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

Reply Brief of Appellant

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Argument

As an initial matter, Appellant Mark Hoffman ("Hoffman") points out mistakes in Respondent Somerset Municipal Court's (the "Village") "Statement of Facts." On p. 3 of the Village's Brief, the Village states Hoffman was walking "in front of Somerset Schools." The citation to the record provided by the Village does not support that location, as no witness ever testified that Hoffman walked in front of a school. On p. 4 of its Brief, the Village states Hoffman testified that Hoffman was "heavily armed." Again, the citation to the record provided by the Village does not support that fact.

I. Hoffman Was Arrested for Carrying a Firearm

The Village desperately wants to make this case into something it is not in order to avoid the inevitable reversal. The Village insists that the Ordinance does not regulate firearms and that Hoffman was not arrested for carrying a firearm. The facts of the case show differently.

The Village's Chief of Police admitted that Hoffman would not have been arrested if he had not been carrying a firearm. R16, p. 15; Tr., p. 143. 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 Village conveniently fails to address either of these points in its Brief, even though Hoffman raised both of them in his Brief of Appellant.

We have an affirmative statement from the Village's chief law enforcement officer at the time of arrest that the reason for the arrest is "being heavily armed,"

coupled with later testimony from the same official that Hoffman would not have been arrested if he had not been carrying a firearm. The Village cites nothing to the contrary, yet it insists Hoffman was not arrested for carrying a firearm.

In reality, the Village ***wishes*** Hoffman had not been arrested for carrying a firearm. But he was.

The Village also attempts to distance its application of its Ordinance against Hoffman from the state statute prohibiting such applications:

> 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]. The Village does not attempt to argue, nor can it, that the Ordinance does not relate to "other inappropriate behavior." The Ordinance punishes loitering "under circumstances that warrant alarm," and thus clearly targets "inappropriate behavior."

The Village argues that Hoffman was arrested for "wandering aimlessly in an unusual manner warranting alarm," and that Hoffman's firearm was "merely the stimulus." Village Brief, p. 7. Under this novel theory, the Village is free, despite state law, to regulate firearms in any manner as long as the Village avoids using the word "firearm" in its ordinances. The Village could, for example,

prohibit carrying a concealed stimulus, and define a stimulus to be anything that, if known to be carried, might warrant alarm.

The Village further deviates from the gist of this case by saying the stimulus could have been "walking a big dog, or carrying a knife or a sword." *Id.* Pretermitting whether walking a dog may constitutionally be banned in all circumstances, this case is not about a big dog, a knife, or a sword. Wis.Stats. § 66.0409(6) does not preempt regulation of walking big dogs or carrying knives or swords. It preempts regulation of carrying firearms.

The Village seems to fail to understand the difference between a facial challenge and an as-applied challenge (and the differences between such constitutional challenges will be discussed below). Hoffman is not arguing that the Ordinance is preempted in all possible applications (i.e., facially preempted). Hoffman argues only that the Ordinance is preempted to the extent it purports to apply to carrying firearms. That is, the Village is free to apply the Ordinance (assuming constitutional issues are avoided) to people walking big dogs or carrying knives or swords. But the legislature has created a carve-out when it comes to carrying firearms. The Village may not apply an ordinance that applies to carrying a firearm as "other inappropriate behavior."

This result cannot be avoided by excluding the word "firearm" from the Ordinance. In essence, the Ordinance is being applied to say, "No one may walk down the street carrying something that might alarm people." The Ordinance does not say that the "something" includes firearms, so it is not regulating firearms (so

says the Village). In Hoffman's case, however, the "something" was a firearm. The Village admits as much in its Brief, and the police conceded as much in their testimony. It is disingenuous at best to say that Hoffman was not arrested for carrying a firearm.

The Village next argues that, even if Hoffman was arrested for carrying a firearm, Hoffman exhibited malicious intent. *Id.* As grounds for this preposterous statement, the Village points out that Hoffman was carrying a "tape" recorder because he knew there was a possibility he would be confronted by the police. The Village characterizes the completely benign action of carrying a recorder in case of a police confrontation as "aimed at bothering the public and thus provoking contact with the police – such actions are certainly spiteful, vindictive, vengeful, and synonymously, malicious." *Id.*, pp. 7-8.

There are multiple problems with this argument. First, the trial court refused to submit the question of criminal or malicious intent to the jury. Tr., p. 169. As outrageous as the Village's argument is, this Court cannot affirm a jury verdict that the jury was not allowed to make and that the trial court itself never made. In essence, the Village is arguing for the first time on appeal that Hoffman was malicious.

Second, it is just plain ridiculous to suggest that carrying a digital recorder in case of confrontation with the police is "malicious." It is common for police officers to have "dash-cam" video recorders, and some even have microphones on their bodies that wirelessly connect back to their in-car recorders. It is a hot media

topic right now of whether police should have mandatory body cameras. Surely no one would suggest that the police are being malicious for recording their interactions with the public. In this case, Hoffman's recorder proved quite useful. The Village's chief of police denied saying that he was arresting Hoffman for being "heavily armed," yet Hoffman's recording clearly caught him saying just that.

Third, carrying a digital recorder "just in case" is no different from carrying other items one might need "just in case." Cars come from the manufacturer with a spare tire and some kind of jack. Many people carry fire extinguishers and road flares in their vehicles "just in case." Wisconsin requires people to carry liability insurance on their cars "just in case." Does the Village suggest that people who carry these things are intending to provoke an incident? Being prepared for an incident is not indicative of an intent to provoke one.

