Is "Justification" a Defense to Possession of a Firearm by a Person with a Felony Conviction?

Author : John Rubin

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North Carolina law prohibits a person who has been convicted of a felony from possessing a firearm. The prohibition, set forth in G.S. 14-415.1, contains narrow exceptions, such as for antique firearms. The question has arisen in several cases whether a person with a prior felony conviction may possess a firearm if necessary to defend himself or others—in other words, whether the person may rely on a justification defense.

So far, the North Carolina appellate courts have withheld final judgment on the question. Several North Carolina decisions acknowledge that other courts have recognized that a person with a prior felony conviction may assert a justification defense to a charge of illegally possessing a firearm. These decisions set forth the requirements for the defense and measure the defendant's conduct against them. They do not recognize the defense explicitly, however, stating that assuming the defense exists, the defendant did not satisfy the requirements. *See, e.g., State v. Edwards*, ___ N.C. App. ___, 768 S.E.2d 619 (2015); *State v. Monroe*, 233 N.C. App. 563, 571 (2014) (Stroud, J., dissenting) (arguing for explicit recognition of defense and noting that several North Carolina decisions have relied on the test for the defense, "although only assuming *arguendo* that it would apply because the facts in those cases did not satisfy the test"), *aff'd per curiam*, 367 N.C. 771 (2015).

In anticipation that the North Carolina courts would allow the defense in appropriate circumstances, this post provides a brief summary of the defense and potential issues.

The defense may go by different names. Defendants raising the defense have used various labels to describe it, including duress, coercion, necessity, and self-defense. *See U.S. v. Nolan*, 700 F.2d 479 (9th Cir. 1983) (so noting); *see also State v. Monroe*, 233 N.C. App. at 565 (noting blurring of duress and necessity defenses). It is probably most accurate to call the defense simply a "justification" defense because the courts have merged the requirements into a single defense in this context.

Almost all federal courts recognize the defense. Like North Carolina law, federal law prohibits a person with a prior felony conviction from possessing a firearm. Of the twelve federal circuit courts of appeal, eleven have recognized a justification defense in limited circumstances. Only the Eighth Circuit has withheld judgment. *See U.S. v. Mooney*, 497 F.3d 397, 403 (4th Cir. 2007) (recognizing that first, second, third, fourth, fifth, sixth, ninth, tenth, and eleventh circuits have recognized defense); *U.S. v. Kilgore*, 591 F.3d 890 (7th Cir. 2010) (recognizing defense); *U.S. v. Mason*, 233 F.3d 619 (D.C. Cir. 2000) (also recognizing innocent possession defense); *compare U.S. v. El-Alamin*, 574 F.3d 915 (8th Cir. 2009).

The Fourth Circuit has held that an attorney provided ineffective assistance of counsel by advising a client that no such defense is "ever available." *U.S. v. Mooney*, 497 F.3d at 404.

The federal courts have found that the federal statute does not preclude the defense. Like North Carolina's statute, the federal prohibition on possession of a firearm by a person with a felony conviction does not specifically provide for a justification defense. In recognizing the availability of the defense, the federal courts have observed that "'Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law." The failure to

provide specifically in a statute for a common-law defense does not preclude the defense. *U.S. v. Crittendon*, 883 F.2d 326, 329 (4th Cir. 1989) (quoting *U.S. v. Bailey*, 444 U.S. 394, 415 n.11 (1980)).

The federal courts also have rejected the argument that because possession of a firearm by a person with a felony conviction is a strict liability offense, a justification defense is unavailable. *See U.S. v. Nolan*, 700 F.2d 479, 484 (9th Cir. 1983) (noting availability of defense even though federal firearms laws "impose something approaching absolute liability"). As one court noted, "[c]ommon sense dictates that if a previously convicted felon is attacked by someone with a gun, the felon should not be found guilty for taking the gun away from the attacker in order to save his life." *U.S. v. Singleton*, 902 F.2d 471, 472 (6th Cir. 1990); *see also U.S. v. Gomez*, 92 F.3d 770, 774 n.7 (9th Cir. 1996) (author of opinion suggests that statute might not pass constitutional muster if it is not subject to justification defense).

In another context, the North Carolina courts rejected the argument that the defense of necessity is inapplicable to DWI prosecutions, which the State characterized as a strict liability offense. *See State v. Hudgins,* 167 N.C. App. 705 (2005).

