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**WISCONSIN COURT OF APPEALS
DISTRICT I**

Appeal No. 2019AP002294

MATTHEW R. DERZAY,
Petitioner,

v.

VILLAGE OF GREENDALE,
Respondent.

Appeal from the Judgment of the Circuit Court of
Milwaukee County, the Honorable Jean M. Kies Presiding,
Circuit Court Case No. 2019CM000725

**RESPONSE BRIEF OF RESPONDENT,
VILLAGE OF GREENDALE**

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STATUTES

Wis. Stat. § 968.20 *passim*

STATEMENT OF THE ISSUES

1. May a circuit court deny a petition for return of property pursuant to Wis. Stats. § 968.20 on the grounds that the petitioner has failed to prove to the court's satisfaction his right of possession of the property.

Answered by the circuit court: Yes.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Oral Argument. Pursuant to Wis. Stat. § 809.22(2)(b), the Respondent does not believe oral argument is necessary in this case. The issues presented can be adequately addressed through the briefing process. Therefore, oral argument would be of marginal value and would not justify the additional expenditure of Court time or costs to the litigants.

Publication. Pursuant to Wis. Stat. § 809.23(1)(b), the Respondent does not believe that publication is warranted in this case because the issues involve no more than the application of well settled rules of law to a recurring fact situation and the issues do not otherwise fit the parameters of Wis. Stat. § 809.23(1)(a).

STATEMENT OF THE CASE

a) Nature of the Case

This case involves the seizure of ten firearms from the home of Petitioner Matthew Derzay (“Derzay”) by the Village of Greendale Police Department following the arrest of Mr. Derzay due to a domestic violence incident.

b) Procedural Posture and Factual Background

Petitioner Derzay was charged with two misdemeanors in Milwaukee County Circuit Court; one count of battery and one count of disorderly conduct.¹ The case was ultimately dismissed without prejudice. Derzay eventually petitioned the Circuit Court for a property return hearing regarding the firearms that had been seized by the Village of Greendale Police Department.

A property return hearing was held in front of Judge Kies in Milwaukee County Circuit Court on October 22, 2019. (*Pet. App’x, pg. 1*). At this hearing, the Village of Greendale (“Village”) entered with the court the eTrace through the ATF National Tracing Center, that the Police Department had run on all of the firearms. (*Pet. App’x, pg. 3*). Out of the ten total firearms², only three of them listed Derzay as the owner. (*Pet. App’x, pg. 3*). Derzay was unable to provide any further evidence of ownership or right to possession for the remaining seven firearms. Judge Kies determined that the three

¹ <https://wcca.wicourts.gov/caseDetail.html?caseNo=2019CM000725&countyNo=40&index=0&mode=details>

² Derzay references in his brief twelve firearms, however, only ten were confiscated from his home at the time of the incident. This is not at issue in this case and if he has further allegations, that is to be addressed in a separate lawsuit. (*Pet. App’x, pg. 7*).

firearms that the eTrace showed were purchased by Derzay, were to be returned to him, however, the court was not satisfied that Derzay had shown right to possession or proof of ownership for the remaining seven firearms. (*Pet. App'x*, pg. 9). Judge Kies gave Derzay additional time to procure proof of ownership or right of possession and present additional evidence regarding the remaining seven firearms. (*Pet. App'x*, pg. 9,10). At the conclusion of the first hearing, the Circuit Court issued an order returning the three firearms to Derzay. (*Pet. App'x*, pg. 14, 15).

On December 3, 2019, the second hearing was held for Derzay's petition for return of property. (*Pet. App'x*, pg. 16). Derzay presented only a letter from what appeared to be the complainant in the criminal case and an email from his mother that vaguely referenced his ownership of firearms. (*Pet. App'x*, pg. 18, 19). No witnesses testified under oath to support Derzay's claims. Judge Kies ruled that this proposed evidence failed to satisfy the court that Derzay had ownership or right to possession of the remaining seven firearms. (*Pet. App'x*, pg. 18, 19). At the conclusion of the second hearing, the Circuit Court issued an order reiterating the return the three firearms to Derzay and that the Village shall dispose the remaining seven firearms. (*Pet. App'x*, pg. 23, 27-28).

