

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 10, 2012**

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. 2011AP313**

**Cir. Ct. No. 2009CF4401**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN RE THE RETURN OF PROPERTY IN STATE V. DANIEL BONNIE PATE:  
NAZIR AL-MUJAAHID,**

**PETITIONER-APPELLANT,**

**v.**

**CITY OF MILWAUKEE,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
REBECCA F. DALLET, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Nazir Al-Mujaahid, *pro se*, appeals from a circuit court order denying his petition for the return of a gun that was seized from the

home of a man named Daniel Bonnie Pate.<sup>1</sup> Al-Mujaahid, who alleged that he was the lawful owner of the gun and sought its return pursuant to WIS. STAT. § 968.20 (2009–10), argues that the circuit court erroneously denied his petition.<sup>2</sup> We reject his arguments and affirm.

## BACKGROUND

¶2 In 2009, the State charged Daniel with being a felon in possession of a weapon. It alleged that Daniel, a convicted felon, had the gun in his home. Several months later, the State provided the circuit court with a copy of a federal indictment against Daniel for being a felon in possession of a firearm. The State moved to dismiss the state charge and the circuit court did so.

¶3 Subsequently, Al-Mujaahid filed a petition for return of property pursuant to WIS. STAT. § 968.20, the statute that allows the owners of property seized by the police to petition for the property's return.<sup>3</sup> In his petition,

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<sup>1</sup> Because this opinion involves two brothers with the last name Pate, we will refer to those men by their first names, Daniel and Darrell.

<sup>2</sup> All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

<sup>3</sup> WISCONSIN STAT. § 968.20 provides in relevant part:

**Return of property seized.** (1) Any person claiming the right to possession of property seized pursuant to a search warrant or seized without a search warrant may apply for its return to the circuit court for the county in which the property was seized or where the search warrant was returned. The court shall order such notice as it deems adequate to be given the district attorney and all persons who have or may have an interest in the property and 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 or property covered under sub. (1m) or (1r) or s. 173.12, 173.21 (4), or 968.205, returned if:

(continued)

Al-Mujaahid stated that the gun recovered from Daniel's home was "[t]aken by Police because they thought a felon possessed it in his home." Al-Mujaahid further indicated that he did not transfer the gun to a prohibited person or allow the gun to be used for an unlawful purpose. The circuit court held the required "hearing to hear all claims to its true ownership." *See* § 968.20(1).

¶4 At the hearing, Al-Mujaahid told the circuit court that he is the "true owner" of the gun. He said he worked with Daniel's brother, Darrell, and "was going to transfer sale" of the gun to Darrell. Al-Mujaahid explained: "I let [Darrell] use the weapon to take to the range, so on and so forth, maybe a few weeks prior to [Daniel's] arrest." Al-Mujaahid said he could not provide "any factual information" about the gun being in Daniel's house, although he later

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(a) The property is not needed as evidence or, if needed, satisfactory arrangements can be made for its return for subsequent use as evidence; or

(b) All proceedings in which it might be required have been completed.

**(1m)** (a) In this subsection:

1. "Crime" includes an act committed by a juvenile or by an adult who is adjudicated incompetent that would have been a crime if the act had been committed by a competent adult.

2. "Dangerous weapon" has the meaning given in s. 939.22 (10).

(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 property may be returned to the rightful owner under this section if the owner had no prior knowledge of and gave no consent to the commission of the crime. Property which may not be returned to an owner under this subsection shall be disposed of under subs. (3) and (4).

asserted that Darrell “did not transfer” the gun to Daniel. Al-Mujaahid said that he knew from talking with Darrell and the police only that the police “retrieved it from a house” where Daniel was staying. He also said he was informed that the state and federal charges against Daniel had been dismissed.

¶5 The State opposed the petition to return the gun to Al-Mujaahid. It explained: “Based upon [Al-Mujaahid’s] own statement, he gave consent for somebody to be possessing the gun who, in turn, allowed a felon to be possessing this gun. That is when it was recovered by the police.... He is the one who should be responsible for his gun.” The State asserted that Al-Mujaahid’s petition should be denied pursuant to WIS. STAT. § 968.20(1m)(b), which provides that a gun “shall not be returned to any person who committed a crime involving the use of the dangerous weapon” and that the gun may be returned to the “rightful owner” only “if the owner had no prior knowledge of and gave no consent to the commission of the crime.”

¶6 The circuit court acknowledged that Al-Mujaahid had not personally committed a crime with the gun, but found that he failed to keep track of it and “gave it to someone whose brother was a felon, who then did use it to commit a crime.” The circuit court indicated that it could not find that there was sufficient evidence that Al-Mujaahid “had no prior knowledge of and gave no consent to the commission of the crime.” *See id.* It denied Al-Mujaahid’s petition.