The test for the defense is strict. In cases in which defendants have sought to rely on justification as a defense, the North Carolina courts have referred to the test stated in *U.S. v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000). Under *Deleveaux*, the defendant has the burden to show by a preponderance of the evidence that:

1. he was under an unlawful and present, imminent, and impending threat of death or serious bodily injury;
2. he did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct;
3. he had no reasonable legal alternative to violating the law; and
4. there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

The test may differ slightly in other circuits, but the defense is still available only in rare instances. *See, e.g., U.S. v. Mooney*, 497 F.3d 397, 406 (4th Cir. 2007) (requiring that defendant be under unlawful and present threat of death or serious bodily injury and that defendant not have recklessly placed himself in situation where he would be forced to engage in criminal conduct).

These requirements are stricter than for self-defense. For example, a defendant who acts recklessly (or negligently) loses the defense, while a defendant must have been the aggressor to lose the right of self-defense.

North Carolina decisions finding that the defendant failed to satisfy the test demonstrate its strictness. A defendant may fail the test by unnecessarily possessing a gun before or after the incident in which he needed the gun. For example, in *State v. Craig,* 167 N.C. App. 793 (2005), the defendant's evidence showed that his girlfriend handed him a gun while he was on the floor being kicked by several men; however, because the defendant unnecessarily kept the gun after he got away from his assailants and was no longer under an imminent threat, the court found the evidence was insufficient to warrant a justification instruction to the jury. In *State v. Boston*, 165 N.C. App. 214 (2004), the defendant took a gun with him to confront a person who had threatened to kill him and, after chasing the person, put the gun on the ground so they could "fight like men," at which time the person shot the defendant four times. The court held that the defendant was not entitled to a jury instruction on justification because he was not under an imminent threat when he made the decision to carry the gun. *See also State v. Edwards*, ___ N.C. App. ___, 768 S.E.2d 619 (2015) (defendant stated only that he got gun an hour earlier because people were threatening his life; evidence of generalized fear insufficient).

Defendants have satisfied the test in some instances. Although the test is strict, defendants have satisfied it in some instances, illustrated by the evidence they presented in the following cases:

- In *U.S. v. Ricks*, 573 F.3d 198 (4th Cir. 2009), the defendant knocked a gun away from his partner, who was acting erratically and talking incoherently; the defendant then removed the clip and threw the pieces in different

directions. After his partner ran off, the defendant put the clip and gun underneath some clothes on top of a dresser in the bedroom that the two shared. The defendant's partner returned with the police 15 to 30 minutes later, and the defendant retrieved the gun after several inquires by the police. The court found that the trial court erred in failing to instruct the jury on justification as a defense.

- In *U.S. v. Mooney*, 497 F.3d 397 (4th Cir. 2007), the defendant's ex-wife put a gun to his head and, after he took it away, he called his boss and said he was bringing it in to give to the police. He then walked directly to his place of employment to turn in the gun. The court found that the defendant was prejudiced by his attorney's advice that a justification defense was unavailable.
- In *U.S. v. Gomez,* 92 F.3d 770 (9th Cir. 1996), after the government inadvertently disclosed that the defendant was an informant against a murder-for-hire conspirator, the defendant received repeated death threats and went on the run, living on the streets, riding buses for hours, and falsely telling his parole agent that he was illegally using drugs so he could go back to jail, where he received additional death threats. After his release, the defendant obtained a shotgun, which the government discovered when it served a subpoena on him in the murder-for-hire case. The court held that the trial court erred in denying the defendant's request to present evidence about why he had a gun.
- In *U.S. v. Panter*, 688 F.2d 268 (5th Cir. 1982), the defendant was tending bar when he was stabbed by a bar patron after an argument; as he was fighting back, he fell on the floor beneath his assailant. The defendant reached underneath the bar for a club that he knew was there and found a pistol, which he used to shoot his assailant. The defendant then placed the pistol on the bar. The court found that the trial court erred in instructing the jury that it could not consider the defendant's reasons for possessing the firearm.

See also U.S. v. Rice, 214 F.3d 1295, 1297 (11th Cir. 2000) (comparing additional cases). Decisions such as these, as well as North Carolina decisions acknowledging the test for a justification defense, suggest that in appropriate circumstances defendants may be able to rely on the defense.