

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 10CM1978

JEREMY D. PINNOW,

Defendant.

DECISION AND ORDER

INTRODUCTION

The defendant, Jeremy D. Pinnow, (Pinnow) has moved to dismiss the criminal complaint charging him with Carrying a Concealed Weapon (CCW) in violation of Section 941.23¹ of the Wisconsin Statutes. The motion challenges Section 941.23 of the Wisconsin Statutes as unconstitutional as applied to defendant Pinnow.

FACTUAL BACKGROUND

The parties have agreed that the criminal complaint and the transcript of the motion hearing held on November 4, 2010 before the Honorable J. D. Watts, presiding, provide a factual basis for the court's findings of fact.

The criminal complaint states that the police saw defendant Pinnow involved in an apparent hand-to-hand drug transaction in a car at 2627 W. Capitol Drive, Milwaukee. Officers approached the car and asked the defendant if he had any guns, knives, drugs, or bombs in the vehicle. Defendant replied that he had a gun in the car. Officers searched the vehicle and recovered a Cobra .380 caliber semi-automatic handgun in a case under the driver's seat. The gun was unloaded. Officers recovered a magazine containing five .380 rounds in the center console.

According to the testimony of Jeremy Pinnow, on Monday night April 12, 2010, Pinnow and two coworkers were doing demolition work in a bathroom (Motion Hearing Transcript: 17:5-7.) at a 400-plus unit apartment building at 14th Street and Locust Street, Milwaukee. They were robbed at gunpoint by two unknown assailants. (Motion Hearing

¹ Section 941.23 of the Wisconsin Statutes states: "Any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor."

Transcript: 15:19-20, 16:14-16.) The assailants pointed guns at Pinnow and his coworkers and one assailant pressed a gun to the back of Pinnow's head. (Motion Hearing Transcript: 7:21-23, 17:10-13.) The assailants took Pinnow's car keys, wallet, cell phone, money and vehicle. Pinnow and his coworkers were hogtied; bound hand and foot. The assailants told Pinnow that when you get untied, you can look for your car on 25th and Capitol, in the alleys. (Motion Hearing Transcript: 8:2-6.)

Pinnow promptly reported the armed robbery to the police. The police would not report the vehicle stolen because it was not yet registered to him. Pinnow had just purchased it. (Motion Hearing Transcript: 22:1-10.)

Later that same Monday night, other police officers recovered items, including keys to Pinnow's stolen vehicle, taken in the armed robbery of Pinnow and his coworkers in the area of 32nd or 35th Streets. (Motion Hearing Transcript: 11:14-25; 12:1-3; 23:15-25; 24:1-2.) However, as of Wednesday morning, April 14, 2010, after Pinnow contacted the police, the police told Pinnow that they would not report his vehicle stolen. (Motion Hearing Transcript: 24:9-10.)

Pinnow legally purchased the .380 caliber chrome handgun from a private dealer at a gun show at the Washington County fairgrounds. (Motion Hearing Transcript: 18:24-25; 19:1-12.) He had conducted internet research on transportation of firearms. He believed that he was transporting the handgun properly. (Motion Hearing Transcript: 9:1-15.)

When police approached Pinnow on the evening of Wednesday April 14 at the gas station at 2627 W. Capitol Drive, Milwaukee, he was specifically looking for his vehicle, stolen two days earlier. (Motion Hearing Transcript: 6:18-21.) Earlier, the police had recovered his vehicle's car keys so Pinnow was going to drive around the area to see if he could locate his stolen car. (Motion Hearing Transcript: 11:4-13.)

When the police recovered the handgun, it was unloaded and without the magazine in a hard plastic case with foam interior, snapped closed. (Motion Hearing Transcript: 5:18-20; 10:5-12; 13:18-23.) Pinnow slid the case containing the handgun underneath the driver's seat from the back seat so that the case was available if Pinnow reached down and put his arm underneath the seat. (Motion Hearing Transcript: 25:11-17; 26:21-25; 27:1-3.) Pinnow never pulled the case out from the front while in the driver's seat and expressed uncertainty as to what would happen if he would have had to retrieve it. Pinnow estimated that the process of loading the magazine, inserting the magazine into the handgun, releasing the safety, and loading the bullets into the chamber took two hands and 15 to 20 seconds. (Motion Hearing Transcript: 15:2-11.)

