The Wisconsin Court of Appeals, District IV

2019AP001767CR

State of Wisconsin,
Plaintiff-Respondent

v.

Mitchell L. Christen
Defendant-Appellant

Appeal from The Circuit Court of Dane County
The Honorable Nicholas J. McNamara, presiding

Brief of Appellant Mitchell L. Christen

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Statement of the Issues

When no injury is cause, and no one has been endangered, does a statute criminalizing going armed with a firearm run afoul of the fundamental right guaranteed by the Second Amendment?

Statement on Oral Argument and Publication

Oral argument is appropriate in this case. The legal issue is one of first impression. Second Amendment litigation is effectively in its infancy nationwide and oral argument will allow this Court to probe the merits and legal reasoning of both parties before determining the constitutionality of a statute.

Publication is warranted. As noted, there are precious few precedent appellate decisions on how courts are to handle Second Amendment challenges throughout the country. Publication will not only aid practitioners in this state, but throughout the country as the body of Second Amendment opinions grows.

Statement of Facts and the Case

In February of 2018, Mr. Christen was living with Mr. Brandon Hughes and Mr. Chase Ravesteijn. (R. 116:13). Mr. Hughes, one of Mr. Christen's "drinking buddies" had convinced him to move in with him. (R. 116:13). Prior to February, the living situation had been in severe decline. (R. 116:15). Mr. Hughes had previously shoved Mr. Christen and hit Mr. Ravesteijn when he had too much to drink. (R. 116:16). Mr. Hughes had also told Mr. Christen to shoot him on another occasion when he was drunk. (R. 116:17)

On February 2, 2018 Mr. Christen had enough of his roommates' alarming behavior and decided to move out. (R. 116:18). He called the person he would be living with to see if he could come pick him up that night, but Mr. Christen's new roommate had been drinking that evening and made the wise decision not to drive while under the influence. (R. 116:18). Mr. Christen then joined his uncle for dinner and Mr. Christen enjoyed a couple of drinks. (R. 116:19). After dinner, Mr. Christen went to the Tipsy Cow, and then walked back to the shared apartment. (R. 116:19). Mr. Christen estimated he consumed four beers and one shot over the course of the entire evening. (R. 116:60)

When Mr. Christen returned, Mr. Hughes and Mr. Ravesteijn were at the shared apartment drinking. (R. 115:38). Mr. Christen asked his roommates to stop eating and throwing out his food which led to an argument between the three of them. (R. 116:20). Mr. Hughes and Mr. Ravesteijn then left and continued drinking. (R. 115:40). Mr. Hughes and Mr. Ravesteijn returned later that night and were joined by two of their friends. (R. 115:41). This quartet continued drinking in the apartment. (R. 115:41).

There was another argument between Mr. Christen and the quartet of friends. (R. 116:23). Mr. Christen retreated to his room, pointed towards his handgun, and shut the door in his effort to be left alone. (R. 116:24). One of Mr. Ravesteijn's friends, Mr. Mana Alyami, opened Mr. Christen's door. (R. 116:24). In response, Mr. Christen picked up his handgun, and told the intruder to get out of his room. (R. 116:24).

Mr. Christen began recording the situation on his iPhone. (R. 116:24). After about six minutes, Mr. Christen left his room to

go to the kitchen. (R. 116:27). For his protection, he tucked his handgun into his waist-band, and continued filming the situation with his iPhone. (R. 116:27-29). In the kitchen, Mr. Christen kept holding his iPhone in his right hand, and reached for string cheese with his left hand. (R. 116:29). Mr. Alyami hit Mr. Christen in his chest and grabbed Mr. Christen's handgun. (R. 115:15, 116:28). Mr. Christen quickly retreated to his room, closed the door, retrieved his secondary weapon, and called 911. (R. 116:29). Police arrived, and shortly thereafter Mr. Christen was taken into custody. (R. 116:30-31).

