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DISTRICT II

July 28, 2023

To:

Hon. Robert S. Repischak
Circuit Court Judge
Electronic Notice

Amy Vanderhoef
Clerk of Circuit Court
Racine County Courthouse
Electronic Notice

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Eric S. Conley, #473035
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Oshkosh, WI 54903-3310

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

2021AP1700 State of Wisconsin v. Eric S. Conley (L.C. #2010CF971)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Eric S. Conley appeals, pro se, from an order denying his WIS. STAT. § 974.06 (2021-22)[1] postconviction motion wherein he sought to vacate a judgment entered after he pled no contest to being a felon in possession of a firearm. Conley asserts that his judgment should be vacated because the gun was an antique gun, which he contends he could legally possess under federal law. 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. We affirm.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

In 2010, the State charged Conley with violating WIS. STAT. § 941.29(2) (2009-10),[2] which prohibits possession of a firearm by a felon. Conley was also charged with obstructing an officer and two counts of bail jumping, and all four counts included the repeater enhancer. The gun Conley had was a .44 caliber revolver that was approximately eighteen inches long. Conley knew he was prohibited from possessing a gun, but said someone he met while in prison gave it to him, and he carried it for protection. Although Conley claimed the gun was not functional, the crime lab concluded it was a functional weapon.

Conley pled no contest to the possession-of-a-firearm count, and the remaining counts (including the repeater enhancer) were dismissed and read in. In the presentence report, Conley described the gun as a "collector's gun[.]" At sentencing, the State described the gun as an antique gun that used black powder. The circuit court sentenced Conley to two-and-a-half years of initial confinement and four years of extended supervision.

In August 2021, Conley filed a WIS. STAT. § 974.06 motion asking the circuit court to vacate his over-ten-year-old judgment on the ground that the gun was an antique firearm that he was allowed to lawfully possess based on federal law. Specifically, he asserted the Gun Control Act of 1968 and 18 U.S.C. §§ 921, 922 exclude antique guns from their definition of "firearm," and therefore he should not have been convicted and sentenced for being in possession of a firearm. The court summarily denied Conley's motion because he was convicted of violating a state law—WIS. STAT. § 941.29(2)—which "clearly shows that an 'antique firearm' is not exempt from prosecution." The court explained that the jury instruction corresponding to this

[2] All references to WIS. STAT. § 941.29(2) are to the 2009-10 version of the Wisconsin Statutes unless otherwise noted.

statute "defines firearm as: 'a weapon which acts by the force of gunpowder. It is not necessary that the firearm was loaded or capable of being fired.'" Because Conley's gun acted "by the force of gunpowder[,]" the court found it clearly met the definition of firearm under § 941.29(2), and therefore, Conley was not entitled to relief from his conviction. Conley now appeals.

Conley makes a similar argument here to the one he made in the circuit court. He claims that under federal law, it is not a crime for a felon to possess an antique weapon. He argues that as a result, he never committed a crime because the gun he possessed did not qualify as a "firearm." The State responds that Conley waived any challenge to his conviction when he resolved the 2010 charges by entering a plea. Alternatively, the State contends that Conley's conviction is based on a state statute where "a firearm" includes the gun Conley possessed. Conley did not file a Reply brief responding to the State's arguments.

We conclude that Conley's no contest plea waives the claim he makes here. When Conley accepted the plea bargain with the State and pled no contest, he waived his right to challenge all nonjurisdictional defenses to his conviction. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; ***State v. Riekkoff***, 112 Wis. 2d 119, 122-23, 332 N.W.2d 744 (1983). The State asserts that Conley waived his right to challenge his conviction under the "guilty-plea-waiver rule[,]" and Conley did not file a Reply brief to refute the State's assertion; therefore he has conceded the point. *See* ***State v. Chu***, 2002 WI App 98, ¶41, 253 Wis. 2d 666, 643 N.W.2d 878 ("Unrefuted arguments are deemed admitted.").

