Does a DWI Conviction Bar a Person from Possessing a Gun?

Author : Shea Denning

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The maximum punishment for driving while impaired in violation of G.S. 20-138.1 increased from two to three years in 2011. As a result, defendants convicted of misdemeanor DWI and sentenced at the most serious level—Aggravated Level One—are prohibited from possessing firearms by federal law. That's because federal law prohibits firearm possession by a person who has been convicted of a crime punishable by imprisonment for a term exceeding one year, though state law misdemeanors that are punishable by a term of imprisonment of two years or less are excluded from this category of disqualifying convictions. Because North Carolina law sets out a single offense of driving while impaired, which may be punished at varying levels, rather than six separate offenses, there is a question as to whether ***any*** defendant convicted of misdemeanor DWI on or after December 1, 2011 may lawfully possess a firearm, regardless of the level at which the defendant was actually punished.

Federal gun law. The federal law colloquially referred to as the felon-in-possession statute is 18 U.S.C. § 922(g)(1). *See* Schrader v. Holder, 831 F. Supp. 2d 304, 309 (D.D.C. 2011) *aff'd*, 704 F.3d 980 (D.C. Cir. 2013). That label is a misnomer, however, as misdemeanor convictions punishable by more than two years imprisonment under state law also disqualify a person from possessing a firearm. *Id.* Section 922(g)(1) makes it unlawful for any person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. Another provision, 18 U.S.C. § 921(a)(20), defines "crime punishable by imprisonment for a term exceeding one year" to exclude "any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less." Thus, for defendants convicted of misdemeanors under state law, the question of whether they are disqualified from possessing a firearm under 18 U.S.C. 922(g)(1) is determined by whether the misdemeanor for which they were convicted carried a maximum punishment of more than two years. If so, the person is disqualified. (*A separate provision of federal law, 18 U.S.C. § 922(g)(9), prohibits firearm possession by a person who has been convicted of a misdemeanor crime of domestic violence. That provision is not tied to a determination of the maximum punishment that could have been imposed for the crime, and is not discussed herein*.)

State DWI law. G.S. 20-138.1 proscribes the conduct known as DWI in North Carolina. A person who (1) drives (2) a vehicle (3) on a street, highway, or public vehicular area within the State, (4) while under the influence of an impairing substance commits the offense of misdemeanor DWI. The person's relative culpability is sorted out at sentencing, based largely on whether the person (1) had other DWI convictions within the previous seven years; (2) had a license that was already revoked for DWI; (3) seriously injured another person; and/or (4) had a child or disabled person in the vehicle when he or she drove. *See* G.S. 20-179(c). In superior court, the State must notify the defendant in writing and before trial of its intention to prove any aggravating factor, including the four grossly aggravating factors previously mentioned. The existence of one or more grossly aggravating factors increases the potential punishment a defendant faces. If three or more grossly aggravating factors are found, the defendant is punished at Aggravated Level One, and may receive up to three years' imprisonment. If two grossly aggravating factors are found, the defendant is punished at Level One, and may receive up to two years' imprisonment. Levels Two through Five carry lesser maximum punishments.

Because G.S. 20-179 effectively requires a prosecutor in superior court to plead applicable aggravating factors, and requires that such factors, other than the fact of a prior conviction, be proved to the jury beyond a reasonable doubt,

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questions regarding whether G.S. 20-138.1 and G.S. 20-179 define one or six offenses are, in most circumstances, academic. The federal felon-in-possession law is, however, an exception. If there are six separate DWI offenses, then only a DWI conviction punished at Aggravated Level One disqualifies a defendant from possessing a firearm. If there is but one crime of DWI that carries a maximum punishment of three years, then any conviction for a DWI committed December 1, 2011 or later might be viewed as disqualifying ~~disqualifies~~ a defendant from possessing a firearm. *See* Binderup v. Holder, 2014 WL 4764424 (E.D.Pa. Sept 25, 2014) (unpublished op.) ("The cases discussed above demonstrate that the phrase "punishable by", as utilized in § 921(a)(20) and § 922(g)(1), concerns the maximum . . potential . . . term of imprisonment applicable to a particular prior state-law conviction."). ~~It seems to me that there are reasonable arguments to be made both ways.~~

