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In the Court of Appeals of Wisconsin

District I

*In re the return of property in: In re State of
Wisconsin v. Matthew R. Derzay:*

Village of Greendale, Respondent,

v.

Matthew R. Derzay, Petitioner

Appeal No. 2019AP002294

**Appeal from the Judgment of the Milwaukee County
Circuit Court, The Hon. Jean M. Kies**

Brief of Petitioner

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Statement of Issues

1. May a circuit court deny a petition for return of property under Wis.Stats. § 968.20 on the grounds that the petitioner has not proven ownership of the property, when 1) the property was seized from the home of the petitioner, 2) the petitioner states on the record that the property is his; and 3) no one else claims an interest in the property?

Circuit Court answer: Yes.

Statement on Oral Argument and Publication

Petitioner Matthew Derzay (“Derzay”) does not believe oral argument is necessary in this case. While this is an issue of first impression and of great statewide interest, the issue is straightforward and it is not likely that oral argument would assist the Court in deciding the case.

Derzay believes that the opinion in the case should be published. Circuit courts around the state continue to apply an incorrect standard in ruling on return of property petitions. The majority of appellate opinions on the subject are unpublished, leaving circuit courts with a dearth of binding precedent to guide them and give them direction on the proper standards to apply.

Statement of the Case¹

On February 16, 2019, Derzay was arrested by officers of the Village of Greendale (“Village”) Police Department in conjunction with a domestic dispute at his residence. Village police sought to seize Derzay’s firearms², which he says he “voluntarily surrendered.” R20, p. 3, L. 1. The Circuit Court of Milwaukee County dismissed all charges against Derzay, so Derzay filed a petition (the “Petition”) pursuant to Wis.Stats. § 968.20 to recover his firearms. R13.

The Circuit Court held a hearing on the Petition on October 22, 2019. R20 (the “First Hearing”). At the First Hearing, the Village conceded that the firearms³ were taken by the Village from Derzay’s house. R20, p. 4. The Circuit Court apparently looked at firearms trace data⁴ supplied by the Village and determined

¹ This statement of the case is drawn from the criminal complaint in this case and from the transcripts on the hearings for return of property (the return of property is the subject of this case, not the criminal prosecution).

² While the legitimacy of this seizure is questionable, it is not a subject of this appeal.

³ The Petition references an attached list of firearms, but that list is not in the record. The Orders of the Circuit Court indicate there were a total of 10 firearms, but the Petition states there were two others, and Derzay told the Circuit Court at the hearing there were two others. For the purposes of this appeal, Derzay will refer to a total of 12 firearms sought to be returned, although two are not identified.

⁴ “Trace data” or “etrace” is “an internet-based system that allows ... agencies to submit firearms traces through the ATF National Tracing Center (NTC).” <https://etrace.atf.gov/etrace/> (viewed December 30, 2019). Firearms tracing “is the systematic tracking of a firearm ... from its first sale by the manufacturer ... to the first retail purchase.” <https://www.atf.gov/firearms/national-tracing-center> (viewed December 30, 2019). Thus, trace data only reveals a firearm’s first retail purchase. It does not show any subsequent transfers, either through a gun dealer, via private sale, via gift, or via inheritance.

that Derzay was listed as the original purchaser of three of the firearms.⁵ The Circuit Court took testimony from Derzay that he was the owner of those three firearms⁶. R20, p. 6. The Circuit Court ruled that Derzay's testimony/statements would be insufficient to prove his ownership or right to possession for the other nine firearms. R20, p. 9 ("It has to be a bill of sale or something more than, because I say so, because they are mine.")

The Circuit Court also ruled that the property being seized from Derzay's home was insufficient to prove ownership or right of possession. R20, p. 8. ("[E]ven though they are in your house, that is not proof that you own them or you are the rightful possessor and owner of those firearms.") Derzay told the Circuit Court that he had no receipts for some of the firearms because they were family heirlooms. R20, p. 3. The Circuit Court asked Derzay if he had an affidavit from someone indicating that Derzay had inherited them. *Id.* The Circuit Court adjourned the hearing to give Derzay an opportunity to present additional evidence of ownership or right of possession. R20, p. 10.

