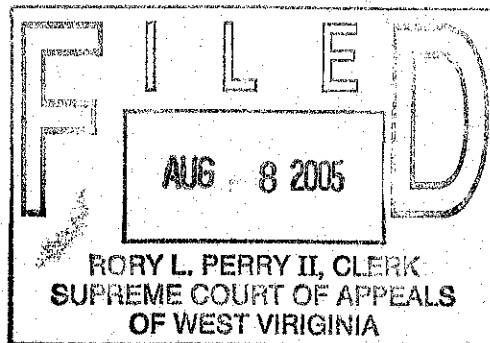

NO. 32662

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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



BRIEF OF APPELLEE,
STATE OF WEST VIRGINIA

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

DAWN E. WARFIELD WWSB#3927
DEPUTY ATTORNEY GENERAL
STATE CAPITOL, ROOM 26-E
CHARLESTON, WEST VIRGINIA 25305-0220
(304) 558-2021

Counsel for Appellee

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BRIEF OF APPELLEE,
STATE OF WEST VIRGINIA

I.

KIND OF THE PROCEEDING AND
NATURE OF THE RULING BELOW

This is an appeal by Robert Adam Parsons (hereinafter "Appellant") of an order of the Circuit Court of Ohio County, West Virginia, dated July 19, 2004. The order denied Appellant the relief he sought in a petition to restore his ability to possess a firearm, filed pursuant to West Virginia Code § 61-7-7.

II.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Marshall County Conviction.¹

In November of 2002 Appellant was indicted by the Grand Jury for Marshall County for the felony offense of wanton endangerment involving a firearm, in violation of West Virginia Code § 61-7-12, by pointing a handgun and cocking the hammer at Kristin Conrad. He was also indicted

¹Pertinent portions of the record of this conviction have been filed with this Court as "Exhibit A" to Appellee's Motion to Supplement the Record.

for the misdemeanor offenses of domestic battery upon Kristin Conrad, in violation of West Virginia Code § 61-2-28(a), and battery upon Judith Thompson, in violation of West Virginia Code § 61-2-9(c).

On May 21, 2003, Appellant entered a plea of *nolo contendere* to the misdemeanor offense of domestic assault, a lesser-included offense of wanton endangerment. The two remaining counts were dismissed. The Marshall County Circuit Court sentenced Appellant to six months in jail, but suspended the sentence and placed him on probation for six months. By the time Appellant completed his probation in November 2003, he had moved to Ohio County.

The Ohio County Petition.

On April 26, 2004, Appellant filed a petition in the Circuit Court of Ohio County pursuant to West Virginia Code § 61-7-7, seeking restoration of his “civil rights.”² (R. 1-3.) On June 18, 2004, a hearing was held by the Circuit Court of Ohio County, Judge Arthur M. Recht presiding, at the conclusion of which the circuit court denied the petition. The circuit court held that the language of § 61-7-7(c) required the court to determine if the possession of a firearm by the petitioner would violate any federal statute. The circuit court then determined that the possession of a firearm by Appellant would, in fact, violate 18 U.S.C. § 922, which prevented the granting of the relief sought in his petition. The court concluded that the language chosen by the Legislature evidenced its intent that “if you are convicted of a domestic violence offense, your gun days are over in terms of possessing a firearm in West Virginia.” (R. 24.)

²It should be noted that West Virginia Code § 61-7-7 does not contain the words “civil rights” but describes a statutory procedure for restoration of a person’s ability to possess a firearm.

The circuit court dismissed the petition, by order entered July 19, 2004. (R. 28.) This Court granted Appellant's petition for appeal on May 9, 2005.

III.

ASSIGNMENT OF ERROR

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." (Appellant's Brief at 4.)

IV.

STANDARD OF REVIEW

Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, this Court applies a *de novo* standard of review. *E.g., Bass v. Rose*, 216 W. Va. 587, 609 S.E.2d 848 (2004).

V.

ARGUMENT

As noted by this Court in *State ex rel. City of Princeton v. Buckner*, 180 W. Va. 457, 465, 377 S.E.2d 139, 147 (1988), "the prohibition against the possession or ownership of handguns by persons convicted of a felony or other specified crimes is widely accepted." Against that backdrop we consider West Virginia Code § 61-7-7 and Title 18, United States Code § 922.

