SUMMARY
October 18, 2018

2018COA149

No. 17CA1502, Rocky Mountain Gun Owners v. Hickenlooper — Constitutional Law — Colorado Constitution — Right to Bear Arms; Crimes — Large-capacity Magazines Prohibited

A division of the court of appeals considers whether statutes prospectively prohibiting the sale, transfer, or possession of large-capacity magazines (able to hold more than fifteen rounds of ammunition) are constitutional with respect to the right to keep and bear arms under article II, section 13 of the Colorado Constitution. *See* §§ 18-12-301, -302, and -303, C.R.S. 2018.

The division applies the "reasonable exercise test" established in *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994), and concludes that the statutes are constitutional as a reasonable exercise of the state's police power for the protection of public health and safety because (1) they reasonably further a

legitimate governmental interest in reducing deaths from mass shootings; (2) they are reasonably related to the legislative purpose of reducing deaths from mass shootings; and (3) they do not sweep constitutionally protected activities within their reach.

COLORADO COURT OF APPEALS **2018COA149**

Court of Appeals No. 17CA1502
City and County of Denver District Court No. 13CV33879
Honorable John W. Madden, IV, Judge

Rocky Mountain Gun Owners, a Colorado nonprofit corporation; National Association for Gun Rights, Inc., a Virginia nonprofit corporation; and John A. Sternberg,

Plaintiffs-Appellants,

v.

John A. Hickenlooper, in his official capacity as Governor of the State of Colorado,

Defendant-Appellee.

JUDGMENT AFFIRMED

Division V
Opinion by JUDGE RICHMAN
Román and Berger, JJ., concur

Announced October 18, 2018

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¶ 1 Plaintiffs, Rocky Mountain Gun Owners and National Association for Gun Rights (Colorado and foreign nonprofit corporations, respectively) and John A. Sternberg, appeal a district court judgment upholding the constitutionality, under the right to bear arms clause of the Colorado Constitution, of statutes prospectively prohibiting the sale, transfer, or possession of large-capacity magazines (LCM). *See* §§ 18-12-301, -302, and -303, C.R.S. 2018. Because we conclude that the LCM restrictions are a reasonable exercise of the state's police power, we affirm.

I. Background

¶ 2 In 1999, two shooters shot and killed thirteen people and wounded twenty-one others at Columbine High School. *See Harris v. Denver Post Corp.*, 123 P.3d 1166, 1168 (Colo. 2005). The shooters used LCMs with capacities of twenty-eight or more rounds.

¶ 3 In 2012, a single shooter entered a movie theater in Aurora with, among other weapons, an AR-15 assault rifle with an LCM. With the rifle, he was able to shoot approximately 1.6 bullets per second, and he fired sixty-five rounds in forty seconds before the gun jammed. Ultimately, the shooter killed twelve people and injured dozens more.

¶ 4 In the wake of that shooting, the Colorado General Assembly passed House Bills 13-1224 (HB 1224), limiting LCMs for firearms, and 13-1229 (HB 1229), expanding mandatory background checks for firearm sales and transfers. HB 1224 added three criminal statutes, sections 18-12-301, 18-12-302, and 18-12-303 (collectively, the statutes), which generally define an LCM as a magazine able to hold more than fifteen rounds of ammunition and provide, with exceptions, criminal penalties for their sale, possession, and transfer after July 1, 2013.

¶ 5 Plaintiffs challenged the facial constitutionality of both bills. As relevant here, plaintiffs alleged that the statutes violate the Colorado Constitution, article II, section 13, which affords individuals the right to keep and bear arms. They did not contend that the statutes violated their rights under the Second Amendment to the United States Constitution.[1] The district court granted the Governor's C.R.C.P. 12(b)(5) motion to dismiss the complaint for

[1] In *Colo. Outfitters Ass'n v. Hickenlooper*, 24 F.Supp.3d 1050 (D. Colo. 2014), the plaintiffs asserted that the same statutes violate the Second and Fourteenth Amendments, and the federal district court granted judgment in favor of the defendant. On appeal, the Tenth Circuit vacated the district court's order and concluded that the plaintiffs failed to establish Article III standing. *See Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 532 (10th Cir. 2016).

failure to state a claim upon which relief could be granted, and plaintiffs appealed.