The Fourth Circuit's analysis in United States v. Simmons, 649 F.3d 237 (4th Cir. 2011), of whether convictions under the State's structured sentencing laws qualify as offenses "punishable by imprisonment for more than one year," tends to support the view that only a defendant punished at Aggravated Level One is disqualified under § 922(g)(1). The *Simmons* court concluded that the defendant's conviction for a Class I felony offense for which he could not have received a sentence exceeding eight months' community punishment given his lack of criminal history was not a conviction for an offense punishable by imprisonment for term exceeding one year, even though a defendant with a certain number of prior criminal convictions could have received a sentence exceeding twelve months' imprisonment. The court explained that the "mere possibility that Simmons's conduct, coupled with facts outside the record of conviction, could have authorized a conviction of a crime punishable by more than one year's imprisonment cannot and does not demonstrate that Simmons was actually convicted of such a crime." *Id.* at 244 (internal quotations omitted). The Fourth Circuit in United States v. Carter, 471 Fed. Appx. 136 (4th Cir. 2012) (unpublished op.), applied *Simmons* in determining that a defendant's prior convictions for drug offense classified as felonies under North Carolina's structured sentencing regime were not offenses punishable by a term of imprisonment exceeding one year for purposes of the federal felon-in-possession statute.

Simmons relied upon the fact that the State had to prove the existence of aggravating factors sufficient to warrant the imposition of an aggravated sentence under the Structured Sentencing Act. That also is true under the sentencing scheme set forth in G.S. 20-179 for DWI.

May the federal government categorically ban persons convicted of DWI from possessing a firearm?

The right to bear arms. The United States Supreme Court in District of Columbia v. Heller, 554 U.S. 570 (2008), held that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, including self-defense within the home. In recognizing an individual right to keep and bear arms, however, the court was careful to note that it did not intend to "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," as well as other long-enshrined restrictions. *See also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality op.) ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill,' . . . . We repeat those assurances here. Despite municipal respondents' doomsday proclamations, incorporation [of the Second Amendment by the Fourteenth Amendment] does not imperil every law regulating firearms."). Courts considering post-*Heller* challenges to § 922(g)(1) have relied upon this commentary in upholding the provision as constitutional.

Are misdemeanants different? The District of Columbia Circuit Court of Appeals in Schrader v. Holder, 704 F.3d 980 (D.C. Cir. 2013), considered plaintiffs' challenge to his disqualification under § 922(g)(1) based on a decades-old conviction of a common law misdemeanor. The *Schrader* court determined that even assuming that common-law misdemeanants fell within the scope of the Second Amendment's protection, the firearms ban imposed upon this class of individuals was constitutional. The court applied intermediate, rather than strict, scrutiny since "common-law misdemeanants as a class cannot be considered law abiding and responsible." *Id.* at 989. Thus, the government was required to demonstrate that disarming common-law misdemeanants is substantially related to an important governmental objective. *Schrader* held that the government met this test. The statute's overarching objective is prevention of armed violence, which is of obvious importance. The firearms ban in § 922(g)(1) is reasonably designed

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to accomplish that objective as it keeps guns away from people suspected of more serious crimes—people who might be expected to misuse such weapons. While some common-law misdemeanants may pose no such risk, *Schrader* noted that "Congress is not limited to case-by-case exclusions of persons who have been shown to be untrustworthy with weapons." *Id.* at 991 (internal citations omitted).

As-applied challenges might succeed. The *Schrader* court noted that *Heller* might dictate a different outcome had the plaintiffs raised an as-applied challenge. Schrader himself was disqualified based on a misdemeanor conviction for assault and battery that occurred forty years before he sought to purchase a gun. The offense involved only a fistfight. Schrader received no jail time, served honorably in Vietnam, and, except for a single traffic violation, had no arrests or convictions in the years that followed. The court declined to consider such a challenge, however, as it had not been argued below.

What do you think?

- Are all persons convicted of DWI for an offense committed on or after December 1, 2011, disqualified from possessing a firearm based on the theory that DWI is a single offense punishable by up to three years imprisonment?
- Alternatively, does the disqualification only apply to defendants sentenced at Aggravated Level One?
- Does anyone know whether the FBI is issuing denial decisions to prospective firearms purchasers based on DWI convictions?

Have other insights to share? Have your say using the comment feature below.

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