State of Wisconsin
Court of Appeals
District IV

Appeal No. 2017 AP 659 - CR
Dane County Case No. 2015 CM 1673

State of Wisconsin,
Plaintiff-Respondent,

v.

Amanda L. Longley,
Defendant-Appellant.

Brief of Defendant-Appellant

On appeal from a judgment of the Dane County Circuit Court,
The Honorable Ellen K. Berz, presiding.

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Issues Presented for Review

I. Whether precedent decided after the *Kosina* decision warrants reconsideration of the rule that the loss of right to bear arms is a collateral consequence of a conviction of a misdemeanor crime of domestic abuse, not entitling the defendant to advice from the court or counsel regarding that consequence prior to a voluntary plea.

Statement of the Case

I. Facts

Amanda Longley entered a plea to Battery and Disorderly Conduct on 17 December 2015. (R.32; App. 65-75.) The disorderly conduct count included the domestic abuse penalty enhancer under sections 968.075(1)(a) and 973.055(1) of the Wisconsin Statutes. (R.14; App. 1-2.) The court found her guilty of the crimes and included the domestic abuse surcharge. (R.14; App. 1-2.)

However, when she later realized that she would be prohibited from possession of a firearm, she pursued post-conviction relief.

The charges in this case resulted from an incident the complaint alleges to have occurred 8 August 2015, in which Ms. Longley argued with the father of her child (AS) and his romantic partner (SS) in the presence of Ms. Longley's child. (R.1.) The conflict occurred at the home of AS, who alleged that Ms. Longley was never invited to the property. (R.1.) The complaint also alleges that Ms. Longley used a closed fist to strike both AS and SS. (R. 1.) The battery count only pertains to SS, however, who had

never theretofore met Ms. Longley, let alone been involved in any relationship with her that would qualify as "domestic" under the statutes. (R.1.)

The disorderly conduct count, however, does not specifically list a victim, but either AS or the child would qualify as potential domestic abuse victims as charged in the complaint. (R.1.)

The charge "has, as an element, the use…of physical force… committed by a…parent[] or guardian of the victim, [or] by a person with whom the victim shares a child in common" under 18 USC § 921(a)(33)(A)(ii). This classifies the offense as a "misdemeanor crime of domestic violence," conviction of which results in the complete prohibition of possession of any firearm under 18 USC 922(g)(9).

Ms. Longley filed a post-conviction motion seeking to withdraw her plea due to her lack of knowledge of this consequence. (R. 18.) The motion was founded in a Sixth Amendment "ineffective assistance" claim. (R.18.)

She testified that neither of her two trial attorneys informed her that the plea agreement would result in the permanent loss of her

right to bear arms. (R.31:25-26; App. 46-47.) Additionally, she testified that, when she reviewed the Plea Questionnaire and Waiver of Rights form, trial counsel circled rights waived by her plea but conspicuously chose not to circle or discuss the warning that she would lose the right to possess a firearm, which indicated to Ms. Longley that she need not be concerned. (R. 31:25; App. 46.) Finally, Ms. Longley testified that she has possessed firearms throughout her life and viewed hunting as a cultural and familial pastime of sufficient importance that she would risk trial to preserve her right to bear arms. (R.31:26; App. 47.)

Both trial counsel confirmed that they had no recollection of having advised Ms. Longley on the loss of her gun rights prior to her guilty plea. (R.31:14-24; App. 35-45.)

The circuit court denied the motion to withdraw Ms. Longley's plea. (R. 27; App. 5-21.)

II. Law

Wisconsin precedent currently does not entitle criminal defendant's to notification either from counsel or from the court

prior to entering a guilty plea to a felony or a misdemeanor crime of domestic violence, either of which will result in a federal firearm prohibition. In *State v. Kosina*, our court of appeals decided that the federal firearm prohibition was a "collateral consequence" that did not fall within the scope of Sixth Amendment protection, 226 Wis. 2d 482, 487, 595 N.W.2d 464 (1999).

