In the Court of Appeals of Wisconsin

District III

Scot Van Oudenhoven,

Petitioner-Appellant,

v.

Wisconsin Department of Justice,

Respondent-Respondent

Appeal No. 2023AP000070-FT

Appeal from the Judgment of the Winnebago County Circuit Court, The Hon. Teresa S. Basiliere

Brief of Appellant

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Statement of Issues

1. Is a federal prohibition on the possession of firearms a valid reason for denial of a handgun purchase under Wis.Stats. § 175.35?

   Circuit Court answer: Yes

2. Does an expungement of a Wisconsin conviction qualify as an expungement under 18 U.S.C. § 921(a)(33)(B)(ii)?

   Circuit Court answer: No

Statement on Oral Argument and Publication

Petitioner Scot Van Oudenhoven ("Van Oudenhoven") does not believe oral argument is necessary in this case. While this is an issue of great statewide interest, the issue is straightforward and it is not likely that oral argument would assist the Court in deciding the case.

Van Oudenhoven believes that the opinion in the case should be published. Van Oudenhoven seeks a ruling of first impression in this state, and one that will have effect on many Wisconsinites purchasing handguns or applying for licenses to carry concealed weapons ("CCWs").

Statement of the Case

This is an action seeking review, under Wis.Stats. § 226.52, of the denial of a transfer of a handgun to Van Oudenhoven. The facts of the case are largely uncontested. The Petition sets out Van Oudenhoven's allegations and the following facts were admitted in the Department's Answer:

1. Van Oudenhoven brings this action seeking review, under Wis.Stats. § 226.52, of the denial of a transfer of a handgun to Van Oudenhoven.
2. [Not admitted].
3. Respondent is the Wisconsin Department of Justice (the "Department").
4. On or about May 28, 2022, Van Oudenhoven attempted to purchase a handgun.
5. The transfer of the handgun to Van Oudenhoven was denied by the Department Crime Information Bureau Firearms Unit.
6. Van Oudenhoven requested a review of the denial with the Department Crime Information Bureau Firearms Unit.
7. On June 22, 2022, the Deputy Director of the Unit sustained the denial.
8. Van Oudenhoven appealed the review.

9. On August 1, 2022, the Administrator of the Department Division of Law Enforcement Services affirmed the review.
10. Van Oudenhoven has been aggrieved by the decision of the Department because he is unable to purchase the handgun and the decision of the Department declares him to be ineligible to possess firearms.
11. [Not admitted].
12. [Not admitted].

Additional facts gleaned from the Administrative Record [Doc. 8] are:

13. Van Oudenhoven was convicted of battery in 1994 in Calumet County Circuit Court, case # 1994CM113. Doc. 8, p. 2.
14. The victim of the battery was the mother of Van Oudenhoven's child. *Id.*

On May 2, 2019, the Circuit Court of Calumet County entered an order expunging Van Oudenhoven's 1994 conviction. Doc. 10 [Order supplementing the Administrative Record with copy of expungement order].

Argument

A person desiring to purchase a handgun in Wisconsin generally must undergo a background check conducted by the Department. See Wis.Stats. § 175.35 and JUS 10.06. Pursuant to Wis.Stats. § 175.35(2g)(c), the

Department is to apply the criteria for eligibility to possess firearms listed in Wis.Stats. § 941.29. The Department then "approves" or "disapproves" of the transfer of the firearm.

Summary: The Circuit Court erred by concluding that a federal prohibition on possessing firearms is a valid reason for denying a handgun purchase under Wis.Stats. § 175.35.

