In the Court of Appeals of Wisconsin

District IV

Wisconsin Carry, Inc. and Thomas Waltz,

Petitioners-Appellants

v.

The City of Madison, **Respondent-Respondent**

Appeal No. 2015AP000146

Appeal from the Judgment of the Dane County Circuit Court, The Hon. Ellen K. Berz

Brief of Appellants

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Table of Contents

Table of Contents 2

Table of Authorities 3

Statement of Issues 4

Statement on Oral Argument and Publication 5

Statement of the Case 5

Argument 6

Certificate of Service 12

Certifications: 13

Table of Authorities

Cases

State ex rel. Kaminski v. Schwarz, 2001 WI 94, 245 Wis.2d 310, 630 N.W.2d 164 (2001) 10

Sturm Ruger v. City of Atlanta, 253 Ga.App. 713 (2003) 8

Statutes

O.C.G.A. § 16-11-173(b)(1).....8

Wis.Stats. § 66.0409(2) 6

City Ordinances

Madison Ordinance § 3.14(4)(h) 7

Statement of Issues

1. May a city circumvent state preemption of firearm regulation by creating an authority that in turn regulates firearms in a manner that the city itself could not do?

   Circuit Court answer: Yes.

Statement on Oral Argument and Publication

Appellants Wisconsin Carry, Inc. and Thomas Waltz (collectively, "WCI") do 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.

WCI believes that the opinion in the case should be published. The issue presented is one of first impression and publication of the opinion would aid circuit courts around the state in the issue, which is likely to arise in other cities or counties.

Statement of the Case[1]

The City of Madison operates "Madison Metro," a bus system administered by the City's Transit and Parking Commission. R7, ¶¶ 7-8. The Commission is authorized by Madison Ordinance § 3.14(4)(h) to "establish such rules and procedures as may be necessary…." R7, ¶ 9. Pursuant to such authority, the Commission established a rule, policy, or practice prohibiting persons from riding Madison Metro buses while armed (the "Ban"). R7, ¶ 10. A violation of the Ban can result in being disallowed from using the Madison Metro system. R7, ¶ 11.

In 2012, Waltz contacted the Commission, challenging the Ban as being violated of state law. R7, ¶ 22. The Commission responded that the City's mayor

[1] The case comes to this Court on a motion to dismiss, where the facts alleged in the complaint must be taken to be true. The Statement of the Case therefore draws largely on the Amended Complaint.

and attorney both indicated the Ban would not be changed. R7, ¶ 23. Wisconsin Carry's chairman also contacted the Commission to point out that the Ban violated state law. R7, ¶¶ 24-25. Again, the Commission responded that the Ban would not be changed. R7, ¶¶ 26-27.

Waltz is a member if Wisconsin Carry, a gun rights organization in Wisconsin. R7, ¶5. Collectively, WCI has an interest in people being permitted to carry firearms for self defense while riding Madison Metro buses, and such interest is frustrated by the Ban, creating a deterrence to people exercising their rights to bear arms. R7, ¶¶ 28-29.

WCI commenced this action in the Circuit Court for Dane County, seeking, *inter alia*[2], a declaratory judgment that the Ban is preempted by state law. On December 15, 2014, the Circuit Court dismissed the case. The Circuit Court said that state law only preempts "ordinances and resolutions" that regulation firearms. Because, the Court said, the Ban is not itself an ordinance or resolution, there is no preemption. On January 21, 2015, WCI filed a notice of appeal, so this appeal is timely.

Argument

I. Wisconsin Law Preempts the Ban

Wis.Stats. § 66.0409(2) states,

[2] WCI's other claims are not included in this appeal.

> Except as provided in subs. (3) and (4), no political subdivision may enact an ordinance or adopt a resolution that regulates the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration or taxation of any firearm or part of a firearm, including ammunition and reloader components, unless the ordinance or resolution is the same as or similar to, and no more stringent than, a state statute.

[The exceptions mentioned do not apply to this case.] As noted (and relied upon) by the Circuit Court, the Ban is not itself an enacted ordinance or an adopted resolution. But the *authority* for adopting the Ban is. Madison Ordinance § 3.14(4)(h) authorizes the Commission to promulgate rules, and the Commission used that authority to create the Ban.

The Circuit Court cited preemption clauses from other states to show that the General Assembly could have worded Wisconsin's preemption statute differently. Of course it ***could have.*** But the question is not whether the statute could be worded differently. The question is whether the statute we actually have preempts the Ban.