Section 61-7-7 of the West Virginia Code, originally enacted in 1989, describes certain categories of persons who may not possess firearms in West Virginia, including convicted felons, drug addicts, mental defectives, persons convicted of domestic violence, and the like. The statute also contains a provision whereby such persons may petition the circuit court of the county wherein

they reside “to regain the ability to possess a firearm.” W. Va. Code § 61-7-7(c). The statute says nothing about restoring one’s civil rights, but relates only to possession of firearms.

The West Virginia statute, however, also contains the following proviso: “[T]he court may enter an order allowing the person to possess a firearm *if such possession would not violate any federal law.*” W. Va. Code § 61-7-7(c) (emphasis supplied). We must then look to the federal statutes to determine if Appellant’s possession of a firearm would violate any federal law, as was found by the circuit court in denying Appellant’s petition.

Title 18, U.S.C. § 922(g)(9) provides, in pertinent part, that it shall be unlawful for any person to possess a firearm “who has been convicted in any court of a misdemeanor crime of domestic violence.” We must then determine if Appellant’s conviction for misdemeanor domestic violence in Marshall County, West Virginia, qualifies as such a conviction. It does.

Section 921(a)(33)(A) of the statute, wherein “misdemeanor crime of domestic violence” is defined, requires that the offense be “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, or 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 of the victim.” (Emphasis supplied.) The record in the underlying criminal case contains a factual basis for finding that the victim, Kristen Conrad, and Appellant were domestic partners, and that Appellant was therefore “similarly situated to a spouse” of the victim. (*See* Appellee’s Exhibit A.) This answers the question regarding a violation of federal law. Thus, if Appellant were to possess a firearm, he would be in violation of 18 U.S.C. § 922(g)(9). He does not argue otherwise.

However, 18 U.S.C. § 921(a)(33)(B)(ii) provides that a person shall not be considered to be convicted of such an offense “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*)[.]” (Emphasis supplied.) Appellant’s conviction has not been expunged or set aside. He has not been pardoned. The only remaining exception that could apply would be if Appellant has had, or *could* have, his civil rights restored.³ That appears to be precisely what he seeks in the present proceeding. However, in West Virginia, Appellant’s conviction for a misdemeanor did not operate to forfeit his civil rights, so the last provision of § 921(a)(33)(B)(ii) (the “restoration exception”) does not apply.

This precise issue was recently addressed by the United States Court of Appeals for the Fourth Circuit in *United States v. Jennings*, 323 F.3d 263 (4th Cir. 2003). In *Jennings*, the defendant was convicted in the United States District Court for the District of South Carolina of possessing a firearm after a conviction in state court of a misdemeanor crime of domestic violence. He appealed. The Fourth Circuit held that Jennings, while convicted of the misdemeanor crime of domestic violence, *but who had never had his civil rights taken away*, could not have had them “restored” so as to exempt him from prosecution under 18 U.S.C. § 922(g)(9). *Jennings*, 323 F.3d at 267. The defendant had argued that he fell within the exception contained in 18 U.S.C. § 921(a)(33)(B)(ii), wherein a person who has had his civil rights restored shall not be considered to have been convicted of a misdemeanor crime of domestic violence. The court of appeals noted that Jennings’ civil rights

³As used in § 921, “[t]he term ‘civil rights’ denotes ‘those rights accorded to an individual by virtue of his citizenship in a particular state,’ comprising the rights to vote, to hold public office, and to serve on a jury.” *United States v. Metzger*, 3 F.3d 756, 758 (4th Cir. 1993) (quoting *United States v. Cassidy*, 899 F.2d 543, 549 (6th Cir.1990)).

had never been taken away under South Carolina law. Accordingly, he could not maintain that such rights had been “restored,” and therefore could not claim the restoration exception. *Jennings* at 267, 275.

The court in *Jennings* reviewed decisions of six other circuit courts, finding that the decisions of four others were persuasive on this issue. In *McGrath v. United States*, 60 F.3d 1005, 1007 (2d Cir. 1995), the court found that the word “restore” means to give back something lost or taken away, and that the exclusion in Section 922 did not apply when one’s civil rights had not been taken away. In *United States v. Smith*, 171 F.3d 617, 623 (8th Cir. 1999), the court held that “an individual convicted of a misdemeanor cannot benefit from the federal restoration exception.” In *United States v. Hancock*, 231 F.3d 557, 566-67 (9th Cir. 2000), *cert. denied*, 532 U.S. 989 (2001), the court found *Smith* persuasive, and held that one with a state misdemeanor domestic violence conviction, for which he did not lose his state civil rights, could not avail himself of the federal “restoration” exception.

