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OF WISCONSIN

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2014AP2707CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DIJON L. CARTER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JEFFREY A. WAGNER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

STANDARD OF REVIEW

This appeal involves the interpretation of two statutes, Wis. Stat. §§ 941.29(2) and 938.341. The governing standard of review is settled:

> "Statutory interpretation is a question of law that this court reviews de novo while benefiting from the lower courts' analyses." *Noffke ex rel. Swenson v. Bakke,* 2009 WI 10, ¶ 9, 315 Wis. 2d 350, 760 N.W.2d 156 (citing *Megal Dev. Corp. v. Shadof,* 2005 WI 151, ¶ 8, 286 Wis. 2d 105, 705 N.W.2d 645). "[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.' " *State ex rel. Kalal v. Circuit Court for Dane Cnty.,* 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citations omitted). . . We interpret statutes to avoid absurd or unreasonable results. *Id.* ¶ 46 (citations omitted).

Stoker v. Milwaukee Cnty., 2014 WI 130, ¶ 18, ___ Wis. 2d. ___, 857 N.W.2d 102.

ARGUMENT

THE STATUTORY LANGUAGE PLAINLY AND UNAMBIGUOUSLY ESTABLISHES ONLY TWO ELEMENTS OF THE OFFENSE, AND NO BASIS EXISTS TO ADD THE NEW ELEMENT URGED BY CARTER.

Carter raises a single challenge to his conviction for being a felon in possession of a firearm, namely that the judge in his earlier juvenile delinquency proceeding failed to give him the required warning that he was barred from possessing firearms.

The statute defining the offense, Wis. Stat. § 941.29(2), makes it a crime for certain persons to possess firearms,

including persons convicted of felonies and persons who have been adjudicated delinquent for an act that if committed by an adult would constitute a felony. Wis. Stat. § 941.29(2)(a), (b) and (bm).

The operative statutory provision as it applies to Carter reads, in full:

> A person specified in sub. (1) is guilty of a Class G felony if he or she possesses a firearm under any of the following circumstances:
>
> . . . .
>
> (b) The person possesses a firearm subsequent to the adjudication, as specified in sub. (1)(bm).

Wis. Stat. § 941.29(2) and (2)(b).

Subsection (1)(bm), added after this court decided *State v. Phillips*, 172 Wis. 2d 391, 493 N.W.2d 238 (Ct. App. 1992), covers persons "[a]djudicated delinquent for an act committed on or after April 21, 1994, that if committed by an adult in this state would be a felony." Carter does not dispute that he falls within this category, having been previously adjudicated delinquent for possessing marijuana with intent to deliver, a felony under Wis. Stat. § 961.41(1m)(h)1 (8:7; A-Ap. 109).

Separate statutory provisions direct judges in both adult and juvenile proceedings to disclose the firearm prohibition to those to whom it applies, at the time of sentencing or adjudication of delinquency. Wis. Stat. §§ 973.176(1) (adults) and 938.341 (juveniles). The juvenile court failed to make the required disclosure when it

adjudicated Carter delinquent (8:3-13; A-Ap. 105-115).[1] Carter's sole argument here is that this failure precludes his subsequent conviction for possessing a firearm.

Carter's argument runs headlong into a contrary controlling decision by this court rejecting the identical claim Carter presses here—that a court's failure to make the firearm ban disclosure in the prior proceeding precludes a subsequent prosecution for possession of a firearm by a felon. *Phillips*, 172 Wis. 2d at 394. And the legislature's enactments after *Phillips* reinforce the meritlessness of Carter's position. Carter can prevail only if the court either overrules *Phillips* or judicially amends the statutes to add a new element applicable only to juvenile adjudications. There is no basis for either.

A. This court, in *Phillips*, has already rejected Carter's argument that compliance with the notice statute is an implied element of the offense of possession of a firearm by a felon.

This court has previously decided the sole issue Carter raises here, namely that a court's failure to warn the defendant of the firearm ban at the time of the predicate adjudication precludes prosecution for the offense of firearm possession. In *Phillips*, the trial court had accepted the

[1]Despite the court's failure to warn Carter about the firearm ban at the delinquency adjudication hearing, Carter was informed of it nonetheless. At the hearing the court explicitly stated that the offense was a felony (8:7; A-Ap. 109). And the Plea Questionnaire/Waiver of Rights form in the juvenile proceeding signed by Carter explicitly disclosed the ban: "I understand that if one of the charges to which I am pleading is a felony, I will lose any right to possess a firearm or ammunition" (9:11; A-Ap. 126). Carter read and signed the form, and both he and his counsel confirmed that his attorney had explained the questionnaire to him (8:7-8; A-Ap. 109-110).

defendant's argument, echoed here by Carter, that compliance with the notice statute is an element of the offense. 172 Wis. 2d at 392.

