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06-20-2024
CLERK OF WISCONSIN
SUPREME COURT

SUPREME COURT
STATE OF WISCONSIN

SCOT VAN OUDENHOVEN,
Petitioner,

v.

WISCONSIN DEPARTMENT OF JUSTICE,
Respondent

PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS IN CASE NUMBER 2023AP70-FT

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Petitioner Scot Van Oudenhoven petitions the Court pursuant to Wis.Stat. § 809.62 for review of a decision of the Court of Appeals. The case pertains to the denial by Respondent Department of Justice ("DOJ") of a purchase of a firearm by Van Oudenhoven, and the application of federal law to the expungement of a conviction under Wisconsin law.

Statement of the Issues

1. Whether an expungement under Wisconsin law qualifies as an "expungement" as that term is used in 18 U.S.C. § 921(a)(33)(B)(ii). This issue was raised in the Court of Appeals in Van Oudenhoven's opening brief and the Court of Appeals ruled that an expungement under Wisconsin law is not an expungement under federal law.

Criteria for Review

A decision by this Court will help develop, clarify or harmonize the law, and the question presented is a novel one, the resolution of which will have statewide impact. Indeed, the resolution can be expected to have persuasive authority on a nationwide basis, at least in states that have a provision for expungement of criminal convictions. Moreover, the decision of the Court of Appeals is in conflict with an opinion of the Supreme Court of the United States. A decision in this case will guide lower courts in

applying the pertinent federal law to the expungement of criminal convictions in Wisconsin.

Statement of the Case

This Petition presents an issue of first impression: whether the expungement of a conviction under Wisconsin law qualifies as an "expungement" in 18 U.S.C. § 921(a)(33)(B)(ii). Federal law generally prohibits a person from possessing a firearm if the person has been convicted of a "misdemeanor crime of domestic violence" ("MCDV"). 18 U.S.C. § 922(g)(9). The federal statute defines what it means to be "convicted," and, as pertinent in the present case, contains an exception. In particular, 18 U.S.C. § 921(a)(33)(B)(ii) provides that a person shall not be considered to be "convicted" if the conviction has been "expunged."

Van Oudenhoven has a 1994 conviction from Calumet County for what would otherwise presumably qualify as a MCDV. But that conviction was expunged by order of the Calumet County Circuit Court in 2019.

When Van Oudenhoven attempted to purchase a firearm in 2022, the DOJ denied the purchase. Van Oudenhoven appealed the denial and DOJ affirmed the denial. Van Oudenhoven commenced an action in circuit court pursuant to Wis.Stat. 226.52 to review the DOJ's denial. The circuit court affirmed DOJ's denial on January 6, 2023.

Van Oudenhoven timely appealed to the Court of Appeals, which affirmed the circuit court on June 4, 2024. The Court of Appeals ruled that the exception in federal law for expungements of convictions only applies to expungements that completely undo the conviction. There is, however, no binding precedent for such a proposition, and in fact the Supreme Court of the United States has found that "expungement" means a variety of things in the several states.

This case is not particularly factual in nature. To the extent any facts from the record were not recited by the Court of Appeals but are needed for consideration of the case, they will be referenced in the Argument section below.

Petitioners request this Court to take jurisdiction in this case to review the Court of Appeals' decision and to determine the application of the federal statute to expungements under Wisconsin law.

Argument

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.

The Court of Appeals concluded that the federal exception for expungements only applies to an expungement if it completely removes a conviction.

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,

[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.

"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 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.

Van Oudenhoven does not question this Court's opinion as to the effect of an expungement on a conviction as a matter of ***state*** law. But the question in the present case is the effect of an expungement as a matter of ***federal*** law. Congress provided that an expungement means there is not conviction of a MCDV, and Congress did not tie the effect of the expungement to any particular effect as a matter of state law.

The federal circuits (whose decisions are not binding on this Court[2]) have come to conflicting conclusions. The *Crank* case, relied upon by the Court of Appeals, concluded that an expungement must completely erase a conviction.

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. §

[2] *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.")

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 no 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." 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).

Even more importantly, however, Congress plainly spoke when it said a conviction does not "count" if it has been expunged. And Congress knew full well that expungement means a variety of things and has a variety of effects among the several states (after all, the Supreme Court had just told it so). Congress' only requirement was that the expungement must not state on its face that the person

cannot possess firearms. Because Van Oudenhoven's expungement did not state that he cannot possess firearms, it should count to remove his federal prohibition on possession of firearms.

Conclusion

For the foregoing reasons, this Court should exercise its jurisdiction and review the decision of the Court of Appeals.

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the requirements of Wis.Stat. § 809.62(4)(a). This document was prepared using a proportional font and it contains 2,163 words.

Electronically signed by: John R. Monroe
John R. Monroe

CERTIFICATE OF SERVICE

I certify that on June 20, 2024, I served a copy of the foregoing via U.S. Mail upon:

Brian Keenan
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Electronically signed by: John R. Monroe
John R. Monroe