IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

No. 23 CF 387

BRIAN CARRUTH Appellant, vs. UNITED STATES, Appellee	2021 CF2 006934

APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA – CRIMINAL DIVISION FELONY BRANCH

AMENDED REPLY BRIEF FOR APPELLANT

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I. CONTRARY TO THE GOVERNMENT'S POSITION, THERE WAS NOT SUFFICIENT EVIDENCE TO SUPPORT MR. CARRUTH'S CONVICTION UNDER D.C. CODE 22 §4504(a-1)

In their brief to this court the Appellee notes that under D.C. Code 22 §4504(a) an individual may not carry within the District of Columbia, either openly or concealed on, or about, their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon. In the government's view, the standard under D.C. Code 22 §4504(a) in terms of what constitutes "carrying" is completely different than what constitutes carrying under D.C. Code 22 §4504(a-1), the statute upon which Mr. Carruth was convicted. (*See*, Gov't's Brief p.12). The government's logic is faulty and would lead to what would be ultimately an absurd result.

Citing cases such as *White v. United States*, 714 A.2d 115 (D.C. 1998), the government asserts that the burden of proof under D.C. Code 22 §4504(a) is narrower in terms of how one need carry a prohibited weapon than what is required under D.C. Code 22 §4504(a-1). Simply put, the government's theory rests almost entirely on this point. It is their position that to be guilty of D.C. Code 22 §4504(a-1) the government need not prove that a defendant carried the shotgun "on or about

their person," but that the individual just "carry" the shotgun. (*See*, Gov't's Brief p.12). It is a premise, as mentioned earlier, that can lead to an absurd result. One cannot carry a prohibited item unless somehow it is either "on" "or about" their person. Mr. Carruth would submit that the more operative fact revolves around both possession and, more importantly, access to the item. In other words, to carry an item, an individual must not only have possession (or constructive possession) of the item, but access (or ready access) to that item at a certain point.

The government is correct in representing that this court's prior holdings does not make specifically clear the interpretation of the term "carry" for the purposes of 22 §4504(a-1). Instead, the government proposes that this court adopt the definition set forth in cases such as *Muscarello v. United States*, 524 U.S. 125, 126-127 (1998). That is, carrying a firearm applies to a person who knowingly possesses and conveys a firearm in a vehicle, including in a locked glove compartment or a trunk of a car, which the individual accompanies. (Gov't's Brief p.12-13, *citing, Muscarello* at 126-127). As Mr. Carruth points out, such an interpretation leads to an inconsistent result. Again, based on the government's interpretation, one could theoretically not be guilty of carrying a firearm (in this case a rifle as a deadly weapon) under D.C. Code 22 §4504(a) if such firearm was inaccessible, padlocked in a secure box, unloaded, and without ammunition (as are the facts in this case), but still be found guilty for "carrying" the same rifle, and in

the exact same manner, under 22 §4504(a-1). Mr. Carruth would respectfully submit that the D.C. Counsel's prohibition intent with carrying a rifle as a "deadly weapon" under D.C. Code 22 §4504(a) would be exactly the same as carrying a rifle under D.C. Code 22 §4504(a-1). Mr. Carruth submits that under this type of fact pattern the result, under the government's interpretation, is not only illogical, but in certain ways unfair, and not what one would think the intent of the Council would be.

The government also supports its sufficiency argument by stating that under D.C. Code 22 §4504.02(b)(2) if the transporting vehicle does not have a compartment separate from the driver's compartment, the firearm or ammunition shall be contained in a locked container other than the glove compartment or console, and the firearm shall be unloaded. The government claims that because there was a storage box in the bed of Mr. Carruth's truck, there was no reason for him to have the rifle in a padlocked box behind the passenger compartment of the main cab. (Gov't's Brief p.18-19, 22-23). However, as Mr. Carruth stated in his testimony at trial, the box on top of his truck bed had all his camping equipment in it. Nor was there testimony by Mr. Carruth that the box could in any way be secured with a lock. (02/27/23 Tr. 58). The statute does allow, "If the transporting vehicle does not have a compartment separate from the driver's compartment, the firearm or ammunition shall be contained in a locked container other than the glove

compartment or console, and the firearm shall be unloaded." D.C. Code 22 §4504.02(b)(2). That is exactly what Mr. Carruth accomplished.

Finally, the government argues that under D.C. Code 22 §4504.02(a)(2), Mr. Carruth would only be allowed to transport his "firearm for a lawful purpose from a place where the person may lawfully possess and carry the firearm to another place where the person may lawfully possess and carry the firearm." In the government's view Mr. Carruth did not qualify for this exception because he was making a round trip from the state where he legal purchased the gun. (Gov't's Brief p.20). Still, Mr. Carruth did testify that the only reason he planned to return to Ohio was to quickly check on the sale of his house and then proceed down to Texas. (02/27/23 Tr. 75). The government's argument does not consider this point.

