

Report on Heller Incorporation case in California

Posted on 01-16-2009

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Yesterday, January 15, 2009, the Federal 9th Circuit Court of Appeals heard testimony on the Nordyke v. King Case. The three judge panel included Justices O'Scannlain (Circuit Judge appointed by Reagan), Alarcon (Senior Circuit Judge appointed by Carter) and Gould (Circuit Judge appointed by Clinton).

I was able to attend the hearing to file this report. It was somewhat difficult to take notes with sufficient detail because each side was only given 20 minutes to make their arguments which included questions asked by the Judges. It was fast and furious to say the least.

This is a case where the plaintiffs, the Russ and Sally Nordyke, filed suit against the county of Alameda citing that the county had unconstitutionally banned gun shows at the county fairgrounds. Here are some of the issues:

* Gun shows had been conducted by the Nordykes for over ten years without a single incident ever occurring.

*In 1999, the County passed an ordinance making it illegal to possess a firearm or ammunition at the County Fairgrounds. They didn't actually ban gun shows, they just said that you can conduct a gun show as long as you don't have any guns or ammo present.

*The Nordykes filed a lawsuit in the Federal District courts citing the State's preemption on the subject of firearms laws, their 1st Amendment free speech rights were violated, and the ordinance was illegal under equal protection laws.

*They asked for a temporary injunction on the ordinance and were denied. They appealed to the 9th Circuit Court of Appeals and introduced a Second Amendment argument to the case.

*The 9th Circuit sent the issue of preemption to the California Supreme Court who found that the preemption law did not prohibit Counties from banning gun shows at their fairgrounds. *The 9th Circuit Court then rejected the claims that the Ordinance violated the Nordyke's 1st or 2nd Amendment rights based on precedents even though the judges themselves stated that they believed the precedent setting cases were not good law.

*The Nordykes then refiled their case with the district court but instead of challenging on a straight 1st Amendment stating that the ordinance was a violation of their right to free speech, they instead challenged that as the Ordinance as applied violated that right. The District Court disagreed.

*The case was appealed to the 9th Circuit Court again and this time another 2nd Amendment claim was added in light of the Heller v. DC U.S. Supreme Court ruling. The same judges who heard the first case, Justices O'Scannlain, Alarcon and Gould, were again to hear the new arguments.

*On Jan. 15, 2009, oral arguments were heard on the case at the Court House in San Francisco.

*Attorney for the Nordykes, Don Kilmer (a well known and prolific defender of the 2nd Amendment), assisted by Attorney Don Kates (a pro-Second Amendment legend) had 20 minutes to make their arguments. He pointed out again that the Ordinance violated free speech and expression by saying that you could have a gun show as long as don't have any guns. He then pointed out that under California law, there are only two places where law abiding citizens could legally purchase firearms; at gun stores and at gun shows. He also made a very good argument that the Heller Decision should be "incorporated" as being relevant to all gun law challenges in California.

*The County of Alameda lawyer, Peter Pierce, then presented his case stating that they believed that public safety trumps the suppression of civil rights and that Counties had the constitutional right to pass such a law. Judge Alarcon then asked what seemed to be a rhetorical question, "How can you sell a gun at a gun show without showing guns?"

The courthouse broke out in laughter and applause. The judges asked a question regarding a violation of "Equal Protection" because the County allows the Scottish Games to take place on the fair grounds where participants carry and use firearms so why can't you have gun shows? The Pierce made a very weak response to the question. With regards to the Heller Decision and the subject of incorporation, Pierce admitted that after Heller, there is a right to possess firearms for protection in the home. He said it is not unlimited. He pointed out that the County Fairgrounds are a sensitive place having had a prior shooting on the facility. He argued that this case falls outside the definition of Heller. Pierce pointed out that nothing prohibits the plaintiffs from having a gun show at a private location; they just cannot have it on public property. He also argued that the court cannot find on the issue of "Incorporation" until it decides whether this case is a Second Amendment case which he doesn't think it is. Finally, the attorney for the County showed his true ignorance about the Second Amendment when he argued that it only applies to the Federal Government and not States and Counties and Cities. The final comment from the court came from Justice Scannlain when he asked about the rationale of the Heller decision and how the historical significance reconciles with any case having to do with guns.

The court now has a few months before it makes its ruling. This will be very interesting. Based on the hearing, it's hard to say which way the court will rule.

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