STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2016AP000173-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

BRIAN GRANDBERRY,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE JANET PROTASIEWICZ, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES CITED

WISCONSIN STATUTES CITED

OTHER AUTHORITIES

STATE OF WISCONSIN

C O U R T O F A P P E A L S

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ISSUES PRESENTED

Whether Grandberry driving a vehicle with a gun in the glovebox was sufficient to satisfy the elements of Carrying a Concealed Weapon beyond a reasonable doubt.

Trial court's answer: Yes

Whether Wis. Stat. § 941.23(2) is unconstitutionally vague as applied to Grandberry when read in conjunction with Wis. Stat. § 167.31(2)(b).

Trial court's answer: No

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State of Wisconsin does not believe oral argument is required in this case as the briefs fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigant. Wis. Stat. § 809.22(3).

Because this case is an appeal from a misdemeanor, and therefore, subject to a one judge review pursuant to Wis. Stat. § 752.31(2) & (3), this opinion should not be published. Wis. Stat. § 809.23(1)(b)4. Furthermore, because neither party is requesting that this case be reviewed by a three judge panel under Wis. Stat. § 752.31(3), this opinion should not be published.

STATEMENT OF THE CASE

On November 9, 2014, City of Milwaukee Police Officers Cassandra Lindert and Darryl Anderson stopped Brian Grandberry in his vehicle at 5804 North 60th Street. (R2:1). During the traffic stop, the officers asked Grandberry if he had any firearms in the vehicle, to which Grandberry answered that he had a gun in the glove box. (R2:1). The officers then asked Grandberry if he had a license to carry a concealed weapon (CCW permit). (R2:1). Grandberry stated he did have a CCW permit, but a subsequent check with the Department of Justice to confirm Grandberry's permit revealed Grandberry did not, in fact, have a permit. (R2:1). Grandberry subsequently stated that he had taken a class to obtain his CCW permit but had not completed the process to obtain that permit. (R2:1). The officers then recovered a loaded, Hi-Point, .45 caliber pistol from Grandberry's glove box. (R2:1).

Upon those facts Grandberry was charged with carrying a concealed weapon pursuant to Wis. Stat. § 941.23(2) on November 10, 2014. (R2:1).

On September 8, 2015, Grandberry stipulated to the facts in the criminal complaint at a trial to the court and the court found Grandberry guilty of carrying a concealed weapon. (R16:2-3). Grandberry now appeals the trial court's decision arguing first, that the stipulated facts were insufficient to convict him in light of Wis. Stat. § 167.31(2)(b), and second, that Wis. Stat. § 941.23(2) is unconstitutional as it applies to Grandberry because it is vague when read in conjunction with Wis. Stat. § 167.31(2)(b). (Brief of Defendant-Appellant p. 6, 11).

STANDARDS OF REVIEW

In reviewing the sufficiency of evidence to support a conviction, an appellate court may not substitute its own judgment for that of the trier of fact unless the evidence, viewed in the light most favorable to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

Whether a statute violates the due process clause because it is vague presents a question of law, which is reviewed *de novo*. *See State v. Pittman*, 174 Wis. 2d 255, 276, 496 N.W.2d 74, 83 (1993).

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT TO PROVE GRANDBERRY GUILTY BEYOND A REASONABLE DOUBT.

Before a person can be found guilty of carrying a concealed weapon, the state must prove, beyond a reasonable doubt, the following three elements:

1. The defendant carried a dangerous weapon. "Carried" means went armed with.
2. The defendant was aware of the presence of the weapon.
3. The weapon was concealed.

> The phrase, "went armed with" means that the weapon must have been either on the defendant's person or that the weapon must have been within the defendant's reach.

Wisconsin Criminal Jury Instruction 1335.

