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**ORANGE IS FOREVER THE NEW BLACK: THE RIGHT TO
BEAR ARMS QUASHED FOR MONTANA FELONS IN VAN DER
HULE V. HOLDER**

Paige Griffith

I. INTRODUCTION

The State of Montana automatically restores felons' gun rights once they complete their underlying sentences, so long as the crimes for which they were sentenced did not involve a dangerous weapon.¹ However, in *Van der hule v. Holder*, the Ninth Circuit Court of Appeals stripped those gun rights under federal statute.²

II. A QUICK HISTORY OF FELON GUN CONTROL

The Second Amendment of the United States Constitution protects “the right of the people to keep and bear arms,”³ but the government has had “longstanding prohibitions on the possession of firearms by felons[.]”⁴ Prior to the 1980s, few felons were able to reclaim their Second Amendment gun rights upon serving their sentence. Title IV of the Omnibus Crime Control and Safe Streets Act of 1968 (Crime Control Act) provides that:

It shall be unlawful for any person—

- (1) who has been convicted . . . of, a crime punishable by imprisonment for a term exceeding one year;
.
.
.
to . . . possess in or affecting commerce, any firearm or ammunition[.]⁵

In 1986, Congress enacted the Firearms Owners' Protection Act (FOPA), which allowed states to restore felons' civil rights. Yet, FOPA would trump state law under certain circumstances. FOPA amended Title IV of the Crime Control Act to define “a crime punishable by imprisonment for a term exceeding one year”:

¹ Throughout this short note, the term “felon” is used as an indication of status. All discussion of “felons” refers to felons released from custody.

² *Van der hule v. Holder*, 759 F.3d 1043 (9th Cir. 2014).

³ U.S. Const. amend. II.

⁴ *D.C. v. Heller*, 554 U.S. 570, 573 (2008).

⁵ 18 U.S.C. § 922(g).

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, *unless* such . . . *restoration of civil rights expressly provides that the person may not . . . possess . . . firearms.*⁶

Therefore, if any state statute triggers the “unless clause” of Title IV, federal statute preempts state law and felons of that state are not allowed to possess or purchase firearms.

In Montana, the State restores felons’ gun rights once they have served their sentences:

[I]f a person has been deprived of a civil or constitutional right by reason of conviction for an offense and the person’s sentence has expired or the person has been pardoned, *the person is restored to all civil rights and full citizenship*, the same as if the conviction had not occurred.⁷

Montana’s re-instatement of these rights is constitutionally and statutorily based.⁸

III. FACTUAL AND PROCEDURAL BACKGROUND

In 1983, Frank Van der hule was convicted of sexual assault and four counts of sexual intercourse without consent.⁹ He was sentenced to 25 years imprisonment.¹⁰ In 1993, Van der hule was paroled, and in 1999 he received a “Final Discharge” notice stating his civil rights were restored.¹¹ In 2003, Van der hule attempted to purchase a firearm from a firearms dealer in Montana.¹² The dealer refused sale to Van der hule after searching through the National Instant Criminal Background Check System (NCIS) and concluding that under federal law, Van der hule was precluded from receiving a Montana concealed weapons permit and purchasing or possessing any firearms.¹³ Van der hule filed suit for

⁶ 18 U.S.C. § 921(a)(20) (emphasis added).

⁷ Mont. Code Ann. § 46-18-801(2).

⁸ *Id.*; Mont. Const. art. II, § 28(2) (“Full rights are restored by termination of state supervision for any offense against the state.”).

⁹ *Van der hule v. Holder*, 759 F.3d at 1045; Mont. Code Ann. § 45-5-502(1), (3); Mont. Code Ann. § 45-5-503(1), (3). Under Montana law, both crimes are felonies punishable by imprisonment of not less than four years.

¹⁰ *Van der hule v. Holder*, 759 F.3d at 1045.

¹¹ *Van der hule v. Mukasey*, 217 P.3d 1019, 1019 (Mont. 2009).

¹² *Van der hule v. Holder*, 759 F.3d at 1045.