The distinction between "direct" and "collateral" consequences of a conviction determines whether a criminal defendant must be informed of the consequence for his plea to be voluntary:

> "A defendant who was not informed of the direct consequences of his plea did not enter his plea knowingly, intelligently and voluntarily and is entitled to withdraw it to correct a manifest injustice. No manifest injustice occurs, however, when the defendant is not informed of a collateral consequence." (Citations omitted) *Id.* at 485.

Distinguishing between direct and collateral consequences is not trivial:

> "A direct consequence of a plea has a definite, immediate, and largely automatic effect on the range of a defendant's punishment. A collateral consequence, in contrast, does not automatically flow from

> the plea. In some cases, a particular consequence is deemed 'collateral' because it rests in the hands of another government agency or different tribunal. It can also be collateral because it depends upon a future proceeding." (Citations omitted) *Id* at 486.

The *Kosina* court decided that the firearm prohibition was not an automatic – and thus not a direct – consequence of the criminal conviction because "the trial court made no explicit factual determination that Kosina's disorderly conduct conviction was related to domestic violence." *Id*. at 487. The *Kosina* court also thought that the whole of federal law was "collateral to the state court proceedings, [and thus] any consequence arising under that law must also be collateral." *Id*. at 488.

Kosina was decided in 1999, more than a decade before the US Supreme Court decided *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473 (2010). In *Padilla*, the US Supreme Court found that the immigration consequences of a criminal conviction could not be disregarded as collateral to the conviction, and effective representation and advice on the issue was constitutionally-guaranteed within the scope of the Sixth Amendment. The court noted, "We…have never applied a distinction between direct and

collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." (citation omitted) *Id*. at 1481. However, the court found it unnecessary to discuss the distinction, due to the "unique nature of deportation." *Id*. Instead, "[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." *Id*. at 1482.

Last year, the Wisconsin Supreme Court addressed whether *Padilla* resulted in a right to effective advice regarding the possibility of civil commitment for sexually violent persons. *State v. LeMere*, 2016 WI 41. "Whether *Padilla's* reasoning extends to collateral consequences beyond deportation is a matter of first impression in Wisconsin." *Id* at ¶ 28. The court determined that *Padilla* required an analysis of a consequence of

criminal conviction guided by six factors: 1. uniqueness of the consequence, 2. severity of the consequence, 3. penal nature of the consequence, 4. whether the consequence is an automatic result of conviction, 5. whether the consequence is enmeshed in the criminal process, and 6. whether a special vulnerability or class status warrants particularized consideration. The court found that the risk of being civilly committed as a sexually violent person was a collateral consequence of conviction that did not fall within the ambit of Sixth Amendment protections. No Wisconsin court, however, has interpreted either *Padilla* or *LeMere* with respect to firearm prohibitions resulting from criminal convictions.

Even if a Wisconsin court were to re-affirm that the consequence is collateral and outside the scope of Sixth Amendment concerns, it may nonetheless constitute the basis for plea withdrawal when such conviction results from "affirmative, incorrect statements on the record by…counsel" regarding that consequence. *State v. Brown*, 2004 WI App 179, ¶ 13, 276 Wis. 2d 559, 687 N.W.2d 543. In *Brown*, a plea bargain involved an incorrect assumption by both the prosecutor and defense counsel that elicited the

defendant's plea. The court of appeals found that the assertions were essential to the plea agreement and that their falsity undermined the voluntariness of the plea.

Argument

I.

Introduction

In this appeal, we ask the court to reconsider whether the loss of the right to bear arms is a consequence that is truly "collateral" to a conviction in light of recent US Supreme Court and Wisconsin Supreme Court precedent.

The circuit court held that "*Padilla* is thus based on the unique nature of deportation, and it is only the province of higher courts, and not this court, to create a new obligation to warn a defendant of what has been previously found a collateral consequence of conviction."

As the court of appeals is one such "higher court," this court should examine this case according to the criteria set forth in *LeMere*. This court has authority to determine that its prior,

otherwise-binding precedent, has been overruled by intervening Supreme Court precedent. *State v. Forbush*, 2010 WI App 11, ¶2.