Reversing the trial court, this court held that the language of Wis. Stat. § 941.29(2) plainly and unambiguously establishes only two elements of the offense, namely "[t]hat the accused is a convicted felon and that the accused was in possession of a firearm." 172 Wis. 2d at 394.

The Wisconsin Supreme Court agrees. *State v. Black*, 2001 WI 31, ¶ 18, 242 Wis. 2d 126, 624 N.W.2d 363 ("This crime has two elements"). So do the pattern jury instructions. Wis. JI-Criminal 1343 (2011) ("State must prove . . . that the following two elements were present").

Carter's theory posits an implied, invisible third element. But as this court has already held, "[n]othing in the plain language of sec. 941.29 leads one to believe a notification element to sec. 941.29 exists." *Phillips*, 172 Wis. 2d at 394. Applying the settled rule that "[u]nless there is an ambiguity, the plain meaning of a statute's terms must be followed," this court in *Phillips* found no ambiguity in the two statutes at issue. *Id.* at 394. It thus rejected the claim of an implied third element not appearing in the statute.

This court went on to observe that adding a notification element, as Carter seeks here, would lead to an "absurd result" by essentially exempting from the ban persons convicted of felonies in other states, since the state "has no way of directing equivalent notification in other states." *Id.* at 395. Making notification an element would undercut the legislature's explicit intent to include such persons within the scope of the ban, expressed through enactment of Wis. Stat. § 941.29(b) and (d). *Id.*

Moreover, adding a notification element is incompatible with the strict liability nature of the offense. It is settled law that possessing a firearm as a felon is a strict

liability offense. *Black*, 242 Wis. 2d 126, ¶ 19 ("[T]he statute makes no reference to intent and therefore creates a strict liability offense.") Carter's theory in essence would inject an element of intent into the statute, by barring prosecution when the defendant had not been warned of the firearm ban at the time of his previous conviction or adjudication. This is outside the bounds of the court's proper role.

In an analogous situation, the Wisconsin Supreme Court invalidated on First Amendment grounds a statute creating a strict liability crime that might have been saved with the addition of a scienter requirement. *State v. Weidner*, 2000 WI 52, 235 Wis. 2d 306, 611 N.W.2d 684. The court declined to do so, stating:

> If we were now to add scienter to the statute, we would defy the legislative intent and usurp the role of the legislature.

Id. at ¶¶ 34, 39.

For the same reason, adding the element Carter proposes to Wis. Stat. § 941.29 is not possible without invading the province of the legislature.

B. The legislature's post-*Phillips* extension of the firearm ban to those with prior delinquency adjudications refutes Carter's theory that the law treats juveniles differently.

In an attempt to overcome *Phillips*, Carter asserts that the statute should be interpreted differently with respect to prior juvenile delinquency adjudications than it is with respect to felony convictions. Specifically, Carter emphasizes that because his predicate disposition was a delinquency adjudication, as opposed to a felony conviction, he was charged under a different paragraph than Phillips

was—i.e. Wis. Stat. § 941.29(1)(a) versus (bm). Carter's brief at 6-7.

But Carter points to no relevant distinction between the two paragraphs. They merely identify different categories of persons to whom the firearm ban applies. The two elements of the offense prescribed in Wis. Stat. § 941.29(2) are the same for all categories of persons included in the firearm ban. Nor can Carter's theory be squared with the history of the relevant statutory provisions, which reflect the legislature's intent to treat juvenile dispositions the same as felony convictions.

The legislature established the crime at issue here in 1982, through enactment of the original version of Wis. Stat. § 941.29(2). 1981 Wis. Laws, ch. 141. At first the statute applied only to persons with prior felony convictions:

> A person is subject to the requirements and penalties of this section if he or she has been convicted of a felony in this state or of a crime elsewhere that would be a felony if committed in this state.

1981 Wis. Laws, ch. 141, § 1.

Only later, in 1989, did the legislature enact section 973.033, which directed sentencing courts to disclose the firearm ban to felony defendants at sentencing:

> 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.

1989 Wis. Act 142, § 2.[2] It left § 941.29 untouched.

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[2]This provision was later renumbered as Wis. Stat. § 973.176(1), its current location. 2003 Wis. Act 121, § 2.

In 1992 came *Phillips*, in which this court explicitly repudiated the assertion that failure to provide the required disclosure of the firearm ban at the time of the first felony conviction barred prosecution for firearm possession.

In 1994—two years after *Phillips*—the legislature extended the firearm ban to cover persons with prior juvenile adjudications involving felony-grade conduct. It accomplished this by creating Wis. Stat. § 941.29(1)(bm), which added a new category to the list of dispositions triggering the ban. 1993 Wis. Act 195, § 8.

In the same enactment, the legislature also imposed a disclosure requirement for juvenile proceedings that mirrors the language in the requirement for adult sentencing hearings:

> Whenever a court adjudicates a child delinquent for an act that if committed by an adult in this state would be a felony, the court shall inform the child of the requirements and penalties under s. 941.29.

