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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2018AP1476 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

OCTAVIA W. DODSON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction Entered in
Milwaukee County Circuit Court, the Honorable M.
Joseph Donald, Presiding, and an Order Denying
Defendant's Postconviction Motion, the Honorable
Carolina Stark, Presiding.

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

Is Mr. Dodson entitled to resentencing because the circuit court relied on an improper factor, in this case, his decisions to obtain a concealed carry permit and to purchase a firearm?

The circuit court answered no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Dodson requests publication because there is no published case in Wisconsin addressing whether a sentencing court may constitutionally consider a defendant's lawful gun ownership when imposing sentence. Publication will provide guidance in future firearm cases.

While Mr. Dodson does not request oral argument, he welcomes the opportunity to discuss the case should the court believe that oral argument would be of assistance to its resolution of the matter.

STATEMENT OF THE CASE

The information charged Mr. Dodson with one count of second-degree intentional homicide by unnecessary defensive force with use of a dangerous weapon, contrary to Wis. Stat. §§ 940.01(2)(b), 940.05(1), 939.63(1)(b). (3). Mr. Dodson resolved his case by pleading guilty to the charged offense without the dangerous weapon enhancer. (24). Following a timely notice of intent to pursue postconviction relief,

(26), Mr. Dodson filed an § 809.30 postconviction motion seeking plea withdrawal and resentencing. (38). That motion was denied after an evidentiary hearing. (58; 71; 72). This appeal followed.¹ (61).

STATEMENT OF FACTS

On March 25, 2016, Mr. Dodson called 911 to report that he shot a man who pulled a gun on him. (1:1). Within minutes, Mr. Dodson—who had been a lawful gun owner with a Wisconsin concealed carry permit since July 29, 2014—immediately arranged to turn himself in at his father’s house and transferred his Glock 9mm firearm to police custody. (1:2, 4). Mr. Dodson was placed under arrest and transported to the police station, where he was interviewed three times by three groups of Milwaukee police officers over the next 36 hours. (1:3; 38:19-22, 23-26, 30-32).

Mr. Dodson told police that he was rear-ended by a Buick while stopped at a red light on North Teutonia Avenue and West Center Street. (1:3). Officers were able to recover video of the car accident from a Citgo gas station. (1:3). The video shows Mr. Dodson’s vehicle slowing down as it approached two stopped cars at an intersection. (38).² A Buick rear-

¹ This is an appeal from the denial of resentencing. Mr. Dodson is not seeking plea withdrawal.

² The relevant portion of the video begins at timestamp 10:42:45 PM and continues until 10:43:32 PM. The video can be found on the CD attached to defendant’s postconviction motion. It is referred to as “CD – Defendant’s Exhibit F-Citgo Video
(continued)

ended Mr. Dodson's car, causing it to lurch several feet forward. (1:3; 38). Immediately following the impact, the Buick reversed out of frame and remained out of frame for a few seconds as Mr. Dodson got out of his car to examine the damage. (38). The Buick re-entered the frame at a high rate of speed as it accelerated between Mr. Dodson and the curb and proceeded north through the intersection. (*Id.*). The light turned green, and the car ahead of Mr. Dodson pulled through the intersection. (*Id.*). Two more cars passed Mr. Dodson's vehicle before he shut his driver's side door and continued driving. (*Id.*).

Three cars separate Mr. Dodson's vehicle from the Buick by the time his car exited the frame. (*Id.*). Mr. Dodson attempted to catch up to the Buick to get its license plate number but lost sight of the vehicle less than one block later. (38:20). Mr. Dodson then drove to his father's house to examine his car; within blocks from his father's house, he saw the Buick that had just struck him. (38:19). Mr. Dodson sped up and continued north to get its license plate number. (*Id.*). The Buick turned east on Concordia Avenue and Mr. Dodson followed until the Buick stopped abruptly as it approached 10th Street. (38:31).

A male subject exited the Buick and ran towards Mr. Dodson yelling, "Fuck Nigga!" and

Attached to Rule 809.30 Postconviction Motion filed on February 26, 2018" in the Certificate of the Clerk. (63).

moved his hands toward his pockets. (1:3). Mr. Dodson could not see the man's hands and feared for his life as the man charged toward him. (*Id.*). He fired a number of shots at the man, and the man fell. (*Id.*). Mr. Dodson left the scene, called police, and arranged to turn himself in. (*Id.*). Police responded to a location near the intersection of 10th and Concordia, where they found Deshon Freeman lying in the middle of the street. (1:2). Officers found a Buick belonging to Mr. Freeman parked on the south side of the street. (1:2). The Buick was still running and had its headlights on—a cell phone connected to a cord dangled from the bottom of the closed driver's side door. (1:2). Mr. Freeman was pronounced dead at the scene. (1:2).

