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New Mexico Supreme Court: Wedding Photographer May Not Decline Business from Same-Sex Couple's Commitment Ceremony

*By Jordan Lorence**

On August 22, the New Mexico Supreme Court handed down a noteworthy opinion in a case involving the First Amendment rights of business owners. In *Elane Photography v. Willock*,[1] the court unanimously upheld a ruling against a small company, Elane Photography LLC, for declining to shoot a same-sex commitment ceremony due to the owners' beliefs on marriage. The New Mexico Supreme Court rejected the photographer's arguments that the company's rights to freedom of speech and religious liberty under federal and state law protected it from being forced to produce images.

I. Background

Elane Photography LLC is a small photography business in Albuquerque operated by husband and wife, Jon and Elaine Huguenin. Elaine works as the photographer. She specializes in the "photojournalistic" style of wedding photography, in which the photographers take expressive or spontaneous shots during the wedding day in the manner that news photographers do. Many believe the photojournalistic approach to wedding photography better communicates the emotions, interpersonal dynamics and ideas of the day than the traditional set shots of the wedding party standing together, etc. Elane Photography advertises its artistic skills on its website.

Vanessa Willock, a lesbian looking for a photographer to shoot her commitment ceremony to Misti Collingsworth, found the Elane Photography website, liked the examples of work that she saw, and then wrote an email inquiring whether Elaine would be "open to helping celebrate" her same-sex "commitment ceremony." Upon receiving this email, Elaine wrote an email politely declining to shoot their ceremony. Elaine did not want to use her photographic skills to communicate the message that marriage can be defined as other than one man and one woman as this was contrary to Elaine and Jon's beliefs. Two months later, Willock sent Elaine

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Illinois Supreme Court Ruling Explores Scope of Second Amendment

*By Tara A. Fumerton**

On September 12, 2013, in *People v. Aguilar*, the Illinois Supreme Court held that Illinois's blanket prohibition of the concealed carry of a firearm in public in its aggravated unlawful use of weapons ("AUUW") statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2008)) violated the second amendment to the U.S. Constitution, but that the portion of Illinois's unlawful possession of a firearm ("UPF") statute ((720 ILCS 5/24-3.1(a)(1) (West 2008)) that prohibited

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Washington Supreme Court Addresses Constitutionality of Water Pollution Control Mandate

*By Seth L. Cooper**

In *Lemire v. Department of Ecology* (2013),[1] the Washington Supreme Court addressed the constitutionality of an order made pursuant to the State's Water Pollution Control Act ("WPCA"). Lemire offers the Washington Supreme Court's latest take on evidentiary standards for reviewing administrative agency actions that affect property rights.

I. Background

At issue in *Lemire* was an administrative order issued by the Washington Department of Ecology ("Department") to cattle rancher Joseph Lemire pursuant to the WPCA.[2] The Department directed Lemire to take steps—namely constructing livestock fencing and off-stream water facilities to eliminate livestock access to the stream corridor—to curb activities it determined were polluting a creek that runs through Lemire's property.

Lemire challenged the order but the Pollution Control Hearings Board ("Board") upheld it on summary judgment. However, on administrative appeal the Columbia County Superior Court reversed the judgment and invalidated the Department's order. In its decision, the Superior Court ruled the Department's order was unsupported by substantial evidence and constituted a taking. Division Three of the Washington Court of Appeals certified the case directly to the Washington Supreme Court for review.

By an 8-1 vote, the Washington Supreme Court reversed the Superior Court on all counts. In an opinion written by Justice Debra Stephens,[3] the majority held that the Department acted within its authority, the order was supported by substantial evidence, and Lemire failed to establish that a taking occurred.

II. Majority Opinion: Substantial Evidence Analysis

The evidence presented by the Department at the administrative hearing consisted of reports of four visits to Lemire's property by a Department employee between

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1 (1986) (California commission may not force a regulated utility to include in its billing envelopes a newsletter from an activist group criticizing the company's actions).

5 547 U.S. 47 (2006).

6 494 872 (1990).

7 309 P.3d at 79.

