Supreme Court of Wisconsin

2019AP1767-CR

State of Wisconsin,
Plaintiff-Respondent

v.

Mitchell L. Christen
Defendant-Appellant-Petitioner

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

Reply Brief of Appellant-Petitioner Mitchell L. Christen

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Argument

I. The Means-End Scrutiny Adopted by Many Courts and Advocated by the State Has Been Explicitly Rejected by the United States Supreme Court

In *Heller*, Justice Breyer asked the all important questions: "How is a court to determine whether a particular firearm regulation... is consistent with the Second Amendment? What kind of constitutional standard should the court use?" *Heller*, at 687. He noted the impracticality of applying strict scrutiny, as almost every single gun control regulation will seek to advance the compelling interest of the safety and lives of citizens. *Id.* at 689. Thus, any attempt to apply strict scrutiny will turn into an interest balancing inquiry. *Id.* The majority soundly rejected this approach, stating:

> We know of no other 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 right subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an 'interest-balancing' approach to the prohibition of a peaceful neo-Nazi march through Skokie....The Second Amendment...is the very *product* of an interest balancing by the people.
> *District of Columbia v. Heller,* 554 U.S. 570, 634-635, 128 S.Ct. 2783, 171 L. Ed. 2d 637, internal citations omitted.

The State would have this Court ignore binding United States Supreme Court precedent and apply what it claims is "consensus framework for analyzing Second Amendment challenges". (State's Br. 14). *But see*, David T. Hardy, *Standards of Review, The Second Amendment, and Doctrinal Chaos,* 43 S. Ill. U.L.J. 91 (2018), Kopel, David B. and Greenlee, Joseph G.S., *The Federal Circuits' Second Amendment Doctrines,* Saint Louis University Law Journal: Vol. 61 : No. 2 , Article 4. (2017).

The State is correct in asserting Justice Kavanaugh's categorical approach to Second Amendment challenges has yet to be adopted by any court. This Court is not bound by the decisions of any of the federal circuit courts or any other state court when determining how to analyze Second Amendment challenges. Accepting a methodology simply because it is popular even though the methodology has been explicitly rejected by the Supreme Court of the United States violates basic principles of law.

II. If This Court Chooses To Apply Means-End Scrutiny, It Must Apply Strict Scrutiny

The State claims intermediate scrutiny is the appropriate analytical framework for analyzing a challenge to Wis. Stat. §941.20(1)(b). The State's argument for this is the statute does not burden the "core" of the Second Amendment, as the statutory scheme allows for an instruction on self-defense, and Mr. Christen did not act in self-defense. The State's argument misreads *Heller*, and ignores the facts and law of this particular case.

A. The Second Amendment Guarantees the Right To Possess and Carry Weapons in Case of Confrontation

The State claims "[t]he 'core' of the Second amendment right is 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home". (State's Br. 13). This is a specious claim which demonstrates the State's failure to comprehend, or unwillingness to abide by the Supreme Court's guidance in *Heller*.

The majority opinion in *Heller* is divided into four sections. The first section summarizes the facts and procedural status of the case. *Heller*, at 574-576. The second, "turn[s] to the meaning of the Second Amendment". *Id.* at 576-626. The third section recognizes the Second Amendment is not unlimited and provides examples of presumptively constitutional limitations on the Second Amendment. *Id.* at 626-628. The final section applies the facts to the law, and holds the District's handgun ban is unconstitutional. *Id.* at 626-636.

Any attempt to identify the "core" of the Second Amendment would logically look to the section which the Court explicitly stated examined the meaning of the Amendment. In this section, the Court explicitly states the textual elements of the Amendment "guarantee the individual right to possess and carry weapons in case of confrontation." *Id.* 592. The *Heller* Court then spends the next 34 pages confirming the original understanding of the Amendment.

The quote the state claims represents the core of the Second Amendment comes at the very end of the opinion, not

from the section where the court provides a deep and rigorous analysis of the meaning of Amendment. *Id.* at 635. Indeed the quote comes after the court has applied the facts to the law, and is in the portion of the opinion rejecting Justice Breyer's interest-balancing methodology. To claim the court leaves the "core" of the Amendment to very end of the opinion, when the Court dedicated 50 pages of analysis to the meaning is simply absurd.