A criminal complaint was filed on February 6, 2018. (R. 2:1-3). On March 21, 2018, Mr. Christen filed a motion to have the charge of operating a firearm while intoxicated dismissed on the grounds it violated his right to bear arms and is unconstitutional as applied to the defendant. (R. 17:1). The Circuit Court held a hearing on this motion on July 13, 2018, and ruled the "statute is focused narrowly enough to withstand [the] constitutional challenge that's been raised....It's operating the gun or going armed with the gun. And I recognize the going armed aspect is a little broad perhaps under some scenarios, but I don't think that the definition of going armed is so broad that it makes it impossible for a homeowner to enjoy constitutional rights to bear arms in the home." (R. 109:21-22).

Mr. Christen proceeded to trial and was found guilty of going armed while intoxicated as well as disorderly conduct. (R. 100:1). A notice of intent to seek postconviction relief was filed the day of sentencing. (R. 92:1). A timely notice of appeal was filed on September 13, 2019. (R. 105:1).

Argument

Mr. Christen's conviction for going armed with a firearm while under the influence of an intoxicant presents an issue of first impression for this Court. Does Wis. Stat. §941.20(1)(b) violate Mr. Christen's right to poses and bear arms as guaranteed by the Second Amendment of the United State's Constitution?

A. Standard of Review

1. Wisconsin Courts Have Not Determined the Proper Test for Second Amendment Challenges

The constitutionality of a statute presents a question of law which appellate courts review independently. *State v. Herrmann*, 2015 WI App 97, ¶6, 366 Wis. 2d 321 (2015). A decade ago, the United States Supreme Court affirmed the Second Amendment of the United States Constitution confers an individual right to keep and bear arms. *District of Columbia v. Heller*, 544 U.S. 570, 595 (2008). Shortly thereafter, the Court confirmed this right is fundamental and applies with full force against state and local governments. *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010). *Heller* and *McDonald* did not explicitly a particular test for courts to use when analyzing the constitutionality of laws which implicate the Second Amendment.[1]

The Wisconsin Supreme Court has yet to significantly address the Second Amendment post-*Heller*, and this court has not yet issued a decision in which it concludes the proper test to apply in Second Amendment cases. In *Wis. Carry, Inc. v. City of Madison*, the Wisconsin Supreme Court decided the case on the basis the State statutes preempted the City's Authority. *Wis. Carry, Inc. v. City of Madison*, 2017 WI 19 (2017). This Court declined to decide on a test in *State v. Herrmann*, as the statute was unconstitutional no matter which test this Court selected. *State v. Herrmann*, 2015 WI App ¶ 10.

This Court addressed whether a felon may possess a fire arm after *Heller/McDonald* in *State v. Pocian*. *State v. Pocian*, 2012 WI App 58, 341 Wis. 2d 380. Without explanation, this court adopted the Seventh Circuit's conclusion intermediate scrutiny was appropriate for testing Pocian's challenge a ban on felons from possessing a firearm as it applied to him. *State v. Pocian*, 2012 WI App 58, ¶14. This Court did not set intermediate scrutiny to be the correct test for all Second

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[1] The case *New York State Rifle &Pistol Association, Inc., Romolo Colantone, Efrain Alvarez, and Jose Anthony Irizarry v. The City of New York and The New York City Police Department-License Division*, is currently scheduled for Oral Argument before the Supreme Court on December 2, 2019. The case does present the Court an opportunity to clarify the test courts should use when analyzing the constitutionality of laws implicating the Second Amendment.

Amendment claims, rather it adopted the Sevenths Circuit logic for felon-in-posession cases. *Id.*

Many cases after *McDonald* and *Heller* have employed a two prong approach when analyzing Second Amendment challenges. *Herrmann*, 2015 WI App ¶9. First, a court looks to whether the challenged law imposes a burden on conduct which falls within the scope of the Second Amendment's guarantee. *Id. quoting U.S. v. Marzzarella*, 6145 F.3d 85, 89 (3d Cir. 2010). If the law does burden the Second Amendment, the court must evaluate the law under some form of means-end scrutiny. *Id.*

2. Mr. Christen's Possession of a Firearm is Protected by the Second Amendment.

Mr. Christen armed himself on the night in question for the purpose of self-defense while in his home. The inherent right of self-defense has always been central to the Second Amendment. *Heller*, 554 U.S. at 698. The need for defense of self, family, and property is most acute in the home. *Id.* Mr. Christen's possession of a firearm for the purpose of self-defense in his home is not only undoubtedly within the scope of the Second Amendment, it is the core of the Second Amendment. *Heller,* 554 U.S. at 630 (This makes it impossible for citizens to use them for the *core lawful purpose of self-defense*)(Emphasis Added).

