original

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

JUDGE PETER D. O'CONNELL, JUDGE JANE E. MARKEY,
JUDGE MICHAEL J. TALBOT

PEOPLE OF THE STATE OF MICHIGAN

Docket No. 129038

Plaintiff Appellee

v.

ANGEL HERNANDEZ-GARCIA

Defendant-Appellant

DEFENDANT APPELLANT'S BRIEF ON APPEAL

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STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF
THE STATE OF MICHIGAN

Plaintiff – Appellee

v.

ANGEL HERNANDEZ – GARCIA

Defendant – Appellant.

Supreme Court No. 129038

C.O.A. No. 252516

Lower Court No. 02-00104-FH

APPLICATION FOR
LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

DEFENDANT–APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Defendant-Appellant was convicted by Jury in the Kent County Circuit Court before the Honorable Dennis C. Kolenda on April 7, 2003 and Sentenced on June 23, 2003 with the Judgment of Sentence of the same date. Defendant-Appellant requested the appointment of appellate counsel on July 1, 2003 with the trial court receiving Defendant-Appellant's request on the same date. The trial Court appointed appellate counsel on December 2, 2003 with a certificate of mailing on the same date. Defendant-Appellant filed a contempt show cause to secure transcripts from the court reporter on January 28, 2004. The trial transcripts show a mailing date of March 3, 2004. This is an appeal from a Jury trail and is authorized by the Michigan Constitution 1963, art. 1, Section 20, and MCR.203 and MCR 7.204. The Court of Appeals affirmed the trial courts ruling, denying Defendant-Appellants appeal on May 10, 2005. The Defendant Appellant files this appeal brief and appendix in accordance with Michigan Supreme Court Order dated January 13, 2006.

STATEMENT IDENTIFYING JUDGEMENT FROM WHICH RELIEF IS SOUGHT AND RELIEF REQUESTED

The Court of Appeals decision dated May 10, 2005 (Appendix Page 1a).

Defendant-Appellant seeks leave to appeal the trial court's ruling and grant a seeks a new trial consistent with law and equity.

STATEMENT OF QUESTIONS PRESENTED

Whether the principle of mens rea in the defense of momentary innocent possession of a handgun should be included in MCL 750.227(2)?

Plaintiff-Appellee	"NO"
Defendant-Appellant	"YES"
Michigan Court of Appeals	"NO"

Whether the trial court improperly gave a preliminary jury instruction that disarming an individual illegally possessing a gun then momentary possessing that gun with the intent to give it to police authorities is a legitimate defense - then allowed and encouraged a trail based on this defense - and then at the end of the trail and without explanation to the jury instructs the jury that said conduct is not a valid defense thereby confusing the jury and denying Defendant-Appellant a valid defense and fair jury trail and/or effectively ordering a directed verdict of guilty?

Plaintiff – Appellee	"NO"
Defendant – Appellant	"YES"
Michigan Court of Appeals	"NO"

STATEMENT OF FACTS

Defendant-Appellant, Angel Hernandez – Garcia, is a former 3-year veteran Police Officer in the Country of Mexico. (trial transcript page volume 2 page 21, L16) He is charged in one count Felony Information to the charge of Carrying a Concealed Weapon contrary to MCL 750.227; MSA 28.424. (Felony Information)

Prior to the trial, the issue of proper jury instructions were discussed between the Defense Attorney and the Prosecutor as evidenced in the letter written by defendant's attorney to the prosecutor. (see appendix page 35a) Prior to trial, both parties were aware of the rule in People v. Coffey, 153 Mich. App 311, 315 (1986) lv app den 426 Mich. 857 (1996) Prior to the jury hearing any testimony of the witnesses, the trail court presented Preliminary Instructions consistent with Coffey. (trial transcript page 92, L 11: to Page 93 L 8 / appendix page 12a) Defense relied upon this instruction in its opening statement and throughout the trial. (trial transcript Page 97/ appendix page 13a) The evidence presented by both the prosecutor and defendant support the Coffey defense. That the court then arbitrarily refused to give the Coffey defense in the final jury instructions. That in fact the trial court told the jury that it was not a defense. (trial transcript volume 2 page 76; L6 / appendix page 25a) Attempting to undo the jury confusion, the trial court explained the proper conclusions by reciting a fact scenario that mirrored Defendant-appellant's case. (trial transcript volume 2 Page 105-106/ appendix page 15a) Defendant-Appellant appeals.

ARGUMENT I

WHETHER THE PRINCIPAL OF MENS REA IN THE DEFENSE OF MOMENTARY INOCENT POSSESSION OF A HAND GUN SHOULD BE INCLUDED IN MCL 750.227(2).

