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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LAWRENCE BOYD, Defendant and Appellant.	B271753 (Los Angeles County Super. Ct. No. YA092529)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark Arnold, Judge. Affirmed.

Benjamin Owens, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Heather B. Arambarri, Deputy Attorneys General, for Plaintiff and Respondent.

Michael Lawrence Boyd (defendant) appeals from the judgment entered following a jury trial that resulted in his conviction of four firearm offenses (Pen. Code, §§ 25850, 29800, 30600, 30605)[1] and seven counts of theft-related offenses (§§ 459, 484g, subd. (a), 530.5, subd. (a)).[2] The trial court found true the allegations that defendant had suffered a prior conviction within the meaning of the Three Strikes law (§§ 667, subds. (b)-(j), 1170.12) and had served three prior prison terms (§ 667.5, subd. (b)), and sentenced defendant to a total term of 24 years four months in state prison. Defendant's two claims on appeal involve his convictions for unlawful possession of an assault weapon (§ 30605) and for unlawful assault weapon activity (§ 30600). He contends section 30605 violates the Second Amendment's right to keep and bear arms and section 30600 is unconstitutionally overbroad because it prohibits a substantial amount of activity protected by the Second Amendment.[3] Defendant did not make these claims in the trial court, and has forfeited them because they raise factual questions which cannot be resolved by the record on appeal. Accordingly, we affirm the judgment of conviction.

BACKGROUND

Around 12:30 a.m. on May 28, 2015, Torrance Police Department Officer Matthew Concannon parked his undercover vehicle in the driveway of

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1 All further undesignated statutory references are to the Penal Code.

2 The jury acquitted defendant of the count 7 and 8 burglary charges.

3 Defendant is a convicted felon who is barred from possessing any firearm. (§ 29800.) Thus, he could not lawfully possess or sell an assault weapon even if we were to strike down sections 30600 and 30605. The trial court imposed punishment for defendant's violation of section 30600 and imposed and stayed sentence for his violation of section 30605. Accordingly, defendant may challenge the two sections.

his residence and went inside. Officer Concannon's department-issued Colt M4 assault rifle was inside the vehicle. When the officer returned to his vehicle at 7:00 a.m., he discovered that the rifle, as well as a camera and its charger, were missing.

Defendant was arrested on June 2, 2015, on suspicion of committing a number of crimes. A stolen .45-caliber handgun was found in his car.[4] The charger for Concannon's camera was also found in the car. Concannon's rifle was not in the vehicle, but defendant's cell phone contained photos of a Colt M4 which appeared to have been taken inside Concannon's vehicle between 2:34 and 2:36 a.m. on May 28, 2015. Defendant's cell phone also showed calls and texts on May 28 to Ashton Coleman. Coleman told police that defendant offered to sell him a "big gun" that he had just acquired because it was "too hot" for him to keep. When Coleman called defendant about the gun later, defendant said it had already been sold.

DISCUSSION

A. Section 30605

Section 30605 prohibits the possession of any assault weapon, including an M4 rifle, with certain exceptions not applicable here. Defendant contends the section represents "a total ban of a popular class of weapons chosen by millions of Americans for lawful purposes" and so violates the Second Amendment as explained in *District of Columbia v. Heller* (2008) 554 U.S. 570 (*Heller*).[5]

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[4] This weapon formed the basis for defendant's conviction for being a felon in possession of a firearm in violation of section 29800.

[5] The United States Supreme Court has held that the Second Amendment right to keep and bear arms, as recognized in *Heller*, applies to the states. (*McDonald v. City of Chicago* (2010) 561 U.S. 742.)

Respondent contends that defendant has forfeited this claim by failing to raise it in the trial court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 880-881 (*Sheena K*).) Defendant claims he may raise a "'facial challenge'" to the unconstitutionality of the statute because it "does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts." (*Id*. at p. 885.)

The California Supreme Court did not hold or imply in *Sheena K.* that a facial challenge never requires scrutiny of facts. The court found that the constitutional challenge to the probation condition before it presented a pure question of law, but cautioned that this would not be true "in every case in which a probation condition is challenged on a constitutional ground." (*Sheena K., supra*, 40 Cal.4th at p. 889.)

A facial challenge to the constitutionality of a statute is simply one which "considers only the text of the measure itself, not its application to the particular circumstances of an individual. [Citation.]" (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of valid circumstances exists under which the act would be valid." (*United States v. Salerno* (1987) 481 U.S. 739, 745.)[6]

Defendant's facial challenge to section 30605 does not present a pure question of law. As we explain below, the challenge turns on questions of fact.