Additionally, Conley failed to allege sufficient facts or provide law to show that our state statute does not apply to the gun he had in his possession. It is undisputed that Conley was charged with a violation of state law—WIS. STAT. § 941.29(2). Section 941.29(2) prohibited a

person convicted of a felony from "possess[ing] a firearm[.]" Although § 941.29(2) did not contain a definition of firearm, in ***State v. Rardon***, 185 Wis. 2d 701, 705-06, 518 N.W.2d 330 (Ct. App. 1994), this court relied on the definition of firearm in WIS. STAT. § 167.31(1)[3] to "conclude that the term 'firearm'" as used in § 941.29(2) (1993-94)[4] "is appropriately defined as a weapon that acts by force of gunpowder to fire a projectile[.]" The ***Rardon*** court noted "that those convicted of a felony [are] not … allowed to possess *any* firearms—operable, inoperable, assembled or disassembled." ***Rardon***, 185 Wis. 2d at 707. Conley provides nothing to show our state law exempts the gun he possessed from qualifying as a firearm. Rather, the Record facts suggest that under state law, the gun he possessed does indeed qualify as a firearm. It is undisputed that Conley's gun acted by force of gunpowder. And, regardless of whether the gun was operable or inoperable, under ***Rardon***, Conley's possession of it violated § 941.29(2). This statute provided no exceptions for antique guns.[5]

Conley cites two Wisconsin statutes to support his argument that his conviction under WIS. STAT. § 941.29(2) is unlawful because these statutes refer to federal law and/or an antique gun. First, he says WIS. STAT. § 175.35(2t)(a) (2009-10) allowed him to possess the gun.

[3] WISCONSIN STAT. § 167.31(1)(c) (2009-10) says: "'Firearm' means a weapon that acts by force of gunpowder." The 1993-94 version of § 167.31(1)(c) is identical.

[4] The 2009-10 and 1993-94 versions of WIS. STAT. § 941.29(2) do not have any material differences with respect to our analysis.

[5] The State also notes that Conley's gun has been destroyed, and the Record contains "only fleeting references to the nature of the firearm." Therefore, Conley has failed to submit evidence to show that his gun would even meet the federal definition of an antique gun. Again, Conley did not file a Reply brief to refute this assertion, and therefore he has conceded the point. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (stating that "propositions of [parties] are taken as confessed which they do not undertake to refute" (citation omitted)).

Conley is wrong. Section 175.35 (2009-10) provided rules applicable to the "[w]aiting period for purchase of handguns." The specific subsection Conley points to exempted the waiting-period purchase rules with respect to certain *transfers* of handguns "classified as an antique[.]" This statute is wholly inapplicable to whether it is a crime for a felon to be in possession of a firearm.

Second, Conley asserts that WIS. STAT. § 941.28(4) (2009-10) allowed him to possess "any firearm that may be lawfully possessed under federal law, or any firearm that could have been lawfully registered at the time of the enactment of the national firearms act of 1968." Conley is wrong again. Section 941.28 (2009-10) governed possession of short-barreled shotguns and short-barreled rifles. Subsection (4) stated that the rules in "*[t]his section* shall not apply to any firearm that may be lawfully possessed under federal law, or any firearm that could have been lawfully registered at the time of the enactment of the national firearms act of 1968." (Emphasis added.) Conley's conviction does not arise under § 941.28 (2009-10). Instead, Conley violated WIS. STAT. § 941.29—the statute prohibiting possession of a firearm by a felon. Section 941.29 does not contain the exception set forth in § 941.28(4) (2009-10).[6]

To the extent Conley tries to argue that federal law preempts state law as to the definition of "firearm" in WIS. STAT. § 941.29(2), his argument is undeveloped, and we do not consider it

[6] Conley also mentions WIS. STAT. § 941.23(1)(g)5. Section 941.23, in the 2009-10 version, did not contain any subsections, and the current version defines who is a "[q]ualified out-of-state law enforcement officer." Thus, his reliance on this subsection is misplaced. We also are unpersuaded by Conley's claim that ***Koll v. DOJ***, 2009 WI App 74, 317 Wis. 2d 753, 769 N.W.2d 69, supports him. ***Koll*** is a case that involves the DOJ's denial of an application for a gun permit based on a prior domestic abuse conviction. ***Id.***, ¶10.

further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (stating that we need not consider insufficiently developed arguments).

Conley has failed to meet his burden to show that the state statute upon which he was convicted provided an antique-firearm exception. Accordingly, the circuit court did not err in summarily denying Conley's WIS. STAT. § 974.06 motion.

Therefore,

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

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

Samuel A. Christensen
Clerk of Court of Appeals