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DISTRICT II

July 9, 2014

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

2013AP2767

John Richard Wittenberger v. DOJ (L.C. #2013CV854)

Before Brown, C.J., Reilly, and Gundrum, JJ.

John Wittenberger appeals from an order affirming the Wisconsin Department of Justice's decision to deny his application for a license to carry a concealed weapon. Wittenberger's application was denied on the Department's conclusion that Wittenberger's 1997 conviction for disorderly conduct was a "misdemeanor crime of domestic violence" under 18 U.S.C. § 921(a)(33)(A).¹ Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21

¹ As relevant here, 18 U.S.C. § 921(a)(33)(A) defines a "misdemeanor crime of domestic violence" to include a misdemeanor offense under state law that "has, as an element, the use or attempted use of physical force ... committed ... by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian...."

(2011-12).² We conclude *Evans v. DOJ*, 2014 WI App 31, 353 Wis. 2d 289, 844 N.W.2d 403, and *Koll v. DOJ*, 2009 WI App 74, 317 Wis. 2d 753, 769 N.W.2d 69, control and we affirm the circuit court's order.

In *Koll*, we examined whether an applicant's convictions for disorderly conduct arising from an incident with a live-in girlfriend was a predicate offense under the federal statute which would preclude the issuance of a handgun permit. *Id.*, ¶¶1, 2. There the convictions were specifically described as "non-domestic." *Id.*, ¶2. We rejected Koll's argument that the convictions could not be considered misdemeanor crimes of domestic violence because the prosecution was not required to prove a domestic relationship to obtain the convictions. *Id.*, ¶10. There it was sufficient that the domestic relationship existed between Koll and the victim. *Id.*

Evans addresses whether the crime of disorderly conduct has the requisite element of use of physical force to qualify as a predicate offense under the federal statute. *Id.*, 353 Wis. 2d 289, ¶8. *Evans* addresses the arguments Wittenberger makes here that the determination of whether a predicate offense was committed is to be decided based only on the elements of the crime and with no examination of the acts of the defendant in committing the crime. These arguments mean that the crime of disorderly conduct can never be a qualifying offense. *Id.*, ¶13. *Evans* recognizes that the crime of disorderly conduct can be committed in alternative ways and consequently, under the modified categorical approach used to determine whether the crime has the use of physical force, a "limited class of documents," may be examined to identify which of the crime's alternative is the crime of conviction." *Id.*, ¶¶10, 18. The court held that because

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Evans was charged with engaging in violent conduct and violent conduct necessarily implies the use of physical force, Evans committed a predicate offense and was not entitled to a license to carry a concealed weapon. *Id.*, ¶¶12, 31.

Turning to apply *Koll* and *Evans*, we first observe that the parties disagree as to our standard of review but, as in *Evans*, it is not necessary to address the disagreement. *See Evans*, ¶7. The criminal complaint charged Wittenberger with having engaged in “violent, boisterous, abusive or otherwise disorderly conduct” as reported by his live-in girlfriend. The probable cause portion of the complaint set forth the victim’s report that Wittenberger became very upset and struck her on the left cheek. Wittenberger entered a guilty plea to that count of the criminal complaint. This is sufficient to determine that Wittenberger was convicted of disorderly conduct involving violent conduct which includes the use of physical force. In his reply brief, Wittenberger argues that in the absence of the plea colloquy transcript there is no way to know which of the alternative versions of disorderly conduct he actually acknowledged in pleading guilty. It was Wittenberger’s obligation to produce the transcript in support of his affirmative defense that he was convicted only of non-violent disorderly conduct; it was not the Department’s burden to prove a negative. Wittenberger committed a predicate offense³ and the Department properly denied Wittenberger’s application for a license to carry a concealed weapon.

³ Wittenberger does not dispute that he shared a federally-defined domestic relationship with the victim of his 1997 conviction.

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals