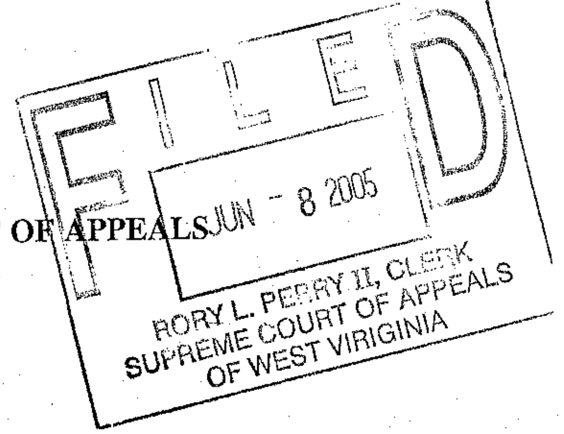


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

IN RE: :

PETITION OF ROBERT ADAM PARSONS FOR RESTORATION OF CIVIL RIGHTS : :

SUPREME COURT NO. 32662

BRIEF OF APPELLANT, ROBERT ADAM PARSONS

William C. Gallagher, Esq.
CASSIDY, MYERS,
COGAN & VOEGELIN, L.C.
The First State Capitol
1413 Eoff Street
Wheeling, WV 26003-3582
Phone: (304) 232-8100
Fax: (304) 232-8352

Counsel for Appellant,
Robert Adam Parsons

I. The Kind of Proceeding and Nature of Ruling in the Lower Tribunal

This is an Appeal from an Order of the Circuit Court of Ohio County, West Virginia denying a petition under West Virginia Code Chapter 61, Article 7, Section 7(c) for restoration of civil rights. The Honorable Arthur M. Recht denied said Petition by Order entered July 19, 2004. Appellant filed a timely Petition to this Court which was granted on May 9, 2005.

II. A Statement of the Facts of the Case

The Appellant, Robert Adam Parsons, was on May 21, 2003, convicted in the Circuit Court of Marshall County, West Virginia, of the misdemeanor offense of Domestic Assault, which was a lesser included offense to a charge of Wanton Endangerment Involving a Firearm for which he had been indicted in Marshall County. This conviction was based on a plea of no contest, after negotiated plea discussions between Mr. Parsons and the State of West Virginia.

Mr. Parsons was sentenced upon that plea to one (1) year confinement in the Northern Regional Jail & Correctional Facility, which was suspended, and he was placed on probation on terms and conditions for one (1) year from and after the sentencing date of May 21, 2003. The remaining counts of the indictment were dismissed.

In a post-plea motion, Mr. Parsons was, on the State's Motion to Correct Sentence, resentenced to six (6) months confinement at the Northern Regional Jail & Correctional Facility, the same being suspended and six (6) months probation being imposed. The State's Motion was based on a submission to the Court that the maximum sentence for Domestic Assault was six (6) months, not one (1) year.

As a specific term of Mr. Parsons' probation, he was not allowed to "use or possess any firearms or lethal weapons," a term acknowledged by him and by Robert Joltes, Probation Officer of Marshall County, West Virginia, on May 21, 2003, the date of the initial sentencing.

Mr. Parsons was, at the time of the offense giving rise to the indictment referred to, an officer with the Bethlehem, West Virginia, police department and a part-time police officer with the town of Yorkville, Ohio.

On April 24, 2004, Appellant filed a Petition under West Virginia Code Chapter 61, Article 7, Section 7(c), to restore to him the civil right to possess a firearm. Mr. Parsons had become a bona fide resident of Ohio County during his probationary period, which after resentencing had expired on November 21, 2003.

Under West Virginia Code Chapter 61, Article 7, Section 7(c), "Any person prohibited from possessing a firearm by the provisions of subsection (a) of this section may petition the circuit court of the county in which he or she resides to regain the ability to possess a firearm and if the court finds by clear and convincing evidence that the person is competent and capable of exercising the responsibility concomitant with the possession of a firearm, the court may enter an order allowing the person to possess a firearm if such possession will not violate any federal law."

