

In the Court of Appeals of Wisconsin

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District I

*In re the return of property in: In re State of
Wisconsin v. Matthew R. Derzay:*

Village of Greendale, Respondent,

v.

Matthew R. Derzay, Petitioner

Appeal No. 2019AP002294

**Appeal from the Judgment of the Milwaukee County
Circuit Court, The Hon. Jean M. Kies**

Reply Brief of Petitioner

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Argument

The Village of Greendale (“Greendale”) paints a bleak picture for the citizens of Wisconsin: If the police seize property *from your home*, whether rightly or wrongly¹, if you do not have receipts for your property, you cannot get it back. It matters not whether you testify that property is yours, and the fact that it was seized from your home has no bearing.

Greendale discounts *Murray v. Norwood*, 77 Wis. 405, 46 N.W. 499 (1890) as too old. *Murray* is still good law, however, and Greendale fails to argue that it is not. *Murray* held, 130 years ago, that “possession of personal property is prima facie proof of ownership.” Greendale attempts to argue that *Murray* must not apply because it predates Wis.Stats. § 968.20. But it is well established that the legislature is presumed to know that in the absence of its changing the law, the construction put upon it by the courts will remain unchanged. *Zimmerman v. Wisconsin Electric Power Company*, 38 Wis.2d 626, 157 N.W.2d 648 (1968). In the present case, when the legislature wrote Wis.Stats. § 968.20, it knew that possession of property created a presumption of ownership. The legislature chose not to change that rule.

Greendale argues that Derzay failed to prove his ownership of the property “to the court’s satisfaction.” That may be, but it was an erroneous exercise of

¹ Greendale attempts to characterize the seizure in the present case as pursuant to a warrant, but there is nothing in the record indicating a warrant to seize any property was issued.

discretion for the trial court to ignore the 130 year-old precedent of *Murray*. Because the property at issue was seized from Derzay's home, there is a presumption that he owns it. The trial court was not authorized to disregard that long-standing rule of property ownership.

Greendale raises for the first time on appeal that Derzay's petition for return of property was filed too late. Wis.Stats. § 968.20 (1) requires that a petition be filed within 120 days of an initial appearance. Derzay's initial appearance was held on February 19, 2019 and he filed his petition on September 30, 2019. Greendale does not claim that the petition deadline is jurisdictional. If it were, the internal inconsistencies within Wis.Stats. § 968.20 would work to deprive Derzay of due process.

There are special rules for petitions for return of firearms. The court must hold the hearing on the petition for return of a firearm within 20 business days after the petition. Wis.Stats. § 968.20(1m)(d)(1). The court must return the firearms if "all charges filed in connection with the seizure against the person have been dismissed." Wis.Stats. § 968.20(1m)(d)(1)(b). Of course, if charges are still pending, the court is not permitted to return the firearms. We therefore have a requirement to 1) petition within 120 days of initial appearance, 2) have a hearing within 20 days of petition, and 3) the firearms will not be returned unless the charges have been dismissed. Greendale's insistence on strict adherence to the

120-day filing requirement will result (frequently, if not usually) in a denial of the petition because charges are still pending.

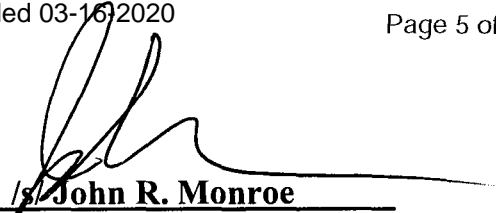
In the present case, all charges against Derzay were dismissed on June 3, 2019, and Derzay promptly filed his petition thereafter. Greendale is not in a position to complain about the timing of the petition, especially when it failed to raise this issue in the trial court.

Greendale next complains that the evidence Derzay attempted to present was hearsay. Again, however, Greendale did not object to its admissibility until now. The trial court did not reject any evidence offered by Derzay on those grounds. It is disingenuous for Greendale to pretend now that it did.

Finally, Greendale apparently adopts Derzay's argument that his possession of the firearms is *prima facie* evidence of his ownership. In a final footnote, Greendale argues that the trial court must have known that Derzay still owned three of the firearms, because they were seized from Derzay's home. Exactly. Just as the other firearms also were seized from his home.

Conclusion

For the foregoing reasons, the judgment of the circuit court should be reversed, with instructions to order the return of Derzay's firearms. Failing that, the judgment of the Circuit Court should be reversed and the case remanded for the Circuit Court to have another hearing with instructions to consider and weigh all evidence presented by Derzay, and treating prior possession as a *prima facie* case for ownership.



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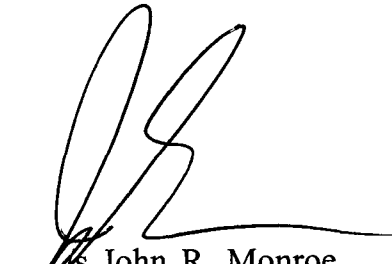
Attorney for Petitioner

Certificate of Service

I certify that on March 13, 2020, I served three copies of the foregoing via

U.S. Mail upon:

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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 1,099 words.

I certify that the text of the electronic copy of the Reply Brief of Appellant is identical to the text of the paper copy of the Reply Brief of Appellant.

I certify that this Reply Brief of Appellant was mailed via priority mail to the Clerk of the Court of appeals on March 13, 2020.



s/ John R. Monroe

John R. Monroe