¶ 6 A division of this court affirmed the dismissal with respect to HB 1229. But the division concluded that the district court had erred in dismissing the plaintiffs' claim that HB 1224 violated the Colorado Constitution. *Rocky Mountain Gun Owners v. Hickenlooper*, 2016 COA 45M (*Rocky Mountain Gun I*). The division concluded that a restriction on the right to bear arms is constitutional, under the Colorado Constitution, if it is shown to be a "reasonable exercise of the state's police power." *Id.* at ¶ 21. Because whether challenged legislation is a reasonable exercise of the state's police power is a mixed question of fact and law, the division remanded the claim with instructions that it should be allowed to go forward for "a factual inquiry into the reasonableness of the limits" prescribed by the bill. *Id.* at ¶¶ 30-31.

¶ 7 On remand, the district court held a weeklong bench trial. After consideration of the evidence, arguments presented, and the relevant legislative history, the court issued a lengthy order. It ruled, in part, as follows:

> [P]rohibitions on the possession, sale, or transfer of LCMs are found to be a reasonable exercise of the police power designed to address a specific and valid governmental concern regarding the health, safety, and welfare of people in Colorado, and the 15 round limit was not only based on a valid, reasonable safety concern, the limit is, itself, reasonable and does not impose on the constitutionally protected right to keep and bear arms for self-defense or defense of home or property.
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> . . . .
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> [The statutes do] not inhibit the use of a firearm for self-defense or defense of home or property but serve[] to reduce the number of victims in mass shootings by limiting the number of rounds that can be fired before the shooter has to reload. As such, the statute is a reasonable exercise of the police power and is constitutional.

¶ 8 As relevant here, the district court further found that plaintiffs' assertion that the statutes make "almost all magazines and semiautomatic weapons illegal" turned on an unreasonable reading of the statutory definition of LCMs. And it rejected plaintiffs' argument that the statutes were unreasonable under a historic interpretation of the Colorado Constitution because "such history and traditions are not pertinent to determining whether [the

statutes] comport[] with the rights guaranteed" by article II, section 13.

¶ 9 Plaintiffs contend that the district court erred when it found that the statutes are constitutional. They disagree with numerous aspects of the court's analysis but advance two primary contentions. First, they argue that the prospective LCM ban should be subject to a heightened standard of review. And second, they argue that the statutes should be interpreted as unconstitutionally broad because they ban "an overwhelming majority of magazines."

¶ 10 We first address the standard of review, and we apply the "reasonable exercise test" to conclude that the statutes are constitutional and not overbroad. In doing so, we review the district court's judgment as a mixed question of law and fact, deferring to the court's findings of fact unless they are clearly erroneous, and reviewing the court's legal conclusions about constitutionality de novo. *Town of Dillon v. Yacht Club Condos. Home Owners Ass'n*, 2014 CO 37, ¶ 22. We also respond to plaintiffs' additional arguments and their challenges to various factual findings by the district court.

II. Constitutional and Statutory Law

¶ 11 Article II, section 13 of the Colorado Constitution provides, both as originally written in 1876 and today, that "[t]he right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called into question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons."

¶ 12 As relevant here, section 18-12-301(2)(a)(I) defines an LCM as "[a] fixed or detachable magazine, box, drum, feed strip, or similar device capable of accepting, or that is *designed to be readily converted to accept*, more than fifteen rounds of ammunition." (Emphasis added.)[2]

¶ 13 Section 18-12-302(1)(a) prescribes the criminal charges, varying between a class 2 misdemeanor and a class 6 felony, for "a person who sells, transfers, or possesses" an LCM after July 1, 2013. The statute also contains exceptions. Section 18-12-302(2) (the grandfather exception) expressly permits possession by a

[2] The statute also separately defines LCMs for shotguns, but plaintiffs do not appear to challenge that portion of the statute.

person who (1) owns the LCM on July 1, 2013; and (2) maintains continuous possession of the LCM.[3] And section 18-12-302(3) permits possession by manufacturers, employees, and sellers meeting specified criteria.

III. Standard of Review

¶ 14 We presume a statute to be constitutional; "[t]he party challenging the facial constitutionality of a statute has the burden of showing the statute is unconstitutional beyond a reasonable doubt." *Hinojos-Mendoza v. People*, 169 P.3d 662, 668 (Colo. 2007); *see People v. Cisneros*, 2014 COA 49, ¶ 23.

¶ 15 In *Rocky Mountain Gun I*, a division of this court evaluated the standard under which a claimed violation of Colorado's constitutional right to bear arms is to be assessed after the Supreme Court rulings in *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). *See Rocky Mountain Gun I*, ¶¶ 11-22. The division, "mindful that the instant case [did] not present [it] with a challenge . . . under the Second Amendment to the United States Constitution," made clear that issues of constitutionality under the

[3] Plaintiffs do not separately challenge this provision on appeal.