Sentencing Hearing

Following Mr. Dodson's guilty plea to second-degree intentional homicide, at sentencing the State recommended "a substantial term of imprisonment" based on the gravity of the offense and the need to protect the public. (73:8, 18). The prosecutor argued that Mr. Dodson's ownership of a semiautomatic weapon with a high-capacity magazine was "meant for nothing, nothing more than killing as quickly and efficiently as one possibly can." (73:18-19). The PSI recommended 5 to 9 years of initial confinement and 5 to 6 years of extended supervision. (73:7).

Defense counsel asked the sentencing court to impose a sentence in line with the PSI's recommendation of 5 years of initial confinement,

noting that Mr. Dodson had no criminal record and a good employment history. (73:24, 27). Counsel highlighted the fact that Mr. Dodson called 911, and that if he had not, it was unlikely that he would even have been linked to the shooting. (73:25). Counsel acknowledged that Mr. Dodson's fear, while subjectively reasonable, would not have won an acquittal at trial:

Now I truly believe in the moment that based upon all of his characteristics that we read about in the PSI, that he really believed he was fearing for his life. Whether that was a reasonable, objective belief, I don't think it is. And that's why I don't, that's why we pled. There is not a self-defense here. But it may have been a reasonable subjective belief in the moment to him.

(73:25).

During its remarks, the sentencing court, the Honorable M. Joseph Donald, acknowledged that the case was unusual in that Mr. Dodson did not have the kind of faults or failings that are often pointed out at sentencing. (73:30). After discussing the tragic circumstances surrounding the death of the victim and the unrelated death of Mr. Freeman's sister a few weeks prior, the court discussed Mr. Dodson's character. (73:31-32). The court described Mr. Dodson as a model citizen who worked hard, provided for his family, and accepted responsibility following this incident. (73:32).

The court struggled to find the reason that someone with no criminal record and no clear motive would end up in this situation. The court disregarded the defendant's self-defense claim, saying that "certain statements that are attributed to [Mr. Dodson] that in [the court's] opinion really don't make any sense." (73:32). The court did not, however, describe the statements it referenced.

Instead, the court blamed the incident on Mr. Dodson's heightened sense of danger and "distorted view of the world," which the court viewed as enhanced due to his possession of a firearm. (73:30-32). The court said:

I am completely baffled as to why this happened. And I don't think that there is any rational way of trying to explain it. I can tell you this, Mr. Dodson, that in my experience as a judge, I have seen over time how individuals when they are possessing a firearm, how that in some way changes them. It changes how they view the world. It changes how they react and respond to people. I know that this is only speculation on my part, but I do strongly feel that the day that you applied for that concealed carry permit and went out and purchased that firearm, and that extended magazine, whether your rational beliefs for possessing it, whether you felt the need to somehow arm yourself and protect yourself from essentially the crime that is going on in this community I think on that day set in motion this circumstance.

It is clear to me, Mr. Dodson, that for whatever reason, and it appears that it is a distorted,

misguided belief of the world that somehow Mr. Freeman was a threat that required you, in essence, to terminate his life. Makes no sense.

(73:30-31).

But it is clear to me that you were operating under some misguided belief, some distorted view of the world that somehow [the victim] was a threat to you when in reality it was nothing further from the truth.

(73:32).

The court imposed a twenty-year sentence composed of 14 years of initial confinement and 6 years of extended supervision. (*Id.* at 34).

Postconviction Motion and Hearing

In his postconviction motion, Mr. Dodson sought to withdraw his guilty plea and, in the alternative, sought resentencing. (38:1). During an evidentiary hearing on July 27, 2018, presided over by the Honorable Carolina Stark, the circuit court denied Mr. Dodson's postconviction motion in its entirety. (72:24-28; 58:1).

The circuit court found that the sentencing court actually relied on the comments challenged by Mr. Dodson:

And when I look at [the comments] there in the context of what [Judge Donald] said, I do think that he was relying on. So the reliance prong of this analysis I think is satisfied.

I think he was relying on the things that he said were factors or things that he was announcing as part of his thought process he was relying on them.

(72:25).

