Missouri Circuit Court
Twenty-Second Judicial Circuit
[St. Louis City]

Mark T. McCloskey, PLAINTIFF, v. State of Missouri, *et al.*, DEFENDANTS.	Cause No. 2122-CC08989 Division 20

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

COME NOW Defendants State of Missouri, the City of St. Louis and Sheriff Vernon Betts and pursuant to Rule 55.27(b), state the following in support of their request that this Court grant judgment in their favor and against Plaintiff Mark McCloskey:

INTRODUCTION and FACTS

On July 20, 2020, Plaintiff Mark McCloskey was charged with the felony of unlawful use of a weapon relating to much-publicized conduct outside his home during a period of civil unrest in the City. His wife, Patricia McCloskey was also charged with felony offenses for her conduct on the same occasion. The offenses involved the McCloskeys' use of two firearms, which are the subject of Mr. McCloskey's replevin action: one Colt AR-15 rifle, serial number ST015663, and one Bryco .380 pistol, serial number 1250579.[1] The prosecutions evolved such that both Mr. and Mrs. McCloskey were indicted by the grand jury on two felony offenses: unlawful use of a

[1] This Court may take judicial notice of the court files in Cause No. 2022-CR01301-01 and 2022-CR1300-01. This Court may also take judicial notice of the transcript of the guilty pleas in the court cases, attached as Exhibit 1.

weapon-exhibiting and tampering with physical evidence in a felony prosecution. For complex reasons, unrelated to this replevin action, a special prosecutor was appointed to take over the prosecution of the McCloskeys from the St. Louis City Circuit Attorney. The indictments filed in the McCloskeys' cases were later superseded by substitute informations in-lieu of indictment filed in each of their cases, charging them with lesser offenses in the alternative. The cases concluded on June 17, 2021, with Mr. McCloskey entering a plea of guilty to a lesser charge of misdemeanor assault in the fourth degree, and Mrs. McCloskey entering a plea of guilty to the charge of harassment in the second degree, both pursuant to an agreement with the State. Ex. 1, Transcript of plea hearing, p. 21, lines 7-19. The agreement provided, as an express term stipulated to and acknowledged by the court, that Mr. McCloskey agreed to waive all interest in the rifle he used in commission of the crime and forfeit possession of the pistol Mrs. McCloskey used in commission of the crime. Upon accepting the McCloskeys' pleas of guilty, the Court entered an order of forfeiture providing that the Bryco Arms handgun and the Colt semi-automatic rifle were thereby forfeited. Ex. 2, Order of Forfeiture. Also pursuant to his agreement with the State, Mr. McCloskey was fined $750. Amended Petition for Replevin; Ex. 3, Sentence Form.

Mr. McCloskey now seeks return of the forfeited firearms, the $750 fine, and his court costs amounting to $122.50, under a replevin theory. Petitioner maintains that he is entitled to return of the personal property willingly surrendered as part of the plea agreement; the entitlement stemming from a belief that because Governor Mike Parson subsequently issued a pardon from his conviction, his right to possession of the firearms is restored and he is due a refund of his fine and costs. The two firearms are currently in the custody of the St. Louis Sheriff 9 (Bryco handgun) and the St. Louis Metropolitan Police Department (Colt rifle). Fines and court

costs are paid to the Circuit Clerk; neither the City Police Department nor the Sheriff has possession of the funds Mr. McCloskey seeks through replevin. The State of Missouri, the Sheriff and the St. Louis City Police Department now move for judgment on the pleadings in their favor, because Mr. McCloskey's claim replevin fails as a matter of law.

LEGAL STANDARD

"The position of a party moving for judgment on the pleadings is similar to that of a movant on a motion to dismiss; i.e., assuming the facts pleaded by the opposite party to be true, these facts are, nevertheless, insufficient as a matter of law." *Mo. Mun. League v. State*, 489 S.W.3d 765, 767-68 (Mo. 2016) citing *State ex rel. Nixon v. Am. Tobacco Co*., 34 S.W.3d 122, 134 (Mo. banc 2000) (internal quotations omitted). "The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion." *Eaton v. Ballinckrodt, Inc.*, 224 S.W.3d 596, 599 (Mo. banc 2007)(quoting *State es rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 144, 134 (Mo. banc 2000)). "Judgment on the pleadings is appropriate where the question before the court is strictly one of law." Id. (quoting *RGB2, Inc. v. Chestnut Plaza, Inc.*, 103 S.W.2d 420, 424 (Mo. banc 2007).; see also *Madison Block Pharmacy, Inc. v. U.S. Fidelity and Guaranty Co.*, 620 S.W.2d 343, 345 (Mo. banc 1981)(judgment on the pleadings properly granted where issue before court was pure question of law).