Colorado Constitution "are matters peculiarly within the province of the Colorado Supreme Court." *Id.* at ¶ 20.

¶ 16 In *Robertson v. City and County of Denver*, 874 P.2d 325 (Colo. 1994), our supreme court established the "reasonable exercise test" as the standard governing our review of a claimed violation of the Colorado right to bear arms. *See Students for Concealed Carry on Campus, LLC v. Regents of Univ. of Colo.*, 280 P.3d 18, 28-29 (Colo. App. 2010) (the reasonable exercise test applied in *Robertson*, not the rational basis test, is the appropriate test for evaluating article II, section 13 challenges), *aff'd on different grounds*, 2012 CO 17. Declining to decide whether the right was fundamental, the *Robertson* court concluded that "the state may regulate the exercise of [the right to bear arms] under its inherent police power so long as the exercise of that power is reasonable." *Robertson*, 874 P.2d at 328. It further specified that a regulation "is within the state's police power if it is reasonably related to a legitimate governmental interest such as the public health, safety, or welfare," but "is facially overbroad if it sweeps within its reach constitutionally protected, as well as unprotected, activities." *Id.* at 331 (quoting *People v. Ryan*, 806 P.2d 935, 939 (Colo. 1991)). Our review of

reasonableness of an exercise of police power does not, however, turn on "the burden on the complaining party or the availability of less burdensome alternatives." *Town of Dillon*, ¶ 24.

¶ 17 Plaintiffs contend, using varied arguments throughout their briefs, that any legislation regulating a firearm component should be subject to more scrutiny than that required by *Robertson*. They suggest that (1) the right to bear arms is fundamental; (2) a reviewing court must determine whether the statutes impose an unreasonable burden on the right to bear arms and "must carefully scrutinize the statute to determine whether it 'sweep[s] unnecessarily broadly'" (citing *City of Lakewood v. Pillow*, 180 Colo. 20, 23, 501 P.2d 744, 745 (1972)); and (3) the law must bear a real and substantial relationship to the stated goal of maintaining public safety.

¶ 18 But we are not at liberty to depart from the supreme court precedent, nor are we inclined to depart from the "law of the case" and analysis stated in *Rocky Mountain Gun I*. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) ("A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be

loathe to do so in the absence of extraordinary circumstances."); *accord Core-Mark Midcontinent, Inc. v. Sonitrol Corp.*, 2012 COA 120, ¶ 10. Plaintiffs do not assert a claim under the Second Amendment, and the decisions in *Heller* and *McDonald* do not address the application of Colorado's constitutional provision. Accordingly, we use the test provided in *Robertson*.

IV. Constitutionality of the Statutes

A. Legislative Purpose

¶ 19 Citing statements by HB 1224's House sponsor, the district court found that "[t]here is no question but that [the legislative purpose in enacting the statutes] . . . is to reduce that number of people who are killed or shot in mass shootings." We defer to the court's finding because it is supported by the record. *See People v. Carrion*, 2015 CO 13, ¶ 8 ("We will not substitute our own judgment for that of the trial court unless the trial court's findings are clearly erroneous or not supported by the record.").

¶ 20 We conclude that this purpose reasonably furthers a legitimate governmental interest in public health and safety.

B. Reasonably Related

¶ 21 The evidence presented at trial showed that the statutes are reasonably related to reducing the number of people injured in mass shootings. Based on the evidence presented, the district court found that in mass shootings (defined as killing six or more people) between 1967 and 2016:

- LCMs had been used "close to 50% of the time," whereas they had been used in only 20% of other crimes.
- The use of LCMs increases the fatality rate per mass shooting by 40% and increases the number of people who are shot by a factor of roughly two to three.
- The use of LCMs results in victims being struck by more bullets, which causes a greater chance of death.
- Smaller-capacity magazines cause a shooter to pause in firing, and those pauses afford potential shooting victims more opportunities to escape harm.
- States without an LCM ban experienced three times as many mass shootings as states with a ban.

¶ 22 The evidence at trial supports the court's findings. Experts from both sides testified using identical data, which we consider here.

¶ 23 Although we calculate that the use of LCMs in mass shootings nears 50% only in the more recent period of 1999-2016 (since Columbine), rather than the overall 1967-2016 range, we do not find this discrepancy in the court's findings to be consequential.[4] If anything, it highlights an increase in use of LCMs for mass shootings over recent decades.

