FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-2143

JONATHAN HUNT, JUSTIN BRASHEAR, CHRISTOPHER MAYS, CLAYTON WOOLFE, and JOSEPH TRUEX,

Appellants,

v.

STATE OF FLORIDA; the ATTORNEY GENERAL; and the COMMISSIONER, FLORIDA DEPARTMENT OF LAW ENFORCEMENT,

Appellees.

On appeal from the Circuit Court for Leon County.
Ronald W. Flury, Judge.

January 28, 2021

TANENBAUM, J.

The appellants assert a single constitutional claim: that enactment of section 790.222, Florida Statutes (2018), which bans "bump-fire stocks," effected a taking of their personal property without just compensation in violation of their constitutional rights. However, the only constitutionally cognizable taking-claim regarding personal property recognized by the Supreme Court involves an actual appropriation of that property by the government for its own use. *See Horne v. Dep't of Agric.*, 576 U.S.

350, 361 (2015) ("The different treatment of real and personal property in a regulatory case suggested by *Lucas* did not alter the established rule of treating direct appropriations of real and personal property alike."); *cf. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321–22 (2002) (noting "distinction between physical takings and regulatory takings").

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), on which the appellants primarily rely on appeal, are regulatory taking cases that involve the use of real property. The Supreme Court does not read the text of the Fifth Amendment of the United States Constitution more broadly to cover restrictions or bans on the use of personal property. The Court has not receded from its historical rejection of that reading. *See Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887) ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit.").

Under extant Supreme Court precedent applying the Fifth Amendment, the following remains true:

> The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law.

Id. at 669; *see also Andrus v. Allard*, 444 U.S. 51, 67 (1979) (noting that taking challenges to bans on previously acquired goods have been "tersely rejected"); *cf. Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005) (rejecting "substantially advances a legitimate state interest" as a formula for analyzing taking claim and reiterating what remain as cognizable taking theories: "by alleging a 'physical' taking, a *Lucas*-type 'total regulatory taking,' a *Penn Central* taking, or a land-use exaction" (bracket omitted)).

We can find no constitutional basis for going further than the Supreme Court, and we decline the appellants' invitation to do so. The trial court correctly dismissed the appellants' complaint for want of a cognizable constitutional theory for relief. We AFFIRM.

ROWE, J., concurs; MAKAR, J., concurs in result with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., concurring in result.

At issue are bump-fire stocks, public safety, and the Fifth Amendment's right to just compensation when the government takes private property.

Prompted by the 2018 school shooting in Parkland, Florida, and the 2017 concert shooting in Las Vegas, Nevada, the Florida Legislature in 2018 enacted the Marjory Stoneman Douglas High School Public Safety Act. Ch. 2018-3, § 13, Laws of Fla. One provision of the Act banned and criminalized, among other actions, the in-state possession and sale of bump-fire stocks:

> A person may not import into this state or transfer, distribute, sell, keep for sale, offer for sale, possess, or give to another person a bump-fire stock. . . . As used in this section, the term "bump-fire stock" means a

> conversion kit, a tool, an accessory, or a device used to alter the rate of fire of a firearm to mimic automatic weapon fire or which is used to increase the rate of fire to a faster rate than is possible for a person to fire such semiautomatic firearm unassisted by a kit, a tool, an accessory, or a device.

§ 790.222, Fla. Stat. (2020). The Act became effective upon it becoming a law on March 9, 2018, Ch. 2018-3, § 52, Laws of Florida, but section 790.222 did not take effect until October 2018, thereby providing a six-month grace period for those affected to come into compliance with its prohibitions. Ch. 2018-3, § 13, Laws of Fla.

Upon section 790.222's enactment, a group of five individuals sued the State asserting one count of inverse condemnation, claiming that the statute effected a taking of their personal property—their bump-fire stocks—in violation of the federal and Florida constitutions thereby requiring just compensation for their losses; no other claims are alleged. Four plaintiffs owned one bump-fire stock; one plaintiff owned four and the components of a fifth; none are commercial firearms vendors. The State moved to dismiss their complaint for failure to state a cognizable claim, arguing that plaintiffs failed to sufficiently allege a compensable taking of their property under federal or state law. The trial court granted the motion, issuing a detailed order of dismissal; plaintiffs now appeal that ruling.

