional, as it conflicts with § 1(7) of the Kentucky Constitution, which section grants to all men "[t]he right to bear arms in defense of themselves" This specious argument is almost patently meritless and would not warrant comment except that both movant and respondent state that it is a point of first impression in this jurisdiction. We hold that the statute is constitutional as a valid exercise of the police power of the Commonwealth of Kentucky. It is our opinion that a statute limiting the possession of firearms by persons who, by their past commission of serious felonies, have demonstrated a dangerous disregard for the law and thereby present a threat of further criminal activity is reasonable legislation in the interest of public welfare and safety and that such regulation is constitutionally permissible as a reasonable and legitimate exercise of the police power. See State v. Amos, La., 343 So.2d 166 (1977); Stevens v. United States, 440 F.2d 144 (6th Cir.1971); Nelson v. State, Fla., 195 So.2d 853 (1967).

Id. at 200.

"The Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor court." Rules of the Supreme Court 1.030(8)(a); Smith v. Vilvarajah, Ky. App., 57 S.W.3d 839, 841 (2001). In short, because this issue was definitively resolved by the Kentucky Supreme Court in Eary v. Commonwealth, we are bound by precedent established therein.

Collier alleges that an earlier case, Holland v. Commonwealth, Ky., 294 S.W.2d 83 (1956), is in direct conflict with Eary and indicates that the provisions of KRS 527.040 are contrary to Section 1(7). Collier urges that we accept his interpretation of Holland and apply Holland in preference to Eary so as to determine that KRS 527.040 is unconstitutional. In particular, Collier directs us to the following language in Holland:

The foregoing section [Section 1(7)] is an exemplification of the broadest expression of the right to bear arms. . . .

In our state the legislature is empowered only to deny to citizens the right to carry concealed weapons. The constitutional provision is an affirmation of the faith that all men have the inherent right to arm themselves for the defense of themselves and of the state. The only limitation concerns the mode of carrying such instruments.

Id. at 85.

The issue under consideration in Holland was the prosecution of a Breathitt County deputy sheriff for carrying a concealed weapon while he was outside his jurisdiction and not on duty, and whether the exemption for police officers contained in the concealed deadly weapon statute then in effect, KRS 435.230 (the concealed deadly weapons statute is now codified as KRS 527.020), applied under the facts of the case. Since the Holland opinion's general discussion of Section 1(7) was not essential to the Court's determination of the case, we construe the language relied upon by Collier as dicta.

In any event, Holland did not address the issue we are concerned with in this case (i.e., the possession of a firearm by a convicted felon) whereas Eary provides a clearly delineated precedent on the issue. Hence we must follow Eary in preference over Holland.

The interplay between the general police power and Section 1(7) of our Bill of Rights may merit an expanded analysis by the Supreme Court. Perhaps other methods may be considered of achieving the desired end without encroaching upon a constitutionally protected right.

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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