STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Case No. 2016AP2160-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NORRIS W. CULVER, SR.,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and an Order Denying a Postconviction Motion Entered in the Kenosha County Circuit Court, the Honorable Mary Kay Wagner, Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The "Post or Publish" Statute, Wis. Stat. § 942.09(3m)(a)2, Violates the First Amendment, the Due Process Clause, and the Commerce Clause.

A. The post or publish statute is overbroad in violation of the First Amendment.

The State does not dispute that: (1) the First Amendment protects photography; (2) the post or publish statute restricts speech; (3) the post or publish statute is subject to strict scrutiny; and (4) the State's reliance in the circuit court on ***State v. Robins***, 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287, was erroneous. (State's Br. at 6, 15, 25). However, the State disputes that the post or publish statute violates the First Amendment.

To be clear, at least two of the cases the State discusses—***York v. Story***, 324 F.2d 450, 452 (9th Cir. 1963) and ***State v. Jahnke***, 2009 WI App 4, ¶ 1, 316 Wis. 2d 324, 762 N.W.2d 696—involve photos taken *without consent.*

Other cases cited by the State analyze statutes that explicitly criminalize intentional conduct that causes harm. *See* ***State v. Hemmingway***, 2012 WI App 133, ¶ 18, 345 Wis. 2d 297, 825 N.W.2d 303 (holding that a stalking statute was not overbroad because "the core of the statute is the stalker's intent to engage in conduct that he…knows or should know will cause fear in the victim and does not cause the victim's actual distress or fear"); ***State v. Osinger***, 753 F.3d 939, 944-45 (9th Cir. 2014) (holding that a harassment statute was not facially invalid because it requires conduct that causes emotional distress to the victim and malicious intent); ***People v. Iniguez***, 202 Cal. Rptr. 3d 237, 243 (Cal. App. Dep't

Super. Ct. 2016) (stating that "the requirement that a person *intend* to cause distress served to narrow the law"); ***Dunham v. Roer***, 708 N.W.2d 552, 564-67 (Minn. 2006) (holding that a statute which defined harassment as "…a single incident of physical or sexual assault or repeated incidents of…acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another," was not overboard).

In contrast, the statute at issue here does not require that a photo be taken without consent. Nor does it require wrongful intent or that the victim suffer harm.

In response to Mr. Culver's argument that the post or publish statute is overbroad because it makes no distinction between images that are posted or published with wrongful intent, the State discusses ***State v. Baron***, 2009 WI 58, 318 Wis. 2d 60, 769 N.W.2d 34. The State asserts that ***Baron*** "does not say that the statute was constitutional because it included an intent to harm element. . ." (State's Br. at 20).

This misses the point. The point of Mr. Culver's "*see generally*" citation was that the statute in ***Baron*** requires "intent to harm," a requirement that is not present in the post or publish statute. (*See* Culver Br. at 10). Significantly, the State's brief (at 18-20) does not cite any United States Supreme Court or Wisconsin case holding that a statute restricting speech is narrowly tailored in the absence of an "intent to harm" requirement.

The State also argues that "proof of individual or specific harm" is unnecessary because "[m]ost people would object to such depictions of themselves posted or published on the internet." (State's Br. at 21). However, once again, the State does not cite any United States Supreme Court or Wisconsin case holding that a statute is narrowly tailored in

the absence of harm. And, the State does not address Mr. Culver's argument the statute is not limited to images that are recognizable or identifiable. (*See* Culver's Br. at 11).

Moreover, contrary to the State's assertion (at 21-24), the statute's lack of a definition of depiction, lack of a definition of public importance or newsworthiness, lack of a limitation on *where* the depiction or private representation takes place, lack of a time frame,[1] and expansive definition of nudity is significant because it illustrates the broadness of the statute.

Lastly, the State spends a portion of its argument asking this Court to apply the "***Coplin/Petrovic*** test" to the particular facts of Mr. Culver's case. (State's Br. at 17 (citing ***United States v. Petrovic***, 701 F.3d 849, 855 (8th Cir. 2012)). However, as Mr. Culver stated in his initial brief (at 7), he is challenging the post or publish statute on its face. He is not raising an as applied challenge.