The plaintiffs urge that the trial court erred in two ways: by misapplying the Supreme Court's precedents in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), a categorical takings case, and *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978), a regulatory takings case.

First off, the plaintiffs claim that section 790.222 amounts to a per se taking, urging that the decision in *Lucas*—which related solely to real property—should be extended to tangible personal property, i.e., their bump-fire stocks. *Lucas*, by its own terms, applied only to real property, of which the entire beneficial use was destroyed due to the governmental regulation at issue in that case. In siding with Lucas, the real property owner, the Court

distinguished between the interests of owners of real property versus owners of personal property as to the burdens of governmental regulations:

> It seems to us that the [real] property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon,* 260 U.S., at 413, 43 S.Ct., at 159. ***And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)***. *See Andrus v. Allard,* 444 U.S. 51, 66–67, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed . . . that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Lucas, 505 U.S. at 1027–28 (emphasis added). The highlighted passage makes evident that items of personal property may be rendered worthless by valid laws adopted pursuant to the legitimate exercise of governmental police powers, yet not amount to a compensable taking. In comparison, laws that appropriate the entire value of a parcel of real property amount to per se takings because of the historical and constitutional "culture" that protects that species of property.

The question of whether dismissal of plaintiffs' taking claim was justified boils down not to whether *Lucas* applies to personal property, but whether section 790.222 is a valid exercise of the State of Florida's police power to prohibit the intra-state sale, possession, or use of a potentially dangerous device it deemed

necessary to ban in the interests of public safety. Section 2 of the Act states:

> The Legislature finds there is a need to comprehensively address the crisis of gun violence, including but not limited to, gun violence on school campuses. The Legislature intends to address this crisis by providing law enforcement and the courts with the tools to enhance public safety by temporarily restricting firearm possession by a person who is undergoing a mental health crisis and when there is evidence of a threat of violence, and by promoting school safety and enhanced coordination between education and law enforcement entities at the state and local level.

Ch. 2018-3, § 2, Laws of Fla. This statement of legislative purpose supports the conclusion that section 790.222 is a valid exercise of the police power and not a taking of private personal property.

In attempting to state a claim, the plaintiffs' complaint acknowledged that the "State of Florida passed the law for a public purpose, ostensibly public safety, as stated in the Legislative Findings," but it averred that section 790.222 "is so onerous that its effect is tantamount to a direct appropriation of property, and therefore, a compensable taking." It is clear, however, that section 790.222 does not directly appropriate property. Instead, section 790.222 required the plaintiffs, at a minimum, to no longer possess their bump-fire stocks in Florida after the statutory grace period; they were required to transfer these items (or to sell them to buyers) out of state by October 2018 (presumably they could destroy them as well). The statute's effect, therefore, was not a direct appropriation of the bump-fire stocks (i.e., the State of Florida did not take physical possession of them); instead, it eliminated the pre-existing intra-state possessory rights the plaintiffs had exercised.

The combination of the compelling public safety interest in reducing, even marginally, the potential impact of gun violence in Florida plus the six-month grace period allowing owners to avoid a total loss in economic value by selling their bump-fire stocks supports dismissal of a categorical takings claim. In upholding a

prohibition on the manufacture and sale of alcohol, the Supreme Court long ago concluded that a state's regulatory power may override the interests of individuals in the control or use of property deemed harmful to society:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.

Mugler v. Kansas, 123 U.S. 623, 668–69 (1887). The police power is not absolute, of course, and is "subject to controlling provisions of the federal Constitution." *In re Seven Barrels of Wine*, 83 So. 627, 632 (Fla. 1920). But a prohibition and criminalization of a device used to accelerate the number of ammunition cartridges fired in rapid succession, almost like a machine-gun, falls squarely in the legitimate use of a state's powers; the same is true as to federal police powers, which have been used by the ATF to classify bump-fire stocks similarly to machine guns.[*] And the ability to sell or transfer the bump-fire stocks is a critical factor weighing against a categorical taking. *See id.* at 631 (statute requiring destruction of wine is invalid where State provided no "reasonable opportunity to lawfully dispose of the commodity before its seizure") (citing and distinguishing *Mugler*). In light of the compelling public safety interest, and the ability of individual owners of bump-fire stocks to lessen or avoid the economic impact

[*] 27 C.F.R. § 447.11 ("The term 'machinegun' includes a bump-stock-type device, i.e., a device that allows a semi-automatic firearm to shoot more than one shot with a single pull of the trigger by harnessing the recoil energy of the semi-automatic firearm to which it is affixed so that the trigger resets and continues firing without additional physical manipulation of the trigger by the shooter.").

of section 790.222 by selling their bump-fire stocks, the trial court was correct to dismiss this theory of relief.

