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STATE OF WISCONSIN
COURT OF APPEALS

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OF WISCONSIN**

DISTRICT I

Appeal Case No. 2019AP000193-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

TAURUS DONNELL RENFRO,

Defendant-Appellant.

On Appeal from a Written Decision and Final Order Denying
Post-Conviction Relief, Entered in the Milwaukee County
Circuit Court, the Honorable Jean M. Kies, Presiding

BRIEF OF PLAINTIFF-RESPONDENT

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BRIEF OF PLAINTIFF-RESPONDENT

ISSUES PRESENTED

1. Did Renfro preserve his right to challenge the constitutionality of Wis. Stat. 941.23(2) as applied to him?

This question was not presented to the trial court.

2. If so, did Renfro demonstrate his right to keep and bear arms for security and defense substantially outweighed the state's interest in prohibiting Renfro from carrying a concealed weapon in his motor vehicle? If so, did the defendant conceal his weapon because concealment was the only means under the circumstances to exercise his right to bear arms?

TRIAL COURT ANSWERED: In a decision and order denying a motion for post-conviction relief following Renfro's conviction at trial for carrying a concealed weapon in violation of Wis. Stat. §941.23(2), the court concluded that Renfro failed to make the requisite showing under *State v. Hamdan*, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785 to sustain a constitutional challenge to his conviction for carrying a concealed weapon.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat § (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. § (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On November 2nd, 2016, Taurus Renfro was charged with carrying a concealed weapon, a class A misdemeanor, contrary to Wis. Stat. 941.23(2). (R1:1) Prior to a jury trial, Renfro filed two motions: a Motion to Dismiss Based on Vagueness of the Statutory Regimes Related to Carrying a Concealed Weapon and a Motion to Dismiss for Lack of Sixth Amendment Speedy Trial. (See, R5:1-36, R13:1-8) Both motions were denied. (R46:1-22) Renfro also filed "Defendant's Proposed Non-Standard Jury Instructions" on November 10, 2017.¹ R.17:1-2; R.18:1. After litigating these issues, the trial court selected the standard jury instruction, Jury Instruction 1335 – Carrying a Concealed Weapon - §941.23. (R22:1-8)

¹ This motion included a request to modify Jury Instruction 1335 - Carrying a Concealed Weapon - to include both a Safe Transport instruction and an instruction that a handgun carried in a visible holster is not considered concealed, based on an Advisory Memorandum written by Wis. Atty. Gen. J.B. Van Hollen. (R17:1-2; R18:1)

On December 11th and 12th, 2017, Renfro received a trial before a jury of his peers. In presenting its case, the State of Wisconsin called two witnesses: City of Milwaukee Police Officer Tiffany Koch and City of Milwaukee Police Sgt. Timothy McAleer. Renfro called one other witness, Keith Brown, and testified in his own defense. The officers testified to the stop of Mr. Brown's vehicle and subsequent discovery of the firearm on the defendant's body. The officers testified that the neighborhood was a high-crime area (R54:105, 112, 122, 125, 131), and that the gun was initially hidden from their ordinary observation. R.54: 106, 115. Mr. Brown testified to driving the defendant to his new housing location (R54:140) and the defendant testified that he owned the firearm because his daughter had witnessed a shooting two months prior (R55:11), that he never really carried the gun outside his home (R55:11), and that he was carrying the gun on this day. (R55:13)

On December 12, 2017, the jury found Renfro guilty of carrying a concealed weapon. (R24:1) Renfro was sentenced to four days (time served) in the House of Corrections. R.27:1. On October 30, 2018, Renfro filed a motion for post-conviction relief seeking to vacate his conviction on grounds that the carrying a concealed weapon statute, as applied to the facts of this case, violated his right to keep and bear arms under *State v. Hamdan*, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785. (R26:1) On January 2, 2019, the circuit court denied the motion in a written decision and order. (R.40:1-4)

STANDARD OF REVIEW

The State and Renfro dispute whether the concealed carry statute, Wis. Stat. § 941.23(2) (2015-16),² is unconstitutional as applied to Renfro under Wisconsin Supreme Court decisions in *State v. Cole*, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 785, *State v. Fisher*, 2006 WI 44, 290 Wis. 2d 121, 125-26, 714 N.W.2d 495, and *Hamdan, supra*. These cases delineate how the constitutional protections of Wis. Const. Article I, Section 25 are to be reconciled with the concealed carry statute.

