
STATE OF WISCONSIN
Plaintiff/Petitioner

DECISION GRANTING MOTION TO
DISMISS

vs.

JOSHUA D. SCHULTZ
Defendant/Respondent

Case No. 10-CM-138

The complaint in this matter alleges that on June 10, 2010, the defendant was carrying a concealed weapon, a knife in the waistband of his pants which was covered by his shirt. The State alleges this is contrary to section 941.23, Wis. Stats. Defendant challenges the statute as unconstitutional “on its face, and because the statute is overbroad, abridges his privileges or immunities as a United States citizen, and violates his due process rights as guaranteed by the Second and Fourteenth Amendments.” Def. Brief, p. 2.

Analysis of this issue starts with the United States Supreme Court decisions in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) and *McDonald v. City of Chicago* No. 08-1521 (U.S. June 28, 2010). Unfortunately, neither of these cases stated with certainty the level of scrutiny that should be applied to laws that infringe upon a citizen’s Second Amendment rights. This court concludes that a strict scrutiny test should be applied in evaluating the statute in question here, section 941.23. The court reaches this conclusion because sec. 941.23 absolutely prohibits the carrying of concealed weapons for all persons in Wisconsin,¹ except “peace officers.” The statute flatly prohibits a certain behavior/activity. It thus takes away what this court understands *Heller* and *McDonald* to deem an individual and fundamental right. Strict scrutiny arises when a fundamental constitutional right, as those listed in the Bill of Rights, is infringed, and that Right has been deemed to apply to the States by virtue of the Fourteenth Amendment.² *United States v. Carolene*, 304 U.S. 144 (1938). To pass strict scrutiny, sec. 941.23 must:

1. be justified by a compelling governmental interest;

¹ Wisconsin resident and nonresident alike—in other words, all United States Citizens, including those nonresidents from other States that are licensed or permitted (because their State has no prohibition) under their state laws to carry concealed weapons.

² This court notes that it agrees with Justice Clarence Thomas of the United States Supreme Court as to his interpretation and application of the Fourteenth Amendment to the States. See *McDonald*, Justice Thomas, concurrence.

2. be narrowly tailored to achieve that interest; and
3. be the least restrictive means for achieving that interest.

The apparent government interest in prohibiting the carrying of concealed weapons is the State's "police power to protect the health, safety, and welfare of its citizens." See *State v. Hamdan*, 264 Wis. 2d 433, 463 (2003). Promotion of health, safety and welfare of citizens is an appropriate use of the police power. However, the court must proceed to answer the remaining questions to determine if the power is appropriately used here.

Is sec. 941.23 narrowly tailored to achieve the State's interest? The answer is clearly "no." As stated in *Hamdan*, "the statute prohibits any person, except a peace officer, from carrying a concealed weapon, regardless of the circumstances, including pursuit of one of the lawful purposes enumerated in Article I, Section 25 [of the Wisconsin Constitution]." *Id.* at p. 465. *Hamdan* went on to state that "we have described Wisconsin's *exceptionally restrictive scheme* to show how it heightens the conflict between [sec. 941.23] and the rights in Article I, Section 25 [of the Wisconsin Constitution]" (*Id.*, at p. 470, emphasis added) and, this court would add, the conflict with the fundamental right set forth in the Second Amendment.

Thus, the Wisconsin Supreme Court has called sec. 941.23 an "exceptionally restrictive scheme." Such a scheme cannot in any sense be considered as "narrowly tailored." Justice N. Patrick Crooks in his concurrence/dissent to *Hamdan* stated:

"The majority in this case improperly reads exceptions into Wis. Stat. § 941.23 in order to hold that it is constitutional. Such exceptions to the statute should be not be made by this court, but by the legislature. Looking at the statute itself, I conclude that Wis. Stat. § 941.23 has become unconstitutional with the passage of Article I, Section 25 of the Wisconsin Constitution.... If the statute does not conform to the Wisconsin Constitution, as amended, then the statute is unconstitutional."

