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Opinion No. 12-90

Handgun Carry Permit Fees and Fines for Unlawfully Carrying Weapons

QUESTION

Do the fees charged for obtaining a handgun carry permit or the fines imposed for unlawfully carrying a weapon impermissibly burden the right to keep and bear arms guaranteed by the United States and Tennessee Constitutions?

OPINION

No. A permit fee that defrays expenses incident to regulating the exercise of a constitutional right does not per se infringe that right. Fines for unlawful weapon possession do not burden the constitutional right to keep and bear arms but instead penalize violations of a legitimate regulatory measure.

ANALYSIS

The General Assembly has designated that the carrying of a firearm with the intent to go armed is a crime in Tennessee. Tenn. Code Ann. § 39-17-1307(a)(1). A first offense can subject an offender to a fine of up to \$500 and imprisonment for up to 30 days. Tenn. Code Ann. §§ 39-17-1307(a)(2)(A), 40-35-111(e)(3). It is a defense to prosecution that a person carrying a handgun possesses a valid handgun carry permit. Tenn. Code Ann. § 39-17-1308(a)(2). *See also* Tenn. Code Ann. § 39-17-1351(n)(1). To obtain a permit, one must pay a fee of \$115. Tenn. Code Ann. § 39-17-1351(p)(1).

The Second Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, protects the right to keep and bear arms for the purpose of self-defense. U.S. Const. amend. II; *see McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (holding that “the Second Amendment right is fully applicable to the States”). Tennessee’s Constitution also guarantees the right of citizens “to keep and to bear arms for their common defense.” Tenn. Const. art. I, § 26. Under both constitutions, the right is subject to reasonable regulation by the State. *See District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008) (observing that “the right secured by the Second Amendment is not unlimited” and that “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues,” labeling such prohibitions and similar measures “presumptively lawful regulatory measures”); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 185 (Tenn. 1871) (stating that the right “is no more above

regulation for the general good than any other right”). This Office has previously opined that neither Tennessee’s prohibition on carrying firearms with intent to go armed nor the statutory handgun permitting scheme violates the Tennessee Constitution. Op. Tenn. Att’y Gen. 96-080 (Apr. 25, 1996) (opining that Tenn. Code Ann. § 39-17-1307(a)(1) does not infringe upon the citizen’s right to keep and bear arms for their common defense); Op. Tenn. Att’y Gen. 95-118 (Nov. 28, 1995) (opining that “the statutory permitting scheme does not violate Article I, § 26 of the Tennessee Constitution”).

The fee imposed for obtaining a handgun carry permit and the fines exacted for carrying one with no permit do not unconstitutionally restrict the right to keep and bear arms. A fee that is used to meet expenses incident to the administration of a regulatory statute governing the exercise of a constitutional right does not constitute an unconstitutional infringement of that right. See, e.g., *Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941) (upholding license fee on parade); *State v. Smoky Mountain Secrets, Inc.*, 937 S.W.2d 905, 916 (Tenn. 1996) (citing *Cox* for the proposition that “fees are consistent with the guarantees of free expression and equal protection if the State can prove that the fees are no more than that amount necessary to pay for the administrative and enforcement costs of the Act”). In the First Amendment context, at least, there may be “some limit” on the amount the government can charge based on the potential for a fee to deter protected speech. *729, Inc. v. Kenton County Fiscal Court*, 515 F.3d 485, 503 (6th Cir. 2008).

By its explicit terms, Tenn. Code Ann. § 39-17-1351 provides that the fee for handgun carry permits “shall cover all aspects of processing the application and issuing a permit.” Tenn. Code Ann. § 39-17-1351(p)(1). The purpose of charging the fee is thus limited to defraying expenses occurred in furtherance of the legitimate state interest in preventing crime. See Tenn. Code Ann. § 39-17-1351(a) (expressing the legislative intent that, while “[t]he citizens of this state have a right to keep and bear arms for their common defense,” the “general assembly has the power, by law, to regulate the wearing of arms with a view to prevent crime”). The United States Constitution does not prohibit the State of Tennessee from imposing fees designed to defray the administrative costs of regulating a constitutionally protected activity such as the right to bear arms under the Second Amendment. As a federal district court recently explained in finding that the Second Amendment did not prohibit New York City’s imposition of a \$340 fee for a three-year handgun license:

The plaintiffs first argue that the \$340 fee is impermissible under the standards that govern the imposition of fees on the exercise of constitutionally protected activities here, the Second Amendment right to keep and bear arms.

The Supreme Court’s fee jurisprudence, which has addressed the imposition of fees on expressive activities protected by the First Amendment, makes clear that, while the Government may not tax the exercise of constitutionally protected activities, it may impose a fee designed to defray the administrative costs of regulating the protected activity. In *Cox v. New Hampshire*, 312

U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941), the Court found that a state statute requiring marchers to obtain licenses and prepay fees with a permissible range of from a “nominal amount” to \$300 a day to parade on public streets was permissible because the fee was “not a revenue tax, but one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed.” *Id.* at 577 (citation omitted). The Court stated that “[t]here is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated.” *Id.* In contrast, in *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), the Court invalidated a city ordinance that, as applied, required religious groups to pay a license fee of \$1.50 a day before distributing literature. The Court found the ordinance to be “a flat tax imposed on the exercise of a privilege granted by the Bill of Rights[.]” *id.* at 113, because the license fee was “not a nominal fee, imposed as a regulatory measure to defray the expense of policing the activities in question[.]” *id.* at 113–14.