Appellant's disqualification was, pursuant to West Virginia Code 61-7-7(a)(8) --

> "(a) Except as provided for in this section, no person shall possess a firearm as such is defined in Section 2 of this Article, who: . . . (8) has been convicted in any court of a misdemeanor crime of domestic violence."

West Virginia Code Chapter 61, Article 2, Section 28, defines domestic violence as domestic assault and domestic battery.

The State did not file any response to the Petition.

At hearing before the Honorable Arthur M. Recht on June 18, 2004, no testimony was taken, and the Court from the bench ordered the Petition be dismissed as, in the Court's opinion, the grant of relief under Chapter 61, Article 7, Section 7(c), to a former law enforcement officer who committed a domestic offense would violate federal law; therefore, the relief could not be granted even if the standards of restoration were met. An Order dismissing the Petition was entered by Judge Recht on July 19, 2004.

III. Assignments of Error Relied Upon on Appeal and the Manner in Which They Were Decided in the Lower Tribunal

Your Appellant asserts that the Circuit Court erred in dismissing the Petition for Restoration of Civil Rights summarily and as a matter of law on July 19, 2004.

IV. Points and Authorities Relied Upon, a Discussion of Law and the Relief Prayed For

The Circuit Court specifically references 18 USC 922 as the federal law which would be violated if he granted relief under West Virginia Code Chapter 61, Article 7, Section 7, stating it provides "that a person who has been convicted of a misdemeanor offense involving domestic violence cannot possess a firearm."

The specific disqualification provision of 18 USC 922 the Court refers to is 18 USC 922(g)(9) . . .

(g) It shall be unlawful for any person –

> (9) who has been convicted in any court of a misdemeanor crime of domestic violence to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

In our memorandum to the Court below, it is argued that the "misdemeanor crime of domestic violence" term was defined in the United States Code at 18 USC 921(a)(33) as

> (i) is a misdemeanor under federal law or state 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 cohabiting with or has cohabited with the victim as a spouse, parent or guardian or by a person similarly situated to a spouse, parent or guardian to the victim.

However, it was argued that 18 USC 921(a)(33)(B)(ii) reads

> "[ii] A person shall not be considered to have been convicted of such an offense for purposes of this chapter [18 USC 921] if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement or restoration of civil rights expressly provides that the person <u>may not ship, transport, possess or receive firearms.</u>" (Emphasis supplied)

The Circuit Court cited this Court's ruling of <u>Perito v. County of Brooke</u>, 215 W.Va. 178, 597 S.E.2d 311 (2004) in its rationale, stating this Court indicated a pardon was insufficient to restore civil rights, the requirements of 61-7-7 needing to be met. Mr. Perito had argued to this Court that such a requirement would violate his Constitutional right to bear arms. The court construing 61-7-7 stated, "When a statute is clear and unambiguous and the

legislative intent is plain, the statute should not be interpreted by the courts and in such case it is the duty of the courts not to construe but to apply the statute (citations omitted)."

This Court stated the obvious purpose of 61-7-7 is to guard the public safety. "We believe the Legislature's method of achieving this goal has been crafted narrowly so as not to offend the Constitution. The statute does not prohibit all individuals who have been convicted of a felony and then received an unconditional pardon from ever possessing a firearm. Rather it puts in place a procedure for the circuit courts to evaluate such individuals to determine if they are 'competent and capable of exercising the responsibility concomitant with the possession of a firearm'." 215 W.Va. at 183, 597 S.E.2d 316.

We would submit the Legislature also did not intend to disqualify domestic assault misdemeanants from ever possessing a firearm.

This Court did not address the "violation of federal law" proviso in Perito, nor did it address a domestic assault misdemeanant. It did, however, indicate the Legislature intended to allow "disqualified" persons from petitioning the circuit court to demonstrate they also could responsibly possess a firearm after conviction.

