

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 24, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP1882**

**Cir. Ct. No. 2013GF000026**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN RE THE RETURN OF PROPERTY IN STATE V. AARON OLS:**

**AARON C. OLS,**

**APPELLANT,**

**v.**

**CITY OF MILWAUKEE AND STATE OF WISCONSIN,**

**RESPONDENTS.**

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APPEAL from an order of the circuit court for Milwaukee County:  
J.D. WATTS, Judge. *Reversed.*

Before Fine, Kessler and Brennan, JJ.

¶1 BRENNAN, J. Aaron C. Ols appeals from a circuit court order denying his petition for return of property pursuant to WIS. STAT. § 968.20 (2011-

12).<sup>1</sup> Ols seeks the return of a firearm police seized from Ols when he was arrested for disorderly conduct while armed. Because the record in this case is sparse, (the City of Milwaukee called no witnesses and Ols simply made an unsworn statement to the court), it does not provide evidence sufficient to demonstrate that the City proved by the greater weight of credible evidence that Ols used his firearm in the commission of a crime. Accordingly, because the City failed to meet its burden, we reverse.

### BACKGROUND

¶2 On March 13, 2012, Ols was arrested and charged with disorderly conduct while armed. Upon his arrest, Milwaukee police confiscated a firearm from Ols. The charge for disorderly conduct while armed was subsequently amended to a municipal ordinance violation, to which Ols pled no contest, and Ols was ordered to pay a forfeiture. In January 2013, Ols filed a petition for the return of his firearm under WIS. STAT. § 968.20.

¶3 The circuit court held a hearing on Ols's petition for return. At the hearing, the City conceded that Ols was the listed owner of the firearm and that he was not prohibited from possessing a firearm.<sup>2</sup> However, the City alleged that Ols used the firearm in the commission of a crime, and therefore, that WIS. STAT. § 968.20(1m)(b) prohibited the return of the firearm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

<sup>2</sup> The City was represented at the hearing and on appeal by a Milwaukee County Assistant District Attorney.

¶4 The circuit court took no formal testimony at the hearing. Instead, the court simply asked Ols why he felt he should get his gun back, and Ols described the events leading up to his March 2012 arrest. He was not under oath. Ols's statement is the only description in the record of what happened the day of his arrest. The City offered no evidence and called no witnesses.

¶5 Ols said that on the day in question he went across the street from his house to a public park to confront a man, the man's fiancée, and two children for being in the park after the park closed and for having an unleashed dog with them, contrary to the park rules. Ols told the circuit court that the man "became belligerent" with him first, and that Ols "used aggressive language," including profanity, only "in response to the way [the man] spoke to me." At the time of the argument, Ols was armed with a firearm. The firearm was in its holster, but the parties agree there is no evidence in the record that anyone except Ols knew he was armed. There is no evidence that the man Ols confronted saw the firearm during the confrontation in the park or that Ols touched the firearm or referenced it in anyway during the confrontation.<sup>3</sup>

¶6 Immediately after the confrontation in the park, Ols retreated to his property across the street from the park and the man followed him to continue their argument. According to Ols, while both men were standing in the "grassy area" in front of his home, he told the man three times to get off of his property. The man told Ols that he was a former United States marine and threatened to kill Ols. Ols said that he then pulled his firearm from its holster, pointed it at the

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<sup>3</sup> At oral argument the parties each agreed that there is no evidence in the record that the man confronted by Ols was ever aware of Ols's firearm in the park.

ground, and called the police. Ols was subsequently arrested for disorderly conduct while armed. The City conceded at the hearing that the disorderly conduct arrest was for Ols's actions at the park and not "for what happened back at his house and afterward."

¶7 The circuit court found that both parts of the incident were one continuous event, that Ols was belligerent or otherwise disorderly at the park, and that he used his gun at his home to commit the disorderly conduct. The circuit court denied Ols's petition for return of the firearm, concluding that return was prohibited by WIS. STAT. § 968.20(1m)(b) because Ols used the firearm to commit the crime of disorderly conduct. Ols appeals.

### DISCUSSION

¶8 This case arises from a petition for the return of property pursuant to WIS. STAT. § 968.20, which provides in pertinent part:

(1) Any person claiming the right to possession of property seized ... may apply for its return .... The court shall ... hold a hearing to hear all claims to its true ownership. If the right to possession is proved to the court's satisfaction, it shall order the property, other than contraband ... returned...

....

**(1m)**

....

(b) If the seized property is a dangerous weapon or ammunition, the property shall not be returned to any person who committed a crime involving the use of the dangerous weapon or the ammunition....

The City carries the burden of proving by the “greater weight of the credible evidence” that Ols’s firearm was used to commit a crime.<sup>4</sup> See *Return of Property in Jones v. State*, 226 Wis. 2d 565, 595, 594 N.W.2d 738 (1999) (“the State [has] the burden of establishing that the property ... constitutes contraband as defined by WIS. STAT. § 968.13(1)(a), and need not be returned”). Whether a party has met its burden of proof is a question of law that we examine *de novo*. See *Burg v. Miniature Precision Components, Inc.*, 111 Wis. 2d 1, 12, 330 N.W.2d 192 (1983).

