COURT OF APPEALS OF WISCONSIN
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2012-CF-000093
Appeal No. 2014AP002701 CR

ROBERT J. STIETZ,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT ROBERT J. STIETZ

Charles W. Giesen
Attorney for Robert J. Stietz
State Bar No.1014364
GIESEN LAW OFFICES, S.C.
14 S. Broom Street
P.O. Box 909
Madison, WI 53701-0909
(608) 255-8200

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE NO.**

UNITED STATES CONSTITUTION

WISCONSIN CONSTITUTION

WISCONSIN STATUTES

ADMINISTRATIVE CODE

ARGUMENT

I. STIETZ WAS ENTITLED TO A SELF-DEFENSE INSTRUCTION

1. This Court should disregard undeveloped arguments in the State's brief.

The State suggests that an error in failing to give a self-defense instruction was harmless error not affecting the substantial rights of Stietz. (State's Brief, p. 10) The State offers no support, citations to the record or further argument in support of that claim. This Court should dismiss that suggestion for two reasons. First, the Court should ignore amorphous and insufficiently developed arguments. Block v. Gomez, 201 Wis. 2d 795, 811, 549 N.W.2d 783 (1996). This well established principle of appellate law is especially true when dealing with complex constitutional issues such as Stietz' right to present a defense. Cemetery Services, Inc. v. Department of Regulation & Licensing, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998).

Secondly, the State does not and cannot plausibly argue that it is clear beyond a reasonable doubt that Stietz would have been found guilty absent the failure to give the self-defense instruction. This was indisputably a close case, evidenced by the jury having acquitted

Stietz on four of the six charged counts. (R.59, 60, 62, 63) Those acquittals following contradictory testimony by Stietz and the wardens lend strong support to the proposition that the jury would have also credited Stietz' testimony that he was acting in self-defense and would have acquitted him on that basis had it been given that option.

2. The State's reliance on Hobson is misplaced because it is inapposite and not controlling.

The narrow and only issue decided by Hobson was whether to abrogate the common law privilege to forcibly resist an unlawful arrest in the absence of unreasonable force. State v. Hobson, 218 Wis. 2d 350, ¶ 2, 577 N.W.2d 825 (1998). Hobson went to great lengths to limit its decision to that issue alone, and answered just two questions: "Whether a common law privilege to forcibly resist unlawful arrest, in the absence of unreasonable force, has existed in Wisconsin until now" and "if that privilege exists, whether it should continue to be recognized or should be abrogated." Id. at ¶ 11. Hobson explicitly limited its holding to those two questions and "underscore[d] the unusual procedural history" of the case, emphasizing its "conclusion in this case is limited to the narrow and peculiar procedural facts presented." Id. at ¶ 10, fn7.

The State's entire argument rests on its misinterpretation of Hobson and the unsupportable contention that it controls here. (State's Brief, p. 12) That reliance is misplaced and conflates two separate and distinct legal doctrines: The common law privilege to forcibly resist a peaceable arrest, and the right to self-defense. Only the former was abrogated in Hobson.

The right to self-defense on the other hand retains unquestionable vitality, remaining not only "the first law of nature" but a basic right enshrined in law from ancient times to the present. District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008); McDonald v. City of Chicago, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010).

Hobson emphasized that the common law privilege to resist an unlawful arrest and the right of self-defense now embodied in the statute had no bearing on each other: "[T]he legislature codified a right to self-defense distinguishable from the right to resist an unlawful arrest." Hobson, supra, at fn17; State v. Reinwand, 147 Wis. 2d 192, 433 N.W.2d 27 (Ct. App. 1988) ("self-defense codified in Section 939.48 is separate from the common law right to forcibly resist an unlawful arrest.") The State is now in effect asking this Court to

invalidate the statutory right to self-defense, which Hobson expressly refused to do. Hobson, supra at fn17.