Subsequent cases have thus analyzed the permissibility of fees imposed on the exercise of expressive activities by examining whether those fees were designed to defray, and did not exceed, the administrative costs of regulating the protected activity. . . .

This standard has also been applied by those few courts that have considered fees imposed on the exercise of Second Amendment rights. *See Justice v. Town of Cicero*, No. 10 Civ. 5331, 2011 WL 5075870, at *7 (N.D. Ill. Oct. 25, 2011) (\$25 application fee for registration of firearms was permissible because, “[l]ike the fee in [*Cox*], [the] registration fee ... is ‘not a revenue tax, but one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed’” (quoting *Cox*, 312 U.S. at 577)); *Heller v. District of Columbia* (“*Heller II*”), 698 F.Supp.2d 179, 192 (D. D.C. 2010) (upholding firearm registration requirements, including imposition of fees for registration, fingerprinting and ballistic identification totaling \$60, concluding that fees were “intended to compensate the District for the costs of fingerprinting registrants, performing ballistic tests, processing applications and maintaining a database of firearms owners”), *aff’d in part, rev’d in part on other grounds*, No. 10–7036, 2011 WL 4551558 (D.C. Cir. Oct.4, 2011); *see also* D.C. Mun. Regs. tit. 24, § 2320.

....

Courts of Appeals have also specifically rejected the argument that a fee imposed on the exercise of constitutionally protected activities must be “nominal” in amount to be permissible. *See Am. Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1248–49 (10th Cir. 2000) (rejecting plaintiffs' reliance on *Murdock* for proposition that sheer size of \$250 fee rendered it constitutionally excessive); *N.E. Ohio Coal. for Homeless*, 105 F.3d at 1110 (“[A] more than nominal permit fee is constitutionally permissible so long as the fee is reasonably related to the expenses incident to the administration of the ordinance and to the maintenance of public safety and order.” (internal quotation marks and citation omitted)); *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1136 (6th Cir.1991) (rejecting plaintiffs' reliance on *Murdock* for proposition that only nominal permit fees are permissible); *cf. Coal. for Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1323 n. 16 (11th Cir.2000) (“While we do not specifically address [the issue], we note that the majority of our sister circuits have interpreted [*Forsyth County*] as making it constitutionally permissible for an ordinance regulating constitutionally protected activity to impose a permit fee which is more than nominal”) (collecting cases).

While it is possible to conceive of fees that are impermissible because they are so exorbitant as to deter the exercise of the protected activity, *see 729, Inc. v. Kenton Cnty. Fiscal Court*, 515 F.3d 485, 503 (6th Cir.2008) (concluding that the Supreme Court's fee cases “created some limit on the amount the government could charge, based on the potential for a fee to deter protected speech”), there is no showing that the \$340 handgun licensing fee qualifies as such a fee. The plaintiffs merely assert that the \$340 fee is excessive, which is not sufficient to raise a genuine issue of material fact regarding the permissibility of the fee. *See 729, Inc. v. Kenton Cnty. Fiscal Court*, 402 F. App'x 131, 133 (6th Cir.2010) (“Merely asserting that the fee is exorbitant, without evidentiary support, is insufficient to withstand the County's motion for summary judgment.”).

Kwong v. Bloomberg, No. 11 Civ. 2356 (JGK), 2012 WL 995290, at *7-8 (S.D.N.Y. March 26, 2012) (footnotes omitted).

As for the fines imposed for carrying a firearm without a permit, those do not burden the right to bear arms at all, but arise from breaches of a reasonable regulatory measure. Such fines are unconstitutional only if grossly disproportional to the gravity of a defendant's offense. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998); *United States v. Blackwell*, 459 F. 3d 739, 771 (6th Cir. 2006). *See also State v. Taylor*, 70 S.W.3d 717, 723 (Tenn. 2002). The fines

established by the General Assembly in Tenn. Code Ann. § 39-17-1307 and in similar provisions of the Code do not transgress that outer limit. *See Bajakajian*, 524 U.S. at 336 (stating that judgments about the appropriate punishment for an offense belong in the first instance to the legislature); *Ross v. Duggan*, 402 F.3d 575, 588-89 (6th Cir. 2004) (finding fines and fees ranging from \$900 to \$2000, imposed for release of vehicles impounded pursuant to Michigan’s nuisance abatement law, not unconstitutionally excessive).

The decision in *City of Maryville v. Langford*, No. E2011-01326-R3-CV, 2012 WL 23096-7 (Tenn. Ct. App. June 19, 2012), does not compel a different conclusion. There the Court of Appeals held overbroad an ordinance requiring “any club, organization, or similar group” to obtain a permit before holding any “meeting, parade, demonstration, or exhibition on the public streets” because it could apply to virtually any pair or group of people engaged in a common activity. *Id.* at *8. Thus the issue before the court was whether the statute itself was unconstitutional on its face because it was “vague, overly broad, and affords too much discretion to the officials charged with issuing permits.” *Id.* at *10. In response to the municipality’s argument that the fine for violating the ordinance was relatively slight and hence did not unduly restrict free speech, the Court remarked that “there is no economic sliding scale for the right to engage in constitutionally protected activities.” *Id.* at *8 That observation reflects that the smallness of a fine cannot salvage an otherwise overbroad law, not that permit fees charged incident to regulation of constitutionally protected activity are per se invalid.

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