STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2023AP0070-FT

SCOT VAN OUDENHOVEN,

Petitioner-Appellant,

v.

WISCONSIN DEPARTMENT OF JUSTICE,

Respondent-Respondent.

APPEAL FROM A FINAL JUDGMENT OF
THE WINNEBAGO COUNTY CIRCUIT COURT,
THE HONORABLE TERESA S. BASILIERE, PRESIDING

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

INTRODUCTION

The Wisconsin Department of Justice denied Scot Van Oudenhoven's handgun purchase because he had been convicted of a misdemeanor crime of domestic violence. He offers two theories for reversal, but neither is correct.

First, DOJ can deny purchases based on federal law because it performs background checks as an agent of the federal government. Further, state law recognizes that DOJ will be reviewing for federal violation.

Second, the exception for expunged convictions, but that does not apply here. Federal courts hold that an expungement must wipe out all the consequences of a conviction. A Wisconsin expungement does not negate the fact of the conviction.

STATEMENT OF THE ISSUES

1. Federal law allows states to serve as a "point of contact" for federal background checks. The federal government appointed DOJ as a point of contact, which is recognized by the state statute governing firearm background checks. Does DOJ have the authority to deny a firearm purchase based on a federal prohibition?

The circuit court did not expressly address this issue but impliedly answered yes by affirming DOJ's decision.

This Court should answer yes and affirm.

2. Federal law bars someone convicted of a misdemeanor crime of domestic violence from possessing a firearm. While the law includes an exception for convictions that have been "expunged or set aside," federal courts interpret this exception to require that the expungement completely remove the effects of the conviction. The Wisconsin Supreme Court has held that an expungement under Wisconsin law does not remove all effects of the conviction.

Does Van Oudenhoven's Wisconsin expungement fall outside the exception under federal law?

The circuit court answered yes.

This Court should answer yes and affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

DOJ does not request oral argument.

Publication may be warranted to clarify whether Wisconsin expungements are within the scope of 18 U.S.C. § 921(a)(33)(B)(ii). *See* Wis. Stat. § (Rule) 809.23(1)(a)1. DOJ notes that this is an issue of federal statutory interpretation, but which is relevant to state court proceedings.

STATEMENT OF THE CASE

I. DOJ reviews handgun purchases on behalf of the federal government.

In the 1990s, the federal government established the national instant criminal background check system (NICS) to determine "whether receipt of a firearm by a prospective transferee would violate section 922 of Title 18 or State law." 34 U.S.C. § 40901(b)(1). The regulations implementing NICS recognize that a person may be "denied the right to obtain a firearm as a result of a NICS background check performed by the Federal Bureau of Investigation (FBI) or a state or local law enforcement agency." 28 C.F.R. § 25.1.

Those regulations define a "POC (Point of Contact)" as "a state or local law enforcement agency serving as an intermediary between an FFL [federal firearm licensee] and the federal databases checked by the NICS." 28 C.F.R. § 25.2. POCs "receive NICS background check requests from FFLs, check state or local record systems, perform NICS inquiries, determine whether matching records provide information

demonstrating that an individual is disqualified from possessing a firearm under Federal or state law, and respond to FFLs with the results of a NICS background check." 28 C.F.R. § 25.2. The regulations further provide that "[i]n states where a POC is designated to process background checks for the NICS, FFLs will contact the POC to initiate a NICS background check." 28 C.F.R. § 25.6(d). The POC then conducts the background check and approves or denies the request depending on the results. 28 C.F.R. § 25.6(g)(2).

Since 1998, DOJ has "act[ed] as the point of contact for NICS checks for handgun transfers." (R. 15:13–14.) This was announced in a November 9, 1998, open letter from the Bureau of Alcohol, Tobacco and Firearms to all Wisconsin federal firearms licensees directing licensees to contact DOJ to request background checks for handgun transactions. (R. 15:13–14.)

II. Van Oudenhoven was convicted of misdemeanor battery against the mother of his child, the record of which was later expunged.

On September 15, 1994, Van Oudenhoven was convicted of misdemeanor battery under Wis. Stat. § 940.19(1), Case No. 94-CM-119 in Calumet County Circuit Court. (R. 8:15.) The police report indicated that he and the victim "have a baby (four weeks old together)." (R. 8:41.)

In 2019, the circuit court ordered "the clerk . . . to expunge the court's record of the conviction." (R. 10:3.)

III. Van Oudenhoven attempts to purchase a firearm, but DOJ blocks the sale due to his conviction.

In May 2022, Van Oudenhoven attempted to purchase a firearm. (R. 8:10.) DOJ denied the purchase. (R. 8:7, 10.) Van Oudenhoven appealed the denial through DOJ's administrative process. (R. 8:7.)

