

Appeal No. 2004AP2989-CR

Cir. Ct. No. 2004CM26

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

v.

SCOTT K. FISHER,

DEFENDANT-RESPONDENT.

FILED

Jun 02, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Vergeront and Lundsten, JJ.

This appeal raises an issue of first impression regarding the constitutionality of WIS. STAT. § 941.23 (2003-04)¹—which prohibits the carrying of concealed weapons in this state—as applied to the owner of a business when away from his business property. More specifically, the question presented is whether the concealed weapon statute can be enforced against a tavern owner who keeps a loaded gun in the glove compartment of his car for protection because he routinely makes large cash deposits in a high-crime neighborhood. We certify this appeal because we believe it presents an opportunity to provide needed clarification of the standard recently set forth in *State v. Cole*, 2003 WI 112, 264

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Wis. 2d 520, 665 N.W.2d 328, and *State v. Hamdan*, 2003 WI 113, 264 Wis. 2d 433, 665 N.W.2d 785, for evaluating as-applied challenges to the concealed weapon statute. In particular, we believe clarification is needed as it relates to the availability of “security interest” justification when a person is away from that person’s home or business.

Because the proper interpretation of *Cole* and *Hamdan* are at the center of this certification, we begin with a discussion of their facts and holdings. *Cole* and *Hamdan* are a pair of companion cases addressing the continued enforceability of Wisconsin’s concealed weapon statute in light of the enactment of article I, section 25 of the Wisconsin Constitution, which provides: “The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.” In *Cole*, the Wisconsin Supreme Court held that the preexisting concealed weapon statute was not rendered unconstitutional on its face by the constitutional amendment because the statute represented “a reasonable regulation on the time, place, and manner in which the right to bear arms may be exercised.” *Cole*, 264 Wis. 2d 520, ¶28. Although the court concluded that Cole had waived any as-applied challenge, it went on to briefly explain why Cole’s generalized assertion that he did not feel safe in the neighborhood as the result of a brutal beating he had once received was insufficiently specific to warrant carrying a loaded gun with him for self-defense as the passenger in a car. *Id.*, ¶¶46, 48. In the course of its discussion, the court noted the possibility of accidents posed by the transport of loaded weapons and stated: “The right to bear arms is clearly not rendered illusory by prohibiting an individual from keeping a loaded weapon hidden either in the glove compartment or under the front seat in a vehicle.” *Id.*, ¶49.

In *Hamdan*, the Wisconsin Supreme Court held that the concealed weapon statute could not be constitutionally applied to the owner of a family-run grocery store who kept a loaded gun under the counter near the cash register. *Hamdan*, 264 Wis. 2d 433, ¶82. Hamdan had been in the process of putting his weapon away for the night near closing time when two police officers entered the store and eventually discovered that Hamdan had the gun in his trouser pocket. *Id.*, ¶¶1-3. The court set forth the following test:

A defendant who challenges on constitutional grounds a prosecution for carrying a concealed weapon will be required to secure *affirmative* answers to the following legal questions before he or she is entitled to raise a constitutional defense. First, under the circumstances, did the defendant's interest in concealing the weapon to facilitate exercise of his or her right to keep and bear arms substantially outweigh the State's interest in enforcing the concealed weapon statute? ... Second, ... did the defendant lack a reasonable alternative to concealment, under the circumstances, to exercise his or her constitutional right to bear arms?

Id., ¶86. If the defendant secures affirmative answers to these two questions, he or she is entitled to raise a constitutional defense to the jury, and the state must then prove at trial that the defendant actually had an unlawful purpose in concealing the weapon in order to obtain a conviction. *Id.*, ¶87.

Applying the two-part test, the court reasoned that Hamdan did not need to face the sort of imminent threat required to assert the privilege of self-defense in order to have a legitimate security interest at his place of business, noting that people are generally less likely to rely upon law enforcement for protection on their own premises. *Id.*, ¶66. The court emphasized several times that a person's expectation of personal security is greatest on his or her own property, particularly in a home or place of business, quoting extensively from cases from other jurisdictions on that point. *Id.*, ¶¶58-67. The court further

determined that Hamdan's interest in concealing a weapon in his grocery store was substantial because his store was located in a high crime neighborhood and had been the site of past violence. *Id.*, ¶82. Hamdan himself had also been a crime victim, and "had good reason to anticipate future crime problems at the store and a need to provide his own security to deal with the problems." *Id.*

Conversely, the court deemed the State's interest in prohibiting Hamdan from concealing a weapon in his store to be "negligible." *Id.*, ¶82. The court noted three generally-accepted public benefits from concealed weapon statutes: (1) "carrying a concealed weapon permits a person to act violently on impulse, whether from anger or fear"; (2) "[n]otice of the presence of a dangerous weapon permits people, including law enforcement officers, to act accordingly," whereas concealment of a weapon "facilitate[s] the commission of crime by creating the appearance of normality and catching people off guard"; and (3) "affixing the stigma of the law of the land" to those who illegally carry concealed weapons may promote the preservation of life. *Id.*, ¶¶ 53-56. The court was not persuaded that any of these potential rationales was particularly compelling as applied to Hamdan, explaining:

Although a shopkeeper is not immune from acting on impulse, he or she is less likely to do so in a familiar setting in which the safety and satisfaction of customers is paramount and the liability for mistake is nearly certain. There is less need in these circumstances for innocent customers or visitors to be notified that the owner of a business possesses a weapon. Anyone who enters a business premises, including a person with criminal intent, should presume that the owner possesses a weapon, even if the weapon is not visible. A shopkeeper is not likely to use a concealed weapon to facilitate his own crime of violence in his own store. The stigma of the law is inapplicable when the public expects a shopkeeper to possess a weapon for security.