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise indicated.

Renfro proposes a question of law that is subject to independent appellate review. *Fisher*, 2006 WI 44 ¶¶3-4; *Hamdan*, 264 Wis. 2d 33, ¶ 19; *Cole*, 264 Wis. 2d 520, ¶ 10.

ARGUMENT

I. Renfro waived his opportunity to raise a *Hamdan* defense by not raising the issue prior to his jury trial.

Renfro asserts that the State infringed on his right to keep and bear arms guaranteed by Article 1, Section 25 of the Wisconsin Constitution when Renfro was charged with and convicted of carrying a concealed weapon in violation of Wis. Stat. § 941.23(2).

Wisconsin Constitution Article 1, Section 25 guarantees that, “[t]he people have the right to keep and bear arms for security, defense, hunting, recreation, or any other lawful purpose.”

Article 1, Section 25 of the Wisconsin Constitution “does not establish an unfettered right to bear arms;” and the State “retains the power to impose reasonable regulations on weapons, including a general prohibition on the carrying of concealed weapons.” *Hamdan*, 264 Wis. 2d 433, ¶41. The Court utilized a balancing test to analyze the reasonableness of the regulations imposed by the statute:

[O]ne must balance the conflicting rights of an individual to keep and bear arms for lawful purposes against the authority of the State to exercise its police power to protect the health, safety, and welfare of its citizens.

Id. at ¶45.

Importantly, the *Hamdan* court also explained the manner in which a defendant may raise a constitutional defense against a carrying a concealed weapon charge. The Court stated, “[t]he invocation of this possible defense must be raised by motion of the defendant before trial, and resolution of these legal questions must be made by the court prior to the trial.” *State v. Hamdan*, 264 Wis. 2d 433, ¶86.

Here, Renfro filed two pre-trial motions and proposed two non-standard jury instructions. (See, R.5:1-36, R.13:1-8, R.17:1-2, R. 18:1). However, Renfro did not ask the court to perform the *Hamdan* balancing test to determine if his “interest in exercising his right to keep and bear arms for purposes of security by carrying substantially outweighs the state’s interest in prohibiting him from carrying a concealed weapon in his vehicle.” *Fisher*, 2006 WI 44, ¶65.

By not raising a *Hamdan* defense prior to his jury trial and first raising this issue post-conviction, Renfro usurped the role of the jury as fact finder. According to *Hamdan*,

[t]he State can overcome a court-approved constitutional defense only if it asserts, and then proves at trial, that the defendant had an unlawful purpose at the time he or she carried the concealed weapon. Whether the defendant had an unlawful purpose, defined as an intent to use the weapon in furtherance of the commission of a crime, is a question of fact. The question should be submitted to the trier of fact along with separate, traditional instructions on the crime of carrying a concealed weapon.

Hamdan, 264 Wis. 2d 433, ¶87.

The Wisconsin Supreme Court is clear that a *Hamdan* defense must be raised pre-trial, and if successful, that the jury should determine if Renfro had an unlawful purpose at the time he carried a concealed weapon. Raising a *Hamdan* constitutional issue on appeal circumvents the role of the jury as fact finder and leads to questions about whether a remedy exists to cure the procedural deficiencies of the case. Here, the appropriate remedy would be to dismiss Renfro’s appeal for waiving the issue below.