The magazine was in the center console. (Motion Hearing Transcript: 5:25; 6:1; 26:1-16.)

Pinnow stated that the reason for the handgun was if something were to happen; the handgun would be closer to him if he were to be in danger. (Motion Hearing Transcript: 7:2-12; 8:19-25.)

There was no presentation of evidence that Pinnow had the handgun for an unlawful purpose or that he intended to use the handgun in furtherance of the commission of a crime.

ANALYSIS

Preliminary Findings of Fact

The facts are not in dispute. The trial court accepts the stipulation of the parties regarding the underlying facts for the court's decision. Having heard the testimony of defendant Pinnow, the court finds that the defendant testified clearly, consistently and credibly regarding the issues at the hearing.

Unconstitutionality of Section 941.23 of the Wisconsin Statutes, as applied.

Applicable Law

A defendant may challenge a statute as being unconstitutional on its face or as applied.

In *State v. Cole*, 2003 WI 112, 264 Wis.2d 520, 665 N.W.2d 328, the defendant challenged his prosecution by attacking the constitutionality of Section 941.23. The Wisconsin Supreme Court held that Section 941.23 of the Wisconsin Statutes was facially valid despite the recent amendment² of the Wisconsin Constitution in Article I, Section 25.³ In *State v. Fisher*, 2006 WI 44, 290 Wis.2d 121, 127-128, 714 N.W.2d 495, the Supreme Court of Wisconsin summarized *Cole*, as follows:

“[T]he court recognized that the right to keep and bear arms is not absolute. In addition, it determined that the test for the constitutionality of a regulation of that right depends on whether the regulation is a reasonable exercise of the state's inherent police power. This reasonableness test, the court explained, focuses on a balancing of the interests at stake: the authority of the state to enact legislation for the health, safety, and welfare of the public as implemented in § 941.23 against the right to keep and bear arms under Article I, Section 25.

The court concluded in *Cole* that the statute is "a reasonable regulation on the time, place, and manner in which the right to bear arms may be exercised." It said that the statute "does not unreasonably infringe upon a citizen's ability to exercise the right." Indeed, the court noted, of all laws that regulate the time, place, or manner in which the right to keep and bear arms may be exercised, "[t]he CCW statute [§ 941.23] in particular serves an important public safety purpose." Ultimately, the court held that § 941.23 was constitutional on its face. [Citations and footnotes omitted.]

By contrast, an as-applied challenge requires courts to consider whether a statute can be constitutionally applied to the defendant “considering the facts of the case, not hypothetical facts in other situations.” *State v. Hamdan*, 2003 WI 113, 264 Wis.2d 433, 462, 665 N.W.2d 785.

Cole, *Hamdan* and *Fisher* are cases involving the challenge to the constitutionality of Section 941.23 of the Wisconsin Statutes as applied. *Fisher*, involved a defendant with a handgun in a motor vehicle and its analysis governs this case.

² Article I, Section 25 became part of the Wisconsin Constitution on November 30, 1998

³ Article I, Section 25 of the Wisconsin Constitution states: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."

“Cole and Hamdan must be read together to resolve the as-applied constitutional challenge to § 941.23 that is before us. Those cases establish several principles that inform our analysis.

First, the Hamdan test applies whenever a defendant asserts that § 941.23 is unconstitutional as applied. In other words, the Hamdan test is not limited to challenges to prosecutions for carrying a concealed weapon in one's home or privately-owned business. When summarizing the test, the court set forth the requirements for “[a] defendant who challenges on constitutional grounds a prosecution for carrying a concealed weapon.”

Second, the court in Hamdan recognized that there are two places in which a citizen's desire to exercise the right to keep and bear arms for purposes of security is at its apex: in the citizen's home or in his or her privately-owned business. Thus, it logically and necessarily follows that the individual's interest in the right to bear arms for purposes of security will not, as a general matter, be particularly strong outside those two locations.

Third, in a similar vein, under both Hamdan and Cole an individual generally has no heightened interest in his or her right to bear arms for security while in a vehicle. This principle follows from Hamdan's repeated focus on the heightened interest in that right in the individual's home or privately-owned business. It is even more emphatically dictated by Cole, in which the court unequivocally held that “[t]he right to bear arms is clearly not rendered illusory by prohibiting an individual from keeping a loaded weapon hidden either in the glove compartment or under the front seat in a vehicle.”

