

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50380

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESSE ROLAND FLORES,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
SA 93 CR 373

March 29, 1995

Before JONES, DUHÉ, and STEWART, Circuit Judges.

PER CURIAM:*

Jesse Flores challenges his eligibility for conviction as a felon in possession of a firearm in contravention of 18 U.S.C. § 922(g). As he stipulated to the district court, Mr. Flores was a felon because in 1979 Flores was convicted of murder in Texas, and received a thirty-five years sentence. He "discharged" that sentence on July 31, 1989. Subsequently, he stipulated that on occasions thereafter he was caught in possession of firearms and

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

that he denied being a felon in completing an ATF form required to acquire a firearm. His only defense at trial was the argument that he did not meet the statutory definition of a "felon" under the firearms statute because he had his civil rights substantially restored under Texas law by the discharge of his initial sentence. The district court rejected the argument, and he now appeals that decision.

I.

It is unlawful for a person convicted of a "crime punishable by imprisonment for a term exceeding one year" to possess a firearm "which has been shipped or transported in interstate . . . commerce." 18 U.S.C. § 922(g)(1). This prohibition, however, excludes "[a]ny conviction . . . for which a person . . . has had civil rights restored . . . unless such . . . restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." 18 U.S.C. § 921 (a)(20). Flores suggests argues that discharge of his sentence for murder in 1979 substantially restored his civil rights.

Whether these civil rights have been restored is determined by the law of the jurisdiction of conviction. Beecham v. United States, 114 S.Ct. 1669, 1671 (1994). Flores was convicted in Texas so his contention is easily dismissed by virtue of this court's opinion in United States v. Thomas, 991 F.2d 206, 209 (5th Cir.), cert. denied, 114 S.Ct 607 (1993).

This exception codified by § 921(a)(20) was designed "to give federal effect to state statutes that fully `restore' the civil rights of convicted felons when they are released from prison, or are granted a pardon, or have their convictions expunged." Id. at 209 (emphasis added). This court prescribed two hurdles that a former felon must surpass to avoid conviction under federal law: (1) The state which obtained the underlying conviction must "revive essentially all civil rights" of the convicted felon (whether individually or automatically); (2) The defendant must not have been "expressly deprived of the right to possess a firearm by some provision of the restoration law or procedure of the state." Id. at 213. Because Flores cannot satisfy this first requirement, we need not address a more refined question presented by the second.

This court held that the state must restore "all" or "essentially all" civil rights of the defendant to escape coverage of the federal firearm statute. Id. To define when the essential civil rights have been restored, the Ninth and the Sixth Circuits have adopted the rights to vote, hold public office, and serve on a jury as the operative criteria. The court in Thomas did not need to decide whether to adopt this approach to defining "essentially all" civil rights because it found as a general matter that "Texas neither actively or passively restores all or essentially all of the civil rights of criminals -- even non-violent felons -- upon release from jail" and that "Texas does not restore the th[ese]

three civil rights considered key." Id. at 214. This alone is fatal to his appeal.

Moreover, the Thomas court noted: "Texas . . . fails to meet muster under any of the approaches of the several circuits that have addressed the concept of restoration of civil rights as contemplated in § 921(a)(20)." Id. Even if this court would (or could) ignore this conclusion, Flores concedes that he does not have the right to serve on a jury. Hence he argues -- as he must -- that not all three "key" civil rights must be restored but only two. Although the Ninth Circuit may have reached this conclusion, it is implausible to read Thomas to support such a result. First, the court never held that it would accept the three key civil rights as a substitute for restoration of essentially all civil rights. Second, there is no intimation that the court if inclined to resort to this gauge would accept less than full satisfaction of the criteria. More importantly, the court concluded that none of these three civil rights were restored to a convicted felon under Texas law. Id. at 214 ("We also find that Texas does not restore to any felon . . . the rights to vote, hold public office, and serve on a jury.") (footnotes omitted). Although Mr. Flores cites the Tenth Circuit in United States v. Maines, 20 F.3d 1102, 1104 (10th Cir. 1994), as authority for the proposition that Texas law restored his right to vote, the Thomas court of this circuit came to the opposite conclusion. Absent en

banc reconsideration of the issue by our court¹ or a "subsequent state court decision[] that [is] clearly contrary to a previous decision of this court"² this determination is conclusive.

Flores's contentions are meritless, and his conviction is **AFFIRMED.**

¹ See Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 425-26 (5th Cir. 1987) ("One panel cannot overturn another panel, regardless of how wrong the earlier panel decision may seem to be").

² Pruitt v. Levi Strauss & Co., 932 F.2d 458, 465 (5th Cir. 1991) (citation omitted).