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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

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT

I. Renfro did not waive his constitutional right-to-bear-arms, “as-applied” defense.

The State begins its response brief by asserting that Renfro procedurally waived his constitutional right-to-bear-arms defense because he did not timely raise the issue by pretrial motion. (State’s Response Brief at 4-6). The State’s procedural objection lacks merit for several reasons.

First, the constitutional right to bear arms issue in this appeal was fully litigated and decided in the circuit court without any procedural objection from the State.¹ In *State v. Ndina*, 2009 WI 21, ¶ 38, 315 Wis.2d 653, 674-752, 761 N.W.2d 612, 622, this Court looked with disfavor at a late objection from the State, similarly first raised at the appeal stage, where the defendant had raised the constitutional issue of whether he was denied his right to a public trial in his postconviction motion:

[T]he circumstances in the present case make clear that this court should not spend time deciding this case either on the defendant's failure at trial to object timely . . . , or on the State's failure during the postconviction hearing to object to the defendant's lapse. The values protected by the forfeiture and waiver rules would not be protected in the instant case by applying a forfeiture or waiver rule to either the defendant or the State. *Here both parties failed to make objections in a timely manner, but they have fully briefed the important substantive issue.* This court should, under these circumstances, reach the merits of the issue presented....

(Emphasis added.)

¹ Indeed, the State’s response brief in the circuit court conceded that Renfro’s postconviction motion, which had raised the constitutional defense as the sole issue, was timely filed. The response brief noted that: “Pursuant to the briefing schedule established by the Court, this motion is timely as filed on or before December 11th, 2018.”

Second, as was the case here, the issue of whether a statute has been unconstitutionally applied to the circumstances of a particular case should be evaluated based upon the facts fully adduced at trial. This has been the approach adopted in cases in which the United States Supreme Court ruled upon “as-applied” constitutional challenges to criminal statutes underlying the petitioners’ convictions, where the challenges were raised following conviction. See, e.g., *Spence v. State of Washington*, 418 U.S. 405 (1974) (state’s flag misuse statute was unconstitutional as applied to college student where trial evidence showed that he hung a privately owned United States flag, upside down, with a peace symbol affixed, out of his window on private property, as a means of expressing his opinion that America stood for peace); *Norwell v. City of Cincinnati, Ohio*, 414 U.S. 14 (1973) (trial evidence showed that defendant voiced an objection, without abusive language or fighting words, to what he believed was a highly questionable detention of him by a police officer, which was constitutionally protected speech and was not punishable as disorderly conduct).

Third, while the Court majority in *State v. Hamdan*, stated that a defendant “must” file a pretrial motion to raise the constitutional right-to-bear-arms defense, it also acknowledged that this pronouncement was intended only to “provide *some guidance* to counsel and the courts until the legislature takes further action.” (Emphasis added.) 2003 WI 113, ¶ 89, 264 Wis.2d 433, 491, 665 N.W.2d 785, 813. The Court was not promulgating a criminal procedure rule. Moreover, the legislature has not enacted such a rule.²

² A valid and enforceable waiver rule relating to the constitutional right-to-bear-arms defense could be created, but only after appropriate notice under the Court’s rule-making authority, pursuant to Wis. Stats. § 751.12, which provides in pertinent part: **Rules of pleading and practice.**

(1) The state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the same and of promoting the speedy determination of litigation upon its merits. The

Finally, the only criminal procedure waiver rule on the books relating to pretrial motions is totally silent about “as-applied” constitutional defenses, as opposed to facial challenges. See, Wis. Stats. § 971.31 (2) which provides in pertinent part:

[D]efenses and objections based on defects in the institution of the proceedings, insufficiency of the complaint, information or indictment, *invalidity in whole or in part of the statute on which the prosecution is founded*, or the use of illegal means to secure evidence shall be raised before trial by motion *or be deemed waived*.

rules shall not abridge, enlarge, or modify the substantive rights of any litigant. The effective dates for all rules adopted by the court shall be January 1 or July 1. A rule shall not become effective until 60 days after its adoption. All rules promulgated under this section shall be printed by the state printer and paid for out of the state treasury, and the court shall direct the rules to be distributed as it considers proper.