The Fourth Circuit U. S. Court of Appeals in U. S. v. Herron, 38 F.3d 115 (1994) specifically ruled that a convicted felon who successfully completed probation does not have his civil rights restored by a West Virginia Circuit Court order on the "functional equivalent" of a 61-7-7 order and may be subject to federal prosecution as a "felon in possession."

The Herron court also addressed the final sentence of 18 USC 921(a)(33)(B)(ii), "unless the . . . restoration of civil rights expressly provides that the person may not . . . possess . . . firearms." Citing U. S. v. Metzgar, 3 F.3d 756 (CA 4, 1999) the Herron court found a violation of [18 USC] 922(g) cannot be predicated on a felony conviction for which a

person's civil rights have been restored, "unless that restoration" "expressly provides that the person may not ship, transport or possess firearms," at 758. Whether a person is restored to the whole of his civil rights is determined by "the laws of the jurisdiction in which such purported predicate conviction occurred" at 758.

This Court, shortly after the submission of the Petition in this case, decided Rohrbaugh v. State of W.Va., 216 W.Va. 298, 607 S.E.2d 404 (2004) and found that the specific non-restoration provision of W.Va. Code 61-7-7(b)(1) for a felony sexual offense was constitutional, but it is not believed that holding otherwise affects this Appeal.

Therefore, we argue a Petitioner under 61-7-7 may still be exposed to federal prosecution with a restoration under 61-7-7, but only if the totality of his restoration of rights expressly excludes possession of a firearm by this reasoning.

The Fourth Circuit has also in U. S. v. Rhynes, 196 F.3d 207 (1999) indicated that a violator with multiple federal and state convictions may be required to comply with both the state and federal restoration provisions, the federal restoration being in accordance with federal law which requires . . . an application to the Secretary for relief from the disabilities imposed by federal law . . . and the Secretary [of the Treasury] may grant such relief . . . (196 F.3d at 235)

Your Appellant has no federal convictions. The United States Supreme Court in Beecham v. U. S., 511 US 368, 114 S.Ct. 1669, 128 L.Ed.2d 383, ruling on appeal from a Fourth Circuit case involving both North Carolina and West Virginia, found that Beecham's state restoration of civil rights did not restore his federal disability resulting from his federal convictions.

Your Appellant prays that this Honorable Court reverse the Circuit Court with directions to allow the Appellant to conduct a meaningful Chapter 61, Article 7, Section 7 hearing, contending that his restoration of civil rights would only violate federal law if that restoration order specifically denied firearm or ammunition possession, which under the circumstances of his petition as a misdemeanant, would be a denial of the petition on its face after given an opportunity to present evidence.

Respectfully submitted,

ROBERT ADAM PARSONS, Appellant

By:____________________________
Of Counsel

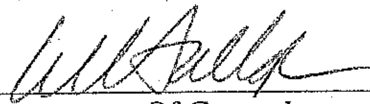
William C. Gallagher, Esq.
West Virginia State Bar No. 1329
CASSIDY, MYERS,
COGAN & VOEGELIN, L.C.
The First State Capitol
1413 Eoff Street
Wheeling, WV 26003-3582
Phone: (304) 232-8100
Fax: (304) 232-8352

CERTIFICATE OF SERVICE

Service of the foregoing BRIEF OF APPELLANT, ROBERT ADAM PARSONS was had upon the following by mailing a true and complete copy thereto to their last known address, by regular United States mail, postage prepaid, this 7th day of June, 2005, as follows:

Honorable Darrell V. McGraw, Jr.
West Virginia Attorney General
1900 Kanawha Blvd., East
Room 26E
Charleston, WV 25305-9924

Scott Smith, Esq.
Prosecuting Attorney of Ohio Co.
City-County Building
1500 Chapline Street 2nd Floor
Wheeling, WV 26003



Of Counsel