

Return of Firearms After a DVPO

[In a recent post](#), I wrote about requiring surrender of firearms in a DVPO. The court of appeals issued an opinion on Tuesday this week discussing when the court can order return of those firearms. In [Underwood v. Hudson](#), the court reversed a trial court order denying return of weapons after the appellate court concluded defendant was not subject to the lifetime ban on possession which arises when a person is convicted of a “misdemeanor crime of domestic violence.”

Process for Return

Once firearms are surrendered pursuant to a DVPO, the sheriff cannot return those weapons until a court orders return. [GS 50B-3.1\(e\) and \(f\)](#). The court cannot order return if defendant is precluded by law from possessing firearms or if there are criminal charges pending against defendant based on acts against the person covered by the DVPO. This is true even if the trial court eventually denies plaintiff’s request for a one-year DVPO. [GS 50B-3.1\(e\); Underwood v. Hudson](#).

Defendant must request return of weapons by filing a motion not later than 90 days after the expiration of the DVPO or final disposition of the criminal charges. [GS 50B-3.1\(f\)](#). Upon receipt of the motion, the court must schedule a hearing and provide notice to plaintiff and to the sheriff who has possession of the weapons. At the hearing, “the court shall determine whether the defendant is subject to any State or federal law or court order that precludes defendant from owning or possessing a firearm.” [GS 50B-3.1\(f\)](#).

When is defendant precluded from possessing weapons?

The most common preclusions arise from statutes prohibiting possession by persons who:

- have been convicted of a felony, [18 USC 922\(g\)\(1\)](#); [GS 14-415.1\(a\)](#);
- are subject to a qualifying civil protection order, [18 USC 922\(g\)\(8\)](#); [GS 14-269.8](#);
- have been adjudicated “mentally defective” or committed to a mental institution, [18 USC 922\(g\)\(4\)](#), [GS 14-404\(c\)\(4\)](#) (no permits to purchase); [GS 14-415.12\(b\)\(6\)](#) (no permit to carry); or
- have been convicted of a “misdemeanor crime of domestic violence,” [18 USC 922\(g\)\(9\)](#).

If defendant is subject to any one of these, [GS 50B-3.1\(f\)](#) provides that the “court shall deny the return of weapons.” In addition, that statute provides that a request for return must be denied if “the defendant has any pending criminal charges, in either state or federal court, committed against the person that is the subject of the current protective order until the final disposition of those charges”.

Underwood v. Hudson

After finding that defendant had, among other things, threatened to kill plaintiff and to commit suicide, the trial court in [Underwood](#) ordered defendant to surrender all firearms as part of the relief granted plaintiff in an ex parte DVPO. Following the hearing on the final DVPO, the trial court dismissed plaintiff's claim after concluding plaintiff failed to prove an act of domestic violence.

However, defendant was convicted of communicating threats to and misdemeanor stalking of the plaintiff and was sentenced to 12 months of probation. After completing his probation, defendant filed a motion requesting return of his firearms. The trial court denied the request after concluding that defendant's convictions for communicating threats and stalking were convictions of misdemeanor crimes of domestic violence, resulting in a lifetime ban on possession of weapons by defendant pursuant to federal law.

Misdemeanor Crime of Domestic Violence

The court of appeals in [Underwood](#) held that defendant's convictions were not convictions of misdemeanor crimes of domestic violence, which federal law defines as:

- A misdemeanor under state, federal or tribal law; and
- Has, as an element, the use of force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

[18 USC 921 \(a\)\(33\)\(A\).](#)

The court explained that federal courts apply either the "categorical approach" or the "modified categorical approach" to determine if a conviction meets this definition. The categorical approach requires that the court look only at the statutory elements of the crime rather than on the conduct underlying the conviction. The modified categorical approach allows the court to look at the statutory elements as well as other documents describing the conduct underlying the conviction, such as the charging documents, jury instructions and plea documents, but only if the statute creating the crime is "divisible," meaning the statute "comprises multiple, alternative versions of the crime." However, at least one of the "versions" of the crime must include the elements of a misdemeanor crime of domestic violence. The other documentation is allowed to establish that the defendant's conviction was for the "version" of the crime involving the required elements.

The court of appeals held that neither of defendant's convictions involved crimes with an element of either the use of physical force, attempted use of physical force or threatened use of a deadly weapon, even though the actual conduct of defendant during the incidents that lead to the convictions also included the use of physical force. Because communicating threats requires only

the threat to physically injure another, see [GS 14-277.1](#), and misdemeanor stalking requires only harassment that would cause a reasonable person to fear bodily injury, see [GS 14-277.3A\(c\)](#), neither contains the elements required for a misdemeanor crime of domestic violence.

The case was remanded to the trial court rather than reversed. While the court of appeals concluded defendant was not disqualified from a return of his weapons at the time of the original hearing, the trial court on remand must “determine if the parties’ circumstances have changed since the prior hearing in such a way that defendant would not be disqualified from return of weapons for any reason.”

Happy Holidays! This is our last blog for 2015 but we will return January 6, 2016.