STATE OF VERMONT

SUPERIOR COURT
Bennington Unit

CRIMINAL DIVISION
Docket No. 173-2-19 Bncr

State of Vermont

v.

Max Misch,
Defendant

DECISION ON MOTION

Defendant Max Misch is charged with two counts of violating 13 V.S.A. § 4021(a), which proscribes the possession of large-capacity magazines, defined as those with a capacity of more than 10 rounds of ammunition for a long gun or more than 15 rounds for a handgun. Mr. Misch moves to dismiss the charges, claiming that the statute violates Chapter I, Article 16 of the Vermont Constitution, guaranteeing the right of the people to bear arms. He also argues that the grandfather provision of § 4021 violates the Common Benefits Clause of Chapter I, Article 7 of the State Constitution by prohibiting some Vermonters from possessing large-capacity magazines while permitting others to do so. For the reasons set forth below, § 4021 does not contravene either constitutional provision and Mr. Misch's Motion to Dismiss is DENIED.

BACKGROUND

Following numerous mass shootings in places like Parkland, Las Vegas, Sutherland Springs, Orlando, Newtown, and Aurora, and an averted attack at Fair Haven Union High School in this State, the Legislature set out to enact gun control legislation. On April 11, 2018, the Governor signed Act 94 (S.55), which, inter alia, requires background checks for most private firearms sales, prohibits the sale of firearms to persons under the age of 21, bans the possession of bump-fire stocks, and proscribes large-capacity magazines. Earlier proposals of the legislation also included a ban on semiautomatic assault weapons, a provision compelling the "safe storage" of firearms, and a 10-day waiting period for the transfer of firearms. These proposals were not adopted.

The large-capacity magazine ban, codified at 13 V.S.A. § 4021, prohibits the manufacture, possession, transfer, offer for sale, purchase, or receipt or importation into the State of a "large capacity ammunition feeding device," defined as "a magazine, belt, drum, feed strip, or similar device that has a capacity of, or that can be readily restored or converted to accept: (A) more than 10 rounds of ammunition for a long gun; or (B) more than 15 rounds of ammunition for a hand gun." *Id.* § 4021(a), (e)(1). The law grandfathers such devices lawfully possessed on or before April 11, 2018 and allowed licensed dealers to sell off their stock until October 1, 2018. *Id.* § 4021(c)(1)–(2).

In January 2019, state law enforcement officers investigated allegations that after § 4021 went into effect, Mr. Misch travelled to a New Hampshire retailer, purchased two 30-round magazines for a rifle, and then transported the magazines into Vermont. Police officers interviewed employees of the retailer and obtained surveillance footage from the establishment, which allegedly depicts Mr. Misch purchasing the magazines. Officers subsequently obtained a warrant and conducted a search of Mr. Misch's house, where two 30-round magazines were found. The State charged Mr. Misch with two counts of possessing a large-capacity magazine contrary to § 4021(a).

DISCUSSION

Mr. Misch moves to dismiss the charges against him, claiming that the large-capacity magazine ban contravenes Chapter I, Article 16 of the Vermont Constitution, which guarantees the right of the people to bear arms. He also maintains that the grandfather provision of § 4021 violates the Common Benefits Clause of Chapter I, Article 7 of the State Constitution by prohibiting some Vermonters from possessing large-capacity magazines while permitting others to do so if they possessed such devises before April 11, 2018.

At the threshold, statutes are presumed to be constitutional and reasonable. *Badgley v. Walton*, 2010 VT 68, ¶ 20, 188 Vt. 367. Legislation having "any reasonable relation to a legitimate public purpose" is accorded deference. *Baker v. State*, 170 Vt. 194, 204 (1999). Thus, a defendant challenging the constitutionality of a statute has a heavy burden to overcome. *Badgley*, 2010 VT 68, ¶ 20.

