STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2022AP1342-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL JAMALL HILL,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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Defendant-Appellant-Petitioner, Michael Jamall Hill, respectfully petitions this Court, pursuant to Wis. Stat. §§808.10 and 809.62, for review of a decision of the Wisconsin Court of Appeals, District I, dated August 28, 2023, which affirmed a judgment of conviction entered in the circuit court for Milwaukee County, the Honorable Frederick C. Rosa and the Honorable Michael J. Hanrahan presiding.

ISSUE PRESENTED

1. Whether application of the mandatory minimum sentencing provision of Wis. Stat. §941.29(4m)(a)1.-2.a. in this case was unconstitutional as applied to Mr. Hill for his conviction for felon in possession of firearm, when it was based upon his prior conviction for felon in possession of firearm.

The circuit court denied Mr. Hill's motion to dismiss the allegation that he was subject to a mandatory minimum sentence upon conviction for felon in possession of a firearm in this case. The motion argued that the mandatory minimum sentence provision was unconstitutional as applied to him because it was arbitrary and not substantially related to any governmental objective, as the "violent felony" predicate included his prior felon in possession conviction despite the lack of any allegations of physical violence or aggression, and therefore violated his right to equal protection under the Fourteenth Amendment of the United States Constitution and Article 1, sec. 1 of the Wisconsin Constitution. The

circuit court concluded that the mandatory minimum applied to Mr. Hill because Wis. Stat. §941.29(1g)(a) defines "violent felony" as including a conviction for felon in possession of firearm.

The court of appeals summarily affirmed, concluding that a rational basis existed for the legislature's inclusion of felon in possession of firearm as a "violent felony" for purposes of the mandatory minimum confinement penalty, finding that it was rationally related to public safety objectives, and noting that "possession of firearms can easily lead to violence," and that the mandatory minimum penalty contained in Wis. Stat. §941.29(4m) was "reasonably related to the goal of repressing that violence." (Slip op. at 7; App. 9). Thus, the court of appeals affirmed the circuit court's application of the mandatory minimum three-year confinement term to Mr. Hill's conviction for felon in possession of firearm. (*Id*. at 8; App. 10).

CRITERIA FOR REVIEW

Review by this Court is warranted under Wis. Stat. §809.62(1r)(a), as this case presents a real and significant question of federal and state constitutional law: whether the legislature's denomination of an offense that involves simple possession of a firearm by a person previously convicted of a felony as a "violent felony" for purposes of a predicate offense that requires imposition of a mandatory minimum sentence has a rational or reasonable basis.

Here, despite the lack of any act of physical violence or aggression in Mr. Hill's prior offense of felon in possession of a firearm, that offense was utilized as a predicate for application of a mandatory minimum initial confinement term of three years when sentenced for the instant felon in possession offense. As such, the court of appeals' determination that the mandatory minimum sentence was properly applied to Mr. Hill because "possession of firearms can easily lead to violence" and because such possession "showed that he was prepared to be violent even if the possession itself did not entail violence" such that the mandatory minimum sentencing provision was "reasonably related to the goal of repressing that violence" is speculative. (Slip op. at 7; App. 9).

This Court should accept review to address whether classification of a prior offense of felon in possession of firearm, which does not include any allegations or acts of physical violence, force or aggression, as a "violent felony" for purposes of application of a mandatory minimum sentence, has any rational relationship to a legitimate governmental interest or instead violates constitutional equal protection guarantees.

STATEMENT OF THE CASE

Based on a traffic stop of a vehicle in which Mr. Hill was a passenger in October 2017, the State charged Mr. Hill with one count of possession with intent to deliver cocaine and one count of felon in possession of a firearm. On the felon in possession charge, the complaint invoked the "violent felony" three-year mandatory minimum penalty in Wis. Stat. § 941.29(4m) because Mr. Hill was previously convicted of possessing a firearm as a felon in Milwaukee Co. Case No. 2010CF3156 and had completed the sentence within five years of the current offense. (1:3).

Mr. Hill moved to dismiss the mandatory minimum penalty on the ground that it violated equal protection guarantees of both the United States and Wisconsin constitutions, and was therefore unconstitutional as applied to him. (24).

Following a hearing, the circuit court, the Honorable Frederick C. Rosa presiding, denied the defense motion, concluding that because Wis. Stat. § 941.29 specifically listed felon in possession of a firearm as a qualifying felony for purposes of applying the mandatory minimum, "there's no room for any different interpretation there." (87:8-10). After a bench trial, the court found Mr. Hill guilty of both charged offenses. (68:49-50).

