ORIGINAL

IN THE SUPREME COURT

20060078

STATE OF NORTH DAKOTA

State of North Dakota,	)	District Court Case No. 30-05-K-0990
	)	
Appellee,	)	Supreme Court No. 20060078
	)	
vs.	)	
	)	
Charles Morrell,	)	
	)	
Appellant.	)	

****

APPELLEE'S BRIEF

****

Appeal from Conditional Plea and Judgment
Dated March 17, 2006
Honorable Donald Jorgensen, Presiding District Judge
Morton County, North Dakota

Allen Koppy, Id. No. 04201
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I. **The Trial Court Correctly Denied the Defendant's Combined Motions to Dismiss and Suppress Evidence.**

In the lower court, the defendant's combined pretrial motions to dismiss and suppress evidence were denied. For the defendant's first specification of error on appeal, the defendant contends that the lower court committed reversible error when it denied the motions to dismiss and suppress. In its ORDER DENYING MOTION TO SUPPRESS EVIDENCE AND ORDER DENYING MOTION TO DISMISS, the trial court opined at page 17 of the Appellant's Appendix on appeal where it held:

> The United States Supreme Court has addressed the issue in **Carney v. California**, 491 U.S. 386, with said decision centering upon the mobility of the motor vehicle. In said decision, the Supreme Court addressed the mobility of a vehicle employed and occupied in a public parking lot. The Court determined the mobility of said vehicle was an exception to the warrant requirement of the Fourth Amendment to the United States Constitution, and denied the Defendant's Motion to Suppress Evidence. In addition thereto, the Court recognized that any distinction between a motor home and an ordinary sedan for the purposes of vehicle exception would require that the exception be applied depending upon the size of the vehicle and the quality of its appointments.

Appendix of the Appellant, p. 17.

The defendant gives short shrift to the authority stated in **Carney v. California**, *supra*, when he argues at page 7 in his brief on appeal, "Even though the definition of "motor home" or "motor vehicle" does not seem to fit the description of the appellant's van, it is also shown on the certificate of title as a "motorized home" [emphasis added]. The van takes on a new dimension when a person utilizes a motor home not only for transportation, but also as a residence." (Appellant's Brief on Appeal, at p. 7.)

The defendant concludes his argument on appeal by claiming in general, his

Constitutional right to keep and bear arms under the Second Amendment to the United States Constitution, and while continuing to characterize his van as a residence, in spite of the authority stated in **Carney v. California**, *supra*, and the trial court's application of **Carney** to the instant case, asserts that he has a constitutional right to carry a loaded firearm in his residence. Id.

The State argues that the United States Supreme Court's holding in **Carney v. California**, *supra*, bears repeating on appeal, insofar as **Carney** stands for the proposition that the Carroll Doctrine, which is the automobile exception to the Fourth Amendment's warrant requirement, is applicable to motorized homes. See generally. **Carroll v. United States**, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

The important attributes of a motor home that the Court in **Carney v. California** noted for the sake of invoking the Carroll Doctrine, included the following:

> First, the vehicle is readily mobile, and, second there is a reduced expectation of privacy stemming from the pervasive regulation of vehicles capable of traveling on highways. Here, while the Respondent's vehicle possessed some attributes of a home, it clearly falls within the vehicle exception. To distinguish between respondent's motor home and an ordinary sedan for purposes of the vehicle exception would require that the exception be applied depending on the size of the vehicle and quality of its appointments. Moreover, to fail to apply the exception to vehicles such as a motor home would ignore the fact that a motor home lends itself easily to use as an instrument of illicit drug traffic or other [violations of law].

Carney v. California, 471 U.S. at 386. [parenthetical added.]

The trial court aptly noted the similarities in the situation presented in the instant case to the facts extant in **Carney v. California**, *supra*, regarding the inherent mobility of the motor homes in question, when the court stated in its ORDER DENYING MOTION TO SUPPRESS EVIDENCE AND ORDER DENYING MOTION TO DISMISS, "The facts

presented to the Court in the above-entitled hearing established that the Defendant owns a 1973 Dodge motorized home and has currently registered the same as a motor vehicle with the North Dakota Department of Transportation. There is no evidence before the Court to suggest that said motor vehicle is inoperable as a motor vehicle, and that the Defendant admits that he had recently operated the same upon public highways." Appendix of the Appellant, page 17.

Just as the motor home in **Carney v. California** possessed the present ability to start up and drive away from the parking lot in downtown San Diego, so too did the defendant's motor home have the same ability to leave the scene where law enforcement encountered the defendant and his loaded weapon in the vehicle. Since the case on appeal so closely mirrors the status of the motor home in **Carney v. California**, *supra*, the State urges the Court to adopt the reasoning of the trial court on this issue, and affirm the lower court's denial of the Defendant's motion to dismiss and suppress evidence.

