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In the Supreme Court of Wisconsin

State of Wisconsin,

Plaintiff-Respondent

v.

***Brian Grandberry*, Defendant-Appellant-Petitioner**

Appeal No. 2016AP000173 - CR

Appeal from the Judgment of the Milwaukee County Circuit Court, the Hon. Janet Prostasiewicz, Presiding

Brief of Wisconsin Carry, Inc., *Amicus Curiae*

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Proceedings Below

Petitioner Brian Grandberry ("Grandberry") was convicted by the Circuit Court of Milwaukee County for carrying a concealed weapon in violation of Wis.Stats. § 941.23(2) (the "CCW Statute"), based on having a loaded handgun in the glove compartment of his vehicle. His conviction was affirmed by a one-judge panel of the Court of Appeals. This Court granted review. On March 23, 2017, this Court granted *amicus curiae* Wisconsin Carry, Inc. ("WCI") leave to file a non-party brief.

Argument

A central issue in this case is whether current law prohibits a law-abiding person from possessing a loaded handgun in an automobile. The State contends that it does – if the handgun is "concealed" as that term is used in the CCW Statute. Grandberry argued in both courts below that it does not. This Brief will concentrate on this issue.

History of Firearms Carry in Wisconsin

In order to understand present law, it is necessary to understand the law as it has evolved. WCI will therefore provide a history of the CCW Statute and its interplay with other pertinent statutes. For most of Wisconsin's history, it has been illegal for citizens to carry

concealed weapons. Laws of 1872, § 1, Ch. 7.[1] From 1955 until 2011, Wis.Stats. § 941.23 provided, "Any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor."[2]

On the other hand, Wisconsin never criminalized openly-carried weapons. It thus became important what it meant for a firearm (or other weapon) to be "concealed."

This Court ruled in 1930 that the word "concealed" means "not to be discernible by ordinary observation." *Mularkey v. State,* 201 Wis. 429, 432 (1930).

From *Mularkey* and its progeny developed a three-part test for applying the CCW Statute, that a weapon is carried concealed if 1) the defendant has a dangerous weapon on his person or within his reach; 2) the defendant was aware of the presence of the weapon; and 3) the weapon was concealed, or hidden from ordinary view. *State v. Asfoor,* 75 Wis.2d 411, 433-34 (1977); *State v. Fry,* 131 Wis.2d 153, 182 (1986). Unique to automobiles came the doctrine that the concealment test is applied from the perspective of a person ***outside a vehicle as the vehicle is moving down the street.*** *State v. Walls,* 190 Wis.2d 65 (Ct.App. 1994). Thus, a firearm lying openly on the front

[1] "Wisconsin's Concealed Carry Law: Protecting Persons and Property", by Mark R. Hinkston, *Wisconsin Lawyer,* July 2012, Vol. 85, No. 7.
[2] *Id.*

seat of a car was "concealed" because a pedestrian could not observe the gun as the car sped past. *Id.* With the *Walls* decision, it was essentially impossible to have a weapon in a modern automobile without the weapon being concealed. But *Walls* also created a safe harbor, as will be seen below.

The History of Restrictions on Vehicle Transport of Weapons

Developing somewhat independently from the CCW Statute was the Transport Restriction Statute. Prior to 2011, Wis.Stats. § 167.31(2)(b) provided, "[N]o person may place, possess or transport a firearm, bow or crossbow in or on a vehicle, unless the firearm is unloaded and encased or unless the bow or crossbow is unstrung or is enclosed in a carrying case." That is, separate from the CCW Statute, the Transport Restriction Statute banned carrying a firearm in a vehicle unless the firearm was both unloaded and encased.

Tension Between the CCW and Transport Restriction Statutes

There was (and remains) a tension between the CCW Statute and the Transport Restriction Statute. A person seeking to lawfully transport a weapon (a necessary precursor to most hunting or other sport shooting activities) had to encase the weapon prior to placing it in the vehicle (in order to comply with the Transport Restriction Statute). But the act of encasing a weapon was to conceal it, contrary to CCW Statute.

The Court of Appeals encountered and dealt with this tension in *Walls*:

> We are mindful that there is a long tradition of widespread lawful gun ownership by private individuals in this country. Thus, our conclusion in this case in no way limits the *lawful* placement, possession or transportation of, unloaded (or unstrung) and encased, firearms, bows, or crossbows in vehicles as permitted by § 167.32(b)(b), Stats....