Fourth, while the state's interest in prohibiting the carrying of concealed weapons may generally be at its weakest in an individual's home or privately-owned business, the state's interest will generally be strong when a concealed weapon is being carried in a vehicle. The objectives behind the concealed carry statute as identified in Hamdan include that carrying a concealed weapon allows individuals to more easily act violently on impulse. Those objectives also include that other individuals, including law enforcement officers, should be placed on notice when they are dealing with someone who is carrying a dangerous weapon, along with the related concern that concealed weapons facilitate the commission of crime by creating the appearance of normality and catching people off guard. The court in Hamdan said that this notice objective is “perhaps the most significant.”

These objectives are highly salient when an individual carries a concealed weapon in a motor vehicle. Of particular concern is the potential danger to law enforcement officers if an individual is carrying a concealed weapon during the course of a traffic stop. Given the frequency of contacts between law enforcement and motorists, individuals carrying concealed weapons in motor vehicles present a greater overall risk to law enforcement than do individuals carrying concealed weapons in their homes or privately-owned businesses.

The carrying of loaded weapons in a motor vehicle also presents an additional risk of accident. The court in Cole recognized this risk as a consideration when analyzing Cole's as-applied challenge to the constitutionality of the concealed carry statute in the vehicle context. The legislature has recognized a similar safety concern by generally prohibiting the transport of any firearm in a vehicle unless it is unloaded and encased. Wis. Stat. § 167.31(2)(b).

Fifth, because the individual's interest in carrying a concealed weapon in a vehicle is generally comparatively weak and the state's interest in prohibiting such weapons in vehicles is relatively strong, it is only in extraordinary circumstances that an individual asserting a constitutional defense under Hamdan will be able to secure an affirmative answer to the first question in the Hamdan test. Stated another way, only in extraordinary circumstances will an individual carrying a concealed weapon in a vehicle be able to demonstrate that his or her interest

in the right to keep and bear arms for security substantially outweighs the state's interest in prohibiting that individual from carrying a concealed weapon in his or her motor vehicle. If a defendant reasonably believes that he or she is actually confronted with a threat of bodily harm or death and that carrying a concealed weapon is necessary for protection from the threat, extraordinary circumstances would be present. Absent such circumstances, an individual carrying a concealed weapon in a vehicle will generally be unable to demonstrate that his or her interest in the right to keep and bear arms for security substantially outweighs the state's interest in prohibiting that individual from carrying a concealed weapon in a motor vehicle.

By requiring extraordinary circumstances, we strike the proper balance between an individual's comparatively weak interest in carrying a concealed weapon in a vehicle and the state's strong interest in prohibiting such weapons in vehicles. To do otherwise would constitute a significant retreat from *Cole*. It would also render largely superfluous the court's repeated emphasis on homes and privately-owned businesses in *Hamdan*.” [Citations and footnotes omitted.] *Fisher*, *id* at pp. 134-8

Application of the Law to this Case.

First, the *Hamdan* test is not limited to challenges to prosecutions for CCW in a defendant's home or privately-owned business. The *Hamdan* test applies to defendant Pinnow for CCW in his vehicle.

Second, while a defendant's interest to bear arms for purposes of security will not, as a general matter, be particularly strong outside the home or privately owned business, defendant Pinnow's right to bear arms in this case is much stronger than *Fisher's* who was merely driving around doing personal errands.

Pinnow had been the victim of an armed robbery two days earlier while at work. On April 14, Pinnow was trying to recover his stolen vehicle at or near the very location that the assailants had informed him that he would find it. The armed robbery and the subsequent attempted recovery of his vehicle involved substantial danger to Pinnow. The threat and danger were imminent and specific. Pinnow reported the armed robbery to the police right after it happened. The crime was substantiated by the police. It was corroborated when other police officers recovered Pinnow's car keys the night of the armed robbery. Pinnow's location was specific, not random. He complied with Section 167.31(2)(b)⁴ of the Wisconsin Statutes by transporting the handgun unloaded and encased. He acted promptly and reasonably to recover his vehicle. The time, location and manner of Pinnow's CCW, unlike *Fisher's*, demonstrated a substantial need to exercise his right to keep and bear arms for security purposes.

