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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP1133-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL L. NELSON,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

JOSHUA L. KAUL
Attorney General of Wisconsin

JENNIFER L. VANDERMEUSE
Assistant Attorney General
State Bar #1070979

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740
(608) 294-2907 (Fax)
vandermeusejl@doj.state.wi.us

ISSUE PRESENTED

Whether Defendant-Appellant-Petitioner Michael L. Nelson is entitled to a *Machner*[1] hearing on his ineffective assistance of counsel claim, on the ground that his trial attorney rendered ineffective assistance by advising him that pleading guilty to disorderly conduct could cause him to temporarily lose his right to possess a firearm.

The circuit court answered no.

The court of appeals answered no.

INTRODUCTION

This Court should deny Nelson's petition. It does not meet the criteria for granting review. Nelson's trial attorney did not give incorrect legal advice when he said that pleading guilty to disorderly conduct could cause Nelson to temporarily lose his right to possess a firearm. Given the criminal charge to which Nelson pled, no binding authority established that Nelson would have permanently lost his right to possess a firearm.

This Court has since clarified that disorderly conduct is not a misdemeanor crime of domestic violence under federal law, and therefore, a conviction for disorderly conduct does not disqualify a person from holding a license to carry a concealed weapon (CCW license). *Doubek v. Kaul*, 2022 WI 31, ¶ 1, 401 Wis. 2d 575, 973 N.W.2d 756.

Nelson's case would not meaningfully develop the law and does not meet any criteria for granting review. Wis. Stat. § (Rule) 809.62(1r). His petition for review should be denied.

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[1] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

BACKGROUND

The following is a statement of relevant facts from the court of appeals' authored but unpublished decision. (Pet-App. 3–13).[2] Nelson was convicted of disorderly conduct with the use of a dangerous weapon, domestic abuse, and operating a firearm while intoxicated. *State v. Nelson*, No. 2021AP1133-CR, 2022 WL 698071 ¶ 1 (Wis. Ct. App. Mar. 9, 2022) (unpublished). The conviction stems from allegations that Nelson engaged in an altercation with his wife and adult children while he was intoxicated. *Id.* ¶¶ 2–3. Nelson's son and daughter reported that the "incident was only verbal," although his wife reported that she "heard what sounded like a loud slap" and saw her daughter holding her face and crying. *Id.* ¶ 3. "[T]hings escalated when Nelson 'pulled his gun from his waistline and began to swing his hand around with the loaded gun.'" *Id.* When police arrived, Nelson told them he had a gun, and he appeared to be highly intoxicated. *Id.* ¶ 2. A struggle ensued in which the officers attempted to disarm Nelson and put him in handcuffs. *Id.* The officers eventually took Nelson into custody. *Id.*

Nelson pleaded guilty to disorderly conduct with a dangerous weapon, domestic abuse, and possession of a firearm while intoxicated. *Id.* ¶ 4. He pleaded guilty to the disorderly conduct charge as it was alleged in the complaint, that is, that he "did engage in violent, abusive, indecent, profane, boisterous, unreasonably loud *or* otherwise disorderly conduct." *Id.* (emphasis added). In the plea colloquy, the court reviewed the elements with Nelson. *Id.*

The court placed Nelson on probation for two years on each count, with six months' conditional jail time for the

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[2] When citing Nelson's appendix, this response cites to the page numbers appearing in the upper right corner of the document. Citations to the court of appeals' decision in this matter use page and paragraph numbers as they appear on Westlaw.

disorderly conduct charge and three months' conditional jail time for the operating a firearm while intoxicated charge, to be served concurrently. *Id.* ¶ 5. As a condition of probation, the court ordered that Nelson was not to possess any firearms. *Id.*

Nelson filed a motion for postconviction relief and sought to withdraw his guilty plea on the basis of ineffective assistance of counsel. *Id.* ¶ 6. He argued that his trial lawyer gave him incorrect information about the collateral consequences of his plea. *Id.* Specifically, Nelson said that his trial attorney advised him that pleading guilty to disorderly conduct could have a temporary (rather than permanent) effect on his right to possess a firearm. *Id.* He further alleged that if his lawyer had not "misinformed [him] regarding the possibility that a disorderly conduct conviction would result in a permanent loss of his right to possess a firearm, he would not have pled guilty and instead would have insisted on going to a jury trial." *Id.*

At a hearing, the court denied the motion without accepting testimony, finding that Nelson's motion was insufficiently pled. *Id.* ¶ 7. The parties agreed that under applicable state and federal law, it was not certain that Nelson's conviction would result in a permanent inability to possess a firearm. *Id.* Because his trial attorney expressed uncertainty about that issue, the court found that it was essentially "correct advice. It could. Maybe it couldn't." *Id.* The circuit court stated that Nelson was welcome to re-file his motion as if trial counsel had told him that under no circumstances would he permanently lose his license. *Id.* Instead, Nelson appealed. *Id.*

The court of appeals affirmed in a decision issued March 9, 2022. (Pet-App. 3.) The court disagreed with Nelson's assumption that the collateral consequence of his guilty plea "would likely" be a permanent bar to possessing a firearm. *Nelson*, 2022 WL 698071, ¶ 12. Nelson's assumption

rested on his theory that his disorderly conduct conviction was considered a crime of domestic violence under federal law.[3] *Id.* ¶¶ 12–14. A misdemeanor crime of domestic violence is defined as an offense that (1) is a misdemeanor under Federal, State, or Tribal law; and (2) "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim." 18 U.S.C. § 921(a)(33)(A). Nelson's disorderly conduct conviction met the first prong of the definition. *Nelson*, 2022 WL 698071, ¶ 14. The issue in Nelson's case turned on whether his conviction met the second prong.