State Law Does Not Support the Department's Disapproval

In the present case, the Department disapproved of the transfer to Van Oudenhoven. The Department does not cite to any of the criteria listed in Wis.Stats. § 941.29 as the reason for the disapproval. Instead, the Department disapproved the transfer based on 18 U.S.C. § 922(g)(9). Doc. 8, p. 23. The department (erroneously) states that that federal code section "prohibits individuals convicted of misdemeanor crimes of domestic violence from purchasing firearms." *Id.*

In reality, that code section prohibits the ***possession*** of firearms, not the ***purchase*** of firearms. More to the point, however, Wis.Stats. § 941.29 does not list prohibition by federal law, or conviction of a misdemeanor crime of domestic violence as a reason to deny a handgun purchase. Thus, the Department's basis for denial is invalid, regardless of whether the legal conclusion (that Van Oudenhoven has been convicted of a misdemeanor

crime of domestic violence) is true. That is, it appears that Wisconsin law does not support denial of a handgun purchase solely on the basis of prohibition of possession of firearms under federal law.

One might conclude that the Legislature surely meant to deny such a purchase. Perhaps so, but it is not for this Court to guess at what the Legislature intended to do. The plain language of the statute says nothing about this situation. For this reason alone, the Department's decision should be reversed.

Van Oudenhoven Has Not Been Convicted of a Misdemeanor Crime of Domestic Violence

Summary: The Circuit Court erred by ruling that Van Oudenhoven's expungement did not qualify as an expungement under 18 U.S.C. § 921(a)(33)(B)(ii).

Even if this Court reasons that the Department cannot approve purchasing a handgun by someone prohibited under federal law from possessing a firearm, Van Oudenhoven still should prevail. That is because he is not prohibited under federal law from possessing firearms.

18 U.S.C. § 922(g)(9) generally prohibits possession of firearms by people convicted of a misdemeanor crime of domestic violence ("MCDV"). Van Oudenhoven assumes *arguendo* that his 1994 conviction would count

as a MCDV under federal law were it not for the expungement. The effect of the expungement is the crux of this case.

18 U.S.C. § 921(a)(33)(B)(ii) provides, "A person shall not be considered to have been convicted of [a MCDV] for purposes of this chapter if the conviction has been expunged or set aside… unless the … expungement … expressly provides that the person may not ship, transport, possess, or receive firearms." The expungement [Doc. 10, p. 3] plainly states that Van Oudenhoven filed a Petition to expunge his conviction and the Court granted the Petition and ordered, "The clerk is ordered to expunge the court's record of the conviction." There is no mention in the expungement regarding Van Oudenhoven's right (or lack thereof) to ship, transport, possess, or receive firearms.

When interpreting a statute, courts must begin with the text of the statute. *State v. Duewell*, 369 Wis.2d 72, ¶6, 879 N.W.2d 808 (Wis.App. 2016). If the meaning of the text is clear and unambiguous, then the inquiry ends. *Id.*

Congress did not define what it meant by the word "expungement." The Supreme Court of the United States, however, has analyzed the history of the exemption language and has discussed the meaning of the terms. In *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 103 S.Ct. 986, 74

L.Ed.2d 845 (1983), the Court considered the effect of a state conviction expungement on the federal felon in possession statute (18 U.S.C. § 922(g)(1)). This was before the enactment of the exemptions in 18 U.S.C. § 921(a)(20) and (a)(33).[1] *Dickerson* ruled that an expungement did not remove the federal prohibition on firearm possession, noting, "expunction under state law does not alter the historical fact of the conviction…." and "expunction does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime…." 460 U.S. at 115. *Dickerson* went on to observe that expungement statutes in the various states vary widely in their scope and effects. 460 U.S. at 121 ("Over half the states have enacted one or more statutes that may be classified as expunction provisions that attempt to conceal prior convictions or to remove some of their collateral or residual effects. These statutes differ, however, in almost every particular…. The statutes also differ in their actual effect.")

