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In the Court of Appeals of Wisconsin

District III

Somerset Municipal Court, Plaintiff-Respondent

v.

Mark J. Hoffman, Defendant-Appellant

Appeal No. 2015AP000140

Appeal from the Judgment of the St. Croix County Circuit Court, The Hon. Scott R. Needham

Brief of Appellant

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Statement of Issues

1. Is a municipal ordinance prohibiting "loitering" preempted by state law, specifically Wis.Stats. § 66.0409, when it is applied to someone who is carrying a firearm, causing alarm, but who does nothing more with the firearm than have it on his person as he walks down public sidewalks?

   Circuit Court answer: No.

2. Is a municipal ordinance unconstitutional as applied to a person when it punishes a person for walking in an aimless manner and refusing to identify himself to the police?

   Circuit Court answer: No.

3. Does a circuit court err when it denies a motion for summary judgment on grounds that there is a genuine issue of material fact, and that whether a person is properly charged or should be convicted is a question of fact for the jury, but fails to identify any such issue and then at trial refuses to give instructions to the jury regarding whether the person was properly charged or should be convicted on the grounds that such questions are legal questions for the court to answer.

   Circuit Court answer: No.

Statement on Oral Argument and Publication

Appellant Mark Hoffman ("Hoffman") does not believe oral argument is necessary in this case. The issues are straightforward and it is not likely that oral argument would assist the Court in deciding the case.

Hoffman believes that the opinion in the case should be published. As described in Hoffman's Motion for a Three Judge Panel, the major issue in this case is of great significance to the citizens of the State, as well as municipalities and law enforcement. The issue is one of first impression and the decision will be important for resolution of future cases.

Statement of the Case

On July 23, 2013, Hoffman was walking in the Village of Somerset with a rifle on his back supported by a sling, with the barrel of the rifle pointed generally downward at the ground. R16, p. 6. Hoffman also wore a handgun in a holster on his waistband, although the handgun was not observed by anyone until Hoffman's encounter with the police. *Id.* Sirovatka testified that Sirovatka did not detain Hoffman initially, that Sirovatka told Hoffman that Hoffman was not being detained, and that Hoffman was not detained until he was arrested. *Id.*, p. 7.

Several occupants of the Village made reports to the police of Hoffman's behavior and expressed concern about Hoffman carrying a rifle. Sgt. Tom Sirovatka with the Village Police Department made contact with Hoffman. *Id.*, p. 6. Sirovatka testified that he asked Hoffman several questions, including Hoffman's name, where Hoffman lived, where Hoffman was going, and why he was carrying the rifle. *Id.*, pp. 6-7. Hoffman declined to answer those questions.

Sirovatka testified that when he encountered Hoffman, Sirovatka did not suspect Hoffman of committing any particular crime or violating any particular ordinance. *Id.*, p. 11. Sirovatka testified that he had no reason to believe Hoffman had any malicious or criminal intent. *Id.*, p. 14. Sirovatka also testified that he told Hoffman that Hoffman would be free to go as long as Sirovatka could verify that Hoffman was not a felon and that the firearms were not stolen. *Id.*, p. 12. Finally, Sirovatka testified that he had no reason to believe that Hoffman was a felon or that the firearms were stolen. *Id.*, pp. 12-13.

Hoffman ultimately was charged by Sirovatka, via citation, for violating two Village ordinances: loitering and obstruction. R3. The obstruction charge was dismissed by the Village Municipal Court, but Hoffman was convicted of the loitering charge.

Hoffman filed a timely appeal for a trial *de novo* in circuit court. Hoffman then filed a motion for summary judgment in the circuit court, on the grounds that the Village ordinance, as applied to him, was preempted by state law. R11. The circuit court denied that motion. R21.

The circuit court then conducted a jury trial. Tr., p. 1. At the close of the Village's case, Hoffman moved for a directed verdict, again on the grounds that the Village ordinance as applied to him was preempted by state law. Tr., p. 145. The circuit court denied that motion. Tr., p. 148.