Finally, the circumstances of the instant case render it factually distinguishable from Hobson. Hobson knew she was dealing with a uniformed police officer. In contrast, when Stietz encountered the wardens, he was unsure who they were because it was dark out (R.111:177; R.112:29), they were some distance away (R.111:177; R.113:125, 141; App. 71, 87), and they shined a flashlight in his eyes (R.111:177, 179; R.113:125, 141; App. 71, 87), blinding his view of them. They were not wearing military style uniforms, but blaze orange jackets (R.113:92; App. 38), typical of what every hunter wears, albeit adorned with a shoulder patch which presumably would not be visible to someone they were facing. Their blaze orange caps with a logo, which itself is unremarkable, were probably not readable by Stietz in the dark. Stietz testified that he first knew they were officers of some sort only after the confrontation, when Webster radioed for backup. (R.111.189; R.112:109; R.113:114; App. 60)

Additionally, Hobson involved the arrest of the defendant, whereas the wardens here admittedly were not attempting to arrest Stietz. They only went onto Stietz' land out of "curiosity"

(R.111:166-167, 173-174; R.112:13) and had no reasonable suspicion, much less probable cause, to think that any crime had been committed when they confronted and forcibly disarmed Stietz. At most, they were investigating the possibility of a DNR Administrative Code violation of after hours hunting, which is a mere civil forfeiture. That hunch or possibility was uncorroborated and unsubstantiated by their observations when they circumnavigated the property and heard no shots and saw no hunting, and refuted by Stietz' immediate statement to them that he was not hunting but merely looking for trespassers. (R.113:92; App. 38)

The other major distinction between Hobson and this case is the fact that Hobson dealt with a peaceful arrest, a circumstance not present when the wardens physically assaulted Stietz, grabbed him by his shirt and forcibly took his gun. (R.102:35-36; R.113:98-99; App. 44-45) Hobson did not abrogate a person's common law right to use force when resisting an arrest where an officer uses unreasonable force. Hobson, supra at ¶¶46, 60-61, fn17. ("The majority opinion does not abrogate a person's common law right to use force when resisting an arrest in which a law enforcement officer uses unreasonable force.")

3. The trial court's decision ignored controlling legal authority.

The trial court did not give consideration to controlling authority set forth at pp. 10-15 of Stietz' opening brief entitling a defendant to a self-defense instruction under the facts of this case. Rather, the trial court based its decision on the absurd rationale that

> ". . . we have law enforcement officers, and if I make this decision and allow this in, that means every time a police officer comes up to a car on his traffic stop at nighttime or anywhere else [sic], someone would be able to pull a gun on him, and that is not the state of the law."

(R. 107:55) That scenario upon which the trial court predicated its decision is not even remotely related to the facts here. An officer making a traffic stop activates emergency lights, clearly identifying himself or herself. Typically such a stop would be made on a public highway and not on remote private country land. An officer peaceably conducting a traffic stop is far different from wardens forcibly assaulting a citizen and taking his lawfully possessed rifle. It is unclear why the trial court adopted such a rationale to deny Stietz' requested self-defense instruction since neither the State nor the defense had put forth such an argument, but it does highlight the error of the trial court's rationale and ruling on this issue.

The State's brief neither addresses nor refutes the

argument and controlling authority in Stietz' brief that Stietz' testimony entitled him to a self-defense instruction. (Stietz Brief, pp. 11-13) At most, it attempts to oppugn his credibility. That is not the proper standard and underscores the necessity of submitting this issue to the jury so it may evaluate the reasonableness and credibility of the testimony.

II. STIETZ WAS ENTITLED TO PRESENT EVIDENCE AND TO HAVE THE JURY INSTRUCTED REGARDING THE CLEARLY UNLAWFUL CONDUCT OF THE DNR WARDENS IN THIS INSTANCE

The State's brief endorses an unduly broad reading of the powers bestowed upon certain agents of the State, to wit: DNR wardens. The State takes the unsupported and untenable position that DNR agents are invested with a wide array of seemingly extralegal powers. (State's Brief, pp. 3-4) While normal citizens, police and sheriffs are governed by laws prohibiting trespass, it contends the DNR is subject to no such laws.

The State cites to WIS. STAT. § 29.924(1) for the proposition that, so long as DNR wardens are investigating a violation of the laws they are empowered to enforce, they may freely enter private property without a warrant or the owner's consent. (State's Brief, p. 15) The problem is, the statute does not say what the State

claims. This quickly becomes clear when one reads the quoted language in proper context. Rather, the cited statute is only a generic assertion of the DNR's ability to conduct investigations generally, not a sweeping endorsement of an unbridled and unlimited investigatory power.

As a purely statutory entity, the DNR has no powers except those given to it by the legislature. The quoted language is therefore merely a means of giving the DNR the authorization it needs to actively investigate, rather than passively enforce, violations of the law. It does not define the scope of its investigatory power except, again, in general terms. If anything, it would appear that the legislature intended the DNR's power to be exercised consistent with other reasonable limitations and laws. For example, the DNR may only enter private lands for specifically enumerated purposes and only after making reasonable efforts to notify the owner or occupant (§ 29.924(5)). The section in no way lends itself to the sweeping reading urged here.

