In the Court of Appeals of Wisconsin

District III

In re the return of property in: State of Wisconsin v. Steven Michael Leonard:

***Steven Michael Leonard,* Appellant**

v.

The State of Wisconsin,

Respondent

Appeal No. 2014AP002892

Appeal from the Judgment of the Douglas County Circuit Court, The Hon. Kelly J. Thimm

Brief of Appellant

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Statement of Issues

1. May a circuit court deny a petition for return of property under Wis.Stats. § 968.20 on the grounds that the property was used to commit a crime, when 1) the State does not introduce evidence of such grounds and does not argue for denial on such grounds; 2) there is no notice that the court is contemplating a denial on such grounds, so that the petitioner has no opportunity to address those grounds; and 4) with no evidence that such property was in the actual possession of the defendant or was used in any way to commit the crime?

   Circuit Court answer: Yes.

2. Is a person convicted of a "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9) when he is convicted of kicking in the locked door of his own residence, obtaining a loaded handgun, and leaving the house threatening to kill himself?

   Circuit Court answer: Yes.

Statement on Oral Argument and Publication

Appellant Steven Leonard ("Leonard") does not believe oral argument is necessary in this case. The issues are straightforward and it is not likely that oral argument would assist the Court in deciding the case.

Leonard believes that the opinion in the case should be published. Circuit courts around the state continue to apply an incorrect standard in ruling on return of property petitions. The majority of appellate opinions are unpublished, leaving circuit courts with a dearth of binding precedent to guide them and give them direction on the proper standards to apply.

Statement of the Case[1]

On February 3, 2014, Leonard returned to his home in Superior around 2 a.m. after attending a Superbowl party. His wife, Shauna Leonard ("Shauna") and he got into an argument, but there was no physical contact between them and no threats of physical harm made by either one to the other. The police were called. As a result of the encounter, police told Leonard it would be best if Leonard spent the night elsewhere, but the police did not require him to leave. The police did tell Leonard that if he went back into the house that night and the police were called again, it was likely that "someone" would be arrested.

Leonard decided to sleep in his truck parked in the garage. After the police left, for reasons not stated in the record, Leonard attempted to enter the house. He found the door from the garage to the house locked, so he broke the door in order to enter. He went into the house, obtained a .44 Magnum revolver and left the house again. He made no threats against Shauna with the handgun. Shauna called the police again.

At the second police encounter, Leonard was arrested for disorderly conduct. His .44 Magnum revolver was seized. In addition, Police also seized other firearms and ammunition, plus a smoke grenade, from an upstairs gun cabinet for "safekeeping." The record does not indicate that Leonard had used,

[1] This statement of the case is drawn from the criminal complaint in this case. Because there was never a trial on the merits in the underlying criminal prosecution, the criminal complaint contains the most succinct and thorough recitation of facts. These facts are presented in order to give the Court an "omniscient" view of the events. As will be shown later, not all facts can be properly considered in resolving the issues before the Court.

touched, or possessed the other items that night (other than his constructive possession of them because they were in his home). Leonard ultimately pleaded no contest to a single count of disorderly conduct.

Following Leonard's conviction, Leonard filed a motion for return of property under Wis.Stats. § 968.20, to recover the firearms, ammunition, and smoke grenade. At a hearing on the motion, the state objected to the return on the grounds that Leonard was convicted of a misdemeanor crime of domestic violence on account of his disorderly conduct conviction, so that Leonard is prohibited under federal law from possessing firearms. The circuit court ruled that Leonard used the firearms and ammunition in the commission of the disorderly conduct, and in the alternative that Leonard was convicted of a misdemeanor crime of domestic violence and is prohibited by federal law from possessing firearms and ammunition. The circuit court ordered the return of the smoke grenade. Leonard appeals the denial of return of the firearms and ammunition.