STANDARD OF FEVIEW:

The de novo standard of review applies to constitutional challenges to a statute. People v. Nimeth, 236 Mich App 616, 623 (1999). People v. Beam, 244 Mich App 103, 105 (2000).

.MCL 750.227(2) states:

> "A person shall not carry a pistol concealed on or about his person whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided law and it licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license".

In People v. Coffey, 153 Mich App 311, 315; 395 NW2d 250 (1986) the court held that MCL 750.227(2) should be interpreted to include a momentary innocent possession defense by opining that said defense is "consistent with the statutes purpose to hold that a momentary or brief possession of a weapon resulting from the disarming of a wrongful possessor is a valid defense against a charge of carrying a concealed weapon if the possessor had the intention of delivering the weapon to the police at the earliest possible time".

People v. Tombs, 472 Mich. 446, (2005), in struggling with the issue of possessing child pornography, reaffirmed the necessity of a criminal statute to include an element of intent, mens rea, with each elements of the offense. The Tombs decision cites Morissette v. United States, 342 US 246; 72 S Ct 240; 96 L Ed 288 (1952) to reaffirm the proposition that criminal offenses that do not require a criminal intent are disfavored. Liability without criminal intent will not be found in the absence of an express or implied indication of congressional intent to dispense with the criminal intent element. Tombs Page 453. The Tombs decision again citing Morissette concluded that the failure to include an intent element in a statute cannot be construed as eliminating the element from the crime. Rather, the court will infer the presence of the element unless the statute contains an expressed or implied indication that the legislative body wants to dispense with it. Tombs Page 454.

The Tombs Decision also cites Staples v. United States, 511 US 600, 114 S Ct 1793; 128 L Ed 2nd 608 (1994) where in it ruled that silence with respect to criminal intent in a federal statute criminalizing the possession of a automatic weapon does not by itself necessarily suggest that Congress intended to dispense with a conventional mens rea element requiring defendant to know and intend illegal conduct. Then Tombs quoting United States Gypsum Co., 438 US 422, 436; (1978) states ...we start with the familiar proposition that the existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-

American criminal jurisprudence..." Tombs Page 455. The Tombs decision then cites United States V. X-Citement Video, Inc, 513 US 64; 115 S Ct 464; 130 L Ed 2nd 372 (1994), establishing that ""mens rea must be shown to obtain a conviction, there being no clear congressional intent that strict liability should be imposed" ... "some form of scienter is to be implied in a criminal statute even if not expressed" and because " a statute is to be construed where fairly possible so as to avoid substantial constitutional questions"" Tombs Page 456.

In light of these cases Defendant-Appellant argues that MCL 750.227(2) language is absent any reference to the intent of the person that carries the pistol. Further that the language is absent any express or implied indication that the legislature intended to dispense with the criminal intent element. Defendant-Appellant further argues that need for the existence of mens rea in a criminal act as a basic rule of Anglo-American law consistent with Tombs and US Gypsum Co. (supra). Also, that the legislative silence is not suggestive of the legislatures intent to dispense with the mens rea requirement. Therefore, in keeping with the decisions of Tombs Supra at 456-457, it is appropriate for the Court to presume that the legislature's intended not to eliminate mens rea. Therefore,

Defendant Appellant believes it is appropriate for the court to conclude that the legislature intended that the prosecution prove that the Defendant-Appellant performed the prohibited act with criminal intent. There must be criminal intent to carry, concealed or otherwise to fully implement the goal of the legislative scheme and avoid substantial constitutional questions.

In the present case, Defendant-Appellant Angel Hernandez-Garcia was convicted of violating MCL 750.227(2) for allegedly carrying a concealed weapon on his person. Specifically, Mr. Hernandez-Gaqrcia wrestled a gun away from an aggressor and possessed it only to deprive his aggressor from it's possession and to secure it's safe placement with a police officer. At the time of trial the prosecutor and judge knew that Defendant would raise the defense of momentary innocent possession of a hand gun consistent with the Coffey decision. The trial court initially told the jury of the Coffey defense then refused to instruct the jury on the defense. The jury expressed confusion on this issue. The trial court gave hypothetical explanation and the jury then returned a verdict of guilty.

Defendant-Appellant argues that People V. Coffey appropriately included an element of mens rea by allowing a momentary or brief possession of a weapon resulting from the disarming of a wrongful possessor if the possessor had the intention of delivering the weapon to the police at the earliest possible time. It opined that this interpretation is consistent with the statutes purpose. Defendant-Appellant agrees with is holding and reasoning. Defendant-Appellant asserts that the Court of Appeals prior ruling in the present case is directly at odds with its previous ruling in Coffey and is improper in light of Coffey and Tombs.

