

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 31

STATE OF WISCONSIN,

Plaintiff,

v.

Case No.: 07 CM 687

ANDRES VEGAS,

Defendant.

DECISION AND ORDER

INTRODUCTION

In this criminal matter, Defendant Andres Vegas (Vegas) has moved to dismiss the concealed weapon charge against him. Defendant Vegas has proffered two arguments: first, that the Carrying a Concealed Weapon statute (CCW) Wis. Stat. § 941.23 is unconstitutional in light of the recent firearm Amendment to the Wisconsin State Constitution, and second, that applying the standards of *Hamdan* and *Fisher*, the CCW statute is unconstitutional as applied to Vegas. The State countered by noting that the *Hamdan* court already upheld the constitutionality of the CCW statute in light of the new amendment and that the application of the CCW statute is not unconstitutional as applied to this defendant. In light of *Hamdan* and *Fisher* and in consideration of the facts of this case, this Court holds that the CCW statute is unconstitutional as applied to Defendant Vegas.

BACKGROUND

On January 4, 2007, Mr. Vegas was attempting to deliver a pizza at 2840 North 22nd St., Milwaukee, Wisconsin. As a precaution, Vegas called the customer twice to ask the customer to come outside. After no response, he called his boss who then called the customer. The customer then called Vegas to assure him that the customer was there and was on his way out to get the pizza. After Vegas got out of his vehicle, two men approached him. One of the men had a handgun and pointed it directly at Vegas' face. Vegas pushed the assailant's gun aside and retrieved his gun. In the melee, Vegas shot one of the robbers in the hip. After the incident, Vegas took the assailant's gun and his gun, placed them on top of his car and dialed 911. He waited for and cooperated with the responding Milwaukee police officers. The Milwaukee County District Attorney has determined that Vegas actions were taken in self-defense. However, the State has brought a CCW charge against Vegas for the moments before he was assaulted and defended himself.

This is not the first time that Mr. Vegas has been a victim of an armed robbery. Before this incident, Vegas has been the victim of an armed robbery while delivering pizzas on three separate occasions. In March 2005, Vegas was robbed while attempting to deliver a pizza. On July 14, 2006, two individuals attempted to rob him. One of the men, who was masked, pointed a gun at Vegas and demanded money. Vegas, who was armed, defended himself and shot one of his assailants. The Milwaukee District Attorney determined that Vegas acted in self defense and declined to prosecute for CCW. However, the District Attorney's office did send Vegas a letter warning him about carrying a concealed weapon.

On September 13, 2006, three men robbed and physically beat Vegas while he was delivering pizzas. It is unclear whether he was armed at the time, but Vegas did not use a firearm to defend himself. The assailants beat Vegas and pepper sprayed his eyes. Vegas attempted to run away, but one of the assailants grabbed him, punched him in the face and then kicked him. In that case, Vegas is a key witness for the Milwaukee District Attorney.

It is undisputed that Vegas delivers pizzas in areas of Milwaukee that are dangerous and that have very high rates of violent crime. (Tr. p. 8; Ex. A.) Furthermore, the parties agree that Defendant Vegas has been a victim of armed robbery numerous times while working as a pizza delivery person. (Tr. p. 35.) As well, the State concedes that Defendant Vegas was not concealing his weapon for an unlawful purpose. (Tr. p. 57.)

Defendant Vegas has moved this court to dismiss the concealed weapon charge against him, because, in light of *Hamdan* and *Fisher*, he argues that the charge against him is unconstitutional as applied to him. Vegas contends that his right to carry a concealed weapon for security and protection is substantial and outweighs the State's interest to police concealed weapons. Vegas asserts that he has no other reasonable alternative but to conceal and has extraordinary circumstances that justify his concealment of a weapon in his car. Vegas also argues that the CCW law should be declared unconstitutional. The State contends that the *Hamdan* exception is limited to only the apex of a person's interest in carrying a concealed weapon, to wit: a home or a privately-owned business. As well, the State argues that Vegas does not have

extraordinary circumstances to justify concealing it in his car nor does he have a substantial interest to have it concealed.

WISCONSIN'S CCW CASELAW

In *State v. Hamdan*, the Supreme Court examined the constitutionality of the CCW statute in light of the recent passing of a new amendment to the Wisconsin Constitution. 264 Wis. 2d 433, 2003 WI 113. The new amendment, Article I, Sec. 25, provides that:

The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.

