COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP1740-CR **Cir. Ct. No. 2010CM1754**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN KIALE LITTLE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

¶1 LUNDSTEN, P.J.[1] This appeal is from a judgment of conviction for carrying a concealed weapon in violation of WIS. STAT. § 941.23. Little

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

contends that his conviction must be reversed because § 941.23's general prohibition on carrying a concealed weapon violates the Wisconsin and Federal Constitutions. I disagree, and affirm the circuit court.

Background

¶2 According to the criminal complaint, on June 28, 2010, a police officer heard very loud music emanating from a vehicle in the City of Beloit. The officer approached the vehicle and observed Little in the driver's seat. The officer smelled a strong odor of burnt marijuana and, as part of the investigation, he searched the vehicle. The officer located a loaded Ruger .40 caliber semiautomatic handgun along with a second magazine for the gun containing 80 bullets. Additional bullets were located in the glove box and spent shell casings were found in a door "cubby hole." Based on this information, Little was charged with carrying a concealed weapon, a class A misdemeanor under WIS. STAT. § 941.23. After the circuit court rejected Little's challenge to the constitutionality of § 941.23, Little entered a no contest plea.[2]

Discussion

¶3 Little challenges the constitutionality of WIS. STAT. § 941.23. In the following sections, I address and reject each of Little's arguments.[3]

[2] I note that the State has included a copy of the transcript of the motion hearing at which the circuit court denied Little's constitutional challenge. That document is not a part of the record on appeal, and was therefore improperly included in the State's appendix. I do not rely on it.

[3] WISCONSIN STAT. § 941.23 was recently amended to include additional exceptions to the prohibition on carrying a concealed weapon, most notably a permit exception. *See* 2011 Wis. Act 35, §§ 50-56. The effective date of the new statute was November 1, 2011. Little was prosecuted under the former version of the statute.

A. Little's Main Argument

¶4 Little argues that WIS. STAT. § 941.23 violates the federal and state constitutional provisions protecting the right to bear arms. As to whether § 941.23 violates the Second Amendment to the United States Constitution, no published Wisconsin opinion addresses this federal law issue and it is, therefore, an open question.

¶5 As to the constitutionality of WIS. STAT. § 941.23 under Article I, Section 25 of the Wisconsin Constitution, that topic was addressed in ***State v. Cole***, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328, and ***State v. Hamdan***, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785. In those cases, our supreme court rejected the proposition that § 941.23 is facially unconstitutional. While acknowledging that the right to bear arms is a fundamental constitutional right, the ***Cole*** court concluded that the State has a compelling interest in protecting the public from the hazards of weapons, such as guns, and that § 941.23 is a reasonable time, place, and manner restriction on that right. ***Cole***, 264 Wis. 2d 520, ¶¶20, 26, 28, 35, 43-44; *see also* ***Hamdan***, 264 Wis. 2d 433, ¶41 ("Article I, Section 25 does not establish an unfettered right to bear arms. Clearly, the State retains the power to impose reasonable regulations on weapons, including a general prohibition on the carrying of concealed weapons.").

¶6 ***Cole*** and ***Hamdan*** are binding on this court with respect to interpretations of the Wisconsin Constitution. *See* ***State v. Jennings***, 2002 WI 44, ¶¶17-19 & n.3, 252 Wis. 2d 228, 647 N.W.2d 142. Our supreme court decisions bind me unless they conflict with a subsequent decision of the United States Supreme Court. *See* ***id.*** Thus, the question arises whether ***Cole*** and ***Hamdan*** conflict with subsequent decisions of the United States Supreme Court. On that

topic, I am unsure. If there is a conflict, it is in the level of scrutiny applied. But Wisconsin's constitutional bear-arms provision has different language and a different history than the Second Amendment. It may be, at least in principle, that the differing language and histories of Article I, Section 25 and the Second Amendment lead to different levels of scrutiny or other differences in the analyses.

¶7 However, regardless whether I am bound by ***Cole*** and ***Hamdan***, I conclude that there is no reason to think that the Wisconsin Supreme Court would reach a different result if it revisited the question in light of subsequent federal cases. Indeed, as I explain below, there is good reason to conclude that both our supreme court and the United States Supreme Court would find WIS. STAT. § 941.23 facially valid.

¶8 Little contends that WIS. STAT. § 941.23 does not further a "compelling state interest" and that any law infringing on the right to bear arms protected by both the State and Federal Constitutions must be subjected to strict scrutiny. He argues that, when that level of scrutiny is applied, § 941.23 does not survive.

¶9 Little's strict scrutiny argument relies primarily on two seminal United States Supreme Court decisions, ***District of Columbia v. Heller***, 554 U.S. 570, 128 S. Ct. 2783 (2008) (holding that the Second Amendment protects the individual right to keep and bear arms for the purpose of self-defense and striking down a District of Columbia law that banned the possession of handguns in the home), and ***McDonald v. City of Chicago, Ill.***, __ U.S. __, 130 S. Ct. 3020 (2010) (holding that the Second Amendment applies to the states). However, neither these cases, nor any other Supreme Court opinion, applies strict scrutiny to a law

like Wisconsin's WIS. STAT. § 941.23. Thus, I reject Little's assertion that strict scrutiny must be applied here.

