

[Cite as *State v. Lerch*, 2016-Ohio-2791.]

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
WASHINGTON COUNTY

STATE OF OHIO,

:

Plaintiff-Appellee,

: Case No. 15CA39

vs.

:

KURT A. LERCH,

: DECISION AND JUDGMENT ENTRY

Defendant-Appellant.

:

---

APPEARANCES:

James R. Leach, Jim Leach, L.C., Parkersburg, West Virginia 26101, for appellant.

Kevin Rings, Washington County Prosecuting Attorney, and Alison L. Cauthorn, Washington County Assistant Prosecuting Attorney, Marietta, Ohio 45750, for appellee.

---

CRIMINAL APPEAL FROM COMMON PLEAS COURT

DATE JOURNALIZED: 4-12-16

ABELE, J.

{¶ 1} Kurt A. Lerch appeals from a Washington County Common Pleas Court judgment that denied his R.C. 2923.14 application for relief from statutory disability to possess a firearm. Because the statute vests the matter within the sound discretion of the trial court, and Lerch has not established that the trial court abused that discretion, we affirm.

{¶ 2} In August 2004, the Washington County Grand Jury returned an indictment that charged Lerch with six counts of passing bad checks in violation of R.C. 2913.11(A), covering a period between November 2002 and May 2004, with two of the counts being felonies of the fourth degree and the remaining four counts being felonies of the fifth degree. Lerch retained

counsel and entered a plea of not guilty to the charges.

{¶ 3} In February 2005, Lerch pled guilty to three counts of passing bad checks, one being a felony of the fourth degree and two being felonies of the fifth degree, in return for the dismissal of the other counts. A couple months later, the trial court sentenced Lerch to serve 12 months in the county jail, five years of community control and ordered him to make restitution to the victims of the crimes, including the counts that had been dismissed, in an amount of nearly \$25,000. In its sentencing entry, the trial court determined that Lerch caused serious economic harm to his victims and that his relationship to the victims facilitated his crimes. The trial court also determined that Lerch is more likely to recidivate than the normal offender because he had prior adult and juvenile convictions and that he had failed to respond to criminal sanctions in the past.

{¶ 4} After serving 10 months of his 12-month jail term, the trial court granted Lerch's motion for release from that portion of his sentence. While he was serving his jail term, the trial court denied his motion to modify the conditions of his community control. In its decision, the trial court stated that it had reviewed the presentence investigation report and had found that in addition to the bad-check-passing offenses charged in his criminal case, from 1992 to May 2004 Lerch had been previously charged with shoplifting by price fixing, reckless operation, disorderly conduct, passing bad checks, three counts of worthless checks, false pretense, two theft counts, operating without a CDL, and overload. The trial court further noted that Lerch had been charged with passing bad checks in the Marietta Municipal Court and had successfully completed probation for that charge, but that he "did not reform his behavior as evidenced by the instant case." The trial court concluded that Lerch's "criminal history as reported in the presentence

investigation report would clearly demonstrate a pattern of conduct on behalf of the Defendant that began as early as 1992.”

{¶ 5} In April 2010, the trial court determined that Lerch had complied with the requirements of his community control for the specified term of five years and discharged him. The trial court further restored him to all civil rights unless otherwise prohibited.

{¶ 6} Over five years after he was discharged from his sentence, Lerch filed an application under R.C. 2923.14 for relief from statutory disability to possess a firearm. In his application, Lerch claimed that he wanted the application to be granted so that: (1) he may obtain a concealed handgun license, (2) he is fully restored to all the rights of any other citizen, and (3) he is able to possess firearms under federal law for purposes of self-protection, tradition, and recreation. In an affidavit attached to his application, Lerch stated that (1) he is 43 years old, (2) he had three convictions for passing bad checks, (3) he deeply regretted the incidents that led to his convictions, but took full responsibility for his actions and past criminal history, (4) he served his sentence in its entirety, (5) he had no criminal convictions since his convictions in 2005 and he continued to lead a law-abiding life, (6) he is not otherwise prohibited from owning or using firearms, (7) he is very responsible and has maintained steady employment his entire adult life, (8) he owns and operates Hard Rock Excavating Co., LLC, (9) he has been married to Shannon Lerch for six years, and (10) he wishes to own a firearm “for self-protection, sport and to clear up all lingering issues stemming from my past.”