The circuit court conducted a conference with counsel for jury instructions. During that conference, Hoffman objected to the circuit court's failure to include certain instructions. The circuit court noted the objections but refused to modify the instructions.

The jury returned a verdict of guilty and the trial court entered a judgment of guilt on December 19, 2014 and sentenced Hoffman to pay a fine of just under $200. Tr., p. 203. Hoffman appealed on January 16, 2015. R33.

Argument

Hoffman will show the Court that the Village Ordinance at issue is preempted by State law as it was applied to Hoffman. The trial court therefore should have granted Hoffman's motion for summary judgment. Failing that, the trial court should have granted Hoffman's motion to dismiss upon the Village's resting at trial. Failing that, the trial court should have included jury instructions on when a person can, under state law, be convicted for a municipal ordinance violation that punishes carrying a firearm.

I. *The Loitering Ordinance is Preempted By State Law*

The Loitering Ordinance provides, in pertinent part:

> No person shall loiter or prowl in a place, at a time or in a manner not usual for law abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself/herself or manifestly endeavors to conceal himself/herself or any object. Unless flight by the person or other circumstances makes it impracticable, a law enforcement officer shall, prior to any arrest for an offense under this Section, afford the person an opportunity to dispel any alarm which would otherwise be warranted, by requesting him/her to identify himself/herself and explain his/her presence and conduct. No person shall be convicted of an offense under this Subsection if the law enforcement officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the person was true and, if believed by the law enforcement officer at the time, would have dispelled the alarm.

Somerset Ordinances, § 11-2-6(c)(1). Loitering is defined as:

> Loiter. To sit, stand, loaf, lounge, wander or stroll in an aimless manner or to stop, pause or remain in an area for no obvious reason.

Somerset Ordinances, § 11-2-6(e)(1).

The Loitering Ordinance is preempted by state law, at least as applied to Hoffman. A central component of the Loitering Ordinance is that the loitering must be done "in a time, at a place, or in a manner not usual for law abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity." Somerset Police Chief Douglas Briggs testified, "It's not unusual for a person in the Village of Somerset to carry a firearm. It happens daily within two blocks of the [police] station." R16, p. 16; Tr., p. 141.

Nevertheless, Briggs also testified that if Hoffman had identified himself and did not have any warrants or felonies, Briggs would not have arrested him. *Id.*, p. 86. Briggs further testified that if Hoffman had not been carrying firearms, Briggs would not have arrested Hoffman. R16, p. 15; Tr., p. 143. Finally, at the time of arrest, Chief Briggs told Hoffman, "You're under arrest for being heavily armed." R- Ex 2 (CD), at 10:38.

The upshot is that Hoffman's carrying a firearm was the primary impetus for the arrest. Each citizen witness testified some measure of concern or alarm over Hoffman's possession of the firearm. Tr., pp. 83, 89, 98, 101, 104, Though worded differently, the provision of the Loitering Ordinance with which Hoffman was charged is quite similar to the state crime of disorderly conduct. It proscribes behavior that tends to cause "alarm" under certain circumstances and the

disorderly conduct statute proscribes behavior that tends to cause "a disturbance" under certain circumstances.

Arresting someone for possession of firearms is clearly illegal and preempted by Wisconsin law. First, the Attorney General in 2009 issued an "Advisory Memorandum" in which he explained that carrying a firearm, by itself, is not disorderly conduct. R16, pp. 18-22.

Next, the legislature has amended the disorderly conduct statute to say, "Unless other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply, a person is not in violation of, and may not be charged with a violation of, this section for loading, carrying, or going armed with a firearm, without regard to whether the firearm is loaded or is concealed or openly carried." Wis.Stats. § 947.01(2).

One might argue that Hoffman was not charged with disorderly conduct, so that statute is irrelevant. It is not irrelevant, however, when viewed in light of the statute that preempts local regulation of firearms:

> [N]o political subdivision may enact an ordinance or adopt a resolution that regulates … use, keeping, possession, bearing, [or] transportation …of any firearm…unless the ordinance or resolution is the same as or similar to, and no more stringent than, a state statute.

