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STATE OF WISCONSIN **02-10-2015**

COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2014AP002707CR

DIJON L. CARTER,

Defendant-Appellant.

ON APPEAL TO REVIEW A JUDGMENT OF CONVICTION
AND ORDER DENYING MOTION TO DISMISS ENTERED IN
MILWAUKEE COUNTY CIRCUIT COURT, THE
HONORABLE CHARLES F. KAHN, J D WATTS, AND
JEFFREY A. WAGNER PRESIDING

BRIEF OF DEFENDANT-APPELLANT

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Table of Contents

	Page
Table of Authorities	1
Statement on Issue Presented For Review	1
Position on Oral Argument And Publication	1
Statement of the Case and of the Facts	2
Argument	3
I. The Circuit Court Should Not Have Extended the Finding in <u>Phillips</u> to Include Juvenile Adjudications	5
a. Juvenile Adjudications are not Criminal Convictions	8
b. Juveniles are a More Vulnerable Population than Adults and Have More to Lose When Notice is not Given	11
Conclusion	12
Wis. Stat. (Rule) 809.19(8)(d) Certification	13
Wis. Stat. (Rule) 809.19(12)(f) Certification	13
Wis. Stat. (Rule) 809.19(2)(b) Certification	14
Wis. Stat. (Rule) 809.19(13)(f) Certification	15
Certification of Mailing	15
Appendix	100

TABLE OF AUTHORITIES

<i>In Re the Interest of Hezzie R.</i> 219 Wis.2d 848, 580 N.W.2d 660 (1998)	5,7,9,10,12
<i>McKeiver v. Pennsylvania</i> 403 U.S. 528 (1971)	10
<i>N.E. v. Wisconsin Dep't of Health & Soc. Servs. (In the Interest of N.E.)</i> 122 Wis.2d 198, 361 N.W.2d 693 (1985)	10
<i>State v. Livingston</i> 159 Wis.2d 561, 464 N.W.2d 839 (1991)	3
<i>State v. Phillips</i> 172 Wis.2d 391, 493 N.W.2d 270(Ct. App. 1992)	4 - 7,11-12
<i>State v. Woods</i> 173 Wis.2d 129, 496 N.W.2d 144 (Ct. App. 1992)	10

Wisconsin Statutes

Wis. Stat. § 938.01(2).....	8, 9
Wis. Stat. § 938.183(1m)(c)3	10
Wis. Stat. § 938.293(1).....	11
Wis. Stat. § 938.299(1)(a)	11
Wis. Stat. § 938.341	3, 6, 12
Wis. Stat. § 938.35(1).....	9, 10
Wis. Stat. § 938.396(2).....	11
Wis. Stat. § 938.60(2)	2
Wis. Stat. § 941.29(1)(bm)	12
Wis. Stat. § 941.29(2)	3, 4, 7
Wis. Stat. § 941.29(8).....	7
Wis. Stat. § 973.033	6
Wis. Stat. § 973.176(1)	2, 6

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STATEMENT ON ISSUE PRESENTED FOR REVIEW

1. Is the failure of a juvenile court to advise a delinquent of a lifetime firearm prohibition, pursuant to Wis. Stats. § 938.341, a ground for dismissal of a felon in possession of a firearm charge filed against that same individual when an adult.

TRIAL COURT ANSWER: No.

**POSITION ON ORAL ARGUMENT
AND PUBLICATION**

Neither is requested.

STATEMENT OF THE CASE AND OF THE FACTS

Mr. Dijon Carter was adjudicated delinquent in case 2006JV414B on August 29, 2006 for a single count of Possession with Intent to Deliver THC – 200 Grams or Less, a charge which had Mr. Carter been an adult, would have been a felony. Mr. Carter was 15 years old at the time and had a 9th grade education. At the time of the juvenile dispositional hearing no warning was given to Mr. Carter regarding firearm possession in the future. (8/29/06 Trs. p.9, App. p.204). In 2009 Mr. Carter was convicted of possession of a dangerous weapon by a person under eighteen years of age a Class A misdemeanor in violation of Wis. Stat. § 938.60(2) in case 2009CM1132. No mention was made of Mr. Carter's 2006 adjudication during the disposition on the 2009 case. (2/22/10 Trs., App. pp.206-216). No mention was made in the 2009 case of Mr. Carter being forbidden to possess firearms due to the previous 2006 delinquency adjudication. *Id.*

