RECEIVED
09-17-2018
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN

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

DISTRICT I

Case No. 2018AP594-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LEEVAN ROUNDTREE,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

CARLY M. CUSACK
Assistant State Public Defender
State Bar No. 1096479

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
cusackc@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

OTHER AUTHORITIES CITED

ARGUMENT

As an initial matter, the state takes issue with the placement of the burden in Second Amendment challenges, but ultimately agrees with Mr. Roundtree that the proper standard of review is intermediate scrutiny. (State's Br. 8-9). Nevertheless, in suggesting this Court was mistaken in assigning the burden of proving constitutionality to the state in Second Amendment constitutional challenges, as well as the starting place of *not* presuming the statute is constitutional—the state ignores the fact that this Court is bound by its own language in the recent, published decision in *State v. Herrmann*, 2015 WI App 97, ¶11, 366 Wis. 2d 312, 873 N.W.2d 257.[1] This Court "may not overrule, modify or withdraw language from a previously published decision of the court of appeals." *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997).

Thus, here, the state has the burden of establishing the constitutionality of Wisconsin's

[1] After this Court concluded that the statute at issue in *Herrmann* was unconstitutional as applied to him, the Attorney General's office did not petition the Wisconsin Supreme Court for review. *See State v. Herrmann*, Wisconsin Court System Supreme Court and Court of Appeals Access page, available at: https://wscca.wicourts.gov/appealHistory.xsl;jsessionid=CD640EEB020B0A507C84F36E065F2CBB?caseNo=2015AP000053&cacheId=A42775F4CF9FA804AF21DBD3F1485CE2&recordCount=1&offset=0&linkOnlyToForm=false&sortDirection=DESC.

felon-in-possession law as applied to Mr. Roundtree and the statute is *not* presumed constitutional. *State v. Herrmann*, 2015 WI App 97, ¶11, 366 Wis. 2d 312, 873 N.W.2d 257 (citing *Ezell v. City of Chicago*, 651 F.3d 684, 706 (7th Cir. 2011); *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008)). As Mr. Roundtree argued in his brief-in-chief, the state cannot meet its burden even under an intermediate scrutiny standard to establish that WIS. STAT. § 941.29(2) is constitutional as applied to Mr. Roundtree.

I. Wisconsin's lifetime firearm ban for all felons is unconstitutional as applied to Mr. Roundtree, who is distinguishable from persons historically barred from Second Amendment protection.

The state unpersuasively argues that Mr. Roundtree's as-applied challenge is "controlled by *Pocian*, which holds that Wisconsin's felon-in-possession statute is not unconstitutional to the extent that it applies to nonviolent felons." (State's Response Brief p.2). However, this argument wholly disregards the very nature of as-applied challenges.

Because this is an as-applied challenge to the constitutionality of the application of WIS. STAT. § 941.29(2) to a particular person under particular circumstances, *Pocian*'s holding neither precludes Mr. Roundtree's argument nor resolves the issue raised. (*See* Roundtree Brief-in-Chief p.14 n.4). An as-applied claim challenges the constitutionality of a

statute as it relates to the facts "of a particular case or to a particular party." *State v. Smith*, 2010 WI 16, ¶10 n.9, 323 Wis. 2d 377, 780 N.W.2d 90.

In contrast, a facial constitutional challenge argues that the statute is unconstitutional under all circumstances. *Id.* Mr. Roundtree did not raise a facial challenge and thus is not arguing that Wisconsin's felon-in-possession statute is unconstitutional under all circumstances. Rather, he argues the statute is unconstitutional in his particular case based on his particular facts and history. While *Pocian* may stand for the general rule that the felon-in-possession statute is constitutional even applied to nonviolent felons, that case did not consider the facts and circumstances of Mr. Roundtree's particular case in which his disqualifying prior felony is for failing to pay child support. *State v. Pocian*, 2012 WI App 58, 341 Wis. 2d 380, 814 N.W.2d 894.