In *Cole*, police seized two loaded weapons from the interior of a vehicle: one concealed inside the glove compartment and another concealed under the front seat of the vehicle. 2003 WI 112, ¶48. The Wisconsin Supreme Court found that Cole had “waived the opportunity to challenge the constitutionality of Wis. Stat. § 941.23 ‘as applied’” because he “pled guilty charges against him and did not raise any

constitutional challenge until his motion for post-conviction relief.” *Id.* at ¶46.

Similarly, Renfro did not raise a *Hamdan* constitutional challenge until his post-conviction brief. Admittedly, Renfro received a jury trial but since the jury was not given an opportunity to make a fact-finding decision on Renfro’s constitutional claims as outlined in *Hamdan*, the challenge is effectively waived.

II. Under the *Hamdan* balancing test, the State did not impair the Renfro’s right to carry a concealed weapon.

In *Cole*, although the Court found that Cole had waived the constitutional challenge by pleading guilty and not raising a *Hamdan* defense until his postconviction motion, the Court nonetheless performed a *Hamdan* balancing test and concluded that the “CCW statute is a reasonable exercise of the state’s inherent police powers” and that “the CCW statute is not unconstitutional either on its face or as applied to Cole.”³ *Cole*, 2003 WI 112, ¶50.

Should this court conclude that a *Hamdan* balancing test is required, it would answer two questions:

1. Under the circumstances, did Renfro’s interest in concealing the weapon to facilitate the exercise of his or her right to keep and bear arms substantially outweigh the State’s interest in enforcing the concealed weapons statute?
2. Did Renfro conceal his weapon because concealment was the only reasonable means under the circumstances to exercise his right to bear arms?

Hamdan, 2003 WI 113, ¶86.

³ The Court held that *Cole*’s claims that “he had been the victim of a brutal beating when was younger and did not feel safe in the neighborhood” and that there was an “substantiated threat of four young men nearby, being loud and profane in a high crime area” were not “imminent and specific enough for the defendant to invoke self-defense.” *Id.*, at ¶49, citing *State v. Nollie*, 2002 WI 4, 249 Wis. 2d 538, 638 N.W.2d 280.

A. Renfro’s interest in concealing the weapon did not outweigh the State’s interest in enforcing the concealed weapons statute.

In *Hamdan*, the defendant was a shopkeeper who was arrested and convicted for carrying a concealed weapon within his own store. The Court ruled that Hamdan had a “constitutional right to keep and bear arms for the lawful purpose of security at the time he carried his concealed weapon” and reversed the conviction. *Id.* at ¶83. But *Hamdan* created a narrow exception that allowed a store owner, who had repeatedly been a victim of crimes directly targeting his store, to carry a concealed weapon within his own store for protection. See, *Cole*, 2003 WI 112; *Fisher*, 2006 WI 44.

Renfro’s conviction stems from a far different fact scenario than was present in *Hamdan*. Renfro was convicted for carrying a concealed weapon in his pocket in the passenger seat of a car. Wisconsin courts have consistently declined to extend the *Hamdan* exception to automobiles. The Wisconsin Supreme Court has held that “while the State’s interest in prohibiting the carrying of a concealed weapons may generally be at its weakest in an individual’s home or privately-owned business, the State’s interest will generally be strong when a concealed weapon is being carried in a vehicle.” *Fisher*, 2006 WI 44, ¶29. [internal citations omitted].

In *Fisher*, the Court outlined the State’s interest in enforcing a concealed carry statute:

The objectives behind the concealed carry statutes as identified in *Hamdan* include that carrying a concealed weapon allows individuals to more easily act violent on impulses. Those objectives also include that other individuals, including law enforcement officers, should be placed on notice when they are dealing with someone who is carrying a dangerous weapon, along with the related concern that concealed weapons facilitate the commission of crime by creating the appearance of normality and catching people off guard. The court in *Hamdan* said that this notice objective is “perhaps the most significant.”

State v. Fisher, 2006 WI 44, ¶29, 290 Wis. 2d 121, 136, 714 N.W.2d 495, 502 [internal citations omitted].

