COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2708-CR **Cir. Ct. No. 2003CM138**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MICHAEL P. FITZPATRICK,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pepin County: ROBERT W. WING, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Michael Fitzpatrick appeals a judgment convicting him of illegal shining of deer, contrary to WIS. STAT. § 29.314(3)(a). He argues the statute violates his right to bear arms under the Wisconsin Constitution. He

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

further argues the circuit court erred by refusing to allow him to argue to the jury that an unloaded, cased rifle is not a firearm for purposes of the statute. We affirm the judgment.

BACKGROUND

¶2 On November 23, 2003, at approximately 5:15 p.m., Warden William Wrasse observed a light shining from the passenger side of what he later identified to be Fitzpatrick's vehicle. Wrasse stopped the vehicle for shining from the vehicle into a field. Wrasse cited both Fitzpatrick and his passenger for shining deer while in possession of a firearm. Wrasse seized two spotlights from the vehicle as well as two hunting rifles that were unloaded and cased.

¶3 Before trial, the State filed a motion in limine to prevent Fitzpatrick from arguing to the jury that an unloaded, properly cased rifle is not a firearm under WIS. STAT. § 29.314(3)(a). The State also sought to prevent Fitzpatrick from arguing that he was transporting a rifle for a lawful purpose. The court granted the motion.

¶4 The case proceeded to a jury trial. After presentation of the evidence, Fitzpatrick moved for a directed verdict arguing the statute was unconstitutional because it interfered with his right to bear arms. The court denied the motion. The jury convicted Fitzpatrick of shining deer while in possession of a firearm.

DISCUSSION

¶5 This case involves interpretation of WIS. STAT. § 29.314 and the constitutional right to keep and bear arms. Interpretation of the state constitution and of a state statute are questions of law this court decides de novo, benefiting

from the analysis of the circuit court. ***State v. Gonzales***, 2002 WI 59, ¶10, 253 Wis. 2d 134, 645 N.W.2d 264.

¶6 WISCONSIN STAT. § 29.314(4)(a) states: "No person may use or possess with intent to use a light for shining wild animals while the person is hunting or in possession of a firearm, bow and arrow or crossbow." Fitzpatrick argues the statute denies him his right under art. I, § 25 of the Wisconsin Constitution "to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."

¶7 The supreme court discussed the right to bear arms in the context of a statute limiting that right in ***State v. Hamdan***, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785. In that case, Hamdan was charged with carrying a concealed firearm, in violation of WIS. STAT. § 941.23. ***Id.***, ¶4. Hamdan argued the statute interfered with his constitutional right to keep and bear arms for security or defense purposes. ***Id.***, ¶5, n.2. The supreme court agreed with Hamdan and determined his conviction under the statute was improper. ***Id.***, ¶6. Fitzpatrick argues his situation is similar in that he was carrying the rifle for a lawful purpose—hunting or transportation of the firearm after he finished hunting.

¶8 "[W]hen an exercise of the State's police power implicates the constitutional right to keep and bear arms, the validity of the exercise is measured by the reasonableness of the restriction on the asserted right." ***Id.***, ¶44. We 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.***, ¶45. Therefore, "only if the public benefit in this exercise of police power is substantially outweighed by an

individual's … exercise of the right to bear arms will an otherwise valid restriction on that right be unconstitutional as applied." ***Id.***, ¶46.

¶9 Shining deer necessarily takes place after dark and after legal hunting hours have ended. WISCONSIN STAT. § 29.314(4) is designed to protect the State's wildlife by preventing shooting after hours. The statute also protects the public from people discharging firearms while unable to see who or what might be nearby.

¶10 If a person does not intend to hunt when shining, there is no need to possess a firearm. More to the point, it would be illegal to hunt while shining because shining is done at night after hunting hours have ended. Thus, the prohibition against shining deer while in possession of a firearm does not interfere with an individual's right to possess arms for hunting. Additionally, if an individual wishes to shine animals after a day of hunting, he or she simply needs to place the firearms somewhere else before doing so.[2] Thus, the prohibition does not interfere with the right to transport weapons, because they can be transported to a safe place before engaging in shining.

