COURT OF APPEALS DECISION DATED AND FILED

June 7, 2012

Diane M. Fremgen
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. 2011AP1034-CR **Cir. Ct. No. 2010CF43**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL LEE RUEDEN, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Clark County: FREDERIC FLEISHAUER, Judge. *Affirmed*.

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 LUNDSTEN, P.J. Daniel Rueden appeals his conviction under WIS. STAT. § 941.29,[1] the felon-in-possession-of-a-firearm statute. Rueden contends that the felon-in-possession statute violates both the Second Amendment of the United States Constitution and our state counterpart provision, Article I, § 25 of the Wisconsin Constitution. Rueden argues that the felon-in-possession statute is facially overbroad because it places a lifetime ban on the possession of firearms by persons who have not committed violent felonies. Rueden also argues that the felon-in-possession statute is unconstitutional as applied to him because his prior felony was nonviolent and he had completed his sentence relating to that crime. As explained below, our recent decision in ***State v. Pocian***, 2012 WI App 58, __ Wis. 2d __, __ N.W.2d __ (No. 2011AP1035-CR), is controlling and requires rejection of Rueden's arguments. Accordingly, we affirm the circuit court.

Background

¶2 A police report indicates that, in 2010, Rueden's ex-wife "kicked him out" of her family's residence. While Rueden was removing his possessions from the residence, he stole a handgun belonging to his ex-wife's uncle. Rueden later offered to sell the handgun to a woman who was cooperating with the police. The police gave the woman marked currency, and she purchased the gun from Rueden. The police monitored the buy, followed Rueden, and arrested him. Rueden was charged under the felon-in-possession statute.

---

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

¶3 Rueden's prior felony stemmed from events in 2004 and 2005. A police report relating to that crime indicates that Rueden had a dispute with an employer over money. Rueden admitted he went onto his employer's property in Clark County and hauled away an El Camino automobile from a storage shed. Rueden stole license plates for the El Camino from a different vehicle and was later apprehended driving the car in Wood County. Rueden was charged with burglary and felony theft, but the burglary charge was dismissed when Rueden entered a guilty plea to felony theft.[2]

¶4 Rueden filed a motion to dismiss, arguing that the felon-in-possession statute was unconstitutionally overbroad on its face and unconstitutional as applied to him. The circuit court rejected both arguments, and Rueden entered a guilty plea to one count of being a felon in possession of a firearm, in violation of WIS. STAT. § 941.29(2)(a).

Discussion

¶5 Relying primarily on ***District of Columbia v. Heller***, 554 U.S. 570 (2008), and ***McDonald v. City of Chicago, Ill.***, 130 S. Ct. 3020 (2010), Rueden argues that a statute like Wisconsin's felon-in-possession statute, which places restrictions on the right to bear arms, must be subjected to either strict scrutiny or

[2] Rueden notes that he also has an unrelated 2005 conviction for fleeing in a vehicle from an officer under WIS. STAT. § 346.04(3). The State asks us to take judicial notice of that conviction based on Rueden's acknowledgment, and further argues that it is a violent felony. Rueden replies that we may not take judicial notice based on the Consolidated Court Automation Program (CCAP) report, appended to the State's brief, because such reports are not sufficiently reliable. We do not understand the State to be asking us to take judicial notice based on the CCAP report, but instead based on Rueden's acknowledgment of the conviction in his brief-in-chief. However, we need not resolve this dispute because, even if Rueden is correct that we may not consider his other prior felony, ***State v. Pocian***, 2012 WI App 58, __ Wis. 2d __, __ N.W.2d __ (No. 2011AP1035-CR), requires rejection of Rueden's facial and as-applied challenges.

intermediate scrutiny. Rueden implicitly argues that ***State v. Thomas***, 2004 WI App 115, ¶¶20, 23, 274 Wis. 2d 513, 683 N.W.2d 497, a case upholding the constitutionality of the felon-in-possession statute against an overbreadth challenge, is no longer good law because it applied the more easily met rational basis test.

