COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP1757-CR **Cir. Ct. No. 2009CM4566**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIFFANY MICHELLE FLOWERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELLEN R. BROSTROM, Judge. *Affirmed*.

¶1 KESSLER, J.[1] Tiffany Michelle Flowers appeals her judgment of conviction after she pled guilty to one count of carrying a concealed weapon (CCW), contrary to WIS. STAT. § 941.23 (2009-10).[2] Flowers contends that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10).

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

§ 941.23 is facially unconstitutional, warranting a reversal of her conviction and sentence. We disagree and affirm.

BACKGROUND

¶2 According to the criminal complaint, on September 9, 2009, Flowers was stopped for a traffic violation. During the stop, she informed the stopping officers that she had a loaded firearm in her purse on the passenger floorboard of the vehicle. That firearm, a loaded .25 caliber handgun, was recovered by the officers. Flowers was subsequently charged with one count of carrying a concealed weapon, in violation of WIS. STAT. § 941.23. On May 3, 2010, Flowers pled guilty to the charge, was found guilty, and was sentenced to pay a fine of four hundred dollars. On May 4, 2011, Flowers's attorney filed a "Motion for Reconsideration, Reversal and Dismissal," arguing that § 941.23 was facially unconstitutional under a strict scrutiny standard. The circuit court denied the motion. This appeal follows.

DISCUSSION

¶3 The constitutionality of a statute presents a question of law that we consider *de novo*, without deference to the decision of the circuit court. *See* ***Aicher v. Wisconsin Patients Comp. Fund***, 2000 WI 98, ¶18, 237 Wis. 2d 99, 613 N.W.2d 849. A party claiming that a statute is unconstitutional must establish the unconstitutionality beyond a reasonable doubt. *See* ***State v. Baron***, 2009 WI 58, ¶10, 318 Wis. 2d 60, 769 N.W.2d 34. A facial challenge requires the challenger to "establish, beyond a reasonable doubt, that there are no possible applications or interpretations of the statute which would be constitutional." ***State v. Wanta***, 224 Wis. 2d 679, 690, 592 N.W.2d 645 (Ct. App. 1999).

¶4 The statute at issue in the instant case, WIS. STAT. § 941.23, as challenged, provides:

> Any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor. Notwithstanding s. 939.22 (22), for purposes of this section, peace officer does not include a commission warden who is not a state-certified commission warden.[3]

¶5 In 2003, our supreme court construed this statutory language in remarkably similar factual circumstances when it decided ***State v. Cole***, 2003 WI

[3] As of November 1, 2011, the text of WIS. STAT. § 941.23(2) has been amended to provide:

> **(2)** Any person, other than one of the following, who carries a concealed and dangerous weapon is guilty of a Class A misdemeanor:
>
> (a) A peace officer, but notwithstanding s. 939.22, for purposes of this paragraph, peace officer does not include a commission warden who is not a state-certified commission warden.
>
> (b) A qualified out-of-state law enforcement officer….
>
> (c) A former officer….
>
> (d) A licensee, as defined in s. 175.60(1)(d), or an out-of-state licensee, as defined in s. 175.60(1)(g), if the dangerous weapon is a weapon, as defined under s. 175.60(1)(j). An individual formerly licensed under s. 175.60 whose license has been suspended or revoked under s. 175.60(14) may not assert his or her refusal to accept a notice of revocation or suspension mailed under s. 175.60(14)(b)1. as a defense to prosecution under this subsection, regardless of whether the person has complied with s. 175.60(11)(b)1.
>
> (e) An individual who carries a concealed and dangerous weapon, as defined in s. 175.60(1)(j), in his or her own dwelling or place of business or on land that he or she owns, leases, or legally occupies.

See 2011 Wis. Act 35, §§ 50-55. The amendments to the statute do not affect our analysis in any way.

112, 264 Wis. 2d 520, 665 N.W.2d 328. Phillip Cole was convicted of violating this statute when, after a traffic stop,[4] officers found two weapons concealed in the vehicle in which he was riding. *See* ***id.***, ¶¶3-4. After entering a guilty plea, Cole challenged the constitutionality of WIS. STAT. § 941.23, arguing that the statute violated article I, section 25 of the Wisconsin Constitution,[5] which guarantees citizens' state constitutional right to bear arms. *See* ***id.***, 264 Wis. 2d 520, ¶1. Cole challenged the statute both on its face and as it applied to his factual circumstances. ***Id.***

¶6 While acknowledging that the right to bear arms is a fundamental constitutional right, the court concluded that limitations on that right are not to be evaluated under the strict scrutiny standard, but rather that "the proper question is whether the statute is a reasonable exercise of police power." ***Id.***, ¶¶20, 23. The court explained that "the reasonableness test focuses on the balance of the interests at stake, rather than merely on whether any conceivable rationale exists under which the legislature may have concluded the law could promote the public welfare." ***Id.***, ¶27. *See also* ***State v. Hamdan***, 2003 WI 113, ¶¶40-41, 45, 264 Wis. 2d 433, 665 N.W.2d 785 (describing the application of the reasonableness standard and various other cases applying the standard). In balancing the interests of the individual in bearing arms and the interest of the "health, safety and welfare of the public as implemented here through the CCW statute," the ***Cole*** court concluded that "the CCW statute is a reasonable regulation on the time, place, and manner in which the right to bear arms may be exercised. It does not

[4] As here, the traffic stop in ***State v. Cole***, 2003 WI 112, 264 Wis. 2d 520, 665 N.W.2d 328, was not disputed. *See* ***id.***, ¶3

