

**IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA**

**THE STATE OF NEBRASKA,**  
Plaintiff,

vs.

**TROY P. HASKELL,**  
Defendant.

Case No. 6809

**ORDER ON DISPOSITION  
OF FIREARMS**

**DATE OF HEARING:** April 14, 1999.

**DATE OF DECISION:** April 26, 1999.

**APPEARANCES:**

For plaintiff: David M. Streich, Brown County Attorney.  
For defendant: Rodney J. Palmer with defendant.  
For claimant: Rodney J. Palmer with claimant, Jacquelyn A. Haskell,  
a/k/a Jackie A. Haskell, f/k/a Jacquelyn A. Peterson.

**SUBJECT OF ORDER:** (1) amended application of defendant and claimant for disposition of seized firearms, and, (2) plaintiff's amended response to application seeking disposition of firearms as contraband.

**FINDINGS:** The court finds and concludes that:

1. The defendant and the claimant, defendant's wife, seek an order authorizing disposition of firearms seized pursuant to a search warrant to the claimant or, in the alternative, to a responsible third party. The plaintiff asserts that the firearms should be considered as contraband and disposed accordingly.

2. The facts are undisputed.

a. Certain firearms were seized pursuant to a search warrant and held as possible evidence in this case. The defendant was charged with possession of a firearm by a felon. The complaint was filed in county court. After preliminary hearing, the case was bound over to this court and an information duly filed on such charge. Shortly before trial, the plaintiff moved to dismiss the information without prejudice. The court granted the motion and dismissed the information without prejudice. Thereafter, this application and

response were filed. At hearing, both the application and the response were amended by interlineation to properly frame the issues.

b. The defendant has been previously convicted of a felony and is ineligible to possess a firearm. Moreover, he asserts that the firearms in question belong to his wife and asserts no possessory interest therein.

c. The defendant's wife has also been previously convicted of a felony, specifically Forgery in the Second Degree, a class IV felony, in the District Court of Madison County, Nebraska. She was placed on probation on July 14, 1989. On August 13, 1992, after successfully completing her 24-month probationary term, she petitioned that court to set aside her conviction. By order dated September 18, 1992, and filed on September 21, 1992, the district court set aside the conviction. That court further ordered that "this Court's Order setting aside the conviction of this Defendant shall nullify the conviction and remove all civil disabilities and disqualifications imposed as a result of the conviction the same as though a pardon has been issued."

3. This court first considers whether its jurisdiction in this case survives the voluntary dismissal of the complaint and information herein by the plaintiff without prejudice. *State v. Dorcey*, \_\_\_ Neb. \_\_\_, \_\_\_ N.W.2d \_\_\_ (April 23, 1999). The court concludes that this case is distinguishable, in that NEB. REV. STAT. § 29-818 through 29-821 (Reissue 1995) provide a continuing basis for exercise of jurisdiction where property has been seized under a search warrant. Accordingly, the court proceeds to the merits.

4. Neither party asserts that § 29-2264 violates the separation of powers clause of the Nebraska Constitution. In *State v. Dvorak*, 254 Neb. 87, \_\_\_ N.W.2d \_\_\_ (1998), the Court described § 29-2264 as a statute "which purports to grant the judicial branch of government the power to set aside a conviction and sentence . . . ." However, the constitutionality of the section was not determined in that case. Except in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court, and if not so raised, it will be considered to have been

waived. *In re Interest of David C.*, 6 Neb. App. 198, \_\_\_ N.W.2d \_\_\_ (1997); *State v. Criffield*, 241 Neb. 738, 490 N.W.2d 226 (1992) (separation of powers argument not presented to, considered by, or ruled upon by district court was deemed waived). Accordingly, the court does not consider the constitutionality of that section.

5. Both parties urge application of the opinion in *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991). However, each focuses on different language.

a. The plaintiff cites the Supreme Court's observations that:

At first glance, it appears that a restoration of civil rights should result in the restoration of the right to bear arms. However, upon viewing case law, it appears that this is usually not the case.

*Id.* at 611, 467 N.W.2d at 384.

b. The defendant and claimant point to the language that “an express authorization to possess firearms in the restoration of citizenship would have permitted the defendant to carry a firearm [citation omitted] . . . .” *Id.* at 609, 467 N.W.2d at 384.

6. In *United States v. Germaine*, 720 F.2d 998 (8th Cir. 1983), the court concluded that § 29-2264 does not nullify the conviction for purposes of 18 U.S.C. § 922(h) (1982), which made it unlawful for a person previously convicted of a crime punishable by imprisonment for more than 1 year to receive firearms shipped in interstate commerce. In *State v. Illig, supra*, the Nebraska Supreme Court concluded that the same rationale can be applied to state law. This court finds that, under *Illig*, the court's action setting aside a conviction under § 29-2264 does not “usually” result in restoration of the right to bear arms.

