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**DISTRICT I**

August 29, 2023

*To*:

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Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Andrea Taylor Cornwall
Electronic Notice

Kieran M. O'Day
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

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2022AP1342-CR State of Wisconsin v. Michael Jamall Hill (L.C. # 2017CF5087)

Before White, C.J., Donald, P.J., and Dugan, J.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Michael Jamall Hill appeals a judgment of conviction entered after a bench trial at which the circuit court found him guilty of two felonies, including one count of being a felon in possession of a firearm. He contends that the circuit court wrongly denied his pretrial motion to dismiss the allegation that he was subject to a mandatory minimum sentence upon conviction of that crime. Based upon a review of the briefs and record, we conclude at conference that this

matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] We summarily affirm.

Hill was a passenger in a vehicle that police stopped for a traffic violation on October 31, 2017. Police searched Hill and found a loaded gun. Hill was a convicted felon and, therefore, was prohibited from possessing a firearm. *See* WIS. STAT. § 941.29(1m)(a). Police arrested him and during the booking process found baggies of cocaine on his key ring. An investigation revealed that Hill had previously been convicted of possessing cocaine. The State charged Hill with two felonies: (1) possession with intent to deliver more than one but less than five grams of cocaine as a second or subsequent offense, by use of a dangerous weapon; and (2) being a felon in possession of a firearm.

Hill's criminal record included a previous conviction in 2011 for being a felon in possession of a firearm. Because Hill had completed his sentence for that felony conviction within five years of the 2017 felon-in-possession charge in this case, the criminal complaint invoked the mandatory minimum sentencing provision set forth in WIS. STAT. § 941.29(4m)(a)1.-2.a. Under that provision, a circuit court sentencing a defendant for felon-in-possession-of-a-firearm was required to impose a bifurcated sentence with an initial confinement term of "not less than [three] years" if: (1) the defendant had a prior conviction for a "violent felony"; and (2) the current felon-in-possession offense was committed within five years after

[1] Because the charges in this case arose in 2017, all subsequent references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

the defendant completed a sentence for a prior felony conviction.[2] *See* ***id.*** The definition of "violent felony" includes "any felony under ... this section," *see* § 941.29(1g)(a), meaning that the mandatory minimum sentencing provision applies to felons with a prior conviction for possessing a firearm contrary to § 941.29.

Hill filed a pretrial motion to dismiss the mandatory minimum sentence requirement on the ground that it was unconstitutional as applied to him "because it violates the rights guaranteed to him under the Equal Protection Clause of the 14th Amendment and Article I, Section 1 of the Wisconsin Constitution."[3] Hill contended that his prosecution under the mandatory minimum sentencing provision was arbitrary and "not substantially related to any governmental objective" because the provision classified him as a "violent felon" based on his 2011 conviction "despite no allegations of physical violence or graft."[4] The circuit court denied the motion, concluding that, because WIS. STAT. § 941.29(1g)(a) defined "violent felony" as including a conviction for possessing a firearm while a felon, "there's no room for any different interpretation there."

[2] WISCONSIN STAT. § 941.29(4m) contains a sunset provision that eliminates the requirement to impose a mandatory minimum term of initial confinement for sentences imposed on or after July 1, 2020. *See* § 941.29(4m)(b). Hill's sentencing occurred before that date, and the parties do not discuss the sunset provision in their briefs. We, likewise, discuss it no further.

[3] Hill also claimed that the mandatory minimum sentence violated the Second Amendment of the United States Constitution, but he has expressly abandoned that argument on appeal. We, therefore, do not consider the claim.

[4] The criminal complaint underlying Hill's 2011 conviction is in the record. That complaint reflects that the State charged Hill with four counts of being a felon in possession of a firearm after police found loaded guns in his home during two separate searches.

