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[Cite as *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922).]

PEOPLE v. ZERILLO. (No. 183.)

(Supreme Court of Michigan. Oct. 2, 1922.)

1. Weapons--Possession of revolver for defense cannot be made a crime.

The Legislature has no power to make it a crime for a person, alien or citizen, to possess a revolver for the legitimate defense of himself or his property.

2. Weapons--Game laws cannot infringe right to bear arms for self-protection.

Game being the property of the state, the Legislature may enact laws for its protection, but under the guise of protection of game may not disarm any class falling within the constitutional guaranty of the right to bear arms in defense of themselves.

3. Weapons--"Right to bear arms" means right to possess and use arms.

The guaranty of the right to every person to bear arms in defense of himself means the right to possess arms for legitimate use in defense of himself, and necessarily includes the right to defend therewith, by lawful means, his property.

4. Constitutional law--Statute will be upheld if possible.

The Supreme Court must, if possible, construe an act so as to make it harmonize with constitutional provisions.

5. Weapons--Act held void as restricting constitutional right to bear arms.

That part of Act No. 14, Pub. Acts 1921, making it a crime for an unnaturalized foreign-born resident to possess a revolver, unless permitted by the sheriff, is in contravention of Const. art. 2, § 5, guaranteeing to every person the right to bear arms for the defense of himself and the state, and is void.

Exceptions from Recorder's Court of Detroit; Pliny W. Marsh, Judge.

James Zerillo, alias Joseph Zerillo, was convicted of possessing a revolver without a sheriff's permit, contrary to Public Acts 1921, Act No. 14, and he excepts. Conviction set aside, and defendant discharged.

Argued before FELLOWS, C. J., and WIEST, STONE, McDONALD, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ.

Speed, Ring & Kelly, McClear, Stein & Sarbaugh, and J. Richard Newman, all of Detroit, for appellant.

Merlin Wiley, Atty. Gen., and Paul W. Voorhies, Pros. Atty., and Robert M. Toms, Asst. Pros. Atty., both of Detroit, for the People.

WIEST, J. Defendant, an unnaturalized foreign-born resident, was convicted under a complaint charging him with possessing a revolver without a permit granted by the (p.928)sheriff, contrary to Act No. 14, Public Acts 1921, and he brings the case here for review on exceptions before sentence.

It was made to appear in evidence that, about 5 o'clock in the morning of the 25th day of September, 1921, at the corner of Chase and Russell streets in the city of Detroit, defendant was seated at the wheel of a Marmon touring car, with four or five men in the car with shotguns. Defendant had no shotgun, but in the pocket of the door of the automobile was found a .38-caliber revolver, and this is the firearm the possession of which led to his conviction.

The complaint was laid under the game law, but did not charge the defendant with hunting for or capturing or killing any wild bird or animal, or intending to do so. Does the game law make it unlawful for an unnaturalized foreign-born resident of the state to possess a revolver? The act mentioned makes it a misdemeanor for an unnaturalized foreign-born resident to hunt for or capture or kill any wild bird or animals, either game or otherwise, of any description, excepting in defense of his person or property, "and to that end," such a person shall not own or be possessed of a shotgun or rifle of any make or a pistol or firearms of any kind. The act provides that, on the recommendation of two citizens, the sheriff of the county, upon a showing of necessity, may issue a permit to an unnaturalized foreign-born resident to possess firearms.

Defendant insists that the act, so far as it deprives him of the right to possess a revolver, for a legitimate purpose, is in conflict with the provisions of the Constitution of the state, and therefore void. The Constitution of this state (article 2, section 5) provides:

"Every person has a right to bear arms for the defense of himself and the state."

The true meaning of this provision is well stated in the Constitution of the state of Colorado:

"That the right of no person to keep and bear arms in defense of his home, person, and property, or in aid of the civil power when thereto lawfully summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons." Article 2, § 13.

There should be added to this, however, the right of the Legislature, under the police power, to regulate the carrying of firearms.