[5] Article I, section 25 of the Wisconsin Constitution provides as follows: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."

unreasonably infringe upon a citizen's ability to exercise the right." ***Id.***, 264 Wis. 2d 520, ¶28. We are, of course, bound by our supreme court's holdings. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

¶7 Flowers argues that federal court decisions issued after ***Cole*** involving the Second Amendment of the United States Constitution[6] requires us to ignore our supreme court's holding in ***Cole***. Flowers relies primarily on ***District of Columbia v. Heller***, 554 U.S. 570 (2008), which held that the District of Columbia could not prohibit possession of a functioning firearm for self-defense by Heller in his home. ***Id.*** at 629. In addition, Flowers relies on ***McDonald v. City of Chicago***, 130 S. Ct. 3020 (2010), in which the Court held that the ***Heller*** ruling was applicable to the states. *See* ***McDonald***, 130 S. Ct. at 3026. After an extensive historical analysis of each clause of the Second Amendment, the ***Heller*** court concluded the Second Amendment confers an individual, but not unlimited, right to keep and bear arms:

> There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms. Of course the right was not unlimited, just as the First Amendment's right of free speech was not[.] Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose.

Id., 554 U.S. at 595 (internal citations and emphasis omitted). The Court further explained that regardless of the standard of scrutiny applied, the ban in ***Heller*** failed to pass constitutional muster:

[6] The Second Amendment of the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

> The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," would fail constitutional muster.

Id. at 628-29 (citation and footnote omitted). The Court held that "the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." ***Id.*** at 635.

¶8 Predictably, litigation generated by the holdings in ***Heller*** and ***McDonald*** soon occupied lower federal courts. The Fourth Circuit in ***United States v. Masciandaro***, 638 F.3d 458 (4th Cir. 2011) considered whether federal limitations imposed on an individual who carried a concealed firearm in his vehicle on national park land offended the Second Amendment. ***Id.*** at 460-61. Noting that the government has a substantial interest in providing safety to those who visit national parks, the Fourth Circuit found that restrictions on possessing loaded firearms in a vehicle on national park grounds was reasonable. *See* ***id.*** at 473 ("[W]e conclude first that the government has a substantial interest in providing for the safety of individuals who visit and make use of the national parks[.]"). The ***Masciandaro*** court addressed the impact and limitations of ***Heller***, noting that:

> Two years after deciding ***Heller***, the Supreme Court revisited the Second Amendment in ***McDonald v. City of***

> ***Chicago***, ____U.S. ____, 130 S. Ct. 3020, 177 L.Ed.2d 894 (2010), holding that the Second Amendment was applicable to the States by incorporation into the Fourteenth Amendment. Explaining ***Heller*** further, the ***McDonald*** Court stated that "self-defense is the central component" of the individual right to keep and bear arms and that this right is "fundamental." ***McDonald*** also reaffirmed that Second Amendment rights are far from absolute, reiterating that ***Heller*** had "assur[ed]" that many basic handgun regulations were presumptively lawful. In a similar vein, the ***McDonald*** Court noted that the doctrine of "incorporation does not imperil every law regulating firearms."

Masciandaro, 638 F.3d at 467 (citations omitted; brackets in ***Masciandaro***). The Fourth Circuit observed that "[t]he upshot of these landmark decisions is that there now exists a clearly-defined fundamental right to possess firearms *for self-defense within the home*. But a considerable degree of uncertainty remains as to the scope of that right beyond the home." ***Id.*** (emphasis added).

¶9 The Seventh Circuit, in ***United States v. Williams***, 616 F.3d 685 (7th Cir. 2010), considered a challenge to the validity of prohibiting a felon from possessing firearms. Police had a warrant to search Williams's home. *See* ***id.*** at 692. When police knocked and announced their presence, they received no response. ***Id.*** at 687. Upon entering the residence, police found Williams coming towards them pointing a gun. ***Id.*** Ultimately, Williams was convicted for being a felon in possession of a firearm. ***Id.*** at 689. Williams argued that the statute criminalizing his possession of a firearm as a convicted felon was unconstitutional based on ***Heller*** because it infringed on his right to possess firearms in his home for use in self-defense. *See* ***Williams***, 616 F.3d at 691. The Seventh Circuit concluded that "the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective." ***Id.*** at 692. The government satisfied the court by

showing "a substantial relationship between its objective of preventing felons access to guns and [the federal regulation prohibiting a felon from possessing a firearm][7] by pointing to Williams's own violent past[,]" which included his conviction of a crime specifically defined as violent, during which he "beat[] the victim so badly that the victim required sixty-five stitches." ***Id.*** at 693.

¶10 We conclude that nothing in ***Heller*** or in the federal appeals decisions brought to our attention has the effect of overruling our supreme court's decision in ***Cole***. Although the cases are not precise about the legal standard to be applied in that analysis, none specifically apply a strict scrutiny test to the analysis. Here, as in ***Cole***, the concealed firearm was possessed on a public street, not in a home. Local and state governments have as legitimate an interest in promoting safety of the public using public streets by prohibiting concealed weapons there as the federal government demonstrated in ***Masciandaro*** with a similar prohibition to protect the safety of visitors using our national parks. Prohibiting the carrying of a loaded weapon concealed in an automobile on public streets is a reasonable exercise of police powers under the holding of our supreme court in ***Cole***, the holding of the United States Supreme Court in ***Heller***, and the holding of the Court of Appeals for the Fourth Circuit in ***Masciandaro***.

[7] *See* 18 U.S.C.A § 922(g)(1).

By the Court.—Judgment affirmed.

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