Hill waived his right to a jury trial, and the matter was instead tried to the court, which found him guilty as charged. The matter proceeded to sentencing. For possessing a firearm while a felon, the circuit court sentenced Hill to the mandatory minimum three-year term of initial confinement followed by a three-year term of extended supervision; the circuit court imposed a concurrent, evenly bifurcated four-year term of imprisonment for the drug offense.[5] Hill appeals, renewing his claim that the mandatory minimum sentence required by WIS. STAT. § 941.29 is unconstitutional as applied to him.

"The constitutionality of a statute is a question of law that we review *de novo*." ***Aicher v. Wisconsin Patients Comp. Fund***, 2000 WI 98, ¶18, 237 Wis. 2d 99, 613 N.W.2d 849. Statutes are presumed constitutional, and "the party making the as-applied challenge carries the burden of proving that the statute 'is unconstitutional beyond a reasonable doubt....' We evaluate as-applied challenges 'considering the facts of the particular case in front of us, not hypothetical facts in other situations.'" ***State v. McReynolds***, 2022 WI App 25, ¶57, 402 Wis. 2d 175, 975 N.W.2d 265 (citations and some quotation marks omitted). Doubts must be resolved in favor of constitutionality, and "[a] statute must be sustained as constitutional if any reasonable basis for the statute exists." *See* ***State v. Quintana***, 2008 WI 33, ¶77, 308 Wis. 2d 615, 748 N.W.2d 447.

Hill contended in circuit court that the mandatory minimum sentencing provision of WIS. STAT. § 941.29 is unconstitutional as applied to him because it violated equal protection guarantees. In this court, he also argues for the first time that the statute violated his right to substantive due process. The State urges us to reject Hill's due process claim on the grounds that

[5] The Honorable Frederick C. Rosa presided over the pretrial and trial proceedings. The Honorable Michael J. Hanrahan presided at sentencing.

he forfeited it by failing to preserve it in the circuit court. *See* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. We agree with the State in this regard, although we also observe that the analysis of a statute's constitutionality under the due process and equal protection provisions is largely the same. *See* ***Quintana***, 308 Wis. 2d 615, ¶78.

"The equal protection clause ... 'is designed to assure that those who are similarly situated will be treated similarly,'" and "'requires that the legislature have reasonable and practical grounds for the classifications that it draws[.]'" ***State v. Smith***, 2010 WI 16, ¶15, 323 Wis. 2d 377, 780 N.W.2d 90 (citations omitted). If the legislature has neither imposed upon a fundamental right nor disadvantaged a suspect class as a result of a classification, the "legislative enactment 'must be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate government interest." ***Quintana***, 308 Wis. 2d 615, ¶79 (citations and internal quotations marks omitted). Both parties state in their respective briefs that neither a fundamental right nor a suspect class is implicated in this case. We agree. *See* ***State v. Annala***, 168 Wis. 2d 453, 468, 484 N.W.2d 138 (1992) (holding that there is no fundamental right not to be incarcerated for criminal behavior); ***State v. Thomas***, 2004 WI App 115, ¶26, 274 Wis. 2d 513, 683 N.W.2d 497 (holding that felons are not a constitutionally protected class). Accordingly, we must reject the challenge to WIS. STAT. § 941.29 if the statute survives rational basis scrutiny. *See* ***Quintana***, 308 Wis. 2d 615, ¶79.

According to Hill, WIS. STAT. § 941.29, as applied to him, unconstitutionally includes "felon-in-possession" as a violent felony because his 2011 conviction did not involve a crime of force or aggression. He points to a dictionary definition of "violent offense" as a crime requiring "physical force," *see Violent Offense*, BLACK'S LAW DICTIONARY (11th ed. 2019), and he reminds us that the crime of felon-in-possession under WIS. STAT. § 941.29(1m) does not include

an element of force. *See* WIS JI—CRIMINAL 1343. He then emphasizes that the charges underlying his 2011 conviction did not include any accompanying allegations of use of force or any threats to use a firearm to harm another person or property. Therefore, he says, his prior felonious act of possessing a firearm while a felon was not violent and should not stand as a predicate "violent felony" requiring a mandatory minimum penalty for his current crime.

