

**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
BIG STONE GAP DIVISION**

**UNITED STATES OF AMERICA,**

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Case No. 2:01CR10023

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v.

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**OPINION AND ORDER**

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**AGNES HOLBROOK,**

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By: James P. Jones

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United States District Judge

Defendant.

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*Eric M. Hurt, Assistant United States Attorney, Abingdon, Virginia, for the United States of America; Richard D. Kennedy, Sturgill & Kennedy, Wise, Virginia, for Defendant.*

In this criminal case, the defendant has filed motions to dismiss the indictment against her, to suppress statements given to law enforcement officials, to present evidence of the affirmative defense of justification at her trial, and to exclude certain government evidence. While the first two of these motions were considered and decided at the hearing on these motions, I memorialize my findings as to all motions herein.

For the following reasons, the defendant's motions will be granted in part and denied in part.

## I

On April 25, 2001, the defendant was charged in a two-count indictment with possession of a firearm after conviction for a misdemeanor crime of domestic violence, in violation of 18 U.S.C.A. § 922(g)(9) (West 2000), and for knowingly making false statements to a licensed firearm dealer in connection with the acquisition of a firearm, in violation of 18 U.S.C.A. § 922(a)(6) (West 2000).

In response, the defendant filed a motion to dismiss the first count on the ground that § 922(g)(9) was an unconstitutional exercise of Congressional power under the Commerce Clause.<sup>1</sup> She also filed a motion to suppress a statement given by her to special agents of the Bureau of Alcohol, Tobacco, and Firearms (“BATF”), claiming that this statement was given without the procedural safeguards afforded under *Miranda v. Arizona*, 384 U.S. 436 (1966). Finally, the defendant filed a motion to present evidence and instruct the jury on the affirmative defense of justification. I will consider each of these motions in turn.

## A

In her motion, the defendant recognizes the “undisputed” power of Congress to regulate the interstate transport and utilization of firearms under the Commerce Clause.

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<sup>1</sup> The United States Constitution provides that Congress shall have the power to “regulate Commerce . . . among the several states.” U.S. Const. art. I, § 8, cl. 3.

(Mot. Dismiss ¶ 3.) She nevertheless argues that § 922(g)(9) impermissibly intrudes into matters of traditional state concern, *see United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995), regarding domestic relations and does not contain a commercial nexus. (*Id.*)

However, § 922(g)(9) has consistently been found by the courts of appeals not to violate the Commerce Clause, *see United States v. Lewis*, 236 F.3d 948, 950 (8th Cir. 2001); *Gillespie v. Indianapolis*, 185 F.3d 693, 704 (7th Cir. 1999); *Fraternal Order of Police v. United States*, 173 F.3d 898, 907 (D.C. Cir. 1999), because it requires the government to prove, in a criminal prosecution, that the firearm at issue was “ship[ped] or transport[ed] in interstate or foreign commerce”; was “possess[ed] in or affect[ed] commerce”; or is received after having been “shipped or transported in interstate or foreign commerce,” 18 U.S.C. § 922(g), an interstate nexus found by the Court to be missing from the statutes at issue in *Morrison* and *Lopez*.<sup>2</sup> Accordingly, the defendant’s reliance on those cases is misplaced.

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<sup>2</sup> While the Fourth Circuit has not specifically addressed a Commerce Clause challenge to § 922(g)(9), it has categorically held that all nine subsections in § 922(g) satisfy the interstate nexus requirement of *Lopez*. *See United States v. Bostic*, 168 F.3d 718, 723 (4th Cir. 1999). *Morrison* affected no change to the analysis under *Lopez*, nor the holding under *Bostic*.

## B

Second, the defendant seeks to suppress a statement given by her to BATF agents because, as she claims, she was entitled to and did not receive her *Miranda* warnings. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

As the Supreme Court noted in *Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980), the *Miranda* safeguards apply to situations involving custodial interrogation. The term “interrogation” refers not only to express questioning, but also its functional equivalent. *Id.* Therefore, “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response” qualify as interrogation. *Id.* at 301. Whether or not words or actions of a law enforcement officer are likely to elicit an incriminating response is determined by focusing on the perceptions of the suspect. *Id.* The subjective intent of the officer is relevant but not dispositive. *Id.* at 301 n.7.