The State satisfied its burden of proving all three of these elements against Grandberry when he stipulated to the facts described in the criminal complaint. (R16:2-3). Grandberry carried a gun under the definition in jury instruction 1335. The gun in Grandberry's glove box was within his reach as the trial court recognized when it found Grandberry guilty. A gun concealed in a glove box, even a locked glove box, is sufficient for a trier of fact to find the gun was within the defendant's reach. *State v. Fry*, 131 Wis. 2d 153, 182, 388 N.W.2d 565 (1986)(overruled on other grounds). Grandberry was aware of the presence of the gun as evidenced by him telling police where the gun in his car was when they asked if he had any firearms in his vehicle. (R2:1). Grandberry's gun was concealed in the glove box, a place that was indiscernible from the ordinary observation of a person located outside and within the immediate vicinity of the vehicle. *See State v. Walls*, 190 Wis. 2d 65, 72, 526 N.W.2d 765 (Ct. App. 1994).

Taken in the light most favorable to the state, these facts support the trial court's verdict of guilt, and that verdict should be affirmed by this court.

Grandberry argues, however, that the evidence against him was insufficient to prove him guilty because he was transporting, not "going armed with," the firearm and argues he was in compliance with Wis. Stat. § 167.31(2)(b). (Brief of Defendant-Appellant p. 10). Grandberry further relies on language in a footnote of *Walls*, stating,

> …our conclusion in this case in no way limits the *lawful* placement, possession, or transportation of, unloaded … and encased, firearms, bows, or crossbows in vehicles as permitted by [Wis. Stat.] § 167.31(2)(b).

Walls at 69. n2. to assert that if a person is in compliance with § 167.31(2)(b) then the person cannot be

guilty under § 941.23(2). (Brief of Defendant-Appellant p. 9-10).

Grandberry incorrectly asserts that he was in compliance with § 167.31(2)(b). That section states:

> Except as provided in sub. (4)[1], no person may place, possess, or transport a firearm, bow, or crossbow in or on a vehicle, unless one of the following applies:
> **1.** The firearm is unloaded or is a handgun.
> **2.** The bow does not have an arrow nocked.
> **3.** The crossbow is not cocked or is unloaded and enclosed in a carrying case.

The current version of § 167.31(2)(b) was created in November of 2011 through Wisconsin Act 51 to account for changes that needed to be made after 2011 Wisconsin Act 35 was passed, creating the right of Wisconsin citizens to obtain licenses to carry concealed weapons. S. 228, 2011- 2012 Leg.,(Wis. 2011). Prior to November of 2011, § 167.31(2)(b) stated:

> 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 …

Wisconsin Statute § 167.31(2)(b) (2009-2010 version).

The only changes made in § 167.31(2)(b) pertinent to this case are that handguns no longer need to be unloaded and encased when a person places, possesses, or transports a firearm in a motor vehicle. This was a necessary change upon the creation of Wis. Stat. § 175.60, which allows citizens to obtain licenses to carry concealed weapons. Had the change not been made to § 167.31(2)(b), those licensed under § 175.60 would not be able to carry a concealed weapon within a vehicle even with a permit. There was never, nor is there now, an allowance under §167.31(2)(b) for a person to place, possess, or transport a concealed firearm in a vehicle within reach of the person unless the person has obtained a license to carry a concealed weapon under Wis. Stat. § 175.60. A concealed firearm, within reach of the defendant, has always been and continues to be a violation of §941.23 and out of compliance

[1] Grandberry does not meet any of the exceptions delineated in 167.31(4).

with § 167.31(2)(b). This court affirming the trial court's verdict would not be contrary to *Walls* as Grandberry argues (Brief of Defendant-Appellant p. 11); but rather, would be in line with the *Walls* decision because Grandberry was not lawfully placing, possessing, or transporting the gun because it was concealed and within his reach.

Finally, it cannot be overlooked that though Grandberry now claims to have believed he was acting in accordance with §167.31(2)(b), his words and actions demonstrated a consciousness of guilt that Grandberry knew he was not safely transporting the gun and knew he was guilty of carrying a concealed weapon. When Grandberry told officers that he was a CCW permit holder, knowing that was false, Grandberry acknowledged through his words and actions that he knew having his gun in the glove box was a violation of the law. Had Grandberry truly believed he was acting in accordance with Wis. Stat. § 167.31(2)(b), he would not have had a reason to lie to the officers about having a CCW permit.