When the lower courts decided this case, *Evans v. Dep't of Justice*[4] was one of the most relevant Wisconsin decisions on this issue. *Id.* In *Evans*, the court of appeals considered whether the use of physical force was an element of a Wisconsin disorderly conduct conviction for the purpose of federal law. *Id.* ¶ 15; *see also Evans v. Dep't of Justice*, 2014 WI App 31, ¶ 2, 353 Wis. 2d 289, 844 N.W.2d 403, *overruled by Doubek*, 401 Wis. 2d 575. Unlike Nelson, who was convicted of "violent, abusive *or* otherwise disorderly conduct," Evans's conviction was based on "violent, abusive *and* otherwise disorderly conduct." *Nelson*, 2022 WL 698071, ¶ 15; *see also Evans*, 353 Wis. 2d 289, ¶ 2.

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[3] Under federal law, 18 U.S.C. § 922(g)(9), it is unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence . . . [to] . . . possess in or affecting commerce, any firearm or ammunition." Under state law, Wis. Stat. § 175.60(3)(b), the Wisconsin Department of Justice shall not issue a CCW license to someone who "is prohibited under federal law from possessing a firearm."

[4] 2014 WI App 31, ¶ 5, 353 Wis. 2d 289, 844 N.W.2d 403, *overruled by Doubek v Kaul*, 2022 WI 31, 401 Wis. 2d 575, 973 N.W.2d 756.

Because Evans's conviction was based on a crime charged in the conjunctive ("violent, abusive, *and* otherwise disorderly conduct") the *Evans* court held that the conviction qualified under federal law as a crime that would have an element of physical force, thus precluding firearm possession. *Nelson*, 2022 WL 698071, ¶ 15; *see also Evans*, 353 Wis. 2d 289, ¶ 2. The *Evans* court did not decide what the result would be if Evans had pleaded guilty to a disorderly conduct crime charged in the disjunctive. *Nelson*, 2022 WL 698071, ¶ 16; *see also Evans*, 353 Wis. 2d 289, ¶ 20.

The court of appeals contrasted *Evans* with Nelson's case, observing that Nelson pleaded guilty to a crime charged in the disjunctive. *Nelson*, 2022 WL 698071, ¶ 16. The parties agreed that other than *Evans*, there was no other binding authority on point. *Id.* Even Nelson acknowledged that the consequences of his disorderly conduct conviction were far from certain, as he argued that his conviction "would likely" or "could" result in a permanent, rather than temporary bar to owning a firearm. *Id.*; *see also* R. 34:5. The court of appeals concluded that Nelson's attorney's advice at the time was not legally incorrect. *Id.* ¶ 17. "The law is not clear on the collateral consequences of a conviction such as this one." *Id.* Because Nelson's trial counsel did not misstate the law, he could not be found ineffective. *Id.* ¶ 18.

Nelson filed a motion for reconsideration, which the court of appeals denied on May 26, 2022. Nelson now seeks this Court's review.

NELSON'S PETITION PRESENTS NO BASIS FOR GRANTING REVIEW

Wisconsin courts have permitted defendants to withdraw pleas that were based on a misunderstanding of the consequences, even when those consequences were collateral. *State v. Brown*, 2004 WI App 179, ¶ 8, 276 Wis. 2d 559, 687 N.W.2d 543. But in this case, Nelson was not misinformed.

The parties agreed that at the time, *Evans* was the most relevant case on the issue. *Nelson*, 2022 WL 698071, ¶ 16. Because Evans was convicted of disorderly conduct in the conjunctive (violent, abusive *and* otherwise disorderly conduct), his crime necessarily contained an element of physical force, which made it a misdemeanor crime of domestic violence under federal law, in turn barring him from possessing a firearm under state law. *Evans*, 353 Wis. 2d 289, ¶¶ 2, 12, 20, 31. *Evans* did not address whether a conviction in the disjunctive (which could be limited to conduct that was, for example, "boisterous" or "unreasonably loud," but not violent) would qualify as a misdemeanor crime of domestic violence under federal law.

Given the state of the law at the time, it was not incorrect for Nelson's lawyer to say that his conviction could result in a temporary loss of his firearm rights. Nelson's own arguments reveal the lack of clarity in the law at the time; he argued that the conviction "would likely" or "could" result in a permanent loss of his ability to possess firearm. *Nelson*, 2022 WL 698071, ¶ 11; *see also* R. 34:5. For this reason alone, his postconviction motion was properly denied.