¶7 Al-Mujaahid filed a motion for reconsideration that outlined the reasons he believed he was entitled to return of the gun. For instance, he questioned whether a crime had actually been committed, noting that “all charges against [Daniel] ... were dismissed as a direct result of both the [United States] Attorney’s Office and the Milwaukee County District Attorney[’]s Office

questioning the credibility of the police officers involved in the seizure.”<sup>4</sup> He also asserted that he told the circuit court that “Darrell Pate did not ever give the weapon to Daniel Pate and that Daniel Pate had no idea that the weapon was on the premises.”<sup>5</sup> In addition, he stated that “Darrell Pate was prepared to testify that Daniel Pate had no knowledge the firearm even existed.”<sup>6</sup>

¶8 A second hearing was scheduled. For the first time, Al-Mujaahid offered an explanation as to how the gun came to be in Daniel’s home. He said Darrell told him that he visited Daniel’s home, where the brothers consumed alcoholic beverages. Al-Mujaahid said Darrell “actually had the weapon with him” and “instead of leaving with the weapon while intoxicated, [Darrell] chose to leave it there in the property and hide it.” Al-Mujaahid said Darrell told him that Daniel “had no information of it, and a few weeks later” the police recovered the gun from Daniel’s house.

¶9 The State told the circuit court that the federal charges against Daniel had been dropped because the U.S. Attorney “fear[ed] problems with the officer’s credibility,” and that the State had decided not to re-issue charges “[f]or reasons that are too esoteric and mundane to get into here.”<sup>7</sup> After Al-Mujaahid

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<sup>4</sup> Al-Mujaahid’s motion for reconsideration asserted that he previously introduced evidence about the dismissal of charges against Daniel, but neither the petition nor the transcript from the first hearing contains any reference to the basis for the dismissals.

<sup>5</sup> Neither the petition nor the transcript from the first hearing contains Al-Mujaahid’s assertions that Darrell did not give the gun to Daniel and that Daniel was unaware the gun was in his house.

<sup>6</sup> The transcripts do not reflect that Al-Mujaahid ever asked for the opportunity to have Darrell testify, either at the first hearing or at the second hearing.

<sup>7</sup> The State did not explain whether the officer’s perceived credibility problems related to the reason for entering the home, whether Daniel was observed with the gun, whether a gun was actually recovered from the home, or other facts alleged in the case.

gave the circuit court a detailed explanation of how the gun came to be in Daniel's house, the State said that it would like a continuance so that it could interview Al-Mujaahid and Darrell about the gun. The State also indicated that the gun may be needed as evidence of Daniel's crime.

¶10 Al-Mujaahid objected to continuing the hearing. The circuit court gave Al-Mujaahid a choice: it would either grant the continuance and reconsider Al-Mujaahid's petition at a later date, or it would explain more fully the reasons why it was denying the petition so that Al-Mujaahid could file the appeal that he said he intended to file. Al-Mujaahid elected the latter option and the circuit court stated:

[I]t's denied. And it's because you allowed the firearm to be used for an unlawful purpose. I think that the record is clear. [The State] made an argument, I believe it is a reasonable one, that you ... consented to the giving of a gun to someone who consented to it being given to someone else, and you were not aware of where your gun was at the time. And based on that it was allowed to be used.

## DISCUSSION

¶11 Al-Mujaahid acknowledges that it was his burden to show that the gun was not used in a crime or that if it was, he had no prior knowledge of the intent to use the weapon in a crime and did not consent to such criminal use. He contends that he met his burden and that the circuit court's findings are erroneous.<sup>8</sup> We review the circuit court's findings under the clearly erroneous standard.

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<sup>8</sup> We address Al-Mujaahid's two primary arguments: that Daniel did not commit a crime and that Al-Mujaahid did not have knowledge that Daniel had the gun. To the extent that we do not address sub-arguments, they are rejected.

See *Champeau v. City of Milwaukee*, 2002 WI App 79, ¶9, 252 Wis. 2d 604, 610, 642 N.W.2d 634, 637; see also WIS. STAT. § 805.17(2).

¶12 First, Al-Mujaahid asserts that the circuit court erred when it relied on the charges against Daniel as evidence that the gun was used in a crime. He argues that although dismissed charges can be used to support a finding that a gun was used in a crime, see *State v. Kueny*, 2006 WI App 197, ¶10, 296 Wis. 2d 658, 664, 724 N.W.2d 399, 402, the circuit court should not have relied on the criminal charges against Daniel because they were found to be “seriously deficient” and were dismissed. We are unconvinced. The details Al-Mujaahid alleged about the basis for the dismissals are not supported by any documentation and he has no firsthand knowledge of the reasons the cases were dismissed. Further, Al-Mujaahid’s own representations to the court provided information that could support the charges against Daniel: Al-Mujaahid claims that Darrell told him that he left the gun at Daniel’s house. Based on the information provided, the circuit court’s finding that the gun was used in a crime was not clearly erroneous.