ARGUMENT

1. Defendants' detention of the firearms is not wrongful, Plaintiff has no right to immediate possession of the firearms, and the property is not subject to seizure

An action in replevin tests the plaintiff's right to the immediate possession of the personal property at issue and the defendants' wrongful detention of that property. *Phillips v. Ockel*, 609 S.W.2d 228 (Mo. Ct. App. E.D. 1980). In order to succeed in his claim for replevin, the plaintiff

must allege and prove his right to immediate possession of the property at the time suit was filed and that the defendants were at that time wrongfully detaining the property. *Green Hills Production Credit Ass'n v. R & M Porter Farms, Inc.*, 716 S.W.2d 296 (Mo. Ct. App. W.D. 1986). Additionally, "a plaintiff's right of recovery depends upon the strength of his own claim, and not on the weakness of the defendant[s']." *Ferrell Mobile Homes v. Holloway*, 954 S.W.2d 712, 714 (Mo. App. S.D. 1997)(quoting *Olson v. Penrod*, 93 S.W.2d 673, 676 (Mo. App. E.D. 1973). The elements of replevin are: (1) the right to immediate possession of personal property of a category or type that is subject to a replevin action; (2) the defendant has the property; (3) the defendants' right to possession is inferior to the plaintiff's right to possession; (4) the defendants' detention of the property is wrongful; and (5) the property is subject to seizure. *White v. Camden County Sheriff's Dept.*, 106 S.W.3d 626, 634 (Mo. Ct. App. S.D. 2003). Here, the claim for replevin will not lie because the defendants' possession of the property is not wrongful, Mr. McCloskey is bound by the terms of his plea agreement, and the property is not subject to seizure as it is *in custodia legis*. Accordingly the plaintiff, Mr. McCloskey, has no right to immediate possession of the personal property. Defendants submit the following in support of their position:

a. The St. Louis Metropolitan Police Department and the Sheriff's detention of the firearms is not wrongful.

In order for Mr. McCloskey to succeed on his claim for replevin, he must establish that the property is being wrongfully detained by the defendants. The facts presumed true in this case, articulated in the First Amended Petition and evident from court files in the underlying criminal cases, establish that there has been no wrongful detention of the firearms; and the gubernatorial pardon does not somehow transform the Sheriff and Police Department's possession of Mr.

McCloskey's forfeited weapons into wrongful acts. It is apparent from the court files in both criminal cases that law enforcement agencies came into possession of the firearms because they were seized in the course of criminal investigations pursuant the authority of the prosecuting attorney and considered evidence in the prosecutions. There is no allegation that Mr. McCloskey challenged the lawfulness of the seizures pursuant to search warrant, and there is nothing to suggest that the seizures were illegal. Because the firearms were lawfully seized and are now lawfully held by the law enforcement agencies in the course of their duties to the prosecuting attorney and the courts, their possession of the firearms is not wrongful.

Reported cases addressing the issue of replevin for property seized in the course of criminal investigations are rare, but available opinions provide persuasive guidance suggesting that replevin will not lie for property seized in the course of criminal proceedings. In *Nykoriak v. Wileczek*, 666 Fed. Appx. 441 (6th Cir. 2016), the Sixth Circuit held that an owner could not maintain a replevin action to recover a pistol that a state trooper had confiscated from him even though the owner had a license to carry the pistol, because the owner did not present his license to the police when it was seized. The court found that the owner could not maintain a replevin action due to his failure to demonstrate that the pistol was unlawfully taken or unlawfully detained. Also, in *Thompson v. City of Shawnee*, 464 Fed.Appx. 720 (10th Cir. 2012), the Tenth Circuit considered an action in replevin concerning fence posts seized in the course of an investigation of fraud. The court found that in light of the plaintiff's guilty plea to charges stemming from the use of fraudulent checks related to the fence posts, the plaintiff could not establish that the property was wrongfully taken or detained, and therefore plaintiff could not establish entitlement to immediate possession of the property. The district court opinion noted that the police officer-defendant in that case "was acting with legal authority when he seized the

t-posts," and "[c]onsequently, no reasonable jury could find he 'wrongfully asserted' dominion over the posts." *Thompson v. City of Shawnee,* No. CIV-09-1350-C, 2010 U.S. Dist. LEXIS 135228, at *11 (W.D. Okla. Dec. 21, 2010).