{¶ 7} At a pretrial proceeding, the trial court noted its concern about the application. Lerch’s counsel then contacted Dr. Bobby Miller, a forensic psychiatrist, who conducted an evaluation of Lerch. Dr. Miller noted that Lerch had a past history of violence, upon being

informed by Lerch that he had been arrested for disorderly conduct a few times for “bar fights” when he was 18 to 20 years old, and that he had a fist fight in high school. Dr. Miller opined that Lerch “does not currently possess emotional, psychological or neuropsychiatric factors that predispose him to future violent behavior.”

{¶ 8} The trial court held an evidentiary hearing to consider Lerch’s application. Lerch testified that he had started CK Excavating with his first wife and, as a result of financial difficulties caused by their struggling business, had passed bad checks to business creditors, which led to the criminal charges against him. He entered a guilty plea and was sentenced to jail and community control, which he fully satisfied. He also paid the ordered restitution and costs. According to Lerch, during his brief incarceration his business was dissolved and he filed for bankruptcy. In addition, his marriage ended shortly after his release from jail.

{¶ 9} Lerch further testified that since that time, he remarried and that he and his new wife started a new business, which has been very successful. The business is called HREC, LLC, a construction company. They hold fundraisers and have donated \$30,000 to a local fire department. In addition, he has had no criminal arrests or charges, including traffic charges, since his convictions in 2005 for passing bad checks.

{¶ 10} Lerch claimed that the reason he wanted relief from the firearm disability is for hunting and recreation. When he was sentenced for passing bad checks, he had relinquished his firearms by giving them to his brother. Lerch concluded his testimony by admitting his past mistakes and hoping to continue his new life:

I made a lot of mistakes and it really caused me a -- a lot of problems. I’ve got a successful marriage. I’ve got a successful family. And I don’t want to do anything to jeopardize that. I know what the punishment can be, and the

consequences from that. I want to continue to lead a law abiding life and -- enjoy the freedoms that I -- that I have.

{¶ 11} Lerch's wife, Shannon, testified that she handles the accounting, taxes, and payroll for their business, which is thriving, and that they own a home and 130 acres of property.

Two of her sons live with them, and she has never seen Lerch exhibit any violent behavior towards anyone. Shannon said she did not have any concern about the court restoring Lerch's ability to possess firearms.

{¶ 12} Lerch's counsel represented to the trial court that Lerch has no intention or interest to obtain a concealed weapons permit and that his sole interest is to restore his hunting rights. He argued that the offenses to which Lerch pleaded guilty are not crimes of violence and did not impose any restriction under Ohio law. The prosecutor noted that Lerch had committed financial and economic crimes that amounted to felony-level criminal offenses, but recognized that "there is nothing \* \* \* about his behavior, whether at the time of these underlying offenses or since, that would cause me to believe he's likely to become a violent offender." The state did not, however, specifically contend that the trial court should grant the motion.

{¶ 13} The trial court specified that it would take the matter under advisement:

Okay. Well, let me think about it over the weekend, because I've -- it used to be, these didn't -- you just gave them, but recently -- I just don't want my name connected to somebody that gets their rights back and goes and shoots somebody. I mean, I don't -- so let me think about it.

{¶ 14} Soon thereafter, the trial court denied the application. In its entry, the court noted that it had taken the matter under advisement following the evidentiary hearing and concluded that "[t]he Court does not find the Defendant's Application to be well taken and hereby ORDERS the same DENIED." (*Id.*) This appeal followed.

## II. ASSIGNMENT OF ERROR

{¶ 15} Lerch assigns the following error for our review:

THE TRIAL COURT ERRED IN DENYING KURT A. LERCH'S APPLICATION FOR RELIEF FROM STATUTORY DISABILITY TO POSSESS FIREARMS PURSUANT TO O.R.C. 2923.14.

## III. LAW AND ANALYSIS

{¶ 16} In his sole assignment of error, Lerch asserts that the trial court erred by denying his R.C. 2923.14 application for relief from statutory disability to possess firearms.

{¶ 17} "The right to keep and bear arms is a fundamental right enshrined in federal and state constitutional law." *State v. Robinson*, 2015-Ohio-4649, \_\_ N.E.3d \_\_, ¶ 11 (12th Dist.). The Second Amendment to the United States Constitution confers an individual right to keep and bear arms. *District of Columbia v. Heller*, 554 U.S. 570, 595, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). The Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right to keep and bear arms and applies it to the states. *McDonald v. Chicago*, 561 U.S. 742, 794, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). This right is not unlimited, but is subject to several longstanding prohibitions, including the possession of firearms by felons. *Heller*, 554 U.S. at 626-627, 128 S.Ct. 2783, 171 L.Ed.2d 637.

