

§ 18-12-108. Possession of weapons by previous offenders

(1) A person commits the crime of possession of a weapon by a previous offender if the person knowingly possesses, uses, or carries upon his or her person a firearm as defined in section 18-1-901(3)(h) or any other weapon that is subject to the provisions of this article 12 subsequent to the person's conviction for a felony crime as defined in section 24-4.1-302(1) or listed in subsection (7) of this section, or subsequent to the person's conviction for attempt or conspiracy to commit a crime as defined in section 24-4.1-302(1) that is a felony, pursuant to Colorado or any other state's law or pursuant to federal law.

(2) A person commits a class 5 felony if the person violates subsection (1) or (3) of this section. A person who violates subsection (1) or (3) of this section and used or threatened the use of the firearm in the commission of another crime is not eligible for probation or any other alternative sentence and shall be sentenced to the department of corrections.

(3)

(a) A person commits the crime of possession of a weapon by a previous offender if the person knowingly possesses, uses, or carries upon his or her person a firearm as defined in section 18-1-901(3)(h) or any other weapon that is subject to the provisions of this article 12 subsequent to the person's adjudication for an act which, if committed by an adult, would constitute a felony crime as defined in section 24-4.1-302(1) or listed in subsection (7) of this section, or subsequent to the person's adjudication for attempt or conspiracy to commit a crime as defined in section 24-4.1-302(1) that is a felony, pursuant to Colorado or any other state's law or pursuant to federal law in the previous ten years from the completion of the person's sentence for the adjudication of a felony crime as defined in section 24-4.1-302(1).

(b) If a person completes a sentence for the adjudication of a felony crime as defined in

section 24-4.1-302(1) or listed in subsection (7) of this section, or subsequent to the person's adjudication for attempt or conspiracy to commit a crime as defined in section 24-4.1-302(1) or listed in subsection (7) of this section that is a felony pursuant to Colorado or any other state's law or under federal law, and the person has good cause for possessing, using, or carrying a firearm as defined in section 18-1-901(3)(h) or any other weapon that is subject to this article 12, the person may petition the court for an order determining that subsection (3)(a) of this section does not apply to the person if the person otherwise legally possesses, uses, or carries upon his or her person a firearm as defined in section 18-1-901(3)(h) or any other weapon that is subject to this article 12. A court shall enter an order determining that subsection (3)(a) of this section does not apply to the person if the court finds, upon request of the person and by a preponderance of the evidence, there is good cause for the person to possess, use, or carry a firearm as defined in section 18-1-901(3)(h) or any other weapon that is subject to this article 12.

(4) and (5) (Deleted by amendment, L. 2021.)

(6)

(a) Upon the discharge of any inmate from the custody of the department of corrections, the department shall provide a written advisement to such inmate of the prohibited acts and penalties specified in this section. The written advisement, at a minimum, shall include the written statement specified in subsection (6)(c) of this section.

(b) Any written stipulation for deferred judgment and sentence entered into by a defendant pursuant to section 18-1.3-102 shall contain a written advisement of the prohibited acts and penalties specified in this section. The written advisement, at a minimum, shall include the written statement specified in subsection (6)(c) of this section.

(c) The written statement shall provide that:

(I)

(A) A person commits the crime of possession of a weapon by a previous offender in violation of this section if the person knowingly possesses, uses, or carries upon his or her person a firearm as described in section 18-1-901(3)(h), or any other weapon that is subject to the provisions of this title subsequent to the person's conviction for a felony, or subsequent to the person's conviction for attempt or conspiracy to commit a felony, or subsequent to the person's conviction for a misdemeanor crime of domestic violence as defined in 18 U.S.C. sec. 921(a)(33)(A), or subsequent to the person's conviction for attempt or conspiracy to commit such misdemeanor crime of domestic violence; and

(B) As used in this subsection (6)(c), "felony" means any felony under Colorado law, federal law, or the laws of any other state; and

(II) A violation of this section may result in a sentence of imprisonment or fine, or both.

(d) The act of providing the written advisement described in this subsection (6) or the failure to provide such advisement may not be used as a defense to any crime charged and may not provide any basis for collateral attack on, or for appellate relief concerning, any conviction.