In addition, and somewhat more generally, Mr. McCloskey's replevin action does not lie for the simple reason that property in legal custody, or *in custodia legis*, is not subject to be seized by other judicial process. *Bates County Nat'l Bank v. Owen,* 79 Mo.429 (Mo. 1883); see also *Holladay v. Roberts,* 425 F.Supp. 61 (Miss. N.D. 1977)(an automobile seized by a state agency investigating violations of state liquor laws was not subject to replevin because the action "clearly is not available" for property *in custodia legis)*. The firearms are currently in the custody of law enforcement pursuant to the order of forfeiture entered by the court in 2022-CR01301-01 and by stipulation articulated by Mr. McCloskey in which he preserved a request that the weapon be donated to charity. Ex. 2, Order of Forfeiture; Ex. 4, Stipulation and Request.

Consequently, and because the gubernatorial pardon "obliterated" Mr. McCloskey's criminal conviction, but did not supersede or displace the finding of guilt or order of forfeiture of the weapons, defendants' continued possession of the weapons is not wrongful and Mr. McCloskey is not entitled to their immediate possession under a replevin theory. Because both firearms were lawfully seized and detained by law enforcement, Mr. McCloskey pled guilty in the relevant case, and the trial court entered an emphatic order that the weapons be forfeited as agreed to by the parties in the course of plea bargaining, defendants are entitled to judgment on the pleadings in their favor, denying Mr. McCloskey's petition for replevin.

b. The gubernatorial pardon does not entitle Mr. McCloskey to immediate possession of the forfeited firearms or a refund of his fine and court costs.

Mr. McCloskey relies solely on the pardon issued by Governor Mike Parson in support of his claim to entitlement to immediate possession of the firearms. The pardon however does no more than, "obliterate" Mr. McCloskey's conviction and "restore all rights of citizenship forfeited by said conviction and remove any legal disqualification, impediment, or other legal disadvantage that may be a consequence of said conviction." Ex. 5, Pardon. The governor's pardon power derives from the Article VI, section 7 of the Missouri Constitution which provides that "[t]he Governor may grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment. The Governor may impose conditions, restrictions and limitations, as deemed proper."

There is scant caselaw on the issue of executive clemency in a context such as this one, however, the Missouri Court of Appeals has held that while a pardon may "obliterate" a conviction, it does not displace or supersede the finding of guilt which preceded the imposition of a conviction and sentence. In *Fay v. Stephenson*, 552 S.W.3d 753 (Mo. Ct. App. W.D. 2018), the Court considered whether an individual who wanted to run for associate circuit judge in Linn County was disqualified from running because §115.306.1, RSMo., provides that "[n]o person shall qualify as a candidate for elective public office in the state of Missouri who has been found guilty of or pled guilty to a felony…", despite the fact that he had been pardoned by the governor. The court considered the pardon power and its reaches, concluding that although the "pardon extinguished the fact of his felony conviction, it did not erase the fact that he had pled guilty to three felonies," and that "[b]ecause §115.306.1 is triggered by the fact of a felony guilty plea, rather than by the fact of a felony conviction, the statute operates to disqualify [plaintiff] from running for office, despite his pardon." *Id* at 57. The court based its reasoning on Missouri cases finding that while a pardon may obliterate a conviction, the fact that [an individual]

pleaded guilty is not negated." *Id.* at 759 (citing *Hill v. Boyer*, 480 S.W.3d 311 (Mo. banc 2016)); see also *Guastello v. Dep't of Liquor Control*, 536 S.W.2d 21 (Mo. banc 1976)(discussing complexity of views regarding the effect of a pardon on conviction and guilt). The court also observed that *Stallworth v. Sheriff of Jackson County*, 491 S.W.3d 657 (Mo. Ct. App. W.D. 2016), held that an individual who was pardoned for an earlier felony was still disqualified from obtaining a conceal-carry permit, because "while the applicant pardon obliterated the fact of his conviction," his guilt---evidence by his guilty pleas—remained. *Id* at 660. And "because the guilty plea is a separate disqualifier that is not obliterated by the pardon…" the individual is barred from receiving the conceal-carry permit." *Id*. The court rejected the argument that "a gubernatorial pardon has the effect of eliminating any automatic disqualifications flowing from the commission of a pardoned offense…" Ultimately, the court determined that there is a distinction between consequences flowing from the fact of a conviction and consequences flowing from the fact of a guilty plea. *Fay*, 552 S.W.3d 761. In this case, the forfeiture order regarding the firearms was a consequence of the fact of Mr. McCloskey's guilty plea. For this reason, Mr. McCloskey is unable to show that the gubernatorial pardon he received somehow entitles him to take immediate possession of the forfeited firearms.