In *United States v. Barnes*, 295 F.3d 1354 (D.C. Cir. 2002), Barnes asserted an “equal protection” argument, asserting that one convicted of a misdemeanor was in a worse position than a felon, since the felon could claim that his civil rights had been taken, and then restored, while a misdemeanant could make no such claim, and could not then avail himself of the federal “restoration” exception. Claiming that there is no rational basis for this distinction, Barnes asserted that his conviction violated equal protection. The court made short work of this claim, finding that “[h]is claim is without merit.” *Id.* at 1368. The court went on to observe that “Congress’s decision to incorporate state law governing forfeiture of civil rights was rational irrespective of differences among states regarding restoration. Furthermore, the Congress provided other methods such as

expungement and pardon that Barnes might use to come within the exception of section 921(a)(33).”

Id. at 1368 (citing *McGrath*, 60 F.3d at 1008).

Beginning with *Smith*, these cases relied on the legislative history of 18 U.S.C. § 921(a)(33)(B)(ii) in upholding the different treatment of felons and those who have committed acts of domestic violence:

Congress knew that the states had widely divergent laws regarding pardon, expungement, and restoration of civil rights. This was true not only when Congress enacted § 921(a)(20), but even more so when it enacted § 921(a)(33) in 1996, ten years after enacting the much criticized restoration exception in § 921(a)(20). *See McGrath*, 60 F.3d at 1009 (noting various courts that have criticized the disparate treatment involving the restoration exception of § 921(a)(20) based on divergent state laws). Yet, Congress continued to look to state law to define the restoration exception, noting that the exception in § 921(a)(33) was modeled after that contained in § 921(a)(20). *See* 142 Cong. Rec. S11872-01, *S11877.

Congress was cognizant of the disparity it would create. *See id.* (“Loss of these [civil] rights generally does not flow from a misdemeanor conviction, and so this language is probably irrelevant to most, if not all, of those offenders covered because of the new ban.”) (statement of Sen. Lautenberg). However, Congress was concerned with domestic abuse offenders who were successful in pleading a felony charge down to a misdemeanor and thus escaping the effect of the felon-in-possession statutes. *See id.* at S 11876. An earlier version of the bill did not cover attempted use of physical force or threatened use of a weapon. *See id.* at S11877. The change reflects Congress's concern that an individual in a domestic relationship who would attempt to use physical force or threaten use of a weapon was as dangerous as one who actually committed an act of physical force and similarly should not be allowed to possess a firearm. *See id.* Congress was concerned with the exact situation faced here: preventing a known (from the fact of the misdemeanor conviction) domestic abuser from later using a firearm to inflict the next bout of abuse. *See id.* at 11876.

United States v. Smith, 171 F.3d at 625.

The exact issue arises herein. Appellant's only possible claim to restoration of his ability to possess a firearm, as noted above, is that he is exempt from proscriptions of the federal statute

because he has had his civil rights “restored.” However, since his civil rights were never lost, there is nothing to restore, and the exception of § 921(a)(33)(B)(ii) does not apply.

So, we are left with an analysis that has nothing to do with civil rights – since he never lost them – but which has everything to do with the language of the statute. Accordingly, there is nothing in § 921(a)(33)(B)(ii) that excludes Appellant from the prohibitions of Section 922. Possession of a firearm by Appellant is a violation of 18 U.S.C. § 922(g)(9), and he is accordingly not entitled to relief under West Virginia Code § 61-7-7 because his possession of a firearm would, in fact, violate a federal law.

Appellant’s counsel argues that the Legislature did not intend to disqualify domestic assault misdemeanants from ever possessing a firearm. (Appellant’s Brief at 6.) However, a review of the legislative history of West Virginia Code § 61-7-7 suggests otherwise. In its original enactment, § 61-7-7 did not contain any disqualification for domestic violence convictions. (1989 W. Va. Acts c. 48.) However, the 2000 amendment rewrote the section, and specifically added language regarding domestic violence convictions as a disqualifying act for possessing a firearm. (2000 W. Va. Acts c.121.) It is submitted that this is clear evidence of the Legislature’s intent to prohibit those convicted of domestic violence from possessing a firearm.