The Court in *Fisher* further noted that “these objectives are highly salient when an individual carries a concealed weapon in a motor vehicle.” *Id.* at ¶30. The Court concluded that

because 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.

Id. at ¶44.

In order to show that extraordinary circumstances were present, Renfro must prove that “he...[was] actually confronted with a threat of bodily harm or death and that carrying a concealed weapon is necessary for protection from the threat.” *Id.* Renfro does not meet this burden.

Here, the evidence does not establish a need for Renfro to have carried a concealed weapon. The trial testimony does establish that the area Renfro was moving from was a high crime area. Officer Koch testified that the area where Renfro was moving from “has a high rate of violence and crime.” (R54:105) Officer McAleer testified about his “focus 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 a crime.” (R54:112, 122, 125) Keith Brown, the driver of the car in which Renfro was stopped, 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. (R54:140-141). Renfro testified that he had purchased the firearm because a shooting had occurred next door to his home a couple of months before, while his six-year old daughter was in front of his home (R55:11). He said on the day of his arrest, he had the gun with him—in a holster on his hip, covered by a coat (R55:17) or a sweatshirt (R55:19) in a manner such that it was not visible when he was seated in the car. (R55:15, 19) As to why he had the gun with him at the time of his arrest, Renfro offered only that he was moving, and

he “wasn’t going to leave it there.” (R55:20) He offered no reason for why he had the gun concealed.

That evidence is insufficient to demonstrate that Renfro was “actually confronted with a threat of bodily harm or death harm.” *Fisher*, 2006 WI 44, at ¶44. At best, Renfro’s testimony explains why he chose to buy a gun; it does not disclose “any threat at or near the time he arrested,” *see, Cole*, 2003 WI 112, ¶50, such that he had to be armed at that moment; neither does it explain why he had to carry the gun concealed.

Renfro offers two arguments to support his conclusion that “extraordinary circumstances” existed that justified the concealment of his weapon: 1) the transitory nature of his possession of the firearm, as he moved from one home to another; and 2) the reason he possessed the weapon, “for home security in reaction to a recent shooting next in the front yard to his home.” (Brief of Defendant-Appellant, p. 11.) Both arguments must fail.

First, Renfro points to no case law to support his contention that moving from a home in a high crime area justifies the same level of protection as Hamdan had: Hamdan owned a grocery store in a high crime neighborhood, which had been the site of past robberies and homicides, and he, himself had been a victim of crime at the very store where he carried a concealed weapon. *Hamdan*, 2003 WI 113, ¶82. Neither does Renfro offer any support that a gun in transit is not subject to the rules of carrying a concealed weapon, nor could he; both *Cole, supra*, and *Fischer, supra*, held that the concealed carry of a handgun in a car tips the balance toward the State’s need to *enforce* concealed carry laws.

Renfro’s second contention that a shooting that occurred next door two months earlier also fails to meet the extraordinary circumstances required for a *Hamdan* defense. Nothing here supports a finding that Renfro was under “any specific threat at the time or near the time he was arrested.” *Cole*, 2003 WI 112, ¶50. Neither is there any indication that Renfro was in imminent danger that would justify carrying a concealed weapon. *Id.* Whereas *Hamdan* had been the target of armed robberies previously, Renfro did not point to a specific

instance where he or a family member was an intended target of a crime. In fact, the shooting that Renfro's daughter may have witnessed several months before (R55:11-13) mitigates against Renfro's *Hamden* claim: that shooting demonstrates the need of the State to exercise its police powers to enforce gun laws. The remedy to fight gun violence is not more unlicensed citizens carrying guns, but rather strict enforcement of statutes that prohibit concealed weapons.

As a result of the State's high interest in regulating the concealment of firearms in vehicles, and Renfro's inability to demonstrate any extraordinary circumstances that justified the carrying of a concealed weapon on that day, Renfro has not satisfied the first question under *Hamdan*.

