IN THE SUPREME COURT OF TEXAS

No. 20-0452

TODD DELANE FERGUSON, PETITIONER,

v.

TEXAS DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

JUSTICE BLACKLOCK, joined by JUSTICE DEVINE, dissenting from the denial of the petition for review.

This petition for review asks whether the State can suspend Ferguson's right to carry a handgun solely because he was charged by information with a misdemeanor. Before answering that question, the Court would also need to address the Ferguson's contention that the Second Amendment protects the right to carry a handgun in public. I would grant the petition and answer these questions.

Section 411.187(a)(1) of the Government Code provides that the Department of Public Safety "shall suspend [a license to carry a handgun] if the license holder . . . is charged with . . . a Class A or Class B misdemeanor." Ferguson was charged by information with trespass while openly carrying a handgun, a Class A misdemeanor. *See* TEX. PENAL CODE § 30.07(a)(1), (d). In compliance with the statutory command, the Department suspended Ferguson's license to carry.

Ferguson argues that he has a Second Amendment right to carry a handgun, which cannot

be deprived without due process of law. *See* U.S. CONST. amend. XIV, § 1. He does not contest that the State can suspend his right to carry if he is convicted of this Class A misdemeanor. He also does not contest that the State can suspend his right to carry while the charges are pending, provided he is given a meaningful hearing at which to challenge whether probable cause supports the charges. His complaint is that Texas's license-to-carry statute requires the Department to indefinitely suspend his license solely because a prosecutor filed an information[1] charging him with a Class A misdemeanor. *See* TEX. GOV'T CODE § 411.187(a)(1). The statute entitles him to a hearing, but the only issue allowed at the hearing is whether charges have actually been filed against him. *See id.* § 411.180(c). If they have, then his right to carry must be suspended whether or not probable cause supports the charges. He asks only for a probable-cause hearing to determine whether the evidence against him satisfies a preliminary standard of proof. Because the statute does not provide for such a hearing or its equivalent, he contends he has been deprived of liberty without due process of law. He may have a point.[2]

[1] In Texas, an "information" is "a document filed by the prosecutor with the court to charge a person with a crime." *Ferguson v. State*, 335 S.W.3d 676, 682 (Tex. App.—Houston [14th Dist.] 2011, no pet.). It "does not require any court or grand jury review before bringing the defendant to trial." *Rodriguez v. State*, 491 S.W.3d 18, 25 (Tex. App.—Houston [1st Dist.] 2016, pet. ref'd).

[2] Ferguson adequately preserved his due-process complaint for this Court's review. At a brief hearing in the county court at law, Ferguson's counsel stated that her client was "rais[ing] a constitutional challenge" to the statutory procedure for suspending his license, explaining that the Due Process Clause required that he be allowed to contest whether probable cause supported the underlying misdemeanor charge. Rather than solicit a lengthy discussion of precisely which liberty or property interests might trigger due-process protections when the state suspends a license to carry, the trial judge understandably made a speedy ruling against Ferguson but encouraged counsel to "take the constitutional case forward, and it may be a very interesting thing, or, who knows, it may change the law." Ferguson now raises the same due-process complaint in this Court as he did in the county court at law. He did the same in the court of appeals. On appeal, he has pointed to his liberty interest rooted in the Second Amendment as one potential source of the due-process protections he seeks. Although the Second Amendment was not specifically mentioned in the county court at law, a question not expressly mentioned to the trial court is nonetheless adequately preserved if it is one of the "subsidiary questions fairly included" in a question that was presented below. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 222 (Tex. 2017). Ferguson's Second Amendment argument is one such "subsidiary question[] fairly included" within the broader issue of whether he has been deprived of a constitutionally significant interest without due process. Moreover, although appellate courts "do not consider *issues*

The Second Amendment's protections fall within the scope of the Due Process Clause's reference to "liberty." *McDonald v. City of Chicago*, 561 U.S. 742 (2010). As a result, government must afford "due process of law" when restricting a person's Second Amendment rights.[3] The predicate question this case raises is whether the Second Amendment protects the right to publicly carry a handgun. If it does, the State cannot "deprive any person of [the right to carry] without due process of law." U.S. CONST. amend. XIV, § 1.

In *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008), the Supreme Court held that the Second Amendment protected an individual's right, unconnected with militia service, to possess a handgun in the home for lawful purposes, including self-defense. In *McDonald*, the court clarified that this right could be asserted against state and local governments. 561 U.S. 742.