WIS. STAT. § 23.61 is not strictly on point either. The phrase "lawful inspection" is not defined by statute and the State has made no effort to claim this was a "lawful inspection." That claim

should be considered waived. Block v. Gomez, supra. Nor do arguments regarding probable cause excuse the trespass actions of the DNR wardens, for two reasons: One, the facts and circumstances do not rise to a sufficient quantum of proof; and two, Stietz has asserted this trespass separate and distinct from any Fourth Amendment argument. Fourth Amendment jurisprudence recognizes the existence of a trespass, but recognizes that a trespass may not necessarily require suppression of evidence. That is not an issue here and is not at all germane to the questions of whether a trespass did or did not occur and whether DNR wardens have the inherent power to trespass whenever they see fit.

The State has not fully addressed Stietz' central claim on this issue: That the trial court's rulings deprived him of his right to present a defense. Accordingly, that argument should be conceded in Stietz' favor. Charolais Breeding Ranches, Ltd. v. FPC Securities Corporation, 90 Wis. 2d 97, 108-109, 279 N.W.2d 493 (Ct. App. 1979). Likewise, the State has also squarely failed to address Stietz' reasoning for requesting that the jury be informed of the DNR's illegal trespass, which would have served to bolster the reasonableness of his apprehension for his personal safety.

III. THE DENIAL OF STIETZ' RIGHT TO A PUBLIC TRIAL WAS NOT "TRIVIAL"

The Wisconsin Supreme Court's adoption of a "triviality" exception to a violation of constitutional rights in State v. Ndina, 2009 WI 21, ¶ 53, 315 Wis. 2d 653, 761 N.W.2d 612, fails to respect the gravity of so-called "structural errors." They are so called because they are inherently damaging with respect to the legitimacy of a presumptively open court proceeding. Calling such an error "trivial" therefore appears contrary to the logic of the U.S. Supreme Court, which has discussed closure as something that inevitably causes a "great, though intangible, societal loss . . ." Waller v. Georgia, 467 U.S. 39, 49, n.9, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).[1]

However, a closure is trivial only when the closure at issue does not implicate those subsidiary concerns embraced by the public trial right. Ndina, supra at ¶ 48-49. Clearly, this case does implicate those concerns, as was fully explicated in Stietz' opening brief. The State attempts to circumvent this by focusing on some enumerated public trial concerns that are admittedly not in play. (State's Brief, pp. 18-19). However, the State ignores those

1 See also Rodriguez v. United States, 135 S.Ct. 1609, 191 L.Ed.2d 492, 2015 US LEXIS 2807 (2015) (minimizing extent of constitutional violation does not dilute significance of a violation of that right.)

enumerated factors in the Ndina analysis which do support Stietz' position and completely glosses over the fact that the triviality "test" does not require a specific showing as to each of the enumerated factors discussed in Ndina. Nor are the enumerated values in Ndina intended to be "exhaustive." Id. at ¶ 49, n.25.

The fact that no witnesses testified is likewise not dispositive, as the Supreme Court has held the public trial right applies to non-evidentiary proceedings such as voir dire. Presley v. Georgia, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010). There is also no requirement that the proceedings be contentious (although the jury instruction conference arguments were vigorous). Rather, the public trial right is implicated when court proceedings that should be open are hidden from the public's eyes without any "assurance that established procedures are being followed and that deviations will become known." Press-Enterprise Company v. Superior Court of California, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed 2d 629 (1984).

In deciding the public trial claim, this Court should follow the lead of the Second Circuit Court of Appeals, which has asserted that the triviality exception is necessarily narrow and should only apply in very rare circumstances. United States v. Gupta, 699 F.3d

682, 684-85 (2d. Cir. 2011). This is not such a circumstance. Rather, this was a compelling denial of Stietz' right to a public trial. (Stietz Brief, pp. 23-36) As a deprivation of the right to a public trial is categorically structural, reversal must result. Johnson v. United States, 520 U.S. 461, 469, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).

Finally, the State neglects to meaningfully address a very important aspect of public trial jurisprudence, whether the trial court made sufficient findings to support a closure. The trial court's "reasoning" (R.107:64) was mistaken, legally deficient, and fell very short of that which the case law explicitly requires. This Court should take the unjustified nature of the closure into account when assessing that closure's significance. Gupta, supra at 689.