In its brief, the state discussed *State v. Thomas*, 2004 WI App 115, 274 Wis. 2d 513, 683 N.W.2d 497 and *State v. Brown*, 571 A.2d 816 (Me. 1990), despite the fact that those cases were decided before the United States Supreme Court's decisions in *Heller* and *McDonald v. City of Chicago,* 561 U.S. 742 (2010). And, both *Thomas* and *Brown* applied a rational basis test. *Thomas*, 274 Wis. 2d at ¶¶21-23; *Brown*, 571 A.2d at 817, 821; *but see Heller*, 554 U.S. at 628 n.27 (noting the law being challenged, "like almost all laws, would pass rational-basis scrutiny.").

Neither case, accordingly, provides any meaningful guidance for this Court.

The state criticizes Mr. Roundtree for "fact-matching" his case against *Pocian*. Yet, in order to raise a successful as-applied challenge, Mr. Roundtree "must present facts about himself and his background that distinguish[] his circumstances from those of persons historically barred from Second Amendment protections." *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 346 (3d. Cir. 2016) (concluding that the misdemeanor offenses of two challengers were not serious enough to strip them of their Second Amendment rights under the federal firearm statute) *see also United States v. Moore*, 666 F.3d 313, 319 (4th Cir. 2012).

The state argues that Mr. Roundtree fails to "explain why a felony-level failure to pay child support is excluded from the category of 'unvirtuous citizens.'" (State's Br.13). Mr. Roundtree's failure to pay child support is distinct from the category of "unvirtuous citizens" because the fact that Mr. Roundtree has a felony conviction on his record for failing to pay child support does not suggest he is more likely than a nonfelon to engage in illegal and violent gun use.

Nevertheless, this type of notion persists: as the Seventh Circuit remarked, "someone with a felony conviction on his record is more likely than a nonfelon to engage in illegal and violent gun use." *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir.

2010) quoting *United States v. Lane,* 252 F.3d 905, 906 (7th Cir. 2001) and citing Thomas M. Cooley, A Treatise on Constitutional Limitations 29 (Boston, Little Brown & Co. 1868) (explaining that constitutions protect rights for "the People" excluding, among others, "the idiot, the lunatic, and the felon"). However, that's not the case with Mr. Roundtree. Mr. Roundtree's moral shortcomings that may be assigned to him based on his failure to pay child support implicate *significantly* different concerns bearing on "virtuousness" than the danger posed to society suggested by felons convicted of crimes like murder, rape, and armed robbery.

In *Heller*, the Supreme Court stated that "[c]onstitutional rights are enshrined with the scope they were understood to have when people have adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." 554 U.S. at 634-35. The initial federal felony dispossession laws only applied to a select group of crimes far more serious and dangerous than Mr. Roundtree's failure to pay child support crimes: those included "murder, manslaughter, rape, mayhem, aggravated assault…robbery, burglary, housebreaking, and attempt to commit any of these crimes." Kevin Marshall, Why Can't Martha Stewart Own a Gun?, 32 HARV. J.L. & PUB. POL'Y 695, 729-30, 714 (2009).

Even the early common law definition of felony was considerably different from today's understanding of what constitutes a felony. *See* Don

B. Kates & Clayton E. Cramer, Second Amendment Limitations and Criminological Considerations, 60 HASTINGS L.J. 1339, 1362 (2009) (Noting the early common law definition of "felony applied only to a few very serious, very dangerous offenses such as murder, rape, arson, and robbery."); *Compare* crimes that constitute felonies in Wisconsin, described in Roundtree's Br. 8. Accordingly, Mr. Roundtree is distinguished from those persons historically barred from Second Amendment protections: murderers, rapists, robbers—as well as from the defendant in *Pocian*. In addition to the arguments set forth in his brief-in-chief distinguishing his background and case from that of the defendant in *Pocian*, Mr. Roundtree notes he was previously convicted of Class I felony offenses, in contrast to Pocian's more serious Class H felony offense. *See* WIS. STAT. §§ 948.22(2); 943.38(2). (Roundtree Br. 13-14).

The Wisconsin Supreme Court previously explained that the very purpose of WIS. STAT. § 941.29 is "the protection of public safety…because the legislature has determined that felons are more likely to misuse firearms." *State v. Coleman*, 206 Wis. 2d 199, 210, 556 N.W.2d 701 (1996). However, no justification exists to permanently deprive *Mr. Roundtree* of his fundamental Second Amendment right to keep and bear arms.

