SCAP-22-0000561

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAII, Plaintiff-Appellant, vs. CHRISTOPHER L. WILSON, Defendant-Appellee.	)	CASE ID. 2CPC-17-964(1) APPEAL FROM ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNTS 1 & 2 FILED AUGUST 30, 2022 CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAIʻI HONORABLE KIRSTIN M. HAMMAN JUDGE

STATE OF HAWAIʻI'S REPLY BRIEF

DEPARTMENT OF THE PROSECUTING ATTORNEY 207

ANDREW H. MARTIN 8307
Acting Prosecuting Attorney
By
RICHARD B. ROST 7947
Deputy Prosecuting Attorney
County of Maui
Wailuku, Hawaiʻi 96793
Tel. No.(808)270-8286
Fax. No. (808)270-7927
Email: Richard.Rost@co.maui.hi.us

Attorney for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

CASES

TABLE OF AUTHORITIES

SCAP-22-0000561

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

STATE OF HAWAII, Plaintiff-Appellant, vs. CHRISTOPHER L. WILSON, Defendant-Appellee.	)	CASE ID. 2CPC-17-964(1) APPEAL FROM ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNTS 1 & 2 FILED AUGUST 30, 2022 CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAIʻI HONORABLE KIRSTIN M. HAMMAN JUDGE

STATE OF HAWAIʻI'S REPLY BRIEF

COMES NOW, Plaintiff-Appellant STATE OF HAWAIʻI ("State") hereby submits the following reply brief, pursuant to Rule 28 of the Hawaiʻi Rules of Appellate Procedure.

I. DISCUSSION.

A. THE CIRCUIT COURT'S FINDING OF FACT REGARDING WILSON'S PURPOSE FOR ILLEGALLY CARRYING AN UNPERMITTED, UNLICENSED FIREARM WHILE TRESPASSING HAS NO BASIS IN THE RECORD.

In response to the State's argument regarding the lack of any basis in the record supporting the circuit court's finding of fact ¶ 3 and conclusion of law ¶ 3 that, during the incident in question, Defendant-Appellee Christopher L. Wilson ("Wilson") was carrying the firearm for "self-defense purposes," (Dkt. 10,

PDF at 15, JIMS No. 179) Wilson argues, incorrectly, the State did not raise the lack of any factual basis for this finding below.

As an initial matter, the issue on appeal is whether "the record lacks substantial evidence to support the finding" made by the circuit court that Wilson was carrying his unpermitted, unlicensed firearm while trespassing for "self defense purposes." (Dkt. 10, PDF at 15, JIMS No. 179). State v. Wilson, 92 Hawai`i 45, 987 P.2d 268 (1999). The State clearly objected to that finding when it filed its own proposed findings of fact and conclusions of law, which did not contain such a finding. (Dkt. 10, PDF at 15, JIMS No. 170). The circuit court's decision to make such a factual finding - with no support in the record and over the State's objection - was error.

The primary issue with this factual finding is the declaration of counsel upon which it is based contains no actual facts. Wilson points out that HRPP Rule 47(a) requires that a motion that requires consideration of facts not in the record must be accompanied by an affidavit or declaration. While that is certainly true as far as it goes, the rule clearly contemplates a declaration or affidavit based on personal knowledge; otherwise the trial courts could dismiss any case upon a motion to dismiss accompanied by a declaration of counsel asserting his or her client's innocence. In this case, defense counsel claimed the factual assertions in the motion were based on unspecified documents; the declaration itself does not allege any facts. Moreover, what were the document the declaration purports to rely upon, and how did they supposedly demonstrate Wilson's purpose for carrying the unpermitted, unlicensed firearm while trespassing was self-defense? There is no way to know on this record. This is plainly not "substantial evidence."

The lack of evidence supporting the circuit court's finding is especially problematic because the burden to show a prima facie basis for dismissal of criminal charges is on the defendant. "[T]he burden of going forward with the motion should be upon the movant to show a prima facie case showing that he is

entitled to dismissal." State v. Almeida, 54 Haw. 443, 509 P.2d 549 (1973). Allowing Wilson to meet his burden on a factual issue regarding his state of mind by relying solely with a blanket declaration of counsel is plainly not what is contemplated by Rule 47.

Finally, even if there were ***some*** factual basis for the circuit court's finding, the issue of Wilson's purpose in carrying his unpermitted, unlicensed firearm while committing another crime is not appropriately resolved on a motion to dismiss. Determining what Wilson did and his state of mind are issues for the jury. State v. Van Dyke, 101 Hawai`i 377, 69 P.3d 88 (2003), *as corrected* (May 23, 2003), *as amended* (June 5, 2003) ("It is well settled that, '[i]n a jury trial, [the] Defendant's state of mind is a fact that must be determined by the [trier of fact],' . . . based on the direct and circumstantial evidence adduced at trial.") (Brackets in original, citation omitted).

