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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2019AP000193-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TAURUS DONNELL RENFRO,

Defendant-Appellant.

Appeal of January 2, 2019 Written Decision and Final Order
Denying Defendant-Appellant's Motion for Postconviction
Relief, in the Circuit Court of Milwaukee County, the
Honorable Jean M. Kies, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

JAMES A. WALRATH
State Bar No. 1012151
324 East Wisconsin Avenue, Suite 1410
Milwaukee, WI 53202
(414) 202-2300
jw@jaw-law.com

Attorney for Defendant-Appellant

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ISSUE PRESENTED FOR REVIEW

Did Renfro reasonably believe that he was confronted with a threat of bodily harm and that carrying a concealed weapon was necessary for home security, so that “extraordinary circumstances” existed which demonstrated his interest in his right to keep and bear arms for security and defense substantially outweighed the state's interest in prohibiting him from carrying a concealed weapon in a vehicle when he was moving to a new home?

The circuit court's ruling below: The jury at Renfro's trial was not instructed to consider the *Fisher* “extraordinary circumstances” exception to criminal liability for carrying a concealed firearm, but the trial court ruled, in response to Renfro's postconviction motion, that extraordinary circumstances were not presented.

**STATEMENT ON ORAL ARGUMENT
AND PUBLICATION**

Appellant Renfro does not request oral argument because, consistent with Wis. Stat. (Rule) § 809.22(2)(b), the written arguments can fully develop the theories and legal authorities on each side so that oral argument would be of marginal value.

Publication is not permitted under Wis. Stat. (Rule) § 809.23(b)4 because this is a single-judge appeal.

STATEMENT OF THE CASE

On December 12, 2017, a jury found the defendant guilty of carrying a concealed weapon, and on the same date, the court sentenced him to four days (time served) in the House of Correction. On October 30, 2018, the defendant filed a postconviction relief motion for seeking to vacate his conviction on grounds that the carrying a concealed weapon statute, as applied to the facts of his case, violated his constitutional right to keep and bear arms. On January 2, 2019 the circuit court denied the motion in a written decision and order (A. App. 101-105).

STATEMENT OF FACTS

Renfro's carrying of a firearm. At approximately 8:15 p.m. on October 31, 2016, Milwaukee police officers McAleer and Koch stopped a black Oldsmobile for a city ordinance tinted windows violation. Renfro was in the front passenger seat. (Tr. 12-11-2017, p. 104).¹ Koch testified that she first asked the defendant whether he had a concealed carry permit, and he admitted that that he did not. (Id. at 105). She then asked Renfro whether there were any firearms or weapons in the vehicles, and the defendant responded, "I am not going to lie; I've got my gun on me." (Id. at 105-06). Koch then asked Renfro to place his hand on the dashboard, which he did, and signaled for her partner to assist. (Id. at 106). Koch testified that at no point prior to McAleer assisting her did she observe a firearm. (Id.).

McAleer testified that he then walked around the vehicle and asked Renfro if there was anything illegal in the car. (Id. at 114). Renfro responded that he had a gun in his pants pocket. (Id.). McAleer then recovered an unholstered, loaded firearm in the defendant's front right pants pocket.

¹ "Tr. 12-11-2017" refers to the transcript pages of the December 11, 2017 trial proceedings. (R. 54).

McAleer testified that the gun was inside Renfro's pants pocket with the grip tucked underneath his belt. (Id.). Additionally, Renfro was wearing a hooded sweatshirt that covered the gun, and McAleer had to lift the sweatshirt to see the gun. (Id. at 133).

Renfro testified that he had been moving his household and that he had the gun on him because he was moving it from his prior residence, with his cousin driving him to his parents' house. (Tr. 12/12/2017, p. 11).² Renfro admitted that he had the gun on his person but claimed that he had it in a holster attached to his belt. (Id. at 14-15). While Renfro stated that the holster was not "visible," that he was wearing a jacket (not a sweatshirt), and that the gun would not have been visible when he was in the car, he stated that when he stood up and exited the car, officers would have been able to see the handgun. (Id. at 18-19).

At the close of evidence, the court instructed the jury on the elements of the offense - *i.e.*, that they must find beyond a reasonable doubt that the defendant carried a dangerous weapon, that he was aware of the presence of the

²“Tr. 12-12-2017” refers to the transcript pages of the December 12, 2017 trial proceedings. (R. 55).

weapon and that the weapon was concealed. (Id. at 34). The court advised the jury that "[c]oncealed means hidden from ordinary observation. The weapon does not have to be completely hidden." (Id. at 35). The jury returned a guilty verdict, and the court sentenced the defendant to time served.