(7) In addition to a conviction for felony crime as defined in section 24-4.1-302(1), a felony conviction or adjudication for one of the following felonies prohibits a person from possessing, using, or carrying upon his or her person a firearm as defined in section 18-1-901(3)(h) or any other weapon that is subject to this article 12 pursuant to subsection (1) or (3) of this section:

(a) An offense subject to sentencing pursuant to section 18-1.3-1004;

(b) First degree murder of a peace officer, firefighter, or emergency medical service provider in violation of section 18-3-107;

(c) Criminal extortion in violation of section 18-3-207;

(d) False imprisonment in violation of section 18-3-303;

(e) Enticement of a child in violation of section 18-3-305;

(f) Internet luring of a child in violation of section 18-3-306;

(g) Internet sexual exploitation of a child in violation of section 18-3-405.4;

(h) Unlawful sexual conduct by a peace officer in violation of section 18-3-405.7;

(i) Unlawful termination of a pregnancy in the first degree in violation of section 18-3.5-103;

(j) Unlawful termination of a pregnancy in the second degree in violation of section 18-3.5-104;

(k) First degree arson in violation of section 18-4-102;

(l) Second degree arson in violation of section 18-4-103;

(m) Third degree arson in violation of section 18-4-104;

(n) Fourth degree arson in violation of section 18-4-105;

(o) Habitual child abuse in violation of section 18-6-401.2;

(p) Contributing to the delinquency of a minor in violation of section 18-6-701;

(q) Pandering in violation of section 18-7-203;

(r) Pimping in violation of section 18-7-206;

(s) Pandering of a child in violation of section 18-7-403;

(t) Procurement of a child in violation of section 18-7-403.5;

- (u) Keeping a place of child prostitution in violation of section 18-7-404;
- (v) Impersonating a peace officer in violation of section 18-8-112;
- (w) Disarming a peace officer in violation of section 18-8-116;
- (x) Aiding escape from an institution for the care and treatment of persons with behavioral or mental health disorders in violation of section 18-8-201.1;
- (y) Assault during escape in violation of section 18-8-206;
- (z) Holding hostages in violation of section 18-8-207;
- (aa) Escape in violation of section 18-8-208;
- (bb) Attempt to escape in violation of section 18-8-208.1;
- (cc) Participation in a riot in detention facilities in violation of section 18-8-211;
- (dd) Intimidating a juror in violation of section 18-8-608;
- (ee) Inciting a riot in violation of section 18-9-102;
- (ff) Arming a rioter in violation of section 18-9-103;
- (gg) Engaging in a riot in violation of section 18-9-104;
- (hh) Vehicular eluding in violation of section 18-9-116.5;
- (ii) Firearms, explosives, or incendiary devices in facilities of public transportation in violation of section 18-9-118;
- (jj) Failure or refusal to leave premises or property upon request of a peace officer in violation of section 18-9-119;
- (kk) Terrorist training activities in violation of section 18-9-120;
- (ll) Aggravated cruelty to animals in violation of section 18-9-202;
- (mm) Treason in violation of section 18-11-101;
- (nn) Insurrection in violation of section 18-11-102;
- (oo) Advocating the overthrow of the government in violation of section 18-11-201;
- (pp) Inciting destruction of life or property in violation of section 18-11-202;
- (qq) Membership in anarchist and seditious associations in violation of section 18-11-203;
- (rr) Possessing a dangerous or illegal weapon in violation of section 18-12-102;
- (ss) Unlawfully carrying a weapon in violation of section 18-12-105.5;
- (tt) Use of a stun gun in violation of section 18-12-106.5;
- (uu) Illegal discharge of a firearm in violation of section 18-12-107.5;
- (vv) Possession of a weapon by a previous offender in violation of section 18-12-108 if committed on or after March 1, 2022;
- (ww) Possession of a handgun by a juvenile in violation of section 18-12-108.5;
- (xx) Unlawfully providing or permitting a juvenile to possess a handgun in violation of section 18-12-108.7;
- (yy) Possession, use, or removal of explosives or incendiary devices in violation of section 18-12-109;
- (zz) Unlawful purchase of a firearm in violation of section 18-12-111;

(aaa) Possessing a large-capacity magazine during the commission of a crime of violence in violation of section 18-12-302(1)(c);

(bbb) Dueling in violation of section 18-13-104;

(ccc) Intentionally setting a wildfire in violation of section 18-13-109.5;

(ddd) Unlawful administration of ketamine in violation of section 18-13-123;

(eee) Smuggling of a human in violation of section 18-13-128;

(fff) Organized crime in violation of section 18-17-104;

(ggg) A special offender in violation of section 18-18-407(1)(d)(II); and

(hhh) A criminal attempt, complicity, or conspiracy to commit any of the offenses listed in this subsection (7).