My decision therefore hinges on whether or not this was in essence “questioning initiated by law enforcement officers” within the meaning of *Miranda* and its progeny. *See Miranda*, 384 U.S. at 444.

To this end, I find credible the testimony of Special Agent Thomas Lesnak of the BATF who testified that no interrogation took place. Lesnak explained that when asked by the defendant why she was being arrested, he informed her that because she

had previously been convicted of a misdemeanor crime of domestic violence, it was illegal for her to possess a firearm. According to Lesnak, the defendant responded that the domestic violence crime in question had occurred in the distant past. When asked by defense counsel whether an interrogation of the defendant could possibly have taken place, Lesnak stated that to the best of his knowledge, he could not remember asking the defendant any questions.

I find that Lesnak's statements in response to the defendant's questions were not the functional equivalent of questioning and that the totality of the circumstances do not implicate the conditions necessitating a *Miranda* warning. This conclusion finds support in Lesnak's additional testimony that he had already obtained a statement given by the defendant to state authorities regarding the same crime for which she was arrested in the instant case. As Lesnak explained, he thus had no need to question the defendant regarding information he already had.

I likewise find from the evidence that the defendant was not particularly suggestible or susceptible; on the contrary, she is a mature individual with prior experience in the criminal justice system. I further find that Lesnak should not have reasonably known that his remarks to the defendant would have produced an incriminating response, and did not himself intend such a result when he answered the defendant's question.

The purpose behind *Miranda* was to “[prevent] government officials from using the coercive nature of confinement to extract confessions.” *Murphy v. Holland*, 845 F.2d 83, 86 (4th Cir. 1988) (quoting *Arizona v. Mauro*, 481 U.S. 520, 529-30 (1987)). The evidence does not show, however, that the defendant was “subjected to compelling influences, psychological ploys, or direct questioning,” *Mauro*, 481 U.S. at 529, as has been held in this circuit to indicate interrogation and implicate *Miranda*. *See Murphy*, 845 F.2d at 86.

## C

Finally, the defendant seeks to introduce evidence at trial that her illegal possession of the firearms at issue was justified because of an ongoing fear of physical harm from her estranged husband.<sup>3</sup> The government opposes the introduction of such evidence, claiming that this evidence does not meet the immediacy requirement of the justification defense as defined by the Fourth Circuit.

Whether an affirmative defense is established is a factual issue that is usually a function of the jury, and the trial court rarely rules on a defense as a matter of law. However, where there is insufficient evidence, as a matter of law, to support an element

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<sup>3</sup> According to her pleadings, the defendant filed for divorce from her husband on September 26, 2000. (Mot. Present Evidence ¶ 3.) Under Virginia law, the defendant must live apart from her husband for one year before a divorce may be decreed. *See* Va. Code Ann. § 20-91(9)(a) (Michie 2000).

of the justification defense, the defendant can be precluded from presenting evidence of justification to the jury. *See United States v. Sarno*, 24 F.3d 618, 621 (4th Cir. 1994). The only issue for me to decide at this early state of the case, therefore, is whether I will permit the defendant to present evidence of the justification defense to the jury.

In order to assert a defense of justification, the defendant must produce evidence that would permit the jury to conclude that: (1) the defendant was under unlawful and present threat of death or serious bodily injury; (2) she did not recklessly place herself in a situation where she would be forced to engage in criminal conduct; (3) the defendant had no reasonable legal alternative (to both the criminal act and the avoidance of the threatened harm); and (4) there existed a direct causal relationship between the criminal action and the avoidance of the threatened harm. *See United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989). This circuit construes the justification defense “very narrowly.” *See United States v. Perrin*, 45 F.3d 869, 875 (4th Cir. 1995).

The majority of cases to address the issue of the justification defense in the Fourth Circuit have affirmed the district court’s refusal to allow evidence on justification on the ground that the defendant in those cases did not establish an “imminent threat of death or injury.” *See Crittendon*, 883 F.2d at 330.

The facts proffered by the defendant in the instant case, however, are distinguishable.<sup>4</sup> According to the defendant, she will be able to prove at trial that, during the time in which she is charged with possessing the firearms in question, she was under a real and present threat of injury from her husband.<sup>5</sup> In support of her motion, the defendant has attached copies of approximately eight protective orders issued against her husband between October 14, 1999, and March 19, 2001, due to acts of “[f]amily [a]buse,” as well as two arrest warrants against him for violations of those orders. (Def.’s Mot. App.)