The guilty verdict should be affirmed as the stipulated facts proved each element of carrying a concealed weapon beyond a reasonable doubt and Grandberry was not lawfully transporting the gun in accordance with § 167.31(2)(b).

II. WIS. STAT. § 941.23(2) IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED TO GRANDBERRY WHEN READ IN CONJUNCTION WITH WIS. STAT. § 167.31(2)(B).

A statute is presumed constitutional: the challenger has the burden of showing beyond a reasonable doubt that it is not. *State v. White*, 180 Wis. 2d 203, 213, 509 N.W.2d 434, 437 (Ct. App. 1993). Thus, courts are to indulge every presumption to sustain the law if at all possible, and—if any doubt exists about its constitutionality—resolve that doubt in favor of constitutionality. *State v. Cole*, 2003 WI 112, ¶ 11, 264 Wis. 2d 520, 665 N.W.2d 328.

A statute is unconstitutionally vague if it fails to afford proper notice of the conduct it seeks to proscribe or if it encourages arbitrary and erratic arrests and convictions. The

Supreme Court summarized the applicable standards in *Pittman*:

> In *State v. Wickstrom*, 118 Wis.2d 339, 351-52, 348 N.W.2d 183 (Ct. App. 1984), the court of appeals set forth the applicable standards and presumptions:
>
> > "We must indulge every presumption to sustain the constitutionality of a statute. One who challenges the validity of a statute has the burden of showing beyond a reasonable doubt that the statute is unconstitutional. Before a court can invalidate a criminal statute because of vagueness, it must conclude that, because of some ambiguity or uncertainty in the gross outlines of the conduct prohibited by the statute, persons of ordinary intelligence do not have fair notice of the prohibition and those who enforce the laws and adjudicate guilt lack objective standards and may operate arbitrarily."
>
> The first prong of the vagueness test is concerned with whether the statute sufficiently warns persons "wishing to obey the law that [their] . . . conduct comes near the proscribed area." *State v. Tronca*, 84 Wis.2d 68, 86, 267 N.W.2d 216 (1978). The second prong is concerned with whether those who must enforce and apply the law may do so without creating or applying their own standards. State v. Popanz, 112 Wis.2d 166, 173, 332 N.W.2d 750 (1983).
>
> The challenged statute, however, "need not define with absolute clarity and precision what is and what is not unlawful conduct." *State v. Hurd*, 135 Wis.2d 266, 272, 400 N.W.2d 42 (Ct.App. 1986). "A statute is not void for vagueness simply because `there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease.'" *Id.* (quoting *State v. Courtney*, 74 Wis.2d 705, 711, 247 N.W.2d 714 (1976)). The ambiguity must be such that "one bent on obedience may not discern when the region of proscribed conduct is neared, or such that the trier of fact in ascertaining guilt or innocence is relegated to creating and applying its own standards of culpability rather than applying standards prescribed in the statute or rule." *Courtney*, 74 Wis.2d at 711.

Pittman, 174 Wis.2d at 276-277.

A fair degree of definiteness is all that is required to uphold a statute, and a statute will not be voided merely by showing that the boundaries of the area of proscribed conduct are somewhat hazy. *State ex rel. Hennekens v. City of River Falls Police & Fire Comm'n*, 124 Wis. 2d 413, 420, 369 N.W.2d 670, 674 (1985).

The ordinary process of statutory construction begins with the language of the statute, which is interpreted according to its common meaning. *See State v. Sample*, 215 Wis. 2d 486, 494, 573 N.W.2d 187, 190 (1998). If, by the ordinary process of statutory construction, one can give practical or sensible meaning to the statute, it is not void for vagueness. *State v. Smith*, 215 Wis. 2d 84, 91-92, 572 N.W.2d 496, 498-99 (Ct. App. 1997). Consequently, §941.23(2) cannot be rendered unconstitutionally vague by § 167.31(2)(b), if any common sense reading of the statutes gives fair notice of the proscribed conduct.