II.

Analysis in Light of the *LeMere* Factors

Our supreme court established six factors to consider when deciding how *Padilla* affects Wisconsin precedent: 1. uniqueness of the consequence, 2. severity of the consequence, 3. penal nature of the consequence, 4. and 5. whether the consequence is an automatic result of conviction and enmeshed in the criminal process, and 6. whether a special vulnerability or class status warrants particularized consideration. *State v. LeMere*, 2016 WI 41.

1. Uniqueness of the Consequence

The right to bear arms is constitutionally-enshrined as well as acknowledged by the US Supreme Court in *DC v. Heller* as a codification of a personal right that pre-existed the US Constitution. 554 U.S. 570, 128 S.Ct. 2783, 2797 (2008). The loss of this right following conviction is effectively life-long,

causing permanent impairment of a person's ability to protect herself or others or to participate in cultural and familial traditions such as hunting. No other consequence of a Wisconsin conviction is more lasting.

2. Severity of the Consequence

Likewise, the permanent loss of an enumerated constitutional right is a severe consequence.

3. Penal Nature Of The Consequence

The loss of the right to bear arms is not intended to be any more penal than deportation. As with deportation, however, the consequence is sufficiently severe that it nonetheless constitutes a punitive effect.

4. and 5. Whether the Consequence Is an Automatic Result of Conviction and Enmeshed in the Criminal Process

Unlike civil commitment as addressed in *LeMere*, no other additional procedural hurdle needs to be cleared before the firearm prohibition takes effect. Instead, it is immediate.

LeMere dealt with civil commitment of sexually violent persons under Wis. Stat. Chapter 980, requiring a trial in which additional elements must be proved beyond the simple fact of conviction of a sex offense. Under Wis. Stat. § 980.02(2)(b) and (c), the subject of a petition must also have a mental illness that makes him or her dangerous to others by increasing the likelihood of further sexual violence.

Unlike deportation as addressed in *Padilla*, loss of gun rights requires no additional procedures in any court prior to becoming effective.

6. Whether a Special Vulnerability of Class Status Warrants Particularized Consideration

Arguably, gun owners are a class defined by their cultural connection to traditions such as hunting. In the same sense that only immigrants that are charged with crimes are affected by *Padilla*, only gun owners charged with crimes would benefit from having adequate advice prior to entering pleas.

Conclusion

The potential loss of the right to bear arms is of central concern to many citizens of our state, and the risk is sufficiently serious that some of them, Ms. Longley included, would take their chances at trial rather than simply give up their right.

Since *Kosina*, *Padilla, LeMere,* and *Heller* have been decided. For that reason, it is necessary that this court review the *Kosina* decision and consider holding that criminal defendants must be advised of the imminent loss of their gun rights prior to pleas.

As such, we request that this court reverse the circuit court, vacate Ms. Longley's conviction, and remand this case to the circuit court for trial.

Dated this 3rd day of August 2017.

Respectfully submitted,

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Rule 809.19(8)(d) Certificate

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 1,994 words.

Dated this 3rd day of August 2017.

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Rule 809.19(12)(f) Certificate

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 3rd day of August 2017.

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Certificate of Mailing

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that I caused ten copies of the Brief and Appendix of Defendant-Appellant to be mailed by Priority Mail to the Wisconsin Court of Appeals, PO Box 1688, Madison WI 53701-1688, three copies to the State by Attorney Stephanie Hilton at Attorney Stephanie Hilton at 215 South Hamilton Street, Suite 3000, Madison WI 53703-3211, and one copy to Amanda Longley at 323 Swap Street, Apt. 202, Johnson Creek WI 53038-9657.

Dated this 3rd day of August 2017.

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Statement on Oral Argument and Publication

Neither oral argument nor publication is warranted in this case.

The brief fully presents and develops the issues on appeal, making oral argument unnecessary. Wis. Stat. (Rule) 809.22.(2)(b).