B. THE CIRCUIT COURT ERRED WHEN IT FOUND THERE ARE NO EXCEPTIONS FOR SELF DEFENSE UNDER HRS § 134-25 AND § 134-27.

In his answering brief, Wilson makes no attempt to defend the circuit court's erroneous conclusion of law determining that HRS §§ 134-25 and 134-27 contain ". . . no exception for carrying firearms outside the home for self defense purposes." (Dkt. 10, PDF at PDF at 15, JIMS No. 179, PDF at 3). As the State explained in its opening brief, this is flatly untrue, as both statutes begin with language providing extremely clear exceptions: "[e]xcept as provided in sections 134-5 and 134-9[.]" HRS § 134-9, in turn, contemplates the issuance of carry licenses upon a showing an applicant has "reason to fear injury to the applicant's person or property[.]" This is plainly an exception allowing firearms to be carried outside the home for self defense.[1]

[1] Whether this exception is adequate under Bruen is another question, but one that Wilson failed to raise in his motion to dismiss.

Wilson, however, based his motion to dismiss on the fallacy that HRS § 134-9 does not exist; his motion to dismiss never mentions the statute, and thus made no effort to argue it was invalidated by New York State Rifle & Pistol Ass'n v. Bruen, 142 S.Ct. 2111 (2022). See, Dkt. 10, PDF at 14, JIMS No. 161. The State clearly explained Wilson's failure to challenge HRS § 134-9 below in its opening brief. (Dkt. 13, PDF at 18-21). Wilson, however, makes no effort to address this point. He never claims the circuit court was correct in finding HRS §§ 134-25 and 134-27 have no exceptions which allow carrying firearms for self defense, and never explains his failure to directly challenge HRS § 134-9 below.

This failure is critical, because as noted in the State's opening brief, Bruen only relates to what requirements a State may impose on those seeking firearm carry licenses. See, Bruen, 142 S.Ct. at 2156 (finding New York's "proper cause" requirement to be unconstitutional). The ***only*** Hawaii statute potentially relevant to Bruen, therefore, is HRS § 134-9, but Wilson never even attempted to argue that statute was invalid. On that basis alone, the circuit court was obligated to deny his motion.

C. WILSON LACKS STANDING TO CHALLENGE HRS § 134-9 DUE TO HIS FAILURE TO EVEN APPLY FOR A CARRY LICENSE.

On the issue of standing, Wilson continues to rely upon State v. Armitage, 132 Hawai`i 36, 319 P.3d 1044 (2014), while refusing to engage with the State's argument regarding the case. As the State explained in its opening brief, Armitage makes it clear that when criminal defendant fails to follow an application process laid out in a statute or rule, he or she lacks standing to challenge the requirements of such a process:

> Since they never attempted to use the application procedure, they cannot claim that the specifics of the application procedures under HAR § 13-216-11, including review by a "cultural practitioner, HAR § 13-261-11(f), are unconstitutional as applied to them . . . ***Had Petitioners attempted to follow the application process, then they would have had standing to challenge***

> ***the constitutionality of HAR § 13-261-11.*** However, those are not the facts presented by this case.

Id., at 55-56, 319 P.3d at 1063-64 (emphasis added).

The State quoted this same passage in its opening brief. See, Dkt. 13, PDF at 22. But Wilson does not make any effort to explain how this case differs from Armitage on this point. Just as in Armitage, Wilson failed to apply for the relevant license. Just as in Armitage, he plainly lacks standing to attack the statute he never applied under, i.e., HRS § 134-9.

This is vitally important, because, again, Bruen is only relevant to what requirements a state may impose on persons seeking licenses to carry firearms, as the court held that New York's "proper cause" requirement was unconstitutional. Bruen, 142 S.Ct. at 2156. A person who does not even attempt to obtain a license to carry, therefore, cannot seek refuge under Bruen.

Wilson instead points to language from Armitage stating that because the petitioners therein ". . . were subject to penal liability pursuant to HAR § 13-261-10, they have a claim of specific present objective harm, and therefor have standing to challenge the constitutionality of that regulation." Armitage, 132 Hawai`i at 55, 319 P.3d at 1063. But this issue is not whether Wilson has standing to challenge the statutes that impose penal liability in this case, i.e., HRS §§ 134-25 and 134-27. Those statutes merely say one cannot carry firearms or ammunition ***without a carry license***. Bruen does not prohibit conditioning carrying a firearm on obtaining a license; instead it deals with what types of requirements issuance of a license may be conditioned upon. As noted by Justice Kavanaugh's concurrence in Bruen, ". . . the Court's decision [in Bruen] does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense." Bruen, 142 S.Ct. at 2162 (Kavanaugh, J., concurring); See also Id. (Kavanaugh, J., concurring). ("Properly interpreted, the Second Amendment allows a 'variety' of gun regulations.").

