IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-140599 TRIAL NO. C-14CRB-8178A
Plaintiff-Appellee,	:	*O P I N I O N.*
vs.	:	
CHAD SMITH,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Affirmed in Part, Sentence Vacated, and Cause Remanded

Date of Judgment Entry on Appeal: July 10, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Sean M. Donovan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Arenstein & Gallagher, *Hal R. Arenstein* and *Ethan J. Arenstein*, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

SYLVIA S. HENDON, Presiding Judge.

{¶1} In this appeal, defendant-appellant Chad Smith challenges the constitutionality of R.C. 2923.16, which defines the offense of improperly handling a firearm in a motor vehicle. We find that the statute is neither void for vagueness nor ambiguous, and we uphold the statute as constitutional.

Factual Background and Procedure

{¶2} On April 2, 2014, Smith was stopped by a city of Sharonville police officer because of warrants attached to his vehicle. During an inventory search of the vehicle, the officer found five loaded firearms in the trunk.

{¶3} Smith entered a plea of no contest to a violation of R.C. 2923.16(C). The trial court found Smith guilty and imposed a sentence of 180 days' incarceration. It then credited Smith with one day of jail-time credit and suspended the remaining 179 days. The trial court additionally imposed a $250 fine and court costs. Smith's sentence was stayed pending his appeal to this court.

R.C. 2923.16 is Constitutional

{¶4} In one assignment of error, Smith argues that R.C. 2923.16 is unconstitutional because it is void for vagueness and ambiguous.

{¶5} A statute is void for vagueness when it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute." *State v. Tanner*, 15 Ohio St.3d 1, 3, 472 N.E.2d 689 (1984), quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). The purposes behind the void-for-vagueness doctrine are to provide citizens fair

notice of what behavior is prohibited by statute, to prevent arbitrary and capricious enforcement of a statute by law enforcement officers, and to prevent constitutionally-protected freedoms from being impinged upon. *Id.*

{¶6} A statute may be challenged for vagueness in two different manners. A facial challenge may be mounted against a statute if the statute inhibits a substantial amount of conduct protected under the first amendment. *See State v. Duncan*, 130 Ohio App.3d 77, 88, 719 N.E.2d 608 (1st Dist.1998). Or if the statute does not infringe upon a protected first-amendment right, it must be judged as applied to the defendant raising the challenge. *Id.* In the latter as-applied type of challenge, a court need only determine whether the defendant's conduct was clearly proscribed by the statute. *Id.*

{¶7} Because R.C. 2923.16 does not unconstitutionally infringe on the right to bear arms, Smith has not raised a facial challenge to the statute. *See Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633, ¶ 3. Rather, he has challenged the statute as applied to him. A party challenging the constitutionality of a statute must prove that the statute is unconstitutional beyond a reasonable doubt. *See State v. Dario*, 106 Ohio App.3d 232, 236, 665 N.E.2d 759 (1st Dist.1995). We are required to indulge a strong presumption in favor of a statute's constitutionality, and, when a statute is subject to more than one interpretation, we must construe the statute to save it from constitutional infirmities. *Id.*

{¶8} In his vagueness challenge, Smith specifically contends that R.C. 2923.16(B) and (C) are internally inconsistent because a person could transport a firearm in a motor vehicle in compliance with subdivision (B), but in violation of subdivision (C).

{¶9} R.C. 2923.16(B) provides that "[n]o person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle."

{¶10} And R.C. 2923.16(C) provides, in relevant part, that

> No person shall knowingly transport or have a firearm in a motor vehicle, unless the person may lawfully possess that firearm under applicable law of this state or the United States, the firearm is unloaded, and the firearm is carried in one of the following ways: (1) In a closed package, box, or case; (2) In a compartment that can be reached only by leaving the vehicle; (3) In plain sight and secured in a rack or holder made for the purpose * * *.

{¶11} Smith argues that, by carrying five loaded firearms in the trunk of his vehicle, although he was in violation of R.C. 2923.16(C), he was in compliance with R.C. 2923.16(B) because the firearms were not accessible without leaving the vehicle. As a result, he asserts, he did not have fair notice regarding what type of conduct was prohibited by statute. We reject this argument.

{¶12} R.C. 2923.16(C), the offense that Smith stands convicted of, is not ambiguous, and it clearly provides a person of ordinary intelligence with fair notice as to what type of conduct is prohibited. Under R.C. 2923.16(C), a person may only transport a firearm in a motor vehicle if the person is legally allowed to possess the firearm, the firearm is unloaded, and the firearm is either carried in a closed package, in a compartment that is only accessible from outside the vehicle, or in plain sight and secured in a rack or holder. Because the firearms in the trunk of Smith's vehicle were loaded, he was in violation of R.C. 2923.16(C).

{¶13} We further find that R.C. 2923.16(B) and (C) are not internally inconsistent and stand independently of each other. Construing the statutes so as to give effect to both, we hold that R.C. 2923.16(B) prohibits carrying a loaded firearm in the passenger compartment of a vehicle, while R.C. 2923.16(C) regulates the manner in which an unloaded firearm may be transported. *See State v. Brown*, 168 Ohio App.3d 314, 2006-Ohio-4174, 859 N.E.2d 1017, ¶ 17 (11th Dist.). Contrary to Smith's assertion, R.C. 2923.16(B) solely prohibits certain conduct. It does not prescribe or make lawful the transportation of a loaded firearm in a vehicle if that firearm is not accessible from inside the passenger compartment of the vehicle. Consequently, Smith's argument that his conduct was in compliance with R.C. 2923.16(B) is disingenuous. R.C. 2923.16(B) simply has no relevance to this case, as Smith did not transport any loaded weapons inside the passenger compartment of his vehicle.

{¶14} If an offender fails to transport an unloaded firearm in compliance with R.C. 2923.16(C), the offender has committed a misdemeanor of the fourth degree. *See* R.C. 2923.16(I). But if an offender transports a loaded firearm in the passenger compartment of a vehicle in violation of R.C. 2923.16(B), the degree of the offense is elevated, and the offender has committed a felony of the fourth degree. *Id.*

{¶15} The language in R.C. 2923.16(B) and (C) is not ambiguous or conflicting. And because the statute provides fair notice as to the type of conduct that is prohibited, it is not susceptible to a vagueness challenge. Smith's assignment of error is overruled.

{¶16} But the state has pointed out an error in Smith's judgment of conviction that must be corrected on remand. During the plea colloquy, the trial

court informed Smith that he was pleading to an offense that was a misdemeanor of the first degree, and it sentenced him accordingly. But a violation of R.C. 2923.16(C) is a misdemeanor of the fourth degree. Consequently, we affirm the judgment of the trial court finding Smith guilty of a violation of R.C. 2923.16(C), but vacate the sentence imposed and remand the cause for the court to impose a sentence for a fourth-degree misdemeanor in accordance with the law.

Judgment affirmed in part, sentence vacated, and cause remanded.

FISCHER and **DEWINE, JJ.,** concur**.**

Please note:

The court has recorded its own entry on the date of the release of this opinion.