OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

October 20, 2020

To:

Hon. Pedro Colon
Circuit Court Judge
821 W. State St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Jesica Ann Ballenger
Milwaukee County District Attorneys Office
821 W State St Rm 405
Milwaukee, WI 53233-1427

Lisa E.F. Kumfer
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Kaitlin A. Lamb
Assistant State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202

Elizabeth A. Longo
Assistant District Attorney
District Attorney's Office
821 W. State. St. - Ste. 405
Milwaukee, WI 53233

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

2019AP977-CR State of Wisconsin v. Brandon Jermaine Bonds (L.C. # 2017CF62)

Before Dugan, Donald and White, JJ.

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).

The State of Wisconsin appeals from a judgment of conviction sentencing Brandon Jermaine Bonds without imposing a mandatory minimum sentence. The State contends that the circuit court erred by holding the mandatory minimum requirement was unconstitutional. 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 (2017-18).[1] The judgment is summarily affirmed in part, the sentence is vacated, and the matter is remanded, with directions, to the circuit court for further proceedings.

On January 1, 2017, a Milwaukee police officer was sent to investigate a damage complaint. While investigating, the officer was advised by the dispatcher that someone at the location had a gun. The officer approached Bonds, who was at the scene, and patted him down, discovering a firearm. Bonds, having prior felony convictions, is prohibited from possessing a firearm. *See* WIS. STAT. § 941.29(1m)(a) ("A person who possesses a firearm is guilty of a Class G felony if … [t]he person has been convicted of a felony in this state."). Thus, the State charged Bonds with possession of a firearm by a felon.

Because Bonds has a prior 2013 felony conviction for possession of a firearm by a felon,[2] and because of the timing of the current felon-in-possession offense, the criminal complaint in this matter invoked a mandatory minimum sentence provision. A circuit court is required to impose a bifurcated sentence with an initial confinement term of "not less than [three] years" if the defendant has a prior conviction for a "violent felony" and the current felon-in-possession offense was committed within five years after the defendant completed a sentence for a prior felony conviction. *See* WIS. STAT. § 941.29(4m)(a)1.-2.a. The definition of "violent felony" includes "any felony under … this section," *see* § 941.29(1g)(a), meaning that the mandatory

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] The predicate felony for Bonds' 2013 felon-in-possession charge was a 2006 conviction for maintaining a drug trafficking place as a party to a crime, a Class I felony contrary to WIS. STAT. §§ 961.42(1) (2005-06) and 939.05 (2005-06).

minimum sentence provision applies to felons with a prior conviction for possession of a firearm by a felon contrary to § 941.29(1m).

In a pretrial motion, Bonds moved to dismiss the mandatory minimum requirement. He argued that the statute violated equal protection as applied to him and that his prosecution was arbitrary and "not substantially related to any government objective" because of its classification of his prior felon-in-possession conviction as a violent felony "despite no allegation of physical violence or graft."

The circuit court ultimately granted Bonds' motion. It acknowledged that the legislature "has wide discretion, [though] not unfettered[,] to decide what kind of penalties people are subjected to." The circuit court concluded, however, that the statute "doesn't speak English. It must be a violent felony, but they must explain why a possession of a firearm is a violent felony and they haven't been able to do that, at least, I cannot glean it from the statutory scheme." Thus, the circuit court determined that WIS. STAT. § 941.29(4m) was "unconstitutional as to this defendant, in this case." Bonds then pled guilty to the current charge, no longer facing the mandatory minimum sentence requirement. The circuit court sentenced Bonds to two years of initial confinement and two years of extended supervision, imposed and stayed in favor of three years' probation. The State appeals.

"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 a challenger must show unconstitutionality beyond a reasonable doubt. *See* ***id.***, ¶¶18-19; *see also* ***Winnebago Cnty. v. C.S.***, 2020 WI 33, ¶14 n.7, 391 Wis. 2d 35, 940 N.W.2d 875 (declining to adopt a different standard). This reasonable doubt standard

applies to both facial and as-applied challenges.[3] *See* ***State v. Quintana***, 2008 WI 33, ¶76, 308 Wis. 2d 615, 748 N.W.2d 447. Doubts must be resolved in favor of constitutionality, and a "statute must be sustained as constitutional if any reasonable basis for the statute exists." ***Id.***, ¶77.

In the circuit court, Bonds asserted that the statute was unconstitutional because it violated equal protection. In his response on appeal, he also argues that the statute violates due process. *See* ***State v. Darcy N.K.***, 218 Wis. 2d 640, 651, 581 N.W.2d 567 (Ct. App. 1998) ("[A] respondent may advance for the first time on appeal any argument that will sustain the trial court's ruling."). Regardless, analysis of the constitutionality of a statute under due process or equal protection is largely the same. *See* ***Quintana***, 308 Wis. 2d 615, ¶78.