Walls, 190 Wis.2d at 69, FN 2 [emphasis in original].

Thus, the case that gave us the onerous test (of the outside the vehicle observer) also gave a safe harbor for those who seek to transport weapons. Compliance with the Transport Restriction Statute constitutes compliance with the CCW Statute. This *Walls* Safe Harbor is central to the resolution of the present case.

The 2011 Overhaul of Weapons Law

The final historic developments germane to the present case were 2011 Wis. Act 35 and 2011 Wis. Act 51, the former of which was a wholesale re-write of Wisconsin weapon law. There are two concepts in particular from Act 35 that impact the present case. First, Act 35 created a mechanism whereby citizens can obtain a license to carry certain weapons concealed. Wis.Stats. § 175.60(1)(j) (2011). Licensees (i.e., those with concealed weapons licenses) are exempt from the prohibition against carrying a concealed weapon, provided the weapon they are carrying is a handgun, electric weapon, or billy

club). Wis.Stats. § 175.60(2)(d) (2016). It still is a crime even for a Licensee to carry any other type of weapon concealed, including long guns, bows, or cross bows.

The second germane provision of Act 35 is that loosened the restrictions of the Transport Restriction Statute. Act 35 amended Wis.Stats. § 167.31(2)(b) to say:[3]

> [N]o person may place, possess, or transport a firearm, bow, or crossbow in or on a vehicle, unless the firearm is a handgun, as defined in s. 175.60(1)(bm), unless the firearm is unloaded and encased, or unless the bow or crossbow is unstrung or is enclosed in a carrying case.

2011 Wis. Act 35, Section 31. Thus, since the passage of Act 35, there no longer is a restriction against transporting a loaded handgun in a vehicle.

Later in 2011, the legislature once again amended Wis.Stats. § 167.31(2)(b), this time to say:[4]

> [N]o person may place, possess, or transport a firearm, bow, or crossbow in or on a vehicle, unless ~~the~~ one of the following applies:
> 1. The firearm is unloaded or is a handgun ~~as defined in s. 175.60(1)(bm), unless the firearm is unloaded and encased, or unless the.~~
> 2. The bow ~~or crossbow is unstrung or is enclosed in a carrying case~~ does not have an arrow nocked.
> 3. The crossbow is not cocked or is unloaded and enclosed in a carrying case.

[3] Language inserted by Act 35 is in underlined font.
[4] Language inserted by Act 51 is in underlined font and language deleted by Act 51 is in ~~strikethrough font.~~

2011 Wis. Act 51, Sections 11-12. Thus, the Transport Restriction Statute was relaxed even further to allow for, in addition to transport of loaded handguns, transport of unloaded long guns and bows -- with no case requirement (except for cocked crossbows).

Notably, there remains tension between the CCW Statute and the Transport Restriction Statute, even for a Licensee. A cocked crossbow, for example, must be encased before putting it in a car (in order to comply with the Transport Restriction Statute), but to do so is to conceal it (in violation of the CCW Statute).

The legislature is presumed to know the law, and to know the legal effect of its actions. *Schill v. Wisconsin Rapids School District,* 2010 WI 86, ¶ 103, 327 Wis.2d 572, 786 N.W.2d 177 (S.Ct. 2010). It must therefore be presumed that the legislature was aware of the *Walls* Safe Harbor when it passed Acts 35 and 51.

The legislature took no steps to abrogate either the "outside the vehicle" test for concealment or the *Walls* Safe Harbor. Presumably, therefore, the legislature was content for courts to apply the onerous "outside the vehicle" test ***provided*** that the *Walls* Safe Harbor continued to apply as well.

Application of *Walls* to the Present Case

With the foregoing history of weapons law in Wisconsin, the facts of the present case may be applied to current law.[5] Assuming that the elements of the CCW Statute are otherwise present in this case, it becomes necessary to consider whether the *Walls* Safe Harbor applies. The weapon at issue was a handgun and was being transported within a vehicle.

Grandberry's placement of the loaded handgun into the vehicle was lawful under the Transport Restriction Statute. Grandberry therefore qualifies for the *Walls* Safe Harbor test, and Grandberry's transportation of the handgun did not constitute a violation of the CCW Statute.