History:

Amended by 2022 Ch. 69, §11, eff. 4/7/2022. Amended by 2021 Ch. 462, §346, eff. 3/1/2022. L. 71: R&RE, p. 483, § 1. C.R.S. 1963: § 40-12-108. L. 73: p. 542, § 1. L. 75: Entire section amended, p. 621, § 17, effective July 21. L. 93, 1st Ex. Sess.: Entire section added, p. 4, § 3, effective September 13. L. 94: Entire section R&RE, p. 1464, § 6, effective July 1. L. 2000: (2)(a) and (4)(a) amended and (2)(d), (4)(d), and (6) added, pp. 632, 633, §§ 1, 2, 3, effective July 1. L. 2002: (6)(b) amended, p. 1517, § 208, effective October 1. L. 2003: (4)(b) amended, p. 1432, § 19, effective April 29. L. 2021: Entire section amended, (SB 21-271), ch. 3210, p. 3210, § 346, effective March 1, 2022.

Editor's Note:

Section 803(2) of chapter 462 (SB 21-271), Session Laws of Colorado 2021, provides that the act changing this section applies to offenses committed on or after March 1, 2022.

Note:

2021 Ch. 462, was passed without a safety clause. See Colo. Const. art. V, § 1(3).

Case Note:

ANNOTATION

Law reviews. For article, "POWPO and Gun Rights After Carbajal", see 44 Colo. Law. 31 (Sept. 2015).

The purpose of this section is to limit the possession of firearms by those who, by their past conduct, have demonstrated an unfitness to be entrusted with such dangerous instrumentalities. *People v. Gallegos*, 193 Colo. 263, 563 P.2d 937 (1977); *People v. Quintana*, 707 P.2d 355 (Colo. 1985).

This section does not deny defendant equal protection, even though it may permit using a prior burglary conviction in another jurisdiction as the "previous offense" when the same conduct might not have resulted in a burglary conviction if committed in this state. *People v. Tenorio*, 197 Colo. 137, 590 P.2d 952 (1979).

Constitutionality of section upheld. *People v. Marques*, 179 Colo. 86, 498 P.2d 929 (1972).

The classification which prohibits certain previous offenders from carrying a weapon is not unreasonable in its relationship to the evil sought to be cured. To limit the possession of firearms by those who by their past conduct have demonstrated an unfitness to be entrusted with such dangerous instrumentalities is clearly in the interest of the public health, safety, and welfare and within the scope of the general assembly's police power, and, accordingly, the statute in question is not subject to constitutional attack on an equal protection basis. *People v. Trujillo*, 178 Colo. 147, 497 P.2d 1 (1972).

The felon with a gun statute is not unconstitutional. *People v. Bergstrom*, 190 Colo. 105, 544 P.2d 396 (1975).

This section as amended in 1994 and as applied to defendant does not violate the prohibition against ex post facto laws because defendant's possession of a firearm occurred in 2009, well after the 1994 amendment. It does not matter that defendant's predicate felonies occurred before the change in the law, because defendant was punished for conduct occurring after the change. There is no ex post facto violation where one or some of the elements of an offense are committed prior to the effective date of a new statute, but where the crime is not completed until after the effective date. *People v. DeWitt*, 275 P.3d 728 (Colo. App. 2011).

"Involving" not constitutionally imprecise. "Involving" is a common, readily understood word, and whatever imprecision its use may entail does not rise to the level of constitutional infirmity. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

Nor is "use of force or violence" extremely vague, though this phrase is not specifically defined by the Colorado criminal code, there can be little doubt that most persons would readily comprehend its import. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

The time computation provision of this section is not too vague. Notwithstanding the fact that the wording of the time provision of this section might require more than a quick glance for full comprehension, its meaning is plain. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

This section is not an attempt to subvert the intent of § 13 of art. II, Colo. Const. The statute simply limits the possession of guns and other weapons by persons who are likely to abuse such possession. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

This section is legitimate and constitutional means of accomplishing the general assembly's obvious purpose. *People v. Tenorio*, 197 Colo. 137, 590 P.2d 952 (1979).

Limitations of § 13, art. II, Colo. Const., superimposed on section. In spite of the flat prohibition contained in this section, the specific limitations of § 13 of art. II, Colo. Const. must be superimposed on the section's otherwise valid language. *People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977).

Because the right to bear arms is not absolute, nor is this section vague or overbroad. *People v. Taylor*, 190 Colo. 144, 544 P.2d 392 (1975).

The right to bear arms is not absolute as that right is limited to the defense of one's home, person, and property. *People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977).

Affirmative defense under § 13, art. II, Colo. Const. A defendant charged under this section who presents competent evidence showing that his purpose in possessing weapons was the defense of his home, person, and property as recognized by § 13 of art. II, Colo. Const., thereby raises an affirmative defense. *People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977); *People v. DeWitt*, 275 P.3d 728 (Colo. App. 2011).