Argument

Leonard will show the Court that the State failed to prove that Leonard used any of the firearms and ammunition, especially the firearms and ammunition that were in the upstairs gun cabinet, in the commission of the disorderly conduct. Leonard will further show that the State failed to prove that Leonard has been convicted of a misdemeanor crime of domestic violence. Leonard is therefore entitled to the return of all the property.

Wis.Stats. § 968.20 provides, in pertinent part:

> (1) Any person claiming the right to possession of property seized pursuant to a search warrant or seized without a search warrant may apply for its return to the circuit court for the county in which the property was seized or where the search warrant was returned. The court shall order such notice as it deems adequate to be given the district attorney and all persons who have or may have an interest in the property and shall hold a hearing to hear all claims to its true ownership. If the right to possession is proved to the court's satisfaction, it shall order the property, other than contraband or property covered under sub. (1m) or (1r) or s. 173.12, 173.21 (4), or 968.205, returned if:
>
> (a) The property is not needed as evidence or, if needed, satisfactory arrangements can be made for its return for subsequent use as evidence; or
>
> (b) All proceedings in which it might be required have been completed.
>
> (1m)
>
> (a) In this subsection:
>
> 1. "Crime" includes an act committed by a juvenile or by an adult who is adjudicated incompetent that would have been a crime if the act had been committed by a competent adult.
>
> 2. "Dangerous weapon" has the meaning given in s. 939.22 (10).
>
> (b) If the seized property is a dangerous weapon or ammunition, the property shall not be returned to any person who committed a crime involving the use of the dangerous weapon or the ammunition. The property may be returned to the rightful owner under this section if the owner had no prior knowledge of and gave no consent to the commission of the crime. Property which may

> not be returned to an owner under this subsection shall be disposed of under subs. (3) and (4).

At the hearing, the State introduced no evidence that Leonard was not the owner of the firearms and ammunition, but only argued that they should not be returned to Leonard for legal reasons.

In a petition for return of property pursuant to Wis.Stats. § 968.20, the petitioner (in this case Leonard) has the burden of identifying the property and the basis for the claim. *In re Jones v. State,* 226 Wis.2d 565, ¶ 56; 594 N.W.2d 738 (S.Ct. 1999). This burden is met if the property is identified and the basis for the claim are both contained in the petition for return of property, *Id.*, ¶ 57. In the instant case, Leonard identified his property and stated the basis for its return on his petition. R10, p. 3. Moreover, neither the State nor the circuit court expressed doubts about these matters, and the circuit court's denial of Leonard's motion was not based on Leonard's failure to address them. *Cf. Welter v. Sauk County Clerk of Court,* 53 Wis.2d 178 (1971).

When the government opposes a petition for return of property, the burden is on the government to prove the basis for denial of the petition. *Jones,* ¶ 57 ("It was the State, however, who argued that the money was contraband and need not be returned to Jones. Because the burden rests with the moving party to support the motion by proof, it follows that the State should have the burden of establishing that the property … need not be returned.") [citations omitted]. The standard of proof is "greater weight of the credible evidence." *Id.*, ¶ 58.

1. The Property Was Not Used in the Commission of a Crime

The property was not used in the commission of a crime, and for that reason should be returned to Leonard. Wis.Stats. § 960.20.

a. The Property In the Upstairs Gun Cabinet

The only mention anywhere in the record of the firearms and ammunition in the upstairs gun cabinet is that the police seized them for safekeeping. There is no mention that Leonard touched them, referred to them, or attempted to access them. It simply cannot be concluded that the property in the upstairs gun cabinet had anything at all to do with the disorderly conduct. That property was no more involved in the disorderly conduct than were the family's television, sofa, or kitchen toaster.[2] For this reason, this property cannot be said to have been used in the commission of a crime, and cannot be forfeited on those grounds.