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6 As the California Supreme Court has acknowledged, the standard governing a facial challenge to the constitutional validity of a statute "has been the subject of controversy" within that Court. (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 502.) Because we find that defendant's challenge involves questions of fact and is forfeited, we need not elect one of the standards mentioned in *Kasler*.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The amendment does not confer "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." (*Heller, supra,* 544 U.S. at p. 626.) The Second Amendment protects weapons "'in common use' . . . for lawful purposes like self-defense." (*Id*. at p. 624.) It "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." (*Id*. at p. 625.) "'[D]angerous and unusual weapons'" may be banned. (*Id*. at p. 627.) An M-16 rifle is a current example of a "highly unusual" weapon, best suited for military purposes, which may be banned without violating the Second Amendment. (*Ibid*.) A short-barreled shotgun is another example of an unusual weapon which may be banned. (*Id*. at p. 625.) Thus, resolution of defendant's claim turns on whether assault weapons are (1) weapons in common use which are typically possessed by law-abiding citizens for lawful purposes or (2) dangerous and unusual weapons like an M-16 rifle or short-barreled shotgun. These are questions of fact.

Defendant contends, in effect, that there is no question of fact because assault weapons are "indisputably in common use for lawful purposes and therefore they are not 'dangerous and unusual' within the meaning of *Heller*." Defendant is mistaken.

As defendant acknowledges, two California courts which have considered challenges to section 30605 or its predecessor, section 12280, have found that assault weapons are dangerous and unusual weapons which may be banned: *People v. James* (2009) 174 Cal.App.4th 662 (*James*) and *People v. Zondorak* (2013) 220 Cal.App.4th 829 (*Zondorak*). In *James*, the Third

District Court of Appeal relied on the legislative history of the Roberti-Roos Assault Weapons Control Act and .50 Caliber BMG Regulation Act (collectively, AWCA) to find that the Legislature viewed assault rifles as dangerous and unusual weapons. The court held that assault weapons "are not the types of weapons that are typically possessed by law-abiding citizens for lawful purposes such as sport hunting or self-defense; rather these are weapons of war." (174 Cal.App.4th at p. 676.) The court also held that assault weapons are "at least as dangerous and unusual as the short-barreled shotgun at issue in *United States v. Miller* [(1939) 307 U.S. 174]," the holding of which was apparently approved by *Heller*. (*James,* at p. 677.) Thus, the court held, assault weapons are not protected by the Second Amendment and may be banned. In *Zondorak*, the Fourth District Court of Appeal found that the extensive legislative history cited by the *James* court supported its conclusion that assault weapons are at least as dangerous and unusual as a short-barreled shotgun; the *Zondorak* court agreed with that assessment. (*Zondorak, supra,* 220 Cal.App.4th at p. 837.) The *Zondorak* court additionally found that "assault weapons are only slightly removed from M-16-type weapons that *Heller* likewise appeared to conclude were outside the scope of the Second Amendment guarantee." (*Id.* at p. 836.) [7]

Defendant argues that *James* and *Zondorak* are wrongly decided in light of the holdings of *New York State Rifle and Pistol Ass'n v. Cuomo* (2d Cir. 2015) 804 F.3d 242 (*New York Rifle*) and *Heller v. District of Columbia*

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[7] The Fourth Circuit has now reached a similar conclusion and has held that assault weapons such as the AR-15 rifle are "like" M-16 rifles and are weapons of war and so fall outside the Second Amendment and may be banned. (*Kolbe v. Hogan* (2017) ____ F.3d ___, ___ [2017 U.S. App. LEXIS 2930, *47-50].)

(D.C. Cir. 2011) 670 F.3d 1244 (*Heller II*). He contends the federal cases "irrefutably" show that assault weapons are in common use.[8]

Defendant is correct that the Second Circuit and the D.C. Circuit both conclude that AR-15 rifles, a type of assault weapon, are "in common use." He overlooks the fact that the courts reached their conclusion on the basis of evidence presented in the district court and therefore included in the record on appeal. (*New York Rifle, supra*, 804 F.3d at p. 255; *Heller II, supra*, 670 F.3d at p. 1261.) We are reluctant to rely on the factual conclusions in these cases. The Second Circuit found that almost 4 million AR-15 assault rifles were manufactured between 1986 and 2013 and comprised 2 percent of the nation's firearms. (*New York Rifle, supra*, 804 F.3d at p. 255.) The D.C. Circuit, writing in 2011, found that 1.6 million AR-15's "have been manufactured since 1986" and in 2007 accounted for 5.5 percent of all firearms. (*Heller II, supra,* 670 F.3d at p. 1261.) We have no way of evaluating or reconciling these broad numbers, and because defendant did not raise his claim in the trial court, there is no evidence in the record before us of the current number of assault weapons in the country or of the number in "common use."