The *Hamdan* court ruled that the new amendment did not overrule the CCW statute in its entirety. *Id.* at ¶ 5. The Supreme Court explained that the state retains the authority to police the manner, time and place a person may possess a firearm. *Id.* at ¶ 46. The Court found that the CCW statute was a reasonable exercise of that power to regulate the manner in which a person may possess a firearm. *Id.* But the Court did find that there are times that the CCW would conflict with a citizen's individual right to possess a firearm for the lawful purpose of security and protection. *Id.* at ¶ 5. Because of this conflict in certain situations, the *Hamdan* Court held that the CCW statute may be unconstitutional as applied. *Id.* The Court then ruled that the CCW statute was unconstitutional as applied to Defendant Hamdan. *Id.*

The Court outlined how a defendant could bring a constitutional challenge to a CCW prosecution. *Id.* at ¶ 86. In order to challenge a prosecution under the CCW statute on constitutional grounds, the Court established that a defendant must secure affirmative answers to both of the following questions:

First, the defendant must show that “the defendant's interest in concealing the weapon to facilitate exercise of his or her right to keep and bear arms substantially outweigh[s] the State's interest in enforcing the concealed weapons statute.” *Id.* The *Hamdan* court explained that the State “generally has a significant interest in prohibiting the carrying of concealed weapons.” *Id.* So to satisfy the first question, “the defendant must have been exercising the right to keep and bear arms under circumstances in which the need to do so was substantial.” *Id.*

Second, the Court stated that a defendant must establish that “conceal[ing] was the only reasonable means under the circumstances to exercise his or her right to bear arms.” *Id.* In other words, the second question asks whether the defendant had a reasonable alternative to concealment to exercise his or her constitutional right to bear arms. *Id.*

Setting forth the procedure for bringing this motion, the Court stated that “the invocation of this possible defense must be raised by motion of the defendant before trial, and resolution of these legal questions must be made by the court prior to trial.” *Id.* Affirmative answers to the previous two questions requires “a court to conclude that the State's enforcement of the CCW statute constituted an unreasonable and unconstitutional impairment of the right to keep and bear arms as granted in Article I, Section 25 of the Wisconsin Constitution.” *Id.*

As to the issue of whether there was an unlawful purpose, the Court explained that the State can overcome a court-approved constitutional defense if it asserts and proves at trial that the defendant had an unlawful purpose in the concealment. *Id.* at ¶ 87.

Implicit in this line of reasoning is that the State must demonstrate that there was probable cause of the unlawful purpose.

The *Hamdan* Court, relying heavily on the facts surrounding the case, determined that the CCW statute was unconstitutional as applied to Defendant Hamdan. *Id.* at ¶ 82, Hamdan's store was located in a high-crime neighborhood of Milwaukee. *Id.* The Court referenced that "between 1993 and 1999, Hamdan's store had been a target of four armed robberies (three of them successful) and two fatal shootings." *Id.* at ¶ 8. Hamdan described one assault where an assailant placed a gun to his head, pulled the trigger and the weapon misfired. *Id.* In another armed robbery attempt, Hamdan struggled with, fought, shot and killed an assailant. *Id.* Hamdan purchased his gun to protect himself and his family while they worked at his business. *Id.* at ¶ 9. Applying the facts, the Court in *Hamdan* came to the conclusion that Defendant Hamdan's interest in having a concealed weapon was substantial in contrast to the weak interest of the state in regulating how Hamdan carried his weapon within his business. *Id.* at ¶ 84. The Court reversed Hamdan's CCW conviction. *Id.*

In *State v. Fisher*, Defendant Fisher attempted to extend the principles of *Hamdan* to carrying a concealed weapon in a vehicle. 290 Wis. 2d 121, 2006 WI 44. The *Fisher* Court stated that there were circumstances when it would be appropriate to have a concealed weapon in a car, but found that the burden to establish the Defendant's individual right was greater than that in *Hamdan*. *Id.* at ¶ 32. The Court explained that to find that an individual's right to carry a weapon within a vehicle is substantial and outweighs the State's interest, a Defendant must show extraordinary circumstances. *Id.* The *Fisher* Court stated that extraordinary circumstances would be present "if a defendant

reasonably believes that he or she is actually confronted with a threat of bodily harm or death and that carrying a concealed weapon is necessary for protection from the threat.”

Id. The Court elaborated:

Because the individual's interest in carrying a concealed weapon in a vehicle is generally comparatively weak and the state's interest in prohibiting such weapons in vehicles is relatively strong, it is only in extraordinary circumstances that an individual asserting a constitutional defense under *Hamdan* will be able to secure an affirmative answer to the first question in the *Hamdan* test. *Id.*