However, the postconviction court also found that the statements in question were not improper sentencing factors when examined “in the context of what Judge Donald was saying” and that Judge Donald was not attributing a “poor character analysis or some sort of poor judgment analysis” to an entire class of people—people who possess a firearm or a CCW permit. (72:25-26). Consequently, the post-conviction court denied resentencing. (58; 72:27).

ARGUMENT

I. The sentencing court improperly relied on Mr. Dodson’s status as a lawful gun owner in violation of his Second Amendment right, and resentencing is warranted.

Mr. Dodson’s sentence was based, in part, on the circuit court’s view that he was a threat to society and had a “distorted view of the world” because he was a lawful gun owner. The court blamed Mr. Dodson not merely for the homicide, but for what the court viewed as putting himself on a path toward violence by lawfully obtaining a gun and a license to carry it. This assumption violated Mr. Dodson’s Second Amendment right to possess the firearm. Therefore, this court should reverse for resentencing.

A. Legal principles and standard of review.

Sentencing is ordinarily an exercise of circuit court discretion. *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). That discretion is erroneously employed when it is exercised on the basis of clearly irrelevant or improper factors. *State v. Gallion*, 2004 WI 42, ¶ 17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203.

However, this case centers on the sentencing court's consideration of Mr. Dodson's constitutionally-protected right to own a gun. Where an improper factor implicates a defendant's constitutional rights, consideration of the factor violates due process. *State v. Alexander*, 2015 WI 6, ¶ 23, 360 Wis. 2d 292, 858 N.W.2d 662. Whether a defendant has been denied due process at sentencing is a question of law that this court reviews de novo. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1.

Mr. Dodson is entitled to resentencing if he can show that: (1) the lawful exercise of the Second Amendment is an improper factor, and (2) the sentencing court relied on that improper factor. *Alexander*, 360 Wis. 2d 292, ¶¶ 22-25.³ Whether the circuit court relied on the improper factor turns on “whether the circuit court gave ‘explicit attention’ or ‘specific consideration’” to the factor, so that it

³ The standard of proof for the defendant is clear and convincing evidence. *State v. Harris*, 2010 WI 79, ¶ 34, 326 Wis. 2d 685, 786 N.W.2d 409.

“formed part of the basis for the sentence.” *See State v. Travis*, 2013 WI 38, ¶ 21, 347 Wis. 2d 142, 832 N.W.2d 491 (quoting *Tiepelman*, 2006 WI 66, ¶ 14). If the defendant proves inaccuracy and actual reliance, the burden shifts to the State to prove the error was harmless. *Alexander*, 360 Wis. 2d 292, ¶ 18.

B. The sentencing court construed Mr. Dodson’s status as a licensed and legal gun owner a negative factor at sentencing.

In this case, the sentencing court actually relied on an improper and erroneous conclusion: that obtaining a CCW permit and possessing a firearm are wrong, in and of themselves. Although it stopped short of specifically referring to these actions as *mala in se*, the court said that the act of possessing a firearm “in some way changes [people]” by “chang[ing] how they view the world ... [and] how they react and respond” to others. (73:30). That is why the sentencing court “strongly fe[lt] that the day [Mr. Dodson] applied for that concealed carry permit and went out and purchased that firearm” was the day that Mr. Dodson “set in motion this circumstance.” (73:30-31). From the perspective of the sentencing court, having obtained his CCW permit and purchased a firearm, Mr. Dodson developed a “distorted, misguided belief of the world that somehow Mr. Freeman was a threat that required [Mr. Dodson], in essence, to terminate his life.” (*Id.*).

And, as the court later reiterated, “it is clear to me that you were operating under some misguided belief, some distorted view of the world that somehow Deshon Freeman was a threat to you when in reality it was nothing further from the truth.” (73:32). The court’s assertion is supported only by its speculation that by exercising his Second Amendment rights, Mr. Dodson created this conflict with Mr. Freeman. (73:30-31).

In so doing, the sentencing court entirely dismissed Mr. Dodson’s own version of events, which was supported in part by evidence at the scene.⁴ (1:2). Mr. Dodson told the PSI writer that, after dropping off his daughter, he was headed to see his girlfriend when he was rear-ended by a vehicle. (17:7). After losing sight of the car, he saw it again minutes later. (*Id.*).