Trial court did not err in modifying jury instruction to state that it is an affirmative defense that the defendant possessed a firearm for the purpose of defending himself, home, or property "from what he reasonably believed to be a threat of imminent harm". Without reasonableness or imminence requirements, the instruction eradicates any distinction between this section's defendants and ordinary citizens, effectively nullifying this section. *People v. Carbajal*, 2014 CO 60, 328 P.3d 104.

Purpose in keeping weapons is question of fact which must be submitted to jury. The question of the defendant's purpose in keeping the weapons in order to establish the affirmative defense based on his constitutional right to keep and bear arms under § 13 of art. II, Colo. Const., is one for the fact finder to determine at trial. *People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977).

But burden of proof is still on prosecution.

After the defendant by competent evidence has raised the affirmative defense under § 13 of art. II, Colo. Const., the prosecution will still have the overall burden of proving its case. *People v. Ford*, 193 Colo. 459, 568 P.2d 26 (1977).

Trial court properly excluded affirmative defense based on § 13 of art. II, Colo. Const., and a proposed jury instruction where the defendant's offer of proof was insufficient to support the proposed affirmative defense. *People v. Barger*, 732 P.2d 1225 (Colo. App. 1986).

Trial court's instruction to jury that second degree assault involved force or violence as a matter of law was proper for conviction under this statute notwithstanding fact that second degree assault could involve injury to another resulting from the administration of drug or other substance. *People v. Allaire*, 843 P.2d 38 (Colo. App. 1992).

Jury must find "knowing" possession to convict. To convict a previous offender of possessing a weapon, the jury must find, not mere possession, but that the defendant "knowingly" possessed the weapon and that he understood that the object possessed was a weapon. *People v. Tenorio*, 197 Colo. 137, 590 P.2d 952 (1979).

To convict under this section, the prosecution must prove that one of the defendant's intended uses for the instrument was as a weapon. As so construed, the section is not overbroad. *People v. Gross*, 830 P.2d 933 (Colo. 1992).

The mental state of "knowingly" applies only to the possession element of subsection (1), not to the prior felony conviction element. *People v. DeWitt*, 275 P.3d 728 (Colo. App. 2011).

This section is not void for vagueness in regard to the definitions of weapon cited therein. "Weapon" has a commonly understood meaning and the definition of "knife" cited in this section is sufficiently specific to give fair warning

of the proscribed conduct. *People v. Gross*, 830 P.2d 933 (Colo. 1992).

Broad definition of "knife", incorporated into this section by reference to §18-12-101, is constitutional. Where defendant possessed a screwdriver with specific intent to use it as a weapon, elements of crime were present. But this section does not prohibit possession of such an instrument for an innocent purpose, so prohibition is neither unconstitutionally vague nor overbroad. *People v. Gross*, 830 P.2d 933 (Colo. 1992).

"Possession" means actual or physical control over a firearm and is a question of fact for the jury. *People v. Rivera*, 765 P.2d 624 (Colo. App. 1988).

"Previously convicted" element satisfied by proof of a guilty plea and deferred judgment; judgment of conviction and sentencing are not required. *People v. Allaire*, 843 P.2d 38 (Colo. App. 1992).

The term "adjudication" in subsection (3) does not include a deferred adjudication. A juvenile defendant's prior deferred adjudication does not serve as a predicate felony offense for the purposes of this section. *People in Interest of A.B.*, 2016 COA 170, 411 P.3d 1116.

The term "possession" in this section is a common term which is to be given its generally accepted meaning. Where court imposed the requirement of exclusive control, the generally accepted meaning was altered, making it both unduly restrictive and a potential source of confusion for jurors. *People v. Martinez*, 780 P.2d 560 (Colo. 1989).

"Involve" has been defined as "to have within or as part of itself: contain, include"; "to require as a necessary accompaniment". *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

The word "force" in this section includes more than actual, applied physical force. *People v. Gallegos*, 193 Colo. 108, 563 P.2d 937 (1977).

Valid exercise of police power. The use, concealment, or possession of weapons specified in this section by a felon who has previously been convicted of one of the crimes itemized in this section may be validly prohibited under the police power. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

Balancing of rights. The conflicting rights of the individual's right to bear arms and the state's right, indeed its duty under its inherent police power, to make reasonable regulations for the purpose of protecting the health, safety, and welfare of the people prohibits granting an absolute right to bear arms under all situations. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

The felon with a gun statute, this section, must be read in pari materia with §18-1-702. *People v. Blue*, 190 Colo. 95, 544 P.2d 385 (1975).