(2) All statutes relating to pleading, practice, and procedure may be modified or suspended by rules promulgated under this section. No rule modifying or suspending statutes relating to pleading, practice, and procedure may be adopted until the court has held a public hearing with reference to the rule.

(3) Notice of public hearings shall be given by publication of a class 3 notice, under ch. 985, the expense of the publication to be paid out of the state treasury. Notice shall also be given in an official publication of the State Bar of Wisconsin. The notice to be published not more than 60 days nor less than 30 days before the date of hearing shall include, at a minimum, the time, date, and location of the hearing and a summary of the proposed rules, including changes, if any, in existing rules, that are the subject of the hearing. The State Bar of Wisconsin shall not charge the state treasury for publication of this notice. The full text of the proposed rules, including changes, if any, in existing rules, shall be placed on the Internet site maintained by the director of state courts for the supreme court.

(4) This section shall not abridge the right of the legislature to enact, modify, or repeal statutes or rules relating to pleading, practice, or procedure.

(Emphasis added.)

Accordingly, the State's waiver argument, just now crafted for this appeal, was itself waived; and the State also neglected to point out that it was relying on the Supreme Court's "guidance," rather than an officially promulgated, or legislated, waiver rule.

II. Under the specific circumstances of this case, where Renfro was moving his firearm from his old, high crime--area residence where his daughter had recently been endangered by a shooting, to his new, safer-area home, and he promptly notified the traffic stop police that he possessed the firearm, it was unreasonable for the State to impair Renfro's constitutional right to bear arms by punishing him for carrying a concealed weapon.

It was uncontroverted at Renfro's trial that he was in possession of a firearm for security and defense.³ But the circuit court completely omitted the fact of most critical importance: 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 was using a vehicle for transport at a vulnerable time and place to transfer the firearm from one constitutionally-protected location (his old home) to another constitutionally-protected site (his new residence) at night in a high-crime neighborhood.

The circuit court erred in its constitutional analysis when it pinned its ruling on a misstatement of the factual

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.).

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.

State v. Hamdan, 2003 WI 113, 264 Wis.2d 433, 665 N.W.2d 785 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 ¶168. (Emphasis added.)

The State’s Reponse Brief, while mentioning these facts in light of *Hamdan*, selectively downplayed them in its discussion of the appropriate weighing process which the circuit court had neglected to perform. (State’s Response Brief at 6-11).

First, citing *State v. Fisher*, 2006 WI 44, 290 Wis.2d 121, 714 N.W.2d 495 throughout its argument, and *State v. Walls*, 190 Wis.2d 65, 526 N.W.2d 765 (Ct. App. 1994) (at 10) (which now has much less precedential force, given the more recent cases that have had to reconcile the conflicts created by Wis. Const., Art. I, Sec. 25), the brief acknowledged (at 7) that the State has a major interest in providing police officers with adequate notice that a person possesses a concealed firearm. However, the State ignored the fact that immediately after Keith Brown’s vehicle was

stopped for a defective taillight that Renfro advised the officers that he was in possession of the firearm in the front of his waistband. Renfro affirmatively honored that State interest. His verbal notice actually was more effective and timely than the notice requirement set forth in Wis. Stat. 175.60(2g)(b).

Second, the State (at 9) ignores the material difference between the facts in *State v. Cole*, 2003 WI 112, 264 Wis.2d 520, 665 N.W.2d 328 and *Fisher*, where the defendants were not moving the firearm from a prior home location to a new one, and the proven facts in this case.

Finally, the State proffers an objectively unfounded point that Renfro could have obtained a CCW license instead under Wis. Stat. 175.60(2g), as a more reasonable alternative to his attempt to carry out a brief, home-to-home transport (for a relatively short distance on Milwaukee's northside). The cost of such a license, the time needed to get an application processed, and the even greater delays posed by having to go through rigorous firearms education and training, did not provide Renfro with a reasonable alternative to his brief conveyance of his home-security firearm from one protected location to another.

CONCLUSION

Renfro's right to bear arms involved his 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. That presents 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 August 2, 2019

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,994 words.

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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.

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