Renfro's movement of his household and his firearm from a "high crime" area. Officer Koch testified that the area "has a high rate of violence and crime" (Tr. 12-11-2017, p. 105); Officer McAleer testified that his "focus [was] on high crime areas, " that he "work[ed] in high-crime areas," and that "in this area, a person has an increased risk of being a victim of crime") (Id. 112, 122, and 125).

Keith Brown, the driver of the Oldsmobile, testified that Renfro was moving from a high crime neighborhood, and that Brown had just left from there with Renfro to go to Renfro's parent's house (Id. at 140-141).

Renfro's home possession of the firearm following a shooting next door. Renfro testified that he was packing up and moving from his prior address to live at his parent's house (Tr. 12-12-2017, p. 11). He stated that he had the firearm because just two months earlier a shooting occurred next door while his six-year old daughter was in front of his

home (*Id.* at 11). He testified that that the gun was normally kept inside for protection of the home (*Id.* at 13).

Renfro's partially visible, firearm possession. Officer McAleer testified that only the top of the gun barrel or slide was extending for about an inch into Renfro's pocket, because most of the firearm was secured underneath his belt (Tr. 12-11-2017, pp. 115, 129). According to Renfro, because his jacket was unzipped and open, the gun was exposed to public view when he was standing. (Tr. 12-12-2017, p. 19). This testimony was corroborated by the squad car video (Exhibit 4) that showed just how visible and open Renfro's waistline area was that night, with his jacket unzipped and hanging at his sides, as he was escorted from Brown's car to the squad car.

No testimony was presented that Renfro was motivated either to possess or conceal the firearm for an unlawful purpose. Further, he purchased it legally (*Id.* at 12).

ARGUMENT

I. Standard of review

This is a dispute as to whether the concealed carry statute, Wis. Stat. § 941.23 (2003-04),¹ was unconstitutionally applied to appellant Renfro based on the Wisconsin Supreme Court's decisions in *State v. Fisher*, 2006 WI 44, 290 Wis.2d 121, 125–26, 714 N.W.2d 495, 497, *State v. Cole*, 2003 WI 112, 264 Wis.2d 520, 665 N.W.2d 328, and *State v. Hamdan*, 2003 WI 113, 264 Wis.2d 433, 665 N.W.2d 785 regarding the protections of Wis. Const. Article I, Section 25. This is a question of law that is subject to independent appellate review. *Fisher*, 2006 WI 44 at ¶¶ 3-4; *Hamdan*, 264 Wis.2d 433, ¶ 19, 665 N.W.2d 785; *see also Cole*, 264 Wis.2d 520, ¶ 10, 665 N.W.2d 328.

II. Under the specific circumstances of this case, it was unreasonable for the State to impair Renfro's constitutional right to bear arms by punishing him for carrying a concealed weapon.

Wisconsin's constitutional right to keep and bear arms states in Article I, Section 25: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."

Three aspects of this right are particularly germane to

Renfro’s appeal. First, this constitutional right is inextricably relevant to those circumstances where persons “bear” (*i.e.*, possess) firearms for purposes of security and defense. It was uncontroverted at Renfro’s trial that he was in possession of a firearm for those very reasons – security and defense.³ Second, the constitutional right is not limited in scope or by its terms to protecting the possession of firearms to one’s home or business. Hence, the right has application in other settings, that, for example, include hunting and recreational locations. Third, Wisconsin’s constitutional right to bear arms reaches to any setting when that conduct is undertaken for one’s security or defense or for “any other lawful purpose.”⁴

³ As to the “security” purpose protected by Wisconsin’s right to bear arms, the Court in *Hamdan* stated: “We infer that the inclusion in the amendment of the right to bear arms for security was intended “to include a personal right to bear arms to protect one’s person, family, or property against unlawful injury and to secure from unlawful interruption the enjoyment of life, limb, family, and property,” . . . , subject to reasonable regulation.”

State v. Hamdan, 2003 WI 113, ¶ 66, 264 Wis.2d 433, 478, 665 N.W.2d 785, 807. (Internal citation omitted.).

⁴Related to the right to bear arms for “any other lawful purpose,” the Court in *Hamdan* stated: “There is a final element to a constitutional challenge of an application of the CCW statute. Article I, Section 25 expressly limits the right to keep and bear arms to ‘lawful purposes.’ Therefore, a defendant is not entitled to assert a constitutional defense to a CCW charge if he or she carried a concealed weapon for an unlawful purpose. . . .

