

STATE OF MICHIGAN
IN THE 61ST DISTRICT COURT FOR THE COUNTY OF KENT

PEOPLE OF THE STATE OF MICHIGAN,

Hon. Nicholas S. Ayoub

Plaintiff,

v

Case No. 22-SM-0130

GREGORY A. BAUER,

Defendant.

Audra J. Blodgett (P85776)
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**PEOPLE'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND MOTION
FOR BILL OF PARTICULARS**

NOW COME the People of the State of Michigan, through the Kent County Prosecutor's Office, and responds to Defendant's Motion to Dismiss and Motion for Bill of Particulars as follows:

STATEMENT OF FACTS¹

Defendant is charged with one count of Careless, Reckless, or Negligent Use of a Firearm Causing Property Damage Less than \$50, contrary to MCL 752.862. On December 9, 2021, the Grand Rapids Police Department was on the lookout for stolen vehicles that were involved in a shooting. One vehicle matching the description, an Audi sedan with tinted windows, was spotted parked and unoccupied in front of a home on Cass Avenue. The GRPD officers surveilled the

¹ For purposes of this motion, the facts are essentially not in dispute between the parties, although there is no evidentiary record to cite. If this Court decides that a particular factual issue is critical to a ruling, an evidentiary hearing would be required. The People are not requesting such a hearing, however, and the defense has not done so either.

vehicle and coordinated to set up a perimeter to detain the driver when he attempted to return to the car.

Defendant was one of the officers involved in setting up the perimeter. After arriving on scene, he hid behind a neighboring home that was across the street from the parked Audi. When the driver appeared and began to approach the car, Defendant emerged from behind the neighboring home and began to run through the grassy yard with his firearm drawn and raised in a ready position. While approaching the car with his gun drawn, the People allege that Defendant recklessly, carelessly, or negligently pulled the gun's trigger, causing a bullet to be unexpectedly fired. The bullet lodged in the exterior of a nearby home, causing property damage.

Defendant has now filed a Motion to Dismiss, arguing that the charging statute, MCL 752.862, is unconstitutionally vague and overbroad as applied to the facts of this case (Mot. p 1). Specifically, Defendant argues that the vagueness and overbreadth of the statute "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" (Mot. p 6). In the motion, Defendant also requests a Bill of Particulars pursuant to MCR 6.112(E).

LEGAL ARGUMENT

When a statute's constitutionality is challenged, a court begins with the presumption that statutes are constitutional. The court construes statutes consistent with this presumption unless their unconstitutionality is readily apparent. *People v Rogers*, 249 Mich App 77, 94; 641 NW2d 595 (2001). The party challenging a statute's constitutionality bears the burden of proving its invalidity. *People v Malone*, 287 Mich App 648, 658; 792 NW2d 7 (2010).

The statute at issue, MCL 752.862, reads:

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 ...

Defendant first argues that this statute is unconstitutional as it is overbroad. However, as a statute may be found to be unconstitutionally overbroad only where it “reaches a substantial amount of constitutionally protected conduct,” *People v Rapp*, 492 Mich 67, 73; 821 NW2d 452 (2012), Defendant’s argument fails. Defendant does not identify any constitutionally protected conduct that is criminalized by the statute. As it is Defendant’s burden to prove the statute’s invalidity, the People assert that any argument as to the statute’s overbreadth is abandoned. *Malone*, 287 Mich App at 658.² Even if the argument is not considered abandoned, there is no constitutionally protected conduct that is reached by MCL 752.862; an argument as to its unconstitutionality is meritless.

