

2002

State of Utah v. Wade Willis : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff/Appellee,

v.

WADE WILLIS,

Defendant/Appellant.

Case No. 200²~~3~~0703-SC

BRIEF OF APPELLEE

ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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UTAH SUPREME COURT

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PAT BARTHOLOMEW
CLERK OF THE COURT

IN THE UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff/Appellee,

v.

WADE WILLIS,

Defendant/Appellant.

Case No. 20030703-SC

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IN THE UTAH SUPREME COURT

STATE OF UTAH,

Plaintiff/Appellee,

v.

WADE WILLIS,

Defendant/Appellant.

Case No. 20020703-SC

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

Whether a convicted felon has the right under article I, § 6 of the Utah Constitution to “possess” a firearm, despite the clear mandate of Utah Code Ann. § 76-10-503, which prohibits the possession or use of a firearm by a restricted person.

ISSUE PRESENTED ON APPEAL AND STANDARDS OF REVIEW

Issue: Whether Utah Code Ann. § 76-10-503, prohibiting the possession or use of a firearm by a restricted person, accords with article I, § 6 of the Utah Constitution, which allows the Utah Legislature to restrict the “lawful use” of firearms.

Standard of Review: On a writ of certiorari, this Court reviews the decision of the court of appeals, not the district court, and applies the same standard of review used by the court of appeals. *Clark v. Clark*, 2001 UT 44, ¶ 8, 27 P.3d 538, 540. A trial court’s ruling on a motion to dismiss based on a claim that a statute is unconstitutional is

reviewed for correctness. *State v. Herrera*, 1999 UT 64, ¶ 18, 993 P.2d 854.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Constitution, art. I, § 6

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for the other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

Utah Code Ann. § 76-10-503(2)(a) (1999)

A Category I restricted person who purchases, transfers, possesses, uses or has under his custody or control . . . any firearm is guilty of a third degree felony . . .

Utah Code Ann. § 76-10-503(1)(a) (1999)

A Category I restricted person is a person who . . . is on probation or parole for any felony . . .

The complete text of these provisions is attached as Addendum A.

STATEMENT OF THE CASE

Defendant was charged on August 15, 2000, with possession of a firearm by a restricted person, a second degree felony in violation of Utah Code Ann. § 76-10-503(2)(a), and theft, a second degree felony, in violation of Utah Code Ann. §§ 76-6-404 and 76-6-412(1)(a)(ii) (1999). R. 2. He was bound over for trial following a preliminary hearing on October 4, 2000. R. 18.

On January 4, 2001, defendant filed a motion to dismiss, claiming that Utah Code Ann. § 76-10-503 is unconstitutional because it violated the right to bear arms guaranteed

by article I, § 6 of the Utah Constitution. R. 45, 124. The trial court denied the motion, noting that *State v. In*, 2000 UT App 358, 18 P.3d 500, had upheld the validity of Utah Code Ann. § 76-10-503 against a claim that it violated article I, § 6. R. 141-43. A copy of the trial court's Ruling and Order, dated **February 6, 2001**, is attached as Addendum B. A copy of *State v. In* is attached as Addendum C.

Defendant pleaded guilty to possession of a firearm by a restricted person on the condition that he be allowed to appeal the denial of his motion to dismiss. R.164-71. He was sentenced to 180 days in the Utah County Jail, although he was eligible for work release after 90 days, and supervised probation for 36 months. R. 180-82.

Defendant timely appealed. R. 184. The Court of Appeals affirmed defendant's conviction on July 5, 2002. See *State v. Willis*, 2002 UT App 229, 52 P.3d 46, a copy of which is attached as Addendum D. Defendant filed his petition for writ of certiorari to this Court on September 3, 2002. On January 24, 2003, this Court granted the petition.

STATEMENT OF FACTS

As a convicted felon, defendant knew he was prohibited from possessing a gun. R. 190:3. For that reason, he was hard-pressed to explain the presence of the 9-millimeter handgun in his bedroom closet. R. 191:15-16. At first, he stated that the handgun had been given to him by his brother-in-law's mother, who asked defendant to store it in his bedroom. R. 191:22. Later, defendant claimed the gun had been given to him as collateral for a loan. R. 190:2.

However, his brother-in-law, Jonathan Coones, told a different story. In late July 2000, Coones reported to police that the handgun had been stolen from his motor home. R. 191:6. Coones knew defendant had seen the weapon and had access to the motor home, so he asked defendant whether he had “borrowed” the gun. R.191:7. Defendant stated that he had not. *Id.*

On August 1, 2000, Eric Price, the Adult Probation and Parole Officer assigned to monitor defendant, received a phone call from Officer Brad Mitchell of the Spanish Fork Police Department. R. 191:14-15, 18, 20. Officer Price conducted a search of defendant’s residence and discovered the 9-millimeter handgun. R. 191:15. Officer Mitchell arrived soon thereafter and confirmed that the serial number on the recovered handgun matched that of the gun Coones reported stolen. R. 191:21.

ARGUMENT

**THE COURT OF APPEALS CORRECTLY DETERMINED THAT
ARTICLE I, § 6 OF THE UTAH CONSTITUTION DOES NOT
PROTECT THE RIGHT OF A CONVICTED FELON TO
“POSSESS” A FIREARM.**

Defendant continues to claim that the Utah Constitution guarantees him the right to “possess” a firearm, even though he is a convicted felon. Aplt. Br. at 6. Thus, he argues that he cannot be convicted of violating Utah Code Ann. § 76-10-503(2), which provides that “a Category I restricted person who purchases, transfers, possesses, uses, or has under his custody or control . . . any firearm is guilty of a second degree felony” Defendant is a “Category I” restrict person because he was on parole for evading a police

officer, a third-degree felony, at the time of his arrest on August 1, 2000¹. R. 191:15.

This argument contradicts clear precedent, runs counter to legislative history and defies common sense.