The sentencing court, the Honorable Michael J. Hanrahan presiding, sentenced Mr. Hill on the drug offense to two years initial confinement and two years extended supervision, and on the felon in possession

offense to the mandatory minimum under Wis. Stat. § 941.29(4m) of three years of initial confinement and three years of extended supervision, to run concurrently with each other. (67:38-39; 44).

Mr. Hill appealed, and prior appointed counsel filed a no-merit report, which the court of appeals rejected, concluding that "it would not be frivolous for Hill to pursue an appeal challenging the applicability of the mandatory minimum term of initial confinement." (2020AP1148). Mr. Hill, by new counsel, then filed this merits appeal raising the mandatory minimum issue.

The court of appeals, in a summary disposition opinion and order, denied relief and affirmed the circuit court's application of the mandatory minimum three-year confinement term to Mr. Hill's conviction for felon in possession of a firearm. (Slip op. at 8; App. 10).

ARGUMENT

I. The "violent felony" mandatory minimum sentence provision of Wis. Stat. § 941.29(4m) as applied to Mr. Hill violates equal protection guarantees.

Wisconsin law barring possession of a firearm by a felon provides that a person convicted of any felony is barred from possessing a firearm, and provides for a maximum potential penalty of ten years in prison and a $25,000 fine. Wis. Stat. § 941.29(1m)(a); Wis. Stat. § 939.50(3)(g).

Wis. Stat. § 941.29(4m) provides for a mandatory minimum prison sentence for individuals who satisfy two preconditions: (1) the person has previously been convicted of a "violent felony"; and (2) the current offense is committed within five years of the person completing a sentence for a felony or violent misdemeanor. *See* Wis. Stat. § 941.29(4m)(a)(1-2).

Wis. Stat. § 941.29(1g)(a) specifies offenses that are considered to be violent felonies, which include homicide, battery, mayhem, sexual assault, kidnapping, and felon in possession of a firearm.

Here, the State used Mr. Hill's 2011 conviction for felon in possession of a firearm to satisfy both preconditions under Wis. Stat. § 941.29(4m). The felon in possession conviction served as the "violent felony" under Wis. Stat. § 941.29(1g)(a). Additionally, the current offense was within five years of Mr. Hill completing his sentence for the prior felon in possession of a firearm conviction.

As discussed below, the mandatory minimum is unconstitutional as applied to Mr. Hill because it violates equal protection guarantees of both the United States and Wisconsin constitutions.

The constitutionality of a statute is a question of law reviewed *de novo*. *See State v. Smith*, 2010 WI 16, ¶8, 323 Wis. 2d 377, 780 N.W.2d 90. In an as-applied challenge, the defendant must prove the statute in question is unconstitutional as applied to him. *Smith*, 2010 WI 16, ¶ 9. The party challenging a statute's constitutionality must "prove that the statute is unconstitutional beyond a reasonable doubt." *See Mayo v. Wisconsin Injured Patients*, 2018 WI 78, ¶27, 383 Wis. 2d 1, 914 N.W.2d 678.

The Fourteenth Amendment to the United States Constitution forbids a state from denying any person the "equal protection of the laws." Wisconsin's corresponding constitutional guarantee is found in Article I, section 1.

The equal protection clause "is designed to assure that those who are similarly situated will be treated similarly." *Treiber v. Knoll*, 135 Wis. 2d 58, 68, 398 N.W.2d 756 (1987).

Because this case does not involve a suspect classification, "the state retains broad discretion to create classifications so long as the classifications have a reasonable basis." *State v. McManus*, 152 Wis. 2d 113, 131, 447 N.W.2d 654 (1989). "The fact that a statutory classification results in some inequity...does not provide sufficient grounds for invalidating a legislative enactment." *Id*.

Rather, the enactment must be upheld unless it is "patently arbitrary" and "bears no rational relationship to a legitimate government interest." *Id*. (internal quotation marks omitted). Of course, "any distinction [must] have some relevance to the purpose for which the classification is made." *Doering v. WEA Ins. Group*, 193 Wis. 2d 118, 132, 532 N.W.2d 432 (1995).

While rational basis scrutiny is a high standard, it is one that still allows for meaningful judicial review. *See generally, State v. Trepanier*, 204 Wis. 2d 505, 555 N.W.2d 394 (Ct. App. 1996). The question is whether the court can conceive of any facts upon which the legislation as applied to Mr. Hill could be reasonably based. *Smith*, 2010 WI 16, ¶16.

In its decision denying Mr. Hill's motion to dismiss, the circuit court concluded that it was "pretty clear" that there was "no room for any different interpretation" of Wis. Stat. § 941.29. (87:8; App. 11). However, this was not the issue before the court, as Mr. Hill raised an equal protection challenge.

