

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0966**

The State of Minnesota,
Respondent,

vs.

D. H. S.,
Appellant.

**Filed March 22, 2021
Affirmed
Hooten, Judge**

Wright County District Court
File No. 86-K5-91-000716

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Thomas N. Kelly, Wright County Attorney, Greg T. Kryzer, Assistant County Attorney,
Buffalo, Minnesota (for respondent)

D. H. S., Annandale, Minnesota (pro se appellant)

Considered and decided by Johnson, Presiding Judge; Hooten, Judge; and Slieter,
Judge.

NONPRECEDENTIAL OPINION

HOOOTEN, Judge

Self-represented appellant challenges an order denying his petition under Minn. Stat. § 690A.03, subd. 3(a)(3) (2018), for expungement of records relating to his misdemeanor assault conviction under Minn. Stat. § 609.224, subd. 1 (1990). Appellant

appears to argue that the district court abused its discretion in determining that the benefit to him is not commensurate with the disadvantage to the public and public safety because enforcing the lifelong federal ban on firearms under 18 U.S.C. § 922(g)(9) (2015) violates the U.S. Constitution’s prohibition against ex post facto laws. U.S. Const. art. I, § 9, cl. 3. We affirm.

FACTS

In 1991, appellant D. H. S. was convicted of misdemeanor fifth-degree assault of his wife. In February 2020, he filed a petition for expungement of his conviction, and the district court held a hearing in May 2020. At the hearing, the state objected to D. H. S.’s petition on the grounds that his conviction results in a lifetime firearm prohibition under 18 U.S.C. § 922(g)(9). That federal statute, which was enacted in 1996, provides that it is unlawful for any person “who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” The state contended that an expungement would impede its ability to enforce the lifetime firearm prohibition against D. H. S.

The district court determined that D. H. S. “ha[d] failed to establish by clear and convincing evidence that expunging [his] record would yield a benefit to [him] commensurate with the disadvantages to the public and public safety of sealing the record and burdening the court and authorities to issue, enforce, and monitor an expungement order.” D. H. S. appeals.

DECISION

D. H. S. argues that enforcement of the lifelong federal ban on firearms under 18 U.S.C. § 992(g)(9), as applied to his conviction, violates the U.S. Constitution's prohibition against ex post facto laws. *See* U.S. Const. art. I, § 9, cl. 3. A statute violates the Ex Post Facto Clause if it applies to events occurring before its enactment and disadvantages the offender it affects by altering the definition of criminal conduct or increasing the punishment for a crime. *Lynce v. Mathis*, 519 U.S. 433, 441, 117 S. Ct. 891, 896 (1997). The constitutionality of a statute is a question of law we review de novo. *State v. Barnes*, 713 N.W.2d 325, 330 (Minn. 2006). A party who challenges a statute's constitutionality bears the burden of proving that the statute is unconstitutional beyond a reasonable doubt. *State v. Tennin*, 674 N.W.2d 403, 407 (Minn. 2004).

D. H. S. contends that the federal firearm ban under 18 U.S.C. § 922(g)(9) does not apply to his conviction because it was enacted in 1996, after his conviction in 1991. Although Minnesota courts have not yet considered whether 18 U.S.C. § 922(g)(9) violates the Ex Post Facto Clause when applied to a defendant who committed the predicate offense prior to the enactment of 18 U.S.C. § 922(g)(9), this court has considered whether a firearm ban under a similar state statute, Minn. Stat. § 624.713 (2000), violates the Ex Post Facto Clause when applied to a defendant who committed the predicate offense prior to an amendment of another related statute. *State v. Grillo*, 661 N.W.2d 641, 643 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003).

In *Grillo*, the defendant, Grillo, was adjudicated delinquent for felony theft of a motor vehicle, an offense that was not then characterized as a "crime of violence." *Id.*, *see*

Minn. Stat. § 624.712, subd. 5 (2000). After Grillo’s discharge from court supervision, Minn. Stat. § 624.713, subd. 1(b) (1995), was amended to include juveniles who had been adjudicated delinquent for commission of violent crimes as a class of persons prohibited from possessing a firearm. *Grillo*, 661 N.W.2d at 643. Minn. Stat. § 624.712, subd. 5, was also amended, making felony auto theft a violent crime for purposes of ineligible firearm possession. *Id.* After these amendments, Grillo was arrested and convicted of illegally possessing a firearm. *Id.* at 643–44. He moved to dismiss the charge, arguing that prosecution of the offense violated both the United States and Minnesota Constitutions’ prohibitions against ex post facto laws. *Id.* at 644. We held that, because the law making Grillo ineligible to possess a firearm applied to future, not past conduct, it was not an ex post facto law, either facially or as applied to him. *Id.* at 645.

The Eighth Circuit’s decision in *U.S. v. Pfeifer*, although not controlling, is also relevant to our analysis as persuasive authority. 371 F.3d 430 (2004). In that case, the appellant, Pfeifer, was convicted of assaulting his wife in 1985. *Id.* at 432. In 2001, he was found hunting with a firearm and was convicted of violating 18 U.S.C. § 922(g)(9). *Id.* at 433. The Eighth Circuit held that the statute applied to persons who were convicted of domestic assault prior to enactment, reasoning that a “law is not retroactive simply because it draws upon antecedent facts for its operation.” *Pfeifer*, 371 F.3d at 436–37 (quotation omitted). In reaching this conclusion, the Eighth Circuit agreed with prior decisions from other circuit courts around the country. *See United States v. Hemmings*, 258 F.3d 587, 594 (7th Cir. 2001); *United States v. Mitchell*, 209 F.3d 319, 322–23 (4th Cir. 2000); *cf. United States v. Brady*, 26 F.3d 282, 290–91 (2d Cir. 1994)

(upholding conviction under felon in possession statute even where predicate felony conviction occurred decades before enactment of the statute).

The facts of this case are similar to the facts in both *Grillo* and *Pfeifer*. Just as the amendment of Minn. Stat. § 624.713, subd. 1(b), made Grillo part of a class subject to future punishment for possessing a firearm, the enactment of 18 U.S.C. § 922(g)(9) made D. H. S. part of a class subject to future punishment for possessing a firearm. Similarly, both Pfeifer and D. H. S. were convicted of assault prior to the enactment of the federal firearm ban under 18 U.S.C. § 922(g)(9), which affected their future ability to possess a firearm in each case. Because 18 U.S.C. § 922(g)(9) applies to future, not past conduct, it is not an ex post facto law and therefore does not violate U.S. Const. art. I, § 9, cl. 3, either facially or as applied to D. H. S. Like Grillo and Pfeifer, D. H. S. remains prohibited from possessing a firearm for the rest of his life. Accordingly, the district court did not abuse its discretion in determining that the benefit to D. H. S. from expungement is not commensurate with the disadvantage to the public and public safety and denying the expungement petition.

Affirmed.