Illinois Supreme Court Ruling Explores Scope of Second Amendment

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the possession of firearms by minors did not.[1] Upon denial of rehearing on December 19, 2013, the Court modified its opinion and clarified that its holding was limited to the "Class 4" form of the specified AUUW violation, leaving unanswered the question of whether other "classes" of a similar AUUW violation (such as a "Class 2" violation of the statute by a felon) would also be deemed unconstitutional and leading two Justices to dissent from the majority opinion, which was previously unanimous.[2]

The Illinois Supreme Court's ruling came on the heels of (and largely adopted) the Seventh Circuit's ruling in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), which similarly found that the AUUW's blanket prohibition on concealed carry of a firearm in public was unconstitutional. While the practical effect of the Court's ruling was largely mooted by the Illinois legislature's enactment after *Moore* of the Firearm Concealed Carry Act (*see* Pub. Act 98-0063 (eff. July 9, 2013)), which amended the AUUW to allow for a limited right to carry certain firearms in public, the ruling nevertheless provides insight into the outcome of future challenges to Illinois laws restricting and regulating the personal use of firearms.

I. Factual Background

At issue in *Aguilar* were defendant's second amendment challenges to his conviction for violating two Illinois gun control laws.[3] Police arrested defendant (who was then 17 years old) after they had investigated a group of teenagers who were making disturbances

and observed defendant with a gun in his hand. At the time of this observation (and his arrest), defendant was in his friend's backyard.[4] Defendant was charged with and convicted of violating the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute (prohibiting the concealed carrying of a loaded firearm anywhere other than "his or her land or in his or her abode or fixed place of business") and section 24-3.1(a)(1) of the UPF statute (prohibiting the possession of "any firearm of a size which may be concealed upon the person" by anyone under 18 years of age).[5] The trial court sentenced defendant to 24 months' probation for the AUUW conviction and did not impose any sentence on the UPF conviction.[6] Defendant appealed his convictions and the appellate court affirmed.[7]

II. Standing Challenge

Before addressing the constitutionality of the two Illinois statutes at issue, the Illinois Supreme Court first rejected the State's argument that defendant lacked standing to assert a constitutional challenge to these statutes.[8] The State's position was that to have standing defendant must show that "he was engaged in conduct that enjoys second amendment protection" and that he could not do so because "the conduct involved in this case, namely, possessing a loaded, defaced, and illegally modified handgun on another person's property without consent, enjoys no such protection."[9] In rejecting the State's argument, the Illinois Supreme Court noted that defendant was not arguing that these statutes *as applied in this case* were unconstitutional, rather he was arguing that they *facially* violated the second amendment and could not be enforced against *anyone*.[10] It further stated, "If anyone has standing to challenge the validity of these sections, it is defendant. Or to put it another way, if defendant does *not* have standing to challenge the validity of these sections, then no one does."[11]

III. Second Amendment Challenge to the AUUW Statute

After disposing of the State's standing argument, the Illinois Supreme Court first tackled the constitutionality of the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW statute. To do so, it looked to the U.S. Supreme Court's decisions in *District of Columbia v. Heller,* 554 U.S. 570 (2008) (holding that a District Columbia law banning handgun possession in the home violated the second amendment) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (holding that second amendment right recognized in *Heller* is applicable to the states through the due process class of the fourteenth amendment and striking down similar laws that banned the possession of handguns in the home).[12] The Illinois Supreme Court noted that Illinois appellate courts previously upholding the constitutionality of the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) had uniformly read *Heller* and *McDonald* to hold only that the second amendment protects the right to possess a handgun *in the home* for the purpose of self-defense and that neither *Heller* nor *McDonald* expressly recognized a right to keep and bear arms *outside the home*.[13]

The Illinois Supreme Court also noted, however, that less than a year earlier, the Seventh Circuit Court of Appeals in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) applied the broader principles that informed *Heller* and *McDonald* to find that section 24-1.6(a)(1), (a)(3)(A) (the same Illinois provision at issue in *Aguilar*) violated the second amendment.[14] In summarizing the Seventh Circuit's holding and rationale in *Moore*, the Illinois Supreme Court cited to several portions of that opinion that stated that the clear implication of *Heller* and *McDonald* is that the constitutional right of armed self-defense is broader than the right to have a gun in one's home.[15] The Illinois Supreme Court also cited to the Seventh Circuit's discussion in *Moore* of the fact that the second amendment guarantees not only the right to "keep" arms, but also the right to "bear" arms, and that the latter must imply a right to carry a loaded gun outside the home if it is to be read (as it should be) as being distinct from the former.[16]