Derzay then filed this appeal seeking reversal of the Circuit Court ruling denying his petition for the return of his property.

STANDARD OF REVIEW

Statutory interpretation presents a question of law that the Court reviews de novo. *Dawson v. Town of Jackson*, 2011 WI 77, 336 Wis. 2d 318, 801 N.W.2d 316. “[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 44, 271 Wis.2d 633, 681 N.W.2d 110. Statutory interpretation begins with the language of a statute. *Id.*, ¶ 45. If the meaning of the statute is plain, the inquiry is stopped, and the language is given its “common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.*

The context and structure of a statute are also important to the meaning of a statute. *Kalal*, 271 Wis.2d 633, ¶ 46, 681 N.W.2d 110. “Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Id.* “A statute’s purpose or scope may be readily apparent from its plain language or its relationship to surrounding or closely-related statutes—that is, from its context or the structure of the statute as a coherent whole.” *Id.*, ¶ 49.

ARGUMENT

I. WISCONSIN STATUTE § 968.20(1g) IS CLEAR ON ITS FACE AND ITS INTENT IS NOT IN QUESTION

“The sole purpose of determining the meaning of a statute is to ascertain the intent of the Legislature. In determining legislative intent, we look to the plain language of the statute. If the statute is clear on its face, our inquiry as to the Legislature's intent ends and we must simply apply the statute to the facts of the case.” *In re Peter B.*, 184 Wis.2d 57, 70–71, 516 N.W.2d 746, 752 (Ct.App.1994). “We do not look beyond the plain and unambiguous language of a statute.” *L.L.N. v. Clauder*, 203 Wis.2d 570, 593, 552 N.W.2d 879, 889 (Ct.App.1996). See also *Nw. Properties v. Outagamie Cty.*, 223 Wis. 2d 483, 488, 589 N.W.2d 683, 686 (Ct. App. 1998).

Wisconsin Statute § 968.20(1g) provides in pertinent part that for property seized pursuant to a warrant, “[t]he court shall hold a hearing to hear all claims to its true ownership ... If the right of possession is proved to the court’s satisfaction, it shall order the property ... returned ...” Wis. Stat. § 968.20(1g) is clear on its face, therefore inquiry as to the legislature’s intent ends after looking at the plain language of the statute and applying it to the facts in this case. There is only one reasonable interpretation of this statute. Ten firearms were seized from Derzay’s home due to his arrest for a domestic incident. Derzay petitioned for return of those 10 firearms and after holding two hearings

and hearing all of the evidence, Judge Kies ruled that Derzay had only proved to the court's satisfaction that he had the right to possession of three of the ten firearms³.

Derzay's attempt to differentiate "right of ownership" with "right of possession" is a red herring. He cites *Jones* as case law that differentiates the two, however, that case does no such thing. In fact, *Jones* does not discuss "ownership" at all. Instead, *Jones* rules that the State need not return seized money if it is considered contraband, even though it was in possession of the petitioner at the time it was seized. *Return of Property in State v. Jones*, 226 Wis.2d 565, 594 N.W.2d 738 (1999). The right of possession is an encompassing term that includes ownership, or permission to possess the property, plus the legal right to do so.

The legislature used the term "right to possession" as opposed to just "possession" because the intention was that mere possession of the property was not enough. Stolen and illegal firearms are a significant issue in this state and across the country, one that the legislature surely had in mind while crafting, deliberating and ultimately signing into law this statute. Just because you possess a gun (especially a stolen one), that does not mean that you have the right to possess that gun. Further, just because something is found at your house, it does not mean that you have the right to possess that item, as discussed further below.

