IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

OPINION AND ORDER

13-cr-128-bbc

v.

MICHAEL HANCOCK,

Defendant.

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At the final hearing in this case, held on December 18, 2014, the parties were directed to submit additional briefing on the question of the alleged restoration of defendant's civil rights. Defendant raised this issue in a motion in limine, dkt. #62, contending that the government should not be allowed to put in evidence of the felonies that led to his incarceration in Colorado and the government raised it in a motion, dkt. #63, that is the mirror image of defendant's motion, arguing that defendant should not be allowed to introduce evidence of the alleged restoration of his civil rights unless he could make a pretrial proffer with sufficient facts to establish all the requisite elements for the defense.

The question of the restoration of rights is a critical one for defendant: he is charged in count 1 of the indictment with possessing a firearm under 18 U.S.C. § 922(g) after having been convicted previously of a crime punishable by a term of imprisonment exceeding one year and the government wants to prove at trial that defendant was convicted previously of

three such felonies, all in Colorado. If it is allowed to do so and if it succeeds in proving the prior convictions as well as the charge in the indictment, defendant will face a mandatory sentence of not less than 15 years, under 18 U.S.C. § 924(e), unless he can show that the civil rights he lost as a result of the prior Colorado convictions had been restored to him before he committed the crime charged in count one. If the government is not allowed to put in proof of the Colorado felonies, defendant faces a sentence of no more than 10 years upon conviction.

18 U.S.C. § 924(e) provides that a person who violates § 922(g) and has three previous convictions for a violent felony or serious drug offense shall be imprisoned for not less than 15 years. 18 U.S.C. § 921(a)(2) provides that the term "punishable by imprisonment for a term exceeding one year" does not include any "conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored . . . unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

The last sentence of § 921(a)(20) has received considerable judicial attention, primarily because the states vary in the information they provide to persons who have served their full sentences. In 1990, the Court of Appeals for the Seventh Circuit read the sentence as an "anti-mouse trapping rule." United States v. Erwin, 902 F.2d 510, 512 (7th Cir. 1990). It held then that if a state sends a felon "a piece of paper implying that he is no longer 'convicted' and that *all* civil rights have been restored, a reservation in a corner of the state's penal code can not be the basis of a federal prosecution. A state must tell a felon

point blank that weapons are not kosher." Id. at 512-13.

As Erwin suggests, not all pieces of paper sent to felons restore *all* civil rights. Some restore none; others restore one or more. The court of appeals has decided that three rights matter: the right to vote, the right to hold office and the right to serve on a jury. United States v. Williams, 128 F.3d 1128, 1134 (7th Cir. 1997). If all three are included in the document, the defendant's prior convictions do not count for § 924(e) purposes, even if nothing in the document tells the defendant that his right to possess, transport, ship or receive firearms has been restored. Id. In addition, if the document does not refer specifically to all three civil rights, it may have the same effect if it confers a full, free and absolute pardon. Buchmeier v. United States, 581 F.3d 561, 565 (7th Cir. 2009).

The document at issue in this case was sent to defendant by the state of Colorado on December 15, 2006 and was entitled "Statutory Discharge from Facility." It stated that defendant was to be "unconditionally discharged from the custody of the Department of Corrections pursuant to 18-1.3-401," dkt. #62-1, and it listed the three convictions to which it applied. It said nothing about the restoration of any rights, including the right to possess a firearm.

Defendant contends that the omission of any reference to restoration of rights is irrelevant because Colorado restores a felon's civil rights automatically and that this may be learned from reading § 18-1.3-401 of the Colorado Revised Statutes, which provides for the restoration of a felon's right to vote automatically upon the completion of his sentence, Colo. Const., Art. VII, § 10:

> No person while confined in any public prison shall be entitled to vote; but every such person who was a qualified elector prior to such imprisonment, and who is released therefrom by virtue of a pardon, or by virtue of having served out his full term of imprisonment, shall without further action, be invested with all the rights of citizenship, except as otherwise provided in this constitution.

In other words, defendant argues that a mere reference to a statute in a document of unconditional discharge without any explanation of the statute's holding is sufficient to have caused him to believe that the document restored certain rights to him, including the right to vote and to hold office. This argument fails because the document did not "mousetrap" him into thinking he could still possess a firearm; nothing contained in the notice of conditional discharge told him that all his civil rights were restored. "When, however, the state sends no document granting pardon or restoring rights, there is no potential for deception, and the question becomes whether the particular civil right to carry guns has been restored by law." Erwin, 902 F. 2d at 511.

If the court assumes, as defendant argues it should, that a mere reference to a specific statute imbues the reader with an understanding of the statutory and constitutional provisions relevant to the restoration of his rights, then it is equally reasonable to assume that the reader would know that Colo. Const. Art. II, § 13 does not confer an absolute right to bear arms on any felon who has been discharged from his term of imprisonment, but only protects the right of that person "to keep and bear arms in defense of his home, person and property or in aid of the civil power when thereto legally summoned." People v. Blue, 190 Colo. 95, 544 P. 2d 385 (Sup. Ct. 1975) (holding that felon who has served term is not

entitled to bear arms except in specific, limited circumstances spelled out in Art. II, § 13 of state constitution); see also People v. Garcia, 197 Colo. 550,552, 595 P.2d 228 (Sup. Ct. 1979) ("The right to bear arms is not absolute, and it can be restricted by the state's valid exercise of police power.").

But it is not necessary to discuss the Colorado statutes or constitution in order to decide defendant's motion. What matters is what was included in defendant's notice of unconditional discharge. Nothing in that document told defendant that any or all of his civil rights had been restored. Therefore, he was not misled into thinking he could possess a firearm. United States v. Glaser, 14 F.3d 1213, 1218 (7th Cir. 1994) (finding it irrelevant that Minnesota statute made it illegal for felons to possess pistols when certificate sent to discharged felon told him that all his civil rights were restored as if his conviction had not taken place without advising him that he was not permitted to possess a pistol; contents of certificate prevailed over contents of state statutes for purpose of determining when defendant could be sentenced under § 924(e)).

ORDER

IT IS ORDERED that defendant Michael Hancock's motion in limine, dkt. #62, is

DENIED and the government's motion in limine, #63, is GRANTED.

Entered this 31st day of December, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge