

STATE OF MICHIGAN
IN THE DISTRICT COURT, 61st JUDICIAL DISTRICT

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THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff,

Case No. 22-SM-130
HON. NICHOLAS S. AYOUB

vs

GREGORY A. BAUER,

Defendant.

DEFENDANT'S MOTION TO DISMISS DUE TO STATUTE'S UNCONSTITUTIONAL
VAGUENESS AND OVERBREADTH; MOTION FOR BILL OF PARTICULARS

NOW COMES the Defendant, Gregory A. Bauer by and through his counsel Dodge & Dodge, P.C., in anticipation of Jury Selection on this matter. Defendant is charged with One Count of Careless, Reckless, or Negligent Use of Firearms Causing Property Damage Less than \$50. (MCL 752.862). Defendant respectfully requests this Court dismiss this case because the charged offense is unconstitutionally vague and overbroad as applied to the facts of this case. Defendant also respectfully requests this Honorable Court order the prosecution to tender to the defense a Bill of Particulars describing the essential facts of the alleged offense pursuant to MCR 6.112(E).

STATEMENT OF FACTS

On the day of December 9, 2021, there had been a shooting in the area of the 1000 block of Burton Street SE in the City of Grand Rapids. The shooting apparently involved three stolen vehicles and it was determined that one of the suspect vehicles was a stolen Audi sedan with tinted windows. There was information that the vehicle had two firearms inside of it when it was stolen. Throughout the day the Grand Rapids Police Department was on the lookout for the

stolen vehicles. The suspected stolen Audi was spotted on several occasions driving erratically through the South and East service areas. The vehicle would take off and drive erratically anytime marked Police vehicles approached. This was a very high-risk scenario because of the earlier shooting involving the Audi, information that the vehicle may have multiple firearms inside, and the subsequent erratic driving that posed danger to the public and police. GRPD personnel treated the situation cautiously and had unmarked police vehicles involved to locate the suspected stolen Audi in hopes of avoiding greater danger to the public.

At approximately 10:30 pm several GRPD units, not including Defendant, spotted what appeared to be the stolen Audi sedan with tinted windows. The Audi parked in front of 639 Cass Avenue. GRPD personnel surveilled the vehicle. GRPD personnel, not including Defendant, concluded that the driver of the suspected stolen Audi had went into a residence, but the vehicle was still running. Defendant was working that evening as a uniformed Special Response Team officer along with his partner Officer Michael Reed. Additional Special Response Team Officers, including Defendant, were called in and coordinated to set up a perimeter and get into locations where they could attempt to detain the driver before he got back into the car with the suspected firearms. Defendant was not involved in the intelligence gathering determination of this Audi being the suspected stolen vehicle.

Officer Bauer and his partner arrived, were on foot, and set up behind a home that was located across the street from the suspected stolen Audi. There is body-camera videos of both Officer Bauer and his partner from this episode. The team of GRPD units stayed in contact via radio. Soon the driver of the vehicle exited the residence and was walking back to the vehicle. It was decided that the team of GRPD units would close in on the suspect and vehicle from several directions in a controlled team maneuver to take the subject driver into custody before he was

able to get into the vehicle where the suspected firearms were located. Officer Bauer and his partner acted in good faith following orders and moved in on the suspect in coordination with their training on such high-risk take down situations. Officer Bauer's training in high-risk situations such as this required him to draw his firearm and raise it to a ready position as he closed in on the subject. This was approximately 10:30 PM and it was dark outside. As Officer Bauer traversed through the grassy neighboring yard, he inadvertently stepped into a significant drop in the grass. Naturally his body clenched up, causing his trigger finger to come off the frame of his pistol onto the trigger resulting in an accidental discharge of his firearm. Officer Bauer's accidentally discharged bullet did not strike the suspected driver. The driver ran away from his vehicle as the team converged upon him and the firearm discharged. The driver was almost immediately apprehended by police, and police performed further investigation on the vehicle and occupants. Officer Bauer was extremely cooperative after this incident and quickly acknowledged that he tripped on the uneven surface resulting in the involuntary discharge of his firearm.

It was later determined that the Audi sedan the team closed in on was not likely to have been the suspected stolen vehicle from earlier in the day. And the driver of the vehicle, Daevionne Smith, was not likely to have been the suspect involved in the stolen vehicle situation from earlier in the day.

LAW

Applicable Case law, Rules, Statutes, and Jury Instruction:

It is well established in due process analysis that no person shall be held criminally responsible for conduct which a person could not reasonably understand to be proscribed. *People v. Ford*, 417 Mich. 66, 98 (1982) A criminal statute will fail if it fails to give a person of

ordinary intelligence reasonable notice that her or his behavior may be unlawful. *People v. DeFillippo*, 80 Mich. App. 197 (1977), *rev'd on other grds* 443 U.S. 31 (1979).

In *Dep't of State v Michigan Education Ass'n--NEA*, 251 Mich App 110, 116; 650 NW2d 120 (2002), the Court of Appeals set forth the three ways in which to challenge an ordinance on the basis that it is unconstitutionally vague. A statute may qualify as void for vagueness if:

1. it is overbroad and impinges on First Amendment freedoms,
2. it does not provide fair notice of the conduct it regulates, or
3. it gives the trier of fact unstructured and unlimited discretion in determining whether the statute has been violated. [*Id.*, quoting *Proctor v White Lake Twp Police Dep't*, 248 Mich App 457, 467; 639 NW2d 332 (2001).]

The charged offense of MCL 752.862(2) states:

Careless, reckless or negligent use of firearms; injury of property; penalty.

Sec. 2. Any person who, because of carelessness, recklessness or negligence, but not willfully or wantonly, shall cause or allow any firearm under his control to be discharged so as to destroy or injure the property of another, real or personal, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail for not more than 90 days or by a fine of not more than \$100.00, if the injury to such property shall not exceed the sum of \$50.00, but in the event that such injury shall exceed the sum of \$50.00, then said offense shall be punishable by imprisonment in the county jail for not more than 1 year or by a fine not exceeding \$500.00.

Applicable Jury Instruction M Crim JI 11.21 states:

Definition of Negligence

(1)The prosecutor must prove beyond a reasonable doubt that the defendant was guilty of at least ordinary negligence in the shooting of this gun. Ordinary negligence is more than slight negligence and slight negligence is not a crime. Because of that, I need to tell you the difference between ordinary and slight negligence.

(2)Slight negligence means doing something that is not usually dangerous, something that only an extremely careful person would have thought could cause injury. In this case, if you find that the defendant was only slightly negligent, then you must find [him / her] not

guilty.

(3) Ordinary negligence means not taking reasonable care under the circumstances as they were at the time. If someone does something that is usually dangerous, something that a sensible person would know could hurt someone, that is ordinary negligence. If the defendant did not do what a sensible person would have done under the circumstances, then [he / she] is guilty of ordinary negligence.

(4) The fact that an accident occurred or that someone was injured does not, by itself, mean that the defendant was negligent.

MCR 6.112(E) states:

Bill of Particulars. The court, on motion, may order the prosecutor to provide the defendant a bill of particulars describing the essential facts of the alleged offense.

ARGUMENT

The Defendant has a Fifth Amendment Constitutional right to present a defense. The defense has a duty to prepare for trial. The defense has consulted with firearm experts and police training personnel. These prospective witnesses have reviewed the discovery materials in this case including police reports, body camera videos, the firearm involved, and a physical examination of the scene. Thus far the defense witnesses have been unable to ascertain what the claimed negligent/careless/reckless conduct was by Defendant as a police officer in the line of duty. Prospective testimony will be that there are sometimes sympathetic reflexes involved with firearm use due to trips, startles, and other natural reactions beyond one's control. There is training to be conscious of these episodes, but they still happen. This can sometimes result in accidental discharges even though a person is reasonably following proper training procedure and technique. This is in line with the above-mentioned jury instruction on negligence, "The fact that an accident occurred or that someone was injured does not, by itself, mean that the defendant was negligent."

The defense has requested specificity of what exactly the prosecution believes was

careless, reckless, or negligent use of a firearm by Defendant in this charged episode. The discovery materials do not point to what was allegedly careless, reckless, or negligent. Defendant is unable to prepare and present a defense without having notice of the allegedly unlawful conduct.

The language of this charge is vague and overbroad as applied to the facts of this case. A police officer in the line of duty, similar to military personnel in combat, may be trained and ordered to follow certain protocols with a firearm that to a reasonable civilian might usually be dangerous. The civilian might be careless, reckless, or negligence for performing the same conduct that police or military are required to perform. In fact, the police or military person might be deemed negligent if they do not follow the orders and training for that otherwise dangerous conduct. The vagueness and overbreadth of the statute puts a police officer in a quandary of potentially criminalizing conduct that they are ethically trained and ordered to follow.

CONCLUSION

Wherefore, Defendant respectfully requests this Honorable Court grant his motion to dismiss this charge because the statute is void for vagueness and overbreadth. MCL 752.862(2) fails to put a police officer acting within their duties on notice of what conduct is prohibited, while the officer may be required to perform certain duties within their training protocol. Conduct by a reasonable civilian may violate the statue while a police officer conducting the same activity should have the right to follow their trained protocol to protect themselves and the public. If this Court does not believe this Statue is void for vagueness or overbreadth, then Defendant respectfully requests this Court grant the Motion for Bill of Particulars so that Defendant understand the suspected law violation to present a defense.

DATED: May 3, 2022

Respectfully submitted,

DODGE & DODGE, P.C.



MARK D. DODGE (P69626)

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STATE OF MICHIGAN)
) ss
COUNTY OF KENT)

Emily Dodge, being duly sworn, deposes and says that on the 3 day of May, 2022, she sent via Professional Courier Service (PCS) a copy of the Notice of Motion, Motion, and this Proof of Service to the Kent County Prosecutor's Office, 82 Ionia Avenue, Suite 450, Grand Rapids, Michigan 49503.



EMILY DODGE