In analyzing the constitutionality of a statute, “we construe the legislation, to the extent possible, as being in compliance with the federal and state constitutions.” *State v. Herrera*, 1999 UT 64, ¶ 18, 993 P.2d 854. Moreover, “[w]hen reviewing the constitutionality of a statute, we must presume that the statute is constitutional.” *State v. Krueger*, 975 P.2d 489, 495 (Utah App.1999). “We resolve any reasonable doubts concerning legislation in favor of constitutionality.” *Id.* “A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987). A facial challenge succeeds only when the statute at issue is incapable of any valid application. *State v. Lafferty*, 2001 UT 19, ¶ 78, 20 P.3d 342. Thus, a single valid application of the statute is sufficient to defeat a facial challenge. Because the statute is clearly valid as applied to defendant, his facial challenge must fail. *See Herrera*, 1999 UT at ¶ 50 (facial challenge fails if challenged statute is valid as applied to defendant).

¹ This conviction was only one of numerous offenses committed by defendant as a juvenile and as an adult between November 1997 and February 2001. *See Adult Probation and Parole Presentence Investigation Report*, dated May 5, 2001. R. 190:3-9.

The crux of defendant's argument is that 1984 amendments to article I, § 6 of the Utah Constitution limited the Legislature's power to regulate firearms. Before the 1984 amendments, the provision stated:

The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law.

In its current version, as amended in 1984, the provision reads:

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful *use* of arms.

Utah Const. art. I, § 6 (emphasis added). Defendant contends that the amended provision allows the Utah Legislature to restrict the "use" of a firearm, but prohibits the enactment of any statute that in any way limits the individual right to "possess" a firearm. Aplt. Br. at 10-11. Thus, in defendant's view, convicted felons like himself have the constitutional right to "possess" guns so long as they do not "use" them.

This contention cannot be seriously entertained. As demonstrated below, defendant's argument is not supported by any logical reading of article I, § 6 or by the legislative history of the provision.

A. The Court of Appeals Correctly Rejected Defendant's Claim that Article I, § 6 of the Utah Constitution Grants a Convicted Felon the Right to Possess Firearms.

Defendant claims the trial court erred in denying his motion to dismiss after determining that *State v. In*, 2000 UT App 358, 18 P.3d 500, disposed of his claim that

Utah Code Ann. § 76-10-503 was unconstitutional. Defendant does not challenge *In*, but rather argues that it is distinguishable because that case dealt with the actual use of a firearm as opposed to mere possession. Aplt. Br. at 7. Defendant is mistaken. *In* dealt with precisely the same issue – a convicted felon charged with possession of a firearm.

In involved a defendant who pleaded guilty to discharging a firearm from a vehicle. 2000 UT App at ¶ 2. One week later, defendant was involved in another “shootout”. *Id.* During an investigation, defendant admitted he was in *possession* of a handgun. *Id.* The defendant was charged with *possession* of a dangerous weapon by a restricted person, in violation of Utah Code Ann. § 76-10-503. *Id.* On appeal, the defendant claimed the statute was an unconstitutional restriction of his right to bear arms. *Id.* at ¶ 3. The Court of Appeals rejected that argument, noting that “[t]his statute only restricts that right [to bear arms] under very limited circumstances – such as a felony indictment or conviction.” *Id.* at ¶ 14. Thus, the court upheld the constitutionality of Utah Code Ann. § 76-10-503 against a challenge by a convicted felon charged with possession of a firearm – exactly the same challenge now made by defendant. Although the *In* defendant did not explicitly argue the use/possession distinction, *In* is still directly on point because it stands for the proposition that a convicted felon has no right to possess a firearm under article I, § 6. This holding is obviously applicable to defendant. Accordingly, the Court of Appeals, relying on *In*, correctly ruled that defendant’s challenge to the constitutionality of Utah Code Ann. § 76-10-503 was without merit. *See Willis*, 2002 UT App 229 at ¶ 3.

B. The Plain Meaning of Article I, § 6 Demonstrates Legislative Intent to Restrict the Use of Weapons by Convicted Felons.

The Court of Appeals properly rejected defendant's claim that the Utah Constitution protects his right to possess firearms by relying on the analysis of precisely the same argument raised by the defendant in *In*. Nonetheless, even without relying on *In*, defendant's claim is readily shown to be untenable.

Defendant contends that the plain meaning of article I, § 6 supports his argument that Utah Code Ann. § 76-10-503 is unconstitutional. Aplt. Br. at 11. Defendant correctly notes that a court, in considering the constitutionality of a statute, “must begin its analysis with the plain language of the provision. . . .” *Id.* (citing *Utah School Boards Ass'n v. Utah State Bd. of Education*, 2001 UT 2, ¶ 13, 17 P.3d 1125). Defendant errs, however, in suggesting that a plain reading of article I, § 6 supports his strained interpretation. On the contrary, defendant's interpretation relies on a hyper-technical and overly restrictive reading of the constitutional provision's final clause, which states “nothing herein shall prevent the legislature from defining the lawful *use* of arms.” Utah Const. art. I, § 6 (emphasis added). Defendant's argument limits “use” of a gun to the active employment of the weapon, *e.g.*, firing it, brandishing it or using it in the commission of a crime. “Possession,” on the other hand, is presumably passive – carrying, storing, perhaps even handling – anything that is not actively “using” the weapon.

However, the amended language of article I, § 6 need not be defined so narrowly. Under the plain ordinary understanding of the words, “use” and “possession” are not mutually exclusive terms; in fact, they are inextricably linked. *See* Black’s Law Dictionary 1183 (7th ed. 1999) (defining “possession” as “the continuing exercise of a claim to the exclusive use of a material object”); *cf. U.S. v. Trotter*, 270 F.3d 1150, 1153 (7th Cir. 2001) (“[U]se of a drug implies its possession”). And while the distinction between active “use” and mere “possession” is clearly cognizable for some purposes – the gun collector, for example, could be said to merely “possess” weapons without “using” them – such “possession” can be as readily characterized as a kind of “use” – a *passive* use, but a “use” nonetheless.² Nothing compels the artificially narrow construction urged by defendant.

