

for an evidentiary hearing as previously ordered in trial court.

[4] It is regrettable this case has had such a protracted journey through the trial court's administrative labyrinth. Motions concerning child custody should be resolved promptly, and, on remand, this matter should be given prompt attention.

DECISION

The trial court erred in refusing to conduct an evidentiary hearing on Dudley's motion to modify custody. On remand, the trial court must conduct an evidentiary hearing and determine the issue of custody by using the best interests of the child standard found in Minn.Stat. § 518.17. For the sake of the child, the hearing should be held with dispatch.

Reversed and remanded.

HUSPENI, Judge (concurring specially).

I agree with the result reached by the majority and with its analysis of applicable case law. However, I am concerned about dicta in the majority opinion referring to possible continued applicability of Minn. Stat. § 518.18(a)-(b) (1990).¹ As stated in the concurring opinion in *Keith v. Keith*, 429 N.W.2d 276 (Minn.App.1988) (Huspeni, J., concurring specially):

[I]t appears that grants of joint physical custody, with no further specification or scheduling, are often ordered or stipulated so as to avoid making a difficult decision, or in the optimistic hope that "things will work out."

Often things don't "work out." When they don't, the adverse effects on a child can be swift. However, an attempt by the trial court to satisfy the strict requirements of Minn.Stat. § 518.18 in such a setting may fail.

Id. at 279.

In a true joint physical custody arrangement, I believe the best interests of chil-

1. Section 518.18(a) and (b) read in relevant part:

(a) [N]o motion to modify a custody order may be made earlier than one year after the date of the entry of a decree * * *.

dren will be served only by allowing parents to seek court assistance without having to first meet the time constraints of section 518.18(a) and (b). I foresee no flood of custody litigation resulting from abrogation of such time restraints. If the court once vests primary physical custody in one parent, all provisions of section 518.18 will then apply and continue to apply to the custodial arrangement which, I believe, was envisioned by the framers of this statute.



STATE of Minnesota, City of Minnetonka, Appellants,

v.

Donald Joseph POUPARD, Respondent.

No. C9-91-39.

Court of Appeals of Minnesota.

June 11, 1991.

Charge of carrying a pistol without a permit was dismissed by pretrial order of the District Court, Hennepin County, Ann Leslie Alton, J., and State appealed. The Court of Appeals, Huspeni, J., held that: (1) State had right to appeal dismissal based on alleged error of law; (2) defendant had burden of going forth with evidence that he was within pistol permit exception for traveling between dwelling and place of business; (3) exception to permit requirement must be construed narrowly; and (4) evidence was sufficient to establish probable cause in light of police report indicating that defendant deviated from di-

(b) If a motion for modification has been heard, * * * no subsequent motion may be filed within two years after disposition of the prior motion on its merits.

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rect route between business and home to stop at restaurant and have several drinks.

Reversed and remanded.

1. Criminal Law §1024(2)

Though dismissal of complaint for lack of probable cause is generally not appealable, such a dismissal is appealable where it is predicated on an error of law. 49 M.S.A., Rules Crim.Proc., Rule 28.04, subd. 1(1).

2. Criminal Law §1024(2)

State had right to appeal on issue of whether trial court committed error of law in dismissing weapons charge in complaint on ground that statute placed burden on the State to show that defendant was not within exception for transporting weapon between business and home. 49 M.S.A., Rules Crim.Proc., Rules 28.04, 28.04, subd. 1(1); M.S.A. §§ 624.714, 624.714, subd. 9(c).

3. Criminal Law §1166(1)

Generally, in reviewing pretrial prosecution appeals, Court of Appeals will reverse determination of trial court only if state demonstrates clearly and unequivocally that trial court erred in its judgment and that, unless reversed, error will have a critical impact on the outcome of trial.

4. Weapons §17(2)

Defendant charged with carrying a pistol without a permit had burden of going forth with the evidence that he was within the statutory exception for traveling between his dwelling and his place of business. M.S.A. §§ 624.714, 624.714, subd. 9(c).

5. Weapons §17(2)

Defense has burden of production to show some evidence of exception to pistol permit requirement. M.S.A. §§ 624.714, 624.714, subd. 9(c).

6. Criminal Law §238(3)

Despite testimony of defendant charged with carrying a pistol without a permit that he was traveling from his busi-

ness to his home, evidence at preliminary hearing was sufficient to establish probable cause in light of unrefuted police report indicating that defendant deviated from the direct route to his home to stop at restaurant and have several drinks. M.S.A. §§ 624.714, 624.714, subd. 9(c).