Article 16 Right to Bear Arms

This case is fundamentally about achieving a balance between conflicting rights—the right to bear arms and the commensurate right to live in a community with a measure of safety. On the one hand, the Vermont Constitution grants the people "a right to bear arms for the defence of themselves and the State." Vt. Const., ch. I, art. 16. This right has a long history in this State and has been recognized on multiple occasions, albeit without much elaboration. See Vt. Const. of 1777, ch. I, art. XV; *State v. Duranleau*, 128 Vt. 206 (1969); *State v. Rosenthal*, 75 Vt. 295 (1903); see also *State v. Carlton*, 48 Vt. 636 (1876) (recognizing common law right to lawfully carry pistol for self-defense).

On the other hand, the Constitution also provides that "the people of this state by their legal representatives, have the sole, inherent, and exclusive right of governing and regulating the internal police of the same." Vt. Const., ch. I, art. 5; see also Vt. Const. of 1777, ch. I, art. IV. This provision expresses a "general distribution of powers to the Legislature, authorizing the Legislature to pass measures for the general welfare of the people and making the Legislature itself the judge of the necessity or expediency of the means adopted." *State v. Curley-Egan*, 2006 VT 95, ¶ 11, 180 Vt. 305 (internal quotations and citations omitted). This police power is the "practical manifestation of each individual's agreement, as part of the social compact, to subject his rights to the common good when a conflict arises." *Id.* ¶ 9.

The Vermont Supreme Court has discussed Article 16 on two occasions. In *State v. Rosenthal*, 75 Vt. 295, 297 (1903), the Rutland City Council adopted an ordinance criminalizing

the carrying of pistols and several other weapons without permission from the mayor or the chief of police. The Court recognized the Article 16 right to bear arms, cited case law and statutes permitting the carrying of firearms for self-defense, and enumerated several statutes restricting that right, including one regulating the possession of firearms in schools. *Id.* at 297–98. The Court invalidated the ordinance insofar as pistols were concerned for two reasons: First, because the ordinance did not account for self-defense, instead prohibiting carrying firearms without permission in all circumstances and for any purpose. *Id.* at 299. Second, because nothing in the ordinance prevented the mayor or police chief from granting permission in circumstances constituting a crime under the statutory restrictions. *Id.*

In *State v. Duranleau*, 128 Vt. 206, 210 (1969), the Court upheld the constitutionality of a statute criminalizing carrying a loaded rifle or shotgun in a vehicle on a public highway without a special permit. The Court observed that the law did not literally prohibit the "bearing" of any arms; it only required that rifles and shotguns be unloaded in a vehicle on a public highway. *Id.* The Court recognized that the statute admittedly conditioned the unrestrained carrying and operation of firearms but held that Article 16 "does not suggest that the right to bear arms is unlimited and undefinable." *Id.* "To require that two particular kinds of weapons," the Court held, "at certain specific places and under limited circumstances, be carried unloaded rather than loaded, is not such an infringement on the constitutional right to bear arms as to make the statute invalid." *Id.* This conclusion was "conditioned upon the presumption that the statutory purpose is reasonable, as it must be assumed to be," and on the absence of other facts demonstrating an unconstitutional operation of the statute. *Id.*

The Court has applied a reasonableness test in interpreting other state constitutional provisions. For example, *In re Prop. of One Church St. City of Burlington*, 152 Vt. 260, 266 (1989), held that Chapter I, Article 9 of the State Constitution requires that "any legislative classification of taxpayers bear a reasonable relation to the purpose for which it is established."

In *Baker v. State*, 170 Vt. 194, 203 (1999), the Court rejected the three-tiered scrutiny categories employed by the federal courts under the Federal Constitution and described its approach to the Article 7 Common Benefits Clause as "broadly deferential to the legislative prerogative to define and advance governmental *ends*, while vigorously ensuring that the *means* chosen bear a just and reasonable relation to the governmental objective." *Baker* also reaffirmed a requirement that under Article 7, legislative classifications must "reasonably relate to a legitimate public purpose." *Id.* (quoting *Choquette v. Perrault*, 153 Vt. 45, 52 (1989)).