7. The claimant argues that the specific action in her prior Madison County case resulted in restoration of the right to bear arms. This court disagrees.

a. This court is dubious that a district court has the power to grant relief beyond that expressly authorized by the statute. Such hesitation finds further support in the line of cases holding unconstitutional various statutes purporting to grant courts authority to modify sentences or other consequences of conviction. See *State v. Bainbridge*, 249

Neb. 260, 543 N.W.2d 154 (1996); *State v. Jones*, 248 Neb. 117, 532 N.W.2d 293 (1995); *State v. Philipps*, 246 Neb. 610, 521 N.W.2d 913 (1994).

b. Even if the statute might constitutionally be construed to authorize a court to expressly restore the right to bear arms, the record does not support such a finding in this case. The only language from the Madison County District Court order remotely bearing on this issue is the general removal language quoted above. Such language fails to “expressly” restore any particular right, and certainly fails to expressly restore a right to bear arms.

c. Moreover, this court is persuaded that the Nebraska Constitution and NEB. REV. STAT. § 83-1,130(2) (Reissue 1994) allocate such power and authority to the Board of Pardons. The evidence in this case undisputedly demonstrates that the Board of Pardons has neither granted a pardon nor empowered the Governor expressly authorize the claimant to possess a firearm.

d. Accordingly, this court concludes that the order setting aside the claimant’s felony conviction did not restore her right to bear arms and she remains subject to the statutory prohibition against possession of firearms by a felon. It then becomes necessary to determine the appropriate disposition of the firearms under the statute.

8. The state seeks to characterize the seized firearms as “contraband.” The court disagrees.

a. Various statutes expressly define certain goods or items as contraband. See, e.g., NEB. REV. STAT. § 9-255.01 (Reissue 1997). Neither party cites nor does the court find any statute defining firearms as “contraband.”

b. Section 29-820 expressly contemplates firearms as something different than contraband. The terms are used in different subsections of the statute (§ 29-820(1)(d) for contraband; § 29-820(1)(e) for firearms). The context and plain language of the statute clearly preclude interpretation of the statute to include firearms within the meaning of “contraband.”

9. The court now considers what disposition § 29-820 mandates regarding the firearms in question.

a. Section 29-820(1)(e) directs that “[e]xcept as provided in subdivision (2)(a) of this section, firearms . . . which have been used in the commission of crime shall be destroyed.”

(1) The court finds that the plaintiff failed to sustain its burden to show that the firearms “have been *used* in the commission of crime” within the meaning of that section. The only conceivable crime in this situation was mere possession by the claimant. In view of her reasonable, though erroneous, belief that her right to bear arms had been restored, it is difficult to reconcile such conduct with the evident intent to reach firearms actively used to commit murder, manslaughter, robbery, assault, and other serious felony offenses. Those crimes can be committed with the *use* of the firearm, where the mere possession does not contemplate “use” of the firearm.

(2) Even if used in the commission of crime, the statute nonetheless provides for an exception from the mandate to destroy such items “as provided in subdivision (2)(a).” The court concludes that, even if such mere possession by a felon whose conviction has been set aside under § 29-2264 constitutes a “us[e] in the commission of crime,” the exception should be applied.

b. Restated for applicability of subdivision (a) in relation to the principal language, § 29-820(2) states that “[w]hen [firearms which may have a lawful use] [are] seized or held and [are] no longer required as evidence, such property shall be disposed of on order of the court as the court may deem adequate . . . .”

(1) The court finds that the firearms in this case: (a) have a lawful use, (b) are held by law enforcement pursuant to seizure upon execution of a search warrant, and, (c) are no longer required as evidence. The statute then authorizes disposition “as the court may deem adequate.”

(2) The court deems disposition adequate to direct: (a) that delivery thereof not be made to the defendant as he is not the owner thereof; (b) that delivery not be made to the claimant so long as she remains subject to the disqualification from possession of such firearms resulting from her prior felony conviction, i.e. until pardoned by the Board of Pardons and being authorized by the Governor to possess such firearms pursuant to authorization of the Board of Pardons; (c) that delivery be made to the claimant's brother, Chris Peterson, upon his execution of a written undertaking not to deliver or allow delivery of such firearms to the possession of the claimant until such disqualification from possession of such firearms resulting from her prior felony conviction has been legally removed in the manner described above and undertaking not to deliver or allow delivery of such firearms to the possession of the defendant; and, (d) the related provisions of the order set forth below.

**ORDER:** IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The defendant's application for order releasing firearms is denied.
2. The claimant's application for order releasing firearms is granted to the extent of the relief set forth below and otherwise denied.
3. The plaintiff's request for affirmative relief upon its response to application is granted to the extent of the relief set forth below and otherwise denied.
4. Items 3, 4, 5, 6, 8, 9, 10, 11, 12, and 13 of Exhibit 5, copy of which is attached hereto and incorporated by reference, shall be released to Chris Peterson upon:
  - a. Execution and delivery by Chris Peterson of his written undertaking:
    - (1) Not to deliver or allow delivery of such firearms to the possession of the claimant until such disqualification from possession of such firearms resulting from her prior felony conviction has been legally removed in the manner described above, i.e. until the claimant is pardoned by the Board of Pardons and is authorized by the Governor to possess such firearms pursuant to authorization of the Board of Pardons, and,

(2) Not to deliver or allow delivery of such firearms to the possession of the defendant.

b. Such undertaking shall be subject to the approval of the county attorney for compliance as to form with the requirements of this order.

c. Such undertaking shall, after approval of the county attorney as to form for compliance with this order, be delivered to the law enforcement officer having custody and possession of such firearms.

d. Such undertaking shall be delivered within 90 days from the date of this order.

5. If Chris Peterson shall fail to comply with the terms for delivery established by this order for release of such items within 90 days from the date of this order, such items shall be destroyed.

6. Each party shall bear such party's own respective costs and attorneys' fees.

Entered: April 26, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.
- : Note the decision on the trial docket as: 4/26/99 Signed "Order on Disposition of Firearms" entered.  
Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

\_\_\_\_\_  
William B. Cassel, District Judge