ARGUMENT II

> The trial court improperly gave a preliminary jury instruction that disarming an individual illegally possessing a gun then momentary possessing that gun with the intent to give it to police authorities is a legitimate defense - then allowed and encouraged a trail based on this defense - and then at the end of the trail and without explanation to the jury instructs the jury that said conduct is not a valid defense thereby confusing the jury and denying Defendant-Appellant a valid defense and fair jury trail and/or effectively ordering a directed verdict of guilty.

STANDARD OF REVIEW: mixed
The Court of Appeals reviews de novo questions of law. People v. Walker, 234 Mich. App 299, 302 (1999); People v. Parker, 230 Mich. App 337, 342 (1998). Discretionary policy-based decisions, such as those involving the management of trials, are typically reviewed under the "abuse of discretion" standard. People v. Nelson, 234 Mich. App. 454, 460 (1999); People v. Gadomski, 232 Mich. App. 24, 33 (1998) Carpenter v. Consumers Power Co., 230 Mich. App. 547, 562 (1998)

In the present case, the Defendant-Appellant, Angel Hernandez – Garcia, is a former 3-year veteran Police Officer in the Country of Mexico. (trial transcript page volume 2 page 21, L16) He is charged in one count Felony Information to the charge of Carrying a Concealed Weapon contrary to MCL 750.227; MSA 28.424. (Felony Information) Prior to the trial, the issue of proper jury instructions were discussed between the Defense Attorney and the prosecutor as evidenced in the letter written by defendant's attorney to the prosecutor. (see

attachment) Prior to trial, both parties were aware of the rule in People v. Coffey, 153 Mich. App 311, 315 (1986); lv app den 426 Mich. 857 (1996) wherein it held:

> "...that a momentary or brief possession of a weapon resulting from the disarming of a wrongful possessor is a valid defense against a charge of carrying a concealed weapon if the possessor had the intention of delivering the weapon to the police at the earliest possible time." (page 315)

Prior to the jury hearing any testimony of the witnesses, the trail court presented to the jury its Preliminary Instructions. These instructions to the jury include instructions on the key defense issue in the case and the subject of this appeal. The trial court instructed as follows:

> "There are some defenses to the charge. Obviously, if the person in fact has a permit to cary a gun concealed, then they can't be guilty of the offense. It's up to the person to prove that they have a permit. Umm, there are also some other things.
>
> For example, if a person was in possession of a gun even concealed for just a momentary or brief moment, having acquired it themselves by taking it away from someone who had it illegally, and if there intent was to turn it over to the police at the earliest possible time, then that can be a defense. But, that's something that the Defendant will have to prove if he in fact alleges it in this particular case.
>
> So the prosecutor's evidence has to prove the gun was on his person, knowingly concealed. It's up to the defendant to prove, if he claims it , that he had a permit for the gun – not just a permit to own it, but a permit to carry it as a concealed weapon that – and that he had possessed it only momentarily before the police found it, and that he'd taken it from someone who in fact had it illegally and it was his intent to give it to the police as quickly as practicable. And that's up to him to prove"

> (trial transcript volume 1 page 92, L 11: to Page 93 L 8/ appendix page 12a) (Emphasis supplied)

Consistent with the trial court's preliminary jury instruction and in reliance upon this preliminary instruction the Defense in its opening statement stated in part:

> "The evidence is going to show that my client was approached by a couple of black gentlemen trying to sell them drugs. That he did in fact take the gun from them. And instead of casting it on the street, a loaded gun, he decided to do the responsible thing; take it home where he – where the evidence will show he was going to call the police.
> (trial transcript page 97; L 5-11/ appendix page 13a)

Witnesses testify that Defendant – Appellant has always explained the possession of the hand gun as resulting from his disarming of two individuals that tried to sell him drugs only moments earlier and Defendant stated his intention was to turn the gun over to the police. People's witness Officer Jeffrey Freres testifies that he was responding to a call that gun shots were fired. (trial transcript volume 1 page 100, L20 – page 101, L 1/ appendix page 13a) He also testified in part that at the time of the investigation and arrest and with the assistance of Sargent Bargas' skills in speaking Spanish that they learned that Defendant – Appellant was telling them that "an altercation took place at Dickinson and College where he [defendant] obtained the gun by disarming two black males that initially asked him to buy drugs, and then triad to jump him. And he stated during that altercation that two rounds were fired out of that gun." (trial

transcript volume 1 page 108, L 9-17 and page 119. L 10-25/ appendix page 19a) Officer Timothy Simon also testified his original response was based on two shots fired. (trail transcript volume 2 Page 4, L20/ appendix page 18a) They also testify that Defendant–Appellant was intoxicated. (trail transcript volume 1 page 120, L9/ appendix page 17a) This testimony of the investigating officers is consistent with the defendant's defense of momentary possession to disarm aggressors / drug dealers and secure the weapon to turn over to the police. Also, the state of the defendant having been intoxicated can explain why he was marked or targeted by these aggressors / drug dealers.

