COURT OF APPEALS
DECISION
DATED AND FILED

November 29, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP173-CR **Cir. Ct. No. 2014CM4581**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN GRANDBERRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JANET C. PROTASIEWICZ, Judge. *Affirmed*.

¶1 CURLEY, P.J.[1] Brian Grandberry appeals his conviction for carrying a concealed weapon (CCW) contrary to WIS. STAT. § 941.23(2) and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14).

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

939.51(3)(a) entered after a court trial on stipulated facts. Grandberry argues that: (1) there was insufficient evidence to convict him of CCW as he was in full compliance with the safe transport statute found in WIS. STAT. § 167.31; and (2) the CCW statute (§ 941.23) was void for vagueness as applied to a person like him, as he was in compliance with the safe transport statute.

¶2 The stipulated facts are sufficient to convict Grandberry of CCW as the stipulated facts support the three elements of the CCW statute. Likewise, the CCW statute is not void for vagueness as to him because circumstantial evidence supports a conclusion that he knew he was prohibited from carrying a concealed and loaded handgun in his glove compartment, evidenced by the fact he lied to the police when he told the police that he had a CCW permit and then admitted that he took a class to get a permit but failed to actually apply for it. Thus, this court affirms the conviction.

BACKGROUND

¶3 According to the complaint, the facts of which were stipulated to by the parties, Grandberry was stopped by the police while driving a car in Milwaukee on November 9, 2014. One of the officers who stopped him asked him if he had any firearms in the car and Grandberry responded that he had a gun in the glove compartment. The officer then asked Grandberry if he had a valid CCW permit to carry a gun and Grandberry said that he did. The officers checked the database and discovered that he did not have a valid CCW permit. The officer then opened the glove compartment and discovered a loaded Hi-Point, 45 cal. semi-automatic pistol. While being conveyed to the station, Grandberry volunteered that he owned the gun and that he took the CCW class but never

actually got a permit. The police also determined that Grandberry was not a peace officer.

ANALYSIS

1. *There was sufficient evidence to convict Grandberry of CCW.*

¶4 Grandberry argues that the evidence was insufficient. The application of a statute to conceded facts is a question of law we review *de novo*. ***Crawford ex rel. Goodyear v. Care Concepts, Inc.***, 2000 WI App 59, ¶4, 233 Wis. 2d 609, 608 N.W.2d 694.

¶5 CCW, as defined in WIS. STAT. § 941.23 of the Criminal Code of Wisconsin, is committed by any person who carries a concealed and dangerous weapon. As explained in WIS JI—CRIMINAL 1335, the three elements of the crime the State must prove are:

> 1. The defendant carried a dangerous weapon. 'Carried' means went armed with.
>
> 2. The defendant was aware of the presence of the weapon.
>
> 3. The weapon was concealed.

(internal footnote omitted). The jury instruction further explains that "[t]he phrase 'went armed' means that the weapon must have been either on the defendant's person or that the weapon must have been within the defendant's reach," "'[d]angerous weapon' means any firearm, whether loaded or unloaded," and "'[c]oncealed' means hidden from ordinary observation." ***Id.*** (footnotes omitted; formatting altered).

¶6 Here, the stipulated facts support the three elements of the crime of CCW. Grandberry does not dispute that his loaded pistol falls within the definition of a dangerous weapon. Grandberry does, however, argue that he did not "carry" a concealed weapon because he was following the dictates of WIS. STAT. § 167.31(2)(b), which reads:

> Except as provided in sub. (4), no person may place, possess, or transport a firearm, bow, or crossbow in or on a vehicle, unless one of the following applies:
>
> 1. The firearm is unloaded or is a handgun.

He submits that language found in ***State v. Walls***, 190 Wis. 2d 65, 526 N.W.2d 765 (Ct. App. 1994), supports his position. There, in a footnote, the court stated:

> 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 § 167.31(2)(b), … which provides in part:
>
> > (b) Except as provided in sub. (4), no 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.[2]

Walls, 190 Wis. 2d at 69 n.2 (internal citation omitted).

¶7 Inasmuch as his pistol was a handgun, he submits that he cannot be found guilty of CCW because he was not carrying a concealed weapon, but rather was transporting it pursuant to WIS. STAT. § 167.31(2)(b). He is wrong.

[2] This is an older version of the statute. Grandberry glosses over the words "lawful placement, possession, or transportation" when claiming this footnote supports his position.

¶8 First, one needs to look at the legislative history of WIS. STAT. § 167.31. The current version of § 167.31(2)(b) was created in November of 2011 through 2011 Wis. Act 51, § 11, to account for the changes that needed to be made after 2011 Wis. Act 35 was passed and created the right of Wisconsin citizens to obtain licenses to carry concealed weapons. Before the change, the statute prohibited a person from placing, possessing, or transporting a firearm unless it was unloaded and encased. *See, e.g.*, WIS. STAT. § 167.31 (2009-10). Without this change, a person 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.