Thus, defendant’s claim that the *Willis* Court rendered the term “possess” inoperative in Utah Code Ann § 76-10-503 is incorrect. *See* Aplt. Br. at 8. Because statutes are required to narrowly define the range of regulated conduct, specificity is required. *See, e.g., In*, 2000 UT App 358, ¶ 13 (Utah Code Ann § 76-10-503 not subject to arbitrary enforcement because it is narrowly drawn). By contrast, “[s]tate constitutions embody fundamental values and articulate the citizens’ common aspirations for constitutional governance and the rule of law. Rather than stating inflexible specific rules

² The Court of Appeals illustrated the folly of defendant’s hypertechnical interpretation by noting that “the United States, by mere possession of a nuclear arsenal, theoretically “uses” that arsenal to deter would-be aggressors from taking military action against it.” *State v. Willis*, 2002 UT App 229, 52 P.3d 46, n.3.

of conduct, they contain broad principles capable of accommodating societal changes.” *Martin v. Beer Board*, 908 S.W.2d 941, 946-47 (Tenn. App. 1995). In short, the broadly drafted language of art. I, § 6 is entirely consistent with the necessarily more exacting provisions of Utah Code Ann § 76-10-503.

Moreover, there are sound reasons to prefer a broader reading of article I, § 6. First, a broader reading avoids invalidating Utah Code Ann § 76-10-503, which would accord with the principle of construction that favors a constitutional interpretation whenever possible. *See, e.g., Herrera*, 1999 UT at ¶ 18 (reasonable doubts resolved in favor of constitutionality); *Krueger*, 975 P.2d at 495 (statutes are presumed constitutional).

Second, a broader interpretation avoids the absurd and contradictory results that necessarily follow from the narrow reading urged by defendant. As this Court has stated: “[W]e interpret a statute to avoid absurd consequences.” *State v. Redd*, 1999 UT 108, ¶ 12, 992 P.2d 986; *see also U.S. v. Brown*, 333 U.S. 18, 27 (1948) (“No rule of construction necessitates our acceptance of an interpretation resulting in patently absurd consequences”); *In re Overland Park Fin. Corp.*, 236 F.3d 1246, 1252 (10th Cir. 2001) (“[C]ourts will reject an interpretation of a statute that produces an absurd result”). Under defendant’s view, criminal background checks required for the purchase of a gun would be useless against the felon who represents that he wishes merely to “possess” a weapon, but not “use” it. Similarly, any restrictions on concealed weapons would likely be unenforceable given that carrying a concealed weapon could be deemed mere

“possession.” Metal detectors at courthouses, government offices and airports would be pointless if citizens had the unencumbered right to “possess” firearms. Perhaps even prison inmates could claim a right to possess guns. In short, a would-be gunman could not be legally penalized or even confronted until he actually began to “use” the gun, by which point the damage would be done.

Obviously, Utah lawmakers could not have intended such bizarre consequences. Moreover, nothing in the text of article I, § 6 requires such an interpretation. Accordingly, defendant’s claim that he cannot be penalized for possessing a handgun is unpersuasive, to say the least. Thus, the Court of Appeals correctly rejected defendant’s claims.

C. The 1984 Amendment to Article I, § 6 Did Not Give Convicted Felons the Right to “Possess” Firearms.

As shown above, the plain language of article I, § 6 does not support defendant’s position. His argument should be rejected for the reasons given above. Nonetheless, to further illustrate defendant’s mistaken reading of the provision, a review of the history of the provision, both the original and amended versions, is helpful.

During the 1983 and 1984 sessions of the Utah Legislature, lawmakers considered amendments to article I, § 6 which would explicitly state that the provision protected the rights of individual gun owners, not merely the collective right of a state “militia.” See House Debate on Senate Joint Resolution No. 2, dated March 7, 1983. R. 84-94. Their concern was based on decisions by the Utah Supreme Court and elsewhere recognizing

that the Second Amendment to the U.S. Constitution protected only the collective right to bear arms. *Id.*; see also *State v. Vlacil*, 645 P.2d 677, 679 (Utah 1982) (“Since the Second Amendment right ‘to keep and bear Arms’ applies only to the right of the State to maintain a militia and not to the individual’s right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm”).

Representatives also wanted to make sure that any amendment to article I, § 6 did nothing to restrict the traditional ability of the state to regulate the use of firearms, particularly with regard to convicted felons. R. 87. This concern is clear in the following colloquy between the House speaker and the amendment’s House sponsor:

MR. SPEAKER: Would this [the 1983 amendment] preclude registration of handguns and Saturday night specials?

REP. HARRISON: Well, I hope, hopefully it wouldn’t. My authority over here tells me “no way.” Okay, as he points out, this does not specifically address registration. It simply gives us our right to bear arms for the specific things that are addressed in here. *And it doesn’t preclude legislation concerning concealed weapons or felons or any prohibitive person from being, those rights being taken away from.*

MR. SPEAKER: Would it be permissible for the Legislature, after passage of this constitutional amendment, to then require registration of Saturday night specials?

REP. HARRISON: He says, “Yes, if they wanted to.” It was permitted.

MR. SPEAKER: Assuming that the person acquiring the Saturday night special *was a law-abiding citizen and had not been convicted of a prior felony*, could the Legislature prevent his acquisition of a Saturday night special or any handguns?

REP. HARRISON: If they wanted to.

R. 86-87. This version of the bill passed the House, but apparently was not approved by the Senate. R. 78, 84.

The following year, lawmakers again considered amendments and finally agreed on the current version of article I, § 6, which was approved by voters in the November 1984 general election. Once again, lawmakers made it clear that the intent of the amendment was to protect the rights of individual gun owners without affecting the traditional ability of lawmakers to restrict the availability of weapons to certain classes of individuals, including convicted felons. In the Voter Information Pamphlet prepared by the lieutenant governor's office, Sen. Jack M. Bangerter and Rep. Donna M. Dahl, sponsors of the amendment in the Senate and House, respectively, stated:

The amendment specifically guarantees broad individual liberties and protects the enjoyment of those liberties from infringement. At the same time, *the legislature may continue to enact laws against the misuse of arms* and the police may continue to enforce such laws; enforcement would extend to seizing arms which are misused.

