In the Supreme Court of Wisconsin

Wisconsin Carry, Inc. and Thomas Waltz,

Petitioners-Appellants-Petitioners

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 Petitioners

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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 and Court of Appeals answer: Yes.

2. Does a statute preempting city ordinances that regulate firearms apply to an ordinance that empowers a city agency to promulgate rules that regulate firearms?

   Circuit Court answer: No.

   Court of Appeals answer: Declined to address.

3. Does the statutory regime in place constitute "occupying the field" of regulation of weapons on the part of the legislature, giving rise to "field preemption" and leaving nothing for the city to regulate?

   Circuit Court answer: Did not address.

   Court of Appeals answer: Declined to address.

Statement on Oral Argument

This Court has ordered oral argument.

Statement of the Case[1]

The City of Madison operates "Madison Metro," a public 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 (the "Ordinance"). Pursuant to the Ordinance, the Commission established a rule 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, Petitioner Thomas Waltz, a Madison Metro user, contacted the Commission, challenging the Ban as violating state law.[2] R7, ¶ 22. The Commission responded that the City's mayor and attorney both indicated the Ban would not be changed. R7, ¶ 23. Petitioner Wisconsin

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

[2] Wis.Stats. § 66.0409(2), cited below, generally preempts local regulation of weapons "by ordinance or resolution." It is referred to in this Brief as the "Preemption Statute."

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 of Wisconsin Carry, Inc., a gun rights organization in Wisconsin. R7, ¶5.[3] WCI has an interest in people being permitted to carry firearms and other weapons for self defense while riding Madison Metro buses, and such interest is frustrated by the Ban, because the Ban creates 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*[4], 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 regulate firearms. Because, the Circuit Court said, the Ban is not itself an ordinance or resolution, there is no preemption. The Circuit Court also said that the Ban was promulgated

[3] For the remainder of this Brief, Waltz and Wisconsin Carry, Inc. are referred to collectively as "WCI."
[4] WCI's other claims are not included in this appeal.

without the "statutory formality" necessary to bring it under the rubric of the Preemption Statute. Finally, the Circuit Court ruled that, because the Ordinance does not mention weapons, it also escapes scrutiny under the Preemption Statute. On January 21, 2015, WCI filed a notice of appeal.

On August 8, 2015, the Court of Appeals affirmed in a published opinion. 2015 WI App 74, 365 Wis.2d 71, 870 N.W.2d 675 ("CA Opinion"). The Court of Appeals affirmed the Circuit Court's ruling that the Ban is not an ordinance or a resolution and is therefore not covered by the Preemption Statute. CA Opinion, ¶ 8. The Court of Appeals declined to address whether the Ordinance is preempted by the Preemption Statute, even though the Court of Appeals acknowledged that the Ban was promulgated under authority of the Ordinance. *Id.*, ¶ 5. Finally, the Court of Appeals ruled that the various departments and agencies of Madison are free under the Preemption Statute to ban weapons over the areas where they exercise jurisdiction (restaurants, parks, streets, sidewalks, etc.), even if collectively such bans have the effect of greatly reducing where citizens may bear arms. *Id.*, ¶ 15.

The Court of Appeals declined to address the "field preemption" arguments raised by WCI. *Id.*, ¶ 5.

On August 21, 2015, WCI filed a motion for reconsideration, which the Court of Appeals denied on August 31, 2015. In the motion for reconsideration, WCI pointed out, *inter alia*, that the Court of Appeals had overlooked several places in WCI's briefs where WCI had raised the issue of field preemption and also developed arguments pertaining to preemption of the Ordinance.

WCI filed a petition for review on September 28, 2015, which this Court granted on January 11, 2016.

Argument

I. Wisconsin Law Preempts the Ban

The Ban is preempted by the Preemption Statute, Wis.Stats. § 66.0409(2).

The Preemption Statute, Wis.Stats. § 66.0409(2) states,

> 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.

The Circuit Court implicitly concluded that although the Common Council lacks the power to regulate carrying firearms, the Commission may ban them. The Circuit Court did not explain how it is that the Common Council can bestow power upon the Commission that the Common Council itself lacks. The Commission's source of power is, of course, the Common Council. It defies logic that the Common Council can grant power it does not have. To hold otherwise is to conclude that the city can augment its power by creating agencies to do what the city's own governing body cannot do.

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 Preemption Statute.