¶10 Although strict scrutiny does not apply, I agree with the parts of Little's argument indicating that ***Heller*** and ***McDonald*** apply a higher level of scrutiny than our supreme court applied in ***Cole*** and ***Hamdan***. Still, there is no reason to suppose that the application of that higher standard to WIS. STAT. § 941.23 would produce a different result. As the State points out, the ***Heller*** majority singled out prohibitions on carrying a concealed weapon and four other prohibitions as examples of longstanding and proper prohibitions. The ***Heller*** Court wrote:

> Like most rights, *the right secured by the Second Amendment is not unlimited*. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. *For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.* Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 128 S. Ct. at 2816-17 (citations omitted; emphasis added). Significantly, two of the examples the ***Heller*** majority cites as permissible examples are *general* prohibitions on concealed carry comparable to § 941.23. *See* ***id.*** at 2816 (citing ***State v. Chandler***, 5 La. Ann. 489, 489-90 (La. 1850), and ***Nunn v. State***, 1 Ga. 243, 251 (Ga. 1846)).

¶11 Little might argue that I have read too much into the majority's comment. But a further exchange between the ***Heller*** majority and dissenting Justice Breyer demonstrates that this was a carefully considered comment. In dissent, Justice Breyer wrote:

> *[T]he majority's list*, in Part III of its opinion, *of provisions that in its view would survive Second Amendment scrutiny [consists of] (1) "prohibitions on carrying concealed weapons"*; (2) "prohibitions on the possession of firearms by felons"; (3) "prohibitions on the possession of firearms by ... the mentally ill"; (4) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings"; and (5) government "conditions and qualifications" attached "to the commercial sale of arms."

Heller, 128 S. Ct. at 2869-70 (Breyer, J., dissenting) (emphasis added). What is particularly telling is the majority's response to Justice Breyer. The majority did not take issue with Justice Breyer's characterization, but instead embraced it:

> Justice BREYER chides us ... for not providing extensive historical justification *for those regulations of the right that we describe as permissible*.... [But] there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.

Heller, 128 S. Ct. at 2821 (emphasis added). Accordingly, I conclude there is little doubt that the ***Heller*** majority, and dissenters for that matter, consider general prohibitions on the carrying of concealed weapons permissible. If our supreme court looked to ***Heller*** for guidance, it would reach the same conclusion.

¶12 Little might complain that I do not actually apply the type of heightened scrutiny to WIS. STAT. § 941.23 that the ***Heller*** Court applied to the District of Columbia handgun ban. But I see no reason to do so when the United States Supreme Court has already told me the result of that analysis.

¶13 This discussion disposes of most of Little's arguments. In the section below, I address his remaining arguments.

B. Little's Remaining Arguments

¶14 Little argues that WIS. STAT. § 941.23 is unconstitutionally overbroad. His argument, however, is undeveloped. He neither fleshes out the overbreadth test nor meaningfully explains why § 941.23 fails under that test. Rather, Little simply contends that § 941.23 defines the crime of carrying a concealed weapon so broadly that that statute might be interpreted to cover situations in which a person is not, in any meaningful sense, carrying a concealed weapon.

¶15 The most glaring deficiency in Little's argument is that he looks to the broadest possible interpretation of WIS. STAT. § 941.23 and argues from that broad interpretation that the statute inhibits protected gun possession activities. However, the overbreadth doctrine is inapplicable when a limiting construction would avoid unconstitutional applications. *See* ***State v. Booker***, 2006 WI 79, ¶15, 292 Wis. 2d 43, 717 N.W.2d 676. Little does not address whether there is a possible limiting construction that avoids unconstitutional applications. Therefore, I address the matter no further.

¶16 Little argues that WIS. STAT. § 941.23 violates due process because it does not provide reasonably clear notice of the difference between criminal and non-criminal conduct. Little argues that this vagueness was created by our supreme court in ***Cole*** and ***Hamdan*** because, after those cases, a reasonable person cannot know in advance whether he or she will satisfy the ***Hamdan*** exception. Little writes:

> Under ***Hamdan's*** multifactor "reasonableness" test, applied on a case-by-case basis, the difference between criminality and the exercise of a fundamental constitutional right is unknowable until a district attorney and then a court conducts an open-ended, fact-intensive balancing test. The result of ***Cole*** and ***Hamdan*** makes it impossible for WIS. STAT. § 941.23 to afford any meaningful notice to citizens of the conduct that it prohibits.

This is a novel argument. According to Little, our supreme court has rendered § 941.23 unconstitutionally vague by limiting its application so as to avoid unconstitutional applications of the statute. Whatever theoretical merit this argument may have, I may not adopt it because the result would be to decline to follow binding precedent. That is, if I were to adopt Little's argument that a limiting interpretation by our supreme court can render a statute unconstitutionally vague, I would, in effect, be overriding our supreme court's holding that the statute *is* constitutional as interpreted by that court. This I may not do.

¶17 Little argues that WIS. STAT. § 941.23 violates the Fourteenth Amendment because it "abridges a specifically enumerated privilege or immunity," namely, the Second Amendment's right to bear arms clause. Because this argument ultimately boils down to the propriety of § 941.23 under the Second Amendment, the argument adds nothing to the arguments I have already addressed.

¶18 Finally, Little asserts that WIS. STAT. § 941.23 is unconstitutional as applied to him and his circumstances. We agree, however, with the State that Little's no contest plea forfeits his right to make an as applied challenge on appeal. *See* ***State v. Trochinski***, 2002 WI 56, ¶34 n.15, 253 Wis. 2d 38, 644 N.W.2d 891. Accordingly, Little's particular purpose in keeping a handgun in his car does not matter. And, although Little asks me to exercise my discretionary authority to

address this waived issue, I see no reason to do so. Based on the scant facts in this record, I have no reason to think that Little's as applied challenge has merit.

By the Court.—Judgment affirmed.

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