After the court of appeals issued its decision in this case, this Court's *Doubek* opinion clarified the law by holding that a conviction for disorderly conduct under Wis. Stat. § 947.01(1) is not a misdemeanor crime of domestic violence under federal law, and therefore, does not disqualify a person from holding a CCW license. *Doubek*, 401 Wis. 2d 575, ¶ 1. *Doubek* overruled *Evans*, which had held that the violent conduct component of a disorderly conduct conviction under § 947.01(1) could constitute a separate element of the crime, depending on how it was charged. *Id.* ¶¶ 18–20 (adopting the framework used by the federal courts in this context, finding that § 947.01(1) is indivisible under that framework, and finding that under the categorical approach applicable to indivisible statutes, § 947.01(1) is not a misdemeanor crime of

domestic violence under federal law). While Nelson is correct that this Court would review the law that existed at the time of Nelson's plea (pre-*Doubek* law), Nelson provides no reason for this Court to decide an ineffective assistance claim with an underlying issue that is essentially mooted by *Doubek*.

Nelson argues that his lawyer's advice was wrong because "neither federal law nor state law provide that the prohibition on firearm possession for persons convicted of crimes of domestic violence is ever temporary." (Pet. 16; *see also* Pet. 4.) This argument is misplaced. Nelson's postconviction motion alleged that "[h]is trial attorney advised him that pleading guilty to *disorderly conduct* could have a temporary rather than permanent effect on his right to possess a firearm." (R. 34:5 (emphasis added).) Given the state of the law at the time as to whether this crime qualified as a misdemeanor crime of domestic violence, his lawyer's advice was not wrong.

Nelson asserts that he properly alleged deficient performance in his postconviction motion. (Pet. 12.) He notes that he alleged his trial attorney advised him that pleading guilty to disorderly conduct "could" result in a temporary rather than permanent loss of his right to possess a firearm. (Pet. 12.) He claims that this advice "clearly demonstrates deficient performance" because "a disorderly conduct conviction could result in a permanent prohibition" on his ability to obtain a CCW license. (Pet. 12–13.)

The language distinction Nelson raises is without a meaningful difference. Whether his attorney told him that his disorderly conduct conviction "could" result in a temporary loss of his firearm rights or "could" result in a permanent loss, the "could" is an accurate characterization under the law as it existed at the time. And even if this subtle language difference amounted to a meaningful distinction, Nelson is at most arguing that the court of appeals' analysis of the law was incorrect. This is not a sufficient basis for this Court to grant

review. *See Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶ 49, 326 Wis. 2d 729, 786 N.W.2d 78 (error correction is not a basis to grant review).

Nelson also argues that under *Evans*, a court could have found that his conviction was a crime of domestic violence, given the factual allegations of his case and the fact that he was "pleading guilty to an act of domestic violence under 968.075." (Pet. 13.) His argument misses the mark for at least three reasons. First, *Evans* declined to analyze the specific facts underpinning the disorderly conduct charge; rather, the analysis turned on the statutory definition of the crime. *Evans*, 353 Wis. 2d 289, ¶¶ 10–12, 19. Second, a domestic abuse enhancer is not an element of a disorderly conduct conviction, the crime to which he pleaded. (R. 15.) Thus, the enhancer was not relevant to whether the disorderly conduct conviction met the physical force prong of the federal test. And third, even if Nelson were correct that the particular facts underpinning his charge "could" have resulted in a different conclusion (which the State does not concede), this argument again shows a lack of clarity in the law, which is consistent with his lawyer's advice. It also amounts to a request for error correction, which is not a sufficient basis to grant review.

Nelson states that there is no published Wisconsin case that addresses ineffective assistance of counsel "in the context of incorrect advice regarding the loss of one's Second Amendment rights." (Pet. 5.) Even if he is right, he does not explain why this case is the proper vehicle to review such an issue. He does not point to "[a] real and significant question of federal or state constitutional law" that needs to be decided. Wis. Stat. § (Rule) 809.62(1r)(a). Nor does he explain why the law in this area needs further development. The fact that this Court decided *Doubek* means that this issue is unlikely to recur or have statewide impact. Wis. Stat. § (Rule) 809.62(1r)(c)2.–3.

In short, there is no reason to grant review of this unpublished decision. While it can be cited for persuasive value because it is authored, *Doubek* has essentially rendered it moot. This case does not meet the criteria for granting review.

CONCLUSION

The State respectfully requests that the petition for review be denied.

Dated this 12th day of August 2022.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

JENNIFER L. VANDERMEUSE
Assistant Attorney General
State Bar #1070979

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740
(608) 294-2907 (Fax)
vandermeusejl@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 2,577 words.

Dated this 12th day of August 2022.

JENNIFER L. VANDERMEUSE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULES) 809.19(12) AND 809.62(4)(B) (2019-20)

I hereby certify that:

I have submitted an electronic copy of this response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic response 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 response filed with the court and served on all opposing parties.

Dated this 12th day of August 2022.

JENNIFER L. VANDERMEUSE
Assistant Attorney General