{¶ 18} Similarly, the right to keep and bear arms is part of Ohio's heritage—predating both the United States and Ohio Constitutions—and is a fundamental state constitutional right. *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633, ¶ 5, 7; Ohio Constitution, Article I, Section 4; *see also* R.C. 9.68(A). And like the federal constitutional right to keep and bear arms, the state constitutional right is also subject to limitations. *Klein* at ¶ 8.

{¶ 19} Pursuant to 18 U.S.C. 922(g)(1), because one of the passing-bad-check convictions for which Lerch was convicted is a fourth degree felony, Lerch was subject to the statutory bar that prevents persons convicted of a crime punishable by a term exceeding one year to possess any firearm or ammunition. *See* R.C. 2929.14(A)(4). Nevertheless, “ ‘[i]f state law has restored civil rights to a felon, without expressly limiting the felon's firearms privileges, that felon is not subject to federal firearms disabilities.’ ” *U.S. v. Zellars*, 334 Fed.Appx. 742, 744 (6th Cir.2009), quoting *United States v. Cassidy*, 899 F.2d 543, 546 (6th Cir.1990); 18 U.S.C. 921(a)(20).

{¶ 20} R.C. 2923.14 provides the mechanism in Ohio to restore civil rights to certain persons, including to a felon prohibited from keeping and bearing firearms by 18 U.S.C. 922(g)(1), by specifying that “[a]ny person who is prohibited from acquiring, having, carrying, or using firearms may apply to the court of common pleas in the county in which the person resides for relief from such prohibition.” R.C. 2923.14(A). R.C. 2923.14(D) authorizes a trial court to grant an application for relief from disability if the evidence establishes the three requirements specified therein:

Upon hearing, the court *may* grant the applicant relief pursuant to this section, if all of the following apply:

(1) One of the following applies:

(a) If the disability is based upon an indictment, a conviction, or an adjudication, the applicant has been fully discharged from imprisonment, community control, post-release control, and parole, or, if the applicant is under indictment, has been released on bail or recognizance.

(b) If the disability is based upon a factor other than an indictment, a conviction, or an adjudication, that factor no longer is applicable to the applicant.

(2) The applicant has led a law-abiding life since discharge or release, and appears likely to continue to do so.

(3) The applicant is not otherwise prohibited by law from acquiring, having, or using firearms.

(Emphasis added.)

{¶ 21} By using the word “may,” the General Assembly has drafted a permissive statute. *In re I.A.*, 140 Ohio St.3d 203, 2014-Ohio-3155, 16 N.E.3d 653, ¶ 13. That is, “[i]n statutory constriction, the word ‘may’ shall be construed as permissive \* \* \* unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage.” *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 271 N.E.2d 834 (1971), paragraph one of the syllabus. There is no contrary clear and unequivocal legislative intent here.

{¶ 22} Consequently, because the determination of whether to grant an application for relief from disability under R.C. 2923.14(D) is vested within a trial court's broad discretion, “[a] court of appeals reviews a trial court’s decision either granting or denying an application for relief from disability under an abuse of discretion standard.” *State v. Brown*, 8th Dist. Cuyahoga No. 96615, 2011-Ohio-5676, ¶ 17. “A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary.” *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34, citing *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980). An abuse of discretion includes a situation in which a trial court does not engage in a sound reasoning process. *Id.*

{¶ 23} Lerch argues that because the record establishes that he satisfied all of the R.C. 2923.14(D) requirements, the trial court should have granted his application for relief from disability. We agree that Lerch introduced evidence that, if credited, established the factors



specified in the statute. That is, he had been fully discharged from imprisonment and community control. R.C. 2923.14(D)(1)(a). Lerch had led a law-abiding life since his discharge and appeared likely to continue to do so based on he and his wife's testimony. R.C. 2923.14(D)(2). Furthermore, the prosecutor agreed with the psychiatrist's conclusion that Lerch appeared unlikely to become a violent offender in the future. Lerch also was not otherwise prohibited by law from acquiring, having, or using firearms. R.C. 2923.14(D)(3).