¶ 24 We note a greater than four-fold increase in mass shootings with LCMs per year when we compare the pre-Columbine period to the period between Columbine and 2016 (the last year that data was available for trial). In the thirty-two years between and including 1967 and 1998, there were eleven mass shootings with LCMs — approximately one mass shooting every three years. Since Columbine, in the eighteen years between and including 1999 and 2016, there have been twenty-seven mass shootings with LCMs — 1.5 per year.

[4] Over the 1967-2016 period, LCMs were used in about one-third of mass shootings.

¶ 25 Because the incidence of mass shootings with LCMs is on the rise; the only mass shootings in Colorado over the last fifty years involved LCMs (and resulted in deaths of twenty-five people); and smaller magazines create more pauses in firing, which allow potential victims to take life-saving measures, we conclude that the statutes are reasonably related to the legitimate governmental purpose of reducing deaths from mass shootings.

¶ 26 We reject plaintiffs' argument that the statutes are not a legitimate exercise of police power because LCM restrictions have not been shown to reduce overall gun violence or deaths from use of guns. Legislation need not solve all gun problems to be constitutional. *See Parrish v. Lamm*, 758 P.2d 1356, 1371 (Colo. 1988) ("[A] statute is not required to solve all problems at once, but may 'take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955))).

C. Not Overbroad

¶ 27 Plaintiffs argue that even if the statutes are reasonably related to a legitimate governmental purpose, they are overbroad because they ban virtually all magazines and unreasonably burden

Coloradans' right to self-defense. *See Robertson*, 874 P.2d at 331 (a statute implicating the right to bear arms is facially overbroad if it sweeps constitutionally protected activities within its reach).

¶ 28 This argument first turns on plaintiffs' assertion that the statutes outlaw all magazines with a detachable base pad because any magazine with a detachable base pad — a typical modern design — is "designed to be readily converted to accept" more than fifteen rounds of ammunition. *See* § 18-12-301(2)(a)(I). To support this assertion, plaintiffs' trial expert demonstrated the ease with which he could convert various magazines to accept more ammunition in less than a minute with simple tools, usually including a "punch."

¶ 29 For plaintiffs' argument to be successful, we would have to (1) agree with their interpretation of the statute and fail to conceive of a way to interpret the statute so that it remains constitutional; or (2) conclude that the statutes prevent Coloradans from exercising their constitutional right of self-defense. We disagree on both counts.

1. Statutory Interpretation

¶ 30 Plaintiffs contend that because magazines with removable base pads can be converted to LCMs with ease, they must have

been "designed" to be converted and are therefore prohibited by the statutes. The district court disagreed. With record support, the court found that manufacturers designed magazines with base pads to facilitate cleaning, maintenance, and repair of the magazines. (Indeed, the parties stipulated that "[r]emovable base pads, base plates, and end caps allow for cleaning, maintenance, repair[,] and other functions, such as weighting the magazine.")

¶ 31 Webster's Third New International Dictionary 612 (2002) defines "designed" as "done, performed, or made with purpose and intent . . . ." Thus, when the district court found that the statute applied only to magazines designed with the "intent" to be converted to LCMs, it did not, as plaintiffs contend, add text to the statute.

¶ 32 Following commonly accepted rules of statutory interpretation, we conclude that the statute's plain language, considered in the context of HB 1224 as a whole and construed according to proper grammar and common usage, reflects that the General Assembly did not intend the statutes to regulate all magazines with removable base pads. *See Jefferson Cty. Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010) (We construe words and phrases "according to grammar and common usage."); *Vigil v. Franklin*, 103

P.3d 322, 327 (Colo. 2004) (We "look[] first to the statute's plain language."); *Waste Mgmt. of Colo., Inc. v. City of Commerce City*, 250 P.3d 722, 725 (Colo. App. 2010) ("We . . . give effect to every word [and] consider the language used in the context of the statute or code as a whole.").

¶ 33 Even if we were to consider the statutory language ambiguous, the legislative purpose is to reduce the number of people who are killed or shot in mass shootings, not to ban all gun magazines. Therefore, the legislative history would resolve any question against plaintiffs' interpretation. *See Gerganoff*, 241 P.3d at 935. Moreover, "[i]f there is more than one possible interpretation of the statute, we must adopt the constitutional construction." *People v. Mojica-Simental*, 73 P.3d 15, 18 (Colo. 2003).[5]

[5] We are not persuaded by plaintiffs' argument that the constitutional avoidance doctrine does not apply to our interpretation because it is "strained." We further note that the parties stipulated that "[t]hrough December 2016 there were 41 prosecutions under the statutes. Plaintiffs do not know of any person being prosecuted for possession of a magazine with a removable base pad and a capacity of fifteen rounds or less."