IV. THE STATE UNLAWFULLY ATTEMPTED TO SEIZE STIETZ' LAWFULLY POSSESSED WEAPON

The State attempts to excuse an excessive exercise of the State's coercive power, here the groundless seizure of Stietz' lawfully possessed firearm. In the State's view, the State may not only trespass onto private property, but may also forcibly disarm a law-abiding citizen simply because it suspects a non-criminal violation of hunting laws.

The State claims the wardens were entitled to stop and

forcibly disarm Stietz by virtue of Sections 23.58 and 23.59, Stats. However, the facts and circumstances here do not rise to reasonable suspicion. (Stietz Brief, p. 18) Section 23.58 explicitly states:

> ". . . such a stop may be made only where the enforcing officer has proper authority to make an arrest for such a violation."

Id. There was no proper authority to make an arrest because none of the factors required under Section 23.57(1)(a), (b) or (c), Stats., were present, nor did the wardens have probable cause as required by Section 23.57, Stats. Furthermore, if this Court agrees the DNR wardens were in fact trespassing, then logically that also deprived them of proper authority to stop and disarm Stietz.

No statute can negate the rights Stietz enjoys under the Second Amendment to the United States Constitution and Article I, § 25 of the Wisconsin Constitution. There can be no question that Stietz' right to bear arms as he did trumps the curiosity of wardens anxious to investigate imagined criminality. Every citizen has the right to bear arms, and the wardens' forcible seizure violated Stietz' peaceable and lawful exercise of that right.

V. DNR WARDENS ARE NOT LAW ENFORCEMENT OFFICERS UNDER WIS. STAT. § 941.20(1m)(b)

The State misstates Stietz' argument. Stietz' argument is

not that "because Frost and Webster are not 'commission wardens' that they are not 'law enforcement officers' under the statute . . ." Commission wardens are not an issue. Section 941.20(1m)(b), Stats., simply does not include DNR wardens as law enforcement officers with respect to the crime it defines. This is a fatal defect with respect to Stietz' conviction. The State argues that "where a statute governing one subject contains a given provision, the omission of that same provision from a statute governing a related subject is evidence that a different intention existed." (State's Brief, p. 25) The problem for the State is that this language actually favors Stietz and not the State. The State then cites a number of statutes dealing with the same subject – law enforcement officers. (State's Brief, p. 25). The State points out, albeit indirectly, that while Section 941.20(1m)(b) and the many cited statutes deal with the same or related subjects, Section 941.20(1m)(b) has plainly omitted any provision on DNR wardens found in other statutes. By the State's very own authority, this means that Stietz, and not the State, is correct.

This Court "may not substitute its judgment for that of the legislature." State v. Steffes, 2013 WI 53, ¶ 21, 347 Wis. 2d 683, 832 N.W.2d 101 (quotations and brackets omitted). Because there is no

textual support for the proposition that DNR wardens are law enforcement officers under Section 941.20(1m)(b), Stats., the State's position cannot prevail.

CONCLUSION

Based upon the record and the authorities and arguments presented, Robert Stietz respectfully requests that this Court enter an order reversing and vacating the convictions on Counts 3 and 6 and remanding this matter to the Circuit Court for further proceedings.

Respectfully submitted this 29th day of June, 2015.

/s/

Charles W. Giesen
State Bar No. 01014364
GIESEN LAW OFFICES, S.C.
Attorneys for Robert J. Stietz
14 S. Broom Street
P.O. Box 909
Madison, WI 53701
(608) 255-8200

CERTIFICATION ON FORM

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced with a proportional serif font. The length of this brief is 2,997 words.

/s/

Charles W. Giesen
State Bar No. 01014364
GIESEN LAW OFFICES, S.C.
Attorneys for Robert J. Stietz
14 S. Broom Street
P.O. Box 909
Madison, WI 53701
(608) 255-8200

CERTIFICATION OF COMPLIANCE
WITH RULE 809.19(12), STATS.

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Section 809.19(12), Stats.

I further certify that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

/s/

Charles W. Giesen
State Bar No. 01014364
GIESEN LAW OFFICES, S.C.
Attorneys for Robert J. Stietz
14 S. Broom Street
P.O. Box 909
Madison, WI 53701
(608) 255-8200