¶11 While taking firearms elsewhere before going back out to shine deer might be an inconvenience, it is not one that sufficiently outweighs the State's right to regulate the time, place and manner in which firearms are used. We conclude the State's exercise of its police powers in enacting WIS. STAT. § 29.314 outweighs an individual's right to be in possession of a firearm while

[2] We note, however, that WIS. STAT. § 29.314(5)(a) prohibits shining between 10 p.m. and 7 a.m. from September 15 through December 31.

shining deer. Therefore, the statute did not interfere with Fitzpatrick's constitutional rights.

¶12 Fitzpatrick next argues that he should have been allowed to argue to the jury that an unloaded firearm is not a firearm for purposes of the shining statute. He contends the statute does not define firearm, but argues that other sources show that the presence of ammunition is necessary. He notes that the purposes of the statute are to prevent illegal shooting of deer and protect hunters. He argues that because the rifles were unloaded and Wrasse did not seize any ammunition from his truck, he could not have shot any deer nor harmed anyone who might have been nearby. Therefore, Fitzpatrick contends the rifle ceased to be a firearm for purposes of the statute. We disagree.

¶13 Fitzpatrick cites ***State v. Erickson***, 55 Wis. 2d 150, 197 N.W.2d 729 (1972), as support for his argument that a firearm is not a firearm for purposes of the shining statute absent the presence of ammunition. In that case, Erickson was charged under an administrative code provision similar to WIS. STAT. § 29.314(3)(a). ***Erickson***, 55 Wis. 2d at 152. The court noted in its factual recitation that ammunition was present when Erickson was shining. ***Id.*** at 153. Fitzpatrick extrapolates from that comment that ammunition must be present in order for a firearm to be a firearm for purposes of the code or the statute. However, there is no indication that the ***Erickson*** court found the presence of ammunition to be a deciding factor in that case. Rather, the court was simply a stating the facts. Indeed, the issue in that case was not whether Erickson was in possession of a firearm, but whether he was using a spotlight for the purposes of shining deer. ***Id.*** We therefore reject Fitzpatrick's contention that ***Erickson*** requires ammunition to be present in order for him to be convicted under the shining statute.

¶14 Firearm is not defined in WIS. STAT. § 29.314; however, case law shows that a firearm need not be loaded in order to be considered a firearm. For example, "[T]he term 'firearm' is appropriately defined as a weapon that acts by force of gunpowder to fire a projectile …." ***State v. Rardon***, 185 Wis. 2d 701, 706, 518 N.W.2d 330 (Ct. App. 1994). The term applies even to a firearm that is inoperable due to disassembly. ***Id.*** If a firearm remains a firearm even when inoperable, it certainly remains a firearm when operable but cased and unloaded.

¶15 We may also look to other statutory provisions for direction regarding what a firearm is. *See* ***Storm v. Legion Ins. Co.***, 2003 WI 120, ¶44, 265 Wis. 2d 169, 665 N.W.2d 353. For example, WIS. STAT. § 167.31(1)(c) defines firearm as "a weapon that acts by force of gunpowder." There is no distinction in this definition between a loaded and unloaded weapon. Fitzgerald points out that § 167.31 requires that a firearm be unloaded for transportation and argues this means the legislature intended there be a distinction between a loaded and unloaded firearm. However, the statute simply indicates that one can transport an unloaded firearm but not a loaded one. The statute does not indicate that an unloaded firearm ceases to be a firearm.

¶16 Fitzpatrick argues that because his rifle was not loaded, the purpose of the shining statute—to prevent illegal shooting of deer and protecting hunter safety—is fulfilled because he could not have shot anything. However, the fact his rifle was not loaded does not mean it was not dangerous. Again, we turn to another statute for direction. WISCONSIN STAT. § 939.22(10) defines a dangerous weapon as

> any firearm, whether loaded or unloaded; any device designed as a weapon and capable of producing death or great bodily harm; any electric weapon, as defined in s. 941.295(4); or any other device or instrumentality which,

> in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

Under this section, a firearm is dangerous regardless whether it is loaded or unloaded.

¶17 Finally, it would be difficult for law enforcement to enforce the shining law if a firearm ceased to be a firearm in the absence of ammunition. Ammunition is comparatively small and can be easily hidden or disposed of by throwing it out a window or dropping it on the side of the road. As we have noted, it might be inconvenient to have to place a firearm elsewhere before going out to shine deer; but the State's ability to regulate the health, safety and welfare of its citizens and to protect wildlife outweigh any inconvenience.

By the Court.—Judgment affirmed.

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