B. The post or publish statute is void for vagueness in violation of Due Process.

The State argues that Mr. Culver's assertion that the statute is vague because it does not specify a time period is "undeveloped and unsupported by legal authority." (State's Br. at 28). First, as the State acknowledges (at 1), this case presents a novel legal issue, thus, no directly on-point case law exists in Wisconsin. Second, the State provides no

[1] In regards to the lack of the time frame, the State argues that "[a]ny publication while the consent was in effect would be permissible and not criminal. If and when the consent was revoked, however, the publisher would be required to remove the image from its location on the internet to extent possible..."(State's Br. at 23). However, this is the State's interpretation. The statute does not provide this explanation.

explanation as to how the argument is unsupported by legal authority.

In addition, the State argues that "'the place where the restricted image was disclosed' will give Wisconsin courts jurisdiction if the disclosure was in Wisconsin." (State's Br. at 29). Why is it the place where the restricted image is disclosed? And what does "disclosure" mean? Does it mean the point where the individual takes the action necessary to upload the photo? Or when the photo is received by a third party responsible for publishing the photo (e.g. Facebook)?

C. The post or publish statute violates the Commerce Clause.

The State argues that Mr. Culver does not have standing to raise a Commerce Clause argument. (State's Br. at 31). The State does not cite any United States Supreme Court or Wisconsin case to support this argument. Additionally, the two cases the State cites are distinguishable.

The first case, ***Cibolo Waste, Inc. v. City of San Antonio***, 718 F.3d 469 (5th Cir. 2013), does not involve a criminal statute. The second case, ***Commonwealth v. Rose***, 960 A.2d 149 (2008), involves a criminal statute, but is factually distinguishable. In ***Rose***, the defendant argued that the Pennsylvania unlawful communication with a minor statute, which prohibits "the act of communicating with a minor for enumerated sexual purposes," violated the Dormant Commerce Clause. ***Id.*** at 153. The defendant argued that the statute violated the Dormant Commerce Clause by ensnaring an out-of-state resident. ***Id.*** The Court held that the defendant lacked standing to make this argument because he was not an out-of-state resident. ***Id.***

Like the defendant in ***Rose***, Mr. Culver is not an out-of-state resident. However, unlike in ***Rose*** where the completed crime (*communicating* with an attorney general posing as a minor) took place within the State, here, the completed crime (posting or publishing a depiction on a website) may have taken place outside of Wisconsin due to the nature of the internet. *See generally*, ***American Booksellers Foundation v. Dean***, 342 F.3d 96, 103 (2d Cir. 2003) (stating that "the internet does not recognize geographic boundaries . . ."); ***Southeast Booksellers Ass'n v. McMaster***, 371 F.Supp.2d 773, 786-87 (D.S.C. 2005) (noting that "Internet speakers have no practical, reliable means of determining the geographical location of the recipients of their online communications" nor any way of "ensuring their communications are not accessed in a certain geographic location."). Thus, given that Mr. Culver was charged with a violation of the post or publish statute, and the completed crime was not limited to Wisconsin, Mr. Culver has "a substantial, direct, immediate interest" in the outcome of the litigation. ***Rose***, 960 A.2d at 153.

The State references Wisconsin's jurisdictional statute, Wis. Stat. § 939.03, and argues that this renders "the extraterritorial reach of the Wisconsin statute . . . virtually non-existent." However, nothing in the jurisdictional statute or the post or publish statute requires that the individual who posts or publishes a depiction intends to harm someone residing in Wisconsin or that the person experiencing harm resides in Wisconsin. *Contrast generally with* ***Simmons v. State***, 944 So. 2d 317, 334-35 (Fla. 2006) (finding that a "luring" statute did not take place "wholly outside of Florida's borders" because the statute prohibits "knowingly" seducing, soliciting, luring, or enticing a minor residing in Florida or a person believed to be a minor residing in Florida).