II. THE TRIAL COURT DID VIOLATE THE SIXTH AMENDMENT WHEN IT ORDERED MR. CARRUTH NOT TO DISCUSS HIS TESTIMONY WITH ANYONE DURING THE BREAK IN TESTIMONY

When the trial court stated to Mr. Carruth, "Don't discuss your testimony with anyone," (02/27/23/Tr. 106), such blanket restriction, that clearly included his defense counsel, is one that clearly violates a Sixth Amendment right to counsel when such an order does not clearly define the limitations of the conversations. The United States claims otherwise. Their reliance is on *Perry v. Leeke*, 488 U.S. 272 (1989). The government's position is that in cases such as *Perry*, and

ultimately Mr. Carruth's, a defendant does not have a Sixth Amendment right to confer with his attorney during a short break in their testimony. The reason, according to the government, is that when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying. Consequently, once a defendant begins to testify, neither he nor his lawyer have a right to have the testimony interrupted to give him the benefit of counsel's advice. (Gov't's Brief p. 27, *citing*, *Perry* at 280-281). On the other hand, this court did state that *Perry's* holding that a defendant has no Sixth Amendment right to discuss his ongoing testimony with his attorney during a short recess, still does not end the inquiry in terms of any constitutional violation. As the *Perry* decision recognizes, a defendant such as Mr. Carruth does have a constitutionally protected right to discuss a variety of trial-related matters' during a substantial recess that will inevitably include some consideration of the defendant's ongoing testimony. Indeed, all of the federal circuit courts that have considered the issue have concluded that under *Perry* and *Geders v. United States*, 425 U.S. 80 (1976) a district court may not order a defendant to refrain from discussing his ongoing testimony with counsel during an overnight recess, even if all other communication is allowed. *Martin v. United States*, 991 A.2d 791, 794-95 (D.C. 2010). And while it is true that this court in *Martin* referenced an overnight prohibition, the recess in Mr. Carruth's case was not 15 minutes but over a lunch period where, even the

government would probably admit, a defendant would in all probability want to discuss matters that may or may not involve their exact testimony but other issues surrounding it.

On June 20th, 2024, this court decided *Petty v. United States* (No. 22-CM-0642 dated June 20, 2024). In *Petty* the appellant, during a break in their testimony, was also given a rule on witnesses instruction. That break involved an overnight recess. This court noted that the Supreme Court "recognized that the Sixth Amendment guarantees more than a formalistic appointment of an attorney for trial; it provides a defendant with a full bodied, functional right during trial to talk to one's lawyer about anything related to the case, to ask questions, and to get explanations and clear-eyed feedback (if not reassurance) about the progress of trial. The [Supreme] Court made plain both that "a sustained barrier to communication between a defendant and his lawyer," such as an overnight ban on communication, violated that full-bodied functional right and that such violation was not amenable to a prejudice analysis." *Petty,* at p. 7 *citing*, *Geders*, 425 U.S. at 91. Such a violation in the court's view required reversal. As stated previously, while Mr. Carruth's order by the trial court did not occur during an overnight recess, it was certainly longer than a brief recess and one where one would expect that any defendant would seek counsel's advice about a matter that is, or may be, related to their testimony. For instance, a defendant may fear that there may be

other Fifth Amendment issues potentially derivative from the testimony. Preventing discussion with one's attorney is a deprivation of counsel in this situation. It is also one that can place a defendant in further legal peril. The *Petty* line of reasoning is directly applicable here. For these reasons alone, this court should reverse for such constitutional violation.

III. D.C. CODE 22 §4504 (a-1) (2001) AND ITS RESTRICTIONS INFRINGE ON MR. CARRUTH'S RIGHT TO BEAR ARMS

It is still Mr. Carruth's position that he has a constitutional right to possess his firearm in the District of Columbia under the circumstances presented at trial. In this case he lawfully purchased his rifle in Ohio, and that D.C. Code 22 §4504 (a-1), by imposing a criminal penalty for that possession in the District of Columbia, infringes on that right. It is both an unfair and undue burden to have him register his weapon in the District of Columbia if his ultimate goal was to travel to another jurisdiction where such similar carry was legal. This is true even if his stay in the District of Columbia was brief.

CONCLUSION

For all these reasons, and any others that may appear to this Court, Mr. Carruth would respectfully request this court reverse his verdict of guilt and remand the case back for further proceedings as directed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Amended Reply Brief for Appellant was served by electronic means, through the Court's EFS system, upon counsel for Appellee, this 2nd day of July 2024 to:
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