Further, even if we were to adopt the conclusions of *New York Rifle* and *Heller II* that certain assault weapons are in common use, that would only fill half the evidentiary deficit in defendant's argument. The courts in both cases

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[8] When defendant filed his briefs in this matter, the Fourth Circuit had granted rehearing en banc in *Kolbe v. Hogan* (4th Cir. 2016) 813 F.3d 160 (rehg. granted Mar. 4, 2016), but had not yet issued an opinion following rehearing. Defendant relied in part on that now-vacated 2016 opinion to argue that *James* and *Zondorak* were wrongly decided and that assault weapons are protected by the Second Amendment. That reliance is now misplaced.

looked for but did not find evidence showing that the weapons were commonly or typically possessed by law-abiding citizens for lawful purposes. (*New York Rifle, supra*, 804 F.3d at pp. 256-257 [evidence in the record does not "cleanly resolve[] the question of whether semiautomatic assault weapons and large-capacity magazines are 'typically possessed by law-abiding citizens for lawful purposes'"]; *Heller II, supra*, 670 F.3d at p. 1261 ["based upon the record as it stands, we cannot be certain whether these weapons are commonly used or are useful specifically for self-defense or hunting"].) There is no evidence in the record in this case which would permit us to make such a determination. As the facts of this case show, some assault weapons are owned by law enforcement agencies, and some are acquired by criminals. Assuming, arguendo, some are owned by law-abiding citizens for lawful purposes, there is no evidence of how many, or of their "common use."

Both the Second Circuit and the D.C. Circuit elected to assume for the sake of argument that assault weapons were commonly or typically possessed by law-abiding citizens for lawful purposes because the courts believed that intermediate scrutiny was the appropriate standard of review and the prohibitions survive that standard. (*New York Rifle*, *supra*, 804 F.3d at p. 257, fn. omitted ["we proceed on the assumption that these laws ban weapons protected by the Second Amendment. This assumption is warranted at this stage, because, as explained *post* . . . the statutes at issue nonetheless largely pass constitutional muster."]; *Heller II, supra*, 670 F.3d at p. 1261 ["We need not resolve that question [of typical use], however, because even assuming [the laws] do impinge upon the right protected by the Second Amendment, we

think intermediate scrutiny is the appropriate standard of review and the prohibitions survive that standard."].)[9]

Defendant, however, objects to the application of intermediate scrutiny or any other interest-balancing test. He contends that *Heller* categorically prohibits the ban of any weapon in common use by law-abiding citizens for a lawful purpose. Thus, defendant's position is that we should assume for the sake of argument that assault weapons are commonly or typically possessed by citizens for lawful purposes and strike down section 30605 on the basis of that assumption. This we cannot do. (*United States v. Salerno, supra,* 481 U.S. at p. 745 ["challenger must establish that no set of circumstances exists under which the Act would be valid"]; see *Kasler v. Lockyer, supra,* 23 Cal.4th at p. 502 [challengers of statute "have not even made the showing required under the formulations of the standard most favorable to their position"].) Defendant's claim of unconstitutionality raises questions of fact which cannot be resolved on appeal. His claim is forfeited by his failure to raise it in the trial court and thereby develop an adequate record. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 880-881, 889.)

B. Section 30600

With exceptions not relevant here, section 30600, subdivision (a) prohibits the manufacture, distribution, transport, import, lending or involvement in the sale of any assault weapon. Defendant contends the

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[9] The Fourth Circuit now agrees that if a weapon is protected by the Second Amendment, a ban of that weapon is subject to intermediate scrutiny. (*Kolbe v. Hogan, supra*, ___ F.3d at p. __ [2017 U.S. App. LEXIS at pp. *47-50].) The Fourth Circuit further ruled that the assault weapon ban before it would be constitutional under that scrutiny. (*Ibid*.) We note that the Seventh Circuit Court of Appeals has also found a ban on assault weapons constitutional, although it employs a different analysis than the D.C., Second and Fourth Circuits use. (*Friedman v. City of Highland Park* (7th Cir. 2015) 784 F.3d 406.)

statute is unconstitutionally overbroad because it prohibits activities that must be protected by the Second Amendment for that right not to be rendered meaningless. Defendant has forfeited this claim by failing to raise it in the trial court. (*In re Sheena K., supra*, 40 Cal.4th at pp. 880-881.) Further, as defendant acknowledges, this claim is dependent on the success of his previous claim that the Second Amendment protects the ownership of assault weapons and invalidates section 30605. That claim has been forfeited as well, as we explained, *ante*.

DISPOSITION

The judgment is affirmed.

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GOODMAN, J.*

We concur:

CHAVEZ, J., Acting P.J.

HOFFSTADT, J.

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* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.