Ultimately, the Illinois Supreme Court rejected the prior Illinois appellate court decisions and adopted the Seventh Circuit's analysis in *Moore*. It stated: "As the Seventh Circuit correctly noted, neither *Heller* nor *McDonald* expressly limits the second amendment's protections to the home. On the contrary, both decisions contain language strongly suggesting if not outright confirming that the second amendment right to keep and bear arms extends beyond the home."[17] Although it concluded in no uncertain terms "that the second amendment protects the right to possess and use a firearm for self defense outside the home," the Illinois Supreme Court was careful to state that it was "in no way saying that such a right is unlimited or is not subject to meaningful regulation."[18] The issue of what would constitute "meaningful regulation" was not, however, before the Illinois Supreme Court as it concluded that the statute at issue "categorically prohibits the possession and use of an operable firearm for self-defense outside the

home."[19] Accordingly, the Court reversed defendant's conviction of the Class 4 form of section 24-1.6(a)(1), (a)(3)(A), (d) of the AUUW.[20]

Notably, after the Seventh Circuit's decision in *Moore*, but before the Illinois Supreme Court's decision in *Aguilar*, the Illinois General Assembly enacted the Firearm Concealed Carry Act, which amended the AUUW statute to allow for a limited right to carry certain firearms in public.[21] The Illinois Supreme Court noted this change in the law but specifically refrained from commenting on the Act or the amended AUUW statute because it was not at issue in the case before it.[22]

IV. Second Amendment Challenge to the UPF Statute

Having concluded that defendant's conviction under the AUUW statute should be reversed, the Illinois Supreme Court next turned to defendant's challenge to his UPF conviction under section 24-3.1(a)(1) for possession of a firearm by a minor.[23] Defendant argued that the right to keep and bear arms extended to persons younger than 18 years of age and, in support, pointed to the fact that historically many colonies required people as young as 15 years of age to "bear arms" for purposes of militia service.[24]

The Illinois Supreme Court rejected defendant's argument. In reaching its holding, the court cited to specific language in *Heller* where the U.S. Supreme Court emphasized that its opinion should not cast doubt on longstanding prohibitions on the possession of firearms by certain categories of people (*e.g.*, felons or the mentally ill) or in certain sensitive locations (*e.g.*, schools and government buildings).[25] While prohibitions on the possession of firearms by minors was not one of the specific examples enumerated in *Heller*, the Illinois Supreme Court surveyed several other courts that have upheld such prohibitions and found that while historically many colonies *permitted* or *required* minors to possess firearms for purposes of militia service, nothing like a *right* for minors to own firearms has ever existed.[26] Relying on the rationale and historical evidence espoused by these other courts, the Illinois Supreme Court stated its "agreement with the obvious and undeniable conclusion that the possession of handguns by minors is conduct that falls outside of the scope of the second amendment's protection."[27] Thus, the Court affirmed defendant's conviction under 24-3.1(a)(1) and remanded the case to the trial court for imposition of sentence on the UPF conviction.[28]

V. The Denial of Rehearing and Dissenting Opinions

The Court's initial opinion issued on September 12, 2013 was unanimous. The State petitioned for rehearing, arguing that the AUUW sections at issue were not facially unconstitutional because, looking to the sentencing provisions in the AUUW, they can be applied to felons without violating the second amendment in its "Class 2" form of the offense.[29] On December 19, 2013, the Court denied the State's petition, but modified its original opinion to make it clear that it was only addressing the "Class 4 form" of the AUUW statute, which applied to anyone who violated the statute with no aggravating circumstances (*e.g.* prior offense, prior conviction of a felony).[30] Other than the insertion of "Class 4 form of" in front of every AUUW citation, the opinion remained virtually unchanged. The denial of rehearing and the insertion of this clarifying language, however, led two Justices to dissent to the new majority opinion.