2. The Statutes Do Not Sweep the Right to Bear Arms Within Their Reach

¶ 34 The district court found, with record support, that regulation of LCMs does not negatively impact a Coloradan's constitutional right to bear arms for self-defense because people almost never fire weapons in self-defense using more than two or three bullets. Citing legislative history, the court further found that the decision to limit magazines to fifteen rounds "was a compromise to increase the capacity of firearms used for defensive purposes," given that the bill originally proposed a ten-round limit. Plaintiffs maintain that the statutes create an unreasonable burden on the right to bear arms for self-defense purposes.

¶ 35 We conclude that the statutes burden only a person's opportunity to use an LCM, not a person's right to bear arms in self-defense. The parties stipulated before trial that,

- with very few exceptions, every gun that was available before the statute's enactment date is compatible with magazines holding fifteen or fewer rounds — magazines that are not LCMs; and

- there are millions of magazines in sizes of fifteen rounds or fewer.

¶ 36 Plaintiffs presented no evidence that any person in Colorado has ever fired even close to fifteen rounds in self-defense. The statutes do not prohibit any type of firearm; they prohibit only magazines with a firing capacity of greater than fifteen rounds at one time. Moreover, the grandfather exception allows continued possession and use of existing magazines with capacities greater than fifteen rounds.

¶ 37 In sum, we conclude that the statutes do not forbid the use of magazines simply because they have detachable base pads and that limiting magazine size to fifteen rounds of ammunition does not unreasonably burden the right to self-defense.[6] Accordingly, the statutes are a reasonable exercise of police power without sweeping constitutionally protected activities within their reach.

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[6] Amici curiae also argue that the statutes unreasonably burden the right to keep and bear arms "in aid of the civil power when thereto legally summoned." We do not address that argument. *See Gorman v. Tucker By & Through Edwards*, 961 P.2d 1126, 1131 (Colo. 1998) ("We will not consider issues raised only by amicus curiae and not by the parties.").

V. Other Arguments

¶ 38 Plaintiffs also disagree with numerous factual findings and further argue various bases for a different analytical approach to the statutes' constitutionality. We briefly address these arguments below.

¶ 39 With respect to plaintiffs' disagreement with the district court's factual findings, we reiterate that we review factual findings only for clear error. We will not disturb those findings if we find support for them in the record. As stated throughout this opinion, we find record support for the court's findings.

¶ 40 With respect to plaintiffs' contention that the statutes are unreasonable because they (1) ban magazines commonly used for lawful purposes; and (2) have a chilling effect on the manufacturers and sellers of such magazines, we repeat that our analysis of constitutionality is guided by the standards outlined in *Robertson*.

¶ 41 With respect to the arguments in the reply brief, we do not view the absence of a response to any of the flurry of arguments made by plaintiffs as equal to a concession by the People. When the People respond to a general contention, they need not attempt to refute each of the other party's arguments, but may address a

host of arguments by addressing the premise on which those arguments stand. The same is true of our opinion here. We address the constitutionality of the statutes using Colorado precedent as our guide, and we are not beholden to the analytical framework proposed by plaintiffs.

¶ 42 Accordingly, we need not interpret the statutes' constitutionality through the lens of history, as plaintiffs suggest. But even taking plaintiffs' factual assertions of historical context as true, we perceive no indication that article II, section 13 prohibits the government from setting reasonable limits on the firepower available to Coloradans. And there is no more reason today for Coloradans to possess magazines of more than fifteen rounds than there was at the time that the right to keep and bear arms was written into the Colorado Constitution.[7]

¶ 43 Plaintiffs also argue that because article II, section 13 of the Colorado Constitution is broader and more protective of citizens' right to bear arms than the Second Amendment of the United

[7] Plaintiffs note that various guns with capacities greater than fifteen rounds, including the Gatling gun, were in existence before the Colorado Constitution was written. This does not affect our analysis.

States Constitution, the reasonable exercise of the state's police power must give way to the state's "robust protection" of that right.[8] But the Second Amendment is not at issue here, and thus we need not resolve the question of whether the Colorado Constitution affords citizens a broader right.

VI. Conclusion

¶ 44 Sections 18-12-301, -302, and -303 represent a reasonable exercise of the state's police power and thus are constitutional. The judgment is affirmed.

JUDGE ROMÁN and JUDGE BERGER concur.

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[8] In *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), the Supreme Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." In *People v. Cisneros*, 2014 COA 49, ¶ 35, a division of this court concluded that there was "no reason to speculate that our supreme court would modify its holding in *Robertson* in light of *Heller*." We agree with that division.