An individual right to keep and bear arms is guaranteed. However, *convicted felons*, mental incompetents, minors, and illegal aliens would not be guaranteed this right. *The principle of law that such persons may be excluded from the enjoyment of the right to keep and bear arms is well-established.*

Voter Information Pamphlet, dated November 6, 1984. R. 69-73 (emphases added).

As noted by Sen. Bangerter and Rep. Dahl, excluding certain classes of individuals from the right to bear arms has a long historical pedigree. As originally conceived in the common law and understood by the Founding Fathers, the right to bear arms was limited to "law-abiding citizens." *State v. Hirsch*, 34 P.3d 1209, 1211 (Or. App. 2001) (citing Stephen P. Halbrook, *The Original Understanding of the Second*

Amendment, in The Bill of Rights: Original Meaning and Current Understanding, 117, 121 (Eugene W. Hickok, Jr., ed., 1991). As one historian noted:

Felons simply did not fall within the benefits of the common law right to possess arms. That law punished felons with automatic forfeiture of all goods, usually accompanied by death. We may presume that persons confined in [jails] awaiting trial on criminal charges were also debarred from the possession of arms. Nor does it seem that the Founders considered felons within the common law right to arms or intended to confer any such right upon them. All the ratifying convention proposals which most explicitly detailed the recommended right-to-arms amendment excluded criminals and the violent.

Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L Rev 204, 266 (1983);³ see also Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 Tenn L Rev 461, 480 (1995) (“[F]elons, children, and the insane were excluded from the right to arms precisely as (and for the same reason) they were excluded from the franchise”); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale LJ 1131, 1164 (1991) (right to bear arms, like right to vote, accrues to citizens, not all people). In sum, the right to bear arms has historically been denied to those who violate the law, thus proving themselves unworthy of the right.

The wording of article I, § 6, both before and after the amendment, evinces an intent to adopt a limited right to bear arms, one that may be regulated by the Legislature. This view is also consistent with the interpretation of similar state constitutional

³ Quoted in *Hirsch*, 34 P.3d at 1211.

provisions guaranteeing the right to bear arms in other jurisdictions. *See, e.g., People v. Blue*, 544 P.2d 385, 391 (Colo. 1975) (“To limit the possession of firearms by those who, by their past conduct, have demonstrated an unfitness to be entrusted with such dangerous instrumentalities, is clearly in the interest of the public health, safety, and welfare and within the scope of the Legislature's police power”) (citation and internal quotation marks omitted).

Thus, the debates concerning the 1984 amendment to article I, § 6, as well as the historical development of similar provisions elsewhere, demonstrate that lawmakers realized the importance of restricting the use or possession of firearms by felons and that they acted purposefully to safeguard that prerogative. Accordingly, the Court of Appeals correctly rejected defendant's claim that the Utah Constitution granted him a right to possess a handgun.

CONCLUSION

In sum, defendant has failed to show that the Court of Appeals' decision was incorrect. The Court of Appeals correctly relied on *State v. In* and properly held that the Utah Constitution does not protect the right of convicted felons to possess firearms. Alternatively, a review of the history of article I, § 6, as well as similar federal and state constitutional provisions in other jurisdictions, also shows conclusively that the Utah provision does not grant convicted felons the right to possess firearms. This Court should therefore affirm the decision of the Court of Appeals.

RESPECTFULLY SUBMITTED this 16th day of July, 2003.

MARK L. SHURTLEFF
Attorney General

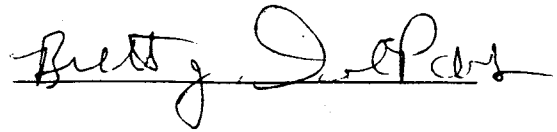
A handwritten signature in black ink, appearing to read "Brett J. DelPorto". The signature is written in a cursive style with a large initial 'B' and 'D'.

BRETT J. DELPORTO
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, this 16th day of July, 2003, to:

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A handwritten signature in black ink, appearing to read "Brett J. Esplin", written over a horizontal line.

Addenda

Addendum A

CONSTITUTION OF UTAH

ARTICLE I DECLARATION OF RIGHTS

Sec. 6. [Right to bear arms.]

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

History: Const. 1896; L. 1984 (2nd S.S.), S.J.R. 3. Joint Resolution No. 2, proposing to amend this section, was repealed by Senate Joint Resolution No. 3, Laws 1984 (2nd S.S.), § 2.

Compiler's Notes. — Laws 1983, Senate

76-10-503. Purchase or possession of dangerous weapon, firearm, or explosive — Persons not permitted to have — Penalties.

(1) (a) Any person who has been convicted of any crime of violence under the laws of the United States, this state, or any other state, government, or country, or who is addicted to the use of any narcotic drug, or who has been declared mentally incompetent may not own or have in his possession or under his custody or control any dangerous weapon as defined in Section 76-10-501.

(b) Any person who violates this subsection is guilty of a class A misdemeanor, and if the dangerous weapon is a firearm or sawed-off shotgun, he is guilty of a third degree felony.

(2) (a) Any person who is on parole or probation for a felony may not have in his possession or under his custody or control any explosive, chemical, or incendiary device as those terms are defined in Section 76-10-306 or dangerous weapon as defined in Section 76-10-501.

(b) Any person who violates this subsection is guilty of a third degree felony, but if the dangerous weapon is a firearm or an explosive, chemical, or incendiary device he is guilty of a second degree felony.