This is precisely what cases from other jurisdictions have determined. As noted in the State's opening brief, both

California and New York have rejected Bruen-based challenges raised by defendants in firearms cases on standing grounds. See, Dkt. 13, PDF at 23-25, *citing, inter alia*, People v. Rodriguez, 171 N.Y.S.3d 802 (N.Y. Sup. Ct. 2022) and People v. Velez, 85 Cal.App.5th 957, 302 Cal.Rptr.3d 88 (Cal.App. 5th Dist. 2022), *as modified* (Dec. 14, 2022). What is Wilson's response to this persuasive authority? Apparently to ignore it, and hope this Court does likewise.

Indeed, since the State filed its opening brief, more courts have reached this same conclusion, i.e., a defendant who never applied for a firearm carry license lacks standing under Bruen. For example, in People v. Brundige, 182 N.Y.S.3d 595, 600-01 (N.Y. Sup. Ct. 2023), the court explained the defendant being prosecuted for criminal possession of a weapon lacked standing under Bruen because:

> Simply stated, Bruen merely invalidated New York's "proper cause" standard. These ruling have no impact on the constitutionality of New York's Criminal Possession of a Weapon Penal Law statutes. This Court does not find that the Second Amendment is a second class right, but rather equal to all other Constitutional rights. This Constitutional rights has no bearing on the legitimacy of the Criminal Possession of a Weapon statute challenged by the defendant.

See, also, People v. Williams, 78 Misc.3d 1205(A), 183 N.Y.S.3d 297 (N.Y. Sup. Ct. 2023) ("Since this defendant has not applied for or been denied a pistol permit, he does not have standing to challenge the New York pistol permit licensing law. The defendant has suffered no prejudice and has no interest in this statute.")

Wilson also claims that he should be allowed to carry a firearm despite not applying for a carry permit, and not even attempting to show he meets the requirements for such a license, because standing is a "barrier to justice" and that "in removing the barriers the emphasis should be on the needs of justice." See, Dkt. 19, PDF at 9-10, *quoting* Life of the Land v. Land Use Commission, 63 Haw. 166, 74 n. 8, 623 P.2d 431, n.8 (1981). Leaving aside that Hawaii courts have continued to regularly enforce standing requirements in the forty-two years since Life

of the Land was decided, a ". . . criminally accused has 'standing' to constitutionally challenge only the specific penal sanctions with which he is charged." State v. Grahovac, 52 Haw. 527, 480 P.2d 148 (1971). Thus, while Wilson has standing to challenge HRS § 134-25 and § 134-27, he lacks standing to challenge HRS § 134-9, because (a) he was not charged with a crime under HRS § 134-9, and (b) he did not even attempt to apply for a carry license pursuant to HRS § 134-9.

D. IT WAS ERROR FOR THE CIRCUIT COURT TO DISMISS COUNTS 1 AND 2 BASED ON *BRUEN*.

Wilson argues that dismissal was appropriate because the State did not adequately justify HRS §§ 134-25 and 134-27 under Bruen, i.e., demonstrating that the restrictions thereunder parallel some restrictions in place at the time the Constitution was written. But this argument misses the point. HRS §§ 134-25 and 134-27 simply prohibit carrying firearms and ammunition unless one has obtained a license under HRS § 134-9. As noted *supra*, there is no question that the State may condition carrying a firearm on obtaining a proper license. Wilson's actual objection is to the licensing requirements imposed under HRS § 134-9, but as noted ***Wilson never challenged*** HRS § 134-9. There was, accordingly, no reason for the State to attempt to justify HRS § 134-9 under Bruen, because Wilson preferred to pretend there was no licensing process.

As noted in the State's opening brief, HRS § 134-9 contains several requirements to obtain a carry license. While one - the "suitable person" prong - might be subject to analysis under Bruen, the others are plainly valid. These requirements include demonstrating that the applicant is not a fugitive, a felon, or "mentally deranged." See, HRS §§ 134-7, 134-9. There is no question that these types of restrictions remain legal. See, District of Columbia v. Heller, 128 S.Ct. 2783 (2008); Bruen, 142 S.Ct. at 2162 (Kavanaugh, J., concurring); McDonald v. City of Chicago, Ill., 130 S.Ct. 3020 (2010). Indeed, Wilson never even contends any of the other requirements of HRS § 134-9 are invalid.