In the alternative, the State did not argue or attempt to prove that ***any*** of the property was used in the commission of a crime. The Circuit Court made that determination *sua sponte,* without asking the parties to argue or brief the issue. Leonard questions whether the circuit court may deny a return of property based on the circuit court's independent (i.e., not urged by another party) conclusion that the property was used in the commission of a crime, especially without giving Leonard an opportunity to argue that issue. Consider, for example, if the State had not opposed the return on any grounds. Would the circuit court have been free to

[2] While it may be true that Leonard had constructive possession of the upstairs firearms during the commission of the disorderly conduct downstairs (*Cf. State v. Kueny,* 2006 WI App 197, 296 Wis.2d 658, 724 N.W.2d 399 (Ct.App. 2006), this is not a possession crime.

deny the return on the grounds that the property was used in the commission of a crime? Such a result implies that the State does not actually have a burden to carry and that the circuit court could carry the burden for the state, an implication that surely is contrary to *In re Jones.*

The circuit court's *sua sponte* ruling on use of the firearms in the commission of a crime also deprived Leonard of an opportunity to present evidence that forfeiture of the firearms violated the 8th Amendment's prohibition against excessive fines. In *State v. Bergquist,* 2002 WI App 39, 250 Wis.2d 792, 641 N.W.2d 179 (Ct.App. 2002), this Court ruled that denials of return of property under § 968.20 implicates the Excessive Fines clause. In that case, a circuit court denied return of two firearms for a single violation of the disorderly conduct statute on the grounds that forfeiture of the firearms was an unconstitutional excessive fine. This Court affirmed. The firearm owner in *Bergquist* testified to the value of his firearms (over $5,000) because he was faced with the State's intention to forfeit the weapons because they were used to commit disorderly conduct.[3]

In the present case, Leonard only was faced with the State's claim that Leonard is prohibited from possessing firearms under federal law. Thus, Leonard had no reason to bring up Excessive Fines clause issues because he had no notice the circuit court intended to supply the State with a different reason for denial. The

[3] There was no issue in *Bergquist* that the firearms were used to commit the crime, because the crime consisted of firing them at a neighbor's house.

differing grounds for denial are significant. In the case of use of firearms to commit a crime, the firearms are contraband and subject to seizure/forfeiture. On the other hand, in the case of a misdemeanor crime of domestic violence, the misdemeanant merely is prohibited from possession. He is not deprived of the beneficial ownership of the firearms, and is free to sell them to third parties and receive the value of his property. The property is not seized by the government the way forfeited property is.

The motion for return of the firearms shows seven separate firearms, approximately 450 rounds of ammunition, some magazines, and a smoke grenade. R10, p. 3. The maximum fine for a single count of disorderly conduct is $1,000. Wis.Stats. §§ 947.01, 939.51(3)(b). The circuit court actually sentenced Leonard to two days in jail (which was the time already served pretrial) plus $100 fine. This Court is not in a position to take judicial notice that the listed property is valued well in excess of $1,000, or even the remaining difference of $900, but it should be obvious that the potential certainly exists. Because Leonard was not given a meaningful opportunity to address the excessive fine issue, with no notice that the Court would find alternative grounds for denial on its own, he is being deprived of his property without due process.

b. The .44 Magnum Revolver

In order to determine if the revolver was used in the commission of the disorderly conduct, we must look at what evidence the State introduced at the

hearing.[4] As an initial matter, Leonard observes that the State did not argue that the revolver was used to commit disorderly conduct. As such, the State failed to introduce any evidence to support that notion. In fact, the State did not introduce evidence that Leonard even possessed the revolver at the time of the incident. The only discussion of the revolver came from the circuit court's questioning of the police witness:

> Q: In the complaint it also alleges that he went upstairs, got a silver revolver and came downstairs, right?
> A: Yes.
> Q: And there was a report that he had a .44 Magnum handgun, was threatening to shoot himself?
> A: That's my recollection of the report.
> Q: In the complaint?
> A; In the complaint.

R18, p. 14.