Though the Court opined that there is the possibility of applying the *Hamdan* exception for a concealed weapon in a vehicle, the *Fisher* Court did not reverse the conviction against Defendant Fisher. *Id.* at ¶ 49. The Court, like in *Hamdan*, relied on the facts surrounding Fisher’s defense. *Id.* at ¶ 34. The Court noted that Fisher’s tavern, which was located in Black River Falls, Wisconsin, was not in a high crime area. *Id.* at ¶ 41. There was no evidence, in the five years that Fisher owned the tavern, that it was ever a site of an armed robbery, a fatal shooting or any other violent crime. *Id.* at ¶ 42. In addition, there was no evidence that Fisher was a victim of any violent crime. *Id.* at ¶ 43. Fisher contended that he needed the firearm for safety when carrying cash from his bar, but the Court pointed out that Fisher inconsistently only kept the guns in his car and did not use them for security or protection when carrying cash back and forth between his bar and his vehicle. *Id.* at ¶ 45. The Court found that Fisher did not have extraordinary circumstances warranting carrying a concealed weapon within his vehicle. *Id.* at ¶ 48.

ANALYSIS

Addressing the first question, Defendant Vegas has demonstrated the requisite extraordinary circumstances that warrant his concealed weapon. Like *Hamdan*, Vegas

works in a dangerous, high crime area in the city of Milwaukee. Like Hamdan's grocery, Vegas is engaged in a cash business activity that makes him a target for armed robberies. Also like Hamdan, Vegas has been a victim of multiple violent crimes. Like Hamdan, Vegas legally purchased his firearm for the purpose of security and protection. There is a strong inference that Vegas' concealed weapon has saved his life during these violent assaults. In light of the totality of the circumstances, Vegas has a substantial interest in being secure and protecting himself by carrying a concealed weapon.

The State argues that Vegas has not demonstrated extraordinary circumstances; that there was not a reasonable belief that he was actually "confronted with a threat of bodily harm or death and that carrying a concealed weapon is necessary for protection from the threat." The State contends that there were no extraordinary circumstances en route to the pizza delivery. In one sense, this is true. There was not a continued immediate threat during his entire trip from pizza store to delivery locale. But the *Fisher* Court, when determining whether Fisher had a substantial interest in concealing a weapon in his car, evaluated the totality of the circumstances surrounding Fisher, not whether there was an acute immediate threat. For security purposes, the need to conceal a weapon in a car may be an intermittent, consistent threat, much like the one in *Hamdan*. Furthermore, though there may not have been an acute immediate threat en route to the pizza delivery, there was such a threat when he got there. Without having an accessible weapon, how does Vegas protect himself then when faced with an extraordinary circumstance of an assailant's gun? Vegas needed his weapon when he got to the scene; this the State concedes. Vegas had a substantial need to conceal a weapon to protect himself and to provide security.

As for the second question regarding the viability of alternatives to concealment, the State argues that there were reasonable alternatives to concealment. The State contends that Vegas could wear it on a holster to warn the public. But, the *Hamdan* court explained that an openly holstered weapon was a dangerous and counterproductive option. *Id.* at ¶ 73. The Court stated that requiring gun owners “to carry a gun openly or in a holster is simply not reasonable. Such practices would alert criminals to the presence of the weapon and frighten friends and customers.” *Id.* As a pizza delivery person, this reasoning applies to Vegas’ situation as well.

In addition, the State alludes to Wis. Stat. § 167.31, which requires those traveling with firearms in vehicles to keep them unloaded and secured in a case. Given Vegas’ experience, he has a need for a gun at a moments notice. Enclosing and unloading the weapon is not a reasonable alternative to secure and protect his safety. Plus, Vegas while delivering pizzas enters and exits his car constantly; it would be unreasonable for him every time that he enters his car to require him to unload it and place it in a case and then reverse the process every time he exits. This defeats the purpose of having the weapon for security and protection.

In Vegas’ situation, carrying a weapon for security requires having the weapon so that it is easily accessible. As in *Hamdan*, Vegas cannot predict the exact moment that the next attack will occur. All Vegas knows is that he has been attacked in the past and that it is highly probable that he will be attacked again.

This Court is not convinced that there are any reasonable alternatives that would have secured Vegas’ safety. Vegas’ concealed weapon has most likely saved his life on several occasions; this the State cannot ignore. The State has conceded that Vegas did

not have an unlawful purpose for concealing a weapon. Given the totality of the circumstances, this Court is satisfied that the Defendant has affirmatively answered the two-prong analysis as outlined in *Hamdan* and *Fisher* and thus grants the Defendant's motion to dismiss.

CONCLUSION

Based on review of the record, briefs and arguments of the parties, this Court finds that Defendant Vegas has demonstrated that Wis. Stat. § 941.23 is unconstitutional as applied to him.

Accordingly, IT IS ORDERED that Defendant Vegas' motion to dismiss is **GRANTED**.

Date this 24th day of September, 2007, in Milwaukee, Wisconsin.

BY THE COURT:



The Honorable Daniel A. Noonan
Milwaukee County Circuit Court, Branch 31