II. The Trial Court Correctly Denied the Defendant's Request to Instruct the Jury on the Defense of Excuse.

In the lower court, the trial judge correctly denied the defendant's request to present evidence and instruct the jury on the defense of excuse, when it held prior to trial:

> The per se offense here, that of carrying a loaded firearm in or on any motor vehicle, does not require any specific intent to achieve the same; and accordingly, I'm not going to grant the request for excuse by virtue of the testimony that has been offered in the offer of proof.

Transcript of March 17, 2006, pretrial ruling.

THE STATE CASES CITED BY THE DEFENDANT ARE NOT APPOSITE TO THE SECOND ISSUE ON APPEAL.

At page 9 in his brief on appeal, the defendant argues that a defendant, any criminal defendant, is entitled to an instruction based on a legal defense if there is evidence presented to support that defense. [citing **State v. Thiel,** 411 N.W.2d 66 (N.D. 1987).] The State counters that the above principle is only a general statement of the law on legal defenses so long as there is legal authority to present the defense in the first instance, since any claim of a legal defense could be made by any defendant in any case at any time the opportunity presents itself.

The State argues that the state cases the defendant has cited on appeal are cases where the underlying criminal offense is either a criminal code or Title 12.1 N.D.C.C. offense, or a case where this court has held that the defense of excuse was not applicable to the defendant at trial.

In **State v. Thiel,** *supra,* the sought-after legal defense and jury instruction that the defendant requested of the court was self defense and defense of others on a charge of simple assault, which is a crime requiring a "mens rea" or level of culpability under Title 12.1 N.D.C.C. and Section 12.1-02-02, and where the offense of simple assault is found at Section 12.1-17-01 N.D.C.C. **State v. Thiel,** 411 N.W. 2d at 66.

The defendant's brief on appeal also cites, in support of his argument, **State v. Nygaard,** 447 N.W.2d 267 (N.D. 1989), involving the offense of duty upon striking an unattended vehicle. Id. at 267. There, the North Dakota Supreme Court held that the defense of excuse, based on the defendant's claim of lack of knowledge that the defendant had struck another vehicle, was not applicable to the case. Id. at 267.

Also cited by the defendant, is the case of **State v. Ronne**, 458 N.W.2d 294 (N.D. 1990). **State v. Ronne**, is another Title 12.1 N.D.C.C. case involving the crime of

criminal trespass under Section 12.1-22-03 N.D.C.C. and generally requires a "knowing" or "knowingly" level of culpability under Section 12.1-02-02 N.D.C.C. In **Ronne** *supra*, the high court held that the defendant's alleged anxiety over and worry for her child, who was in the home that was illegally entered, did not entitle the defendant to the instruction on excuse premised on the defense of others. Id. at 294.

Finally, the defendant, in his brief on appeal, cites the North Dakota homicide case of **State v. Leidholm**, 334 N.W.2d 811 (N.D. 1983), for the proposition that the trial court erred in refusing to allow the excuse instruction in the instant case on appeal. While the defendant's conviction for manslaughter in **Leidholm** was reversed on appeal on other grounds, the State argues that the Court's holding in **Leidholm** regarding the instruction given to the jury on self defense, does not bear on the issue before the Court in the instant case. **State v. Leidholm**, *supra*, is a homicide case brought under the auspices of Chapter 12.1-16 N.D.C.C. The State argues that **State v. Leidholm**, with its requisite essential element requiring proof of criminal intent, is inapposite to the strict liability offense under consideration on appeal.

THE FEDERAL CASES CITED BY THE DEFENDANT ARE NOT APPOSITE TO THE ISSUE ON APPEAL.

The defendant cites several federal cases in support of the argument that the trial court erred when it refused to allow the defendant to present evidence and instruct the jury on the defense of excuse. None of the federal cases cited are apposite to the issue presented on appeal.

The defendant first cites **U.S. v. Lomax**, 87 F.3d 959, 961 (8th Cir. 1996) regarding the justification defense in general in the federal court system. **Lomax**

involved a case of a felon being in possession of a loaded firearm. In **Lomax**, the defendant sought to present evidence on the justification defense because the defendant perceived that he was in imminent danger. **U.S. v. Lomax,** 83 F.3d at 961.

The justification defense was rejected by the trial court and the defendant appealed. In affirming the defendant's conviction, the Federal 8th Circuit Court of Appeals held that the defendant cannot claim the defense of justification in the face of other legal options that may have been available. **U.S. v. Lomax**, 87 F.3d at 962.