The Court of Appeals' Decision

The Court of Appeals incorrectly recited the changes to the Transport Restriction Statute made by Act 51 as the only ones made in 2011, implying that Act 51 was necessary to "fix" problems created by Act 35 when it came to licensees transporting loaded handguns in vehicles:

> Before the change [in Act 51], the [Transport Restriction] statute prohibited a person from placing, possessing, or transporting a firearm unless it was unloaded and encased. Without this change, a person

[5] Unless otherwise stated, the remainder of this Brief will reference the 2016 Statutes, which also were in effect on the operative date of the events of this case.

> licensed under Wis.Stat. § 175.60 would not have been able to carry a loaded concealed weapon within a vehicle even after obtaining a CCW permit.

372 Wis.2d 834, 890 N.W.2d 49, ¶ 8. The Court of Appeals overlooked the changes made in Section 31 of Act 35, which had indeed made a provision for the transport of loaded handguns.

The only changes made to the Transport Restriction Statute by Act 51 (upon which the Court of Appeals relied) apply to ***weapons not covered by CCW licenses***. That is, while Act 51 loosened restrictions on the transportation of long guns and bows, neither of those types of weapons are legally concealable by a Licensee. The only types of weapons legally concealable by Licensees and that ever have been restricted in the Transport Restriction Statute are handguns. Transport of handguns (loaded or otherwise) was de-restricted by Act 35, and Act 51 did nothing to change that.

The Court of Appeals concluded (incorrectly) that because Act 51 was a hasty "fix," it was not really part of a comprehensive re-write of policy regarding weapons. In reality, though, Act 35 accomplished what the Court of Appeals ascribed to Act 51. Act 35 was a comprehensive re-write of policy, done with full knowledge of *Walls* (and the intention for all of *Walls* to continue to apply).

The Court of Appeals compounded its error by then concluding that the Transport Restriction Statute applies only to Licensees:

> Although the statute is not a model of clarity in explaining who exactly falls within its ambit, Wis.Stat. § 167.31 does make a specific reference to Wis.Stat. § 175.60, which is the detailed statute setting out the requirements to obtain a concealed carry permit. (*See* § 167.31(cm). Thus, § 167.31(2)(b) only applies to those who have passed the rigorous conditions for obtaining a CCW permit. Grandberry did not have a CCW permit, and therefore, the statute regulating the transport of firearms does not apply to him.

372 Wis.2d 834, ¶9.

There are multiple issues with this line of reasoning by the Court of Appeals. First, to the extent any of it was based on a conclusion that the reach of the Transport Restriction Statute is ambiguous, such conclusion is inconsistent with the wording of the Statute. The Transport Restriction Statute clearly says that "no person" may transport a weapon in the manners provided. The Court of Appeals fails to elaborate on why it is "not a model of clarity who exactly falls within its ambit." "No person" means "no person." That is, ***everybody*** falls within the Statute's ambit and no one may violate it.

If the plain meaning of a statute is clear, a court need not look to rules of statutory construction or other extrinsic aids. Instead, a court should simply apply the clear meaning of the statute to the facts before it. *Wisconsin Carry, Inc. v. City of Madison,* 2017 WI 19, ¶

18. It was therefore error for the Court of Appeals to try to read more into the statute, in essence substituting "Licensees" for "no person."

Second, the Court of Appeals' conclusion is illogical. Under the Court of Appeals' reasoning, if the Transport Restriction Statute applies only to Licensees, then non-Licensees are not subject to those restrictions. That is, Licensees (whom the Court of Appeals acknowledges have undergone "rigorous conditions" to obtain their licenses) are prohibited from carrying loaded long guns and bows with arrows nocked, but non-Licensees are not so restricted.

If the legislature intended this result, surely it would have given ***some*** indication of its intention to create such a counterintuitive system, which places more restrictions on people who have been heavily vetted and no restrictions on people who have not been vetted at all.

Third, because of the "ambiguity" the Court of Appeals found in the ambit of the Transport Restriction Statute, the Court of Appeals sought elsewhere to find an indication of legislative intent. The definitions section of the Transport Restriction Statute borrows one definition from the licensing statute (Wis.Stats. § 175.60), that of a "handgun." Wis.Stats. § 167.31(1)(cm). Based solely on this single cross-referenced definition, the Court of Appeals concludes that the

legislature intended for the Transport Restriction Statute to apply only to Licensees.