B. Concealment was not the only reasonable means for Renfro to carry a firearm.

Renfro did not satisfy the first question under *Hamdan* and therefore, an analysis of the second question is not required. However, an examination of the facts here demonstrates that Renfro did not and cannot show that concealment was the only reasonable means to carry the firearm.

In *State v. Walls*, the Court of Appeals held that a firearm "indiscernible from the ordinary observation of a person located outside and within the immediate vicinity of the vehicle," was concealed. *State v. Walls*, 190 Wis. 2d 65, 73, 526 N.W.2d 765, 768 (Ct. App. 1994). In the present case, having the handgun concealed was not the only reasonable action Renfro could have used to transport the weapon. There are a myriad of ways to transport a handgun without violating the carrying a concealed weapon statute. Renfro could have worn a shoulder holster; he could have transported his gun in the trunk; or he could have placed the gun on the dashboard above the window line. In fact, carrying the firearm in a more open and discernible fashion may have assisted the defendant in dissuading any action from unspecified and non-imminent threats that allegedly inspired his choice to carry a firearm that day. Judge Kies, in the decision and order denying Renfro's motion for post-conviction relief, wrote, "not only was [Renfro's] decision to carry a loaded handgun tucked into his

pants not ‘the only reasonable means’ to transport the firearm, it was perhaps the most reckless.” (R.40:4)

C. A reasonable way existed for Renfro to have carried a concealed gun: with a CCW license.

Ultimately, Renfro’s arguments must fail because—even if he felt a need to carry a weapon concealed—there was a method by which he could have done so legally, which he chose not to pursue. Renfro could have, but did not, obtain a CCW license under Wis. Stat. § 175.60; that license would have provided lawful authority for him to carry a concealed weapon in a car.

Finally, the Wisconsin Supreme Court explicitly set forth that reasonable means—not present here—by which a person may carry a weapon in a vehicle. In *State v. Grandberry*, 2018 WI 29, 380 Wis. 2d 541, 910 N.W.2d 214, the defendant was convicted of carrying a concealed weapon, contrary to Wis. Stat. § 941.23(2) after police discovered a loaded handgun in the defendant’s glove box. *Grandberry*, 2018 WI 29, ¶2. Grandberry sought to overturn the conviction, arguing that the Safe Transport statute, Wis. Stat. § 167.31(2)(b), precluded his conviction under § 941.23(2). The Court held that the two statutes were not in conflict, and that Grandberry could have complied with § 167.31(2)(b), § 941.23(2), or the both, either by obtaining a concealed carry license pursuant to Wis. Stat. § 175.60 or by placing his loaded handgun out of reach. *Grandberry*, 2018 WI 29, ¶37.

Grandberry did not involve a *Hamdan* balancing test, but it is instructive in determining how courts should answer the second *Hamden* question. The Court offered two reasonable means to carry a handgun in a car: (1) concealed, in conjunction with a CCW license, or (2) placed outside of reach. Renfro did not follow either of these reasonable recommendations. Renfro should have gotten a CCW license or he should have kept his loaded handgun out of reach, rather than tucking it into his waistband. Renfro’s argument fails on this second question because illegal concealment was not the only means to carry his firearm.

CONCLUSION

Taurus Renfro waived his opportunity to raise a *Hamdan* constitutional defense by not raising the issue prior to his jury trial. This usurped the ability of the jury to perform its fact-finding role in answering whether Renfro had a lawful purpose in carrying a concealed weapon. Renfro also failed to demonstrate that his right to keep and bear arms for the purpose of personal security substantially outweighed the state's interest in prohibiting Renfro from carrying a concealed weapon in his motor vehicle. Finally, Renfro cannot show that concealment was the only means under the circumstances to exercise his right to bear arms.

For these reasons, the State respectfully requests that the decision denying Renfro's post-conviction motion be affirmed.

Dated this _____ day of June, 2019.

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 3,611 words.

Date

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**CERTIFICATE OF COMPLIANCE
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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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