Given Wilson's apparent concession that, at the very least, the ***other*** requirements under HRS § 134-9 remain valid, the question becomes why Wilson should be excused from applying for a carry license and demonstrating he meets all the requirements untouched by Bruen. Why should Wilson not have to demonstrate that he is not a felon or mentally ill before he carries a firearm in public? Wilson's theory is apparently that, because Bruen arguably calls one requirement to obtain a carry license into question, the entire system is unconstitutional and anyone and everyone can simply carry a firearm (a firearm that was not even acquired legally, at that) whenever and wherever they desire. Apparently this would extend to fugitives, felons, and others explicitly excluded by HRS § 134-9; if there is no obligation to even apply for a license, then the State would be rendered powerless to stop such individuals from carrying firearms.[2]

This outcome would be a colossal disaster for public safety. The Court must decline Wilson's invitation to plunge Hawaii into the violent chaos of totally unregulated firearms. Indeed, Wilson is advocating an expansive reading of Bruen, under which there would be no obligation to comply with any part of Hawaii's carry licensing system due to one aspect thereof being arguably questionable under Bruen. Such an expansionist interpretation of Bruen would be ruinous for public safety. One need only to look at the Fifth Circuit's recent decision in United States v. Rahimi, 61 F.4th 443, 2023 WL 2317796 (5th Cir. 2023), to see the results of the kind of broad reading of Bruen Wilson asks this Court to employ.

---

[2] As noted in the State's opening brief - and ignored by Wilson - this approach is essentially an endorsement of self help when it comes to firearms restrictions. The State submits such an approach would be reckless in the extreme. Public safety required that - instead of simply ignoring the licensing process and carrying an illegally obtained firearm wherever he wanted - Wilson apply for a carry license and, if he had been denied one, file an appropriate challenge to that denial. Wilson's complaint that such a process would be expensive is both speculative and not a valid reason to totally ignore the licensing requirements.

In Rahimi, the Fifth Circuit struck down 18 U.S.C.A. § 922(g)(8), which prohibits possession of firearms or ammunition by any person subject to a court order which ". . . restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child . . ." and which ". . . includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child[.]" According to the court in Rahimi, the prohibition of gun possession by persons subject to restraining orders against domestic violence ran afoul of Bruen because there was not a "comparable tradition of regulation" at the time of the founding of the United States, i.e., because the founders were allegedly unconcerned with the risks posed by possession of firearms by persons subject to restraining orders against domestic violence in the late eighteenth century, the federal government and the States cannot prohibit such persons from possessing firearms in 2023. See, Id., 2023 WL 2317796 at *6-11.

The State submits that this Court should not follow the Fifth Circuit down the rabbit hole of applying this radical reading of Bruen, which is the same reading that Wilson's counsel invited the circuit court to use here. Indeed, the most obvious fallacy committed by the Rahimi court is the same one the circuit court committed: Bruen only holds that ***law-abiding*** citizens have a Second Amendment right to carry firearms: "New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." Bruen, 142 S.Ct. at 2156.[3]

Here, Wilson stands accused to violating the place to keep law by carrying a firearm ***while he was committing another crime***, i.e., criminal trespass in the first degree. Additionally,

[3] Indeed, the majority opinion in Bruen references "law-abiding" citizens at least 11 times.

he did not have a permit to acquire the weapon he was illegally carrying in the first place. He was, therefore, not behaving in a law-abiding manner at the relevant time. Nothing in Bruen authorizes carrying a firearm which has not been legally acquired while committing another crime. To find otherwise would be to eviscerate Hawaii's firearms laws - which are crucial given the "heightened danger of firearm use," State v. Talo, No. SCWC-20-0000457, 2023 WL 2523951, at *8 (Mar. 15, 2023) - and would be to ignore Bruen's consistent reminders that the right in question is that of ***law-abiding*** individuals to carry firearms. See, e.g., Bruen, 142 S.Ct. at 2132-33 ("[W]e do think that Heller and McDonald point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense."); Id., at 2159 ("All that we decide in this case is that the Second Amendment protects the right of law-abiding people to carry a gun outside the home for self-defense[.]" (Alito, J., concurring).

II. CONCLUSION.

This case is, at bottom, a simple one. Bruen does not prohibit the States from conditioning carrying a firearm on obtaining a license. Wilson did not even attempt to obtain a license to carry the firearm and ammunition he was in possession of while committing criminal trespass. There is no need to go any further to see it was error for the circuit court to dismiss Count 1 and Count 2.

The State respectfully requests that the circuit court's order granting Wilson's motion to dismiss be reversed, and this case remanded for trial.

DATED: Wailuku, Hawaii, March 28, 2023.

DEPARTMENT OF THE PROSECUTING ATTORNEY
ANDREW H. MARTIN, PROSECUTING ATTORNEY

By /s/ Richard B. Rost
RICHARD B. ROST
Deputy Prosecuting Attorney
County of Maui
Attorney for Plaintiff-Appellant