

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP1631

Cir. Ct. No. 2009CF3877

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN RE THE RETURN OF PROPERTY IN: STATE OF WISCONSIN V. LONNIE
SWEETALLA:**

STATE OF WISCONSIN,

RESPONDENT,

v.

LONNIE SWEETALLA,

APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
PATRICIA D. MC MAHON, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Lonnie Sweetalla appeals orders denying his motion for the return of property and the motion for reconsideration that followed. Because Sweetalla had no right to possess firearms at the time he filed his motions, we affirm.

I. BACKGROUND

¶2 On August 10, 2009, Sweetalla was charged with endangering safety by use of a dangerous weapon (a Class A misdemeanor) and first-degree reckless endangerment (a Class F felony) in Oneida County. Twelve days later, Sweetalla was charged with felony bail jumping in Milwaukee County based on his possession of guns in violation of the terms of his bond in the Oneida County case. At the time of his arrest, a number of Sweetalla's guns were seized from a safe in his garage.

¶3 Sweetalla was ultimately convicted of a misdemeanor in the Oneida County case and was prohibited from possessing firearms as a condition of his one-year probation. Upon resolution of the Oneida County case, the circuit court granted the State's motion to dismiss the Milwaukee County bail jumping case.

¶4 While still on probation in the Oneida County case, Sweetalla moved, pursuant to WIS. STAT. § 968.20 (2009-10), for a return of the guns that were seized in the Milwaukee County case.¹ In his motion, Sweetalla asserted that the guns were going to be released to an "arms-length" purchaser.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

We take judicial notice of the Wisconsin Circuit Court Access (CCAP) records in the Oneida County matter, which reveal that the terms of Sweetalla's probation were in effect at the

(continued)

¶5 The circuit court held a hearing and denied Sweetalla’s motion. The court also denied Sweetalla’s motion for reconsideration. He now appeals.

II. ANALYSIS

¶6 Sweetalla argues that the circuit court erred when it refused to return his guns to him. The parties agree that there is no evidence in the record before us that the guns were contraband or property covered under any of the statutory exclusions found in WIS. STAT. § 968.20, nor were they needed as evidence.² Thus, the only issue is whether Sweetalla established that he, as “the person seeking return[,] ha[d] a right to possession of the property.” See *State v. Benhoff*, 185 Wis. 2d 600, 603, 518 N.W.2d 307 (Ct. App. 1994) (listing the elements of § 968.20); see also *State v. Jones*, 226 Wis. 2d 565, 595, 594 N.W.2d

time he filed the motion for return of the guns and the subsequent motion for reconsideration. See *State v. Sweetalla*, No. 2009CF120 (Oneida County Circuit Court); see also WIS. STAT. § 902.01.

² As relevant here, WIS. STAT. § 968.20 provides:

Return of property seized. (1) Any person claiming the right to possession of property seized pursuant to a search warrant or seized without a search warrant may apply for its return to the circuit court for the county in which the property was seized or where the search warrant was returned. The court shall order such notice as it deems adequate to be given the district attorney and all persons who have or may have an interest in the property and shall hold a hearing to hear all claims to its true ownership. If the right to possession is proved to the court’s satisfaction, it shall order the property, other than contraband or property covered under sub. (1m) or (1r) or s. 173.12, 173.21(4), or 968.205, returned if:

(a) The property is not needed as evidence or, if needed, satisfactory arrangements can be made for its return for subsequent use as evidence; or

(b) All proceedings in which it might be required have been completed.

738 (1999) (While the State bears the burden of establishing that property constitutes contraband, “the burden rests with the moving party to support the motion [for return] by proof.”).

¶7 Sweetalla’s attorney, in his affidavit submitted in support of Sweetalla’s motion for the return of property, acknowledged that Sweetalla was convicted of a misdemeanor in the Oneida County case “and, among other things, was given a one[-]year probationary term that was conditional upon Mr. Sweetalla not possessing any firearms.” Sweetalla’s attorney confirmed this point during the circuit court hearing.

¶8 In an attempt to circumvent the statutory right to possession language, Sweetalla sought to transfer the guns directly to an arms-length purchaser.³ The circuit court, presumably in reliance on WIS. STAT. § 968.20(1m)(b), denied Sweetalla’s motion stating: “My problem is that one of the standards is property can be returned unless they have been used for an unlawful purpose. I think the conduct ... he engaged in, that he has no right to have the firearms.” *See id.* (“If the seized property is a dangerous weapon or ammunition, the property shall not be returned to any person who committed a crime involving the use of the dangerous weapon or the ammunition.”). Sweetalla sought reconsideration arguing that the guns were not used in the commission of a crime.

³ Sweetalla writes that he arranged for the good-faith purchase of his guns because he feared they would be destroyed prior to his completion of probation in the Oneida County case. *See* WIS. STAT. § 968.20(3)(a) (“First class cities shall dispose of dangerous weapons ... seized 12 months after taking possession of them if the owner ... has not requested their return and if the dangerous weapon ... is not required for evidence or use in further investigation and has not been disposed of”).

¶9 To resolve this appeal, we need not discuss the applicability of WIS. STAT. § 968.20(1m)(b) because Sweetalla has not met his initial burden of establishing his right to possession of the guns. See *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (“[W]e may affirm on grounds different than those relied on by the trial court.”). The terms of Sweetalla’s probation on the Oneida County case precluded him from possessing firearms; as such, he was not entitled to a return of the guns seized in the Milwaukee County case even for the sake of effectuating a transfer. See WIS. STAT. § 968.20(1) (“Any person *claiming the right to possession of property seized pursuant to a search warrant or seized without a search warrant* may apply for its return to the circuit court for the county in which the property was seized or where the search warrant was returned.”) (emphasis added).

¶10 We agree with the State that so long as Sweetalla remained subject to the prohibition against firearms possession as a term of his probation in the Oneida County case, he could not properly petition the circuit court for a return under WIS. STAT. § 968.20. If, however, Sweetalla’s probation period, and its attendant prohibition, has expired, he can move for a return.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