[Mr. Dodson] claimed that the car rapidly pulled over to the side of the road. He too stopped his vehicle. Mr. Dodson stated that he carefully checked his surroundings and saw that the man from the other car was running abruptly towards him and screaming, “I’m tired of you fuck niggers.” He had his hand near his waistband emulating that he was in possession of

⁴ For instance, the complaint states that the Buick was running, the headlights were left on, and “a cell phone connected to a charger was dangling from the bottom of the driver’s door.” (1:2). These facts, particularly the dangling cell phone, support Mr. Dodson’s claim that the driver of the Buick ran out in an excited manner.

something. Mr. Dodson stated that he, being a permit wielding concealed carry holder pulled out his gun and fired it, as he feared for his personal safety. He recollected seeing the victim fall to the ground.

(17:7).

The court's assumptions about gun owners are based solely on the court's experience with gun owners.⁵ The court then attributes the negative views it has about gun owners to Mr. Dodson, in violation of his Second Amendment rights.

The Supreme Court has held that a defendant “has a constitutional due process right not to be sentenced on the basis of race or gender” and that “imposing a sentence on the basis of race or gender is therefore an erroneous exercise of discretion.” *Harris*, 326 Wis. 2d 685, ¶ 33. The list of improper factors is not limited to protected groups and immutable characteristics; it also includes constitutional violations. In *Alexander*, the Court evaluated a list of improper factors—including race or national origin, gender, alleged extra-jurisdictional offenses, and the defendant's or victim's religion—and held that “a circuit court employs an improper factor in sentencing if it actually relies on compelled statements” because Alexander has “a Fifth

⁵ The sentencing court said, “[I]n my experience as a judge, I have seen over time how individuals when they are possessing a firearm, how that in some way changes them. It changes how they view the world.” (73:30).

Amendment right not to be compelled to be a witness against himself” and that right “continues through sentencing.” *Alexander*, 360 Wis. 2d 292, ¶ 23-24.

The sentencing court’s remarks demonstrate that Mr. Dodson was not only being punished for shooting Mr. Freeman, but for choosing to become a lawful gun owner in the first instance. The sentencing court said that individuals who possess a firearm are fundamentally changed, that they view the world differently. (73:30-31). The court said that Mr. Dodson set this circumstance in motion the day that he “applied for that concealed carry permit and went out and purchased that firearm.” (73:30-31). However, this aspect of the sentencing court’s view is conflicts with the Second Amendment and violates Mr. Dodson’s right not to be sentenced based on irrelevant and improper factors. The purpose of the Second Amendment is to “guarantee the individual right to possess and carry weapons *in case of confrontation*.” *D.C. v. Heller*, 554 U.S. 570, 592 (2008) (*emphasis added*).

Wisconsin’s constitutional protection is even stronger, as the Supreme Court has recognized that our state constitutional right to bear arms is a fundamental individual right. *State v. Cole*, 2003 WI 112, ¶ 20, 264 Wis. 2d 520, 665 N.W.2d 328. The Supreme Court has recently stated that the protection of the right to bear arms contained within

Wisconsin Constitution, art. 1, § 25⁶ is “a straightforward declaration of an individual right to keep and bear arms for any lawful purpose,” noting that “[o]ne way in which people in Wisconsin may exercise this individual right is by obtaining a license to carry concealed weapons.” *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶¶ 10-11, 373 Wis. 2d 543, 892 N.W.2d 233.

Not only is the right to carry a firearm constitutionally protected, one’s status as a person licensed to carry a concealed weapon also enjoys a statutorily-protected status: it is illegal for law enforcement to discriminate against licensed gun owners based solely on their status as a licensee.

Any law enforcement officer who uses excessive force *based solely on an individual’s status as a licensee* may be fined not more than \$500 or sentenced to a term of imprisonment of not more than 30 days or both. The application of the criminal penalty under this paragraph does not preclude the application of any other civil or criminal remedy.

Wis. Stat. § 175.60(17)(ar) (emphasis added).

Further, the sentencing court’s speculation that Mr. Dodson is more dangerous to society by virtue of his status as a gun owner is unfounded. The court

⁶ Wis. Const., art. 1, § 25: “The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.”

failed to consider the fact that CCW permit holders—like Mr. Dodson—must take a firearms safety course that teaches the following lessons, among others:

Adhere to firearm safety rules.

Advise your family on the safety rules for weapons in your home.

Maintain control of your weapon.

Review techniques for avoiding and controlling violent confrontations.

Demonstrate what to do when you encounter law enforcement.

Review Wis. Stat. § 939.48, Self-defense and the defense of others.