7. Criminal Law §238(2)

Standard for granting motion to dismiss for lack of probable cause is whether facts appearing in the record, including reliable hearsay, would preclude granting of motion for directed verdict of acquittal if proved at trial.

8. Weapons §12

Exception to pistol permit requirement for transporting pistol between business and home must be construed narrowly to avoid negating general rule that permit is required to carry a handgun, rather than allowing anyone with a proprietary interest in a business to carry a loaded pistol in car while traveling between home and work, regardless of how indirect and how far reaching the route. M.S.A. §§ 624.714, 624.714, subd. 9(c).

Syllabus by the Court

1. The defense bears the initial burden of production to show that an exception to the pistol permit requirement applies.

2. In order to dismiss a charge for lack of probable cause, the trial court must find that the record contains insufficient evidence to defeat a motion for a directed verdict of acquittal.

3. The exception contained in Minn. Stat. § 624.714, subd. 9(c) (1990) must be narrowly construed to avoid negating the pistol permit requirement.

Hubert H. Humphrey, III, Atty. Gen., Robert A. Stanich, Sp. Asst. Atty. Gen., St. Paul, Patrick W. Ledray, Minnetonka Sp. Prosecutor, Fridley, for appellants.

David V. Anderley, Edina, for respondent.

Considered and decided by FOLEY, P.J., and HUSPENI and MULALLY,* JJ.

OPINION

HUSPENI, Judge.

Appellant State of Minnesota challenges the trial court's pre-trial dismissal of one count of carrying a pistol without a permit. Minn.Stat. § 624.714, subd. 1 (1990). We reverse and remand for trial.

FACTS

On May 3, 1990, a state highway patrolman stopped a Cadillac driven by respondent Donald J. Poupard after observing the vehicle make a number of lane changes without signaling. The officer, after noting signs of alcohol consumption, administered a consensual preliminary breath test. Respondent failed the breath test and performed poorly on field sobriety tests. Based on the test results, the trooper placed respondent under arrest for driving while intoxicated (DWI) and read him the implied consent advisory. Respondent refused further testing and did not respond to police questioning.

Following the arrest, during a routine inventory search of the Cadillac, a trooper found a loaded .38 caliber pistol in a zippered leather bag in the center console between the front seats. When asked whether the gun belonged to him, respondent refused to answer. The trooper later learned that respondent did not have a permit to carry the weapon.

Respondent alleged in his affidavit submitted to the trial court in support of his motion to dismiss that he was the owner of the Hungry Pilgrim Restaurant located at Interstate 494 and Highway 55. Respondent further stated that the gun found in his car was formerly in the restaurant safe and was being transported to his home located near the intersection of Interstate 494 and Highway 62. He explained that the transfer was necessary because the restaurant had been sold and new owners were taking possession on May 12, 1990.

* Retired judge of the district court, acting as judge of the Court of Appeals by appointment

Respondent further alleged that on his way home, he stopped at the Hopkins House Restaurant (located at 1501 Highway 7, Hopkins). He explained that he intended to deliver kitchen equipment, but admitted to the arresting officer that he had had a few drinks while at the Hopkins House.

On June 27, 1990, respondent was charged by complaint with one count of carrying a pistol without a permit, Minn. Stat. § 624.714, subd. 1 (1990), and one count of DWI, Minn.Stat. § 169.121, subd. 1(a) (1990). The parties agreed to submit to the court both the issue of probable cause and respondent's motion to dismiss for lack of evidence, based on the complaint, police reports and respondent's affidavit.

Based on these submissions, the trial court dismissed the weapons count concluding:

This Court finds that the State has not proffered any evidence to support the allegation that defendant was not carrying his pistol between his dwelling and place of business as is permissible pursuant to Minn.Stat. § [6]24.714, subd. 9(c).

The state challenges the trial court's dismissal of the weapons charge and brings this appeal pursuant to Minn.R.Crim.P. 28.04.

ISSUES

1. Is the state entitled to bring this appeal as of right pursuant to Minn. R.Crim.P. 28.04?
2. Did the trial court err by dismissing the weapons charge after concluding the state had not met its burden of showing that respondent was not on his way home?

ANALYSIS

I.

[1,2] Appellant argues that this matter is appealable as of right. We agree. Minn.R.Crim.P. 28.04, subd. 1(1), confers upon a prosecuting attorney the right to appeal to the Court of Appeals:

pursuant to Minn. Const. art. VI, § 2.

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in any case, from a pretrial order of the trial court except an order dismissing a complaint for lack of probable cause to believe the defendant has committed an offense.