Hamdan, concurrence, at p. 494. Justice Crooks did not use the phrase, but he is in essence saying that courts should not engage in judicial activism—the philosophy of judicial decision making whereby judges' decisions are not based on the law as it is written, whether it be a regulation, statute or the Constitution itself but instead are based on personal views, political views or perceptions of desired public policy. Judicial activism substitutes the view of the courts for the view of the people as expressed through their elected legislature. "Policy decisions affecting the statute's constitutionality should be made in typical legislative fashion." *Id.*, at p. 496.

When this court examines this case in view of *Hamdan* as affected by *Heller* and *McDonald*, Justice Crooks' analysis prevails—leading to the conclusion that sec. 941.23 is not narrowly tailored and therefore is unconstitutional. “A statute which under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional.” *Heller*, p. 56, n. 27. “The breadth of [sec. 941.23] is incompatible with the broad constitutional right to bear arms. Its prohibition extends to anyone at any time and, therefore, improperly and unnecessarily impinges on a person’s right to bear arms ‘for security, defense, hunting, recreation or any other lawful purpose.’ ... [The statute] logically extends to such a wide variety of scenarios that it leaves no ‘open ample alternative channels by which the citizen may exercise the right at issue.’” *Hamdan*, concurrence, pp. 495-496.

Heller and *McDonald*, recognize the fundamental and personal right written, in plain English, in the Second Amendment. These two decisions reinforce the need for the sec. 941.23 to be narrowly tailored and, in addition, the least restrictive means of the State achieving its goal. The statute is neither. As written, sec. 941.23:

1. Prohibits a gun or knife owner from storing his weapons out of plain sight, such as in a gun cabinet, closet or drawer in his own home.
2. Prohibits a store owner from storing his weapons out of plain sight at his place of business, a store in a “rough” neighborhood.³
3. Prohibits the logger, hiker, cross country skier and other outdoors person from keeping his weapon out of plain sight, but available, in the event of a wolf, bear or other wild animal attack.⁴
4. It prohibits judges, prosecutors, defense attorneys, court staff and child support agency workers (and many others) that have received legitimate death threats from carrying a concealed weapon for personal safety.

The court could continue this list ad infinitum. The point of the list is that it shows the over breadth and over reach of sec. 941.23. The statute applies a leaden blanket to when silk would suffice. Persons on the list, and many others, are faced with a Hobson’s choice—go unarmed (thus not able to act in self defense), violate the law (and risk jail/fines) or (as some would argue) carry openly. However, the argument

³ The store owner would be faced with carrying/displaying his weapon in plain view, alerting criminals to the weapons presence and causing legitimate customers to have undue concern.

⁴ For fatal cougar attacks, see http://en.wikipedia.org/wiki/List_of_fatal_cougar_attacks_in_North_America. For fatal bear attacks, see http://en.wikipedia.org/wiki/List_of_fatal_bear_attacks_in_North_America. For a recent bear attack in our neighbor state of Michigan, see <http://www.petoskeynews.com/news/pnr-hunter-fortunate-to-survive-be-101210.0,5853596.story>.

that one could carry or display the weapon openly (holding it in the open, in a visible holster, or on the wall in plain sight) is not a realistic alternative. Even the *Hamdan* majority said:

“Such practices would alert criminals to the presence of the weapon and frighten friends and customers. Likewise, requiring the gun owner to leave a handgun in plain view in his or her store so that he or she avoids a CCW charge fails the litmus test of common sense. We do not think it is necessary to spell out the dangers created by making firearms more accessible to children, to assailants, to strangers, and to guests. In fact, leaving a firearm in the open could expose a gun owner to other liability, both criminal and civil. See Wis. Stat. §§ 948.55 (prohibiting the leaving of a loaded firearm within the reach or easy access of a child) and 947.01 (prohibiting disorderly conduct).

There is no dispute that most storeowners have the right to possess a firearm. As a practical matter, the storeowner who keeps a firearm for security must have the gun within easy reach. Requiring a storeowner to openly display weapons as the only available means of exercising the right to keep and bear arms for security is impractical, unsettling, and possibly dangerous. If the State prosecutes a storeowner for having a concealed weapon within easy reach, it is strongly discouraging the use of firearms for security and is practically nullifying the right to do so. Such a prosecution is very likely to impair the constitutional right to bear arms for security.”

