



Stephen Masciocchi

Partner
303.295.8451
Denver
smasciocchi@hollandhart.com



Tina Van Bockern

Partner
303.295.8107
Denver
trvanbockern@hollandhart.com

Tenth Circuit Confirms Constitutionality of Ban on Felons' Firearm Possession in Wake of 'Bruen'

Insight — October 6, 2023

Law.com

After considering the U.S. Supreme Court's new test on the scope of the Second Amendment right to possess firearms, announced in *N.Y. State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), the U.S. Court of Appeals for the Tenth Circuit reaffirmed its longstanding precedent upholding the constitutionality of a federal statutory ban on convicted felons' possession of firearms, even for nonviolent felons. *Vincent v. Garland*, 2023 U.S. App. LEXIS 24554, at *1-2 (10th Cir. Sep. 15, 2023).

A Nonviolent Convicted Felon Challenged the Ban

Melynda Vincent, who was convicted of a nonviolent felony (bank fraud), challenged the federal ban on possession of firearms by convicted felons established by the Gun Control Act of 1968, 18 U.S.C. § 922(g)(1), arguing that it violates the Second Amendment rights of nonviolent felons like herself.

The federal district court, bound by the Tenth Circuit's pronouncement in *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009), ruled that the ban is constitutional and dismissed Ms. Vincent's challenge. Ms. Vincent appealed.

The Supreme Court Decides 'Bruen' While Ms. Vincent's Appeal Is Pending

In *Bruen*, the court addressed the scope of the Second Amendment in a challenge to a state law requiring gun owners to demonstrate a special need to obtain a license to carry a firearm in public. *Bruen* created a new test for evaluating the constitutionality of laws affecting the Second Amendment, namely: "1. Does the Second Amendment's plain text cover an individual's conduct? 2. If the answer is yes, has the government justified the ban by showing that it's consistent with the nation's 'historical tradition of firearm regulation'?" (quoting *Bruen*, 142 S.Ct. at 2129-30).

Because *Bruen* was decided pending Ms. Vincent's appeal, the Tenth Circuit addressed it, reasoning that "we may consider arguments based on an intervening Supreme Court case—which was decided during the

pendency of the appeal—even though the parties did not make those arguments to the district court.” (citation omitted).

The Tenth Circuit Evaluates Ms. Vincent's Challenge in Light of 'Bruen'

The Tenth Circuit recognized that this test didn't exist when it decided *McCane*, but that “the emergence of the new test doesn't necessarily invalidate our earlier precedent.” The circuit court could not “jettison *McCane* just because it might have been undermined in *Bruen*.” Rather, it had to “determine whether *Bruen* indisputably and pellucidly abrogated *McCane*.”

To begin, the appellate court acknowledged that “[i]n *Bruen* itself, the Supreme Court didn't address the ban on felons' possession of firearms.” But in evaluating New York's licensing requirement, and in establishing the historical test for the scope of Second Amendment protection, it relied on prior Supreme Court precedent where the high court specifically “noted that 'nothing in [its] opinion should be taken to cast doubt on the longstanding prohibitions on the possession of firearms' by felons and felon dispossession statutes and that such statutes are 'presumptively lawful.'” (quoting *District of Columbia v. Heller*, 544 U.S. 570, 626-27 & n.26 (2008)). The Tenth Circuit, in *McCane*, had relied heavily on *Heller* in holding prohibitions on possession of firearms by convicted felons are constitutional.

The Tenth Circuit observed that the *Bruen* Court “didn't appear to question the constitutionality of longstanding prohibitions on possession of firearms by convicted felons.” Instead, “[i]f anything, *Bruen* contains two potential signs of support for these prohibitions.” “First, six of the nine Justices pointed out that *Bruen* was not casting any doubt on this language in *Heller*.” “Second, *Bruen* apparently approved the constitutionality of regulations requiring criminal background checks . . . to ensure that the applicant is a 'law-abiding, responsible citizen.’” (internal citations and brackets omitted).

The circuit court concluded that “*Bruen* did not indisputably and pellucidly abrogate [the Tenth Circuit's] precedential opinion in *McCane*.” Accordingly, it affirmed the dismissal of Ms. Vincent's challenge.

A Concurring Opinion Questions Whether 'Bruen' Implicitly Abrogated 'McCane'

Judge Robert E. Bacharach wrote a concurring opinion to consider whether “the Supreme Court's creation of a new standard might implicitly upend [the Tenth Circuit's] precedent.” He observed that the court “might question the viability of *McCane* if the Supreme Court's creation of a new test would have required [the court] to view the federal law as unconstitutional” (emphasis added). But because “courts can differ on whether historical analogues existed for the statutory prohibition on felons' possession of firearms,” it “remain[ed] debatable even under the Supreme Court's new test” whether 18 U.S. C. § 922(g)(1) was constitutional (citing

cases).

In other words, “even if it were possible for the Supreme Court to implicitly abrogate [Tenth Circuit] precedent,” “[g]iven the judicial disagreement over historical analogues for the federal ban, *Bruen* did not indisputably and pellucidly contradict or invalidate [the Tenth Circuit’s] precedent in *McCane*.”

Stephen Masciocchi and Tina Van Bockern are attorneys in Holland & Hart's Denver office. Masciocchi co-chairs the appellate group at Holland & Hart and assists clients with high-stakes federal and state appeals and class actions. Van Bockern helps clients appeal federal agency regulations, decisions, and orders, as well as unfavorable trial court judgments in a variety of substantive areas.

Reprinted with permission from the October 6, 2023 online edition of Law.com © 2023 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-257-3382 or reprints@alm.com.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.