There is additional support for this position in a line of Supreme Court cases including *Knote v. United States*, 95 U.S. 149 (1877). As noted by Mr. McCloskey in some of his papers, this is an historical case considering the question of whether a presidential pardon restores rights to property forfeited in the course of proceedings charging treason and rebellion during the Civil War. The case's somewhat remote and historical circumstances do not detract from the clear principle it enunciates: a pardon does not entitle a property owner to recompense or return of property lawfully seized by the government pursuant to its police power. The Court expounded

upon the presidential pardon power and its limits which can certainly be considered and applied in this case:

> A pardon is an act of grace by which an offender is released from the consequences of his offence, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offence, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position. But it does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. *Knote*, 95 U.S. at 153-54.

The question was repeatedly considered by the Court in the same context and the holdings remained consistent. In *Illinois v. Bosworth*, U.S. 92, 103 (1890), the Court again held that a pardon does not "restore offices forfeited, or property or interest vested in others in consequences of the conviction in judgment."

Defendants' position is further supported by guidance from the United States Department of Justice on the issue of pardons as distinct from the vacation or reversal of a conviction, or an expungement. DOJ guidance provides the following:

> A pardon is an expression of the President's forgiveness and ordinarily is granted in recognition of the applicant's acceptance of responsibility for the crime and established good conduct for a significant period of time after conviction or completion of sentence. It does not signify innocence. It does, however, remove civil disabilities –e.g., restrictions on the right to vote, hold state or local office, or sit on a jury—imposed because of the stigma arising from the conviction.
> Department of Justice, *Office of the Pardon Attorney, Frequently Asked Questions*, available at: https://www.justice.gov/pardon/frequently-asked-questions.

Guidance also provides a pardon does not "erase" convictions the way expungements do. Instead, a pardon "will facilitate removal of legal disabilities imposed because of the conviction…," and "may be helpful in obtaining licenses, bonding, or employment." *Id*. Missouri Department of Corrections has published similar guidance, providing that the full pardon

"restores all rights of citizenship and removes any disqualification or punitive collateral consequence stemming from the conviction." State of Missouri-Executive Clemency Process Fact Sheet, available at: https://doc.mo.gov/sites/doc/files/media/pdf/2020/01/Executive_Clemency_Information_Sheet_1-1-20.pdf. State guidance also recognizes that the pardon is an act of mercy which removes encumbrances on an individual's rights to obtain a professional license, serve as a juror, vote, and possess a firearm. The administrative guidance demonstrates what is apparent from the cases addressing this somewhat obscure, but significant issue: a pardon does not entitle the recipient to the return of forfeited property, compensation for moneys paid, or reimbursement of costs associated with mounting a defense to criminal prosecution.

Mr. McCloskey's claim that he is entitled to return of the firearms and refund of the fine and court costs fails because the gubernatorial pardon did not restore his right to the forfeited weapons and money paid. The pardon was an "act of grace" that released Mr. McCloskey from the stigma of a conviction and from any future encumbrance on his rights associated therewith. It does not obligate the government and its agencies to "make amends for the past" or provide relief or compensation "for what has been suffered by the offender." *Knote*, 95 U.S. at 153-54. Governor Parson's *ex gratia* act of clemency does not entitle Mr. McCloskey to the return of his forfeited weapons, or money paid in fine or costs.

c. Plaintiff is bound by the terms of his plea agreement.

Mr. McCloskey knowingly and intelligently entered into plea bargaining and agreement with the State before entering his plea of guilty to the misdemeanor assault charge. See Exabit 1, Transcript. As part of his plea agreement he consented to forfeiture of the weapons involved in the events of July 20, 2020, in front of his home. The stipulation of forfeiture was articulated in a

memo submitted by his attorney, a motion submitted by the prosecutor, and an order entered by the Judge in both Cause nos. 2022-CR01301-01 and 2022-CR1300-01. The terms of the agreement bind Mr. McCloskey regardless of his gubernatorial pardon.