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that were not raised . . . below, . . . parties are free to construct new *arguments* in support of issues" that were raised. *Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 764 n.4 (Tex. 2014). The *issue* here is whether the suspension of Ferguson's license to carry implicates constitutional due-process protections. The *arguments* for why due process might be implicated are just that—arguments.

It is notable that Ferguson cited *Bell v. Burson*, 402 U.S. 535 (1971) (Brennan, J.), in the trial court. In that case, the U.S. Supreme Court itself never bothered to specify whether its due-process holding was based on a "liberty" or a "property" interest, instead basing its holding on the textually untethered observation that suspension of a driver's license "adjudicates important interests of the licensee." *Id*. at 539. If the U.S. Supreme Court does not always feel the need to precisely identify the source of the liberty or property interest that gives rise to due-process protections, it would be awfully persnickety to require a litigant in a county court at law to do so on pain of waiver. In any event, litigants need not "rely on precisely the same case law or statutory subpart" in the trial court as they do on appeal. *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 896 (Tex. 2018). "[D]isposing of appeals for harmless procedural defects is disfavored," and "appellate courts should reach the merits of an appeal whenever reasonably possible." *Perry v. Cohen*, 272 S.W.3d 585, 587 (Tex. 2008). I see no obstacle to our doing so in this case.

[3] *See, e.g.*, *United States v. Rehlander*, 666 F.3d 45, 48 (1st Cir. 2012); *United States v. Arzberger*, 592 F. Supp. 2d 590, 602 (S.D.N.Y. 2008); *United States v. Kennedy*, 593 F. Supp. 2d 1221, 1231 n.4 (W.D. Wash. 2008); *United States v. Laurent*, 861 F. Supp. 2d 71, 107 (E.D.N.Y. 2011); Jonathan Zimmer, *Regulation Reloaded: The Administrative Law of Firearms after* District of Columbia v. Heller, 62 ADMIN. L. REV. 189, 211 (2010); Diane Yandach, *How Do We Keep Guns Out of the Hands of Those on the Terrorist Watch List Without Violating Due Process*, 15 RUTGERS J.L. & PUB. POL'Y 91, 113 (2017); *see also* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1945, 1950 (Thomas M. Cooley ed., 1873) ("[L]ife, liberty, and property . . . cannot be dispensed with either generally or specially"; the Fourteenth Amendment "is not . . . a mere shield to personal liberty, but to civil" and "political liberty," including "the right of self-defence against unlawful violence.").

Although *Heller* did not consider the carrying of arms outside the home, strong historical evidence favors a right to publicly carry.[4] It is, after all, a right "to keep *and bear* Arms." *See* U.S. CONST. amend. II. Several courts post-*Heller* have recognized as much by holding unconstitutional blanket bans on carrying arms outside the home.[5]

Ferguson does not fall into a class of persons categorically outside the historical scope of the Second Amendment's protections. *See United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc). *Heller* did say that forbidding felons from owning firearms was a "longstanding" and "presumptively lawful regulatory measure[]." 554 U.S. at 626, 627 n.26. Depriving those merely *charged with misdemeanors* of their Second Amendment rights is quite another matter. Most courts to consider the question have agreed that "there is no basis for categorically depriving persons who are merely accused of certain crimes of the right to legal possession of a firearm." *Arzberger*, 592 F. Supp. 2d at 602; *see also Kennedy*, 593 F. Supp. 2d at 1231 n.4 (same); *Laurent*, 861 F. Supp. 2d at 107 (same).

Assuming Ferguson has been deprived of Second Amendment rights, "the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Again, Ferguson does not contend that the Second Amendment prohibits the State from suspending the public-carry

[4] "Founding era legal commentators," the "majority of the relevant cases [decided] during the antebellum period," and sources from around "the time the Fourteenth Amendment was ratified" almost uniformly "confirm that the . . . right to bear arms was understood to protect public carry." *Rogers v. Grewal*, 140 S. Ct. 1865, 1871–73 (2020) (Thomas, J., dissenting from denial of certiorari); *accord* David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1535–36 (1998); Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (i): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 623 (2012). The U.S. Supreme Court is at least interested enough in the question that it recently granted certiorari to decide "[w]hether . . . denial of . . . applications for concealed-carry licenses for self-defense violated the Second Amendment." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Corlett*, __ S. Ct. __, __, No. 20-843, 2021 WL 1602643 (2021).