B. Wis. Stat. 941.20(1)(b) infringes on the Core of the Second Amendment

Wisconsin Statute §941.20(1)(b), as applied to Mr. Christen, strikes at the core of the Second Amendment. The core of the Second Amendment guarantees is the right to possess and carry weapons in case of confrontation. *Heller,* at 592. Mr. Christen carried his pistol, and later his shotgun, in his home for the purpose of self-defense in case of continuing or escalating conflict with this roommates or their guests. Any statute which would prohibit Mr. Christen from doing so implicates the core of the Second Amendment guarantee. *See, Kanter v. Barr*, 919 F.3d 437, 465 (7th Cir. 2018)(Barrett, J., dissenting).

C. The State's Argument Wis. Stat. §941.20(1)(B) Does Not Burden the Core of the Second Amendment as the Statutory Scheme Allows for Self-Defense, and Mr. Christen Did Not Act in Self-Defense Is Demonstrably False

The State claims Wis. Stat. §941.20(1)(b) does not burden the core of the Second Amendment as it allows for self-defense. Further the State claims it proved "beyond a reasonable doubt

that Christen did *not* carry his firearm in self-defense"[1]. (State's Br. 20). A simple analysis of the jury instructions reveals how flawed the State's arguments are, and how severely the statutory scheme ignores *Heller* and the guarantees of the Second Amendment. The jury was instructed:

> The law allows a person under the influence of an intoxicant to go armed with a firearm if all the following circumstances are present:
> 1. The defendant reasonably believed he was under an unlawful threat of imminent death or great bodily harm;
> 2. The defendant reasonably believed he had no alternative way to avoid the threatened harm other than by doing armed with a firearm;
> 3. The defendant did not recklessly or negligently place himself in a situation in which it was probably he would be forced to go armed with a firearm; and
> 4. The defendant went armed with a firearm only for the time necessary to prevent the threatened harm.
>
> (R.82:7-8).

First, Mr. Christen's right to armed self defense was only permissible if he *reasonably* believed he was subject to death or great bodily harm. This imposes a restriction based on the severity of harm possible as well as imposing a reasonableness requirement on Mr. Christen's constitutional right to bear arms.

Writing for the majority in *Heller*, Justice Scalia provides a detailed history of the purpose of the Second amendment. *Heller*, 554 U.S. 581-596. The textual elements placed together "guarantee the individual right to possess and carry weapons in

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[1] The question of whether Mr. Christen acted in self-defense was never presented to the jury. Instead the jury was asked if he acted in *lawful* self-defense. (R.82:7-8). The State conflates these two concepts in a careless and dangerous manner.

case of confrontation". *Heller*, at 592. Further the *Heller* Court instructs this is a well understood natural right to repel force by force to prevent an injury. *Id.* at 595. The natural right protected by the Second Amendment does not require a belief of imminent great bodily harm, or even a belief of imminent confrontation. Imposing such a restriction is inconsistent with the text and tradition of the Second Amendment.

Even more troubling is the requirement of a *reasonable* belief imposed by the circuit court's instructions. The enumeration of a constitutional right removes the power of all three branches of government to decide on a case by case basis whether the right is worth insisting upon. *Heller*, at 634. A constitutional guarantee subject to future assessments of reasonableness and usefulness is no guarantee at all. *Id.* The Second Amendment is the very product of an interest balancing of the people, and having a jury conduct an assessment of reasonableness any time someone asserts their constitutional rights defeats the purpose of the constitutional guarantee.

The second restriction placed on Mr. Christen's right to bear arms for self-defense is equally ignorant of the Second Amendment and *Heller's* guidance. The instruction allows Mr. Christen to exercise his right to bear arms in self-defense only if he reasonably believed there was no other way to avoid the threatened harm. This again imposes an additional improper reasonableness requirement, and requires Mr. Christen to consider alternative measures before arming himself. As noted above, requiring a reasonableness to Mr. Christen's actions is

inappropriate. Requiring Mr. Christen to consider alternative measures also runs afoul of the Second Amendment. The Second Amendment *guarantees* the right to bear arms in self-defense. There are no qualifications to the guarantee, and the guarantee is a product of interest balancing by the people. Reevaluating the constitutional guarantee on a case by cases is no guarantee at all.

There is no support for a restriction an individual may not place themselves in a position where they may be forced to go armed. Early American settlers knowingly expanded into land populated by the indigenous peoples of America. It is absurd to suggest because they recklessly, negligently, or even knowingly placed themselves in situations where it was probable they would need to go armed, they deprived themselves of the natural right to armed self-defense.