Equal protection "requires that the legislature have reasonable and practical grounds for the classifications that it draws." ***Id.***, ¶79. If neither a fundamental right has been imposed upon, nor a suspect class disadvantaged as a result of the classification, the statute "must be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate government interest."[4] ***Id.*** (citations and internal quotation marks omitted). "Due process bars certain

[3] A facial challenge contends that a statute is unconstitutional on its face and, thus, is unconstitutional under all circumstances. *See* ***State v. Smith***, 2010 WI 16, ¶10 n.9, 323 Wis. 2d 377, 780 N.W.2d 90. This includes categorical facial challenges. *See* ***Winnebago Cnty. v. C.S.***, 2020 WI 33, ¶14 n.6, 391 Wis. 2d 35, 940 N.W.2d 875. An as-applied challenge claims that a statute is unconstitutional when applied to the facts of a particular case or party. *See* ***Smith***, 323 Wis. 2d 377, ¶10 n.9. We need not decide whether Bonds has made a categorical facial challenge, as the State contends, or an as-applied challenge, as Bonds and the circuit court treated it, because the statute survives either challenge.

[4] Cases involving the Second Amendment and the right to bear arms are subjected to a heightened "intermediate scrutiny" analysis. *See* ***State v. Pocian***, 2012 WI App 58, ¶11, 341 Wis. 2d 380, 814 N.W.2d 894. Though Bonds had raised a Second Amendment issue in the circuit court, he does not do so here. We note, however, that the result of this appeal would be the same, even if we applied the "substantially related" test instead. *See* ***id.***

arbitrary, wrongful government actions" and "[s]ubstantive due process forbids a government from exercising 'power without any reasonable justification in the service of a legitimate governmental objective.'" ***Id.***, ¶80 (citation omitted).

In ratifying Bonds' challenge to the mandatory minimum requirement, the circuit court started with the language of WIS. STAT. § 941.29(4m)(a)1., that the mandatory minimum sentence applies if the defendant is subject to § 941.29 "because he or she was [previously] convicted of a violent felony." The circuit court determined this provision was unconstitutional because there is nothing inherently violent—as that word is commonly understood by English speakers—about simply possessing a firearm. The legislature, however, specifically defined "violent felony" for the purposes of the § 941.29 mandatory minimum to *include* possession of a firearm by a felon. *See* § 941.29(1g)(a). While statutory language is given its "common, ordinary, and accepted meaning," specially-defined words are given their special definitional meaning. *See* ***State ex rel. Kalal v. Circuit Ct. for Dane Cnty.***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. That is, "statutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" ***Id.*** (citation omitted).

The circuit court rejected the legislature's definition of violent felony in part because it could not find any legislative history to explain why the legislature included possession of a firearm by a felon in the definition of a violent felony. But the legislature need not expressly state its reasoning; if there are facts on which the legislation could reasonably be based, the statute must be upheld as constitutional. *See* ***Quintana***, 308 Wis. 2d 615, ¶77. The statute's meaning is perfectly plain when using the legislature's definition of "violent felony," so the circuit court erred when it turned to extrinsic sources as interpretive aids. *See* ***Kalal***, 271 Wis. 2d 633, ¶48.

Though Bonds insists that simple possession of a gun is not necessarily accompanied by violence, the question is not whether possession of a firearm by a felon is properly considered to be a violent offense but, rather, whether there is any reasonable or rational basis for the legislature to have included felon-in-possession in its definition of violent felony. *See* ***State v. Smet***, 2005 WI App 263, ¶17, 288 Wis. 2d 525, 709 N.W.2d 474. We conclude that there is.

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 "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). This relationship exists whether the predicate felony is considered violent or nonviolent. *See* ***id.***, ¶¶13-15.

Similarly, including felon-in-possession in the list of violent felonies for which a subsequent felon-in-possession conviction requires a mandatory minimum sentence is both rationally and substantially related to the same public safety objectives. As the State argues, the legislature could have determined a felon in possession of a firearm shortly after having completed a felony sentence "shows a willing disregard for the law and a readiness to commit violence that warrants a mandatory minimum sentence." Relatedly, the legislature also could have concluded that a felon-in-possession charge incurred by someone previously convicted of and sentenced for the same offense means that any rehabilitative or deterrent effect from the first sentence failed, defeating public safety objectives and warranting escalation of the penalty.

Accordingly, we conclude that the circuit court erred when it held the mandatory minimum sentence requirement of WIS. STAT. § 941.29 is unconstitutional. We thus affirm that portion of the judgment reflecting Bonds' conviction following his plea, but we vacate the sentence that was imposed. Following remittitur of this matter to the circuit court, Bonds is to be resentenced, subject to the mandatory minimum sentence requirement of § 941.29(4m)(a).[5]

Upon the foregoing,

IT IS ORDERED that the judgment is summarily affirmed in part, the sentence imposed by the judgment is vacated, and the cause is remanded, with directions, to the circuit court for further proceedings consistent with this opinion. *See* WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals

[5] We are mindful that the circuit court's invalidation of the mandatory minimum may have influenced Bonds' decision to enter a guilty plea. Thus, nothing in this opinion should be construed as foreclosing Bonds from alternatively seeking, subject to applicable pleading requirements, plea withdrawal in lieu of resentencing. *See, e.g.*, ***State v. Lopez***, 2014 WI 11, ¶61, 353 Wis. 2d 1, 843 N.W.2d 390.