Statute may be violated by either concealing or using any of the specified weapons. *People v. Trujillo*, 184 Colo. 387, 524 P.2d 1379 (1974).

Prior conviction element of offense. Under this section, the prior conviction does not go merely to the punishment to be imposed, but rather is an element of the substantive offense charged and this distinction is critical. *People v. Fullerton*, 186 Colo. 97, 525 P.2d 1166 (1974); *People v. Quintana*, 707 P.2d 355 (Colo. 1985).

Defendant in a possession of weapon by prior offender trial may request limiting instruction or stipulate to the fact of conviction of another offense rather than requiring prosecution to agree to waive a trial by jury. *People v. District Court*, 953 P.2d 184 (Colo. 1998).

A prior conviction obtained in violation of a defendant's constitutional rights cannot be used as the underlying conviction in a prosecution under this section. *People v. Quintana*, 707 P.2d 355 (Colo. 1985).

Reference by name or description to crimes committed in other jurisdictions is a proper means for the general assembly to define which prior crimes satisfy the "previous offender" element of this statute and such references to crimes committed elsewhere do not constitute delegation of this state's legislative power. *People v. Tenorio*, 197 Colo. 137, 590 P.2d 952 (1979).

Conviction being challenged on appeal may be used as a predicate offense under statute prohibiting possession of firearms by previous offenders since a conviction becomes final and is valid for purposes of appeal when sentencing occurs. *People v. Tramaglino*, 791 P.2d 1171 (Colo. App. 1989).

Showing necessary for conviction under conspiracy provision. A conviction under the conspiracy provision of this section does not require a showing that the overt act of the conspiracy was an act of force or violence, but rather that, the crime which is the object of the conspiracy was one of force or violence. *People v. Jenkins*, 198 Colo. 347, 599 P.2d 912 (1979).

Where one is charged under this section with possession of a weapon, having previously been convicted of conspiracy to commit the crime of robbery, it is unnecessary to prove that the underlying robbery which was the object of the conspiracy did in fact involve the use of force or violence. *People v. Jenkins*, 198 Colo. 347, 599 P.2d 912 (1979).

Defendant to invoke procedural safeguards where substantive offense also charged. While procedural safeguards such as separate trials or a bifurcated procedure should be available to ensure a fair trial for a defendant charged with a substantive offense and with violation of this section, it is the defendant who must make a tactical decision whether to invoke such procedures, and the defendant must exercise the right to these procedures by means of a timely, pretrial motion. *People v. Peterson*, 656 P.2d 1301 (Colo. 1983).

Prior Colorado conviction not predicate felony for purposes of federal prohibition of possession of firearm by felon. Defendant was wrongly charged for possession of gun by felon, because at the time of his arrest he was once again entitled to possess a gun. Under this statute defendant's civil rights had been restored ten years after he served time on his prior conviction, such rights encompassing his ability to possess a firearm. *U.S. v. Hall*, 20 F.3d 1066 (10th Cir. 1994).

Plaintiff whose felony conviction in another state was set aside under that state's law and who was entitled to possess a handgun under that state's law was entitled to possess a handgun under this section. *Seguna v. Maketa*, 181 P.3d 399 (Colo. App. 2008).

The fact that defendant assisted in purchase of firearm and was within "arm's reach" of firearm at time of arrest constituted prima facie evidence of illegal possession of a firearm, which precluded defendant from judgment of acquittal. *People v. Rivera*, 765 P.2d 624 (Colo. App. 1988).

Evidence sufficient in prosecution for possession of weapon. *People v. Tenorio*, 197 Colo. 137, 590 P.2d 952 (1979).

Evidence including retrieval of gun from house where defendant arrested, witnesses' identifications of gun as belonging to defendant, and defendant's use of gun during previous threats provided ample support for verdict. *People v. Jackson*, 98 P.3d 940 (Colo. App. 2004).

An attempted robbery by threat is a felony involving the use of force under this section. *People v. Gallegos*, 193 Colo. 108, 563 P.2d 937 (1977).

Robbery is crime involving use of "force or violence". The offense of robbery, whether committed by actual force or by constructive force, i.e., threats or intimidation, is a crime involving the use of "force or violence" for the

purposes of this section. *People v. Jenkins*, 198 Colo. 347, 599 P.2d 912 (1979).

When the same weapon is alleged in each charge, possession of an illegal weapon under §18-12-102(4) is a lesser included offense of possession of a weapon by a previous offender under subsection (1) of this section. *People v. Brown*, 119 P.3d 486 (Colo. App. 2004).

Cross Reference Note:

For the legislative declaration contained in the 2002 act amending subsection (6)(b), see section 1 of chapter 318, Session Laws of Colorado 2002.