DOJ sustained the denial, concluding that his conviction for battery was a misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9). (R. 8:6.) Van Oudenhoven appealed DOJ's upholding of the denial under Wis. Admin. Code JUS § 10.08, arguing that DOJ erred in treating his expunged conviction as a conviction. (R. 8:4.)

DOJ affirmed the denial. (R. 8:2–3.) It first noted that a misdemeanor battery conviction when the victim is the mother of the perpetrator's child qualifies as a misdemeanor crime of domestic violence. (R. 8:2.) It then explained that an expunged conviction did not restore the right to possess a firearm because the Wisconsin Supreme Court holds that an expunction does not invalidate the underlying conviction. (R. 8:2–3 (citing *State v. Braunschweig*¸ 2018 WI 113, ¶ 22, 384 Wis. 2d 742, 921 N.W.2d 199).)

IV. The circuit court affirms the denial.

After briefing by the parties (R. 13; 15–16), the circuit court affirmed DOJ's denial of the firearm purchase in a written decision (R. 18). The court first determined that Van Oudenhoven's conviction was a misdemeanor crime of domestic violence. (R. 18:2–3.) It then held that "since the Wisconsin expungement procedure does not completely remove the consequence of the conviction, it appears to fall outside the expungement exception to the firearm restriction." (R. 18:4.)

This appeal followed. (R. 20.)

STANDARD OF REVIEW

This is a judicial review under chapter 227. In an appeal of "a circuit court order reviewing an agency decision," this Court reviews "the decision of the agency, not the circuit court." *Lake Beulah Mgmt. Dist. v. DNR*, 2011 WI 54, ¶ 25, 335 Wis. 2d 47, 799 N.W.2d 73. Van Oudenhoven asks this Court to "set aside or modify" DOJ's decision because he

alleges that it "erroneously interpreted a provision of law and a correct interpretation compels a particular action." Wis. Stat. § 227.57(5).

This Court's reviews statutory interpretation issues de novo. *DOR v. River City Refuse Removal, Inc.*, 2007 WI 27, ¶ 26, 299 Wis. 2d 561, 729 N.W.2d 396. Courts no longer defer to the statutory interpretations of administrative agencies. Wis. Stat. § 227.57(11); *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21.

ARGUMENT

I. DOJ has the authority to deny a firearm purchase because it is a point of contact for the federal government, which is recognized by state law.

Van Oudenhoven contends that DOJ has no authority to deny a firearm purchase based on a violation of federal law. This argument ignores that DOJ is a federal point of contact and thus performs background checks on behalf of the federal government. This status gives DOJ the authority to block sales that would be in violation of federal law. Van Oudenhoven's brief does not even address this federal authority, even though DOJ briefed it in the circuit court. (R. 15:9–11.)

As noted above, the federal government can make a state law enforcement agency a POC for performing background checks on firearm purchases. 28 C.F.R. § 25.2. The regulations specifically provide that in states like Wisconsin, "where a POC is designated to process background checks," the federally licensed firearm dealers are to "contact the POC to initiate a NICS background check." 28 C.F.R. § 25.6(d). The POC then conducts the background check and approves or denies the request depending on the results. 28 C.F.R. § 25.6(g)(2).

Since 1998, the State of Wisconsin has "act[ed] as the point of contact for NICS checks for handgun transfers." (R. 15:13–14.) ATF issued an open letter to all Wisconsin federal firearms licensees directing them to contact DOJ for background checks on handgun transactions. (R. 15:13–14.) As a result of these federal statutes and regulations, DOJ has the authority to deny firearms purchases that would violate federal law because it is acting as an agent of the federal government.[1]

State law recognizes DOJ's authority to deny based on federal law. The state statute relating to DOJ's firearm background checks provides that

> If the search indicates that it is unclear whether the person is prohibited under state *or federal law from possessing a firearm* and the department needs more time to make the determination, the department shall make every reasonable effort to determine whether the person is prohibited under state *or federal law from possessing a firearm* and notify the firearms dealer of the results as soon as practicable . . . .

Wis. Stat. § 175.35(2g)(c)4.c. This shows the Legislature understood DOJ would be performing NICS background checks for the federal government as a POC and notifying dealers when transfers were prohibited under federal law. And the statutes also recognize that DOJ has the authority to contract with the federal government. *See* Wis. Stat. § 165.23(15).

Van Oudenhoven claims that DOJ has no authority based on different sections of Wis. Stat. § 175.35 that do not mention federal law. But these are additional, Wisconsin-

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[1] Van Oudenhoven says the federal law bars possession of a firearm, not a purchase. (App. Br. 6.) This distinction is immaterial because someone purchasing a firearm will possess the firearm upon completion of the purchase.

specific provisions that allow for denial on state-law grounds. They do not invalidate section 175.35(2g)(c)4.c., which specifically provides that DOJ will be reviewing for federal law prohibitions. That provision does not address the process for denials based on federal law because that is governed by federal law, which states cannot change.