Lastly, contrary to the State's argument (at 32-33), the statute does not satisfy the ***Pike*** criteria. Wisconsin has overreached by enacting a statute that regulates conduct outside its borders, thereby violating the Commerce Clause. The internet makes it impossible to restrict the effects of the post or publish statute within Wisconsin. *See* ***American Libraries Ass'n v. Pataki***, 969 F. Supp. 160, 177 (S.D.N.Y. 1997). Moreover, the burden that the statute imposes on interstate commerce is excessive in relation to the local benefits it confers. The statute has no effect on posting or publishing originating outside of the United States and the prosecution of out-of-state parties who violate the statute but whose only contact with Wisconsin occurs via the internet is beset with difficulties. *See* ***id.*** at 177-80. Additionally, the statute subjects interstate use of the internet to inconsistent regulations. Internet users cannot foreclose access to certain states. ***Id.*** at 183. This is not a statute that prohibits an individual from sending an e-mail or communication to a particular person located in Wisconsin. Rather, this statute prohibits uploading a picture on a website.

II. Wis. Stat. § 941.29(2), Wisconsin's Lifetime Firearm Ban for All Felons, Is Unconstitutional As Applied to Mr. Culver Who Was Convicted of a Non-Violent Operating While Intoxicated Felony.

A. Wis. Stat. § 941.29(2) is unconstitutional as applied to Mr. Culver.

The State's argument opens with a discussion of ***State v. Thomas***, 2004 WI App 115, 274 Wis. 2d 513, 683 N.W.2d 497, and a Maine case, ***State v. Brown***, 571 A.2d 816 (Me. 1990). (State's Br. at 34). These cases are irrelevant as they pre-dated the United States Supreme Court cases, ***Heller*** and ***McDonald***, and applied a rational-basis test. *See, e.g.*,

Thomas, 2004 WI App 115, ¶¶ 21-23; ***Brown***, 571 A.2d at 817, 821. Thus, the language from these cases do not provide any guidance. Almost every firearm regulation would withstand rational-basis scrutiny. *See* ***District of Columbia v. Heller***, 554 U.S. 570, 628 n. 27 (2008) (remarking that "[D.C.'s] law, like almost all laws, would pass rational-basis scrutiny.").

The State also argues that ***State v. Pocian***, 2012 WI App 58, 341 Wis. 2d 380, 814 N.W.2d 894, precludes any relief in this case. (State's Br. at 37-39).

First, Mr. Culver is not raising a facial challenge, but an "as applied challenge." An "as applied" challenge claims that a statute is unconstitutional as it relates to the facts of "a particular case" or "a particular party." *See generally*, ***State v. Smith***, 2010 WI 16, ¶ 10 n.9, 323 Wis. 2d 377, 780 N.W.2d 90. Given that an as applied challenge depends on the facts of the particular case or party, ***Pocian*** does not preclude Mr. Culver from obtaining relief.

Second, as set forth in Mr. Culver's brief-in-chief (at 28-30), he is differently situated than the defendant in Pocian. There is no indication in the record that Mr. Culver has ever been convicted of taking another's property, Mr. Culver's OWI fourth conviction has a lower felony classification, and Mr. Culver was simply storing two handguns and an antique firearm at his residence.

The State argues that Mr. Culver "committed crimes that could have caused death or grievous bodily injury" and "[s]adly, examples of death and grievous bodily harm resulting from acts of OWI are legion." (State's Br. at 38). Once again, Mr. Culver raises an as applied challenge, which is assessed by considering the facts of the instant case not hypothetical facts in other situations. *See* ***State v. Hamdan,***

2003 WI 113, ¶ 43, 264 Wis. 2d 433, 665 N.W.2d 785. What "could have" happened, or what others may have done is irrelevant. The State does not, and cannot, allege that Mr. Culver has done anything that has resulted in death or great bodily harm to someone else.

The State also argues that "Culver's second distinction…is that Pocian used his gun to hunt deer, whereas Culver was simply storing his firearms…The statute bars mere "possession" of firearms, not actual use." (State's Br. at 39). However, contrary to the State's assertion, how a firearm is used is significant because it goes to whether the individual is "unvirtuous" or poses a danger to society. For example, a person who uses a firearm to hold-up a bank poses more of a danger than a person who keeps a firearm in their home for safety. *See generally*, ***Hamdan***, 2003 WI 113, ¶¶ 81-84 (holding that it was unconstitutional for the State to punish a store owner in a high crime area for concealing a handgun under the counter near the cash register when the store was open).