Wis.Stats. § 66.0409(2). Thus, the Village may not have an ordinance that is more restrictive than state law when it comes to carrying firearms. While the Village does not use the words "disorderly conduct" in conjunction with its Loitering Ordinance, the Loitering Ordinance is, in effect, a disorderly conduct ordinance.

To remove all doubt, however, the Village is further restricted by:

> Unless other facts and circumstances that indicate a criminal or malicious intent on the part of the person apply, no person may be in violation of, or be charged with a violation of, an ordinance of a political subdivision relating to disorderly conduct ***or other inappropriate behavior*** for loading, carrying, or going armed with a firearm, without regard to whether the firearm is loaded or is concealed or openly carried. Any ordinance in violation of this subsection does not apply and may not be enforced.

Wis.Stats. § 66.0409(6). [Emphasis supplied].

Subsection (6) is a more generalized statute, prohibiting the Village from enforcing an ordinance that has the effect of punishing a person for "inappropriate behavior" relating to carrying or going armed with a firearm. That is exactly what the Loitering Ordinance does, at least with respect to Hoffman. The Loitering Ordinance was used to punish Hoffman for carrying a firearm, which alarmed some people. The police clearly said Hoffman would not have been detained or arrested if Hoffman had not been carrying a firearm. Each witness for the Village testified that they called police or notified superiors because Hoffman was carrying a firearm.

No witness was able to identify any malicious or criminal intent based on Hoffman's actions. In fact, witnesses testified they knew of no such malicious or criminal intent. Tr., pp. 84, 85, 90, 98, 99, 105, 106, 111, 112, and 132. In the absence of evidence of malicious or criminal intent, Hoffman should not have been charged, let alone convicted. Despite all this, however, the Village has applied its ordinance in such a way as to punish a person for carrying a firearm,

something it is explicitly prohibited from doing. Sirovatka testified that he had no indication that Hoffman had any malicious or criminal intent (Tr., p. 132), so the exception in the statute does not apply. The Loitering Ordinance is preempted.

Moreover, pursuant to the ordinance, a person cannot be punished under it unless he refuses to identify himself to police upon request. We know, however, from both state and federal case law, that it is illegal to punish a person for refusing to provide his name to police, especially in a case where, as here, the person is not being detained by police.[1] *See* constitutional discussion below.

Finally, it should be noted that in Wisconsin, as in a large majority of states, a person does not need a license to carry firearms openly, but does need one to carry firearms concealed. Our Supreme Court has stated, "[P]erhaps the most significant inspiration" for banning (and now licensing but still otherwise restricting) carrying concealed weapons is "to put people on notice when they are dealing with an individual who is carrying a dangerous weapon." *State v. Hamdan*, 2003 WI 113, ¶56, 264 Wis. 2d 433, 471, 665 N.W.2d 785 (2003). Sirovatka testified that it is not illegal to carry firearms openly in Wisconsin. R16, p. 10.

[1] Sirovatka told Hoffman that Hoffman was not being detained, and he testified that Hoffman was not detained until he was arrested. Tr., p. 130; R16, p. 7. Those are dubious claims, give the circumstances, but Hoffman was entitled to rely on Sirovatka's repeated statements that Hoffman was not being detained.

It is thus the public policy of this state to encourage open carriage of arms, reserving concealed carry to police and those with licenses to do so. It is hardly appropriate for the Village to punish behavior that is preferred by the State.

2. The Loitering Ordinance is Unconstitutional As Applied to Hoffman

Sirovatka testified that of the two methods of violating the Loitering Ordinance (i.e., loitering or prowling), Hoffman loitered. R16, p. 8. If Hoffman is accused of loitering (as opposed to prowling), it becomes relevant to consider the definition of loitering and how Hoffman's conduct did or did not fit the definition. There are nine different ways to loiter under the ordinance. One may "sit, stand, loaf, lounge, wander or stroll" in an aimless manner or one may "stop, pause, or remain" in an area for no obvious reason. Sirovatka testified that Hoffman "wander[ed] or stroll[ed]," presumably in an aimless manner. *Id.*, p. 9.