Chief Justice Garman dissented from the denial of rehearing because, in her view, the State "fundamentally redefined the issue presented in this case" in its petition for rehearing.[31] While she acknowledged that this fact may typically weigh against rehearing, she wrote, "[G]iven the constitutional nature of the issue and the potential far-reaching consequences of our decision, I would prefer to resolve this question after more deliberation."[32] Justice Theis also dissented from the modified majority opinion and denial of rehearing, stating that "the majority seeks to dramatically alter the issue in this case" by "consider[ing] not only the elements of the offense of AUUW in determining the constitutionality of the statute, but also incorporat[ing] the sentencing provisions into its constitutional analysis."[33] While questioning the "unintended consequences" of conflating the distinctions between the elements of an offense and the factors relevant to enhancing a sentence, Justice Theis took issue with the fact that the majority never explained why the class of sentence has any bearing on the constitutional question and noted that neither the Seventh Circuit decision in *Moore* nor the Illinois appellate decisions relied on and cited by the majority mention the words "Class 4 form" at all.[34] Given this decision's " momentous import to the litigants and to the people of this state," Justice Theis concluded that the "majority's new analysis leaves too many questions unresolved" to not warrant rehearing and an opportunity for the parties to argue

about whether the court's new constitutional analysis should cause it to reconsider the determination that the AUUW statute is facially unconstitutional.[35]

**Tara A. Fumerton is a partner in the law firm Jones Day. This article represents the view of the author solely, and not the view of Jones Day, its partners, employees, or agents.*

Endnotes

1 People v. Aguilar, 2013 IL 112116, __N.E.2d__, 2013 Ill. LEXIS 1626 (Ill. Sept. 12, 2013) (petition for rehearing denied).

2 *Aguilar*, 2013 IL 112116, ¶22, n.3.

3 *Id.* at ¶¶1, 11.

4 *Id.* at ¶¶3-7.

5 *Id.* at ¶¶7, 15, 25.

6 *Id.* at ¶7.

7 *Id.*

8 *Id.* at ¶¶11-12.

9 *Id.* at ¶11.

10 *Id.* at ¶12.

11 *Id.*

12 *Id.* at ¶¶15-18.

13 *Id.* at ¶18.

14 *Id.* at ¶19.

15 *Id.*

16 *Id.*

17 *Id.* at ¶20.

18 *Id.* at ¶21.

19 *Id.*

20 *Id.* at ¶21.

21 *See* Pub. Act 98-0063 (eff. July 9, 2013).

22 *Aguilar*, 2013 IL 112116, ¶22 n.4.

23 *Id.* at ¶¶24-25.

24 *Id.* ¶25.

25 *Id.* at ¶26 (*quoting Heller*, 554 U.S. at 626).

26 *Id.* at ¶27.

27 *Id.*

28 *Id.* ¶¶28-30.

29 *Id.* at ¶36 (Garman, J., dissenting).

30 Id. at ¶22 n.3 (majority opinion); *see also* 720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008).

31 *Id.* at ¶33 (Garman, J., dissenting).

32 *Id.*

33 *Id.* at ¶40 (Theis, J., dissenting).

34 *Id.* at ¶44-45 (Theis, J., dissenting).

35 *Id.* at ¶48 (Theis, J., dissenting).

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2003 and 2008, as well as four visits to his property in 2009. Reported conditions at the property included "livestock with direct access to the creek, overgrazing of the riparian corridor, manure in the stream corridor, inadequate vegetation, bare ground, erosion, cattle trails across the creek, trampled stream banks, and cattle wallowing in the creek."

Addressing this, Justice Stephens' opinion noted that the Department's expert had "described via declaration how these conditions tend to cause pollution."[4] The declaration also stated that Washington State's water quality assessment report to Congress—required by the federal Clean Water Act—listed the creek as polluted. The majority continued that even when viewing the record in the light most favorable to Lemire, the evidence still supports a grant of summary judgment to the Department. It reasoned that the observations of cattle access to the stream on Lemire's property was "consistent with the kind of pollution found in the stream, such as sediment content, fecal coliform, and other disturbances of the water quality" and this was all the Department was required to prove.[5]

This can be distinguished from the Superior Court decision, which emphasized that "[t]he record is absolutely absent of any evidence-direct evidence-that Mr. Lemire's modest herd *actually polluted* Pataha Creek."[6] The Supreme Court applied a different standard than the lower court, ruling that the statute at issue "does not require it [the Department] to prove causation" and that it was sufficient that the Department's "expert declaration provided evidence that the *current condition* of Pataha Creek is polluted."[7] The court rejected arguments that causation is a question of fact and stated rather that "the 'causation' contemplated by the statutes is the likelihood that organic or inorganic matter will cause or tend to cause pollution."[8]