Dismissals for lack of probable cause are appealable, however, where the dismissal is predicated on an error of law. *See State v. Skjefte*, 428 N.W.2d 91, 95-6 (Minn.App. 1988) (error in permitting defense to call victim as recantation witness and ruling victim's hearsay statements to police inadmissible); *State v. Diedrich*, 410 N.W.2d 20, 22-23 (Minn.App.1987) (error in interpreting statutory definition); *State v. Aarsvold*, 376 N.W.2d 518, 520 (Minn.App. 1985), *pet. for rev. denied* (Minn. Dec. 30, 1985) (error in ruling that possession of cocaine not appropriate predicate felony for application of felony murder rule).

In this case, the trial court's order dismissing the charge does not state that the dismissal was based on a lack of probable cause. Rather, it appears the trial court interpreted the statute to place the burden on the state to show that respondent was not on his way home at the time of his arrest, and dismissed on this ground. If this interpretation is erroneous, it would constitute an error of law. Accordingly, we conclude that the state's appeal is properly before the court.

II.

[3] Generally, in reviewing pretrial prosecution appeals, this court

will only reverse the determination of the trial court if the state demonstrates clearly and unequivocally that the trial court has erred in its judgment and that, unless reversed, the error will have a critical impact on the outcome of the trial.

State v. Webber, 262 N.W.2d 157, 159 (Minn.1977). At the outset, the dismissal of a charge clearly has a critical impact on the outcome of the trial. Our analysis, therefore, will focus on the first element of the test.

[4,5] Minn.Stat. § 624.714, subd. 1 (1990) provides in part:

A person * * * who carries, holds or possesses a pistol in a motor vehicle * * * or on or about the person's clothes or the person, or otherwise in possession or control in a public place or public area without first having obtained a permit to carry the pistol is guilty of a gross misdemeanor.

The statute, however, also provides: "[A] permit to carry is not required of a person * * * [t]o carry a pistol between the person's dwelling house and place of business." Minn.Stat. § 624.714, subd. 9(c).

Appellant argues first that the trial court improperly interpreted the effect of Minn. Stat. § 624.714, subd. 9(c) upon the weapons charge. We agree. Respondent contends, and the trial court seemingly ruled, that the state carried the burden of showing subdivision 9(c) did not apply. We conclude, however, that respondent had the burden of going forth with evidence that he was traveling between his dwelling and place of business.

In *State v. Paige*, 256 N.W.2d 298, 303 (Minn.1977), a case interpreting the language of section 624.714, the supreme court ruled that the language "without a permit" did not constitute an element of the crime, but rather an exception to the rule. The court reasoned:

[Minn.Stat. § 624.714, subd. 1] is * * * properly characterized as a "general prohibition": Anyone having a firearm in a public place may be prosecuted if he has no permit. "Without a permit" is not an element of the crime, but only indicates that some persons *cannot* commit the offense by reason of having a valid permit.

Id. (emphasis in original). Therefore, the supreme court concluded that the defendant properly carried the burden of production to show "some evidence of a permit." *Id.* at 304. Once a defendant presents a prima facie showing of a permit,

the overall presumption of innocence operates to shift the burden back onto the state to show the invalidity of the permit, or violation of the terms of the permit. Once the defendant has come forward initially with evidence of the permit, the

state's difficulty in "proving a negative" is alleviated, making it reasonable for the state to disprove the defense.

Id.; see also *State v. Charlton*, 338 N.W.2d 26, 30-31 (Minn.1983) (court places initial burden on defense to show duress defense). The trial court apparently interpreted the language in subdivision 9(c) to constitute an element of the offense. We find the *Paige* rationale compelling in interpreting the appropriate allocation of burdens under Minn.Stat. § 624.714, subs. 1 and 9(c).

[6] Respondent here is in the best position to come forward with evidence that he was traveling between his business and his home at the time of his arrest. By placing the initial burden on the state to "proffer evidence" that respondent was *not* on his way home, the court put the state in the impossible position of proving a negative. The state presented unrefuted evidence in the form of the police report that respondent deviated from the direct route to his home to stop at the Hopkins House and to have several drinks while there. Thus the state presented sufficient evidence to rebut respondent's argument that he was merely on his way home when he was arrested. The state should be permitted to proceed to trial, at which time the issue of whether respondent comes within the exception of subdivision 9(c) may be presented to the fact-finder.

[7] Next, appellant contends that the court applied the improper probable cause standard. The standard for granting a motion to dismiss for lack of probable cause is whether

the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict of acquittal if proved at trial.

State v. Florence, 306 Minn. 442, 459, 239 N.W.2d 892, 903 (1976). In deciding whether to grant a directed verdict, the trial court must determine "whether, as a matter of law, the evidence is sufficient to present a fact question for the jury's consideration." *Diedrich*, 410 N.W.2d at 22 (quoting *Paradise v. City of Minneapolis*, 297 N.W.2d 152, 155 (Minn.1980)).