In other words, Hoffman was found guilty of going for a walk. Ordinances such as the one at the heart of this case do not pass constitutional muster, because they "fail[] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden… and because [they] encourage[] arbitrary and erratic arrests and convictions. *United States v. Harris*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954); *Thornhill v. Alabama*, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940); *Herndon v. Lowry*, 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066 (1937).

In *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972), the Supreme Court considered the constitutionality of a Jacksonville, Florida

ordinance prohibiting "night walking … without any lawful purpose or object." The Court described the ordinance as a "trap for innocent acts." 405 U.S. at 164. The Court further said that "[w]alkers and strollers and wanderers … [and l]oafers or loiterers" may be committing crimes such as going to or coming from a burglary or casing a place. But, [t]he difficulty is that these activities are historically part of the amenities of life as we have known them." *Id.*

In striking down the Jacksonville ordinance, the Court concluded:

> A presumption that people who might walk or loaf or loiter or stroll … look suspicious to the police … is too precarious for a rule of law. The implicit presumption in these generalized vagrancy standards that crime is being nipped in the bud – is too extravagant to deserve extended treatment. Of course vagrancy statutes are useful to the police. Of course, they are nets making easy the roundup of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws of the Jacksonville type teach that the scales of justice are so tipped that even-handed administration of justice is not possible."

405 U.S. at 171.

The Loitering Ordinance also is unconstitutional as applied to Hoffman because it is a "detain and demand identification" ordinance. An officer is required under the Loitering Ordinance to ask for identification in order to "dispel the alarm" before making an arrest. In other words, a person can be arrested and charged if he does not identify himself, but not if he does identify himself and "explain his conduct to the satisfaction of the officer." The Supreme Courts of both Wisconsin and the United States have declared demands for identification unconstitutional.

In *Brown v. Texas,* 443 U.S. 47 (1979), a man was arrested after being detained by El Paso police. The man refused to identify himself until after he was arrested (for refusing to identify himself in ostensible violation of Texas law). The Court ruled that there was no reasonable, articulable suspicion that the man was involved in criminal activity, so therefore the man could not be lawfully detained and his identification could not be required:

> The Texas statute under which appellant was stopped and required to identify himself is designed to advance a weighty social objective in large metropolitan centers: prevention of crime. But even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.

443 U.S. at 52.

In the current case. Sirovatka testified that he had no reason when he first accosted Hoffman to believe Hoffman was committing any particular crime or violating any particular ordinance. R16, p. 11. He also testified that Somerset is not a high crime area (*Id.*, p. 10), so Somerset does not even have the same motivation that El Paso did in the *Brown* case.

Moreover the Supreme Court of the United States has ruled unconstitutional a California statute that "requires persons who loiter or wander on the streets to provide a credible and reliable identification and to account for their presence when requested by a peace officer." *Kolender v. Lawson,* 461 U.S. 352 (1983). In rejecting the statute, the Court said:

> Although the void for vagueness doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine is not actual notice, but the other principal elements of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections.

461 U.S. at 357-358. The Court found the statute unenforceable because of its standardless sweep.

The current Loitering Ordinance is no less deficient. It requires a pedestrian to satisfy a police officer, on a standardless basis, to identify himself and explain his presence. It is, in its essential aspects, virtually identical to the California statute.

In addition to binding Supreme Court of the United States precedent, there is also binding Supreme Court of Wisconsin precedent. In *Henes v. Morrisey,* 194 Wis.2d 338, 533 N.W.2d 802 (1995), the Court ruled that Wisconsin law does not support arresting a person who refuses to identify himself to law enforcement.