(3) (a) A person may not purchase, possess, or transfer any handgun described in this part who:

(i) has been convicted of any felony offense under the laws of the United States, this state, or any other state;

(ii) is under indictment;

(iii) is an unlawful user of a controlled substance as defined in Section 58-37-2;

(iv) is a drug dependent person as defined in Section 58-37-2;

(v) has been adjudicated as mentally defective, as provided in the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993), or has been committed to a mental institution;

(vi) is an alien who is illegally or unlawfully in the United States;

(vii) has been discharged from the Armed Forces under dishonorable conditions; or

(viii) is a person who, having been a citizen of the United States, has renounced such citizenship.

(b) Any person who violates this Subsection (3) is guilty of a third degree felony.

Addendum B

2-6-01 Deputy

**IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH**

STATE OF UTAH,

Plaintiff,

vs.

WADE LEON WILLIS,

Defendant.

RULING AND ORDER

Case No. 001403071

Judge Gary D. Stott

Before the Court is Defendant's Motion to Dismiss, filed January 4, 2001, and his accompanying memorandum in support thereof. The State filed an Opposition to Defendant's Motion to Dismiss, and the Defendant filed a Response.

Defendant moves to dismiss Count I of this prosecution on the grounds that U.C.A. § 76-10-503(2)(a) violates Defendant's right to keep and bear arms pursuant to Article I, Section 6 of the Utah Constitution. This provision of the Utah Constitution reads:

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

The Defendant argues that a portion of the statute under which Defendant was charged is at odds with this provision of the Utah Constitution, and is therefore unconstitutional. Defendant was charged under U.C.A. § 76-10-503(2)(a), which reads:

(2) Any Category I restricted person who purchases, transfers, possesses, uses, or has under his custody or control:

(a) any firearm is guilty of a second degree felony.

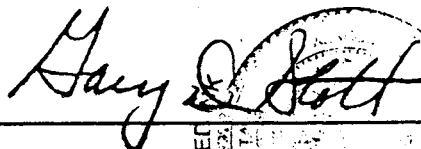
Defendant maintains that the Utah Constitution has granted the legislature the power to regulate the *use* of firearms, but not the *possession* of firearms. Defendant asserts that this statute is unconstitutional because it prohibits the mere possession of a firearm, the crime with which Defendant was charged in Count I.

The recent case of State v. In, 2000 UT App. 358, addresses the constitutionality of U.C.A. § 76-10-503(2)(a) in light of Article I, Section 6 of the Utah Constitution. The Appellate Court noted that “[w]hen addressing [constitutional challenges], this court presumes that the statute is valid, and [resolves] any reasonable doubts in favor of constitutionality.” Id. The court then concluded that the statute “does not unconstitutionally interfere with one’s right to bear arms. This statute only restricts that right under very limited circumstances—such as a felony indictment or conviction. Such restrictions are constitutional.” Id. (citations omitted). The court further cited State v. Beorchia, 530 P.2d 813, 815 (Utah 1974), as holding that this statute is a proper exercise of State police powers.

In light of this recent appellate decision, the Court holds that the restrictions contained in U.C.A. § 76-10-503(2)(a), including the restriction of mere possession of a firearm by a restricted person, do not unconstitutionally interfere with one’s right to bear arms because the statute only restricts that right under very limited circumstances. Defendant’s Motion is Dismiss is therefore denied.

DATED this 6 day of Feb, 2001,

BY THE COURT



GARY D. STOTT, JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 001403071 by the method and on the date specified.

METHOD NAME

By Hand STATE OF UTAH
By Hand JARED ELDRIDGE

Dated this 6 day of Feb, 2001.

Keri Synt
Deputy Court Clerk

Addendum C

410 Utah Adv. Rep. 33, 2000 UT App 358, ¶ 14, 18 P.3d 500
(Cite as: 18 P.3d 500)

©

Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,

v.

Chamnap IN, Defendant and Appellant.

No. 990710-CA.

Dec. 14, 2000.

Defendant was convicted in the District Court, Salt Lake Department, Sandra Peuler, J., of possession of a dangerous weapon by a restricted person, and defendant appealed. The Court of Appeals, Davis, J., held that: (1) defendant was a "convicted" felon for purposes of statute prohibiting a person convicted of a felony offense or under an indictment from possessing a handgun; (2) "convicted" as used in statute means guilty by verdict or plea, rather than by judgment of conviction at sentencing; and (3) application of statute to defendant did not violate defendant's due process rights.

Affirmed.

West Headnotes

[1] Criminal Law ↪ 1134(3)
110k1134(3) Most Cited Cases

If the trial court's order is premised on statutory interpretation, the Court of Appeals affords the trial court's interpretation no deference and reviews for correctness.

[2] Criminal Law ↪ 1134(3)
110k1134(3) Most Cited Cases

A constitutional challenge to a statute presents a question of law, which the Court of Appeals reviews for correctness.

[3] Constitutional Law ↪ 48(1)
92k48(1) Most Cited Cases

[3] Constitutional Law ↪ 48(3)
92k48(3) Most Cited Cases

When addressing a constitutional challenge to a statute, the Court of Appeals presumes that the statute is valid, and the Court resolves any reasonable doubts in favor of constitutionality.

[4] Weapons ↪ 4
406k4 Most Cited Cases

Defendant was a "convicted" felon within meaning of statute prohibiting a person convicted of a felony offense or under an indictment from possessing a handgun, though defendant had pled guilty to a prior felony but had not been sentenced on prior felony at time of his subsequent offense; if defendant was found innocent after

indictment, or the guilty plea or verdict was set aside or overturned, he would no longer be a restricted person, however, at time of plea, defendant was restricted based upon that conviction resulting from the plea or verdict. U.C.A.1953, 76-10-503(3)(a)(i) (1999).

[5] Statutes ↪208
361k208 Most Cited Cases

It is a fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.

[6] Weapons ↪4
406k4 Most Cited Cases

"Convicted," as used in statute prohibiting a person convicted of a felony offense or under an indictment from possessing a handgun, means guilty by verdict or plea, rather than by judgment of conviction at sentencing. U.C.A. 1953, 76-10-503(3)(a)(i) (1999).