Much of the State's argument relative to the complimentary nature of § 167.31(2)(b) and § 941.23(2) is set forth above, and will not be repeated here. Relevant, here, is the specific way that the statutes, read together, give notice of the restrictions of § 941.23(2).

In common language, the relevant portion of § 167.31 provides:

> Handguns and long guns may be placed, possessed, or transported in or on cars, but long guns must be unloaded.

In common language, the relevant portion § 941.23(2) provides:

> It is illegal to have a concealed handgun on your person or within your reach, unless you have a CCW license. You can have a handgun, but it either has to be out of your reach or not concealed.

Read together, the two statutes give perfectly clear notice of what conduct is illegal. Again, in common language,

> You can have a handgun in a car, but unless you are a CCW license holder, it must be out of reach or not concealed.

Nothing in the two statutes is contradictory; and nothing under § 167.31(2)(b) broadens the group of people who may legally carry a concealed weapon under § 941.23(2). Grandberry demonstrated that he understood the harmony between the statutes when he told officers that he was a CCW permit holder knowing that statement was false. Had Grandberry not understood the proscribed conduct stated in § 941.23(2), he would not have told this falsehood to the officers. Grandberry's actions were designed to deceive the police because he knew he was not in accordance with either § 167.31(2)(b) or § 941.23(2) because the gun was concealed and within reach and he was not a CCW permit holder.

Additionally, in his own brief, Grandberry further demonstrates he recognized the harmony between the two statutes, noting that a person can be in compliance with § 167.31(2)(b) and § 941.23(2) by placing the gun in a place where it is not concealed such as the dashboard, or placing it out of reach such as the trunk or the very back of an SUV or van, or by obtaining a CCW permit. (Brief of Defendant-Appellant p. 14). Though Grandberry argues that these options are unreasonable, he nevertheless demonstrates that he understands the proscribed conduct § 941.23(2) seeks to prevent.

Because a plain reading of the statutes gives fair notice of the prohibited conduct, and Grandberry's own actions demonstrated that he understood the prohibited conduct, Grandberry has not established that the CCW law is unconstitutionally vague as applied to him.

CONCLUSION

The facts described in the criminal complaint were sufficient to prove each element of carrying a concealed weapon against Grandberry beyond a reasonable doubt. Grandberry did go armed with a gun, Grandberry knew of the presence of that gun, and the gun was concealed in the glove

box. Grandberry's argument that he was acting in compliance with § 167.31(2)(b) fails because that statute does not provide any allowance for carrying a weapon concealed and within reach of the person. Section 167.31(2)(b) merely provides that a handgun can be placed in a vehicle loaded and uncased. Grandberry's actions were not in line with §167.31(2)(b) and the stipulated facts were sufficient for the trier of fact to find him guilty under Wis. Stat. § 941.23(2).

Wisconsin Statute § 941.23(2) is not unconstitutionally vague as applied to Grandberry. Section 941.23(2) read with § 167.31(2)(b) provide harmony in that any person may have a loaded, uncased handgun in a car, but only a CCW permit holder can have that gun both concealed and in reach. The proscribed activity § 941.23(2) seeks to prevent is readily apparent even when reading it in conjunction with § 167.31(2)(b). Grandberry demonstrated his recognition of the harmony between the statutes by describing several scenarios a non CCW permit holder could employ to lawfully place, possess, or transport a firearm in a vehicle without running afoul of § 941.23(2). Grandberry has failed to show that § 941.23(2) is unconstitutionally vague beyond a reasonable doubt.

The State respectfully asks this court to affirm the trial court's finding of guilt on the stipulated facts and to affirm the trial court's decision denying Grandberry's motion to dismiss based on vagueness.

Dated this _____ day of May, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 2,862.

_____ _____

Date Randy P. Sitzberger
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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

This 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.

_____ _____

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