At the adjourned hearing held on December 3, 2019 (Second Hearing), Derzay showed the Circuit Court an affidavit from his mother showing that he

⁵ It appears from the transcript of the First Hearing that the Village provided trace data to the Circuit Court [R20, p. 3], but such data was not entered into evidence and is not in the record.

⁶ Derzay appeared pro se at the hearing. The Court therefore controlled the proceedings to a greater extent than perhaps it would have if Derzay had been represented by counsel. In any event, the Court did not really give Derzay an opportunity to testify regarding the other nine firearms.

inherited some firearms and a statement from his wife indicating that he had purchased some firearms. R21, p. 4. Again, however, the Circuit Court did not admit the documents into evidence and they are not in the record. Nevertheless, the Circuit Court ruled that such documents would not prove ownership or right of possession, and that Derzay would have to produce a bill of sale. R21, p. 3.

(“Well, that’s not a Bill of Sale. That’s not what we’re looking for, Mr. Derzay.”)

At the conclusion of the First Hearing, the Circuit Court entered an order (the “First Order”) returning three firearms to Derzay. R15. At the conclusion of the Second Hearing, the Circuit Court entered an order (the “Second Order”) reiterating the return of three firearms to Derzay. R -16, p. 3. The Second Order ruled that the remaining firearms on the Village list (a total of seven more) should be disposed of by the Village⁷. *Id.* The Circuit Court refused to discuss the two additional firearms referenced in the Petition. R21, p. 7, LL. 19-21.

Argument

Summary: The Circuit Court erred by failing to give weight to the evidence offered by Derzay, by failing to consider the standard contained in Wis.Stats., § 968.20,

⁷ While not in the record, the Village has agreed not to dispose of the firearms until this case is decided. Derzay includes this information solely to address any mootness concerns the Court may have.

and by failing to treat the source of the property (Derzay's home) as prima facie evidence of ownership.

It appears that if Derzay had not been the original purchaser of three of the firearms, the Circuit Court would not even have ordered the return of those. The Circuit Court's logic, however, was faulty. The Circuit Court ordered return of three of Derzay's firearms because he was the original purchaser, without regard to whether he may have later disposed of them. The Circuit Court denied return of the remaining firearms because Derzay was not the original purchaser, again without regard to whether he may have acquired them after original purchase.

The Circuit Court effectively created a new evidentiary standard – a person seeking a return of property under Wis.Stats. § 968.20 must have written documentation in the form of a receipt or a bill of sale in order to prove that he owns the property, or he must be the original purchaser of the property. Otherwise, he may not recover his property. There are multiple issues with this standard.

First, it is beyond the requirements of the statute. The statute only says that a petitioner should show “right to possession.” Wis.Stats. § 968.20(1g) (“If the right to possession is proved to the court’s satisfaction....”). The Supreme Court has ruled that a petitioner only has to show a right of possession (i.e., not right of ownership). *Return of Property in State v. Jones*, 226 Wis.2d 565, ¶ 9, 594 N.W.2d 738 (1999). The Village might argue that the statute leaves to the Circuit Court’s discretion what level of proof meets the court’s “satisfaction.” This might

be true in the abstract, but the standard the Circuit Court applied is not consistent with the statute and existing law, as shown below.

Second, the standard adopted by the Circuit Court, requiring a receipt or bill of sale, is too stringent for the statutory basis of “right of possession.” A receipt or bill of sale implies a purchase, i.e., ownership. The Circuit Court therefore imposed a standard requiring the petitioner to prove ownership, when the statute only requires proof of right of possession. A rightful possessor would not and should not be expected to have a receipt or bill of sale.