Similarly, in *State v. Curley-Egan*, the Court held that the function of the Article 5 police power is to balance "the possession and enjoyment by the individual of all his rights" with "such reasonable regulations and restraints as are essential to the preservation of the health, safety and welfare of the community." 2006 VT 95, ¶ 9 (quoting *State v. Morse*, 84 Vt. 387, 393 (1911)).

Other states have adopted a reasonableness test to determine the constitutionality of gun-control statutes under their state constitutional right to bear arms. See, e.g., *Bleiler v. Chief, Dover Police Dep't*, 155 N.H. 693, 700, 927 A.2d 1216, 1223 (2007) ("In light of the compelling state interest in protecting the public from the hazards involved with guns," the correct test is "whether the statute at issue is a 'reasonable' limitation upon the right to bear arms"); *Mosby v. Devine*, 851 A.2d 1031, 1039 (R.I. 2004) (State Constitution "provides individuals with a right to

keep and bear arms, subject, however, to reasonable regulation by the state in exercising its police power"); *Benjamin v. Bailey*, 234 Conn. 455, 465, 662 A.2d 1226, 1232 (1995) ("To the extent that we previously have construed [the state constitutional right to bear arms] we have indicated that it permits reasonable regulation of the right to bear arms."); *Arnold v. Cleveland*, 67 Ohio St. 3d 35, 47–48, 616 N.E.2d 163, 172 (1993) ("[T]he question is whether the legislation is a reasonable regulation, promoting the welfare and safety of the people . . . .").

Guidance in the interpretation of Article 16 may also be obtained from federal courts construing the Second Amendment to the Federal Constitution, which provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the U.S. Supreme Court held that the Second Amendment confers an individual right to keep and bear arms, irrespective of militia service. This right, however, is not unlimited and does not "protect the right of citizens to carry arms for *any sort* of confrontation." *Id.*; see also *id.* at 626 ("From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."). The Second Amendment, moreover, permits prohibitions on the carrying of "dangerous and unusual weapons." *Id.* at 627. In *Heller*, the Court declined to establish a level of scrutiny for evaluating Second Amendment restrictions. See *id.* at 628–29. Instead, it held that the challenged D.C. law, which totally banned handgun possession in the home, failed all three standards of scrutiny applied to enumerated constitutional rights because it amounted to a prohibition of an entire class of arms commonly chosen by Americans for self-defense where the need for that defense is most critical. *Id.* The Court also explained that its opinion should not be read to "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626–27.

Since *Heller*, multiple federal courts of appeal have upheld the constitutionality of large-capacity magazine bans under the Second Amendment. See *Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019); *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106 (3d Cir. 2018); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406 (7th Cir. 2015); *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015); *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244 (D.C. Cir. 2011). With the exception of the Seventh Circuit, these courts employed a two-prong test: First, the court asks whether the challenged law burdens conduct protected by the Second Amendment; second, if so, then the court determines what level of scrutiny is appropriate and decides whether the law survives that level of scrutiny. See, e.g., *Ass'n of New Jersey Rifle & Pistol Clubs*, 910 F.3d at 116. The appropriate level of scrutiny in turn depends on how heavily the law burdens the Second Amendment right. *Id.* at 117. The federal courts of appeal either held that the challenged law did not burden conduct protected by the Second Amendment, *Kolbe*, 849 F.3d at 137, or did so to such a minimal extent that the appropriate test was intermediate scrutiny. See, e.g., *Worman*, 922 F.3d at 38.

Turning to this case, 13 V.S.A. § 4021 satisfies both the state reasonableness test and the federal two-prong, intermediate-scrutiny test. To begin, the courts applying the reasonableness

test seemed to have assumed that the challenged law implicated the constitutional right to bear arms—to put it in federal terms, that the law burdened conduct protected by the constitutional provision. See, e.g., *Bleiler v. Chief, Dover Police Dep't*, 155 N.H. 693, 700 (2007). As discussed, this is the first step in the federal test. However, it should not be assumed that any law relating to firearms necessarily implicates, or burdens conduct protected by, Article 16. Thus, although not explicit in the reasonableness test, the threshold inquiry in both tests is appropriately whether the challenged law even implicates Article 16, that is, whether it burdens conduct protected by the constitutional provision.