This view is strengthened by the 1996 amendments to the federal statute, which added the provisions of § 922(g)(9) to the then-existing federal statute, disqualifying persons convicted of misdemeanor crimes of domestic violence from possessing firearms. As noted by the court in

Jennings:

In 1996, Congress amended the Gun Control Act of 1968, *id.* § 922, by providing that a person convicted of a misdemeanor crime of domestic violence (MCDV) is prohibited from, *inter alia*, possessing a firearm or ammunition. *Id.* §

922(g)(9). A MCDV is defined as an offense that is a “misdemeanor under Federal or State law,” *id.* § 921(a)(33)(A)(i), and

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 or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

Jennings, 323 F.3d at 264-65.

It is clear that the West Virginia Legislature wanted to make the law of this State reflect the will of its citizens – that persons convicted of domestic violence should not possess firearms. That is why the law was changed in 2000. It is also clear that the 2000 changes to the West Virginia statute contemplated the 1996 change in the federal statute and were enacted in conformity with such changes. The language of the last clause of West Virginia Code § 61-7-7(c), “if such possession would not violate any federal law,” recognizes the futility of restoring one’s ability to possess a firearm if possessing that firearm would then expose that person to a federal prosecution. The sole question in this case, or in any case like this, is whether the possession of a firearm by Appellant violates federal law. It does.

As the circuit court astutely observed:

Now, you see, where we are is, under West Virginia law, if possession would violate the federal law, you can’t be restored. And it does violate federal law.

So under – you could never be restored, as I read these two statutes, to your civil rights upon conviction of a domestic battery or domestic assault.

....

I think that the legislature – and it has the authority to do this – is to – they put that section in there for a reason. It’s just tagged onto the end of it. And until you

get to that last section, you say, all right, you take testimony regarding the – whether or not they should be permitted to possess a firearm.

I believe, quite frankly, that the legislature knew what it was doing; and that, if a person is involved in any kind of domestic offense and they're convicted, that our legislature is saying you'll never own a gun.

And that's – you're given – you're given fair warning of that. And that's how it reads. That will be all.

(R. 25-26.)

As the circuit judge clearly recognized, even if Appellant were to obtain a favorable ruling from the Circuit Court of Ohio County on his petition, such an order would not shield him from federal prosecution under 18 U.S.C. § 922. None of the federal cases cited by Appellant holds that an order entered pursuant to West Virginia Code § 61-7-7 is the functional equivalent of an order restoring one's civil rights within the meaning of 18 U.S.C. § 921. In fact, *United States v. Herron*, 38 F.3d 115, 117 (4th Cir. 1994), says that it is not. And, as the Fourth Circuit held in *Jennings*, Appellant cannot obtain the relief he seeks – an order giving him permission to possess a firearm – because the clear language of the federal statute precludes it. The decision of the court of appeals, interpreting a federal penal statute, would appear to be controlling on this core issue. This Court should therefore decline Appellant's request.

VI.

CONCLUSION

Appellant's position is that he is entitled to a full hearing on his petition before the Circuit Court of Ohio County, West Virginia. However, given the explicit prohibitions of the Federal Gun Control Act, a favorable ruling in Ohio County would merely set a trap for Appellant – since his

possession of a firearm, after a conviction for a misdemeanor crime of domestic violence, would place him squarely in the cross hairs of the federal criminal statute.

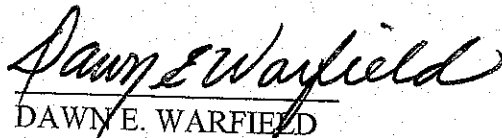
For the foregoing reasons, the ruling of the Circuit Court of Ohio County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

by Counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



DAWNE E. WARFIELD
DEPUTY ATTORNEY GENERAL
State Bar ID No. 3927
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

CERTIFICATE OF SERVICE

I, DAWN E. WARFIELD, Deputy Attorney General for the State of West Virginia and counsel for Appellee, do hereby certify that the foregoing *Brief of Appellee, State of West Virginia* was served upon counsel for Appellant by depositing a true copy thereof in the United States mail, postage prepaid, this 8th day of August, 2005, addressed as follows:

To: William C. Gallagher, Esq.
Cassidy, Myers, Cogan, Voeglin & Tennant, L.C.
The First State Capitol
1413 Eoff Street
Wheeling, West Virginia 26003-3582



DAWN E. WARFIELD