¶13 Moreover, Al-Mujaahid declined the opportunity to continue the hearing so that the State could complete an additional investigation using the new information Al-Mujaahid provided, including Al-Mujaahid’s assertion that Darrell hid the gun in Daniel’s house without Daniel’s knowledge. In doing so, Al-Mujaahid implicitly agreed to rely on the limited information that had been provided to the court. He cannot now be heard to complain that the circuit court did not accept his representations that the charges were unfounded when he declined the opportunity to have his assertions investigated further.

¶14 Al-Mujaahid’s second argument is that the circuit court improperly required him to “disprov[e] he had prior knowledge that the weapon would fall

into the hands of a convicted felon and be used by this felon in the commission of a crime—in this case, felon in possession of a firearm.” He contends that if he as the owner “had no prior knowledge that a third party perpetrator would engage in a crime involving the weapon, and did not give consent to anyone to use his weapon in a crime, the weapon ought to be returned to him.” The problem with Al-Mujaahid’s analysis is that it ignores the circuit court’s findings in this case. The circuit court found that Al-Mujaahid did not prove that he “had no prior knowledge of and gave no consent to the commission of the crime.” *See* WIS. STAT. § 968.20(1m)(b). That finding is not clearly erroneous.

¶15 Al-Mujaahid did not provide the court with details about the planned sale of the gun to Darrell, such as when he gave Darrell the gun to try and when the sale was to occur. Further, Al-Mujaahid made inconsistent claims about his knowledge of Darrell’s handling of the gun. At the first hearing, Al-Mujaahid said that he “couldn’t give you any factual information with respect” to the gun being found in Daniel’s house and later asserted that Darrell “did not transfer” it to Daniel. In his motion for reconsideration, Al-Mujaahid said that Darrell was “prepared to testify that Daniel Pate had no knowledge” of the firearm or the firearm sale, but the transcript does not indicate that Al-Mujaahid asked the circuit court to hear testimony from Darrell. Instead, at the second hearing, Al-Mujaahid provided, for the first time, a detailed story he claimed Darrell told him about hiding the gun in Daniel’s house to avoid possessing it while intoxicated. These inconsistencies explain the circuit court’s implicit determination that Al-Mujaahid’s testimony lacked credibility. We defer to the circuit court’s credibility assessments. *See Jones v. State*, 226 Wis. 2d 565, 596, 594 N.W.2d 738, 753 (1999).



¶16 In addition, the State in its brief argues that an agency relationship was created when Al-Mujaahid provided the gun to Darrell for, in Al-Mujaahid's words, "inspection and use prior to sale." The State explains:

When the firearm was transferred from Mr. Al-Mujaahid to Darrell Pate, it created an implicit agency relationship between the two men. An agency relationship requires the "manifestation of one party that the other party shall act for him." *Boehck Constr. Equip. Corp. v. Voigt*, 17 Wis. 2d 62, 68, 115 N.W.2d 627, [630] (1962). Whether agency exists is a legal concept based upon particular facts. *Brown v. Sandeen Agency, Inc.*, 2009 WI App 11, ¶18, 316 Wis. 2d 253, 263, 762 N.W.2d 850, 855. See *Cochran v. Allyn*, 16 Wis. 2d 20, 23, 113 N.W.2d 538, [540] (1962). Whether the facts fulfill the legal standard is a question of law. See *B.C. Ziegler & Co. v. Ehren*, 141 Wis. 2d 19, 26, 414 N.W.2d 48, [51] (Ct. App. 1987). This authorization was an unspoken manifestation that Mr. Al-Mujaahid was authorizing Darrell Pate to act for him with regard to possessing, using and storing the firearm, although Darrell Pate did not own it. Therefore, when Darrell Pate transferred the firearm to his brother, he was acting with the authorization of Mr. Al-Mujaahid.

....

... Al-Mujaahid did not have contact with his firearm at the time the crime was committed, but he had both the right and the means to possess his firearm via Darrell Pate. He could have requested, or even demanded, the return of the firearm from Darrell Pate at any time. The firearm was stored at Daniel Pate's house by Darrell Pate, whom Mr. Al-Mujaahid allowed to possess the firearm. Since Mr. Al-Mujaahid manifested his intent to have Darrell Pate possess the firearm, he consented to the commission of the crime. As the firearm's owner, he was responsible for keeping the firearm out of the hands of a felon and he failed to do so. Therefore, Mr. Al-Mujaahid was still responsible for the firearm because Darrell Pate was acting as his agent when Darrell Pate gave the firearm to Daniel Pate, or stored it in his residence.

(Bolding and italics added; underlining omitted.) Al-Mujaahid did not refute this argument in a reply brief. Unrefuted arguments are deemed admitted. *Charolais*

*Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979).

¶17 For the foregoing reasons, we affirm the circuit court's order denying Al-Mujaahid's petition for return of his gun.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

