



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 IV

May 20, 2021

To:

Hon. Julie Genovese
Circuit Court Judge
Br. 13, Rm. 8103
215 S. Hamilton St.
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Robert D. Zitowsky
Law Offices of Robert D. Zitowsky
Ste. 501
131 W. Wilson St.
Madison, WI 53703-3233

Joshua Kaul
Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Brian Keenan
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Petitioner

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

2020AP1015

Petitioner v. Todd J. Kissinger (L.C. # 2014CV2534)

Before Fitzpatrick, P.J., Blanchard, and Nashold, 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).

Todd Kissinger appeals an order denying his motion for reconsideration of the denial of his petition for return of his firearms. 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 (2019-20).¹ We reverse and remand with directions.

In 2014, a four-year domestic abuse injunction was entered against Kissinger that required him to surrender his firearms. The injunction petition was filed by Kissinger's ex-girlfriend, and was based on conduct that formed the basis for criminal charges resulting in Kissinger being convicted of two counts of misdemeanor battery.

In 2020, Kissinger petitioned pursuant to WIS. STAT. § 813.1285(7) for return of the firearms that he had surrendered in 2014. In response, the circuit court requested that the sheriff provide the court with information as to whether Kissinger was barred from possessing a firearm. *See* WIS. STAT. § 165.63(3) (a court making a determination under § 813.1285(7) "shall request information under sub. (2) from the department or from a law enforcement agency or law enforcement officer as provided in sub. (4)(d)"). The sheriff's department informed the court that under federal law Kissinger was disqualified from possessing a firearm because he had been convicted of a misdemeanor crime of domestic violence, based on the battery convictions referenced above. After receiving this information from the sheriff's department, the court denied Kissinger's petition. Kissinger filed a motion for reconsideration, a hearing was held, and the court denied Kissinger's motion for reconsideration. Kissinger appeals. The petitioner-respondent has not filed a brief on appeal.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted. WISCONSIN STAT. § 813.12 has been revised several times since the entry of the domestic abuse injunction in 2014. Because these differences are not material to the issues on appeal, we refer to the current version of the statute.

A person who has surrendered firearms based on an injunction under WIS. STAT. § 813.12 may petition the circuit court for return of the firearms, but the circuit court may grant the petition only if, among other things, “the person is not prohibited from possessing a firearm under any state or federal law.” WIS. STAT. § 813.1285(7)(a)2. Kissinger argued to the circuit court, and argues again now on appeal, that the information provided by the sheriff’s department was incorrect and that his battery convictions did not disqualify him from possessing firearms under federal law. He separately argues that the procedure for return of firearms provided in § 813.1285 violates his constitutional right to due process because the statute did not require the court to hold a hearing before resolving his petition.² As explained below, we address the first issue and agree with Kissinger that the circuit court erred in concluding that he is disqualified from possessing firearms under federal law. In contrast, we do not address his constitutional challenge to § 813.1285(7).

² Because Kissinger challenges the constitutionality of WIS. STAT. § 813.1285(7) as applied to him and others similarly situated, we issued an order on January 26, 2021, requiring Kissinger to provide service of a “copy of the proceedings” on the Attorney General and the legislative officers specified in WIS. STAT. § 893.825(2). After Kissinger notified us that he provided such service, we issued an order on February 23, 2021, in which we invited a response from those served under § 893.825(2). The Attorney General’s office has filed a response in which it agrees with Kissinger that he was not disqualified under federal law from having his firearms returned, but disagrees that § 813.1285(7) is unconstitutional. The Attorney General also provided a helpful analysis of the issue on which we now base our resolution of this appeal.

We also note that Kissinger initially argued in his appellant’s brief to this court that the circuit court erred in denying his request for return of his firearms because the court failed to recognize that, according to Kissinger, the existence of a domestic relationship with the victim is a required element of the predicate offense. The Attorney General argues to the contrary, and in reply Kissinger has now withdrawn that argument, conceding that the Attorney General is correct.

Federal law prohibits “any person ... who has been convicted ... of a misdemeanor crime of domestic violence” from possessing a firearm. 18 U.S.C. § 922(a)(1) and (g)(9). A “misdemeanor crime of domestic violence” means an offense that:

(i) is a misdemeanor under Federal, State, or Tribal law;
and

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 921(a)(33)(A)(i) and (ii) (footnote omitted). Kissinger’s relationship with the victim in the battery and injunction cases did not satisfy the relationship requirement under this provision to establish a “misdemeanor crime of domestic violence” for purposes of prohibiting Kissinger from possessing a firearm. *See also Evans v. DOJ*, 2014 WI 31, ¶26, 353 Wis. 2d 289, 844 N.W.2d 403 (federal law requires that “[t]he qualifying crime must be committed by a person who has a specified domestic relationship with the victim”).

Here, the injunction against Kissinger was based on a “dating relationship,” which is defined as “a romantic or intimate social relationship between 2 adult individuals.” WIS. STAT. § 813.12(1)(ag). The record does not establish that Kissinger and the victim had any children together, that they ever lived together, or that they were spouses or ex-spouses. Thus, their relationship did not meet the requirements for establishing a “misdemeanor crime of domestic violence” under federal law. As a result, the circuit court erred in denying Kissinger’s petition for return of his firearms, and we therefore reverse the circuit court’s decision.

Because we grant Kissinger all of the relief that he seeks in this appeal, we decline to address his alternative argument for reversal that the procedures in WIS. STAT. § 813.1285(7) deprived him of his constitutional right to due process. See *State v. Scott*, 2018 WI 74, ¶12, 382 Wis. 2d 476, 914 N.W.2d 141 (“We adhere to the doctrine of constitutional avoidance: A court ordinarily resolves a case on available non-constitutional grounds.”); *Waters v. Pertzborn*, 2001 WI 62, ¶14, 243 Wis. 2d 703, 627 N.W.2d 497 (“When a case may be resolved on non-constitutional grounds, we need not reach constitutional questions.”).

Upon the foregoing reasons,

IT IS ORDERED that the circuit court’s order denying Kissinger’s motion for reconsideration is reversed and that the matter is remanded with directions to grant Kissinger’s petition for return of his firearms.

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

Sheila T. Reiff
Clerk of Court of Appeals