The Transport Restriction Statute is the only provision in Wisconsin law that prohibits carrying loaded long guns in vehicles. If the Transport Restriction Statute applies only to Licensees, as the Court of Appeals concluded, then only Licensees are prohibited from carrying loaded long guns in vehicles. Non-Licensees are therefore free to transport loaded long guns. The absurdity of this logical extension of the Court of Appeals' decision is apparent.

As further support for its conclusion, the Court of Appeals in a footnote observes, "Further, to adopt Grandberry's position would be to practically abrogate the CCW statute and make almost all loaded guns found in vehicles legal. This would be contrary to the legislative purpose behind the CCW permit." 372 Wis.2d 834, FN 3. This statement is not true. All loaded handguns found in vehicles are now legal. All loaded long guns found in (moving)[6] vehicles remain illegal.

Moreover, the Court of Appeals' footnote reads more like a to policy argument than a legal one. The Court of Appeals dismisses a perfectly reasonable understanding of the interplay between the CCW

[6] Wis.Stats. § 167.31(4)(ag) provides an exception for stationary vehicles.

Statute and the Transport Restriction Statute because the Court of Appeals refused to accept that the legislature intended to decriminalize carrying a loaded handgun in a vehicle, an intention that fits well within the overhauled regulatory scheme of Act 35.

The CCW Statute was extensively modified in Act 35. The legislature decriminalized concealed carry in a person's home or place of business. Just 14 years ago, this Court was called upon to decide if it was ***constitutional*** to criminalize carrying concealed in a place of business. *State v. Hamdan,* 2003 WI 113; 264 Wis.2d 433; 665 N.W.2d 785 (2003). Now, the same behavior no longer is even codified as a crime. It is perfectly reasonable that the legislature also would have decriminalized carrying a concealed handgun in a vehicle.

The Rule of Lenity Should Apply

As a final note, the rule of lenity compels reversal in this case. Under the rule of lenity, if a criminal statute is ambiguous, it must be resolved in favor of the defendant. *State v. Cole,* 2003 WI 59, ¶ 67, 262 Wis.2d 167, 663 N.W.2d 700 (S.Ct. 2003). It is a canon of strict construction, ensuring fair warning by applying criminal statutes only to conduct clearly covered. *State v. Guarnero,* 2015 WI 72, ¶ 26, 363 Wis.2d 857, 867 N.W.2d 400 (S.Ct. 2015).

If the CCW Statute applies in the present case, Grandberry was not given fair warning that transporting loaded handguns in vehicles

remains criminal when such handguns are "concealed." There seems to be no debate that handguns may be transported in vehicles if not "concealed." Moreover, under the *Walls* Safe Harbor, Wisconsinites have been told they need not worry about the CCW Statute if they are in compliance with the Transport Restriction Statute.

In addition, the Legislative Council published a memo stating that transport of loaded handguns would be legal under the Senate bill that became Act 35.[7] Wisconsin Legislative Council Amendment Memo, 2011 Senate Bill 93, June 15, 2011, p. 16. A copy of the Memo is attached to this Brief as Exhibit 1 for the Court's convenience.

With both the *Walls* Safe Harbor and the Legislative Council Memo, citizens can be expected to believe they may carry loaded handguns in vehicles without regard to whether a handgun is "concealed." Prosecuting people under these conditions fails to give them fair warning of what conduct is prohibited. Under the rule of lenity, such prosecutions should not be permitted to proceed.

[7] By introducing the comments of the Legislative Council into this Brief, WCI does not intend to imply that Legislative Council comments on bills are appropriate references as to the meaning of those bills. In the context of whether a statute gives a person fair warning, however, governmental publications about the statute are appropriately consulted.

Conclusion

Under the *Walls* Safe Harbor, it no longer is a crime to carry a loaded handgun in a vehicle, regardless of whether the handgun otherwise fits the elements of the CCW Statute. In addition, Wisconsinites have not been given fair warning that it continues to be a crime to carry a "concealed" handgun in a vehicle. Under the rule of lenity, Grandberry's conviction should be reversed.

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Certificate of Service

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OTHER CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,968 words.

I certify that the text of the electronic copy of this Brief is identical to the text of the paper copy of this Brief.

/s/ John R. Monroe
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