At best, then, the only role the revolver played is that it was in Leonard's possession when he allegedly threatened to shoot himself. There was no evidence that Leonard possessed the gun while he was breaking the door. There was no evidence that he pointed the gun at anyone, including himself. There was no evidence that he took any steps to implement the alleged threat. There was no evidence that he waived the gun around or even made reference to it. He merely

[4] The circuit court did not take judicial notice of any facts during the evidentiary phase of the hearing. If it had, Leonard would have had an opportunity to refute them or introduce evidence to alter their significance. Because the only evidence introduced was the State's single exhibit and testimony of a single witness, that is all the evidence the circuit court should have considered.

possessed it. The question then becomes whether this constituted use of the revolver in the commission of the crime of disorderly conduct.

One might expect that a suicide threat occurs frequently enough, accompanied by the possession of a firearm, that this issue is not particularly novel. That is not, however, the case. Leonard has found a single case discussing whether a suicide threat (without more) is disorderly conduct. In *State v. Carroll*, 241 Wis.2d 571, 624 N.W.2d 420 (Ct.App. 2001), a man used profanity and on a telephone call with a doctor's office. When the doctor called the man back, the man threatened to kill himself. He was later convicted of disorderly conduct. This Court reversed, finding insufficient evidence for a conviction.

Obviously, *Carroll* is not identical to the present case. Leonard has been convicted of disorderly conduct already, so this is not a question of whether a crime was committed at all. Nevertheless, *Carroll* is instructive that a mere threat to commit suicide is not *per se* disorderly conduct.

In the present case, the complaint recites multiple behaviors as grounds for the disorderly conduct conviction: 1) drinking; 2) kicking in the locked door of his residence; 3) scaring his wife; 4) obtaining a loaded handgun; and 5) leaving the house threatening to kill himself.[5] R1, p. 1. Clearly, all these events did not occur at the same time. What is not clear is which event, or combination of events, gave rise to the disorderly conduct conviction.

[5] Leonard notes the complaint alleges that these events all took place "in a public place," even though they all were in his private residence. Nevertheless, the fact remains that Leonard was convicted.

Event #1, drinking (presumably alcohol) may have contributed to the remaining events ever occurring, but the State cannot seriously contend that drinking is disorderly conduct, or that the remaining events would not have constituted disorderly conduct absent the drinking. Thus, the complaint cannot be read to mean that each behavior described was actually an element of the offense. Clearly at least one of the behaviors was included in the complaint merely for context.

Event #2, kicking in a locked door, probably comes closest to constituting disorderly conduct. Leonard suggests it was ***the*** event giving rise to the conviction.

Event #3, scaring Leonard's wife, is not really a separate event, nor is it a behavior as much as a result, and the complaint does not state exactly what scared Shauna.

Event #4, obtaining a loaded handgun, even in combination with the other events, is not disorderly. There is nothing in the record that Leonard obtained the handgun in a violent, boisterous, or otherwise disorderly manner, nor that obtaining the handgun tended to cause a disturbance. Under Wisconsin law, possession of a firearm, without more, cannot constitute disorderly conduct:

> Unless other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply, a person is not in violation of, and may not be charged with a violation of, this section [Disorderly Conduct] for loading, carrying, or going armed with a firearm, without regard to whether the firearm is loaded or is concealed or openly carried.

Wis.Stats. § 947.01(2).

Event # 5, the suicide threat, is the only event that also occurred during the actual possession of the revolver. It stands to reason, therefore, that this Court only need consider whether obtaining a handgun and threatening suicide in the presence of one's spouse is disorderly conduct, and whether the handgun is "used" to commit the crime in that context.

The complaint only alleged conduct that was "violent, boisterous, or otherwise disorderly (i.e., the other possible statutory ways of committing the crime were not alleged). There is no evidence and no allegation that either the obtaining the revolver or the suicide threat were violent or boisterous. To be disorderly, then, those events only could qualify as "otherwise disorderly." There is nothing in the record, however, to indicate that they were even otherwise disorderly.