Firearms serve the people of this country a useful purpose wholly aside from hunting, and under a constitution like ours, granting to aliens who are bona fide residents of the state the same rights in respect to the possession, enjoyment, and inheritance of property as native-born citizens, and to *every person* the right to bear arms for the defense of himself and the state, while the Legislature has power in the most comprehensive manner to regulate the carrying and use of firearms, that body has no power to constitute it a crime for a person, alien or citizen, to possess a revolver for the legitimate defense of himself and his property. The provision in the Constitution granting the right to all persons to bear arms is a limitation upon the power of the Legislature to enact any law to the contrary.

The exercise of a right guaranteed by the Constitution cannot be made subject to the will of the sheriff. The part of the act under which the prosecution was planted is not one of regulation, but is one of prohibition and confiscation. It is not regulation to make it a crime for an unnaturalized foreign-born resident of the state to possess a revolver, unless permitted to have one by the sheriff of the county where he resides.

Game being property of the state the Legislature may enact laws for its protection, but under the guise of protection of game may not disarm any class, falling within the constitutional guaranty, of the right to bear arms in defense of themselves. The guaranty of the right to every person to bear arms in defense of himself means the right to possess arms for legitimate use in defense of himself, and necessarily includes

the right to defend therewith, by lawful means, his property.

The provision of the act permitting an unnaturalized foreign-born resident to hunt for, capture, or kill any wild bird or animal in defense of his person or property cannot be made to work out if the law is construed to make it a crime for such a person to possess a firearm, but can be made to function if the act is construed to make it a crime for such a person to possess a firearm for the purpose of hunting, capturing or killing any wild animal, either game or otherwise, of any description, excepting in defense of his person or property.

Must an alien owner of a farm sit with folded arms and watch henhawks steal his chickens? No, the act permits him to kill noxious birds and animals, when necessary, in defense of his person or property. But what is he going to use for that purpose? Until the occasion arises, if this statute is given the construction contended for by the people, it is a crime for him to possess a firearm, and he therefore cannot be prepared to exercise the leave granted without committing a crime. Woodchucks could burrow in his yard and meadows with impunity, owls rob his henroost, rats run about his feet at chore time, and in some sections of the state wolves could sit on his very doorstep and howl defiance. Even the predatory skunk, in the open season, would be more offensively armed than the unnaturalized farmer faring forth to drive it away. Must such a farmer whistle off the dog discovered (p.929) in the act of killing his sheep? Another statute gives him the right to kill such a dog discovered in the act. Must he request the burglar to come unarmed because he has been unarmed by the law? This act, if construed as contended for by the people, is so sharp-shod as to calk itself. The right to kill noxious birds and animals in defense of person or property would be but a joke if the means of

exercising the right are taken away by the general prohibition against possessing any firearms.

If it is a crime for an alien to possess a revolver what meaning shall be accorded section 3 of the act, which provides:

"That the possession of a shotgun, or rifle, or pistol, or firearm of any kind, at any place outside of buildings within this state by an unnaturalized foreign-born resident, shall be conclusive proof of a violation of the provision of section one of this act."

Is this to be considered merely a rule of proof? Proof of what? Proof of intent to hunt, or proof of possession of prohibited weapons? If the alien is in possession of a revolver, and it is a violation of the law for him to have one at all, there is no sense in declaring his possession of a revolver outside of buildings conclusive proof of a violation of the provisions of section 1 of the act, but there is some sense in making it proof of a purpose to hunt therewith, although it might be hard to convince a real hunter that a revolver is a hunting arm.

At the same session of the Legislature, and in another and a later act, relative to protection of game

(Act 117, Public Acts 1921),
it is provided:

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be absurd to

so hold, and
no such
holding is
necessary if
the game law
is kept to its
true purpose.
It is our duty,
if possible, to
so construe
the act in
question as to
make it
harmonize
with
constitutional
provisions.

The
people rely
upon the case
of Com. v.
Patsone, 231
Pa. 46, 79 Atl.
928 (affirmed
232 U.S. 144,
34 Sup.Ct.
281, 58 L.Ed.
539). We have
examined that
case, and find
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revolvers and
pistols, and
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Court of the
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