

Date: Thursday, August 22, 1996 10:08 am
From: CRM04 (DELACRUZ)
Subject: Fax Number Needed

Crime -
~~to~~ Restoration of
Gun Rights

I'll fax you a copy of the Arkansas statute. In essence it says a convicted felon does not have his firearms rights restored unless expressly approved by the Governor (or his designee), or by the Treasury Department (ATF or other designated bureau).

Send your fax number. The statute is a single page, and there are four additional explanatory pages.

AR ST § 5-73-103
A.C.A. § 5-73-103

Page 1

ARKANSAS CODE OF 1987 ANNOTATED
TITLE 5. CRIMINAL OFFENSES
SUBTITLE 6. OFFENSES AGAINST PUBLIC HEALTH, SAFETY, OR WELFARE
CHAPTER 73. WEAPONS
SUBCHAPTER 1. POSSESSION AND USE GENERALLY

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Current through End of 1995 First Extraordinary Session

5-73-103 Possession of firearms by certain persons.

(a) Except as provided in subsection (d) of this section or unless authorized by and subject to such conditions as prescribed by the Governor, or his designee, or the Bureau of Alcohol, Tobacco, and Firearms of the United States Treasury Department, or other bureau or office designated by the Treasury Department, no person shall possess or own any firearm who has been:

- (1) Convicted of a felony; or
- (2) Adjudicated mentally ill; or
- (3) Committed involuntarily to any mental institution.

(b) A determination by a jury or a court that a person committed a felony:

(1) Shall constitute a conviction for purposes of subsection (a) of this section even though the court suspended imposition of sentence or placed the defendant on probation; but

(2) Shall not constitute a conviction for purposes of subsection (a) of this section if the person is subsequently granted a pardon explicitly restoring the ability to possess a firearm.

(c)(1) A person who violates this section commits a Class B felony if he has been convicted of a felony, unless the prior felony was for a nonviolent offense and the possession of the firearm did not involve the commission of another crime; then it is a Class D felony.

(2) Otherwise, he commits a Class A misdemeanor.

(d) The Governor shall have authority, without granting a pardon, to restore the right of a convicted felon or an adjudicated delinquent to own and possess a firearm upon the recommendation of the chief law enforcement officer in the jurisdiction in which the person resides, so long as the underlying felony or delinquency adjudication:

- (1) Did not involve the use of a weapon; and
- (2) Occurred more than eight (8) years ago.

History. Acts 1975, No. 280, § 3103; 1977, No. 360, § 18; A.S.A. 1947, § 41-3103; Acts 1987, No. 74, § 1; 1994 (2nd Ex. Sess.), No. 63, § 1; 1995, No. 595, § 1; 1995, No. 1325, § 1.

A.C.R.C. Notes. Pursuant to § 1-2-207, this section is set out above as amended by Acts 1995, No. 1325. This section was also amended by Acts 1995, No. 595 to read as follows:

"(a) Except as provided in subsection (d) of this section or unless authorized by and subject to such conditions as prescribed by the Governor, or his designee, or the Bureau of Alcohol, Tobacco, and Firearms of the United States Treasury Department, or other bureau or office designated by the Treasury Department, no person shall possess or own any firearm who has been:

"(1) Convicted of a felony; or

"(2) Adjudicated mentally ill; or

"(3) Committed involuntarily to any mental institution.

"(b) A determination by a jury or a court that a person committed a felony:

"(1) Shall constitute a conviction for purposes of subsection (a) of this section even though the court suspended imposition of sentence or placed the defendant on probation; but

"(2) Shall not constitute a conviction for purposes of subsection (a) of this section if the person is subsequently granted a pardon explicitly restoring the ability to possess a firearm.

"(c)(1) A person who violates this section commits a Class B felony if he has been convicted of a felony.

"(2) Otherwise, he commits a Class A misdemeanor.

"(d) The Governor shall have authority to restore the right of a convicted felon to own and possess a firearm:

"(1) By granting a pardon explicitly restoring the right of the person to possess a firearm; or

"(2) Without granting a pardon, upon the recommendation of the chief law enforcement officer in the jurisdiction in which the person resides, so long as the underlying felony did not involve the use of a weapon and occurred more than three (3) years ago."

Publisher's Notes. Acts 1995, No. 1325, noted Apr. 14, 1995, became law without the Governor's signature. As to the effective date of Acts 1995, No. 595, see Effective Dates notes at the beginning of this subchapter.

Amendments. The 1995 amendment added the language beginning "unless the prior felony was for a nonviolent offense" in (c)(1).

The 1994 (2nd Ex. Sess.) amendment substituted "Except as provided in subsection (d) of this section or unless authorized" for "Unless so authorized" at the beginning of (a); and added (d).

RESEARCH REFERENCES

UALR L. J. DeSimone, Survey of Criminal Law, 3 UALR L.J. 191. Survey of Arkansas Law, Evidence, 5 UALR L.J. 139.

CASE NOTES

ANALYSIS

Constitutionality. Purpose. Authorization. Arrest. Constructive possession. Conviction. -- Proof. Evidence. Intent. Lesser included offense. Prior conviction. Sentencing. Trial proceedings.

Constitutionality.

This section is not an unconstitutional statute based on status since it does not punish the status of

being a felon but rather punishes the act of carrying a firearm by one who has been convicted of a felony. *Crafton v. State*, 274 Ark. 319, 624 S.W.2d 440 (1981).

The legislature could constitutionally provide that any person who had previously been convicted of a felony as defined by this section could not thereafter possess or own a firearm, and this section did not operate as an ex-post facto law when applied to a felon convicted prior to passage of the section. *Finley v. State*, 282 Ark. 146, 666 S.W.2d 701 (1984).

Purpose.

The purpose of this section is to keep firearms out of the hands of persons who have been formally adjudicated as irresponsible or dangerous. *Reynolds v. State*, 18 Ark. App. 193, 712 S.W.2d 329 (1986).

Authorization.

The "authorization" clause in subsection (a), permitting a felon to possess a firearm if authorized by the Governor, his designee, or the Treasury Department, creates a defense, as defined by § 5-1-111(c)(3), rather than an element to be proved by the state. *Fendley v. State*, 314 Ark. 435, 863 S.W.2d 284 (1993).

Arrest.

Regardless of whether the information or warrant were defective, a warrant was not required for the defendant's arrest on charges of being a felon in possession of a firearm, a class D felony under this section, since ARCrP 4.1 provides that a law enforcement officer may arrest a person without a warrant if he has reasonable cause to believe that that person has committed a felony. *Van Daley v. State*, 20 Ark. App. 127, 725 S.W.2d 574 (1987).

Constructive Possession.

Where defendant occupied the truck with the driver, and the shotgun was located in plain view between the seats, which made it immediately accessible to her and subject to her control, this was sufficient to constitute constructive possession. *Banks v. State*, 315 Ark. 666, 869 S.W.2d 700 (1994).

Conviction.

A prior Supreme Court ruling on a completely different statute did not justify the defendant's reliance on alleged "mistake of law" in assuming his suspended sentence did not constitute a "conviction" under this section prohibiting felons from carrying firearms. *Finley v. State*, 282 Ark. 146, 666 S.W.2d 701 (1984).

-- Proof.

As a prior felony conviction was an element of the offense, it was certainly not improper for the prosecutor to refer to the previous conviction prior to the introduction of direct proof so long as competent evidence was later presented to support the statement. *Plummer v. State*, 270 Ark. 11, 603 S.W.2d 402 (1980).

Where the defendant was charged with being a felon in possession of a firearm, the very nature of the crime charged necessarily placed the defendant on notice that the state would be required to prove that he was a felon, and therefore, the trial court did not abuse its discretion when it allowed the state to introduce documents concerning the defendant's prior felony convictions. *Terry v. State*, 9 Ark. App. 38, 652 S.W.2d 634 (1983).

A prior felony conviction was relevant evidence in a prosecution for possession of a firearm by a felon in that it was an element of the crime, and the trial court's decision that the State could elect to introduce evidence of one prior conviction rather than another was not an abuse of discretion; the defendant's contention that he should be permitted to select the prior conviction to be introduced by the State was not tenable. *Clinkscale v. State*, 15 Ark. App. 166, 690 S.W.2d 740 (1985).

Actual physical possession is not necessary for conviction, nor is ownership; the evidence is sufficient if it is shown, by either direct or circumstantial evidence, that the defendant had the right to exercise control over the object. *Harper v. State*, 17 Ark. App. 237, 707 S.W.2d 332 (1986).

Where the gun was found in the defendant's bedroom, directly under a window in which the police officers had observed the defendant looking out when they drove up, the officers saw no other person in that room, and one of the officers testified

that he saw the defendant fumbling around with something that could have been a gun, there was substantial evidence from which a jury could infer that the defendant had knowledge of the gun's presence and a right to control it. *Harper v. State*, 17 Ark. App. 237, 707 S.W.2d 332 (1986).

Where defendant was charged with being a felon in possession of a firearm, proof of one prior felony conviction would have been sufficient. *Tatum v. State*, 21 Ark. App. 237, 731 S.W.2d 227 (1987).