The large-capacity magazine ban imposes a burden on conduct protected by Article 16 because many, perhaps most, firearms today require a magazine for their operation and § 4021 restricts the capacity of those magazines. Because magazines are indispensable for the operation of many firearms, a law that restricts their capacity imposes some burden on conduct protected by Article 16. Here, as in *State v. Duranleau*, 128 Vt. 206, 210 (1969), the statute admittedly conditions the "unrestrained carrying and operation of firearms." See also *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 116 (3d Cir. 2018) ("Because magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are 'arms' within the meaning of the Second Amendment."); *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) ("[T]o the extent that certain firearms capable of use with a magazine . . . are commonly possessed by law-abiding citizens for lawful purposes . . . there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable.").

As relevant to the federal test, the burden § 4021 imposes is minimal. First, the statute does not impose any restriction on firearms themselves. Instead, it only regulates the capacity of magazines. See *Ass'n of New Jersey Rifle & Pistol Clubs*, 910 F.3d at 117. Second, the law does not restrict the number of lawful magazines that a person may possess. See *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 260 (2d Cir. 2015) ("[W]hile citizens may not acquire high-capacity magazines, they can purchase any number of magazines with a capacity of ten or fewer rounds."). Because the burden § 4021 imposes on conduct protected by Article 16 is minimal, intermediate scrutiny is the appropriate standard. See, e.g., *Fyock*, 779 F.3d at 999.

To survive intermediate scrutiny, a challenged law "must be substantially related to an important governmental objective." *Worman v. Healey*, 922 F.3d 26, 38 (1st Cir. 2019). "To achieve this substantial relationship, there must be a 'reasonable fit' between the restrictions imposed by the law and the government's valid objectives, 'such that the law does not burden more conduct than is reasonably necessary.'" *Id.* This last inquiry is analogous to the state reasonableness test, which asks "whether the statute at issue is a 'reasonable' limitation upon the right to bear arms." See, e.g., *Bleiler*, 155 N.H. at 700.

Mr. Misch argues that it is impossible to know the governmental objective behind § 4021 because the legislature did not explicitly announce a governmental interest in enacting the law. He maintains, moreover, that legislators prevented adequate public debate on the law—debates from which the governmental objective may have been gleaned. First, an explicit statement of legislative purpose is not necessary for a court to rule on the constitutionality of a statute. See, e.g., *Badgley v. Walton*, 2010 VT 68, ¶ 23 (examining proffered governmental purpose in Common Benefits Clause challenge). Second, the Legislature's purpose in enacting the large-

capacity magazine ban is plainly revealed by the legislative enactment itself and by its legislative history. Act 94 (S.55), in addition to prohibiting large-capacity magazines, included requirements for background checks for the sale of firearms, a prohibition on the sale of firearms to persons under the age of 21, and a ban on the possession of bump-fire stocks. Legislators also considered—though ultimately rejected—a ban on semiautomatic assault weapons, a provision compelling the "safe storage" of firearms, and a 10-day waiting period for the transfer of firearms. The legislative history also reveals extensive written testimony and numerous emails from the public for and against the bill. These records contain numerous references regarding the need for gun-control legislation and references to mass shootings throughout the country.

It is clear from the above that the legislative purpose in enacting the large-capacity magazine ban, as one of several gun-control measures, was to protect the public from gun violence, in particular, from mass shootings. This public-safety interest is eminently important and indeed compelling. See, e.g., *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015); *Bleiler v. Chief, Dover Police Dep't*, 155 N.H. 693, 700 (2007). Public safety is, moreover, at the heart of the Legislature's function under the Article 5 police power. See *State v. Curley-Egan*, 2006 VT 95, ¶ 9 (under Article 5, Legislature is to balance "the possession and enjoyment by the individual of all his rights" with "such reasonable regulations and restraints as are essential to the preservation of the health, safety and welfare of the community") (quoting *State v. Morse*, 84 Vt. 387, 393 (1911)).