Carter was charged in case 2011CF3770 with a single count of Possession of Firearm by a Felon, contrary to Wis. Stat. § 941.29(2). The basis of the charge was the prior adjudication of delinquency in case 2006JV414B for possession of marijuana with intent to deliver. That juvenile adjudication remains of record and unreversed. A motion to dismiss the information for Failure to Notify Juvenile of Firearm Ban was filed by Mr. Carter's trial counsel on February, 2012 but was later withdrawn. (R:5). On May 8, 2012 Mr. Carter pled guilty, but the judgment of conviction was not entered, pending briefing of the firearm notice issue at the request of then presiding Judge Charles F. Kahn Jr. Briefs were filed by both defense (R:8 and R:10) and the District Attorney's Office (R:9). Oral argument on the motions were heard by Judge Kahn on June 21, 2012 with no decision entered, and heard again by Judge Watts on April 1, 2013. An oral decision, denying the defense motion to dismiss, was

made on April 1, 2013 by Judge Watts and by written order on April 18, 2013. (R:11). Mr. Carter's trial counsel also filed a Petition for Leave to Appeal the non-final order or judgment with the Court of Appeals District I, which was denied on June 14, 2013. (R:12). Mr. Carter's guilty plea was entered at the time of his sentencing before Judge Jeffrey A. Wagner on November 15, 2013. Notice of Intent to Pursue Post Conviction Relief was filed November 15, 2013. (R:19).

ARGUMENT

This is a case of first impression in Wisconsin. Both the Wisconsin Criminal Code and Juvenile Justice Code require that courts give notice of the requirements and penalties under Wis. Stat. § 941.29. Adult proceedings are governed by Wis. Stat. § 973.176(1): "Whenever a court imposes a sentence or places a defendant on probation regarding a felony conviction, the court *shall inform* the defendant of the requirements and penalties under s. 941.29." (*emphasis added*). In juvenile proceedings a similar statute, Wis. Stat. § 938.341 mandates that: "Whenever a court adjudicates a juvenile delinquent for an act that if committed by an adult in this state would be a felony, the court *shall inform* the juvenile of the requirements and penalties under s. 941.29." (*emphasis added*). Both the adult and juvenile statutes use the mandatory term "shall." Unless there is an ambiguity, the plain meaning of a statute's terms must be followed. State v. Livingston, 159 Wis.2d 561, 573, 464 N.W.2d 839, 844 (1991). When each word in the statute is given its full effect the statute is most naturally read to require that court give every juvenile a warning that future possession of firearms is banned. Even if the meaning of the text were susceptible to multiple interpretations, the burden would remain on those advocating a departure from the requirement in the statute and from settled law to come forward with persuasive new arguments or evidence.

In this case, the circuit court has improperly chosen to expand the holding in State v. Phillips, 172 Wis.2d. 391, 493 N.W.2d 270 (Ct. App. 1992) to apply not only to adult criminal convicts but also juvenile delinquents. The circuit court focuses upon the language of Wis. Stat. § 941.29 and the holding in Phillips.

“The Court cannot really get away from State versus Phillips and I look at the defense arguments and his reasons to dismiss the case and if that’s the basis for his motion, it’s really as of fairness or equity....”

(R42:9) and

“...as we have heard from the cases I have recited, especially Phillips, the defendant’s knowledge and the lack of warning that first of all, the lack of knowledge and the lack of warning are not requirements. Phillips says there are only two elements. There is no notification element and I am not going to create one here. The failure by Judge Cooper doesn’t nullify 941.29. That is right out of Phillips as well and 941.29 creates a strict criminal liability.”

(R42:11). This expansion of State v. Phillips does not take into account the numerous differences between juvenile and adult law, nor the factual differences between the defendant in Phillips and Mr. Carter’s current situation in the case now before the Court.

In this instance, Mr. Carter was adjudicated delinquent of an act that if committed by an adult would be a felony in 2006JV414B for Possession with Intent to Deliver THC – 200 grams or less. Mr. Carter was never advised during disposition of this predicate juvenile offense that he was thereafter prohibited from possessing a firearm. (See 8/29/06 Trs., App. p. 204). Mr. Carter was 15 years old at the time of his juvenile adjudication and had completed only the 9th grade.

In Mr. Carter’s case, the 2006 error of the Mr. Carter’s sentencing court was compounded when Mr. Carter was subsequently charged with a misdemeanor for Possession of a Firearm by an Individual under the age

of 18 in 2010 when apparently, by the logic of the judge who denied the motion in this case, he could have been charged as a Felon in Possession of a Firearm. Mr. Carter similarly did not receive warning from the court in his 2010 case of the firearm restriction because his 2010 case was charged as a misdemeanor and as such notice of the firearm restrictions was not required. Thus, not only did Mr. Carter not get warned he was not allowed to possess firearms at the time of his 2006 sentencing, but his 2010 conviction suggested the opposite- that he could legally possess a firearm – just not until he was 18 years old.