These are expansive concepts, which the courts are obligated to apply in the context of Wisconsin's carrying a concealed weapon (CCW) statute; that is the point of Renfro's appeal.⁵ These three concepts should have guided the circuit court, or at the very least, reminded the circuit court that Renfro's conduct was consistent with those three aspects of Article I, Section 25. Regrettably, the circuit did not recite the provision or acknowledge its specific language for guidance in reaching its decision to deny Renfro's

¶ 77 Whether a defendant carried a concealed weapon for an unlawful purpose is a question of fact, as it may involve a state of mind for which competing evidence is necessary. This inquiry requires a determination of the individual's purpose for carrying the concealed weapon.”

State v. Hamdan, 2003 WI 113, ¶¶ 76-77, 264 Wis.2d 433, 483–84, 665 N.W.2d 785, 810.

⁵The Court in *Hamdan* adopted view of the Wyoming Supreme Court in *State v. McAdams*, 714 P.2d 1236, 1237-38 (Wyo. 1986) : “[A] balance must be struck between the individual's right to exercise each constitutional guarantee and society's right to enact laws which will ensure some semblance of order. As these interests will necessarily conflict, the question then becomes which party should accept the encroachment of its right. The solution to the conflict is judicial in nature. *Courts must be and are, whether willingly or not, the ultimate arbiters as to whether or not there is, in a particular case, an unwarranted invasion of constitutionally guaranteed rights.*

State v. Hamdan, 2003 WI 113, ¶ 45, 264 Wis.2d 433, 463–64, 665 N.W.2d 785, 800. (Emphasis added.)

postconviction motion.⁶

The circuit court did, however, refer to the *Hamdan* and *Fisher* cases, which the parties agreed were relevant to deciding Renfro's case. But there too, the circuit court gave no mention in its decision to a fact of critical importance, according to both cases: Renfro's family had recently been exposed to a shooting in the front yard next door to the home which they were then leaving.

Renfro therefore appeals his CCW conviction because the circuit court's decision (A. App. 101-105) unnecessarily focused the scope of Wisconsin's right to bear arms to home and business settings, without consideration of circumstances when a firearm is being transported between two home locations, and because the circuit court gave no consideration to Renfro's need to provide "security" and "defense" to his family in the face of a recent, violent incident next to their home.

First, the circuit court implemented an incorrect "as applied" analysis that improperly weighted Article I's

⁶ Indeed, based on the more expansive terms appearing in Article I, Section 25 compared to the Second Amendment (U.S. Const., amend. II), these three aspects of Wisconsin's constitutional right to bear arms take on added significance.

protections to favor possession in a home over transport of a home-security weapon from one home location to another. The circuit court's imbalanced analysis ignored the closeness of Renfro's vehicular possession to his home possession of the firearm. His possession was transitory from one home to another. This made Renfro's circumstances "extraordinary" under the *Fisher* decision's analysis.

Second, the circuit court simply neglected to take into account Renfro's purpose for possessing the firearm – for home security and defense – in reaction to a recent shooting next in the front yard to his home.

State v. Hamdan, 2003 WI 113, ¶80, 264 Wis.2d 433, 665 N.W.2d 785 instructs that a three-factor test should be used in an "as-applied" challenge such as Renfro's. Consistent with these factors, the facts adduced at his trial showed that: (1) he was exercising the constitutional right to keep and bear arms (Wis. Const., Article I, Section 25) under circumstances in which the need to do so was substantial, as he was moving the firearm which he had purchased for home security purposes from his old home, which was located in a high-crime area and where a recent shooting had occurred next door; (2) the temporarily concealed state of the firearm

on his person, while he was seated in his brother-in-law's vehicle, was the only reasonable means under the circumstances to exercise that right and to move his firearm from his old residence to the new one; and (3) no unlawful purpose motivated his temporary concealment of the firearm.

State v. Fisher, 2006 WI 44, ¶ 26, 290 Wis.2d 121, 714 N.W.2d 495 discussed the circumstances under which the concealed carry of a firearm in a vehicle may be constitutionally protected, and it recognized that the *Hamdan* test applies whenever a defendant makes an as-applied challenge to his conviction and that “the *Hamdan* test is not limited to challenges . . . for carrying a concealed weapon in one's home or privately-owned business.”

Fisher also held, at ¶ 32 that:

[B]ecause the individual's interest in carrying a concealed weapon in a vehicle is generally comparatively weak and the state's interest in prohibiting such weapons in vehicles is relatively strong, *it is only in extraordinary circumstances* that an individual asserting a constitutional defense under *Hamdan* will be able to secure an affirmative answer to the first question in the *Hamdan* test. Stated another way, *only in extraordinary circumstances* will an individual carrying a concealed weapon in a vehicle be able to demonstrate that his or her interest in the right to keep and bear arms for security substantially outweighs the state's interest in prohibiting that individual from carrying a concealed weapon in his or her motor vehicle. *If a defendant reasonably believes that he or she is actually confronted with a threat of bodily harm or death and that carrying a concealed weapon is necessary for protection*

from the threat, extraordinary circumstances would be present.

