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STATE OF WISCONSIN

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

DISTRICT I

Case No. 2016AP173-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

BRIAN GRANDBERRY,

Defendant-Appellant.

On Notice of Appeal from a Judgment of Conviction
Entered in the Milwaukee County Circuit Court, the
Honorable Janet Protasiewicz Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. There Was Insufficient Evidence To Convict Grandberry of Carrying A Concealed Weapon Because His Conduct Fully Complied With the Safe Transport Statute.

Grandberry's principal brief argued that his actions in this case were in full compliance with the requirements of the safe transport statute, Wis. Stat. § 167.31, and therefore, did not constitute "carrying" a dangerous weapon for purposes of the CCW statute, Wis. Stat. § 941.23. (Grandberry's Initial Br. at 7-11).

In response, the State claims that "Grandberry incorrectly asserts that he was in compliance with" the safe transport statute. (State's Resp. Br. at 5). The State, however, does not explain how Grandberry's conduct actually violated any of the terms of the safe transport statute. Instead, it simply asserts that because Grandberry violated the CCW statute by having a concealed handgun in his glove compartment, he was therefore "out of compliance with" the safe transport statute, as well. (*Id.* at 5-6). This circular argument misses the point entirely.

As an initial matter, nothing in the safe transport statute prohibits a person from having a concealed firearm inside a vehicle. The statute simply precludes a person from placing, possessing, or transporting a firearm in a vehicle if the firearm is a long gun and is loaded.[1] *See* Wis. Stat.

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[1] The safe transport statute also contains additional prohibitions that are not relevant to this case, such as prohibitions against loading or discharging a firearm from a vehicle, among others. *See* Wis. Stat. § 167.31(2), (3), (3m).

§ 167.31(2)(b). Transporting a handgun in a vehicle – as Grandberry did in this case – is expressly permitted by the safe transport statute, regardless of whether the handgun is loaded. *Id.* Grandberry's conduct in this case therefore fully complied with the safe transport statute. Any argument to the contrary is without merit.

Moreover, in ***State v. Walls***, 190 Wis. 2d 65, 526 N.W.2d 765 (Ct. App. 1994), this court recognized that the placement, possession, or transportation of a firearm in a vehicle in full compliance with the safe transport statue does not constitute "going armed with" a dangerous weapon. ***Id.*** at 69 n.2, 72; *see also* Wis. Legis. Council Memo., IM-2011-10 at 1 n.3; App. 116. Since going armed with a dangerous weapon is an essential element of carrying a concealed weapon, *see* Wis. JI-Criminal 1335, ***Walls*** thus establishes that a person who places, possesses, or transports a firearm in a vehicle as permitted by the safe transport statute cannot, as a matter of law, be in violation of the CCW statute. The State's brief does not address the ***Walls*** decision in any meaningful or developed way.

Accordingly, pursuant to ***Walls***, Grandberry's conduct did not constitute "going armed with" a dangerous weapon. *See* ***Walls***, 190 Wis. 2d at 69 n.2. His conviction for carrying a concealed weapon should therefore be reversed on the grounds of insufficiency of the evidence.

II. The Conflicting Nature Of the CCW Statute and the Safe Transport Statute Renders the CCW Statute Void For Vagueness As Applied To Grandberry.

In the alternative, Grandberry's principal brief argued that if this court now decides, contrary to its conclusion in ***Walls***, that a person can be guilty of carrying a concealed weapon even if he or she fully complies with the safe

transport statute, then the apparent conflict between the CCW statute and the safe transport statute renders the former unconstitutionally vague as applied in this case. (Grandberry's Initial Br. at 11-16). As Grandberry pointed out in his principal brief, this court cannot reasonably conclude that a person of ordinary intelligence would have fair notice of how the CCW statute applies to the placement, possession, or transportation of firearms inside vehicles, if this court itself previously misinterpreted the interplay between the two statutes in ***Walls***. (*Id.* at 15-16).