{¶ 24} However, as we previously observed, the plain language of R.C. 2923.14(D) specifies that even if all the factors are established to the trial court's satisfaction, it is nevertheless within the court's discretion whether to grant the application. Therefore, insofar as Lerch's claim that a trial court abuses its discretion whenever it denies an application for relief from disability when the factors have been established, we reject it because it would require this court to construe "may" as "shall."

{¶ 25} Moreover, Lerch also argues that the trial court abused its discretion by denying his application because he seeks relief from prior convictions for the nonviolent, non-drug offenses of passing bad checks. But as the Tenth District Court of Appeals observed in upholding a trial court's partial denial of an application for relief from disability, "to establish a bright-line test for determining release from disability cases, based upon the particular crimes or number of crimes, would ignore the discretion the trial court is specifically granted in R.C. 2923.14." *In the Matter of Relief from Disability of Mercer*, 10th Dist. Franklin No. 01AP-520, 2001 WL 1327218, \*3 (Oct. 30, 2001).

{¶ 26} Further, a trial court is free to consider the nature and extent of the applicant's prior criminal activity in determining that the person is not a fit subject for relief under R.C.

2923.14. *Brown*, 2011-Ohio-5676, at ¶ 22. The record here establishes that Lerch has a lengthy prior criminal history from 1992 through 2004, including multiple charges of passing bad checks and theft, as well as several charges that involve criminal offenses based on violence, e.g., disorderly conduct from bar fights. Although both the prosecutor and the psychiatrist opined that Lerch is unlikely to commit a violent offense in the future, they did not argue that Lerch is unlikely to commit a nonviolent offense in the future. In addition, Lerch and his counsel gave differing reasons at different times for why he sought relief from disability. For example, in the application Lerch's counsel specified that Lerch wanted to obtain a concealed handgun license, but at the hearing on the application he represented that Lerch had no interest in obtaining a concealed weapons permit. Also, in his application and supporting affidavit Lerch specified self-protection as one of the reasons he wanted to be relieved from the disability. However, at the hearing Lerch did not mention this at all.

{¶ 27} Finally, insofar as Lerch relies on the trial court judge's oral statement at the conclusion of the hearing that he did not want his name "connected to somebody that gets their rights back and goes and shoots somebody" to support his claim, we note that "a court speaks only through its journal entries" and that generally, "[n]either the parties nor a reviewing court should have to review the trial court record to determine the court's intentions." *Infinite Secuirty Solutions, L.L.C. v. Karam Properties II, Ltd.*, 143 Ohio St.3d 346, 2015-Ohio-1101, 37 N.E.3d 1211, ¶ 29. But "the reviewing court must examine the entire entry and proceedings when it is in the interest of justice to ascertain the grounds upon which a judgment is rendered." *See State v. Nguyen*, 4th Dist. Athens No. 14CA42, 2015-Ohio-4414, ¶ 28, citing *Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 551 N.E.2d 172 (1990), paragraph one of the syllabus.

{¶ 28} Here, the entry discloses no reason for the trial court’s denial of Lerch’s application. However, the trial court did not need to specify a reason under the statute. Although the trial court mentioned that it did not want to grant an application and then have the applicant shoot a person, it did not indicate that it would base its ultimate decision on that criteria. In fact, the trial court specified at that point that it had not made a decision and that it would take the matter under advisement. Therefore, we cannot presume that the trial court based its decision on that consideration. Moreover, even if the trial court had relied on it, the statement could be reasonably interpreted as not a blanket prohibition against the trial court ever granting an application, but rather a statement evidencing the court’s determination that it would not grant an application to someone that it determined to be likely to later shoot somebody.

{¶ 29} Therefore, based upon the foregoing reasons, we hold that Lerch has failed to satisfy his burden to establish that the trial court acted in an unreasonable, unconscionable, or arbitrary manner by denying his R.C. 2923.14 application for relief from disability. Although the members of this court may well have granted Lerch’s application were we in the position of the trial court, the “ ‘abuse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court.’ ” *State v. Newman*, 2015-Ohio-4283, \_\_\_ N.E.3d \_\_\_, ¶ 26 (4th Ed.), quoting *Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, at ¶ 34. Thus, we overrule Lerch’s assignment of error.

#### IV. CONCLUSION

{¶ 30} The trial court did not abuse its considerable discretion by denying Lerch’s R.C. 2923.14 application for relief from statutory disability to possess a firearm. Having overruled Lerch’s assignment of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Hoover, J.: Concurs in Judgment & Opinion

McFarland, J.: Concurs in Judgment Only

For the Court

BY: \_\_\_\_\_  
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.