1993 Wis. Act 195, § 1 (creating Wis. Stat. § 48.341).[3]

Except for the introductory phrase identifying the recipient of the disclosure, the legislature lifted the operative language verbatim from the adult disclosure requirement in Wis. Stat. § 973.176(1)—"the court shall inform the [defendant or child] of the requirements and penalties under s. 941.29."

That the legislature borrowed language from an existing provision that had already been interpreted by the appellate courts leaves no doubt that the holding of *Phillips*

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[3]The term "child" has been replaced with "juvenile," and the statute has been renumbered to current section 938.341. 1995 Wis. Act 77, §§ 266 and 629.

applies equally to the subsequently enacted juvenile provisions.

The legislature's reiteration of language already interpreted by the courts creates a strong presumption that it intended the new provision to be interpreted in the same manner. This precise scenario arose in *State v. Grady*, 2006 WI App 188, 296 Wis. 2d 295, 722 N.W.2d 760. A predecessor statute had been construed by the appellate courts, and the legislature had enacted a new statute using highly similar language. As the court put it,

> [t]he question here is whether equivalent language in the current statute should be given the same interpretation. We conclude the answer is yes.
>
> We presume that the legislature acts with full knowledge of existing case law when it enacts a statute. . . It is telling, then, that the legislature chose to use strikingly similar language [in the subsequent statute]. . . . Had the legislature intended, this time around, to permit appellate review of a court's failure to consider sentencing guidelines, it would have used language differentiating the current limitation from the former limitation. Instead, the legislature chose nearly identical language. Thus, we must assume the legislature contemplated that the courts would construe the new language to limit appeals consistent with *Halbert*.

Id. at ¶¶ 8-9.

This principle applies with even greater force here, as the legislature did not merely use language that is "strikingly similar." It is identical.

Carter's argument is thus foreclosed by *Phillips*. Had the legislature intended to distinguish delinquency adjudications from felony convictions in the manner urged by Carter, it certainly would have altered the statutory language in its 1994 enactment to reflect this intention.

C. Public policy reasons for treating juveniles differently than adults cannot override the plain meaning of the statutes.

In the absence of any statutory language supporting his theory, Carter's primary argument appears to be that treating juveniles the same as adults is unfair. Carter ably catalogues the public policy reasons for treating juveniles differently from adults, and impliedly suggests a new rule of statutory construction, namely that the courts should overlook even plain and unambiguous statutory language when the statutes could be interpreted in a way the courts deem fairer to juveniles. Carter's brief at 7-12.

Carter adduces no authority for this novel and problematic suggestion. He relies heavily on *In re the Interest of Hezzie R.*, 219 Wis. 2d 848, 580 N.W.2d 660 (1998), playing up the court's statement that Wis. Stat. § 941.29 "does not apply to juveniles in the same manner that it applies to adults." 219 Wis. 2d at 881; Carter's brief at 7.

But the court in *Hezzie* was hardly announcing a radical new principle of statutory construction. Rather, it was merely referring to § 941.29(8), which affords persons subject to the firearm ban because of juvenile delinquency adjudications (as opposed to felony convictions) the ability to persuade a court to exempt them from the firearm ban because they are not dangerous to the public. 219 Wis. 2d at 881. The court found that this option distinguished juvenile delinquency adjudications from true criminal proceedings, thereby not entitling juveniles to jury trials. *Id.* And unlike in this case, there the court was deciding a constitutional challenge to various statutes; here, Carter challenges only the interpretation of statutes—not their validity.

Moreover, the special statutory treatment of juveniles in Wis. Stat. § 941.29 undermines rather than advances Carter's argument. It shows that the legislature in fact did consider the special nature of juveniles and adjusted the statute to provide a safety valve for juveniles not available to those with adult felony convictions. Nothing in *Hezzie* suggests that a single statute—Wis. Stat. § 941.29(2)—can be read in one way for those with prior adult felony convictions (as an offense with only two elements), and another for those with prior delinquency adjudications (impliedly adding a third element), with no language distinguishing between the two groups.

Carter's argument confuses this court's role with that of the legislature. As the supreme court recognized in *Hezzie*, the juvenile provisions of the statutes "reflect a desire [by the legislature] to balance the rehabilitative needs for care and treatment of each juvenile, with holding the juvenile accountable for his or her acts, and protecting the public." 219 Wis. 2d at 889. Such a balancing lies within the sphere of the legislature, not the courts.

The policy considerations Carter presents in his brief could be used to advocate for a different approach by the legislature. But they do not empower the courts to rewrite the statutes, no matter how plain and unambiguous their language and purpose, when they disagree with the policy balance struck by the legislature.

Carter offers no legal authority to the contrary, and the court should reject his appeal.

CONCLUSION

For the reasons stated above, the court should affirm the judgment of conviction.

Dated this 10th day of March, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,665 words.

_____
John S. Greene
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 10th day of March, 2015.

_____
John S. Greene
Assistant Attorney General