¶6 We need not discuss the specifics of Rueden's facial and as-applied challenges because, with respect to both issues, we are bound by our recent ***Pocian*** decision. The following language in ***Pocian*** requires rejection of Rueden's overbreadth challenge:

> Under [the intermediate scrutiny] test, a law "is valid only if substantially related to an important governmental objective." ...
>
> By keeping guns out of the hands of felons, we hold that WIS. STAT. § 941.29 is substantially related to the important governmental objective of enhancing public safety. As we stated in ***Thomas***, "the legislature determined as a matter of public safety that it was desirable to keep weapons out of the hands of individuals who had committed felonies." While ***Heller*** mandates that § 941.29 is subject to a higher level of scrutiny than the rational basis test we used in ***Thomas***, the law still survives intermediate scrutiny.

Pocian, 2012 WI App 58, ¶¶11-12 (citations omitted).[3]

[3] Rueden and the State apparently dispute whether the overbreadth doctrine, generally applied in a First Amendment context, applies here. The State argues that Rueden's facial challenge is a non-starter because Rueden, at least implicitly, admits that the statute may constitutionally be applied to violent felons. Rueden replies that Wisconsin and federal case law support applying the overbreadth doctrine in this Second Amendment context. Because ***Pocian*** compels us to reject Rueden's facial challenge on the grounds described above, we need not decide whether the State is correct that there is a second reason to reject Rueden's facial challenge.

¶7 Regarding Rueden's as-applied challenge, the State argues that we should apply the guilty plea waiver rule. Rueden does not meaningfully dispute the applicability of the guilty plea waiver rule to the facts here, but instead argues that we should exercise our power to ignore waiver because he raised the issue before entering his plea and because the purposes underlying the rule do not apply here. We choose to ignore waiver, but pause to briefly comment on the parties' arguments.

¶8 First, Rueden's reliance on ***State v. Huebner***, 2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727, is misplaced. Contrary to Rueden's assertion, ***Huebner*** does not set forth the justifications for the *guilty plea* waiver rule, but rather the justifications for the general waiver rule. ***Id.***, ¶¶10-12. Second, we also question the State's reasoning. According to the State, the fact that Rueden raised his constitutional challenge, and the circuit court decided the issue before Rueden's plea, argues in favor of applying the guilty plea waiver rule. In the State's view, either Rueden entered a plea knowing that his plea would result in forfeiting the issue or Rueden should have moved to withdraw his plea because it was not knowingly entered. However, so far as our non-exhaustive research reveals, for purposes of the guilty plea waiver rule, it is not particularly significant whether a defendant raised or failed to raise an issue prior to entering a plea. Rather, in deciding whether to ignore waiver, this court looks to whether there are factual disputes in need of resolution, whether the issue is one of statewide importance, and whether addressing the issue will serve the interests of justice. *See* ***State v. Tarrant***, 2009 WI App 121, ¶6, 321 Wis. 2d 69, 772 N.W.2d 750. It appears to us that, as an "interest of justice" factor, the parties here aptly explain why raising an issue prior to entering a plea cuts both ways.

¶9 Turning to the merits of Rueden's as-applied challenge, ***Pocian*** plainly controls. As Rueden does here, Pocian argued that, even if the felon-in-possession statute was not facially invalid, the statute was unconstitutional as applied to him because there was no public safety rationale for permanently depriving a nonviolent felon of his right to bear arms. ***Pocian***, 2012 WI App 58, ¶13. We rejected Pocian's argument, holding that "the State may constitutionally deprive Pocian of the right to keep and bear arms" because the law is substantially related to an important governmental interest. ***Id.***, ¶¶13-15.

¶10 In ***Pocian***, we did not delve into the particular facts of the underlying nonviolent felony when rejecting the as-applied challenge. But in terms of the underlying facts, Rueden is plainly in no better position than Pocian. Pocian was charged with being a felon in possession of a firearm after he went hunting using his father's gun, shot two deer, and registered them with the DNR. ***Id.***, ¶4. Pocian's prior felony conviction, more than twenty years earlier, had been for uttering about $1,500 in forged checks. ***Id.***, ¶3. In contrast, Rueden's prior offense involved going onto another person's property and stealing from a shed. Rueden's gun possession charge involved stealing a handgun and selling it. If anything, the circumstances here indicate a greater need for public protection.

¶11 In sum, ***Pocian*** is controlling and requires rejection of Rueden's constitutional challenges to his felon-in-possession conviction.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.