The testimony of Defendant-Appellant establishes that two black males approached Defendant-Appellant and attempted to sell him drugs and a gun. Defendant-Appellant refused and an incident resulted wherein Defendant-Appellant secured the gun from these two people. Defendant-Appellant testified that he had no intention to keep the gun. Further, that it was his intent to go home, call the police and give them the gun. (trial transcript volume 2 page 23; L9-12/ appendix page 19a)

After the close of proofs, the trial court then changed course. The court then gave jury instructions that conflicted with the original preliminary jury instructions when it instructed the jury in part as follows;

> "<u>It is not a defense that the person has a gun because they disarm someone else with it , even if they were going to turn it over to the police</u>. That's because you can disarm someone, and you don't

> have to conceal the weapon. If you disarm and leave it out in the open, then no one is under any misapprehension as to what's going on. It's no crime to hold a gun out in the open. If you want to walk down the street carrying the thing in your hand so everyone can see it, that's not a crime. Because no one is deprived of the ability to know you have a gun and therefore, you better handle the situation as if the person has a gun.
>
> So, if someone disarms it and wants to take it to the police, there are simple ways to do it that don't even come close to violating the statute. So that turns out not to be a defense." (Trial transcript volume 2 Page 76; L 6-21/ Appendix Page 25a) (emphasis supplied)
>
> Additionally, "...<u>So, as long as it is out and in the open, no problem. The moment it gets concealed, as I said in any of the fashions we're talking about here, then what we have is not a defense</u>, because it was being carried in the best of faith for protection. " (trial transcript volume 2 page 77; L 22-25/ appendix page 27a) (emphasis supplied)

The trial court then preserved the issue for appeal and recited a most curious and belated explanation for its change of position. The trial court acknowledges that it originally instructed the jury as to the existence of the defense and that is why it needed to now tell the jury it is not a defense. It did not however feel the need to tell the court that the court erred when it gave the original instruction. Rather, it just simply left the jury confused as to what it previously heard when reconciled with the new contrary instruction. (trial transcript volume 2 page 90; L14-20/ appendix page 27a)

The trial court then in a fashion, temperament, and protocol historically reserved to Appellate Courts explained the errors of the Appellate and Supreme Court decisions. At one point the trail court explained "I can not overrule the Court of Appeals, even if convinced that the Court of Appeals is in error. I can only address the error by noting that I think it exists and imploring higher courts to do something about it, but must, of course, adhere to the Court of Appeals mistake, because frankly, it may not be a mistake. And even if it is, there mistake is law until someone corrects the mistake. .....I don't believe Coffey is any longer the law .....(trial transcript volume 2 page 91; L7-19/ appendix page 27a) Later it states "...Therefore, it can't be said that the Court of Appeals misinterpreted the statute. They just didn't pay attention to the statute. (trial transcript volume 2 Page 94; L 12-16/ appendix page 28a) Defendant-Appellant asserts that these are most curious and disingenuous statements in light of the courts refusal to follow the holding in the Coffey Case.

Equally curious and lacking in consistency is the trial court's confusion of the existence/age of the law. When explaining the trial court's refusal to instruct on the Coffey defense it then asserts the law has changed. (trial transcript volume 2 Page 92; L10-12/ appendix page 27a) Only minutes later, the jury expresses confusion with the trial court's instructions and asks about the change in the law and the trial court then explains that the law is 75 years old and it's against the law to carry a concealed weapon. (trial transcript volume 2 page 111-112/ appendix page 30a)

The jury demonstrates it's confusion and sought the assistance of the trial court on two occasions. Defendant-Appellant asserts that the trial court recited the fact of the case at bar and the required conclusion or finding when attempting to resolve the jury's confusion surrounding the trial courts contradictory instructions. Defendant-Appellant asserts that on the first attempt to resolve the confusion the trial court explained what "concealed' and "casual observation" means when it instructed the jury as follows;

"...On the other hand, it has been determined that if a person places a revolver, for example, in the belt or waistband of his or her trousers, and then the weapon cannot be readily seen, that is enough to be deemed concealed, even though it's not completely covered, but that, given the circumstances, it's just not readily apparent." ... " But, in the second situation the defendant did something which contributed to the fact that it isn't readily apparent, if it isn't readily apparent, and then they did in fact engage in an act of concealment." (trial transcript volume 2 Page 105 and 107/ appendix page 29a) Defendant-Appellant asserts that these are in fact the facts in his case and the trial court effectively ordered the jury to find the Defendant guilty as charged.