In response to *Dickerson,* Congress implemented the exception in 18 U.S.C. § 921(a)(20). *Logan v. United States,* 128 S.Ct. 475, 169 L.Ed.2d 432, 552 U.S. 23, 35 (2007). Ten years later, Congress adopted the

[1] The exemption in the present case for MCDVs, in 18 U.S.C. § 921(a)(33), is identical in material respects to the exemption for felons in possession in 18 U.S.C. § 921(a)(20), so cases analyzing one inform the interpretation of the other.

similarly-worded exemption at issue in the present case (found in 18 U.S.C. § 921(a)(33)(B)(ii). 552 U.S. at 36. In *Logan*, the Court noted, "Congress' decision to have restoration triggered by events governed by state law insured anomalous results. The several states have considerably different laws governing pardon, expungement, and forfeiture and restoration of civil rights." 552 U.S. at 34. The Court announced a common understanding of "expungement," "set-aside," "pardoned," and "civil rights restored" as "Each term describes a measure by which the government relieves an offender of ***some*** or all of the consequences of his conviction. 552 U.S. at 32 [emphasis supplied].

Under a plain reading of 18 U.S.C. § 921(a)(33)(B)(ii), Van Oudenhoven should not be considered to be convicted of a MCDV. Even if he were so considered before the expungement, the expungement erased that effect. And it is not the province of the judiciary to attempt to fill in perceived gaps in what Congress enacted. *Logan,* 552 U.S. at 35, FN 6 ("Enlargement of a statute by a court so that what was omitted, presumably by inadvertence, may be included within its scope transcends the judicial function.") When Congress said an expungement negates a conviction for purposes of MCDV consideration, we must assume it meant what it said.

The circuit court disagreed, with a one-sentence analysis:

> Hence, since the Wisconsin expungement procedure does not completely remove the consequence of the conviction, it appears to fall outside of the expungement exception to the firearm restriction. See 18 USC 922, and 18 USC 921. See also Crank [v. United States, 539 F.3d 1236 (10th circuit 2008].

Doc. 18, p. 3-4.

In Van Oudenhoven's administrative appeals, the Department explained its disagreement with Van Oudenhoven's position:

> Prior to a court decision in December 2018, the Department of Justice took the position that individuals with an expunged conviction could possess a firearm. In December 2018, however, in *State v. Braunschweig*, 2018 WI 113, 384 Wis.2d 742, 921 N.W.2d 199, the Wisconsin Supreme Court write that '[e]xpunction … *does not invalidate the conviction.*' *Id.* ¶ 22 (emphasis added). As a result, a person whose conviction prohibited possession of a firearm before expungement remains prohibited from possessing a firearm after expungement.

Doc 8, pp. 2-3. The circuit court relied on *Braunschweig* for the proposition that expungement does not completely remove the consequence of the conviction. The issue in *Braunschweig* was whether a previous (expunged) conviction for operating while intoxicated ("OWI") would make a subsequent conviction a second one for sentencing purposes. The Supreme Court said that it would count, because an expunged conviction is not an invalidated conviction and the Department of Motor Vehicles may keep its own traffic records even if court records have been expunged.

The problem with the circuit court's decision is that nothing in the federal statute requires that an expungement have the effect of invalidating the conviction. As the Supreme Court of the United States noted in *Logan,* expungement means merely a measure by which the government relieves an offender of some or all of the consequences of his conviction. It is erroneous to conclude that the expungement has to remove all consequences of a conviction.

The circuit court's ruling might be more applicable in a different case, say one where a ***state*** law prohibits possession of a firearm for a conviction. But that is not the situation before the Court in the present case. The present question is whether an expunged conviction under ***state*** law for what would otherwise be a MCDV counts under ***federal*** law. It is important to note here that Wisconsin has no independent state-law analog for a MCDV. Either Van Oudenhoven's conviction counts as a MCDV under federal law or it has no effect at all on his right to possess firearms.

In effect, the circuit court's decision writes into the federal statute language that Congress did not pass – that an expungement only eliminates a MCDV if the expungement has the effect of invalidating the conviction. If Congress sought that result, it surely knew how to say it. Instead, the federal statute contains a provision that makes Van Oudenhoven's conviction not

count because it was expunged and because the expungement does not make an express exception for possession of firearms.