Third, while defendant Pinnow did not have a heightened interest in his vehicle, the facts of this case, as discussed above, demonstrate that Pinnow had a substantial need to exercise his right to keep and bear arms for security purposes.

⁴ Section 167.31(2) of the Wisconsin Statutes states: “(b) Except as provided in sub. (4), no person may place, possess or transport a firearm, bow or crossbow in or on a vehicle, unless the firearm is unloaded and encased or unless the bow or crossbow is unstrung or is enclosed in a carrying case.”

The twin concerns that the handgun was loaded and hidden from view so as to be considered concealed were paramount in *Cole*. However, here the handgun was unloaded and concealed in a snapped closed plastic case. The testimony of Pinnow regarding the plastic case with foam interior expressly fitting his handgun matches the language of Section 167.31(1)(b) of the Wisconsin Statutes for an encased firearm.⁵ Compliance with Section 167.31(1) and (2) of the Wisconsin Statutes always constitutes encasement and therefore concealment.

The facts of *Cole*, loaded and not encased firearm in a glove compartment and another loaded and not encased firearm underneath the driver's seat; and the facts of *Fisher*, loaded and not encased firearm in the center console of the front seat, are distinguishable.

Fourth, the objectives promoted by the CCW statute are deterrence of individuals who may easily act on violent impulse; placing law enforcement on notice of those carrying a dangerous weapon; and the concern that concealed weapons create the appearance of normality and catch people off guard.

The record shows Pinnow was not likely to act easily on violent impulse. His handgun was unloaded and encased under the driver's seat. The case needed to be retrieved from under the seat and opened: the handgun removed from the case; the magazine inserted into the handgun; the first round chambered and the safety released before firing. Pinnow did not react impulsively or violently during the armed robbery or during the events leading up to and including his CCW arrest. He had reported the armed robbery and cooperated with the police. He legally purchased the handgun. He conducted internet research on the proper transportation of firearms. He transported his handgun pursuant to Section 167.31(2)(b) of the Wisconsin Statutes.

The potential danger to law enforcement officers from individuals carrying a dangerous and concealed weapon during a traffic stop is substantial. An individual who violates the CCW statute with a loaded and not encased firearm does not place law enforcement officers on notice. An individual who complies with Section 167.31(2)(b) of the Wisconsin Statutes does not place law enforcement officers on notice either. The difference lies with the unfolding of the events during the traffic stop.

At the beginning of the traffic stop, Pinnow, when asked, disclosed the existence of his handgun. From a practical standpoint, Pinnow placed law enforcement on notice regarding his handgun almost immediately. Pinnow was not upset or concerned about the police; he was looking for his car. His reactions were not impulsive or violent. Pinnow was not a threat or danger to the police; he believed that he was transporting his handgun legally.

⁵ Section 167.31(1) of the Wisconsin Statutes states: "(b) "Encased" means enclosed in a case that is expressly made for the purpose of containing a firearm and that is completely zipped, snapped, buckled, tied or otherwise fastened with no part of the firearm exposed."

Likewise, the concern that CCW creates the appearance of normality and catches people off guard is significant. However, an individual who complies with Section 167.31(2)(b) of the Wisconsin Statutes may catch people off guard as well. The difference lies in the peculiar facts of this case.

Pinnow was searching for his vehicle; he was not trying to catch the police or others off guard regarding his handgun. He believed that he was obeying the law regarding handgun transportation. He was exercising his right to bear arms in a reasonable and prudent manner.

In *Cole*, the court discussed the possibility of accidents and the danger to public safety involved in the transportation of loaded firearms. In *Fisher*, the court agreed and cited Section 167.31(2)(b) of the Wisconsin Statutes where the legislature recognized a similar safety concern. Here, Pinnow's handgun was unloaded and encased; in compliance with Section 167.31(2)(b) of the Wisconsin Statutes. Pinnow was safe under Wisconsin law.⁶

Defendant Pinnow's case is very different from the *Cole* or *Fisher* cases where the defendants had immediate access to loaded and not encased firearms.