[7] Sentencing and Punishment ↪30
350Hk30 Most Cited Cases

A guilty defendant who is considered worthy of a reduced sentence should receive all the advantages that go with such leniency.

[8] Constitutional Law ↪258(3.1)
92k258(3.1) Most Cited Cases

[8] Weapons ↪4
406k4 Most Cited Cases

Application of statute prohibiting person convicted of a felony or under an indictment from possessing a handgun to defendant did not violate defendant's due process rights; definition of "convicted" was sufficiently explicit to inform ordinary reader what conduct was prohibited, statute was narrowly constructed, there was no assertion that others had been treated differently, it did not vest unlimited enforcement discretion in anyone, and statute only restricted one's right to bear arms under very limited circumstances. U.S.C.A. Const. Amend. 14; Const. Art. I, § 6; U.C.A.1953, 76-10-503(3)(a)(i) (1999).

[9] Criminal Law ↪13.1(1)
110k13.1(1) Most Cited Cases

The failure to define a statutory term is not necessarily fatal to a statute.

[10] Criminal Law ↪13.1(1)
110k13.1(1) Most Cited Cases

A statute is not unconstitutionally vague if it is sufficiently explicit to inform the ordinary reader what conduct is prohibited and does so in a manner that does not encourage arbitrary and discriminatory enforcement.

*501 Linda M. Jones, Salt Lake Legal Defender Association, Salt Lake City, for Appellant.

Jan Graham, Attorney General and Kris C. Leonard, Assistant Attorney General, Salt Lake City, for Appellee.

Before Judges JACKSON, DAVIS, and ORME.

OPINION

DAVIS, Judge:

¶ 1 Defendant Charnap In appeals from his judgment of conviction for possession of a dangerous weapon by a restricted person, in violation of Utah Code Ann. § 76-10-503(3)(a)(i) (Supp.1997). [FN1] Defendant argues that he was not a "restricted person" as defined in section 76-10- 503(3)(a)(i) because, although he had pleaded guilty to a prior felony at the time of this offense, he had not been sentenced on that prior felony, and thus, he had not yet "been convicted of any felony offense." *See id.* Defendant further contends that if his first argument fails, his due process rights were violated because the statute fails to give adequate notice, it is susceptible to arbitrary enforcement, and it interferes with his right to bear arms. We affirm.

FN1. This statute has since been amended. *See Utah Code Ann. § 76-10-503 (Supp.2000).* Although those amendments are not material to the analysis of this case, we rely on the version of the statute which was in effect in January 1998 when defendant committed the offense.

BACKGROUND

¶ 2 Defendant, a member of the Tiny Oriental Posse gang, was involved in the drive-by shooting of a member of the Oriental Laotian Gangsters, a rival gang. Defendant pleaded guilty to discharging a firearm from a vehicle, a third degree felony, in violation of Utah Code Ann. § 76-10-508 (Supp.1997), on January 23, 1998. Sentencing on that offense was set for August 7, 1998. One week later, on January 30, 1998, defendant was involved in another shootout. Pursuant to an investigation of that shootout, defendant admitted he was in possession of a handgun, and was subsequently charged with **possession of a dangerous weapon by a restricted person, in violation of Utah Code Ann. § 76-10-503(3)(a)(i) (Supp.1997).** Defendant's status as a restricted person was based solely on his prior guilty plea to a third degree felony.

ISSUES AND STANDARD OF REVIEW

[1][2][3] ¶ 3 Defendant asks us to address the following narrow issue: In the context of Utah Code Ann. § 76-10-503(3)(a)(i), is one "convicted" who has pleaded guilty, or been found guilty by a trier of fact but has not yet been sentenced and a judgment of conviction has not yet been entered? "[I]f the trial court's order is premised on statutory interpretation, as it is here, we afford the trial court's interpretation no deference and review for correctness." *State v. Dominguez*, 1999 UT App 343. ¶ 6, 992 P.2d 995 (citation omitted). Defendant contends, in the alternative, if we hold he is a restricted person under section 76-10- 503(3)(a)(i), then a

subsequent conviction under section 76-10-503(3)(a)(i) violates his due process rights because the statute fails to give adequate notice, is susceptible to arbitrary enforcement, and interferes with one's right to bear arms. [FN2] "A constitutional challenge to a statute presents a question of law, which we review for correctness." State v. Lopes, 1999 UT 24, ¶ 6, 980 P.2d 191. "When addressing such a challenge, this court presumes that the statute is valid, and we resolve any reasonable doubts in favor of constitutionality." Id.

FN2. Defendant's attorney stated in oral argument that he was not challenging the statute on its face.

ANALYSIS

[4] ¶ 4 Utah Code Ann. § 76-10-503(3)(a) (Supp.1997) states in pertinent part, "A person may not ... possess ... any handgun ... who: (i) has been convicted of any felony offense under the laws of the United States, *502 this state, or any other state; [or] (ii) is under indictment...." Id. In this case, defendant disputes the trial court's interpretation of the meaning of "convicted." "Previous cases have acknowledged that in the legal context, there are two common meanings for 'conviction': one which denotes the establishment of 'guilt by verdict or plea' and one which refers to 'the final judgment entered on the plea or verdict.'" State v. Hunt, 906 P.2d 311, 313 (Utah 1995) (quoting State v. Duncan, 812 P.2d 60, 62

(Utah Ct.App.1991)); cf. State v. Ewell, 883 P.2d 1360, 1363 (Utah Ct.App.1993) (holding that definition of "conviction" in context of Utah Code Ann. § 76-3-203(4) (1990) firearms enhancement does not include sentencing).

[5] ¶ 5 The determination of which definition controls turns on " 'the context and the purpose within which the term 'conviction' is used.' " Hunt, 906 P.2d at 313 (quoting Duncan, 812 P.2d at 62). "Indeed, it is a 'fundamental principle of statutory construction ... that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" Id. (quoting Deal v. United States, 508 U.S. 129, 132, 113 S.Ct. 1993, 1996, 124 L.Ed.2d 44 (1993)).

