In the Supreme Court of Wisconsin

Scot Van Oudenhoven,

Petitioner-Appellant-Petitioner,

v.

Wisconsin Department of Justice,

Respondent-Respondent

Appeal No. 2023AP000070

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

Brief of Petitioner

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Statement of Issues

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

   Circuit Court's answer: No.

   Court of Appeals' answer: No (*Van Oudenhoven v. Wisconsin Department of Justice,* 2024 WI App. 38)

Statement on Oral Argument and Publication

Oral argument is appropriate in this case. The case presents an issue of great statewide interest and oral argument would assist the Court in deciding the case.

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.Stat. § 226.52, of the denial by the Wisconsin Department of Justice (the "Department") 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.Stat. § 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.*

15. 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.Stat. §

175.35 and JUS 10.06. Pursuant to Wis.Stat. § 175.35(2g)(c), the Department is to apply the criteria for eligibility to possess firearms listed in Wis.Stat. § 941.29. The Department then "approves" or "disapproves" of the transfer of the firearm. In the present case, the Department disapproved of Van Oudenhoven's attempt to purchase a handgun based on its conclusion that Van Oudenhoven has been convicted of a misdemeanor crime of domestic violence ("MCDV"). Van Oudenhoven will show below that that is not the case.

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).

18 U.S.C. § 922(g)(9) generally prohibits possession of firearms by a person convicted of a 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, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under

> such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

Van Oudenhoven's 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. Clearly, Van Oudenhoven's conviction has been expunged. The Department, however, takes the position (and the Court of Appeals agreed) that Van Oudenhoven's expungement does not count as an expungement for the purposes of 18 U.S.C. § 921(a)(33)(B)(ii).

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 "expunged." 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 of a firearm 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 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), *citing McGrath v. United States,* 60F.3d 1005,

[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 of firearms in 18 U.S.C. § 921(a)(20), so cases analyzing one inform the interpretation of the other.

1008 (2d Cir. 1995) *cert. denied,* 1996 U.S. LEXIS 1074. 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]. The Court did not overrule its declaration from *Dickerson* that expungement does not alter the historical fact of conviction, alter the legality of the conviction, nor signify that the defendant was innocent.

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. 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 Cir 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. This 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 Court of Appeals agreed with the Circuit Court. "Consistent with the meaning of "expunged or set aside" in 18 U.S.C. 921(a)(33)(B)(ii) and the effect of Wisconsin expungement espoused in ***Braunschweig,*** Van Oudenhoven's conviction was not completely removed of all effects and remains valid for purposes of denying him permission to purchase a firearm in Wisconsin under federal law." 2024 WI App. 38, ¶ 45.

The problem with the decisions of the courts below 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. And, expungement means something different from state to state and apparently never has the effect of completely undoing the conviction. It is erroneous to conclude that the expungement has to remove all consequences of a conviction, especially in light of *Dickerson's* conclusion that that is not what an expungement does.

The Court of Appeals' 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 as an expungement 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 court of appeals' 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.

The Department plainly said in its administrative record that the reason it denied 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.*** When Congress created the exception, it surely knew what the Supreme Court said in *Dickerson* about state expungements: they vary widely in their effect and they do not undo the conviction. Congress is presumed to know the state of the law when it passes a new law. *Fogerty v. Fantasy, Inc.,* 510 U.S. 517, 528 (1994) ("Congress is presumed to be aware of a[] … judicial interpretation of a statute and to adopt that interpretation when it … enacts a statute without change…."); *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 185 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.") With the foregoing in mind, it is difficult to conclude that Congress meant something other than an expungement described in *Dickerson* when it passed the exception.

The Court of Appeals relied largely on *Crank* for its conclusion that a state law expungement only counts for federal purposes if it completely removes the effects of a conviction. 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.") 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 ("unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.")

The Court of Appeals' decision also improperly groups "expunged or set aside" into a single item. As a reminder, the statute's exception clause has four disjunctive options: 1) expunged; 2) set aside; 3) pardoned, and 4) civil rights restored. The *Logan* court supports that disjunctive listing when

it says, "None of Logan's battery convictions have been expunged, set aside, or pardoned." 552 U.S. at 31. In addition, " [T]he words 'civil rights restored' appear in the company of the words 'expunged,' 'set aside,' and 'pardoned.' ***Each*** term describes a measure by which the government relieves an offender of some or all of the consequences of his conviction." *Id.* [Emphasis added].

The Court of Appeals treated "expunged or set aside" as a single term. 2024 WI App. 38, ¶ 24 ("We must now determine the meaning of 'expunged or set aside…. Therefore for a state conviction that has been expunged not to count as a 'conviction,' it must meet the meaning of 'expunged or set aside'…."). The Court of Appeals concluded, "[T]he plain meaning of 'expunged or set aside' is better described as 'a measure by which the government relieves an offender of … *all* of the consequences of his conviction,' rather than 'some' consequences." 2024 WI App. 38, ¶ 26 [emphasis in original].

The Court of Appeals' treatment of "expunged or set aside" as a single term inevitably resulted in the Court's defining the term to mean just "set aside." It is clear, however, that that is not what Congress intended. The unless clause only lists the pardon, expungement, or restoration of rights and it omits set aside. That is because "Set aside" means "To reverse, vacate, cancel, annul, or revoke a judgment, order, etc." *Black's Law Dictionary,* Sixth Ed. If a conviction is set

aside, by definition the conviction cannot continue to have lingering effects (like preventing possession of a firearm).

On the other hand, an expungement, pardon, or restoration of rights ***can*** have such lingering effects, at least in Congress' view. If an expungement means the same as "set aside" and must completely negate a conviction, then including an expungement in the unless clause would have served no purpose. Clearly, Congress contemplated that there could be an expungement that would not completely undo a conviction.

The "Anti-Mousetrapping" Interpretation Favors Van Oudenhoven

Summary: The Anti-Mousetrapping Rule Works to Interpret the Expungement as an Expungement Under Federal Law

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 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." 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 exception 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

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 Court of Appeals 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 Petitioner

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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