Id., ¶57. Thus, the court concluded that Hamdan’s interest in keeping a concealed weapon in his store substantially outweighed the State’s interest in prohibiting him from having a concealed weapon there. *Id.*, ¶82.

The court further concluded that Hamdan had no reasonable means of keeping his gun in his store except to conceal it. *Id.*, ¶83. In discussing this element, the court noted that a weapon must necessarily be kept somewhere and handled and moved at various times. *Id.*, ¶72. It further reasoned that requiring a shopkeeper to openly display a weapon kept for security “fails the litmus test of common sense,” because it could frighten customers and create additional dangers by making the gun more accessible to children, assailants, or others. *Id.*, ¶¶73-74. Accordingly, the court held that Hamdan had established a basis to raise his constitutional right to keep and bear arms for security as a defense to the charge of carrying a concealed weapon, and it remanded the case to the circuit court with directions that, if the State could show probable cause to show that Hamdan had an unlawful purpose when carrying the concealed weapon, the matter should proceed to trial.

We turn now to the facts of the present case. Scott Fisher owned and operated a tavern. Four or five nights a week he would bring home several thousand dollars in receipts to deposit at the bank. One night, Fisher’s car was stolen from outside the tavern. When Fisher called the police to report the theft, he also cautioned them that there was a loaded gun in the car.² He was notified the next day that he would be receiving a citation for transporting a loaded firearm in

² It appears from Fisher’s hearing testimony that there may also have been several other weapons in the vehicle at the time it was stolen, but they are not at issue on this appeal.

a vehicle. See WIS. STAT. § 167.31(2)(b) (requiring that firearms being transported in vehicles must be both unloaded and enclosed in a suitable case).

About a week and a half later, Fisher complained about the citation to a DNR official. He explained that he had the gun in his car because he carried large amounts of cash from the tavern. During the conversation, Fisher disclosed that he still had the gun in his car. After the DNR official verified that there was a loaded gun in the console of Fisher's car, the official summoned the police, who arrested Fisher for carrying a concealed weapon contrary to WIS. STAT. § 941.23.

Fisher challenged the constitutionality of applying the concealed weapon statute in these circumstances. At a pretrial hearing, Fisher testified that, in addition to his own experience as a crime victim, he was aware of several armed robberies that had occurred in the area of his tavern during the past year. Fisher asserted he believed he was at risk for robbery due to the large amounts of cash he carried. He further explained that he felt it made sense to keep the gun in the console because if the gun were openly displayed on the seat of the car, someone could break the car's window and take it.

The facts of this case appear to fall somewhere in between those of *Cole* and *Hamdan*. In *Hamdan*, where the prosecution violated the constitution, the defendant was a business person inside his business establishment. In *Cole*, where prosecution did not violate the constitution, the defendant was a non-business person with a concealed gun in a car in a high-crime neighborhood. Here, Fisher is a businessman with an interest in protecting himself and his money, as in *Hamdan*, but Fisher also was arrested for concealing his gun, not in his business establishment, but in a car in a high-crime area, as in *Cole*. We will

now more specifically explain why various statements in *Hamdan* and *Cole* leave much room for doubt as to the proper result in this case.

We first note that the language in *Cole*, 264 Wis. 2d 520, ¶49, is quite broad when explaining that a legitimate public concern over the possibility of accidental shootings justifies restricting the transport of loaded weapons in vehicles and that prohibiting individuals from keeping loaded weapons in a glove compartment does not render the right to bear arms illusory. It is not apparent whether that discussion in *Cole* is meant to foreclose constitutional challenges to prosecutions for carrying a concealed firearm in the glove compartment of a vehicle.

If not, and if a constitutional defense based on the right to bear arms may still be available on a case-by-case basis to individuals carrying loaded firearms in the glove compartments of vehicles, is such a defense limited to the grounds of actual self-defense? This question arises because the court in *Cole* found the defendant's assertion that he had been a crime victim and did not feel safe in the neighborhood insufficiently specific or imminent to invoke a self-defense claim, but did not explain why such an assertion would not provide the defendant with a legitimate need for security. *Cole*, 264 Wis. 2d 520, ¶48. In contrast, the court in *Hamdan* explicitly cited the defendant's status as a crime victim and location in a high-crime neighborhood in support of a legitimate need for security in his store. Was the only reason a security interest was viewed as a valid justification in *Hamdan*, but not *Cole*, that the defendant in *Cole* failed to properly preserve and argue the issue? Or were the continual references in *Hamdan* to the security interest being strongest in a person's home or business meant to limit the availability of a security justification to those places?

“Security” is a broad concept that could arise in a myriad of situations. *See Hamdan*, 264 Wis. 2d 433, ¶145 and n. 48 (Abrahamson, C.J., concurring). If an individual may cite security as the basis for carrying a loaded firearm in a vehicle, is there any further guidance the Supreme Court could give on how to analyze such claims? For instance, should the constitutional right be interpreted liberally or narrowly?

In sum, we believe that further clarification on the scope and availability of the constitutional security justification would be helpful to both this court and trial courts.