3. If Means-End Scrutiny Governs Second Amendment Claims, Strict Scrutiny Must Apply

After *Heller* and *McDonnald*, there can be no doubt the right to possess and bear arms is fundamental. Indeed the Wisconsin Supreme Court wrote in *Wis. Carry, Inc. v. City of Madison*, "This is a species of right we denominate as 'fundamental', reflecting our understanding that it finds its protection, but not its source, in our constitutions." *Wis. Carry, Inc.*, 2017 WI ¶9. When a regulation interferes with fundamental constitutional rights, strict scrutiny applies. *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. 1, 16 (1973).; *see, e.g., Reno v. Flores*, 507 U.S. 292, 302 (1993); *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 n.14 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).; *See also Lawrence v. Texas,* 539 U.S. 558, 586 (2003) (Scalia, J., dissenting); *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgement).

Several courts have determined the level of review based on how close the law comes to the core of the Second Amendment right and the severity of the law's burden upon the right. *Kanter v. Barr*, 919 F.3d 437, 441-442 (7th Cir.2019). Severe burdens on the core right require very strong public-interest justifications and a close means-end fit; lesser burdens are more easily justified. *Id. See also*, *United States v. Chester,* 628 F.3d 673, 683 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010). This legal argle-bargle is nothing short of a freestanding interest-balancing approach which Justice Scalia specifically forbade in *Heller*. *Heller*, 554 U.S. at 634 (We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government - - even the Third Branch of Government - - the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.).

Subjecting the Second Amendment to any less exacting of scrutiny would create a hierarchy of constitutional values. The Supreme Court has refused to treat the Second Amendment as a second-class right. *McDonald*, 651 U.S. 780. This Court is bound by the precedent in *Heller/McDonald* and must treat the Second Amendment as the fundamental right it is.

B. Wis. Stat. § 941.20(1)(b) Cannot Survive Strict Scrutiny

A law challenged on Second Amendment grounds is not presumed constitutional and the burden is on the government to establish the law's constitutionality. *Herrmann* at ¶11; *see also Ezell v. City of Chicago*, 6541 F.3d 684, 706 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010). When a law burdens the core of a Constitutional freedom, the State has the burden of proving the law is serving a compelling state interest, and the law is narrowly tailored to serve this interest. *Republican Party v. White*, 536 U.S. 765, 774-775 (2002). This court must assess both the strength of the government's interest and the fit between the stated governmental objective and the means selected to achieve that objective. *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014)(plurality op.). To show Wis. Stat § 941.20(1)(b) is narrowly tailored State must demonstrate the law

does not unnecessarily circumscribe the protected freedom. *Republican Party v. White* 536 U.S. at 775. While the State has identified an arguably significant and important interest, it cannot demonstrate the narrow tailoring required to preserve the statute.

1. The State's Has Identified an Arguably Compelling Interest

At the July 13, 2018 motion hearing, the State argued "regulations prohibiting drunken operations of a firearm, even within the home, easily falls within the category of reasonable exercise of police power." (R109:13). The State followed this statement by arguing "[i]t's not hard to visualize a bullet, or shotgun slug, or buckshot passing through windows or walls and causing injury". (R109:14). Protecting the public from unnecessary injury caused by the use of a firearm by an intoxicated individual is arguably an important interest for the State.