¹³ *Id.*

declaratory judgment under 18 U.S.C. § 925A, asking the Attorney General to approve his firearm purchase.¹⁴ In September 2007, the district court granted the State’s motion for summary judgment, but certified a question to the Montana Supreme Court.¹⁵ The district court “asked whether, under Montana law . . . a sheriff has the discretion to grant a concealed weapons permit to someone with a criminal history similar to Van der hule’s.”¹⁶ The Montana Supreme Court accepted the certified question on October 10, 2007.¹⁷ More than a year later, in January 2009, the Montana Supreme Court answered that no felon was permitted to have a concealed weapons permit.¹⁸

Subsequently, Van der hule amended his complaint and argued that “federal and state law depriving him of his right to purchase a firearm violate[d] the Second Amendment.”¹⁹ The parties filed cross motions for summary judgment, and the district court granted the government’s motion on the Second Amendment issue.²⁰ The court held that “Van der hule was prohibited by federal law from possessing or receiving a firearm by virtue of his restriction on obtaining a Montana concealed weapons permit and that Van der hule, by virtue of his prior felony conviction, had no federal constitutional right to possess a firearm.”²¹ Van der hule appealed.²²

IV. MAJORITY OPINION

The Ninth Circuit Court of Appeals majority upheld the U.S. District Court decision. Under Montana law, a local sheriff “shall issue” a concealed weapons permit unless the applicant was convicted of a felony. The statute describing the permit describes that this:

privilege may not be denied an applicant *unless* the applicant . . .

has been convicted in any state or federal court of:

(i) *a crime punishable by more than 1 year of incarceration; or*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Van der hule v. Mukasey*, 217 P.3d at 1020.

¹⁸ *Van der hule v. Holder*, 759 F.3d at 1045 (citing *Van der hule v. Mukasey*, 217 P.3d 1019).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 1045–1046.

²² *Id.* at 1046.

(ii) regardless of the sentence that may be imposed, a crime that includes as an element of the crime an act, attempted act, or threat of intentional homicide, serious bodily harm, unlawful restraint, sexual abuse, or sexual intercourse or contact without consent.²³

The majority opined that this Montana law restricting felons from obtaining a concealed weapons permit was enough of a restriction on the right to possess firearms to trigger the “unless clause” of 18 U.S.C. § 921(a)(20).²⁴

The court used *Caron v. United States* to assess how the “unless clause” is activated.²⁵ In *Caron*, a Massachusetts felon served his time and was restored his civil rights pursuant to Massachusetts law.²⁶ However, Caron was unable to obtain a license to carry because of his felony record.²⁷ After his unsuccessful attempt to get a valid permit, Caron was convicted of carrying a rifle in violation of 18 U.S.C. § 922.²⁸ He appealed the conviction pursuant to his state’s civil right restoration statute.²⁹ The First Circuit concluded that the inability to obtain a Massachusetts license to carry was sufficient to trigger the “unless clause” and bar him from possessing any firearms under federal law.³⁰ Caron appealed, and the United States Supreme Court held that the phrase “may not . . . possess . . . firearms” in § 922(g) must be interpreted under an “all-or-nothing” approach.³¹ The Supreme Court determined that the legislative intent was “to keep guns away from all offenders who, the Federal Government feared, might cause harm, even if those persons were not deemed dangerous by States.”³²

The Ninth Circuit found Van der hule’s case almost identical to *Caron*. The only difference was Massachusetts permitted felons to own firearms, including rifles, shotguns, and handguns, but they could not carry the handguns outside of their home or business, while Montana allowed felons to carry firearms, but restricted them from obtaining a permit to carry concealed handguns.³³ Montana’s scheme was less restrictive than Massachusetts’s.³⁴ Thus, Montana did not restrict what

²³ Mont. Code Ann. § 45–8–321(1)(c)(i–ii) (emphasis added).

²⁴ *Van der hule v. Holder*, 759 F.3d at 1051.

²⁵ *Id.* at 1048 (citing *Caron v. U.S.*, 524 U.S. 308 (1998)).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Van der hule v. Holder*, 759 F.3d at 1048.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1049.

³⁴ *Id.*

firearms a prior felon could carry, but did limit the way in which a felon can possess firearms.³⁵

The court further held that although the word “possession” was ambiguous, the U.S. Supreme Court defined possession of a firearm as “the power to control and the intent to control.”³⁶ Because Montana limited the way felons could carry a handgun, the limitation was sufficient under the Supreme Court’s definition of “possession” since it regulated a felon’s power to control and intent to control his or her firearms. For the court, this constraint was sufficient to trigger the “unless clause.”³⁷ Further, the court found Van der hule’s Second Amendment argument unsubstantiated. The Ninth Circuit had already concluded § 922(g)(1) did not violate the Second Amendment.³⁸

V. ANALYSIS

The Ninth Circuit improperly held that § 921(a)(20)’s “unless clause” was triggered by Montana’s concealed weapons statute. The court stretched the federal statute too far by concluding that once a state deems a felon too dangerous to be able obtain a concealed weapons permit, then all felons are too dangerous to possess firearms in any context. The court quickly dismissed Van der hule’s argument that the phrasing “may not . . . possess” did not reach to concealment as a matter of possession.³⁹ Through a textual reading of the Montana statute, the legislature, very explicitly, did not restrict re-instatement of felon gun rights. Quite the opposite, the statute reads: “*the person is restored to all civil rights and full citizenship, the same as if the conviction had not occurred.*”⁴⁰ Montana wanted felons, who have properly served their sentences, to live again as citizens of the State.

