

**IN THE COURT OF APPEALS OF IOWA**

No. 1-082 / 10-0689  
Filed March 30, 2011

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**DENG KON TONG,**  
Defendant-Appellant.

---

Appeal from the Iowa District Court for Story County, Steven P. Van Marel, District Associate Judge.

Defendant appeals his conviction for possession of a firearm as a felon.

**AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, Stephen Holmes, County Attorney, and Travis Johnson, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Potterfield, J. and Mahan, S.J.\* Tabor, J., takes no part.

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

**SACKETT, C.J.**

The defendant, Deng Kon Tong, appeals from his conviction for the offense of possession of a firearm as a felon in violation of Iowa Code section 726.24 (2009). He contends the district court erred in denying his motion to dismiss the charge as he had not been convicted of a felony at the time he possessed the firearm. He asserts he is not a convicted felon because he was given a deferred judgment on a prior felony charge and his probation had not been completed or revoked at the time the possession charge was filed against him. We affirm.

**I. BACKGROUND AND PROCEEDINGS.** On February 2, 2009, Tong pleaded guilty to one count of burglary in the second degree. He was sentenced on March 16, 2009, to a deferred judgment under Iowa Code sections 901.5 and 907.3. Tong was placed on probation for a period of three years.

While on probation, Tong was arrested for unauthorized possession of an offensive weapon. The arrest came as a result of a tip from a confidential informant to the police that Tong, and two other students at Ames High School, purchased and were attempting to sell a sawed-off shot gun. The charge against Tong was later changed to possession of a firearm as a felon.

On February 8, 2010, Tong filed a motion to dismiss alleging the trial information and minutes of testimony did not constitute the charge filed. Tong asserted the trial information falsely alleged he had been convicted of a felony when in fact the judgment and sentence for the burglary charge had been deferred. Pursuant to *State v. Walton*, 311 N.W.2d 110, 112 (Iowa 1981), Tong

stated a deferred judgment cannot serve as proof of a felony conviction in prosecuting a charge of possession of a firearm as a felon.

The State filed a resistance to Tong's motion on February 19, 2010, asserting the test to determine whether the deferred judgment qualified as a felony conviction is found in *Schilling v. Iowa Department of Transportation*, 646 N.W.2d 69, 73 (Iowa 2002). The State asserted the court had to first determine the purpose of the possession statute, and if the statute's purpose was to protect the public, the court needed to apply the four-factor test laid out in *Schilling* to determine whether Tong's deferred judgment was a "conviction" under the possession statute. *Schilling*, 646 N.W.2d at 73. The State argued *Walton* was distinguishable from the present case because Walton's probation had been revoked at the time the possession of a firearm as a felon charge was filed, whereas Tong was still on probation when the charge was filed.

On February 22, 2010, the district court overruled Tong's motion. The court agreed with the State and found Iowa courts have defined the word "conviction" both narrowly and broadly. When the purpose of a statute was to protect the public, the courts used the broad definition. After finding the purpose of Iowa Code section 724.26 was to protect the public, the district court applied the four factor test under *Schilling*. The court ultimately concluded a deferred judgment qualified as a conviction for the purposes of section 724.26. The district court did not address *Walton* in its decision.

Tong proceeded to trial on March 16, 2010, where the jury found him guilty of possession of a firearm as a felon. On April 19, 2010, he was sentenced

to an indeterminate period not to exceed five years. He filed his notice of appeal three days later, asserting the district court erred in overruling his motion to dismiss.

**II. SCOPE OF REVIEW.** Issues of statutory interpretation and application are reviewed for errors of law. *State v. Armstrong*, 787 N.W.2d 472, 475 (Iowa Ct. App. 2010). On appeal, we are not bound by the trial court's determination of law. *State v. McCoy*, 618 N.W.2d 324, 325 (Iowa 2000).

**III. POSSESSION OF A FIREARM AS A FELON.** Iowa Code section 724.26 provides,

[a] person who is *convicted of a felony* in a state or federal court, or who is adjudicated delinquent on the basis of conduct that would constitute a felony if committed by an adult, and who knowingly has under the person's dominion and control or possession, receives, or transports or causes to be transported a firearm or offensive weapon is guilty of a class "D" felony.

(Emphasis added.)<sup>1</sup> The question in this case is whether a person on probation for a deferred judgment is "convicted of a felony" as required by section 724.26. Tong asserts because he received a deferred judgment and was still on probation when he was arrested, he had not yet been convicted of a felony. In support of his position, Tong cites *Walton*, 311 N.W.2d at 112. Specifically, Tong points us to the Iowa Supreme Court's statement in *Walton*, "[a] deferred judgment order cannot serve as proof of a felony conviction in the prosecution of

---

<sup>1</sup> Iowa Code section 724.27 provides for an exception to section 724.26 for individuals who were convicted of felonies but have had their civil rights regarding possession of firearms restored, indicating a legislative intent to criminalize the possession of firearms by felons only for the period of time during which the felony conviction operates as a civil disability. Individuals with deferred judgments have not lost these civil rights.

a section 724.26 charge. The record necessarily has to disclose the revocation of probation and the ultimate conviction.” *Walton*, 311 N.W.2d at 112.