II. Van Oudenhoven is barred from possessing a firearm even though the record of his conviction was expunged.

A. The battery conviction is a misdemeanor crime of domestic violence.

Van Oudenhoven does not contest that his conviction was a misdemeanor crime of domestic violence under 18 U.S.C. § 922(g)(9), defined as a misdemeanor that "has, as an element, the use or attempted use of physical force . . . committed by" someone with one of a specified list of domestic relationships. 18 U.S.C. § 921(a)(33)(A). Here, the relevant relationship is "by a person with whom the victim shares a child in common." *Id.*

Battery in Wisconsin is a crime that "has, as an element, the use or attempted use of physical force" under 18 U.S.C. § 921(a)(33)(A). A crime with an element of mere "offensive touching" qualifies as a misdemeanor crime of domestic violence. *United States v. Castleman*, 572 U.S. 157, 162–63 (2014). That is met here, where battery requires one to "cause[] bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed." Wis. Stat. § 940.19(1).

The battery conviction also satisfies the domestic relationship requirement because the victim and Van Oudenhoven had a child in common. (R. 8:41.)

B. The expungement did not restore Van Oudenhoven's right to possess a firearm.

While Van Oudenhoven's conviction was expunged, expungements under Wisconsin law do not meet the definition of an "expungement" necessary to restore firearm rights under federal law.

Federal law provides that someone "shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been *expunged or set aside*." 18 U.S.C. § 921(a)(33)(B)(ii). In defining "expunged or set aside," federal courts hold that "that Congress intended both terms equivalently to require that a state procedure completely remove the effects of the conviction in question." *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1245 (10th Cir. 2008); *Jennings v. Mukasey*, 511 F.3d 894 (9th Cir. 2007).

In the Tenth Circuit case, the State of Wyoming challenged ATF's interpretation of the term "expunged" in section 921(a)(33)(B)(ii). *Crank*, 539 F.3d at 1238–39. The court, conducting a de novo review of the ATF interpretation, began by noting that "[t]here are two possible interpretations for the phrase 'expunged or set aside.'" *Id.* at 1244. One was that "that Congress intended the two terms to have separate meanings," while the other was that Congress "intended the two terms to have the same meaning and used separate terms merely to avoid potential issues of terminology created by the varying language used in the different laws of the States." *Id.* at 1245. The court concluded that "Congress intended both terms equivalently to require that a state procedure completely remove the effects of the conviction in question." *Id.*

The court offered two plain language reasons for its interpretation. First, dictionary definitions indicated that both terms "require a complete removal of the effects of a

conviction." *Id.* Second, the structure of the statute "suggests that Congress intended the terms to be interpreted equivalently." *Id.* The first part of subsection 921(a)(33)(B)(ii) lists four state actions that remove disability: expunging, setting aside, pardoning, or restoring civil rights. *Id.* The second part, however, only uses three terms: pardoning, expunging, or restoring civil rights. *Id.* This showed that Congress intended the term "expunging" to include both expunging and setting aside and thus they both have the same meaning. *Id.*

The Tenth Circuit relied on the Ninth Circuit's *Jennings* decision, in which a firearms licensee challenged the ATF's denial of his renewal application based on a misdemeanor crime of domestic violence that had been expunged under California law. 511 F.3d at 896. The Ninth Circuit relied on a California decision that held the relevant statute "does not, properly speaking, 'expunge' the prior conviction." *Id.* at 898 (quoting *People v. Frawley*, 98 Cal. Rptr. 2d 555, 559 (Cal. Ct. App. 2000)). The California "statute does not purport to render the conviction a legal nullity" and provided that it "is ineffectual to avoid specified consequences of a prior conviction." *Id.* (quoting *Frawley*, 98 Cal. Rptr. 2d at 559). As a result, the Ninth Circuit held that the relief the dealer obtained under California law "did not expunge his conviction for purposes of 18 U.S.C. § 922(g)(9)." *Id.* at 899.

The same is true here. Under the definition used by the federal courts, an expungement under Wisconsin law is not an "expungement" under section 921(a)(33)(B)(ii) because it does not completely remove the effects of conviction. In *Braunschweig*, the Wisconsin Supreme Court held that an expunged conviction is still a conviction, just with the record of that conviction removed from court files. *Braunschweig*, 384 Wis. 2d 742, ¶¶ 19–24. Therefore, the person still has

been "convicted" of the crime even if it has been expunged from the court records.