Mr. Roundtree's disqualifying convictions involved no violence. He is no more dangerous to society than a typical law-abiding citizen, and as such, is distinguished from those persons historically

barred from Second Amendment protection. Mr. Roundtree was not prosecuted for carrying a firearm around town on his person or in his car; rather, it was found in his bedroom, underneath his mattress—consistent with being kept for the protection of his family and home. *See Heller*, 554 U.S. at 635 (the core of the Second Amendment right is the right of a law-abiding, responsible citizen to use arms in defense of hearth and home).

As the prosecutor at Mr. Roundtree's sentencing put it, "*Mr. Roundtree has not been a problem for society at large*; it's a problem for his kids." (46:6-7)(emphasis added). The permanent dispossession of Mr. Roundtree's right to possess a firearm does not advance the government's goal of public safety.[2] WISCONSIN STAT. § 941.29(2) is unconstitutional as applied to Mr. Roundtree, and this Court should vacate his conviction.

---

[2] *See generally*, *State v. Hamdan*, 2003 WI 113, ¶¶81-84, 264 Wis. 2d 433, 665 N.W.2d 785 (In discussing an as-applied challenge to the concealed-carry weapon statute, the Wisconsin Supreme Court concluded, "the State's interests in prohibiting Hamdan from carrying a concealed weapon in his small store, under the circumstances on the night the police officers visited his store, were negligible. The police knew that Hamdan's store was a crime target and that Hamdan kept a weapon for protection. There is no evidence that Hamdan was prone to act irresponsibly or impulsively, and he was unlikely to do so in his own store. Therefore, enforcement of the CCW statute on these facts would seriously frustrate the constitutional right to keep and bear arms for security but advance no discernible public interest.").

II. In light of the United States Supreme Court's decision in *Class v. United States*, __U.S.__, 138 S.Ct. 798 (2018), Mr. Roundtree did not waive his as-applied challenge to the constitutionality of WIS. STAT. § 941.29(2) by pleading guilty.

Unsurprisingly, the state takes a very different view of the impact of *Class v. United States* than Mr. Roundtree. The state's narrow stance on *Class* is wrong.

The state asserts that *Class* neither affects Wisconsin's guilty plea waiver rule, nor overturns the facial versus as-applied distinction in the guilty plea waiver context. Mr. Roundtree preemptively addressed this argument in his brief-in-chief, as it is essentially the same reasoning relied on by the postconviction court in denying the postconviction motion. (See Roundtree Br. 15-18).

The United States Supreme Court in *Class* determined that a defendant's "challenge [to] the Government's power to criminalize...(admitted) conduct...thereby call[s] into question the Government's power to 'constitutionally prosecute.'" *Id*. at 803-04. In such circumstances, a guilty plea does not waive the constitutional argument on direct appeal. *Id.*

Contrary to the state's assertion, *Class* did not distinguish between as applied challenges and facial

challenges. The defendant in that case raised both facial and as applied arguments, and the Supreme Court held that neither claim was waived by his guilty plea. *Id*. at 802; *see also id*. at 813 n.4 (Alito, J., dissenting). Rather, because these claims could not "have been cured through a new indictment," they were not waived by a guilty plea. *Id*. at 805.

The same logic applies in this case. Mr. Roundtree challenges the state's ability to criminalize his conduct. Therefore, the fact that his constitutional challenge is an as-applied challenge is irrelevant because *Class* held that neither a facial nor as-applied constitutional challenge is waived by a guilty plea.

If this Court disagrees with Mr. Roundtree, it should nevertheless decide Mr. Roundtree's arguments on the merits, as the guilty plea waiver rule is one of judicial administration and this case is of constitutional dimension. (See Roundtree Br. 18).

CONCLUSION

For the foregoing reasons, and those argued in his brief-in-chief, Mr. Roundtree respectfully requests that this Court issue an order vacating his conviction.

Dated this 14th day of September, 2018.

Respectfully submitted,

CARLY M. CUSACK
Assistant State Public Defender
State Bar No. 1096479

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
cusackc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,963 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 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 14th day of September, 2018.

Signed:

_____

CARLY M. CUSACK
Assistant State Public Defender