[5] *See, e.g.*, *Rogers*, 140 S. Ct. at 1868 (citing cases); *People v. Aguilar*, 2 N.E.3d 321, 327 (Ill. 2013).

rights of defendants charged with misdemeanors. Instead, he contends only that the Due Process Clause has been violated because the minimal process afforded him was insufficient to support denial of his right to carry during the pendency of the charges. In this regard, it bears emphasis that Ferguson was charged by information, not by indictment. Traditionally, a "[grand jury's] indictment . . . conclusively" establishes "probable cause . . . without further inquiry." *Gerstein v. Pugh*, 420 U.S. 103, 118 n.19 (1975). Hence, the "grand jury, all on its own, may effect a pre-trial restraint on a person's liberty by finding probable cause to support a criminal charge." *Kaley v. United States*, 571 U.S. 320, 329 (2014). By contrast, the Supreme Court has held unconstitutional the pretrial detention of a defendant based only on a prosecutor's filing of an information, unless a neutral magistrate determines that the charges are supported by probable cause. *Gerstein*, 420 U.S. at 117–18.

Here, the only individualized "process" involved in the deprivation of Ferguson's rights was (1) the prosecutor's unilateral decision to file an information charging him with a misdemeanor, and (2) a statutory hearing at which Ferguson could contest only whether the charge in fact existed. To deprive a person of his Second Amendment rights based on the mere existence of a prosecutor's allegations carries a substantial risk of the wrongful deprivation of liberty, as the statistics cited by Ferguson demonstrate.[6] Ferguson convincingly argues that the Due Process Clause requires a prosecutor who wishes to deprive a defendant of his constitutional right to carry a handgun to obtain a probable-cause finding from a neutral magistrate. *See Arzberger*, 592 F. Supp. 2d at 603.

[6] *See* Petition for Review at 18 ("From January 1, 2018 through January 31, 2019, Bexar County," where Ferguson was charged, "dismissed 13,070 misdemeanors" but achieved only "10,379 convictions . . . . Therefore, a defendant is [26%] more likely to have his charge dismissed than he is to be convicted.").

Post-*Heller* case law supports the conclusion that a misdemeanor charge alone is not sufficient to deprive a person of Second Amendment rights. Two district courts have declared unconstitutional a federal statute prohibiting certain criminal defendants from possessing firearms while released on bail, reasoning that the law "violate[d] due process by requiring . . . an accused person . . . to surrender his Second Amendment right" without "an individualized determination" that the condition is appropriate or "an opportunity [for the defendant] to contest" such determination. *Arzberger*, 592 F. Supp. 2d at 603; *accord Kennedy*, 593 F. Supp. 2d at 1231 n.4.

Other courts have upheld similar measures, however. Two district courts have rejected due-process challenges to a federal law prohibiting someone "under indictment for a crime punishable by imprisonment for a term exceeding one year" from shipping or receiving in interstate commerce "any firearm or ammunition." 18 U.S.C. § 922(n). *See Laurent*, 861 F. Supp. 2d at 107–08; *United States v. Call*, 874 F. Supp. 2d 969, 977 (D. Nev. 2012). Likewise, an Ohio appellate court upheld a state law prohibiting a person under indictment for a violent felony from possessing guns, reasoning that since "pretrial detention" of indictees "is constitutionally permissible," it follows that the lesser measure of forbidding indictees from possessing arms is likewise permissible. *State v. Philpotts*, 132 N.E.3d 743, 755 (Ohio Ct. App. 2019). The Ohio court found it noteworthy, however, that a defendant could contest "the finding of probable cause" in "an individualized judicial assessment through a hearing." *Id.*

Unlike the statutes upheld in these cases, section 411.187(a)(1) applies not only to indicted defendants but also to defendants, like Ferguson, charged by information. In such cases, neither a grand jury nor a court has determined whether probable cause supports the charges. Nor does the statute afford Ferguson a hearing at which to contest the charges. A defendant deprived of Second

Amendment rights based solely on a prosecutor's unilateral say-so has received little that can rightly be called the "process of law." The State may well be within its rights in depriving Ferguson of his right to bear arms under these circumstances, but I doubt that a prosecutor's unfettered exercise of discretion is all the process Ferguson was "due" in conjunction with this deprivation of liberty. I would grant his petition and decide these questions.[7]

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James D. Blacklock
Justice

OPINION DELIVERED: June 25, 2021

[7] It is possible, though not at all clear, that the recent enactment of legislation authorizing the public carry of handguns without a license resolves Ferguson's complaint by authorizing him to carry in public despite the suspension of his license. The Court has received no briefing on that issue and is not equipped to decide it. If the Court granted the petition, I would ask the parties to brief that issue. The effect of the new legislation on the rights of license holders whose licenses are suspended could, on its own, be an important legal question suitable for this Court's review.