The City argued, and the Circuit Court accepted, that a Ban not promulgated by the Common Council cannot be preempted. This argument might have some superficial attraction, but that attraction is lost in the implementation. The City's implementation of the Ban serves as nothing more than an end-run around the intent of the statute.

Under the Circuit Court's analysis, the City's various agencies with jurisdiction over a multitude of aspects of life in the city could ban guns in parks, restaurants, streets, sidewalks, and stores. As long as the bans are not promulgated

by the Common Council in the form of an ordinance or resolution, they pass muster with the state preemption law. Clearly, that is not the intent of the legislature.

Because the Circuit Court found assistance in differently-worded preemption statutes in other states, it may be helpful to consider the effects of preemption statutes in other states that are very similar to Wisconsin's. Georgia's preemption statute says:

> Except as provided in subsection (c) of this Code section, no county or municipal corporation, by zoning or by ordinance or resolution, … shall regulate in any manner … possession, ownership, transport, carrying, transfer, sale, purchase, licensing, or registration of firearms ….

O.C.G.A. § 16-11-173(b)(1).

The Georgia statute is at its essence, identical to the Wisconsin statute. Both statutes preempt local regulation of firearms by ordinance or resolution.[3] Under the Circuit Court's reasoning, one would conclude that a city in Georgia could, for example, sue a firearms manufacturer for negligence by making unreasonably dangerous products. That conclusion, however, would be erroneous.

In *Sturm Ruger v. City of Atlanta,* 253 Ga.App. 713 (2003), the City of Atlanta sued 17 gun manufacturers for negligence. After the manufacturers' motion to dismiss was denied, the manufacturers appeal. In reversing, the Court of Appeals of Georgia found that the state legislature had occupied the field. The Court said, "The City may not do indirectly that which it cannot do directly. As

[3] Georgia also preempts regulation by zoning, but that additional feature is not germane to this case.

the State points out, power may be exercised as much by a jury's application of law in a civil suit as by statute." 253 Ga.App. at 718.

The Circuit Court distinguished the Ban from an ordinance by finding that it lacked "statutory formality" and it lacked enforcement by means of forfeiture (the Ban is enforceable by disallowance from using the Madison Metro system). At a motion to dismiss stage, we do not have the benefit of detailed facts. No discovery has been conducted. We do not know, therefore, what level of formality was associated with issuing the Ban. It ***may*** have been enacted in a very formal setting, with the members of the Commission publicly debating and voting on it in the same way members of the Common Council may debate and vote on ordinances and resolutions. It is therefore impossible to say that the Ban lacks "statutory formality."

The Circuit Court also found the Ban not to be an ordinance or resolution because the consequences of a violation differ. The Circuit Court made the value judgment that a forfeiture is inherently more severe than a lifetime disallowance from using the Madison Metro system. It is impossible to say that the former is necessarily worse for the violator than the latter. For a person who depends on the Madison Metro system to commute to work or school, the lifetime prohibition on use could be devastating. On the other hand, a forfeiture against a person who is "judgment proof" works no hardship at all.

Moreover, it would be possible for the City to structure its Ban so as to work a forfeiture, still without passing an ordinance explicitly containing the Ban.

Consider, for example, if the City were to include in its ordinance empowering the Commission to pass rules a provision that makes violation of a rule subject to a forfeiture.

The better reading of the statute is that, if the common council lacks the authority to enact the Ban, as it clearly does, then commissions created by the common council cannot have authority to do that which the common council cannot. The words of the statute evidence an intent of the legislature to "occupy the field" of regulation of carrying firearms, leaving municipalities with nothing but the ability to regulate carrying firearms in a manner no more strict than state law. *See, e.g., State ex rel. Kaminski v. Schwarz,* 2001 WI 94, 245 Wis.2d 310, 630 N.W.2d 164 (2001).

To conclude otherwise would lead to a very anomalous result. The City operates a variety of departments and commissions to oversee its public services. The departments and commissions are responsible for parks, sidewalks, and roads. They also have inspection authority over groceries, restaurants, and other food dispensers. If all the departments and commissions, collectively, banned firearms in the places they control, inspect, or oversee, they could essentially ban carrying firearms anywhere in Madison. All this could take place without the City literally passing a resolution or ordinance banning such carry. Clearly that is not what the legislature intended.

Conclusion

For the foregoing reasons, the judgment of the circuit court should be reversed and the case remanded for further proceedings.

John R. Monroe
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Certificate of Service

I certify that on March 30, 2015, I served a copy of the foregoing via U.S. Mail upon:

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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 2,003 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