In response, the State argues that the CCW statute is not unconstitutionally vague because "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." (State's Resp. Br. at 9). The State also argues that Grandberry's principal brief further "demonstrates [his recognition of] the harmony between the two statutes," because the brief outlines the ways in which a person could lawfully transport a firearm in a vehicle in compliance with the CCW statute. (*Id.*)

However, contrary to the State's suggestion, Grandberry's subjective understanding of the CCW statute is irrelevant in this case.[2] The test for determining whether a statute is unconstitutionally vague is an objective one. A statute is void for vagueness if, because of some ambiguity or uncertainty in the gross outlines of the conduct prohibited, persons of ordinary intelligence do not have fair notice of the prohibition because they cannot discern when the region of proscribed conduct is neared, or those who enforce the laws and adjudicate guilt lack objective standards and may operate

[2] In addition, Grandberry's principal brief was drafted by counsel, not by Grandberry himself.

arbitrarily. ***State v. Pittman***, 174 Wis. 2d 256, 276, 496 N.W.2d 74 (1993); ***State v. Propanz***, 112 Wis. 2d 166, 172-73, 332 N.W.2d 750 (1983).

Here, when read together, the safe transport statute and CCW statute are ambiguous to the point where they create unconstitutional vagueness under this objective standard. This is not a case where a statute simply contains some degree of ambiguity that can be resolved by the "ordinary process of statutory construction," thereby giving "practical or sensible meaning . . . to the law." *See* ***State v. Smith***, 215 Wis. 2d 84, 92, 572 N.W.2d 496 (Ct. App. 1997). When read in conjunction with the safe transport statute, the CCW statute's prohibitions are so vague and uncertain with respect to the placement, possession, and transportation of firearms inside vehicles that persons of ordinary intelligence do not have fair notice of the conduct that is actually prohibited.

As noted in Grandberry's principal brief, if ***Walls*** was incorrect, then the CCW statute effectively prohibits the possession, placement, or transportation of a firearm inside a vehicle in all but two circumstances: (1) if the firearm is placed in the car's trunk; or (2) if the owner of the firearm has a concealed carry permit under Wis. Stat. § 175.60.[3] (Grandberry's Initial Br. at 14).

The safe transport statute, however, does not require either of these two conditions. It expressly permits the placement, possession, or transportation of a firearm inside a vehicle, so long as the firearm is either unloaded or is a

[3] There is also a third possibility for lawfully transporting a firearm in a vehicle: placing the gun above the lower portion of the car's window frame, such as on the dashboard. However, given the safety concerns this would create, this possibility is not a reasonable alternative. (*See* Grandberry's Initial Br. at 14).

handgun. Wis. Stat. § 167.31(2)(b)1. As a result, conduct prohibited by the CCW statute appears to be permitted by the safe transport statue.

In light of this apparent conflict, an ordinary person, reading both the CCW statute and safe transport statute together, would not reasonably know that he or she was prohibited from placing, possessing, or transporting a firearm inside a vehicle unless the firearm was placed in the car's trunk or he or she had a concealed carry permit. Rather, an ordinary person, based on a plain reading of the safe transport statute, would reasonably believe that he or she could lawfully place, possess, or transport a firearm in any place inside a vehicle, so long as the firearm is either unloaded or is a handgun. That is, after all, exactly what the safe transport statute permits by its plain terms.

As noted above, this court appears to have similarly concluded in ***Walls*** that the placement, possession, or transportation of firearms in vehicles, as permitted by the safe transport statute, does not constitute carrying a concealed weapon. Consequently, if this court now determines that ***Walls*** was incorrect, that determination would only highlight the fact that the CCW statute is unconstitutional vague as applied in this case. An ordinary person cannot reasonably be expected to have fair notice of prohibitions that are so vague and uncertain that even is court (and/or the Wisconsin Legislative Counsel) previously misconstrued them in ***Walls***. If ***Walls*** was incorrect, it underscores the conflicting nature of the CCW statute and the safe transport statute – it demonstrates that together they create unconstitutional vagueness. This is especially true in light of the more stringent vagueness test that applies to statutes like the CCW statute, which infringe on constitutionally protected rights. *See* ***Dog Federation of Wis., Inc. v. City of South***

Milwaukee, 178 Wis. 2d 353, 360, 504 N.W.2d 375 (1993) (citing ***Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.***, 455 U.S. 489, 499 (1982)). Accordingly, this court should hold that the CCW statute is void for vagueness as applied to Grandberry.

CONCLUSION

For the foregoing reasons, Brian Grandberry respectfully requests that this court reverse the judgment and order of the circuit court on the grounds of insufficiency of the evidence and remand the case to the circuit court with directions to enter a judgment of acquittal. In the alternative, Grandberry requests that this court reverse the judgment and order of the circuit court, declare Wis. Stat. § 941.23, as applied to Grandberry, to be unconstitutionally vague, and remand the matter to the circuit court for entry of a judgment of dismissal.

Dated this 7th day of June, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,557 words.

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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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.

Dated this 7th day of June, 2016.

Signed:

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