We are not persuaded. While statutory language is given its "common, ordinary, and accepted meaning," specially-defined phrases are given their special definitional meaning. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. The legislature here specifically defined "violent felony" to include possession of a firearm by a felon for purposes of the mandatory minimum sentence requirement set forth in WIS. STAT. § 941.29. It was within the legislature's prerogative to determine which felonies are classified as violent and to impose a corresponding penalty. *See* ***State v. Heidke***, 2016 WI App 55, ¶17, 370 Wis. 2d 771, 883 N.W.2d 162 (explaining that "[i]t is within the legislature's prerogative to decide which crimes are serious and to fashion an appropriate sentence"); *see also* ***State v. Block***, 222 Wis. 2d 586, 593, 587 N.W.2d 914 (Ct. App. 1998) (holding that "it is entirely within the legislature's power to classify crimes, recognize different degrees of harm that result from them, and decide which more urgently need repression").

Because the legislature chose to include felon-in-possession within the definition of a violent felony, the question is not whether Hill's possession of a firearm fits within a dictionary definition of a "violent offense," but rather, whether a rational basis exists for the legislature to have classified felon-in-possession as a "violent felony." *See* ***State v. Hirsch***, 2014 WI App 39, ¶6, 353 Wis. 2d 453, 847 N.W.2d 192. In an as-applied challenge, our role is to determine "whether we can conceive any facts upon which the legislation as applied to [the challenger]

could be reasonably based." *See* ***Smith***, 323 Wis. 2d 377, ¶16. We will not invalidate a statutory classification even if it results in some inequality if any reasonable basis exists to justify the classification. *See* ***Hirsch***, 353 Wis. 2d 453, ¶6.

Classifying Hill's crime as a violent felony has a reasonable basis. We have previously concluded that "the restriction placed upon felons prohibiting them from possessing firearms is a reasonable exercise of the State's inherent police power." *See* ***State v. Pocian***, 2012 WI App 58, ¶11, 341 Wis. 2d 380, 814 N.W.2d 894. Further, there is a "rational relationship between statutes forbidding the possession of firearms by convicted felons and the legitimate state purpose of protecting the public from misuse of firearms." *See* ***id.***, ¶¶11, 14 (citations omitted). As our supreme court recently opined, "'someone with a felony conviction on his record is more likely than a nonfelon to engage in illegal and violent gun use,'" and therefore, "even if a felon has not exhibited signs of physical violence, it is reasonable for the State to want to keep firearms out of the hands of those who have shown a willingness to ... commit a crime serious enough that the legislature has denominated it a felony[.]" ***State v. Roundtree***, 2021 WI 1, ¶48, 395 Wis. 2d 94, 952 N.W.2d 765 (citation omitted).

A similar analysis applies here. Including felon-in-possession in the list of violent felonies warranting application of a mandatory minimum three-year term of initial confinement is rationally related to public safety objectives. "A firearm is a dangerous weapon," *see* ***State v. Norris***, 214 Wis. 2d 25, 31, 571 N.W.2d 857 (Ct. App. 1997), and possession of firearms can easily lead to violence. Hill's crime of possessing a firearm while a felon showed that he was prepared to be violent even if the possession itself did not entail violence. The mandatory three-year term of initial confinement is reasonably related to the goal of repressing that violence. Moreover, possessing a firearm while a felon within five years of completing a sentence for the

same conduct demonstrates that Hill's prior sentence failed to confer any rehabilitative or deterrent effect, defeating public safety objectives and reasonably warranting a mandatory minimum penalty for the new offense.

For all the foregoing reasons, we conclude that the circuit court properly denied Hill's motion to dismiss the mandatory minimum sentence requirement on the ground that it was unconstitutional as applied to Hill. Accordingly, we affirm.

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2021-22).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Samuel A. Christensen*
*Clerk of Court of Appeals*