Factually, Mr. Carter's situation is very different from that of the defendant in Phillips and this Court should not extend the finding in Phillips to excuse failure of the juvenile court to provide adequate notice of firearm restrictions to juveniles, who could be as young as 10 years old, that have been adjudicated delinquent. Phillips. Even if the Court can ignore Mr. Carter's situation by considering the statutory language in Wis. Stat. § 941.29 as imposing strict liability, the Court should not ignore the language in In Re the Interest of Hezzie R., 219 Wis.2d. 848, 580 N.W.2d 660 (1998), which is predicated on the courts long-held belief that there is a significant difference between an adult criminal conviction and a juvenile adjudication. The circuit court does not to address Hezzie R. nor does it discuss the difference between juvenile and adult proceedings at all within its decision, despite such differences being argued in defense counsel's motion. *Id.* (4/1/13 Trs. R42:9).

I. The Circuit Court Should Not Have Extended the Finding in Phillips to Include Juvenile Adjudications.

The circuit court denied Mr. Carter's Motion to Dismiss for Failure to Warn seemingly because of the court's belief that the decision in Phillips,

was controlling. *Id.* The Phillips decision; however, is clearly distinguishable from Mr. Carters case, both factually as detailed in the last section, and because firearm warnings are mandated by two different statutes. In Phillips Wis. Stat. § 973.033¹ mandated that the circuit court advise the adult defendant, in the current case, Wis. Sec. § 938.341 mandated that the juvenile court advise the juvenile delinquent. Phillips, 172 Wis.2d. 391.

In State v. Phillips, the Court of Appeals determined that failure to give the mandatory warning in Wis. Stat. § 973.033 to an adult felon did not prevent a subsequent conviction for Felon in Possession under Wis. Stat. § 941.29. *Id.* The defendant in Phillips had previously been sentenced for a felony, and the court at sentencing had failed to notify him of the firearm ban. 172 Wis.2d at 392. Phillips challenged his charge of Felon in Possession of a Firearm, arguing that a violation of § 941.29 could be established only with proof that the § 973.033 warning of firearm ban had been given by his sentencing court at his prior sentencing. Initially, the circuit court agreed and dismissed the information. The Court of Appeals overturned the circuit court. The Court of Appeals held that Wis. Stat. § 941.29 had only two elements: that the accused was a convicted felon and that the accused was in possession of a firearm. The Court of Appeals determined that no notification element existed and, as such, the prosecutor need not prove that notice had been given to Phillips under § 973.033.

A number of factual distinctions separate Phillips from the instant case. The most obvious of which is that the defendant in Phillips, was charged under a different subsection of § 941.29, as a felon, than Mr. Carter, who was charged for Possession of a firearm as;

¹ Wis. Stat. §973.033 was renumbered to Wis. Stat. §973.176 by 2003 Act 121. No substantive changes to the section were made.

“A person is subject to the requirements and penalties of this section if he or she has been... (bm) Adjudicated delinquent for an act committed on or after April 21, 1994, that if committed by an adult in this state would be a felony.”

The subsection of Wis. Stat. §941.29 that is at play is important because juvenile adjudications are treated very differently than adult felony convictions in Wisconsin.

In Hezzie R., the Wisconsin Supreme Court determined that the provisions of Wis. Stat. §941.29 “...does not apply to juveniles in the same manner that it applies to adults. Hezzie R., 219 Wis.2d. at 881. In particular the Court noted that the ban on firearm possession doesn’t apply to any juvenile adjudicated delinquent “if a court subsequently determines that the [juvenile] is not likely to act in a manner dangerous to public safety.” Wis. Stat. § 941.29(8). The juvenile has the burden only of showing “by a preponderance of the evidence that he or she is not likely to act in a manner dangerous to public safety.” *Id.* This language is evidence that the legislature intended to restrict firearm possession of a juvenile adjudicated delinquent only where public safety is at risk. Mr. Carter has not had a hearing under 941.29(8), but argues that Hezzie R. clearly outlines that Wis. Stat. § 941.29 applies differently to juveniles. The circuit court denial of Mr. Carter’s motion to dismiss does not address Hezzie R., or the differences between adult criminal convictions or juvenile adjudications in any part of its decision. There is no evidence that the court in Phillips intended its holding to be extended to individuals that had been adjudicated delinquent.

a. Juvenile Adjudications are not Criminal Convictions

In Wisconsin, juveniles are treated differently from adults when prosecuted for crimes in part because juveniles are presumed to be less mature and less sophisticated than adult offenders. A criminal defendant of any age may be challenged to understand the legal system, but the juvenile system involves children as young as age 10. On top of the general lack of education that some juveniles may face, there is also a compounding lack of life experience. Parents of a juvenile may be present to assist their children in the process, but may themselves also face educational or environmental gaps that further confuse or alienate a child going through the juvenile court system. Thus the juvenile justice code was developed not as a strict criminal code, but to provide a more balanced approach to juvenile delinquency, adding personal accountability and community protection to the legislature's primary objectives, in addition to the rehabilitation of juveniles.