³ It should also be noted that while this was not discussed during the Circuit Court proceedings, Derzay did not file his application for the return of property within 120 days of his initial appearance, as required under Wis. Stat. § 968.20(1). Derzay's initial appearance was held on February 19, 2019 and he did not file his application for return of property until August 30, 2019, well outside of the 120-day window. See <https://wcca.wicourts.gov/caseDetail.html?caseNo=2019CM000725&countyNo=40&index=0&mode=details>

Derzay provides no support to his claims that mere possession is enough to satisfy his burden of proving his right to possession. Derzay's only citation for his argument that "possession of personal property is prima facie proof of ownership" is a case from the 19th century that did not involve firearms at all, and certainly not ones seized pursuant to a warrant. *Murray v. Norwood*, 77 Wis. 405, 46 N.W. 499 (1890). Not only does this case not reference Wis. Stat. § 968.20 at all, but it was published almost one hundred years prior to the passing of Wis. Stat. § 968.20. *Id.*

It is telling that Derzay omitted from his argument a crucial portion of the statute referencing, "proved to the court's satisfaction." The legislature did not enumerate what the standard was for the "court's satisfaction" instead leaving it up to the courts discretion to make that determination. If the legislature had intended the standard to be uniform (or that mere possession was sufficient), it would have included that within the statute.

As the petitioner for the return of the ten firearms, Derzay had the burden to prove, to the court's satisfaction, that he had the right to possess all ten firearms. Through its discretion, the court ruled that he had only proven his right to possess three of the ten firearms, which is a ruling entirely in line with the requirements set forth in Wis. Stat. § 968.20.

II. DERZAY FAILED TO PROVE TO THE COURT'S SATISFACTION HIS RIGHT TO POSSESSION OF SEVEN OF THE FIREARMS

"We review the decision of the circuit court for erroneous exercise of discretion; we do not look to "whether this court would or would not have granted ... relief but rather

whether the circuit court abused its discretion in reaching its decision.”” *Casper v. Am. Int’l S. Ins. Co.*, 2011 WI 81, ¶ 30, 336 Wis. 2d 267, 283, 800 N.W.2d 880, 889, citing *Hedtcke*, 109 Wis.2d at 470, 326 N.W.2d 727. A circuit court’s decision in the exercise of discretion will not be disturbed by an appellate court unless an abuse of discretion is shown. When a circuit court exercises discretion, the record on appeal must reflect the circuit court’s reasoned application of the appropriate legal standard to the relevant facts in the case. See *Hedtcke v. Sentry Ins. Co.*, 109 Wis.2d 461, 471–72, 326 N.W.2d 727 (1982). “[T]he burden rests with the moving party to support the motion [for return] by proof.” *State v. Jones*, 226 Wis.2d 565, 595, 594 N.W.2d 738 (1999).

During the October 22, 2019 hearing, Judge Kies correctly stated that pursuant to Wis. Stat. § 968.20, Derzay had the burden of proof to show that he was the “owner or rightful possessor of those firearms, and that’s more than simply that they were in the house. That means that you have to show an ownership interest, like a bill of sale, a box, or something to that effect.” (*Pet. App’x*, pg. 5). Because proof of ownership and right to possession only existed for three of the ten firearms⁴, Judge Kies ordered that those three firearms were to be returned. (*Pet. App’x*, pg. 9). Judge Kies then generously gave Derzay additional time to provide evidence for proof of ownership of the remaining seven firearms. Derzay stated during that hearing that he purchased two of the firearms from a gentleman he used to work with and would get ahold of him to procure a bill of sale, and

⁴ The evidence for Derzay’s ownership of the three firearms ordered to be returned was submitted by the Village through the eTrace its Police Department had completed.

he would reach out to his aunt to find proof of the firearms he alleges he inherited. (*Pet. App'x*, pg. 9-10).