In this instance, the question was, and remains, whether there is a reasonable relationship between the intent behind the enactment of the mandatory minimum penalty and the classification of felon in possession of a firearm as a "violent felony" such that the minimum penalty applies. *See State v. Smet*, 2005 WI App 263, ¶7, 288 Wis.2d 525, 709 N.W.2d 474.

The mandatory minimum was codified into law as part of 2015 Wisconsin Act 109, as a result of the

2015 Assembly Bill 220. According to the Wisconsin Legislative Counsel Act Memo, "2015 Wisconsin Act 109 imposes a mandatory minimum sentence for certain offenders who were previously convicted of a violent felony, and subsequently possess a firearm." Wisconsin Legislative Council Act Memo (November 30, 2015).[1] Based on the memo's language, and the statute's specific use of "violent felony," it is clear that the law is intended to deter individuals who have been convicted of violent felonies from later possessing a firearm, and to impose a significant penalty when they are not so deterred.

If the legislature's intent was to impose a mandatory minimum for nonviolent felonies, it could have applied the mandatory minimum to all offenses of felon in possession of a firearm. Alternatively, if the legislature intended to impose a mandatory minimum punishment for all individuals convicted of subsequent felon in possession charges, regardless of whether the conviction included allegations of violence, and previously convicted of the same offense, they could impose an enhancer, such as a second and subsequent enhancer, that includes a mandatory minimum. They did not do so.

Here, there can be no reasonable relation between the legislature's intent of additional punishment for violent felons who possess firearms and its decision to include felon in possession of a

[1]Act Memo available at https://docs.legis.wisconsin.gov/2015/related/lcactmelc/act109.

firearm that do not involve allegations of physical force or violence under its definition of a violent felony. The crime of felon in possession of a firearm contains two elements: first, that the defendant possess a firearm and second, that the defendant was convicted of a felony prior to the date of offense. Wis. JI-Criminal 1343. Neither of these elements contain any requirement that the defendant act in some way by the use of any physical force.

That is not to say that there are not scenarios in which possessing a firearm as a felon involves violence, such as shooting at another or using the gun to hit someone, and, thus, it is possible that a felon in possession of firearm offense could, in some instances, in fact constitute a violent offense.

However, this argument does not apply to Mr. Hill, as there was no allegation that his prior offense for felon in possession involved violence or physical force against another person or property, but rather was a simple possession of weapons, and there were no claims that Mr. Hill used the weapons to threaten, hurt or harm another individual or property at any point. Thus, Mr. Hill's prior conviction was not in fact a "violent" felony. Likewise, in this case, while Mr. Hill had a gun on his person, there were no allegations that he used the gun to hurt or harm another individual or property at any point. Again, the offense was not violent.

Mr. Hill does not dispute that the legislature has reasonable and practical grounds for more harshly punishing individuals who have previously committed

a violent felony if they later possess a gun. However, applying the mandatory minimum penalty in this circumstance to Mr. Hill is arbitrary and unreasonable, as Mr. Hill's prior conviction for felon in possession of a firearm was not, in fact, an offense of violence against another person or property.

Therefore, in this case, applying the mandatory minimum penalty to Mr. Hill based on his prior nonviolent felon in possession conviction is arbitrary and unreasonable.

In its decision, the court of appeals approved the application of the mandatory minimum sentence to Mr. Hill's circumstance by finding that "[a] firearm is a dangerous weapon" and that "possession of firearms can easily lead to violence." Moreover, the court of appeals found that Mr. Hill's "crime of possessing a firearm while a felon showed that he was prepared to be violent even if the possession itself did not entail violence." (Slip op. at 7; App. 9). Thus, the court's conclusion that the mandatory minimum confinement term is "reasonably related to the goal of repressing that violence" assumes anticipated violence where none in fact existed in this case, thus creating a straw man and failing to consider Mr. Hill's actual conduct, which did not involve any acts of physical violence, force or aggression such that he was "violent" or dangerous.

This Court should accept review of this case to address whether a "violent felony" for purposes of the application of the mandatory minimum confinement term required by Wis. Stat. §941.29(4m) to certain

felon in possession of firearm convictions includes a prior conviction for felon in possession that involves no physical violence, force or aggression.

CONCLUSION

For these reasons, it is respectfully requested that this Court grant this petition for review.

Dated this 26th day of September, 2023.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 2,452 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition 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 rules 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 or 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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 26th day of September, 2023.

Signed:
Electronically signed by
Andrea Taylor Cornwall
ANDREA TAYLOR CORNWALL
Assistant State Public Defender