The juvenile code is not a criminal code, and a juvenile adjudication is not a "criminal conviction" in the same manner as a prior adult criminal conviction. Rehabilitation, not punishment, is stressed by the juvenile code. A review of Wis. Stat. §938.01(2) supports these propositions.

"LEGISLATIVE INTENT. It is the intent of the legislature to promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system which will protect the community, impose accountability for violations of law and equip juvenile offenders with competencies to live responsibly and productively. To effectuate this intent, the legislature declares the following to be equally important purposes of this chapter:

- (a) To protect citizens from juvenile crime.
- (b) To hold each juvenile offender directly accountable for his or her acts.
- (c) To provide an individualized assessment of each alleged and adjudicated delinquent juvenile, in order to prevent further delinquent behavior through the development of competency in the juvenile offender, so that he or she is more capable of living productively and responsibly in the community.

- (d) To provide due process through which each juvenile offender and all other interested parties are assured fair hearings, during which constitutional and other legal rights are recognized and enforced.
- (e) To divert juveniles from the juvenile system through early intervention as warranted, when consistent with the protection of the public.
- (f) To respond to a juvenile offender's needs for care and treatment, consistent with the prevention of delinquency, each juvenile's best interest and protection of the public, by allowing the court to utilize the most effective dispositional option.
- (g) To ensure that victims and witnesses of acts committed by juveniles that result in proceedings under this chapter are, consistent with this chapter and the Wisconsin constitution, afforded the same rights as victims and witnesses of crimes committed by adults, and are treated with dignity, respect, courtesy, and sensitivity throughout those proceedings.

Wis. Stat. 938.01(2).

The adjudication of a juvenile provides a system whereby juvenile offenders are held accountable for their actions while also receiving rehabilitation and targeted services with a goal of avoiding criminal convictions in adult court. As pointed out by the dissent in Hezzie R., "The juvenile justice system has historically been focused solely on nurturing and rehabilitating youthful offenders while removing the taint that accompanies a criminal conviction in adult court." 219 Wis.2d at 901. In fact, the legislature did not express an intent that the adjudication of delinquency be treated as a criminal conviction, codifying to the contrary:

"A judgment in a [juvenile delinquency] proceeding on a petition under this subchapter is not a conviction of a crime, does not impose any civil disabilities ordinarily resulting from the conviction of a crime and does not operate to disqualify the juvenile in any civil service application or appointment."

Wis. Stat. § 938.35(1).

In Hezzie R., the Court noted that even the placement of the Juvenile Code, next to the Criminal Code, was not because it was part of the Criminal Code, but was a symbolic move to provide incentives for young offenders to change their behavior. 219 Wis.2d at 872. Even when a

criminal court imposes a juvenile disposition, the juvenile is not convicted of a crime but is rather adjudged delinquent. Wis. Stat. § 938.183 (1m)(c)3.

Given the young age, maturity level, and developmental status of individuals appearing before juvenile courts the Juvenile Code's procedure and legislative goals differ greatly from those contained in the adult Criminal Code. Numerous differences exist that illustrate the difference between a juvenile adjudication and a criminal conviction. Under Wis. Stat. § 938.12, the juvenile court has exclusive jurisdiction over juveniles 10 years old or older who are alleged to be delinquent. But beyond age and maturity of the individuals involved, the basic rights afforded an individual involved in juvenile delinquencies are different than those available in adult criminal proceedings. All the constitutional rights afforded criminally accused adults are not imposed in a juvenile adjudication proceeding. Hezzie R., 219 Wis.2d at 867. A juvenile does not have a state or federal constitutional right to a jury trial in a delinquency proceeding. McKeiver v. Pennsylvania, 403 U.S.528 (1971); N.E. v. Wisconsin Dep't of Health & Soc. Servs. (In the Interest of N.E.), 122 Wis.2d 198, 201 361 N.W.2d 693 (1985). Nor is there a fundamental right to one. See N.E., 122 Wis.2d at 207-08.