Respondent maintains that the record before the trial court (e.g. the police report, complaint and respondent's affidavit) comes within the rationale of *Florence*, 306 Minn. at 459, 239 N.W.2d at 903, and, therefore, the only appropriate course for the trial court to take was to dismiss the charge. We disagree.

Even if we assume that the state waived its right to cross-examine respondent's assertions in his affidavit by agreeing to submit the case on a written record, we nevertheless conclude that the record contains ample additional evidence to preclude a grant of a directed verdict of acquittal. The testimony in respondent's affidavit did not contradict the information in the police reports. Once the state established the elements of the offense, and the defense presented a prima facie showing that subdivision 9(c) applied, the state came forward with additional evidence that respondent was on his way home from a drinking establishment, admitted having consumed alcohol, failed a preliminary breath test and performed poorly on field sobriety tests. The state presented sufficient evidence to raise a fact question for resolution by the jury.

[8] Appellant further urges that any exception to the permit requirement must be construed narrowly. As respondent concedes, the public policy underlying the statute is to "prohibit criminal behavior," *State v. Folstrom*, 331 N.W.2d 231, 233 (Minn.1983), and to "protect innocent people from being injured by handguns." *State v. DeLegge*, 390 N.W.2d 10, 12 (Minn. App.1986). We believe that subdivision 9(c) was intended to carve out a narrow exception to the general requirement of obtaining a permit to carry a handgun. The expansive interpretation of the exception urged by respondent would substantially broaden the spectrum of conduct that would not require a permit. Under the rationale put forth by respondent, anyone with a proprietary interest in a business would be able to carry a loaded pistol in his car while traveling between home and work regardless of how indirect and far reaching the route. *Cf. Application of Atkinson*,

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291 N.W.2d 396, 400 (Minn.1980) (rejecting interpretation that anyone driving an "appreciable distance" on public highway obtained right to carry weapon without permit, as gutting the statute). We hold, therefore, that the exception must be construed narrowly to avoid negating the general rule that a permit is required to carry a handgun and protect the public interest.

Finally, respondent raises a number of maxims of statutory construction that are inapposite. These rules are only applicable if the statute is ambiguous. See Minn.Stat. § 645.16 (1990). Neither party raises the ambiguity of the statutes in question.

DECISION

The trial court erred by dismissing the charges where the state presented sufficient evidence to raise a question for jury resolution.

Reversed and remanded.



STATE of Minnesota, Respondent,

v.

Willard LeRoy DAVIDSON,
Jr., Appellant.

No. CX-90-1304.

Court of Appeals of Minnesota.

June 11, 1991.

Review Granted Aug. 12, 1991.

Defendant was convicted of one count of sale or distribution of obscene material after jury trial in the District Court, Winona County, Dennis A. Challeen, J. Defendant appealed. The Court of Appeals, Randall, J., held that: (1) "community standard" obscenity statute was overly vague and violative of state constitutional guarantee of due process; (2) trial court did not

abuse its discretion by excluding offered expert testimony on alleged margin of error of six-person jury attempting to define community standard; (3) trial court was authorized to require State to return video seized from bookstore to defendant but nonetheless allow it at trial; and (4) if jury failed to ascertain contemporary community standard pursuant to obscenity statute, then prosecution failed to prove its case beyond reasonable doubt, and defendant was entitled to acquittal.

Reversed.

Amundson, J., concurred specially and filed opinion.

Huspeni, J., filed opinion concurring in part and dissenting in part.

1. Obscenity ⇨2.5

"Community standard" obscenity statute was void for vagueness under State Constitution, where statute did not give defendant before trial clear and meaningful description of what materials were against law, and did not provide to jury clear description of law that they should apply to facts as they found them based on evidence presented in court. M.S.A. § 617.241, subd. 2(a); M.S.A. Const. Art. 1, § 7.

2. Criminal Law ⇨13.1(1)

Statute is void for vagueness if persons of common intelligence must necessarily guess at its meaning or differ as to its application. M.S.A. Const. Art. 1, § 7; U.S.C.A. Const. Amend. 14.

3. Criminal Law ⇨662.7

Right of confrontation includes both opportunity to cross-examine and occasion for jury to weigh demeanor of witness. M.S.A. Const. Art. 1, § 6; U.S.C.A. Const. Amends. 6, 14.

4. Criminal Law ⇨476.5

Trial court did not abuse its discretion in obscenity trial by excluding offered testimony of expert on alleged margin of error of six-person jury drawn from community of 2,500 in attempting to define community standard.