Third, assuming for the sake of argument, but not conceding, that ***Pocian*** prohibits all criminal defendants from bringing as applied challenges, as set forth in Mr. Culver's brief-in-chief (at 30), he asserts that ***Pocian*** was wrongly decided to preserve this challenge for Wisconsin Supreme Court review.

Lastly, just because the legislature has classified an offense as a "felony" does not eliminate a constitutional as applied challenge. As discussed in Mr. Culver's brief-in-chief (at 25, 30), constitutional rights are enshrined with the scope they were understood to have when people adopted them regardless of whether or not future legislatures think the scope is too broad. And, here, given that operating while

intoxicated is not a violent felony or a serious felony, such as murder, rape, arson, or robbery, Mr. Culver is not an "unvirtuous citizen" and no justification exists to deprive him of his fundamental Second Amendment right to keep and bear arms. (See Culver Br. at 25-28).

B. This argument is not waived or forfeited.

As Mr. Culver set forth in his brief-in-chief (at 31-32), his argument should be resolved on the merits.

The State argues that Mr. Culver offers "no compelling reason" for foregoing the guilty-plea-waiver rule. (State's Br. at 36). However, gun ownership rights and the right to protect oneself and one's family are important issues and have statewide impact. (*See* Culver Br. at 31).

Moreover, as the defendant argues in ***Rodney Class v. United States***, No. 16-424, *pending in the United States Supreme Court*, "a challenge to the constitutionality of the statutes of conviction goes to the very power of the government to prosecute the defendant." *See* Pet. Br. at 2).[2] A defendant's ability to raise such as a challenge should not disappear merely because he chose to admit he engaged in conduct that he asserts is constitutionally protected. (*Id.* at 2-3). Leaving an unconstitutional statute on the book unchallenged chills constitutionally protected conduct. (*Id.*).

The State argues that ***Class*** is irrelevant because it involves Federal Rule of Criminal Procedure 11, thus, Wisconsin's guilty-plea-waiver rule would be unaffected. (State's Br. at 37). The State does not explain at all why Wisconsin's guilty-plea-waiver rule would be unaffected.

[2] Briefs *available at* http://www.scotusblog.com/case-files/cases/class-v-united-states/.

Class's holding absolutely has the potential to impact Wisconsin law.

In ***Class***, the defendant was convicted of 40 U.S.C. § 5104(e), which makes it a crime to possess a firearm on the U.S. Capitol grounds. (*See* Pet. Br. at 5, 8). The defendant did not reserve in writing the right to appeal the constitutionality of the 5104(e) pursuant to Federal Rule 11(a)(2). (*Id.* at 8-9). On appeal, the United States Court of Appeals for the District of Columbia Circuit did not address the merits of the defendant's appeal, which included a Second Amendment Constitutional claim. (Pet. Br. at 13).

In the United States Supreme Court, at issue in ***Class*** is whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction. The defendant argues in part that his constitutional claims survive his guilty plea on the theory that they, like double jeopardy and vindictive prosecution claims, do not involve a challenge to his *factual* guilt. (*See* Pet. Br. 22-44 (discussing ***Menna v. New York***, 423 U.S. 61 (1975); ***Blackledge v. Perry***, 417 U.S. 21 (1974))). The defendant also argues that Federal Rule 11(a)(2) does *not* apply. Thus, a holding in ***Class*** may potentially go beyond federal cases and impact state law.

Alternatively, if this Court deems the argument was meritorious, but waived, trial counsel was ineffective and this Court should remand for a hearing. (*See* Culver Initial Br. at 31-32).

The State argues that trial counsel "did not perform deficiently for not making an argument contrary to this Court's binding ***Pocian*** decision." (State's Br. at 37). However, as discussed in Mr. Culver's brief-in-chief (at 29-30) and above, the facts contrast to those in ***Pocian***.

CONCLUSION

For the reasons stated above, Mr. Culver respectfully requests that this Court issue an order vacating his convictions and dismissing the complaint with prejudice.

Dated this 11th day of September, 2017.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,875 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 11th of September, 2017.

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