The second hearing was held on December 3, 2019, at which time Derzay was given another opportunity to provide the requisite proof of his right to possession for the remaining seven firearms. (*Pet. App'x*, pg. 16). As discussed above, Derzay was told exactly what would be required of him in order to satisfy the court that return of the those seven firearms was appropriate. Instead of providing a bill of sale, original box, will showing inheritance of the firearms, receipt or otherwise, Derzay submitted an email from his mother and an alleged affidavit from the complainant in the criminal matter that caused the seizure of the firearms, both of which stated generally that Derzay owned firearms. (*Pet. App'x*, pg. 17-21). Not only do hearsay issues exist with this evidence but it was determined by Judge Kies that the proposed evidence did not satisfy the court regarding proof of right to possession. *Id.* See *Christensen v. Econ. Fire & Cas. Co.*, 77 Wis.2d 50, 55–56, 252 N.W.2d 81 (1977) (“The question of admissibility is one of law which is determined by the judge. We have held on numerous occasions that the decision on the admissibility of a hearsay statement is within the discretion of the trial court.³ Such discretion will not be reversed unless it is abused or is premised upon an erroneous view of the law”).

While making her ultimate decision in this matter, Judge Kies again explained the courts reasoning as to why mere possession was not enough to satisfy the statutory standard of “right to possession.” Derzay claimed that he owned all ten of the firearms

that he sought to be returned. Derzay did not allege that he was borrowing them with the permission of the owner nor did he provide any evidence or testimony from a current or previous owner alleging that he had the right to possess the firearms, therefore only his ownership of the firearms was at issue. Entirely consistent with her ruling during the first hearing, Judge Kies reiterated to Derzay that, “Wisconsin Statute section 968.20 requires even some sort of proof of ownership, that’s a Bill of Sale, that’s an eTrace that the firearm was registered to you, something to that effect. Just a property inventory, for instance, is just that property was retrieved from the home at the time of the arrest. That’s problematic because the property, I might have left my gun at your house but that does not mean it belongs to you. It’s just simply in your possession at the time of the alleged incident. That does not prove ownership.” (*Pet. App’x*, pg. 19).

Judge Kies’ logic is sound and follows the statutory intent, as there are numerous situations where someone could have possession of a firearm but not the right to possess it. A circuit court’s decision on whether property should be returned is discretionary. *See City of Milwaukee v. Dyson*, 141 Wis.2d 108, 113, 413 N.W.2d 660, 662 (Ct.App.1987). “There is nothing in the statute which requires the property to be returned to the person who was the legal owner, or on whose property the weapons were found, at the time it was confiscated.” *City of Milwaukee v. Dyson*, 141 Wis. 2d 108, 112, 413 N.W.2d 660, 662 (Ct. App. 1987).

The court did give weight to Derzay’s possession of the firearms, however, it determined that mere possession did not satisfy the court that Derzay had the “right to

possession”⁵. Judge Kies, in her discretion, gave Derzay ample opportunity to provide proof of right to possession and the fact that he did not avail himself to the opportunity granted by the judge does not create reversible error.

CONCLUSION

For the reasons stated above, the Court should affirm the circuit court judgment denying Derzay’s petition for return of property.

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⁵ Derzay attempts to discredit the “Circuit Court’s logic” when he states in his brief that, “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.” (*Pet. Brief*, pg. 9). The court knows that he had not disposed of them because they were found in his home during the seizure and he testified that he was still the owner of those firearms. Indeed, this bolsters the court’s logic that proof of ownership plus possession was enough to satisfy the statutory requirements.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19 (8) (b) and (c) for a brief produced with proportional font. The length of this brief is 2,465 words.

Dated this 2nd day of March 2020.

**CERTIFICATION REGARDING ELECTRONIC
BRIEF PURSUANT TO WIS. STAT. § 809.19(12)(f)**

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12)(f) and (13)(f).

I further certify that the 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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