Defendant also argues that MCL 752.862 is unconstitutionally vague for failing to provide fair notice of the proscribed conduct — specifically, that a police officer in the line of duty may handle a firearm in a way that might otherwise be dangerous for reasonable civilian, putting the officer “in a quandary of potentially criminalizing conduct.” (Mot. p 6). However, as with the argument that the statute is overbroad, Defendant has failed to state with particularity his argument or provide reference to court decisions that support his claim. His one paragraph argument is simply a claim that as a police officer, he might be allowed or even required to perform an act that

² It is Defendant’s burden as the moving party to “state with particularity the grounds and authority on which it is based,” MCR 2.119(A)(1)(b), and the People submit Defendant has not done so here. While specifically dealing with arguments on appeal, the People argue the following principles apply here as well. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority.” *People v Kelly*, 231 Mich App 627, 640-41; 588 NW2d 480 (1998). “An appellant’s failure to properly address the merits of his assertion of error constitutes abandonment of the issue.” *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

would be reckless, careless, or negligent if performed by a citizen. The statute's plain language, however, does not set up a two-tiered system of justice whereby the police can be reckless, careless, or negligent in discharging a firearm. As with the other argument, Defendant's argument should be rejected as he has not met his burden of establishing how the statute is unconstitutional as applied.

To the extent this Court might want to consider Defendant's skeletal arguments, the People note that in order to be deemed constitutional, a statute must "define the criminal offense 'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *People v Lino*, 447 Mich 567, 575; 527 NW2d 434 (1994). A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words. *People v Vronko*, 228 Mich App 649, 653; 579 NW2d 138 (1998). Although Defendant argues that the statute is indefinite as it could be read to criminalize standard police protocol, the Michigan Supreme Court has clarified that the measure of duty of a negligence-charged defendant is "reasonable care *appropriate to the circumstances of the case*, a standard of negligence which allows the fact finder to determine that some factual circumstances reasonably require greater or lesser diligence than do other circumstances in order to constitute reasonable or due care." *Felgner v Anderson*, 375 Mich 23, 30; 133 NW2d 136 (1965) (involving a civil suit alleging negligent discharge of a firearm). Consequently, the jury instructions regarding negligence require the jury to evaluate conduct "under the circumstances as they were at the time." MI Crim JI 11.21(3).

Part of the circumstances are that Defendant was participating in a high-risk stop as a police officer, and part of the circumstances are that no one else discharged their weapon while running

up in the same weather and lighting conditions. Part of the circumstances are that Defendant had been trained to draw his gun while running up on the scene, and part of the circumstances are how that training was specifically designed to avoid an accidental discharge of a firearm. Defendant opines that he has experts that will say how the discharge was not negligent, but a jury need not agree with those experts, and instead could find that Defendant having his finger close enough to the trigger and his other actions which caused the discharge of the firearm to happen under these circumstances was reckless, careless, or negligent. As the statute and jury instructions require the jury to take into consideration the specific factual circumstances of each case, Defendant's argument that his actions as a trained police officer were not careless, reckless, or negligent conduct is not a question of constitutionality, but a factual question to be resolved at trial.

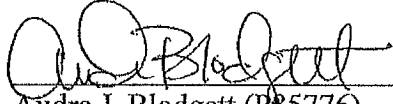
Defendant also requests that the Court order the prosecution to tender to the defense a Bill of Particulars describing the essential facts of the alleged offense pursuant to MCR 6.112(E) (Mot. p 1). However, as the charge in this case is a misdemeanor, MCR 6.112(E) does not apply. MCL 752.862; MCR 6.001(B) (listing which rules apply to misdemeanor cases, and MCR 6.112 is not included).³ Additionally, Defendant has been served copies of the complaint, the body worn camera videos, and the police reports in this case, which describe the essential facts of the alleged offense sufficient to prepare for trial.

³ Specifically, MCR 6.001(B), labeled "Misdemeanor Cases," states: "MCR 6.001-6.004, 6.005(B) and (C), 6.006, 6.101, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.202, 6.425(D)(3), 6.427, 6.430, 6.435, 6.440, 6.445(A)-(G), and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts."

THEREFORE, the People respectfully request that Defendant's Motion to Dismiss and Motion for a Bill of Particulars be DENIED.

Date: May 18, 2022

Respectfully submitted,


Audra J. Blodgett (P85776)
Assistant Prosecuting Attorney

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 5/18 2022

By: U.S. Mail Fax
 Hand Delivered Overnight Courier
 Certified Mail Other email

Signature Audra J. Blodgett