Other courts have held likewise. In dismissing a similar Takings Clause challenge to section 790.222, the federal district court in *Roberts v. Bondi*, No.: 8:18-cv-1062-T-33TGW, 2018 WL 3997979, at *4 (M.D. Fla. Aug. 21, 2018), stated:

> Section 790.222 is an exercise of the legislative police power, not the state's eminent domain power. . . . [It] was enacted because the legislature found that "there is a need to comprehensively address the crisis of gun violence." Therefore, the prohibition on bump-fire stocks is not a compensable taking under the Takings Clauses of the United States and Florida Constitutions.

In addition, the Court of Federal Claims has upheld the federal rule classifying bump-stock devices as machine guns as a permissible exercise of police powers that does not constitute a Takings Clause violation. *Modern Sportsman, LLC v. United States*, 145 Fed. Cl. 575, 583 (2019) (federal government "acted within the narrow confines of the police power when it required the surrender or destruction of all bump stocks."); *McCutchen v. United States*, 145 Fed. Cl. 42, 52 (2019) ("Because the prohibition on possession [of bump-stock devices] involved an exercise of the government's police power, there was no taking within the meaning of the Fifth Amendment."); *see also Maryland Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 367 (4th Cir. 2020) (state ban on "rapid fire trigger activators," which include bump stocks, does not violate Takings Clause). Given the undeniable governmental interest in public safety that spawned the Act, and the grace period allowing for sale of the bump-fire stocks, it cannot be concluded that the plaintiffs have adequately alleged a categorical per se taking of their personal property.

Next, the claim that the trial court misapplied *Penn Central* breaks down for similar reasons. Under *Penn Central*, a court must consider: (1) the economic impact of the regulation on the claimant, (2) the character of the government action, and (3) the extent to which the regulation interfered with the claimant's investment-

backed expectations. 438 U.S. at 124. Each of these factors cut against the plaintiffs' regulatory taking theory.

Beginning with the character of the government action, section 790.222 is a classic example of the exercise of police powers to ban potentially dangerous devices and contraband. This factor alone overwhelmingly weighs against a regulatory taking. Next, section 790.222 cannot be said to have interfered with the plaintiffs' investment-based expectations because the regulation of firearms is pervasive and subject to "future enactments that reasonably regulate its use in the interest of the public welfare." *In re Seven Barrels of Wine*, 83 So. at 633. As our supreme court noted a century ago:

> But property already lawfully acquired for legal purposes is not subject to be wholly destroyed by virtue of the police power, under statutes enacted after the lawful acquisition of the property, unless the property is of such a nature that it has become or been adjudged to be or declared by a valid law to be a nuisance, or unless it otherwise endangers the public safety, health, or welfare, or unless it is designedly used for, or in connection with, or in furtherance of, an illegal act or purpose that injuriously affects public rights or the general welfare.

Id. Section 790.222 falls within the category of laws that classify an item of property as endangering or injurious to public safety, health or welfare; as such, it cannot be concluded that individual owners of bump-fire stocks have investment-backed expectations in obtaining financial returns in a heavily regulated firearms industry where such items are foreseeably subject to prohibitions. Finally, although section 790.222 may impose some degree of economic loss on each plaintiff (depending on whether each chose to sell or transfer the small number of bump-fire stocks in question), it cannot be concluded—given the regulatory interests at stake—that this factor is met.

In summary, the trial court correctly concluded that the plaintiffs failed to state a claim under the Takings Clauses and that dismissal was proper.

Michael T. Harper and Aaron Behar of BeharBehar, Sunrise; and Andrew Kagan of Kagan Law Firm, Humacao, Puerto Rico, for Appellants.

Ashley Moody, Attorney General; Amit Agarwal, Solicitor General; Christopher John Baum, James H. Percival, and Kevin A. Golembiewski, Deputy Solicitors General, Tallahassee, for Appellees.