Understandably, the concern in America is whether a violent felon should be classified differently than a less violent felon. In *Britt v. North Carolina*⁴¹, the North Carolina Supreme Court ruled in favor of a particular felon’s right to possess firearms.⁴² After this 2009 decision, a wave of confusion ensued: Did this court decision extend to other felons?

³⁵ *Id.* (emphasis in original).

³⁶ *Van der hule v. Holder*, 759 F.3d at 1049 (citing *United States v. Angelini*, 607 F.2d 1305, 1310 (9th Cir. 1979)).

³⁷ *Id.*

³⁸ *Id.* at 1050–1051 (citing *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010); *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013)).

³⁹ *Id.*

⁴⁰ Mont. Code Ann. § 46–18–801(2).

⁴¹ *Britt v. North Carolina*, 681 S.E.2d 320 (N.C. 2009).

⁴² Deborah Bone, *Comment: The Heller Promise Versus the Heller Reality: Will Statutes Prohibiting the Possession of Firearms by Ex-felons be Upheld After Britt v. State?*, 100 J. Crim. L. & Criminology 1633, 1639–1640 (2010) (citing *Britt*, 681 S.E.2d 320 (holding that that a state statute prohibiting possession of firearms by convicted felons could not reasonably be applied to a felon who had an uncontested record of lifelong nonviolence, thirty years of law-abiding conduct since his crime, and seventeen years of responsible, lawful firearm possession before the statute was enacted)).

What type of felons were allowed re-instatement of their gun rights? Should other states follow suit?⁴³ Clearly, to consider the felon's history of "responsible, lawful firearm possession" and consider some "absence of lawlessness and dangerousness" for each individual felon is tedious.⁴⁴ Yet, the *Britt* majority believed citizens' "right to keep and bear arms" is fundamental and did not want to paint all felons with the same brush. Since Mr. Britt was convicted of a non-violent crime, had a long history of lawfulness, and had always safely possessed firearms, the Court did not see him as a threat to public safety and allowed him to possess firearms.⁴⁵

The *Britt* dissent found a prohibition on felon gun rights reasonable because "one who has committed a felony has displayed a degree of lawlessness that makes it entirely reasonable for the legislature, concerned for the safety of the public it represents, to want to keep firearms out of the hands of such a person."⁴⁶ The Ninth Circuit agreed. Rather than try to decipher whether a particular felon was able to possess firearms or obtain a concealed weapons permit, the federal judiciary wrongly laid a blanket ban over all Montana felons' gun rights.

While the *Britt* decision had no direct effect on federal law, it should have persuaded other states to follow suit. This is especially true for Montana—a strong pro-gun state. Even though the process of determining individual felons' worthiness to possess firearms may be grueling, it is well worth it to uphold our state's constitutional right to bear arms.

Moreover, *Van der hule* is flawed because the Ninth Circuit analyzed Montana law to fall within the "unless clause." If the court had decided Montana's limitation on felons' ability to carry a concealed weapon did not reach "possession" of firearms as a matter of law, there would be no preemption issue. When states, like Montana, explicitly codify felons' civil right re-instatement, a minor state regulation on the way felons can carry firearms should not result in a comprehensive prohibition on all firearm possession. As such, the court should have interpreted the "unless clause" more narrowly, so no conflict between Montana law and federal law existed.

VI. CONCLUSION

After this Ninth Circuit decision, Montana felons who wish to possess guns will never be able to. If other states take on *Van der hule*'s approach, the "unless clause" of 18 U.S.C. § 921(a)(20) will continue to eat away at state re-instatement of felons' civil rights.

⁴³ *Id.* at 1642.

⁴⁴ *Id.*

⁴⁵ *Britt*, 681 S.E.2d at 323.

⁴⁶ *Id.* at 324 (Timmons-Goodson, J., dissenting).