The most logical conclusion is that the kicking in of the door was the disorderly conduct, and the other events were described to give context. But if this Court concludes that Leonard may have committed disorderly conduct with the .44 Magnum by merely possessing it when he threatened suicide, then the case should be remanded for a new hearing to give Leonard an opportunity to introduce evidence and argue against those grounds.

2. ***Leonard Was Not Convicted of a Misdemeanor Crime of Domestic Violence***

Leonard was not convicted of a misdemeanor crime of domestic violence, and therefore is not prohibited by 18 U.S.C. § 922(g)(9) from possessing firearms or ammunition.

The reason the State urged for denying the return of the firearm, which also was an alternative reason found by the circuit court, is that Leonard was convicted of a misdemeanor crime of domestic violence, and is therefore prohibited by 18 U.S.C. § 922(g)(9) from possessing firearms or ammunition.

18 U.S.C. § 922(g)(9) provides:

> It shall be unlawful for any person who has been convicted in any court of a misdemeanor crime of domestic violence, to … possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate commerce.

18 U.S.C. § 921(a)(33) provides, in pertinent part:

> [T]he term "misdemeanor crime of domestic violence means an offense that (i) is a misdemeanor under Federal or State law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse … of the victim.

27 C.F.R. § 478.11 further defines the "element" provision of the use or attempted use of physical force to mean, by way of example, assault and battery.

18 U.S.C. § 922(g)(9) has been extensively litigated, mostly in the federal courts. Recently, the Supreme Court of the United States had occasion to consider meaning of the element of physical force clause. In *United States v.*

Castleman, ___ U.S. ___, Case No. 12-1371 (March 26, 2014), the Court ruled that the "physical force" element in the statute is "the degree of force that supports a common-law battery conviction." Slip Opinion at p. 12. A common law battery is "Intentional and wrongful physical contact with a person without his or her consent that entails some injury or offensive touching." *Black's Law Dictionary,* 6th Ed.

Castleman goes on to re-affirm the methodology used to determine if a given conviction was for misdemeanor crime of domestic violence. Slip Op., pp. 12-14. First, we begin by examining the statute of conviction to see if it necessarily has as an element the use or attempted use of physical force or the threatened use of a deadly weapon. *Id.* This is the so-called "categorical approach." If it does not, then we examine the charging document and plea colloquy to determine whether the conviction included the elements necessary to constitute "the generic federal offense" [of common law battery.] *Id. See also Shepard v. United States,* 544 U.S. 13, 16 (2005); *United States v. Ellis,* 622 F.3d 784, 798 (7th Cir. 2010).

An important aspect of 18 U.S.C. § 922(g)(9) is that there must be a victim, and the victim must have a certain relationship with the convicted person. *United States v. Hayes,* 555 U.S. 415, 421, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009) ("[I]t suffices for the Government to charge and prove a prior conviction that was, in fact, for an offense committed by the defendant against a spouse or other domestic victim."); *Evans v. Wisconsin Department of Justice,* 2014 WI App 31, ¶ 25, 353

Wis.2d 289, 844 N.W.2d 403 (Ct.App. 2013) ("Of course it is true that any qualifying crime under 18 U.S.C. § 921(a)(33)(A) must, as a factual matter, have a victim.")

Applying the principles outline above to the facts of the present case yields the following. It is clear that Leonard was convicted of a state law misdemeanor. We must therefore focus on the second element, the use of "physical force" or a threat of use of a deadly weapon against a victim of a specified relationship.

The State had difficulty with this element, and so did the circuit court. The State argued that Leonard "attempted the use of physical force ***in front of*** or to his wife…." R18, p. 18 [emphasis supplied]. The State could not show physical force used ***to*** Leonard's wife, so it had to manufacture the false disjunctive of "in front of or to." The problem with the State's argument, of course, is using physical force "in front of" someone does not satisfy the federal statute. If, for example, Leonard would have battered the neighbor in Shauna's presence ("in front of" her), he clearly would not have been guilty of a crime of ***domestic*** violence. If Shauna was not a victim of Leonard's actions that constitute at least a common law battery, then it cannot be said that Leonard committed a misdemeanor crime of domestic violence.