Proof of a prior felony is an element of the crime of felon in possession of a firearm and must be proven beyond a reasonable doubt by the state. To require an accused to prove expungement of his record after completion of his sentence under the Youthful Offender Alternative Service Act would be to require an affirmative defense when none is required by the section. *Irvin v. State*, 301 Ark. 416, 784 S.W.2d 763 (1990).

Evidence.

Impeachment of defendant with remarks made by defendant's attorney during opening statement held not abuse of discretion. *Fisher v. State*, 290 Ark. 490, 720 S.W.2d 900 (1986).

Where there is joint occupancy of premises, mere occupancy is insufficient to convict one of possession of contraband, unless there are additional factors linking the defendant with the contraband. *Kandur v. State*, 291 Ark. 194, 726 S.W.2d 682 (1987).

Evidence held insufficient to convict. *Kandur v. State*, 291 Ark. 194, 726 S.W.2d 682 (1987).

Evidence held sufficient to uphold conviction. *Holbird v. State*, 301 Ark. 382, 784 S.W.2d 171 (1990).

Evidence sufficient to support conviction. *Moore v. State*, 304 Ark. 257, 801 S.W.2d 638 (1990).

Intent.

In prosecution for the offense of felon in possession of a firearm, whether the defendant believed that it was legal for a felon to possess a firearm after the completion of his parole was irrelevant. *Fisher v. State*, 290 Ark. 490, 720

S.W.2d 900 (1986).

Lesser Included Offense.

Since the offense of possession of a firearm requires proof that the person possessing the firearm has been convicted of a felony and that fact is not an element in the proof of aggravated robbery, the lesser offense is not included in aggravated robbery. *Allen v. State*, 281 Ark. 1, 660 S.W.2d 922 (1983), cert. denied, 472 U.S. 1019, 105 S. Ct. 3482, 87 L. Ed. 2d 617 (1985).

Prior Conviction.

The state can use the defendant's prior felony convictions to convict him of felony in possession of a firearm and then use the same prior felony convictions to enhance the penalty for that conviction. The defendant was not convicted of two offenses which share the same elements, and thus he was not twice put in jeopardy for the same offense. *Traylor v. State*, 304 Ark. 174, 801 S.W.2d 267 (1990).

Sentencing.

The nature of the prior felony and the facts surrounding the incident leading to defendant's arrest do reflect on the seriousness of the crime and are relevant in the determination of sentence, and if these factors were not meant to be considered in sentencing, the General Assembly could have provided for imprisonment for a definite term upon conviction of a felon for possession of a firearm rather than allowing the jury to impose any sentence not in excess of five years. *Combs v. State*, 270 Ark. 496, 606 S.W.2d 61 (1980).

Trial Proceedings.

Where during closing arguments the prosecuting attorney pled with the jurors to enforce the law and send a message out to other drug-traffickers in the county that that kind of conduct is not going to be tolerated, the defendant objected but did not ask for a mistrial, and the trial court sustained the objection and admonished the jury that arguments of counsel were not evidence and that they should disregard any statements by counsel which were not supported by the evidence, there was no error. *Reynolds v. State*, 18 Ark. App. 193, 712 S.W.2d 329 (1986).

AR ST § 5-73-103

Page 5

The trial judge erred in refusing to sever a firearm/felon count from a murder count for trial; for an offense based in part on a prior conviction is not part of a single scheme or plan with first degree murder, as ARCrP 22.2(a) requires, nor do the two offenses require the same evidence, which would be an alternative reason for upholding the trial judge's decision to deny severance. *Ferrell v. State*, 305 Ark. 511, 810 S.W.2d 29 (1991).

Where the trial of a felon/firearm charge with a murder charge was prejudicial error, the circuit court abused its discretion in denying a motion to sever; accordingly, defendant was prejudiced by the joinder and was entitled to a new trial. *Sutton v. State*, 311 Ark. 435, 844 S.W.2d 350 (1993).

Cited: *Shelton v. State*, 271 Ark. 342, 609 S.W.2d 18 (1980); *Terry v. State*, 271 Ark. 715, 610 S.W.2d 272 (1981); *Scott v. State*, 272 Ark. 88, 612 S.W.2d 110 (1981); *Bradley v. Bureau of Alcohol, Tobacco & Firearms*, 736 F.2d 1238 (8th Cir. 1984); *Henderson v. State*, 16 Ark. App. 225, 699 S.W.2d 419 (1985); *Beasley v. State*, 29 Ark. App. 104, 777 S.W.2d 865 (1989); *Ussery v. State*, 308 Ark. 67, 822 S.W.2d 848 (1992); *State v. Mosley*, 313 Ark. 616, 856 S.W.2d 623 (1993).

A.C.A. § 5-73-103

AR ST § 5-73-103

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