Plea agreements are contractual in nature and should be interpreted according to general contractual principles. *United States v. Jensen*, 423 F.3d 851, 854 (8th Cir. 2005). By the terms of the plea agreement, Mr. McCloskey agreed to waive ownership interest the weapon used in Case No. 2022-CR01300-01, and agreed to forfeit the weapon used in Case No. 2022-CR01301-01. See Exhibit 3, Stipulation of Forfeiture, Exhibit 4, Order of Forfeiture. While the enforceability of plea agreements is more often analyzed from the perspective of ensuring the criminal defendant's rights are preserved, the government, too, is entitled to the benefit of its bargain with Mr. McCloskey in the terms of the plea agreement. *See e.g. United States v. Young*, 223 F.3d 905, 911 (8th Cir. 2000); see also *United States v. Norris*, 486 F.3d 1045 (8th Cir. 2007). In *Young*, the Eighth Circuit held that when a criminal defendant breached a term of his plea agreement by absconding before his plea hearing, the government was entitled to withdraw from the plea agreement and use certain statements of the defendant made during plea discussions at subsequent trial. The court's reasoning demonstrates that the government is entitled to the benefit of its bargain with the McCloskeys, independent of the gubernatorial pardon. The prosecutor acted in reliance on Mr. McCloskey's undertaking to forfeit the weapons, and performed all its obligations under the agreement: assenting to the McCloskeys pleas to lesser charges and recommending the agreed upon sentences. Just as Mr. and Mrs. McCloskey were entitled to the benefit of their bargain with the prosecutor because they acted in reliance when they pleaded guilty, the government, too, is entitled to the benefit of its bargain: in this case Mr. McCloskey's agreement to waive rights to the firearms and forfeit possession. Mr.

McCloskey is not entitled to repudiate his agreement with the special prosecutor by virtue of the pardon issued by Governor Parson.[2] Because there was a lawful and binding agreement between Mr. McCloskey and the State, requiring forfeiture of the weapons, their detainer is not wrongful as a matter of law, and replevin will not lie.

CONCLUSION

Mr. McCloskey's claim for replevin fails as a matter of law. Governor Parson's pardon constitutes an act of mercy, removing any future encumbrances on Mr. McCloskey's civil rights associated with his criminal conviction. Executive clemency, as understood by the Supreme Court, Missouri courts and both state and federal administrative guidance, does not entitle Mr. McCloskey to the return of his firearms, the money he paid as a fine pursuant to his plea agreement with the State, or his court costs. The weapons forfeited as part of his and Mrs. McCloskey's plea agreements were lawfully seized and are lawfully detained by the St. Louis Metropolitan Police Department and the Sheriff. Additionally, the McCloskeys are bound by the terms of the plea agreement which required the forfeiture of the weapons in exchange for the benefits assented to by the prosecutor. For all of these reasons, Mr. McCloskey's Amended

[2] The Court might also consider a challenging issue presented: forfeiture of the firearms and payment of the fines were basic assumptions of the plea agreement. If this Court finds that the pardon negates the McCloskeys' agreement with the State entitling Mr. McCloskey to repossession and reimbursement, it should also find that the entire agreement is voided because "the government's fundamental purpose in entering into the plea agreement was frustrated by a supervening event ([the issuance of the pardon]), the non-occurrence of which was a basic assumption of the plea agreement." *United States v. Thompson*, 237 F.3d 1258 (10th Cir. 2001). If this is the case, the parties should be "returned as a matter of law to the position they occupied before the plea agreement and are no longer bound by it." *Id*. Accordingly, it is conceivable that the prosecutor might be entitled to reinstate the offense of tampering with evidence which was dropped as part of the plea. *See also United States v. Ervin* 765 F.3d 219 (3d Cir. 2014) (addressing *novel* issue of remedy for criminal defendant's breach of term in plea agreement); *United State v. Bowe*, 257 F.3d 336 (4th Cir. 2001). At a minimum, Mr. McCloskey should now be considered estopped from rescinding the agreement with regard to the firearms, fine and costs.

Petition for Replevin fails as a matter of law, and defendants are entitled to judgment on the pleadings in their favor.

Respectfully submitted,
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Certificate of Service

I hereby certify that on January 3, 2022, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system to all attorneys of record.

/s/ Catherine Dierker