[6] ¶ 6 With respect to section 76-10-503(3)(a), the context and purpose within which the term "convicted" is used indicate that the proper meaning here is guilt by verdict or plea rather than by judgment of conviction at sentencing. The purpose of such a law is to restrict access of weapons to those who could be dangerous to society. The statute restricts access to handguns not only to convicted felons, but also to people under indictment. It would be illogical to restrict a person from possessing a handgun who has merely been accused of committing a crime and is under indictment, but then allow that person to turn around and possess a handgun upon a plea or verdict of guilt pending sentencing. [FN3] Indeed, the thrust of this statute is to restrict one's possession of a handgun upon

an indication that one may be a danger to society. See Utah Code Ann. § 76-10-503(3) (Supp.1997). Thus, the context and purpose of this statute indicate that convicted refers to a plea or verdict of guilt, and not to a judgment of conviction.

FN3. Even if one were later allowed to withdraw his or her plea, or the court entered the conviction for a lower category of offense, one could still be guilty of possession of a dangerous weapon by a restricted person. Such a finding is consistent with the legislative intent, just as one could violate this statute while under indictment even if he or she was later found not guilty.

¶ 7 This holding is also consistent with the analysis in State v. Hunt, 906 P.2d 311 (Utah 1995), in which the Utah Supreme Court held that the meaning of conviction in the context of a sentencing enhancement statute referred to "the determination of guilt by verdict or plea rather than by judgment of conviction." Id. at 313. The supreme court reasoned that if conviction referred to judgment of conviction then "a defendant could commit an offense, be charged for that offense, and commit another offense while the charges were pending without being subject to the enhancement provision." Id. Likewise, defendant committed a crime with a handgun, after pleading guilty to a felony, while sentencing and judgment were pending on that felony. Such a situation

is consistent with the language of the statute, and "[w]e decline to inject ... an amendment into the otherwise plain language of the statute." Id.

¶ 8 In State v. Ewell, 883 P.2d 1360 (Utah Ct.App.1993), this court examined a firearm enhancement statute, Utah Code Ann. § 76-3-203(4) (1990), which distinguished the terms "sentenced" from "convicted," and held that sentencing must precede the second felony conviction in order to impose the enhancement. See id. at 1363. That holding is consistent with our holding here because the language at issue in Ewell supports the proposition that the Legislature is well aware of the difference between "convicted" and "sentenced." See id. at 1364-65 (Jackson, J., concurring).

[7] ¶ 9 Finally, State v. Duncan, 812 P.2d 60 (Utah Ct.App.1991), addressed whether a witness could be impeached for a felony plea which was reduced to a misdemeanor at sentencing. In Duncan, we held that the witness could not be impeached for the felony, once he had been sentenced to the misdemeanor. See id. at 64. This holding is not *503 inconsistent with our holding here. "A guilty defendant who is considered worthy of a reduced sentence should receive all the advantages that go with such leniency." Id. at 64. Likewise, here, if a defendant was found innocent after indictment, or the guilty plea or verdict was set aside or overturned, he would no longer be a restricted person. However, at the time of the plea, the defendant would be restricted based upon that conviction resulting from the plea or

verdict.

¶ 10 Thus, in the context of possession of a dangerous weapon by a restricted person, see Utah Code Ann. § 76-10-503(3)(a)(i) (Supp.1997), the term "convicted" refers either to the entry of a guilty plea or to a guilty verdict, and does not refer to the later entry of judgment on the conviction.

[8] ¶ 11 Next, defendant argues that his due process rights were violated because the statute fails to give adequate notice, is susceptible to arbitrary enforcement, and interferes with one's right to bear arms. We disagree.

[9][10] ¶ 12 First, section 76-10-503(3)(a)(i) gives adequate notice. "[T]he failure to define a statutory term is not necessarily fatal to a statute." State v. Shepherd, 1999 UT App 305, ¶ 10, 989 P.2d 503; see also State v. Krueger, 1999 UT App 054, ¶ 23, 975 P.2d 489, cert. granted, 984 P.2d 1023 (Utah 1999) (noting adequate notice of prohibited conduct even when statute failed to define term "delinquent"); State v. Owens, 638 P.2d 1182, 1185 (Utah 1981) (upholding constitutionality of statute when term "gross deviation" was not defined); Salt Lake City v. Lopez, 935 P.2d 1259, 1265 (Utah Ct.App.1997) (holding failure to define "emotional distress" in statute "does not render the statute unconstitutionally vague"). "[A] statute is not unconstitutionally vague if it is sufficiently explicit to inform the ordinary reader what conduct is prohibited and does so in a manner that does not encourage arbitrary and discriminatory enforcement."

Krueger, 1999 UT App 054 at ¶ 23, 975 P.2d 489; see also Greenwood v. City of N. Salt Lake, 817 P.2d 816, 819 (Utah 1991). Here, the definition of "convicted" "is sufficiently explicit to inform the ordinary reader what conduct is prohibited." Krueger, 1999 UT App 054 at ¶ 23, 975 P.2d 489. In common usage, the verb "convict" means "to find or prove to be guilty." Webster's Ninth New Collegiate Dictionary 287 (1986); see also Black's Law Dictionary 335 (7th ed. 1999) ("To find (a person) guilty of a criminal offense either upon a criminal trial, a plea of guilty, or a plea of nolo contendere (no contest).") In addition, the statute prohibits a person under indictment from possessing a handgun. It would be unreasonable for a person to interpret the term "convicted" under its technical definition of the actual entry of judgment of conviction, as opposed to its more common meaning of a finding or proving of guilt, especially in light of the prohibition against possessing a handgun when indicted, which is a mere accusation of a crime.

¶ 13 Second, this statute is not susceptible to arbitrary enforcement. The statute is narrowly constructed and there is no assertion that others have been treated differently in the application of this statute. In addition, the statute does not vest unlimited enforcement discretion in anyone.