Third, the Circuit Court’s failure to give any weight to the fact that the property was seized from Derzay’s house is contrary to law. *Murray v. Norwood*, 77 Wis. 405, 46 N.W. 499 (1890) (“The possession of personal property is *prima facie* proof of ownership....”) The Circuit Court erred by failing to give any evidentiary weight to the fact that the property was seized from Derzay’s possession – from his house. He made a *prima facie* case for ownership and there was no evidence introduced to rebut it.

The Circuit Court effectively renounced the *prima facie* proof by way of example. “I might have left my gun at your house but that doesn’t mean it belongs to you. It’s just simply in your possession at the time of the alleged incident. That does not prove ownership.” R21, p. 4. The Circuit Court both paid no attention to the *prima facie* proof and reinforced its requirement that a petitioner prove *ownership* and not merely *right of possession*.

The very example given by the Circuit Court underscores the Circuit Court's error. In the example, where the judge may have left her firearm at Petitioner's house, depending on the circumstances, the judge may have created a license or bailment in Petitioner. Either way, the licensee or bailee has a right to possession. The Circuit Court's implication is that only the true owner has the right to petition for return of property under Wis.Stats. § 968.20, and that is not the law.

In the unlawful possession of contraband context, a *prima facie* case of possession is shown if the property is in one's place of business. *Schwartz v. State*, 192 Wis. 414, 212 N.W 664 (1927). Presumably, the case is even stronger in one's home. Moreover, knowledge and consent clinch the presumption. *Id.* Derzay knew where the firearms were in his house and directed the police to where they would find them. R20, p. 3 ("I told police exactly where they were, and then they went in the house and confiscated them.") The fact that Derzay knew where in *his* house the firearms were stored shows he had knowledge of possession. Derzay exhibited his knowledge of possession of the firearms by directing the police to the location of the property.

Fourth, the Circuit Court's giving no weight to the affidavits and other written submissions Derzay offered at the Second Hearing was unfair, in light of

the fact that the Circuit Court had asked Derzay for such documentation at the First Hearing.⁸

Lastly, the Circuit Court essentially ruled that testimony of ownership/right of possession would be insufficient as a matter of law. This is not a matter where the Circuit Court took testimony but found it unbelievable. The Circuit Court did not even entertain testimony because, the Court ruled, it would be insufficient.

This also is not a matter where there was a competing assertion, such as that the property was stolen, or where a third party claimed to be the rightful owner/rightful possessor. Instead, the Circuit Court established a rule that only receipts, bills of sale, or similar documents are sufficient to prove right of possession.

Common experience shows how unworkable this standard is. Consider a victim of a home burglary where, luckily enough, the police capture the burglars and recover all the stolen property. Of a person's total household contents, for how many items might the person actually have a receipt or bill of sale? Under the Circuit Court's standard, pitifully few of the burglary victim's possessions would be returned to him if he filed a petition under § 968.20 to recover his things.

⁸ Neither party raised any hearsay objections at the hearings. The Village showed trace reports on the firearms to the Court, and Derzay showed his affidavits. Any such objections were therefore waived.

Consider further if some of the possessions had been inherited. Would the burglary victim be expected to show original receipts, death certificates, and wills to prove right to possession?

The Circuit Court created an impossible standard for the average citizen to be able to recover his property.

Conclusion

For the foregoing reasons, the judgment of the circuit court should be reversed, with instructions to order the return of Derzays firearms. Failing that, the judgment of the Circuit Court should be reversed and the case remanded for the Circuit Court to have another hearing with instructions to consider and weigh all evidence presented by Derzay, and treating prior possession as a *prima facie* case for ownership.

/s/ John R. Monroe

John R. Monroe

Attorney for Petitioner

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 2,821 words.

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

I certify that this Brief of Appellant was mailed via priority mail to the Clerk of the Court of appeals on January 29, 2020.

/s/ John R. Monroe

John R. Monroe