The circuit court agreed with the State, that "the actions of kicking a door in to me is an act of force or use of force that would qualify and disqualify the defendant from having firearms." R18, p. 20. What the circuit court failed to explain is how Leonard's kicking in of the door constituted, at a minimum,

common law battery against Shauna. The criminal complaint is replete with statements that Leonard did not use force against Shauna. R1, p. 2 ("there was never any contact"); R1, p. 3 ("Stephen [sic] never threatened to harm her, and never touched her," "She told Sergeant Jaszczak that she was not assaulted.") R1, p. 4. At the return of property hearing, the police witness testified that Leonard did not cause Shauna any harm and did not attempt to cause her any harm. R18, p. 10. There is no indication that Shauna was injured in any way, or that she received even the slightest "offensive touching" necessary to constitute a common law battery.

At the risk of stating the obvious, Leonard is not the first person to have become locked out of his own home. No doubt he is not the first person to have broken into his own home as a result. The circuit court, in its own questioning of the police witness, apparently attempted to establish that Shauna may have been the victim of the damage to the door:

> [W]hen a home belongs to two people or is the marital home, one party can't consent to the destruction of the property can they?

R18, p. 12. Why the circuit court asked a police office a question of marital property law is not clear, but it is clear that the response to the question of "no" is legally wrong. Spouses are not obligated to consult with one another every time one decides to shred a document, throw an item in the garbage, or even tear down a wall in the home. All that is required is that spouses act in good faith. Wis.Stats. §766.15. The exclusive remedies for breach of the duty of good faith

are found in Wis.Stats. § 766.70. *Gardiner v. Gardiner*, 175 Wis.2d 420 (Ct.App. 1993).

There is no indication in the record that Leonard and Shauna were homeowners and not renters, and in fact the police witness testified that he did not investigate that matter. R18, p. 12. More importantly, however, nothing in the complaint indicates the ownership of the building or identifies a "victim" of whatever damage, if any, Leonard caused when he kicked in the door. For this reason alone, Leonard cannot have committed a misdemeanor crime of domestic violence against Shauna merely by kicking in a door.

Neither the State nor the circuit court suggested the presence of the alternative means of fulfilling the force element, by threatening the use of a deadly weapon. Because there was a revolver present, however, Leonard will address that possibility. There is an indication that Leonard threatened to kill himself while he was holding the revolver. As discussed earlier, however, it is not clear that this threat is what constituted the conviction for disorderly conduct. Even if it did, however, it is clear that Leonard at most threatened to use the firearm ***on himself.*** The criminal complaint states, "The defendant [Leonard] did not threaten her [Shauna] with the handgun." R1, p. 3. Moreover, at the return of property hearing, the police witness testified that Leonard did not point the gun at Shauna, did not cause her harm and did not attempt to cause her harm. R18, p. 10.

In short, the State did not prove, and the circuit court could not have found, that Leonard used "physical force" ***against*** Shauna.

Conclusion

For the foregoing reasons, the judgment of the circuit court should be reversed, with instructions to order the return of Leonard's firearms and ammunition to him. At a minimum, all firearms and ammunition save for the revolver and its ammunition should be returned, with instructions for the circuit court to conduct a hearing on whether the revolver was used in the commission of the disorderly conduct.

John R. Monroe
Attorney for Appellant

Certificate of Service

I certify that on January 29, 2015, I served a copy of the foregoing via U.S. Mail upon:

Gregory Weber
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/s John R. Monroe
John R. Monroe

Certifications:

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.

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) as modified by the court's order for a brief and appendix produced with a proportional serif font. The length of this brief is 5,222 words.

I certify that the text of the electronic copy of the Brief of Appellant is identical to the text of the paper copy of the Brief of Appellant.

/s/ John R. Monroe

John R. Monroe