3. The Circuit Court Should Have Granted Summary Judgment or Dismissal

Hoffman moved for summary judgment in the Circuit Court. The Circuit Court denied the motion, saying there were genuine issues of material fact. R21, p. 2. This is a surprising finding, given that Hoffman's facts presented to the Circuit Court relied on the Village's witnesses' testimony in the municipal court. Hoffman did not testify or call any witnesses in the municipal court, and he filed no affidavits in the Circuit Court, so he took no opportunity to inject his own facts

into the motion. Moreover, the Circuit Court did not identify in what way there was a dispute of facts, and the Village did not dispute any of Hoffman's facts in its response to Hoffman's motion.

The Circuit Court also ruled, "Whether [Hoffman] was properly charged or should be convicted is an issue of fact for the jury. This case is not property resolved via summary judgment." R21, p. 3. Of course, the application of law to a set of facts is a question of law. *Acuity Mutual Insurance Co. v. Olivas*, 2006 WI APP 45, ¶ 12, 289 Wis.2d 582, 712 N.W.2d 374 (Wis.App. 2006). The Circuit Court realized this at trial, when it said, in response to Hoffman's request for a jury instruction on preemption, "[I]t's a matter of law for the Court to determine." Tr., p. 169.

In reality, there were no disputed facts for the summary judgment motion. Hoffman presented the facts in his motion in a light most favorable to the Village (by using the Village's own witnesses' testimony as the basis for the facts). Applying those facts to the law, Hoffman was entitled to judgment as a matter of law.

At the close of the Village's case in the Circuit Court trial, Hoffman moved for a directed verdict [Tr., p. 145], largely on the same grounds as in his earlier-denied motion for summary judgment. Hoffman reasoned that, because the Circuit Court had not ruled on the merits in the summary judgment motion, the matter was ripe for a ruling on the merits at trial. After the Village had presented its entire case, there no longer was the issue of a dispute of fact, as the Circuit

Court could construe all the facts the Village presented in a light most favorable to the Village. The Circuit Court denied the motion, saying that it had already ruled on those issues in denying summary judgment. Tr., p. 148 ("As indicated, I addressed, in essence, the same arguments as part of the summary judgment. I'm satisfied, as Ms. Olson said, that at the time, there were factual issues, there continue to be factual issues….")

Thus, the Circuit Court never made a substantive ruling on the legal issues Hoffman raised. The Circuit Court did not address them in denying summary judgment and the Circuit Court did not address them on a motion for directed verdict. The Circuit Court never addressed the preemption issue. The Circuit Court never addressed the constitutionality issue. It merely denied Hoffman's motions without discussion.

At the close of all evidence, the Circuit Court held a charging conference with counsel. Hoffman requested instructions on preemption and Wis.Stats., § 66.0409. Tr., p. 166. The Circuit Court denied the request, saying the issue of whether there is preemption is a matter for the court to decide, not the jury. Tr., p. 169.

While Hoffman does not disagree with that conclusion, the Circuit Court had earlier ruled that it was a matter for the jury to decide. In making that ruling, the Circuit Court avoided answering the question of preemption. Because the Circuit Court did not rule on preemption and the jury was not instructed on it, Hoffman never received the consideration of this issue to which he was entitled.

Conclusion

For the foregoing reasons, the judgment of the circuit court should be reversed. The Ordinance as applied to Hoffman is preempted by state law. Even if it is not preempted, it is unconstitutionally applied to Hoffman. Either way, Hoffman's conviction must be vacated.

/s/ John R. Monroe
John R. Monroe

Attorney for Appellant

Certificate of Service

I certify that on April 27, 2015, I served three copies of the foregoing via U.S. Mail upon:

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/s John R. Monroe
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Certifications:

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) as modified by the court's order for a brief and appendix produced with a proportional serif font. The length of this brief is 4,459 words.

I certify that the text of the electronic copy of the Brief of Appellant is identical to the text of the paper copy of the Brief of Appellant.

/s/ John R. Monroe

John R. Monroe