Fifth, the *Fisher* court stated, at p. 137:

[O]nly in extraordinary circumstances will an individual carrying a concealed weapon in a vehicle be able to demonstrate that his or her interest in the right to keep and bear arms for security substantially outweighs the state's interest in prohibiting that individual from carrying a concealed weapon in his or her motor vehicle. If a defendant reasonably believes that he or she is actually confronted with a threat of bodily harm or death and that carrying a concealed weapon is necessary for protection from the threat, extraordinary circumstances would be present.

Pinnow was the victim of an armed robbery at work where a gun was pressed to the back of his head. Personal items and his car were taken. He promptly reported the armed robbery to the police. The police recovered some of the items taken, including the keys to his stolen vehicle. Two days later he went to the area where the assailants had told him he could recover his vehicle. The fact that Pinnow was at or near this location attempting to recover his vehicle is critical. Pinnow's belief was reasonable that the armed robbery and the attempted recovery of his vehicle confronted him with substantial and imminent danger of threat of bodily harm or death.

Pinnow legally purchased his handgun. He researched proper transportation of firearms. He complied with Section 167.31(2)(b) of the Wisconsin Statutes and safely transported his handgun. None of the objectives promoted by the CCW statute apply against Pinnow to deny his constitutional protection. Carrying a concealed weapon was a proper and necessary exercise of his right to bear arms for security.

The court finds that defendant Pinnow reasonably believed that he was actually confronted with the threat of bodily harm or death and that carrying a concealed weapon

⁶ Section 167.31 of the Wisconsin Statutes is entitled "Safe use and transportation of firearms and bows."

was necessary for protection from that threat. The defendant has demonstrated that his interest in concealing the weapon to facilitate exercise of his right to keep and bear arms substantially outweighs the State's interest in enforcing the concealed weapons statute.

The second prong of the *Hamdan* test is that:

“[A] court must assess whether an individual could have exercised the right in a reasonable, alternative manner that would not violate the statute.”

...

“[T]he test for whether statutes or ordinances that restrict a fundamental right are constitutional is whether they leave "open ample alternative channels by which the citizen may exercise" the affected right.” *Hamdan*, *id* at p. 479-80.

In *State v. Walls*, 190 Wis.2d 65, 526 N.W.2d 765 (Ct. App. 1994), the Court of Appeals recognized in footnote two the lawful transportation of unloaded and encased firearms.

“We are mindful "that there is a long tradition of widespread lawful gun ownership by private individuals in this country." *Staples v. United States*, 114 S. Ct. 1793, 1799 (1994). Thus, our conclusion in this case in no way limits the *lawful* placement, possession, or transportation of, unloaded (or unstrung) and encased firearms, bows, or crossbows in vehicle as permitted by § 167.31(2)(b), STATS....” *Walls*, *id.* at p. 69.

Section 167.31(2)(b) of the Wisconsin Statutes sets forth the legal way to transport a firearm in Wisconsin. Pinnow was properly exercising his constitutional rights and transporting his handgun legally.

There were no practical alternatives for Pinnow to exercise his right to bear arms and to be able to defend himself against the threat (requiring that the handgun is within his reach) and to otherwise comply with the CCW statute (violated if the handgun is within his reach). If carried openly in a holster on his hip in a vehicle, it would still be considered concealed and a violation of the CCW statute. If carried in front of him while driving, it would be very dangerous driving, would terrify and confound others, and would likely constitute disorderly conduct.

Requiring Pinnow to put the encased and unloaded firearm out of reach would effectively deny him his right to bear arms guaranteed by Article I, Section 25.

The court finds that Pinnow's compliance with Section 167.31(2)(b) of the Wisconsin Statutes was the most reasonable way to exercise his right to bear arms and that other alternatives were impractical.

Finally, while the District Attorney may go forward with Pinnow's prosecution if he asserts and shows probable cause to believe that the defendant carried the handgun for an unlawful purpose, there appears no such evidence in this record. Without this offer,

defendant's motion to dismiss is granted as Section 941.23 of the Wisconsin Statutes is unconstitutional as applied to defendant Pinnow.

Dated this 11th day of February, 2011.

BY THE COURT:

Hon. J. D. Watts
Milwaukee County Circuit Court
Branch 15