(Emphasis added.)

In sum, similar to Munir Hamdan's circumstances, but unlike Fisher's, Renfro had possessed the gun in a high-crime neighborhood (*Hamdan* at ¶¶7-8; *Fisher* at ¶41), and a violent crime had recently occurred next to his home where the gun was normally kept (*Id.*).

Unlike Fisher's circumstances, Renfro was using a vehicle for transport at a vulnerable time and place to transfer the firearm from one constitutionally-protected site (his old home) to another constitutionally-protected site (his new residence) at night in a high-crime neighborhood. Scott Fisher was driving at 4:00 in the afternoon in Black River Falls, doing errands on his way to McDonald's (*Id.* at ¶48). Paraphrasing from *Fisher* (*Id.* at ¶49), the evidence showed that Renfro reasonably believed he was actually confronted with a threat of bodily harm or death, and he reasonably believed that carrying a firearm that he purchased for home security, that was necessary for protection from such a threat.

Lastly, *Hamdan* contemplates that there will be occasions where temporary concealment is constitutionally protected, if it is connected to temporary movement of the

firearm for home security purposes: “If the constitutional right to keep and bear arms is to mean anything, it must, as a general matter, permit a person to possess, *carry*, and *sometimes conceal* arms to maintain the security of his private residence and to safely move . . . weapons within these premises.” *Hamdan* at ¶68. (Emphasis added.)

Ultimately, the circuit court erred in its constitutional analysis when it pinned its ruling on a misstatement of the factual record. It concluded that Renfro possessed his firearm in response to the “too generalized threat” of “travelling in a car through a ‘high-crime’ area.” (A. App. 103). That finding was seriously flawed because it was unrefuted that Renfro possessed his gun in reaction to a recent nearby shooting. There was nothing “too generalized” about that shooting incident’s threat to the safety and security of his family. This factual error then caused the circuit court to ignore the requirement that it determine whether Renfro’s mental purpose in transporting the gun was lawful or unlawful. The court simply ignored its obligation to make a finding on his purpose:

To overcome a constitutional defense that has been approved by the court, the State has the burden of alleging

that a defendant had a specific criminal purpose and of presenting evidence that the defendant carried the concealed weapon for that unlawful purpose. .

State v. Hamdan, 2003 WI 113, ¶ 78, 264 Wis.2d 433, 484, 665 N.W.2d 785, 810.

Accordingly, the circuit court's second error, that contributed to its erroneous constitutional ruling, was that it failed to take into account Renfro's lawful purpose for carrying his firearm.

CONCLUSION

The Wisconsin Supreme Court recognized that “[a]s a result of our legislature's decision to prohibit the carrying of concealed weapons under any circumstance, the interaction between Wisconsin's CCW statute and the state constitution's right to bear arms is anomalous, if not unique.” *State v. Hamdan*, 2003 WI 113, ¶ 7, 264 Wis.2d 433, 470, 665 N.W.2d 785, 803. This “interaction” presents a conflict between governmental and individual interests which Wisconsin courts must weigh on a case-by-case basis. Here, the right to bear arms involved Renfro's transport of a firearm from his former home to a new one (while literally moving from one to the other) in reaction to a recent shooting next to at his former home. Then why does this not present one of the

“extraordinary circumstances” that, according to the Wisconsin Supreme Court, should be constitutionally protected?

The circuit court erred by not properly weighing the facts and the competing interests. Had it properly considered the relevant facts, it would have found that Renfro’s individual right to bear arms was in play and outweighed the State’s concealed weapon interests.

For these reasons Renfro respectfully requests that the decision denying his postconviction motion be reversed, with directions that his conviction be vacated with the entry of a judgment of acquittal based on his exercise of the right to bear arms.

Dated April 27, 2019

Respectfully submitted,

State Bar No.1012151
324 East Wisconsin Avenue, Suite 1410
Milwaukee, WI 53202
414-202-2300
jw@jaw-law.com

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 2,784 words.

Dated April 27, 2019.

Respectfully submitted,

State Bar No.1012151
324 East Wisconsin Avenue, Suite 1410
Milwaukee, WI 53202
414-202-2300
jw@jaw-law.com

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 April 27, 2019.

Respectfully submitted,

State Bar No.1012151
324 East Wisconsin Avenue, Suite 1410
Milwaukee, WI 53202
414-202-2300
jw@jaw-law.com

