

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
v.) Crim. No. 04-9-B-W
)
MICHAEL V. FOWLER,)
)
Defendant)

RECOMMENDED DECISION

Defendant Michael Fowler has filed a Motion to Dismiss the indictment on the ground that this court is without subject matter jurisdiction under the Commerce Clause to entertain the alleged violation of 18 U.S.C. § 922(g)(1), unlawful possession of a firearm "in or affecting commerce." (Docket No. 57.) Defendant acknowledges that the Court of Appeals in this Circuit has repeatedly rejected facial challenges to the constitutionality of 18 U.S.C. § 922 (g)(1). (*Id.* at 2, citing United States v. Joost, 92 F.3d 7, 14 (1st Cir. 1996), United States v. Abernathy, 83 F. 3d 17, 20 (1st Cir. 1996), and United States v. Bennett, 75 F.3d 40, 49 (1st Cir. 1996)).¹ Nevertheless, Fowler contends that "the mere possession of a firearm through a private, noncommercial, and intra-state transaction involving two private individuals does not involve economic activity that substantially 'affects' interstate commerce." (*Id.* at 1, citing United States v. Lopez, 514 U.S. 549 (1995) and United States v. Bass, 404 U.S. 336 (1971).)

The ultimate determination of whether the United States will be able to establish the requisite nexus with interstate commerce will depend upon the evidence introduced at

¹ See also United States v. Cardoza, 129 F.3d 6, 9 (1st Cir. 1998) (rejecting a facial challenge to § 922(g) as "hopeless on . . . the law") (quoting United States v. Blais, 98 F.3d 647, 649 (1st Cir. 1996), cert. denied, 519 U.S. 1134)).

trial, where the Government will have to prove that Fowler's possession of the firearm was "in commerce or affecting commerce." United States v. Bass, 404 U.S. 336, 337-38 (1971). However, given the current state of the record, based upon the presentation at the companion evidentiary hearings on defendant's motion to suppress and motion to suppress out-of-court identification, it does not appear to me the Government will have any difficulty proving a nexus with interstate commerce on the facts of this case.

Fowler, although identifying himself as from Springvale, Maine, at the time of the gun's purchase, was actually believed to be living in Massachusetts. The gun itself was discovered in connection with a crime scene some six weeks after the purchase and the crime scene was in Boston, Massachusetts. The gun's serial number had been obliterated and ultimately the serial number plate itself was recovered from Fowler's residence in Lynn, Massachusetts. And, it is worth noting, Fowler learned of the gun from reading a "For Sale" ad in *Uncle Henry's*, a Maine-based but regionally distributed "Swap or Sell It Guide." See Uncle Henry's, Inc. v. Plaut Consulting Co., Inc., ___ F.3d ___, 2005 U.S. App. LEXIS 3017, *2, 2005 WL 407394, *1 (1st Cir. Feb. 22, 2005) ("Uncle Henry's is a Maine corporation based in Augusta that publishes a "Swap or Sell It Guide." While best known in Maine, the guide is also distributed throughout New England and parts of Canada."). It seems that there is a greater interstate nexus in this case than in many others where the Government relies solely upon the place of manufacture. For that reason alone it appears to me that Fowler's "as applied" challenge must fail.

Conclusion

Based upon the foregoing I recommend that the Motion to Dismiss be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/Margaret J. Kravchuk
U.S. Magistrate Judge

Dated: March 3, 2005

Defendant

MICHAEL V FOWLER (1)
also known as
MICHAEL W SMITH (1)

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LEAD ATTORNEY
ATTORNEY TO BE NOTICED
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Pending Counts

18:922G.F FELON IN
POSSESSION - 18:922(g)(1) and
924(a)(2)
(1)
42:408.F - MISUSE OF SOCIAL
SECURITY NUMBER -
42:408(a)(7)(B)
(2)

Disposition

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

**Highest Offense Level
(Terminated)**

None

Complaints

18:922G.F - Felon in Possession

Disposition

Plaintiff

USA

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