¶9 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. [3]

¶10 Having decided that WIS. STAT. § 167.31(2)(b) does not apply to Grandberry, we look to see if the remaining elements have been met by the stipulated facts.

[3] 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.

¶11 In the case of ***State v. Fry***, 131 Wis. 2d 153, 170, 388 N.W.2d (1986), *overruled on other grounds by* ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97, our supreme court determined that a firearm found in Fry's locked glove compartment was "within his reach," establishing the element of CCW that Fry carried a weapon because he "went armed." ***Fry***, 131 Wis. 2d at 182-83. Grandberry's pistol was in an unlocked glove compartment. Thus, he "went armed" because the gun was within his reach. Finally, the fact that Grandberry's pistol was within a glove compartment meets the test for "concealment." Thus, all three elements of the crime of CCW can be found in the stipulated facts.

2. *The CCW statute was not void for vagueness as applied to Grandberry.*

¶12 Grandberry claims that the CCW statute is void for vagueness because it conflicts with the safe transport statute. He submits that he did not have fair notice of the CCW statute's prohibitions.

¶13 In his brief, he argues that: "If conduct that is prohibited by the CCW statute also appears to be permitted by the safe transport statute, then an ordinary person like Grandberry would not have fair notice of the CCW statute's prohibitions with respect to the transportation of firearms in vehicles." Thus, he submits this court should conclude that the CCW statute is void for vagueness.

¶14 We review a statute under the presumption that it is constitutional. ***State v. Hansford***, 219 Wis. 2d 226, 234, 580 N.W.2d 171. Accordingly, the party raising the constitutional claim must prove that the challenged statute is unconstitutional beyond a reasonable doubt. ***Id.*** We interpret Grandberry's challenge to WIS. STAT. § 941.23 as being unconstitutional as applied to him.

¶15 "[T]he analysis that is employed for an as-applied challenge contains no presumption in regard to whether the statute was applied in a constitutionally sufficient manner." ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶49, 333 Wis. 2d 273, 300, 797 N.W. 2d 854. "Rather, the analysis of an as-applied challenge is determined by the constitutional right that is alleged to have been affected by the application of the statute. Stated otherwise, the analysis differs from case to case, depending on the constitutional right at issue." ***Id.***

¶16 In an as-applied challenge, we assess the merits of the challenge by considering the facts of the particular case in front of us, "not hypothetical facts in other situations." ***State v. Hamdan***, 2003 WI 113, ¶43, 264 Wis. 2d 433, 665 N.W.2d 785. "Under such a challenge, the challenger must show that his or her constitutional rights were actually violated." ***State v. Wood***, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63. If a challenger successfully shows that such a violation occurred, the operation of the law is void as to the party asserting the claim. *See* ***id.***

> Before a court can invalidate a criminal statute because of vagueness, it must conclude that, because of some ambiguity or uncertainty in the gross outlines of the conduct prohibited by the statute, persons of ordinary intelligence do not have fair notice of the prohibition and those who enforce the laws and adjudicate guilt lack objective standards and may operate arbitrarily.

State v. Wickstrom, 118 Wis. 2d 339, 351-52, 348 N.W.2d 183 (Ct. App. 1984).

¶17 The vagueness test is concerned with whether the statute sufficiently warns persons "wishing to obey the law that [their] conduct comes near the proscribed area." ***State v. Tronca***, 84 Wis. 2d 68, 86, 267 N.W.2d 216 (1978). The challenged statute, however, "need not define with absolute clarity and precision what is and what is not unlawful conduct." ***State v. Hurd***, 135 Wis. 2d

266, 272, 400 N.W.2d 42 (Ct. App. 1986). "A statute is not void for vagueness simply because 'there may exist particular instances of conduct the legal or illegal nature of which may not be ascertainable with ease.'" ***Id.*** (citation omitted).

¶18 Grandberry's challenge to the constitutionality of the CCW statute fails. Grandberry knew he was required to have a CCW permit to put a loaded gun in his glove compartment. This can be deduced from the fact that he originally lied when he told the police that he had a CCW permit. Later, he volunteered that he took a class to obtain a CCW permit but he never actually got one. His actions and admissions strongly suggest that he was aware that he needed a CCW permit in order to lawfully keep a loaded pistol in his glove compartment. Had Granberry really believed that the safe transport law allowed him to carry a loaded gun in his glove compartment, he would have had no reason to lie about having a CCW permit. Circumstantial evidence can support a criminal conviction and may be as strong or stronger than direct evidence. *See, e.g.,* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

¶19 In sum, Grandberry was well aware of the fact he needed a CCW permit in order to take advantage of the safe transport statute, and given his knowledge of the law, his argument that the CCW statute was void for vagueness fails.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.