COURT OF APPEALS
DECISION
DATED AND RELEASED

June 27, 1995

No. 94-2542-CR

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

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANTHONY HICKS,

Defendant-Respondent.

APPEAL from an order of the circuit court for Milwaukee County: STANLEY A. MILLER, Judge. *Reversed and cause remanded with instructions.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

WEDEMEYER, P.J. The State of Wisconsin appeals from an order, which dismissed one count of a criminal complaint charging Anthony Hicks with violating the controlled substances tax statute. The dismissal was granted on the basis that the controlled substances tax law, as implemented, violates Hicks's protection against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 8 of the Wisconsin Constitution. The State claims that the trial court erred in granting

Hicks's motion to dismiss because Hicks lacks proper standing to assert that the controlled substances tax, as implemented, violates his right against compelled self-incrimination.[1] Because Hicks lacks proper standing to assert that the controlled substances tax law, as implemented, violates his constitutional rights, we reverse the order and remand this case to the trial court with instructions to deny Hicks's motion to dismiss and reinstate the controlled substances tax violation count.

I. BACKGROUND

Hicks was initially charged with one count of attempting to deliver cocaine, as party to a crime, contrary to §§ 161.16(2)(b)1, 161.41(1)(c)4, STATS., 1991-92, and 939.05, STATS. The State filed an amended information adding one count of possessing cocaine without evidence that the controlled substances tax had been paid, contrary to §§ 139.87(1), STATS., 1989-90;[2] 139.87(2), 139.88(2), 139.89, 139.95(2),[3] 161.16(2)(b)1 and 939.05, STATS., 1993-94.

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[1] In the alternative, the State claims that: (1) Hicks failed to present any evidence that the Department of Revenue has taken any action to implement the controlled substances tax law; (2) the controlled substances tax law does not require the taxpayer to disclose incriminating testimony; and (3) the confidentiality provision in the controlled substances tax law provides the taxpayer protection co-extensive with the Fifth Amendment. Because we decide this case on the standing issue, however, it is not necessary for us to address any of these alternative arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

[2] As an initial consideration, we note that the amended information listed § 139.87(1), STATS., which was repealed, effective October 1, 1991. *See* 1991 Wis. Act 39, §§ 2531-2534. Accordingly, on remand the reinstated charge should reflect this fact. Prior to repeal, § 139.87(1), STATS., 1989-90, provided:

> **139.87 Definitions.** ...
>
> **(1)** "Controlled substance" has the meaning under s. 161.01(4) and includes a counterfeit substance, as defined in s. 161.01(5).

[3] The controlled substances tax statute is contained in §§ 139.87-139.96, STATS., 1993-94. Sections 139.87(2), 139.88(2), 139.89, and 139.95(2), provide as follows:

> **139.87 Definitions.** In this subchapter:

(..continued)

(2) "Dealer" means a person who in violation of ch. 161 possesses, manufactures, produces, ships, transports, delivers, imports, sells or transfers to another person more than 42.5 grams of marijuana, more than 5 marijuana plants, more than 14 grams of mushrooms containing psilocin or psilocybin, more than 100 milligrams of any material containing lysergic acid diethylamide or more than 7 grams of any other schedule I controlled substance or schedule II controlled substance. "Dealer" does not include a person who lawfully possesses marijuana or another controlled substance.

139.88 Imposition. There is imposed on dealers, upon acquisition or possession by them in this state, an occupational tax at the following rates:

....

(2) Per gram or part of a gram of other schedule I controlled substances or schedule II controlled substances, whether pure or impure, measured when in the dealer's possession, $200.

139.89 Proof of payment. The department shall create a uniform system of providing, affixing and displaying stamps, labels or other evidence that the tax under s. 139.88 has been paid. Stamps or other evidence of payment shall be sold at face value. No dealer may possess any schedule I controlled substance or schedule II controlled substance unless the tax under s. 139.88 has been paid on it, as evidenced by a stamp or other official evidence issued by the department. The tax under this subchapter is due and payable immediately upon acquisition or possessing of the schedule I controlled substance or schedule II controlled substance in this state, and the department at that time has a lien on all of the taxpayer's property. Late payments are subject to interest at the rate of 1% per month or part of a month. No person may transfer to another person a stamp or other evidence of payment.

....

139.95 Penalties. ...

(2) A dealer who possesses a schedule I controlled substance or schedule II controlled substance that does not bear evidence that the tax under s. 139.88 has been paid may be fined not more than $10,000 or imprisoned for not more than 5 years or both.

Hicks moved to dismiss the controlled substances tax violation count, alleging that it violated his right to be free from compelled self-incrimination under the procedures implemented by the Department of Revenue. The trial court heard arguments from both sides and granted Hicks's motion to dismiss. The State now appeals.

(..continued)

II. DISCUSSION

The constitutionality of a statute is reviewed *de novo*. ***State v. McManus***, 152 Wis.2d 113, 129, 447 N.W.2d 654, 660 (1989). As a preliminary consideration, we note that Hicks does not challenge the statute on its face because that issue has already been decided. *See* ***State v. Heredia***, 172 Wis.2d 479, 484-86, 493 N.W.2d 404, 406-07 (Ct. App. 1992) (holding that the controlled substances tax statute does not violate a defendant's rights against compelled self-incrimination), *cert. denied*, 113 S. Ct. 2386 (1993).

Instead, Hicks argues that this statute is unconstitutional as implemented. Specifically, Hicks claims: (1) that the procedures established by the Department of Revenue that require a dealer to purchase the tax stamps in person compel the dealer to incriminate himself because the clerk selling the stamps could identify him or because the police could stake-out the purchase; and (2) that the procedures established by the Department of Revenue that require a dealer to affix the tax stamps to the drugs in his possession compel self-incrimination because they demonstrate the dealer's knowledge of the nature and substance of the drugs.