¶ 14 Finally, this statute does not unconstitutionally interfere with one's right to bear arms. **This statute only restricts that right under very limited**

circumstances--such as a felony indictment or conviction. See Utah Code Ann. § 76-10-503(3)(a)(i) (Supp. 1997). Such restrictions are constitutional. See Utah Const. art. I, § 6 ("nothing herein shall prevent the legislature from defining the lawful use of arms"); State v. Beorchia, 530 P.2d 813, 815 (Utah 1974) (holding that this section is a proper exercise of State police powers).

CONCLUSION

¶ 15 The trial court did not err in finding defendant a "restricted person" as defined in section 76-10-503(3)(a)(i) based upon his prior felony plea of guilty at the time of this offense. In addition, defendant's due process rights were not violated. The statute gives adequate notice, is not susceptible to arbitrary enforcement, and does not unconstitutionally interfere with defendant's right to bear arms. We affirm.

*504 ¶ 16 I CONCUR: JACKSON, Associate Presiding Judge.

¶ 17 I CONCUR IN THE RESULT: GREGORY K. ORME, Judge.

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Addendum D

451 Utah Adv. Rep. 12,
(Cite as: 52 P.3d 461)

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Court of Appeals of Utah.

STATE of Utah, Plaintiff and Appellee,
v.
Wade WILLIS, Defendant and
Appellant.

No. 20010495-CA.

July 5, 2002.

Defendant was convicted in Fourth District Court, Provo Department, Gary D. Stott, J., of possession of a firearm by a restricted person. Defendant appealed. The Court of Appeals, Jackson, P.J., held that Weapons Restriction Statute was not unconstitutional.

Affirmed.

West Headnotes

[1] Criminal Law ⚡ 1134(3)
110k1134(3) Most Cited Cases

A constitutional challenge to a statute presents a question of law, which is reviewed for correctness.

[2] Constitutional Law ⚡ 48(1)
92k48(1) Most Cited Cases

[2] Constitutional Law ⚡ 48(3)

92k48(3) Most Cited Cases

When addressing a constitutional challenge to a statute, the reviewing court presumes that the statute is valid, and resolves any reasonable doubts in favor of constitutionality.

[3] Weapons ⚡ 1
406k1 Most Cited Cases

[3] Weapons ⚡ 4
406k4 Most Cited Cases

Weapons Restrictions Statute that prohibited defendant from possessing a firearm was a valid exercise of State police power and did not violate Second Amendment, where statute restricted the right under very limited circumstances such as felony indictment or conviction. U.S.C.A. Const. Amend. 2; Const. Art. 1, § 6; U.C.A. 1953, 76-10-503(2)(a).

*461 Margaret P. Lindsay, Provo, for Appellant.

Mark L. Shurtleff and Brett J. DelPorto, Salt Lake City, for Appellee.

Before Judges JACKSON, DAVIS, and THORNE.

OPINION

JACKSON, Presiding Judge:

¶ 1 Defendant appeals his conviction subsequent to a conditional guilty plea to possession of a firearm by a restricted person, a second-degree felony, in violation of Utah Code Ann. § 76-10-503(2)(a) (Supp.2001) (Weapons Restrictions Statute). [FN1] We affirm.

FN1. This section provides, in pertinent part, "[a] Category I restricted person who purchases, transfers, possesses, uses, or has under his custody or control: (a) any firearm is guilty of a second degree felony." Utah Code Ann. § 76-10-503(2)(a) (Supp.2001).

[1][2] ¶ 2 Defendant challenges the statute under which he was convicted as being unconstitutional on its face. " 'A constitutional challenge to a statute presents a question of law, which we review for correctness.... When addressing such a challenge, *462 this court presumes that the statute is valid, and we resolve any reasonable doubts in favor of constitutionality.' " State v. Morrison, 2001 UT 73, ¶ 5, 31 P.3d 547 (Utah 2001) (alteration in original) (quoting State v. Lopes, 1999 UT 24, ¶ 6, 980 P.2d 191).

ANALYSIS

[3] ¶ 3 State v. In, 2000 UT App 358, 18 P.3d 500, is controlling. In that case we stated that the Weapons Restrictions Statute does not unconstitutionally interfere with

one's right to bear arms. This statute only restricts that right under very limited circumstances--such as a felony indictment or conviction. Such restrictions are constitutional. See Utah Const. art. I, § 6 ...; [FN2] State v. Beorchia, 530 P.2d 813, 815 (Utah 1974) (holding that this section is a proper exercise of State police powers).

FN2. Utah Const. art. I, § 6 provides: "The individual right of the people to keep and bear arms for security and defense of self, family, and others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms."

Id. at ¶ 14. Defendant attempts to distinguish the present case by arguing that *In* only addresses the constitutionality of the statute as it applies to *use*, as opposed to "mere *possession* of a firearm by a restricted person." (Emphasis added.) However, our conclusion in *In*, a case in which the defendant was convicted of illegally *possessing* a firearm, simply stated that the restrictions contained in "this statute do[] not unconstitutionally interfere with one's right to bear arms," and made no distinction between use and possession. *Id.* Because *In* made no distinction between use and possession, its conclusion that the Weapons Restrictions Statute is constitutional applies both to restrictions on possession and to

restrictions on use. [FN3]

FN3. Moreover, we note that one may "use" a firearm by the mere act of possessing it--e.g., to deter unlawful behavior in "defense of self, family, and others" etc. Utah Const. art. I, § 6. By way of further illustration, we note that the United States, by mere possession of a nuclear arsenal, theoretically "uses" that arsenal to deter would-be aggressors from taking military action against it. We also note that Utah Const. art. I, § 6 makes no distinction between passive use and active use of a firearm.

¶ 4 Accordingly, we reject Defendant's constitutional challenge to the Weapons Restrictions Statute and affirm his conviction for possession of a firearm by a restricted person.

¶ 5 Affirmed.

¶ 6 We Concur: JAMES Z. DAVIS and WILLIAM A. THORNE JR., Judges.

52 P.3d 461, 451 Utah Adv. Rep. 12, 2002
UT App 229

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