2. The State's Interest is Already Enforced by Other Statutes

Wisconsin Statute §940.24 is entitled "Injury by Negligent Handling of a Dangerous Weapon, Explosive or Fire. It criminalizes the negligent use of dangerous weapons, which would include the negligent usage of a firearm. This provision is sufficient to address the State's interest in protecting the public from a bullet, shotgun slug, or buckshot passing though windows and walls causing injury.

Additionally, Wis. Stat. §941.20(1)(a) allows the state to punish individuals who are negligent in their operation or handling of a dangerous weapon and endanger another's safety. This also advances the State's interest of protecting its citizens from stray armaments.

These provisions do not significantly burden the Second Amendment; an individual may be intoxicated and still go armed to defend themself. Their intoxication would certainly be a factor into deciding if there was negligence in the use, operation, or handling of their firearm, but a jury would be allowed to consider other factors as well. Further, the right to carry a firearm in self-defense is not burdened. Only when the individual carrying the firearm causes injury, or endangers another's safety is there

cause for State intervention. These are the proper statutes for addressing the interest the State has identified.

3. Wis Stat. §941.20(1)(b) Does Not Advance the State's Identified Interest.

Operating or going armed with a firearm while under the influence of an intoxicant does not advance the State's purported interest in protecting its citizens from unnecessary injury. Wis. Stat. 941.20(1)(b) does not require the defendant pull the trigger, or cause injury of any sort, or even create a dangerous situation for another; it only requires the party operate or go armed with a firearm while under the influence. Wis. Stat. §941.20(1)(b) creates situations in which it is illegal for an otherwise law-abiding individual from exercising their Second Amendment rights.

Wisconsin has long recognized a person "goes armed" when a firearm is on the defendant's person, or "within the defendant's reach". *Mularkey v. State*, 201 Wis. 429, 432 (1930), *see also State v. Asfoor*, 75 Wis. 2d 411, 433-434 (1977), *State v. Hamdan* 2003 WI 113 ¶21-27, 264 Wis. 2d 433, 665 N.W. 2d 785 (2003). Any person who keeps a firearm within reach of their bed is subject to criminal penalties should they overindulge. If they fell asleep in their own bed, they are within reach of their firearm, and going armed. Thus, they have violated Wis. Stat. §941.20(1)(b). There is no danger of stray bullets flying, yet the State would still have sufficient grounds to sustain a conviction.

Intoxication via alcohol is common in society. It is all too easy to envision a scenario in which an individual is celebrating, or commiserating with friends and family, chooses to indulge in alcoholic beverages and then encounters the need for self-defense. This individual has done nothing wrong. Wis. Stat. §941.20(1)(b) robs them of the ability to defend themselves. If the hypothetical individual were to position themselves to defend their person, as Mr. Christen did, they have committed a misdemeanor for exercising their Second Amendment rights. The need to defend ones self rarely comes at a time of our choosing; this Court should not restrict the people of Wisconsin's right to defend themselves to only the most opportune scenarios. As Justice Thomas wrote,

> For those of us who work in marbled halls, guarded constantly a vigilant and dedicated police force, the guarantees of the Second Amendment might seem

> antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. *Peruta v. California*, 137 S.CT. 1995, 1999 (2017) (Thomas, J., dissenting from denial of certiorari).

Conclusion

Mr. Christen respectfully requests this Court find Wis. Stat. §941.20(1)(b) unconstitutional as applied to him, and vacate his convictions as his conduct on February 2, 2018 was and is protected by the Second Amendment to the United States Constitution.

Dated: Friday, December 20, 2019
Respectfully submitted,

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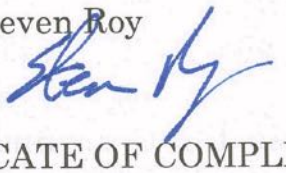
CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8)

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 2,724 words.

Signed: Steven Roy

Signature 

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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.

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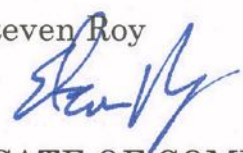
Signature 

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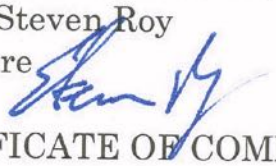
Signature 

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