In applying the facts of this case to the standard of review, the Defendant-Appellant argues that the facts in the present case justify the trail court in giving the jury instruction for the defense in carrying a concealed weapon cited in People v. Coffey, 153 Mich. App 311 (1986) Defendant-Appellant also believes

that the trial courts refusal to give the jury instruction for the Coffey defense is premised on two parts each possibly employing different standards of review.

First, the trial court's actions demonstrate a failure or refusal to acknowledge the law in the Coffey case as written. If this is determined to be a lack of knowledge of the law, then questions of law are reviewed de Novo, People v. Walker, 234 Mich. App. 299 302 (1999); People v. Parker, 230 Mich. App. 337, 342 (1998). Second, the trial court, convincing itself on its own motion that Coffey is not valid law, reversed its original preliminary jury instruction after the close of defendant's proofs, refused to give the jury instruction for the Coffey defense. Therefore Defendant-Appellant believes that this conduct and management of the trial is an abuse of discretion as there is no justification or excuse for the conduct or rulings made in the manner and timing that they were made consistent with the standards set forth in People v. Nelson, 234 Mich. App. 454, 460 (1999); People v. Gadomski, 232 Mich. App. 24, 33 (1998); Carpenter v. Consumers Power Co., 230 Mich. App. 547, 562 (1998).

Additionally, the record reflects that the jury was very confused as it was faced with numerous questions from the jury. These questions of concern surround the very jury instruction that the trial court originally instructed the jury was a valid defense at the beginning of the trial and after the close of the defendant's proof told the jury is NOT a valid defense. Then when attempting to resolve the confusion instructed the jury by explaining what a probable outcome

could be by using a set of facts that are the defendant's facts. Therefore, the trial court made the finding of fact in the case at bar and gave a directed verdict of guilt. Defendant-Appellant believes that this conduct deprived him a jury trial as guaranteed by the united States Constitution and the State of Michigan Constitution an therefore is reviewed de novo People v. Walker, 234 Mich. App. 299, 302 (1999): People v. Parker, 230 Mich. App. 337, 342 (1998).

CONCLUSION

Defendant-Appellant asserts that he had no criminal intent when he wrestled away the hand gun in question form the holder of the gun. He believes that the prosecutor failed to establish criminal intent and further that the jury instructions prevented the jury from evaluating any issue of intent. He believes that a momentary innocent possession of the hand gun is and was allowed under the statute. He believes that it is required for the reasons already stated.

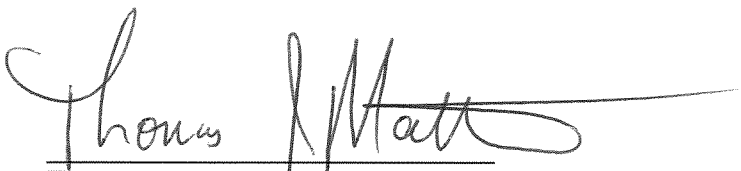
Defendant-Appellant further asserts that the trial courts conduct prejudiced Defendant-Appellant's right to a fair and impartial jury trail. The testimony establishes that Defendant-Appellant disarmed two drug dealers and secured their gun for purposes of turning over to the police and he did momentarily possess the gun as is necessary to effectuate this outcome. Defendant-Appellant believes that the trail court was correct in originally explaining this defense as a valid defense when it gave its preliminary instructions and conducted a trial allowing this defense to be brought forth. Defendant-Appellant

further asserts that the great weight of the testimony favors the Defendant-Appellant's defense. Defendant-Appellant asserts that the trail court's refusal to give the same jury instruction as he gave in the preliminary instructions and the fact that the instruction is contradictory to the first instruction led to total jury confusion. Then when attempting to resolve this confusion gave a fact scenario with a conclusion that mirrored Defendant-Appellant's facts. Any one of these issues in and of them self deprived defendant-Appellant from a fair trial.

RELIEF REQUESTED

Defendant-Appellant respectfully requests that this Honorable Michigan Supreme Court grant Defendant-Appellant a new trial consistent with established law and equity.

Dated: 3/10/06



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