Firearm Safety Course: A Training Guide for Concealed Carry Licenses, Wisconsin Department of Justice, January 2017, at vi (Hereafter “DOJ Training Guide”).⁷

The DOJ’s training guide teaches responsible gun ownership. It includes information on the use of deadly force, explains the difference between objectively and subjectively reasonable beliefs, and teaches that use of a firearm in defense of self or others is only acceptable when presented with an

⁷ The website for the DOJ Training Guide was last visited on Mar. 18, 2019 at the following URL: <https://www.doj.state.wi.us/sites/default/files/dles/ccw/student-manual.pdf>.

imminent threat of death or great bodily harm. (DOJ Training Guide at 32-33). The manual also includes instructions about reporting an incident of self-defense and turning oneself into the police, all of which Mr. Dodson followed. (DOJ Training Guide at 34).

The sentencing court's belief that gun ownership distorted Mr. Dodson's view of the world unjustly punishes him for exercising his Second Amendment rights. The court chastised Mr. Dodson not for using his firearm for an *improper* purpose, but for making the decision to carry a firearm in the first instance. The court highlighted "the day that [Mr. Dodson] applied for that concealed carry permit" and disregarded whatever his "rational beliefs for possessing it" were, such as protecting himself from "the crime that is going on in this community." (70:30-31). Mr. Dodson obtained his permit on July 29, 2014, nearly two years before this incident. (1:4). He was a responsible gun owner who sought to defend himself because he felt threatened, not merely because he was in possession of a firearm. Consideration of Mr. Dodson's lawful gun ownership in sentencing him was improper.

C. The sentencing court relied on its negative view of gun ownership when it sentenced Mr. Dodson.

A sentencing court relies on improper information by giving "explicit attention or specific consideration to it," such that the improper

information “formed part of the basis for the sentence.” *Tiepelman*, 291 Wis. 2d 179 at ¶ 14 (internal quotations omitted). In this case, the factor challenged by Mr. Dodson was given great weight—it bookended the court’s brief sentencing remarks.

The court found the offense to be serious. (73:31-32). It examined Mr. Dodson’s character, finding that he had been a “model citizen” who was respected and worked hard to provide for his family. (73:32). The court then speculated, without any support, that something about the way Mr. Dodson was driving may have escalated the situation. (73:31). It said that “certain statements that are attributed to [Mr. Dodson] that in [the court’s] opinion really don’t make any sense” but it did not explain which statements it considered or how they failed to make sense. (73:32).⁸

Other than those brief remarks, the sentencing court focused on its own speculation that Mr. Dodson’s Second Amendment rights gave him a distorted view of the world that led him to perceive a

⁸ Here, the court may have been referring to the discrepancy between Mr. Dodson’s description of the Buick that struck him and the Buick found at the scene, a fact pointed out by the State at sentencing. (73:17). The discrepancy involved only minor differences in color and window tint, as well as the fact that it had no front license plate. (1:4). This argument fails to recognize that the discrepancy is more likely a failure of Mr. Dodson’s memory than it is proof that the two cars were, in fact, different.

threat where none existed. (73:31). The court said that the only explanation for this incident was that Mr. Dodson's gun gave him a distorted and misguided view of the world. (73:30-31). That explanation recurred at the end of the court's remarks and formed the main thrust of the basis for the sentence as articulated by the court. (73:30-31).

Mr. Dodson had a legitimate subjective fear. That this was not merely an unprovoked shooting case. He was the sole witness in a confrontation with a stranger who charged at him aggressively while yelling. The physical evidence at the scene corroborates important portions of his story. He called the police immediately after the shooting—as instructed by the DOJ Training Guide for CCW applicants. He disarmed himself before turning himself in to police. He transferred his weapon and ammunition into the custody of law enforcement. Mr. Dodson had no criminal record. He acted responsibly after the incident. He was a trained and licensed gun owner.

Given the fact that the court returned to the idea that Mr. Dodson's firearm gave him a distorted view of the world at the conclusion of its sentencing remarks, it is clear that the court gave explicit attention and specific consideration to Mr. Dodson's status as a lawful gun owner in imposing sentence. (73:32). In so doing, the court actually relied on an improper factor and inaccurate assumptions explained above, and violated Mr. Dodson's due

process rights at sentencing. Resentencing should be granted.

CONCLUSION

Mr. Dodson respectfully requests that this Court reverse and remand for resentencing.

Dated this 20th day of March, 2019.

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 4,001 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 20th day of March, 2019.

Signed:

JORGE R. FRAGOSO
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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 § 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 § 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 one or more initials or other appropriate pseudonym or designation 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.

Dated this 20th day of March, 2019.

Signed:

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APPENDIX

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