Finally, § 4021 is both substantially related to the important government objective of protecting the public from gun violence and a reasonable limitation upon the right to bear arms. Here, like in *Duranleau* and unlike in *Rosenthal*, the challenged law does not literally prohibit the "bearing" of any arms because the law is silent as to firearms themselves. See *State v. Duranleau*, 128 Vt. 206, 210 (1969); *State v. Rosenthal*, 75 Vt. 295, 297 (1903). Instead, § 4021 regulates the capacity of magazines, it being well documented that large-capacity magazines allow more shots to be fired from a weapon, with a consequent greater potential for casualties and severity of injuries. See *New York State Rifle & Pistol Ass'n*, 804 F.3d at 263–64. Additionally, the law does not force gun owners who possessed large-capacity magazines before April 11, 2018 to relinquish their devices, 13 V.S.A. § 4021(c)(1), the goal being to curtail the availability of these devises and phase them out in time. The law, moreover, permits gun owners to purchase and possess as many lawful magazines as they wish. This is consistent with the objective of forcing assailants to reload more often during an attack and thereby create opportunities for victims to flee and bystanders or law enforcement to intervene. See *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 119 (3d Cir. 2018). In sum, § 4021 advances the people's public-safety interest in a modest and reasonable way while respecting the right to bear arms. The balance struck does not contravene Article 16.

Article 7 Common Benefits Clause

Mr. Misch's second argument is that the grandfather provision of § 4021 violates the Article 7 Common Benefits Clause because it prohibits some Vermonters from possessing large-capacity magazines while permitting others to do so if they possessed such devises before April 11, 2018. See 13 V.S.A. § 4021(c)(1).

The Common Benefits Clause provides, as relevant, "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." Vt. Const., ch. I, art. 7. "Article 7 is intended to ensure that the benefits and protections conferred by the state are for the common benefit of the community and are not for the advantage of persons 'who are a part only of that community.'" *Baker v. State*, 170 Vt. 194, 212 (1999). Adjudicating an Article 7 challenge involves a three-step analysis: First, the court identifies the part of the community disadvantaged by the law. *Id.* at 212–13. Second, the court examines "the government's purpose in drawing a classification that includes some members of the community within the scope of the challenged law but excludes others." *Id.* at 213–14. Finally, the court asks "whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose." *Badgley v. Walton*, 2010 VT 68, ¶¶ 21, 26 (quoting and clarifying *Baker* standard).

Here, the part of the community alleged to be disadvantaged by § 4021 is composed of Vermonters who wish to possess large-capacity magazines after April 11, 2018. As discussed, the legislative purpose in enacting § 4021 was to protect the public from gun violence. The grandfather provision allowed the Legislature to gradually curtail the availability of large-capacity magazines while lessening the burden on individuals that already possessed these devises. The provision, as discussed, militates in favor of the reasonableness of § 4021. As the Supreme Court recognized in *OMYA, Inc. v. Town of Middlebury*, 171 Vt. 532, 534 (2000), "[c]ourts have consistently upheld less than comprehensive legislation out of a recognition that, for reasons of pragmatism or administrative convenience, the legislature may choose to address problems incrementally." Accordingly, the omission of a part of the community from the benefit of possessing large-capacity magazines bears a reasonable and just relation to the governmental purpose of protecting the public from gun violence. Thus, § 4021 does not violate the Common Benefits Clause.

CONCLUSION

Over 240 years ago, the people of Vermont inscribed on their basic law their right to bear arms and their commensurate right to circumscribe that right through reasonable legislation. Those freedom-loving people recognized the need to cede a measure of freedom in exchange for the benefits conferred by association and community. In § 4021, their descendants established a balance between these seemingly adverse interests. This balance is consistent with the State's basic law and will not today be disturbed.

For these reasons, Mr. Misch's Motion to Dismiss is DENIED.

So ordered.

Dated at Bennington, Vermont, this 27th day of June 2019.

William Cohen
Superior Court Judge