In **U.S. v. Perrin**, 45 F.3d 869 (4th Cir. 1995), the justification defense was denied for the offense of possession of a firearm by a felon. The defendant there claimed that he needed the offending firearm to protect himself from a dangerous fellow by the name of Delano "Dee" Graves, despite the fact that another officer told the defendant on the same morning of his arrest on July 8, 1992, that Graves was in jail. **U.S. v. Perrin,** 45 F.3d at 871.

The federal courts have distinguished the generalized fear that one may have from the fear from a specific threat of death or personal injury. Id. More specifically, the court in **U.S. v. Perrin** stated, "It has been only on the rarest occasions that our sister circuits have found defendants to be in the type of imminent danger that would warrant the application of a justification defense." **U.S. v. Perrin**, 45 F.3d at 874, citing **U.S. v. Singleton**, 902 F.2d 471, 472 (6th Cir. 1990), cert. denied, 498 U.S. 872, 111 S.Ct.196, 112 L.Ed.2d 158 (1990).

U.S. v. Crittendon, 883 F.2d 326, 330 (4th Cir. 1989), involved another case of a felon unlawfully possessing a firearm in violation of 18 U.S.C. Section 922(g). There, the trial court likewise rejected the justification defense, and the defendant's conviction

was affirmed on appeal. The undisputed facts in **Crittendon** showed that the defendant possessed his .357 revolver solely to protect himself from the possibility of another shooting. The defendant had on a previous occasion been shot while returning home on the evening of July 5, 1987. Id.

The trial court in **U.S. v. Crittendon** accepted the defendant's assertion that his motivation for possessing the gun was self defense. The trial court refused though, to instruct the jury on the defense of justification because there was no evidence to suggest that Rajib [another name for the defendant, Crittendon] was in imminent danger on the evening of his encounter with [the arresting officer] Geary. **U.S. v. Crittendon**, 883 F.2d at 329. [parentheticals added.]

Finally, the defendant cites **U.S. v. Blankenship**, 67 F.3d 673 (8th Cir. 1995), on the general requirements that must be proven in order for an accused to establish the defense of justification at the federal level. However, **U.S. v. Blankenship**, also involved a case of a felon in possession of a firearm. The Federal 8th Circuit Court of Appeals also affirmed the defendant's conviction. The trial court in **U.S. v. Blankenship** also rejected the defendant's attempt to use the defense of justification at trial, and on appeal the court held "The 8th Circuit has not actually recognized a so-called justification defense to 18 U.S.C. Section 922(g) [felon in possession of a firearm]." [other citations omitted] **U.S. v. Blankenship,** 67 F.3d at 677. [parenthetical added.]

The State argues that the cases cited by the defendant on appeal, at both the State and Federal level, fail to establish or assist the defendant in his argument that the trial court erred when it refused to permit Mr. Morrell from presenting evidence at trial on the defense of excuse or justification.

Based upon the holdings from the federal cases cited by the defendant in his brief on appeal, and as further discussed by the State in its brief on appeal, the greater weight of authority leads to the conclusion that the legal defense of excuse or justification should not be available to an individual charged with keeping a loaded firearm in a vehicle under the circumstances of the instant case. Therefore, the trial court did not commit reversible error when it refused the defendant's request to present evidence and instruct the jury on the defense of excuse or justification.

CONCLUSION

The State on appeal urges the Court to hold that the district court correctly denied the defendant's motions to dismiss and suppress evidence based upon the prevailing authority under **Carney v. California**, *supra*. The State likewise argues that the lower court did not err when it denied the defendant's pretrial request to present evidence at trial on the legal defense of justification or excuse and in refusing to allow the jury to be instructed on the defenses of justification and excuse, based upon the authorities, both state and federal, that were cited and discussed by both parties on appeal, and to affirm the lower court's ruling on that issue.

Dated at Mandan, North Dakota, this 21st day of June. 2006.

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STATE OF NORTH DAKOTA

State of North Dakota,	)	District Court Case No. 30-05-K-0990
	)	
Appellee,	)	Supreme Court No. 20060078
	)	
v.	)	CERTIFICATE OF SERVICE
	)	BY MAIL
Charles Morrell,	)	
	)	
Appellant.	)	

I hereby certify that on the 21st day of June, 2006, I served a true and correct copy of the attached:

BRIEF OF APPELLEE

upon the following named party by _____ personal delivery to said party or, _X_ by depositing the documents in the United States mail at Mandan, North Dakota, postage prepaid, to:

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