At first blush, this argument seems convincing, but upon examination, we find the issue in *Walton* is distinguishable from the issue presented in this case. In *Walton*, the defendant had initially received a deferred judgment on the charge of malicious injury to a building. *Id.* at 111. Walton subsequently pleaded guilty to assault and battery, and operating a vehicle while his license was suspended. *Id.* As a result his probation on the deferred judgment was revoked and he was sentenced to 180 days in jail. *Id.* Walton was then charged in a subsequent incident with the offense of possession of a firearm as a felon. *Id.* In an attempt to prove Walton was a convicted felon, the State offered the entire trial court file from the malicious injury to a building charge. *Id.* The Iowa Supreme Court found it was improper to enter into evidence the entire trial court file as it contained prejudicial and unnecessary information. *Id.* at 112.

The case was remanded for a new trial, but the court first provided guidance on what information could properly be admitted to prove Walton’s prior felony conviction. *Id.* The court ruled the deferred judgment order could not serve as proof of a felony conviction and the record had to disclose the revocation of the probation and the ultimate conviction. *Id.* However, the court did not want the jury to see the final judgment because it contained prejudicial information about the subsequent crimes that resulted in the revocation of the probation. *Id.* at 113. Thus, the court ruled the State was entitled to submit into evidence the original or certified copy of the judgment, so long as the portion that

described the offenses, which triggered the probation revocation and entry of judgment, were concealed. *Id.* at 113.

The issue addressed in *Walton* was what document out of the entire trial court file should be received into evidence so the State could meet its burden to prove the defendant was a convicted felon. *Id.* The court, faced the unique circumstances of that case, was balancing the State's need to prove a prior conviction with the defendant's interest in keeping unnecessary and prejudicial information from the jury. *Id.* This is different from the issue presented here: whether a deferred judgment qualifies as a conviction for the purposes of the possession of a firearm as a felon statute. The court in *Walton* was not faced with this question because the defendant's deferred judgment had already been revoked and sentence imposed by the time he was charged with possession of a firearm as a felon. Thus, while the quote Tong pulls from *Walton* appears dispositive in this case, we find *Walton* does not answer the issue presented here. We must now determine whether the definition of "convicted" contained in section 724.26 includes a deferred judgment.

We find, as did the trial court, that the term "conviction" has a number of definitions and interpretations. *Schilling*, 646 N.W.2d at 71. In determining what definition to apply, the court should look to the purpose of the statute containing the term. *Id.* If the purpose of the statute is to punish the defendant, a narrow and technical meaning is used. *Id.* Under this narrow definition, conviction means the "final consummation of the prosecution against the accused including the judgment or sentence rendered pursuant to an ascertainment of his guilt."

*State v. Kluesner*, 389 N.W.2d 370, 372 (Iowa 1986). If the purpose of the statute is to protect the public, a broader definition is accepted, which is the “establishment of guilt prior to and independently of judgment and sentence by a verdict of guilty or a plea of guilty.” *Id.*

The State asserts the purpose of the possession of a firearm as a felon statute is the protection of the community. In support of this position, the State cites *State v. Buchanan*, 604 N.W.2d 667, 669 (Iowa 2000). *Buchanan* states: “[n]o one questions the legislature’s purpose in prohibiting felons from possessing firearms. It is because the legislature considers them dangerous. This is a legitimate public purpose because such persons have an elevated tendency to commit crimes of violence.” *Buchanan*, 604 N.W.2d at 660 (citations omitted).

Tong, on the other hand, argues the purpose of the statute is punitive as it denies him his federal constitutional right to possess a gun. While we agree the statute does deny Tong his federal constitutional right to possess a gun, the denial is not intended to punish Tong for his past criminal behavior; instead the purpose of the prohibition is to protect the public from potentially harmful person—felons. *State v. Halliburton*, 539 N.W.2d 339, 345 (Iowa 1995).

Having found the purpose of the statute is to protect the public, this court must apply the broad definition of “conviction.” *Schilling*, 646 N.W.2d at 73. Under the broad definition, the court in *Schilling* held a conviction exists if the following four factors are established:

- (1) A judge or jury has found the defendant guilty, or the defendant has entered a plea of guilty;
- (2) the court has ordered some form of

punishment, penalty, or restraint on the person's liberty to be imposed; (3) a judgment of guilty may be entered if the person violates the terms of probation or fails to comply with the requirements of the court's order; and (4) the conviction has become final. A conviction is final if the defendant has exhausted or waived any postorder challenge.

*Id.*

Applying these factors to the case at hand, we find Tong's deferred judgment constitutes a conviction for the purposes of section 724.26. Tong entered a plea of guilty to the crime of burglary in the second degree. The district court imposed probation for three years. If Tong violated his probation, the court had the power to pronounce judgment and impose a sentence pursuant to section 907.3(1). Finally, a deferred judgment is final as it cannot be appealed. *State v. Anderson*, 246 N.W.2d 277, 279 (Iowa 1976) (holding a deferred judgment order is interlocutory, which does not support an appeal, and a deferred judgment cannot be entered without the defendant's consent).

**IV. CONCLUSION.** We find a deferred judgment entered on a felony charge qualifies as a conviction under the possession of a firearm as a felon statute so long as the judgment has not been discharged upon successful completion of the terms and conditions of probation.

**AFFIRMED.**