Hamdan, at pp. 481-482. Thus, the *Hamdan* majority recognized that open carry or open display was not and is not a feasible alternative to concealed carry. Open carry or display could result in the gun owner violating other laws regarding access of minors to guns or result in overzealous police and/or prosecutors charging disorderly conduct under sec. 947.01, Wis. Stats., for (what this court considers) the lawful open carrying and display of handguns. The argument that this will not happen with reasonable prosecutors has already been proven wrong. See the Wisconsin State Journal article, at the following citation:

http://host.madison.com/wsj/news/local/crime_and_courts/article_26e20b12-c6b4-11df-9b03-001cc4c002e0.html This article details how five men were issued disorderly conduct citations for eating at a Culver’s restaurant while having firearms in holsters in plain view. The *Hamdan* court, apparently, was prophetic on this issue.

The *Hamdan* decision also shows that an absolute ban on concealed carry is not least restrictive. At the time *Hamdan* was written, Wisconsin was “one of only six states that generally disallow any class of ordinary citizens to lawfully carry

concealed weapons.” As of now, Wisconsin is one of only two States that do not permit the carrying of concealed weapons under any circumstances. Halbrook, *Firearms Law Deskbook, 2009-2010 Edition, Appendix A*. Thus when *Hamdan* was written there were 44 States, and now there are 48 States, that have an alternative that is less restrictive than Wisconsin’s absolute prohibition. Despite the varying concealed carry laws allowing “ordinary”⁵ citizens to carry concealed weapons in 48 States, there have been no shootouts in town squares, no mass vigilante shootings or other violent outbreaks attributable to allowed concealed carry. There is a strong argument that guns, and concealed carry of them, makes citizens safer. See John Lott, *More Guns, Less Crime, Third Edition*, 2010, The University of Chicago Press.

In 48 States, less restrictive possession, conceal or permit statutes allow citizens to carry concealed weapons. Many of those statutes were analyzed in *Hamdan* itself. See *Hamdan*, p. 466, n. 22. This court will not repeat that analysis, other than to say that it clearly demonstrates the feasibility and functionality of less restrictive alternatives.

Thus, while the State has an interest in public safety, sec. 941.23 is unconstitutional because it is not narrowly tailored to achieve the State’s interest nor is it the least restrictive means for achieving that interest.

The parties have not addressed the issue of whether under *Hamdan*, defendant meets the *Hamdan* judicial exception to the sec. 941.23 concealed carry prohibition for weapons kept at home or place of business. The complaint alleges that defendant was in a private apartment when a deputy opened the door and defendant immediately said “Hey relax, I got a knife here, all I want to do is smoke a cigarette.” The deputy then asked where the knife was and defendant pulled up his shirt and showed it to the deputy. As the parties addressed only the broader constitutional issue, so has this court.

In addition, as noted above, this court agrees with Justice Clarence Thomas’s *McDonald* concurrence and application of the Fourteenth Amendment to this matter. In essence, no State shall abridge the privileges and immunities of citizens of the United States. As Justice Thomas demonstrates, the right to keep and bear arms is a fundamental right, not created by the Second Amendment, but secured or recognized by it. The right to keep and bear arms is therefore not to be abridged by

⁵ I use “ordinary” in quotes (as that is how *Hamdan* referred to citizens) as it troubles this court to refer to some citizens as “ordinary” because of the inference that other citizens are then somehow of greater or lesser stature. See the Declaration of Independence—“All men are created equal.”

any State law. Sec. 941.23 must also fail under the application of the Fourteenth Amendment.

In sum, sec. 941.23 is unconstitutional on its face as overly broad in violation of the Second and Fourteenth Amendments of the United States Constitution.

The clerk's office is directed to prepare an order of dismissal based on this decision. The order of dismissal is considered by the court to be a final order for purposes of any appeal.

Dated: October 12, 2010

By the Court:

Jon M. Counsell
Circuit Court Judge