There is no evidence in the record, however, that Hicks ever attempted to purchase tax stamps, or that he ever affixed any tax stamps to any drugs. In other words, Hicks did not engage in the procedures that he alleges make a facially constitutional statute unconstitutional. A party has standing to challenge the application of a statute if the application causes that party injury in fact and the party has a personal stake in the outcome of the action. ***Racine Steel Castings v. Hardy***, 144 Wis.2d 553, 564, 426 N.W.2d 33, 36 (1988). The procedures that Hicks alleged were implemented by the Department of Revenue have not caused Hicks any injury because he never attempted to comply with them. Therefore, the hypotheticals that Hicks raised regarding a clerk identifying him or police staking out the area where stamps are purchased are purely speculative. Because Hicks did not purchase or affix stamps, the question of whether the statute, as implemented, is unconstitutional, must be left for another day. Hicks lacks proper standing to assert it.

Hicks claims that he has standing to attack the implementation of the statute because the statute applies unconstitutionally to every person who

falls within the statute's ambit and that no person required to pay the tax may do so without incriminating himself or herself. As noted above, however, this court has previously upheld the statute, on its face, as constitutionally permissible. *See* ***Heredia***, 172 Wis.2d at 484-86, 493 N.W.2d at 406-07. In ***Heredia***, this court held that the statute "both contemplates and permits the anonymous payment of the tax" and that the statute "does not subject those who comply with its provision to compelled self-incrimination." ***Id.*** at 484-85, 493 N.W.2d at 407. Accepting Hicks's argument that he has proper standing because no one can pay the tax without incriminating himself or herself, would squarely contradict our holding in ***Heredia***. We are bound by that holding and therefore reject Hicks's argument. *See* ***In re Court of Appeals of Wisconsin***, 82 Wis.2d 369, 371, 263 N.W.2d 149, 150 (1978).

Accordingly, we reverse the trial court's order dismissing the controlled substances tax violation count against Hicks, and instruct the trial court to reinstate the charge.

By the Court.—Order reversed and cause remanded with instructions.

Not recommended for publication in the official reports.

SCHUDSON, J. (*dissenting*). Hicks's argument that he has standing is premised on his assertion that "[n]o person required to pay the tax may do so, under the Department's procedures, without incriminating himself or herself." Thus, as he explains, "[b]ecause the Department's implementation of the statute cannot be applied constitutionally to anyone required to pay the tax, Hicks is not required to show any injury beyond the fact that he is being prosecuted for failing to pay the tax." Under ***Marchetti v. United States***, 390 U.S. 39 (1968), Hicks is correct.

Marchetti was convicted for violations of the federal wagering tax statutes. He challenged "the statutory obligations to register and to pay the occupational tax," arguing that they violated his Fifth Amendment rights. ***Marchetti***, 390 U.S. at 40-41. Although speaking in terms of "waivers" of the Fifth Amendment privilege rather than "standing" to challenge the statutes, the Supreme Court explained:

> To give credence to such "waivers" without the most deliberate examination of the circumstances surrounding them would ultimately license widespread erosion of the privilege through "ingeniously drawn legislation." We cannot agree that the constitutional privilege is meaningfully waived merely because those "inherently suspect of criminal activities" have been commanded either to cease wagering or to provide information incriminating to themselves, and have ultimately elected to do neither.

Id. at 51-52 (citations omitted). Thus, while ***Marchetti*** did not talk in terms of "standing," it clearly was concerned with the principles underlying the standing issue in this case. *See* ***id.*** at 50-54; *see also* ***Herre v. State of Florida Dep't of Revenue***, 617 So.2d 390, 395, *aff'd*, 634 So.2d 618 (Fla. 1994). ***Marchetti*** rejected "the premise that the [Fifth Amendment] privilege is entirely inapplicable to prospective acts" where, as here, "the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." ***Id.*** at 53 (citations omitted).

Relying on ***State v. Heredia***, 172 Wis.2d 479, 493 N.W.2d 404 (Ct. App. 1992), *cert. denied,* 113 S. Ct. 2386 (1993), the majority offers a tautology:

> In ***Heredia***, this court held that the statute "both contemplates and permits the anonymous payment of the tax" and that the statute "does not subject those who comply with its provision to compelled self-incrimination." Accepting Hicks's argument that he has proper standing because no one can pay the tax without incriminating himself or herself, would squarely contradict our holding in ***Heredia***.

Majority slip op. at 6-7 (citation omitted). This tautology, of course, simply begs the question in this case. Clearly, ***Heredia's*** declaration that the statute contemplates anonymous payment does not eclipse Hicks's argument that the *implementation* of the statute, *in every case*, precludes anonymous payment and therefore violates the Fifth Amendment. Indeed, ***Marchetti*** overruled the very theory of "standing" the majority has attempted to revive. *See* ***United States v. Apfelbaum***, 445 U.S. 115, 128-129 (1980) (***Marchetti*** overruling ***United States v. Kahriger***, 345 U.S. 22 (1953), and ***Lewis v. United States***, 348 U.S. 419 (1955)). Under ***Marchetti***, therefore, I conclude that Hicks has standing.

How exactly does the Department of Revenue implement the statute? Although Hicks offers strong arguments that the undisputed record answers that question and allows this court to address the Fifth Amendment issue, ***Marchetti*** emphasizes the need for "the most deliberate examination of the circumstances." ***Id.*** at 51-52. Thus, I would remand for an evidentiary hearing to develop a definitive factual record of the way in which the Department implements the statute.

Accordingly, I respectfully dissent.