

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1485

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KEVIN WAYNE HANDY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

October 20, 1993

Before REYNALDO G. GARZA, KING and DEMOSS, Circuit Judges.

PER CURIAM:*

Appellant Kevin Wayne Handy was convicted under 18 U.S.C. § 922(q)(1)(A) for possession of a firearm in a school zone. He appeals his conviction on the ground that the statute is unconstitutional. We agree with appellant and accordingly reverse his conviction.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

Appellant, Kevin Wayne Handy, attended a nighttime dance at Lincoln High School in Dallas, Texas, on April 17, 1992. At some point that evening, he removed a pistol from the trunk of his car, which was parked in the school parking lot, and fired several shots in the air.

Handy was charged in a two-count indictment with knowingly possessing a firearm in a school zone in violation of 18 U.S.C. §§ 922(q)(1)(A) and 924(a)(4), and with knowingly and with reckless disregard for the safety of another discharging a firearm within a school zone in violation of 18 U.S.C. §§ 922(q)(2)(A) and 924(a)(4). Handy entered into a plea agreement in which he agreed to plead guilty to the possession count and the government agreed to dismiss the discharging count. Handy, represented by counsel, pled guilty to the possession count on March 1, 1993. Handy, his attorney, and an Assistant United States Attorney signed and filed a factual resume in support of the guilty plea in which Handy stated that he knew he was within a school zone when he removed the pistol from his car. The government offered no proof that the pistol in question had ever traveled in interstate commerce.

Handy was sentenced to nine months imprisonment to be followed by a three-year term of supervised release. He timely filed his notice of appeal.

II.

A guilty plea generally waives all non-jurisdictional defects in the prior proceedings against the accused; it does not, however, waive the right of the accused to challenge the constitutionality of the statute under which he is convicted. Askew v. Alabama, 398 F.2d 825, 825 & n.1 (5th Cir. 1968) (citations omitted); see also Barnes v. Lynaugh, 817 F.2d 336, 338 (5th Cir. 1987) (holding that one who pleads guilty may challenge "antecedent constitutional intrusions that reflect on 'the very power of the State to bring the defendant into court to answer the charge brought against him.'" (citations omitted)).

III.

Handy argues that 18 U.S.C. § 922(q)(1)(A) is unconstitutional because Congress lacks the power to prohibit mere possession of a firearm in a school zone unless Congress either includes as an element of the offense that the firearm traveled in or affected interstate commerce, or makes some finding that simple possession of a firearm in a school zone affects interstate commerce.

This case was originally scheduled for oral argument. After the briefs were filed but before argument could be heard, this court handed down its opinion in United States v. Lopez, --- F.3d ---, No. 92-5641 (5th Cir. Sept. 15, 1993). In Lopez, we confronted the same claim on essentially the same facts. We held that "section 922(q), in the full reach of its terms, is invalid as beyond the power of Congress under the Commerce Clause." Id. at ---, slip op. at 54 (footnote omitted). We intimated that

"[c]onceivably, a conviction under section 922(q) might be sustained if the government alleged and proved that the offense had a nexus to commerce." Id. (footnote omitted). Such allegation and proof are not present in the instant case.

Because one panel of this court will not overrule the decision of another, Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1121 n.8 (5th Cir. 1992), we need go no further than to recognize that Lopez is indistinguishable from the instant case. Section 922(q) is unconstitutional as applied to Handy. Therefore, his conviction must be REVERSED.