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

Reply Brief of Appellant

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Appellee Wisconsin Department of Justice (the "Department") argues that Appellant Scot Van Oudenhoven ("Van Oudenhoven") was convicted[1] of a misdemeanor crime of domestic violence ("MCDV") as defined under federal law and that consequently the Department properly denied a handgun purchase attempt by Van Oudenhoven. Van Oudenhoven will show that the Department's arguments are incorrect.

State Law Does Not Support the Department's Disapproval

The Department cites to Wis.Stats. § 175.35(2g)(c) as authority for its denial of Van Oudenhoven's handgun purchase. That section, however, only indicates what the Department should do if it is ***unclear*** if a putative purchaser of handgun is prohibited under state (or federal) law from possessing a firearm. And it does not give the Department ***any*** direction regarding approval or denial of purchases. Even if it did, the problem with the Department's reliance on this section is that the Department never has asserted that it is unclear whether Van Oudenhoven is prohibited form possessing firearms.

[1] The Department cites to Calumet County case # 1994 CM 119. As Van Oudenhoven stated in his opening brief, the correct case number is 1994 CM 113.

The section that does apply in the present case is Wis.Stats. § 175.35(2g)(b).[2] That section states, "If the search indicates that the transferee is not prohibited from possessing a firearm under s. 941.29, the department ***shall*** provide the firearms dealer with a unique approval number." [Emphasis supplied]. The word "shall" in a statute is presumed to be mandatory. *In re C.A.K.*, 154 Wis.2d 612, 621, 453 N.W.2d 897 (1990). Thus, this section, which actually ***does*** apply in the present case, directs the Department to look to Wis.Stats. § 941.29, and, if the purchaser is not prohibited ***by that statute*** from possessing a firearm, the Department "shall" approve the transfer.

Wis.Stats. § 941.29(1m) contains a short of list of statuses that make a person ineligible to possess a firearm, but two things are absent from that list: 1) having been convicted of a MCDV; or 2) being prohibited under federal law from possessing firearms. The Department's referral to a different statute, which addresses only how quickly the Department must resolve unclear backgrounds, supports Van Oudenhoven's position and not the Department's. When the legislature uses different words in different statute sections, it is presumed that the different words have different

[2] Van Oudenhoven mistakenly referred to this section as 175.35(2g)(c) in his opening brief.

meanings. *Masri v. State*, 2014 WI 81, ¶ 77, 356 Wis.2d 405, 850 N.W.2d 298 (2014).

Thus, the inclusion by the legislature in Wis.Stats. § 175.35(2g)(c) of a reference to federal law and the exclusion by the legislature in Wis.Stats. § 175.35(2g)(b) of any such reference means that the legislature did not intend to include federal law in the latter statute section. Moreover, courts must presume that the legislature meant what it said. *Boucher v. Wis.Cent.Ry.Co.*, 141 Wis. 160, 123 N.W. 913 (1909). In the present case, the legislature said in clear, unambiguous words that if a person is not prohibited from possessing a firearm under Wis.Stats. § 941.29, the Department must approve the sale. The Department apparently concedes that Van Oudenhoven is not prohibited under § 941.29 from possessing a firearm, so it was required to approve the sale to Van Oudenhoven.

Van Oudenhoven Has Not Been Convicted of a MCDV

18 U.S.C. § 921(a)(33)(B)(ii) states, "A person shall not be considered to have been convicted of [a MCDV] 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…unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." There is no dispute that Van Oudenhoven's conviction at

issue in the present case has been expunged. There also is no dispute that the expungement he received does ***not*** say anything at all about possessing firearms. From the plain language of the federal law and the face of Van Oudenhoven's expungement, Van Oudenhoven's conviction is not, as a matter of federal law, considered to be a MCDV.

Nevertheless, the Department cites to federal appellate cases for the propositions that 1) "expunge" and "set aside" have the same meaning; and 2) that meaning is "the complete removal of the effects of a conviction." As noted in Van Oudenhoven's opening brief, the opinions of the federal circuit courts are 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.")

More importantly, however, is the logical flaw in the cases the Department cites in light of the language of the federal statute. The federal statute says a conviction is not a MCDV if the conviction has been expunged and the expungement does not say the person cannot possess firearms. Consider that sentence using the Department's "definition" of expungement in lieu of the word expunge: *A conviction is not a MCDV if the effects of the conviction have been completely removed and the complete removal of the*

effects of the conviction does not say the person cannot possess firearms. It is, of course, unnecessary to say a "complete removal" does not leave something unremoved. A "complete removal" would, after all, be incomplete if it retained a firearms prohibition. The only logical reading of the federal statute is that Congress contemplated that an expungement may not completely remove the effects of a conviction. That is, Congress did not expect an expungement would be a "complete removal" of the effects of conviction.

Moreover, a case from the Supreme Court of the United States, whose opinions ***are*** binding on this Court, undermines the Department's positions. *Logan v. United States*, 128 S.Ct. 475, 169 L.Ed.2d 432, 552 U.S. 23 (2007). *Logan* examined the definition of a crime punishable by imprisonment for a term exceeding one year, which is listed in 18 U.S.C. § 921(a)(20). That definition has an exception for "Any conviction which has been expunged, or set aside, or for which a person has been pardoned or has had civil rights restored." Because Congress used the same words to make exceptions for those convicted of crimes potentially constituting both felonies or MCDVs, it is instructive to consider Supreme Court opinions interpreting either. Moreover, *Logan* actually discussed 18 U.S.C. § 921(a)(33)(B)(ii), pointing out that that definition (relating to MCDVs) "tracks § 921(a)(20)…." 552

U.S. at 36. And, the Supreme Court thought it instructive to note the "tracking" of these two (virtually identical) definitions, and used one to understand the other.

Logan repeatedly made reference to all four possibilities (i.e., expunge, set aside, pardon, restoration of rights). At no point did *Logan* even imply that any of them, including expungement and set aside, were synonymous. But the Court did explain what they mean. "***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]. Thus, contrary to the circuit opinions upon which the Department relies, the Supreme Court has made clear that complete removal of effects of conviction is not required. ***Each*** term can be a measure of relieving an offender of ***some*** of the consequences of his conviction.

The Department tries to pass this explanation off as dicta. It isn't. In the case interpreting what constitutes a restoration of rights, the Court necessarily had to explore what a restoration of rights is, and it interpreted that phrase in part based "the company of words" in the same sentence. *Id.* Thus, the Court's explanation of what a restoration of rights is was in part based on the fact that it was in the same list as, *inter alia*, expungements.

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.

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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 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 1,530 words.

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