This case does not, like those above, present evidence of intermittent and random acts of violence by an unknown assailant. Rather, at this early stage of the case, the defendant has proffered facts evincing a real and continuous threat by a readily identifiable party who relentlessly pursued her, despite her efforts to the contrary.

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<sup>4</sup> See generally *id.* (finding no imminent danger when defendant was shot by an unknown assailant one year earlier); *Perrin*, 45 F.3d at 875 (finding no imminent threat where defendant knew assailant was incarcerated); *United States v. Holt*, 79 F.3d 14, 16 (4th Cir. 1996) (finding no imminent threat where defendant inmate previously attacked by unknown fellow inmates); *United States v. Poole*, No. 98-4231, 1998 WL 911717, at \* 3 (4th Cir. Dec. 31, 1998) (unpublished opinion) (finding no imminent danger where defendant attacked four months earlier); *United States v. Lindsay*, No. 00-4256, 2000 WL 1514373, at \*1 (4th Cir. Oct. 11, 2000) (unpublished opinion) (finding no imminent danger where defendant attacked six to eight hours earlier); *United States v. Brown*, No. 00-4282, 2001 WL 256109, at \*2 (4th Cir. Mar. 15, 2001) (unpublished opinion) (finding no imminent danger where defendant did not establish initial altercation with alleged assailant).

<sup>5</sup> In the indictment, the government charges the defendant with possessing the firearms in question “on or about or between February 2, 2001 and April 7, 2001.” (Indictment at 1.)

With respect to the second prong under *Crittendon*, I find that the evidence at this point does not establish that the defendant recklessly placed herself in a position where she would be forced to break the law. I reject the government's argument that the defendant was required to move from her home in order to avoid contact with her husband. With no facts regarding her financial condition or opportunities to relocate with minor children, I cannot accept that argument as persuasive.

Addressing *Crittendon's* third prong and assuming the truth of the facts asserted by the defendant, I find that the defendant did not have any reasonable legal alternatives. It appears from the appendix to her motion, reflecting the history of domestic abuse between the defendant and her husband, that the defendant tried in good faith to keep him away through protective orders and arrest warrants. Those measures, however, allegedly proved unsuccessful.

Additionally, while the government asks me to find that the defendant's reasonable alternatives included the use of weapons that she was not prohibited from possessing, such as a knife, I am unable to do so on the present record.

Finally, for the reasons already stated, the defendant has proffered sufficient facts to establish a causal connection between the criminal act in question and the threat sought to be avoided.

It is important to note that I do not address here the issue of whether the jury will be instructed on and allowed to consider the issue of justification. Although I will permit the defendant, based upon the proffered facts, to introduce evidence of her justification defense at trial, I may nevertheless refuse to instruct the jury on this issue, depending on the actual evidence at trial. *See Sarno*, 24 F.3d at 621.

## D

The defendant has also filed a motion in limine to exclude evidence regarding the death of her estranged husband, evidence of the investigation of his death, and evidence of her indictment by state authorities for his death.<sup>6</sup> Consistent with my earlier rulings, I will reserve decision on this issue until the record is more fully developed at trial.

## II

For the aforementioned reasons, it is **ORDERED** that:

1. The defendant's Motion to Dismiss (Doc. No. 11) is denied;
2. The defendant's Motion to Suppress (Doc. No. 12) is denied;
3. The defendant's Motion to Present Evidence of and Instruction on the Defense of Justification (Doc. No. 17) is partially granted. The defendant will be

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<sup>6</sup> The defendant's motion also sought to exclude evidence of the details of the defendant's misdemeanor conviction for domestic violence. Because the government has conceded that it will not seek to introduce such evidence, however, I need not address that issue here.

allowed to present evidence supporting a justification defense. However, I will reserve decision on whether to instruct the jury on this defense until the conclusion of the evidence; and

4. The defendant's Motion in Limine (Doc. No. 13) is denied without prejudice to reconsideration when the record is more fully developed at trial.

ENTER: June 15, 2001

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United States District Judge