The circuit court further imposed a temporal restriction on Mr. Christen's right to armed defense. First, there is no suggestion Mr. Christen went armed prior to being in a situation where confrontation was actively occurring. Mr. Christen was in his home with four other people, with whom he had severe disagreements and there was a history of confrontations. There was absolutely the possibility of further confrontations as the four would not leave Mr. Christen be until he armed himself. Secondly, the temporal restriction is not supported by the *Heller* Court's guidance on the Second Amendment. As the Court noted the Second Amendment guarantees the individual right to possess and carry weapons *in case* of confrontation. *Heller*, at

592. The Second Amendment does not require an actualized threatened harm.

The State makes the bold assertion Mr. Christen did not act in self-defense, and the jury found this beyond a reasonable doubt. (State's Br. 20). This is factually false; they jury found Mr. Christen did not act *lawfully* act in self-defense. However, the conditions for acting lawfully do not comport with the guarantees of the Second Amendment, and impose restrictions which have been rejected by binding Supreme Court precedent. This absolutely burdened the very core of Mr. Christen's Second Amendment rights, and as such, strict scrutiny must be applied.

III. Wis. Stat. §941.20(1)(B) Are Not Reasonably Tailored to the Purported Governmental Interests

The State argues Wis. Stat. §941.20(1)(b) promotes public safety and preventing intoxicated individuals from using firearms. (State's. Br. 24). While Wis. Stat §941.20(1)(b) does prohibit an intoxicated individual from operating a firearm, it also prohibits the individual from bearing a firearm. While Mr. Christen has conceded the State has an interest in protecting the public from *unnecessary injury* from use of a firearm, it does not follow that bearing a firearm will necessarily cause such an injury.

The State argues armed intoxicated individuals presents a threat to public safety, as they are less able to exercise clear judgment. (State's Br. 24). The State then moves to felon dispossession cases, to demonstrate the burden imposed by felon dispossession statutes is greater than the burden imposed by

Wis. Stat. §941.20(1)(b).[2] The use of felon dispossession statutes fails to bolster the State's arguments: it presumes the cases are correctly decided, and utterly fails to address how the statute at hand is tailored to the government's interests.

The State then shifts its argument to a trio of cases. *United States v. Yancey* has been addressed previously and dismissed as inapplicable. *United States v. Yancey*, 621 F.3d 681, 683 (7th Cir. 2010). The State cites the Ohio Court of Appeals's decision in *State v. Weber*, for the proposition Wis. Stat. §941.20(1)(b) is narrowly tailored. The *Weber* Court makes many of the same logical errors the Stat has: it claims the core of the Second Amendment is the right of law-abiding, responsible citizens to use arms in defense of hearth and home, *State v. Weber*, 132 N.E.3d 1140, ¶21 (Ohio Ct. App. 2019), and the concludes intermediate scrutiny is applicable because many other courts have used it. *Id.* ¶23. The opinion in *People v. Wilder*, makes the same false assumptions, and is devoid of significant legal analysis. *People v. Wilder*, 861 N.W.2d 645 (Mich. Ct. App. 2014). Additionally, both cases assert the statutes allow for the privilege of self-defense. As noted above, Wisconsin's self-defense laws do not comport with *Heller* and the Second Amendment.

The State ignores the interest in protecting the public from actual injury is protected by other statutes. *See,* Wis. Stat

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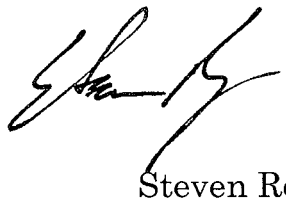
[2] The State fails to provide any connection between the case at hand and felon dispossession cases. Presumably, the connection is to a category of people deemed dangerous by the legislature. However, equating convicted felons to citizens who have consumed legal and socially acceptable intoxicants is a tremendous logical leap.

§§941.24; 941.20(1)(a). When an intoxicated individual actually exercises less than clear judgment and causes injury or is actually negligent in the operation of a firearm, the State has appropriately tailored statutes to enforce its interests. Bearing a firearm and using a firearm are two separate, but related issues. Wis. Stat. §941.20(1)(b) is overly broad and unnecessarily infringes on the Constitutional Right to bear arms after engaging in a legal and socially acceptable behavior.

Conclusion

Mr. Christen respectfully requests this court recognize he was exercising a fundamental right guaranteed to him by the United States Constitution, and vacate his convictions as his conduct on February 2, 2018 is protected by the Second Amendment.

Dated: Friday, December 4, 2020
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 2,487 words.

Signed: Steven Roy

Signature 

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 s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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.

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