The *Braunschweig* court reasoned that the expunction statute has the effect of "expunging the record," *id.* ¶ 19 (quoting Wis. Stat. § 973.015(1m)(b)), which means "the clerk of court seals the case and destroys the court records." *Id.* The court contrasted that outcome with a sentence that is vacated, which "unlike expunction, removes the fact of conviction." *Id.* ¶ 21. The court concluded: "Vacatur invalidates the conviction itself, whereas expunction of a conviction merely deletes the evidence of the underlying conviction from court records. Expunction, unlike vacatur, does not invalidate the conviction." *Id.* ¶ 22. In *Braunschweig*, that holding meant that the defendant's prior expunged conviction would be considered for purposes of sentencing for a subsequent offense. *Id.* ¶ 2.

Here, as in *Braunschweig*, Van Oudenhoven's expungement does not completely remove the effects of his conviction under Wisconsin law. The conviction is still valid; the records have merely been removed from the court files. As a result, his expungement does not satisfy the federal requirement that an expungement "completely remove the effects of the conviction in question." *Crank*, 539 F.3d at 1245. While these federal cases are not binding on this Court, they are the only federal authority interpreting the provision at issue.

C. The authority relied upon by Van Oudenhoven does not support his argument.

Van Oudenhoven relies on authority interpreting a different statute, 18 U.S.C. § 921(a)(20). His unstated premise is that courts have read section 921(a)(20) to mean that a conviction is "expunged or set aside" if the offender's civil rights are restored, and that this also applies to section

921(a)(33). (App. Br. 8–15.) But the plain language of section 921(a)(33) prohibits that interpretation, and courts have not interpreted section 921(a)(20) the way Van Oudenhoven suggests.

The wording of section 921(a)(33)(B)(ii) is clear that a court's expunction or setting aside of a conviction is a separate act from another branch of government's pardon or restoration of civil rights. Section 921(a)(33)(B)(ii) excludes a conviction "if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored." 18 U.S.C. § 921(a)(33)(B)(ii). The provision groups the two actions taken by courts regarding the conviction itself—"expunged or set aside"—separately from the two actions taken by other branches of government regarding the effects of a conviction—pardon or civil rights restoration.

The restoration of civil rights thus does not define what constitutes expungement. Rather, it is a different act to be interpreted on its own terms. Unsurprisingly, *Crank* looked at "expunged or set aside" as a pair and held them to be equivalent; the interpretation of the other two options was not relevant to that analysis. *Crank*, 539 F.3d at 1245.

Van Oudenhoven points to authority applying section 921(a)(20), which has slightly different language and relates to the definition of a "felony conviction."[2] But even if the two provisions were identical, the cases he cites applying section

[2] Section 921(a)(20) provides, "What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms."

921(a)(20) don't support his premise. To the contrary, *United States v. Erwin*, 902 F.2d 510, 512 (7th Cir. 1990), supports DOJ's decision here.

In *Erwin*, the Seventh Circuit held that "[w]hen state law deems a person convicted, that is dispositive for federal purposes," and "a federal court [need not] disregard the state's definition of a conviction just because the state has restored any one civil right." *Erwin*, 902 F.2d at 512. The court explained that the second sentence in section 921(a)(20) applies only when "the state sends the felon a piece of paper implying that he is no longer 'convicted' and that all civil rights have been restored." *Id.* (emphasis omitted). In contrast, when "the state sends no document granting pardon or restoring rights, there is no potential for deception, and the question becomes whether the particular civil right to carry guns has been restored by law." *Id.* at 513.

Here, Van Oudenhoven received no document purporting to restore his rights or saying he was no longer convicted. Instead, he obtained an order stating that the court's record of conviction would be expunged. (R. 10:3.) At the time of the expungement in 2019, the Wisconsin Supreme Court had made clear that this did not remove the fact of conviction and any attendant consequences. *Braunschweig*, 384 Wis. 2d 742, ¶¶ 21–22. Under state law, he is still considered convicted, therefore the exception in section 921(a)(33)(B)(ii) does not apply.

Logan v. United States, 552 U.S. 23 (2007), also does not support Van Oudenhoven's position. There, in dicta, the court characterized the phrase "conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored" in section 921(a)(20) as involving actions that relieve an offender "from some or all of the consequences of his conviction." *Id.* at 26, 28. The Court did not say that "some" covered all four categories—nor could it when some of the actions relieve all consequences—or that

the reference to "some" applied to expungement. In any event, that passage was not relevant to the holding because none of the convictions at issue "ha[d] been expunged or set aside." *Id.* at 26.

* * *

DOJ has the authority under federal and state law to determine whether a person is prohibited from possessing a firearm under federal law. The exception in section 921(a)(33)(B)(ii) does not apply because Van Oudenhoven's expunction did not remove the fact of his conviction. As the circuit court recognized, DOJ correctly denied the purchase.

CONCLUSION

For the foregoing reasons, this Court should affirm DOJ's denial of the firearm purchase.

Dated this 10th day of March 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font, and the court's January 27, 2023, expedited briefing order. The length of this brief is 2676.

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 10th day of March 2023.

Electronically signed by:

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