The Court of Appeals accepted this result, noting that the legislature "could have" intended to allow spotty gun regulation as long as it was not imposed city-wide by the city's common council. The Court of Appeals expressed doubt that a collective effort would arise to create large areas of gun-free zones. Of course, the legality of the Ban does not turn on judicial speculation that a city would not exercise its power to the fullest extent possible. The logical conclusion of both the Circuit Court's and the Court of Appeals' rulings remains valid – Madison is free to ban guns in large parts of the city through collection action of its many agencies, as long as it does not pass an ordinance or resolution to do so.

The Court of Appeals' decision permits such collective action, effectuating an end run around the clear dictates of the Preemption Statute.

II. The Ordinance Creating the Commission is Preempted to the Extent It Empowers the Commission to Regulate Firearms

Even though the Ban is not itself an ordinance or a resolution, 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.

It is clear from the Preemption Statute that the Madison Common Council lacks the authority to pass an ordinance or resolution that regulates carrying weapons on city buses. The Circuit Court concluded, however, that the Common Council is free to pass an ordinance creating an agency of the city, giving that agency plenary rulemaking authority over a certain topic, and that such authority can extend to weapons regulation as long as the ordinance does not mention weapons:

> M.G.O. § 3.14(4)(h) would not be preempted because it does not regulate firearms…. There is no language in the ordinance about firearms; so it cannot be construed as regulating the "sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permitting, registration or taxation of any firearm."

R14, p. 7.

The Circuit Court's conclusion, apparently, is that preemption only applies to an ordinance that explicitly mentions the subject matter of the Preemption Statute. A general enabling ordinance granting plenary rulemaking

authority, such as the Ordinance creating the Commission, leaves the Commission without limitation on its power to act in a given field, even if the city itself is preempted.

Again, the logical extension of this result is troubling. Consider, for example, an ordinance that prohibits behavior that "frightens the public." The ordinance does not mention weapons explicitly. The city prosecutes people seen openly wearing firearms in holsters on their waistbands if anyone in the public testifies as having been frightened by seeing the firearm.

Under the Circuit Court's reasoning, because this hypothetical ordinance does not mention weapons, it is not preempted and may freely be applied so as to prohibit carrying weapons. In other words, the legislature's preemptions of local regulation can be circumvented with clever drafting and creative application.

III. **The Legislature Has "Occupied the Field" of Firearms Regulation**

In addition to the express preemption contained in the Preemption Statute, it is clear that the legislature has occupied the field of firearms regulation. *See, e.g., Gorton v. American*

Cyanamid Co., 194 Wis.2d 203, 553 N.W.2d 746 (S.Ct., 1995). Wis.Stats. § 175.60(2g)(a) provides:

> A licensee or an out-of-state licensee may carry a concealed weapon anywhere in this state except [listing of several exceptions inapplicable to this case].[5]

Thus, the legislature has declared that a licensee may carry a concealed weapon anywhere in the state with only an express list of off-limits locations (city buses are not included in that list of exceptions). If a license issued by the State permits carrying a weapon statewide, allowing city agencies to prescribe additional off-limits locations frustrates the intent of the legislature.

An example of a field preemption case from another state on the subject of local firearms regulation can be found in Georgia. Georgia's firearm 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 ….

[5] The word "licensee" is used to refer to someone who possesses a license to carry a concealed weapon issued pursuant to Wis.Stats. § 175.60.

O.C.G.A. § 16-11-173(b)(1). (Again, the exceptions are irrelevant to the present analysis).

The Georgia statute is at its essence identical to the Wisconsin statute. Both statutes preempt local regulation of firearms by ordinance or resolution.[6] 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. After all, a lawsuit is neither an ordinance nor a resolution. 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, in that they manufactured unreasonably dangerous products. After the manufacturers' motion to dismiss was denied, the manufacturers appealed. In reversing, the Court of Appeals of Georgia found that the state legislature had occupied the field in promulgating the above-cited Georgia statute. The Court said, "The City may not do indirectly that which it cannot do directly. As the State points out, power may be exercised as much by a jury's

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

application of law in a civil suit as by statute." 253 Ga.App. at 718.

Likewise, Wisconsin's legislature has occupied the field by declaring that cities and counties cannot regulate carrying weapons. 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).

Conclusion

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

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Certificate of Service

I certify that on February 8, 2016, I served a copy of the foregoing via U.S. Mail upon:

John Strange
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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 2,692 words.

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

/s/ John R. Monroe
John R. Monroe