Juveniles are treated differently at the time of their disposition. The juvenile court is given great deference in crafting dispositions. But there are limits that again illustrate that the court is dealing with juveniles rather than adults. Juveniles serve their time in juvenile correctional facilities until reaching age 17. Wis. Stat. § 938.183(3). A disposition in a delinquency case does not qualify as a sentence, and a court cannot order an adult sentence to run consecutively to a juvenile disposition. State v. Woods, 173 Wis.2d 129, 137, 496 N.W.2d 144 (Ct. App. 1992).

In addition, the proceedings of juvenile court are treated differently than those of adult criminal courts. Court records for juvenile proceedings

are kept confidential and separate from other court records. Wis. Stat. §938.396(2). Disclosure of juvenile delinquency discovery is more closely regulated. Wis. Stat. § 938.293(1). In addition, the public is not allowed to attend juvenile delinquency fact-finding hearings without a specific order from the Court. Wis. Stat. § 938.299(1)(a). CCAP does not include any information on juvenile delinquency charges or dispositions.

Given the great differences between juvenile court and adult criminal courts it should not be presumed that the Phillips finding should be expanded to include juvenile delinquencies. Juveniles are not similarly situated to adults in capacity, age, or understanding. For these reasons, and because one of the goals of the juvenile system is not to create criminals but rather to help juveniles avoid becoming entangled in the adult criminal court system, Mr. Carter asks the court to decline to extend Phillips to include all cases involving juvenile adjudications.

b. Juveniles are a More Vulnerable Population than Adults and Have More to Lose When Notice is not Given

Extending the finding in Phillips would prejudice defendants in situations similar to Mr. Carter. The defendant in Phillips was an adult at the time of the felony conviction that served as a predicate to his Felon in Possession charge. Mr. Carter was only 15 at the time of his juvenile adjudication. He was a minor and arguably more vulnerable, less educated, and with less life experience. Mr. Carter was unable to vote, drive, or even to skip school without the permission of his parents at the time of his juvenile adjudication. Juveniles such as Mr. Carter, at the time of his juvenile adjudication in 2006, are still in the care and custody of their parents. Perhaps most importantly, however, the defendant in Phillips already had an adult felony on his criminal record at the time that he was

charged with Felon in Possession of a Firearm. Phillips, 172 Wis.2d. 391 (Ct. App. 1992). The predicate felony was on his adult record, un-reversed. The Felon in Possession charge was an additional felony, adding to Phillips' criminal record that already included felony charges. Mr. Carter, however, and defendant's similarly situated, could have had no adult felony's on their criminal record at the time that they are charged with Felon in Possession of a Firearm and instantly can become felons. As in Mr. Carter's case, the current felony charge of Felon in Possession instantly became the most serious conviction on Mr. Carter's record and thereafter has effects on Mr. Carter's employability, his ability to pursue an education and certifications, as well as potentially enlisting in the armed forces, to name just a few consequences.

While it is clear that the legislature intended individuals that were adjudicated delinquent to potentially face punishment under § 941.29(1)(bm) what is also clear is that juveniles face the higher penalty upon conviction for a violation of §941.29(1)(bm) and as such the notice requirement should be regarded with more scrutiny than in instances where felons with adult criminal convictions fail to receive warning. As suggested by Hezzie R., §941.29 does not, and Mr. Carter would argue should not, apply to juveniles in the same manner that it applies to adults.

Conclusion

For the above reasons, Dijon Carter, requests that his conviction for Felon in Possession of a Firearm conviction be reversed, and charges against him dismissed because of the failure of the juvenile court to properly notify Mr. Carter of the requirements and penalties of Wis. Stat. § 941.29 as required in Wis. Stat. § 938.341.

Dated at Pewaukee, Wisconsin this 9th day of February, 2015.

Respectfully submitted,

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WIS. STAT. (RULE) 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rules) 809.19(8)(b) and (c) for a brief produced with a proportional serif font, minimum printing resolution of 300 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of this brief is 3,497 words.

Kathleen A. Lindgren

WIS. STAT. (RULE) 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Kathleen A. Lindgren

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(2)(b)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Kathleen A. Lindgren

CERTIFICATE OF MAILING – RULE 809.80(4)

I have submitted an electronic copy of this appendix, which complies with the requirements of s. 809.19(13). I further certify that this electronic appendix is identical in content to the printed form of the appendix filed as of this date.

Kathleen A. Lindgren

CERTIFICATE OF MAILING – RULE 809.80(4)

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 9th day of February, 2015, I caused 10 copies of the Brief and Appendix of Defendant-Appellant, Dijon L. Carter, to be delivered to the Wisconsin Court of Appeals, 110 E. Main Street, Suite 215, Madison, Wisconsin 53703.

Kathleen A. Lindgren