As noted above, this case might be different for a state law prohibition. But the Department plainly said in its administrative record that the reason it disapproved the transfer was because of a federal prohibition. Because the federal statute contains an exception for expunged convictions, federal law is not dependent on the effect ***under state law*** of the expungement. The federal statute does not require that the state expungement have any particular effect on the conviction as a matter of state law. In fact, the federal statute applies equally to a conviction that was expunged ***or set aside.***

As noted above, the circuit court relied completely on *Crank* for its conclusion that a state law expungement only counts for federal purposes if it completely removes the effects of a conviction. The circuit court did not perform an independent analysis of the statutes in question. Because this case involves the interpretation of law, this Court must conduct a *de novo* review. *Nehls v. Nehls,* 343 Wis.2d 499, 819 N.W.2d 335, 2012 WI App 85 ¶ 7 (Wis.App. 2012)

The *Crank* case is not binding on this Court. *State v. Mechtel,* 176 Wis.2d 87, 499 N.W.2d 662, 666 (1993) (“It is clear, however, that

determinations on federal questions by either the federal circuit courts of appeal or the federal district courts are not binding upon state courts.") This Court is not bound by *Crank.* On the other hand, as a decision of the Supreme Court of the United States, *Logan* is binding on this Court.

The *Crank* court concluded that when Congress wrote "expunged or set aside," it intended the words both to mean the same thing: "erase or destroy" and "annul or vacate." 539 F.2d at 1245. *Crank* came to that conclusion because the "unless" clause omits the phrase "set aside." And, *Crank* decided, unless the expungement erased all vestiges of a conviction, it was not an expungement for federal MCDV purposes. This conclusion, however, writes into the statute an unless clause that Congress did not create.

Congress wrote its own unless clause, and that clause is the only operative one ("unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.")

The 7th Circuit provides a different analysis. In *United States v. Erwin*, 902 F.2d 510 (7th Cir. 1990), the Court considered the language of 18 U.S.C. § 921(a)(20) (which is contains the identical unless clause as 18 U.S.C. § 921(a)(33)). The Court concluded that the unless clause is an "anti-

mousetrapping" rule. 902 F.2d at 512 ("If the state sends a felon a piece of paper implying that he is not longer 'convicted' and that all civil rights have been restored, a reservation in a corner of the state's penal code can not be the basis of a federal prosecution.") *Erwin* was followed in *United States v. Glaser*, 14 F.2d 1213 (7th Cir. 1994).

In the present case, the state issued Van Oudenhoven a document called an "Order on Petition to Expunge Court Record of Conviction." expungement." Doc. 10, p. 3. In it, the circuit court ordered "The clerk is ordered to expunge the court's record of conviction." *Id.* The Order says nothing about firearms. Under the *Erwin-Glaser* logic, because the State of Wisconsin gave Van Oudenhoven a piece of paper implying that his conviction had been erased, the State was required to tell him (if indeed it were so) that he could not possess firearms. Because the State failed to do so, the unless clause of 18 U.S.C. § 921(a)(33) applies and Van Oudenhoven is not "convicted" of the MCDV. The 4th Circuit agrees with the 7th Circuit. *United States v. McBryde*, 938 F.2d 533 (4th Cir. 1991).

Conclusion

State law does not support denial of a firearm purchase on account of a federal prohibition. Even if it did, however, Van Oudenhoven has not been convicted of a MCDV because his battery conviction was expunged.

Van Oudenhoven requests the Court reverse the decision of the circuit court with an order requiring the Department to approve the transfer and not to consider Van Oudenhoven's 1994 conviction to be a MCDV for any future purposes.

Electronically signed by: John R. Monroe
Attorney for Appellant

Certificate of Service

I certify that this Brief is being filed electronically and a notice of filing will be sent automatically to:

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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 3,084 words.

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