Finally, the Village fails to say to whom Hoffman was "spiteful, vindictive, and vengeful." It is the Village that detained, arrested, searched, and prosecuted Hoffman, yet the Village claims that Hoffman has exhibited spite, vindictiveness, and vengefulness. This claim holds no water. The Village's own witnesses testified they had no reason to believe Hoffman exhibited a criminal or malicious intent and only now is the Village attempting to manufacture maliciousness on Hoffman's part.

II. The Ordinance Is Unconstitutional As Applied to Hoffman

The Village next claims that the Ordinance is "constitutional on its face." *Id.*, p. 8. Because Hoffman only raised an as applied constitutional challenge, this argument is irrelevant and unnecessary.

The real constitutionality issue in this case is the way the Ordinance was applied to Hoffman. Hoffman asserted in his Brief of Appellant that he was arrested (and then convicted) of "going for a walk." Brief of Appellant, p. 13. Hoffman went on to explain why a "going for a walk" ordinance is unconstitutional.

The Village does not dispute that a "going for a walk" ordinance is unconstitutional. It defends against Hoffman's argument by pointing out that Hoffman was convicted of more than just going for a walk. He did so (the Village argues) under circumstances that tend to cause an alarm, i.e. ***carrying a firearm.*** But wait, one might say. The carrying of the firearm was only a "catalyst." It was the going for a walk that was the offense. The same going for a walk that cannot constitute an offense. Therein lies the rub.

In order to be constitutional, the Ordinance has to have put Hoffman on notice what conduct was prohibited. Nothing in the Ordinance mentions firearms, and state law says the Village cannot regulate carrying firearms. Under these circumstances, Hoffman could not be on notice that the Ordinance prohibits him from going for a walk while openly carrying a firearm. If he is, then the Ordinance is preempted. If he is not, then the Ordinance is unconstitutional.

Hoffman also showed in his Brief of Appellant that the Ordinance as applied to him is a "detain and demand identification" ordinance. The Village attempts to dispute that characterization. According to the Village, the Ordinance does not punish one for failing to identify himself, but instead for "wandering in a manner not usual for law abiding citizens under circumstances that warrant alarm AND when being given the opportunity to dispel alarm then refusing to identify themselves or their purpose of conduct." Brief of Appellee, pp. 12-13. In other words, only after an officer has probable cause to detain for the first half of the offense description, does the requirement to identify arise.

The Village tries to paint the Ordinance as not requiring identification, but giving a suspect an opportunity to avoid arrest and prosecution by giving identification. That, however, is exactly what was wrong with the Texas statute at issue in *Brown v. Texas*, 443 U.S. 47 (1979). ("A person commits an offense if he … refuses to report … his name … to a peace officer who has lawfully stopped him and requested the information.") 443 U.S. at 49.

In both the Texas statute and the Ordinance, a person is detained by police and then subject to arrest if he fails to give his name. The Supreme Court ruled the statute unconstitutional in Texas. Adding elements to the Ordinance does not make it any better. The result remains the same. A person stopped by police will be arrested if he fails to give his name.

The reasonableness of the Ordinance also must be questioned. In the present case, what would have been accomplished had Hoffman supplied his name? Nothing. No alarm would have been dispelled.

III. There Was No Genuine Issue of Material Fact For Summary Judgment

The Village asserts, without real support, that the trial court correctly ruled that there were issues of material fact and therefore denied Hoffman's motion for summary judgment. The only support the Village cites is that issues of fact arose at the trial. Brief of Appellee, p. 16. The Village seems to lose sight of the fact that the trial happened ***after*** summary judgment was denied. The Village cannot use the trial as evidence that a dispute of fact existed when the trial court considered Hoffman's motion for summary judgment.

More importantly, the ***Village fails to identify any disputed facts.*** If the Village really believed there was a genuine issue of material fact that precluded the trial court granting summary judgment to Hoffman, surely the Village would have identified it. But it did not. Not a single issue. The trial court did not identify genuine issue of material fact when it denied Hoffman's motion, and even now, when invited to do so, the Village cannot identify such an issue. The inescapable conclusion is that none existed.

It also is difficult to imagine how a dispute could have arisen. In his summary judgment motion, Hoffman used as his factual assertions the testimony of the Village's witnesses from the municipal court trial. Hoffman called no

witnesses at that trial, so only the Village's evidence was presented. In responding to Hoffman's motion, the Village failed to dispute any of Hoffman's asserted facts (that Hoffman drew from the Village's evidence). The Village added a few more facts in its response, none of which Hoffman disputed (although he did point out that two of them were not supported by the record citations provided by the Village).

There were no issues of material fact, and the trial court erred by denying Hoffman's motion on the grounds that there were.

In the three-page order denying summary judgment, the trial court gave little insight into its rationale. It gave no rationale regarding Hoffman's preemption arguments. Indeed, the Village concedes that the "Circuit Court never expressly stated in the Summary Judgment Decision (or in his ruling on the directed verdict) that the ordinance was not preempted…." Brief of Appellee, p. 16. That statement sums of the issue. The trial court never gave Hoffman the ruling to which he was entitled.

Instead, when ruling on the motion for summary judgment, the trial court said that whether Hoffman was correctly charged was "an issue of fact for the jury." 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 trial 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.

Hoffman agrees with the latter statement by the trial court. The problem, of course, is that the trial court never made the determination. Not once, anywhere in the record, is there any discussion by the trial court of Hoffman's primary defense in this case: preemption by state law. Hoffman raised his preemption issue before the municipal court, and he raised it again in the circuit court. He raised it in his motion for summary judgment, he raised it at trial via a directed verdict, and he raised it at trial in his requested jury instructions.

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.

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Certificate of Service

I certify that on June 5, 2015, I served three copies of the foregoing via U.S. Mail upon:

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Certifications:

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 3,264 words.

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

/s/ John R. Monroe

John R. Monroe