¶9 The City argues that Ols is not entitled to the return of his firearm under WIS. STAT. § 968.20(1m)(b) because he used the firearm to commit the crime of disorderly conduct. To prove disorderly conduct, the City must show that: (1) Ols engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct; and (2) Ols’s conduct, under the circumstances as they then existed, tended to cause or provoke a disturbance. See WIS. STAT. § 947.01; see also WIS JI—CRIMINAL 1900.

¶10 Here, the City failed to present evidence sufficient to support its assertion that Ols used his firearm to commit the crime of disorderly conduct. The only evidence in the record regarding Ols’s arrest is Ols’s own statement made at the hearing on his petition. The City presented no other witnesses to meet its

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<sup>4</sup> At the hearing before the circuit court, the City stated that the burden was on Ols to prove that his firearm was *not* used in the commission of a crime. On appeal, the City concedes that statement was in error. We need not address whether the circuit court applied the proper standard because our review is *de novo*. See *Burg v. Miniature Precision Components, Inc.*, 111 Wis. 2d 1, 12, 330 N.W.2d 192 (1983).

burden and offered no other evidence. Ols’s brief statement falls far short of meeting the City’s burden.<sup>5</sup>

¶11 In his statement to the circuit court, Ols described two incidents that occurred just prior to his arrest: the first occurring at the park and the second occurring in the front yard of Ols’s home. Before this court, the City attempts to argue that we should view the two incidents as a single, ongoing event. However, before the circuit court, the City limited its argument—that is, its assertion that Ols used his firearm while committing the crime of disorderly conduct—to the incident at the park. Before the circuit court, the City expressly stated that:

No one is charging [Ols] with ... disorderly conduct while armed for what happened back at his house and afterward. Had this marine or individual with the armed forces background came to his house for whatever reason--bad intentions to commit a crime against this petitioner--we wouldn't be in this situation.

But what we have here is a situation where--where Mr. Ols confronted a person, two very young children with a firearm on his hip and then engaged in a heated argument.

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<sup>5</sup> Ols complains to this court that the circuit court did not hold a proper evidentiary hearing because he was not sworn under oath when he made his statement to the court. *See* WIS. STAT. § 968.20(1) (stating that a circuit court “shall hold a hearing” on a petition for return of property); *see also* WIS. STAT. § 906.03(1) (requiring all witnesses “to declare that the witness will testify truthfully, by oath or affirmation” before testifying). However, Ols does not explain how his statement regarding what happened the day of his arrest would have been different had he been under oath. As such, we conclude that any failure by the circuit court was harmless. *Cf. State v. Dyess*, 124 Wis. 2d 525, 542-43, 370 N.W.2d 222 (1985) (The test for harmless error is “whether there is a reasonable possibility that the error contributed to the conviction.”); *see also State v. Williams*, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919 (“A reasonable possibility is a possibility sufficient to undermine our confidence in the conviction.”). Additionally, the City, while not stipulating to Ols’s statement before the circuit court, offered no other testimony and on appeal does not object to the circuit court’s reliance on Ols’s statement for the factual record. *See State v. Polashek*, 2002 WI 74, ¶25, 253 Wis. 2d 527, 646 N.W.2d 330 (“the general rule is that issues not raised in the circuit court are deemed waived”).

He is the initial aggressor in this situation.<sup>6</sup> He left his property.

Having limited its argument before the circuit court to the incident at the park, the City cannot now argue that the incident at Ols's home is also relevant. We do not generally allow parties to raise issues for the first time on appeal. See *Apex Elecs. Corp. v. Gee*, 217 Wis. 2d 378, 384, 577 N.W.2d 23 (1998). Here, the City's failure to argue before the circuit court that the incident at Ols's home was relevant to the discussion of whether Ols committed the crime of disorderly conduct deprived both Ols and the circuit court of the opportunity to address the issue and to ensure that all of the relevant facts regarding the incident at Ols's home were in the record.

¶12 Given the City's concession before the circuit court, we are limited in our review to the incident in the park. The parties both admit that the record is woefully undeveloped regarding what happened at the park. All we have is Ols's statement that he went to the park, while armed, and confronted a man, his fiancée, and two children, to tell them that they were violating park rules. According to Ols, the man "became belligerent" with him first, and, in response, Ols used profanity in front of the man's children. There is nothing in the record indicating that while Ols was at the park he touched his firearm, flashed his firearm, referenced his firearm, or that the man was even aware that Ols had a firearm in the park. In short, even if we assume that Ols's behavior at the park amounted to

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<sup>6</sup> There is no evidence in the record to support the City's assertion that Ols was the initial aggressor at the park. Ols told the court that he went to the park to enforce the park's rules and that the man "became belligerent" with him. Ols admitted to using "aggressive language," including profanity, in front of the man's children, but only "in response to the way [the man] spoke to me."

disorderly conduct under the law, there is no evidence in the record that he used his firearm to commit the crime. As such, we reverse.<sup>7</sup>

*By the Court.*—Order reversed.

Not recommended for publication in the official reports.

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<sup>7</sup> Ols also argues that his constitutional rights to bear arms and due process were violated because the City failed to meet its burden in this case. Because we conclude that the City failed to show that Ols committed the crime of disorderly conduct while armed, we need not address Ols's constitutional arguments. See *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (we decide cases on narrowest possible ground).

