



McCoy, Scott Lazalde, James Rector, and Erik Pingel. Ronald Smith is a Detective with the Seattle Washington Police Department. Dennis McCoy is a Sergeant with the Seattle Washington Police Department. Scott Lazalde is a law enforcement officer with the U.S. Customs and Border Protection Service in Blaine, Washington. James Rector is a law enforcement officer with the U.S. Customs and Border Protection Service in Blaine, Washington. Finally, Erik Pingel is a Firefighter with the U.S. Department of Defense.

Defendants were involved in an altercation with members of the Hell's Angels Motorcycle Club. All defendants were carrying concealed pistols at the time in question. Defendants were arrested and charged with alternative charges under SDCL 22-14-9 and SDCL 22-14-9.2.

Pingel, at all relevant time, possessed a concealed weapons permit from the State of Colorado and a valid reciprocity agreement exists between the two states. Smith, McCoy, Lazalde, and Rector are authorized by their respective employer agencies to carry concealed weapons.

#### Issue I

The defendants first contend that the charge contained in Count I does not comply with SDCL 23A-6-7(5). The statute states that "[a]n indictment or information is sufficient if it can be understood therefrom . . . [t]hat the offense charged is

designated in such a manner as to enable a person of common understanding to know what is intended." SDCL 23A-6-7(5).

Defendants argue that the phrase "not being a law enforcement officer acting as such" in lieu of the statutory language of "person other than a law enforcement officer acting under color of authority" is prejudicial, and that the indictment does not allow them to plead the judgment as a bar to subsequent prosecution for the same crime.

The "requirement that every essential element of the offense should be alleged in an information must be read in light of overall fairness to both the defendant and the government." U.S. v. Hill, 171 F. Supp.2d 1032. "Words used in a statute to describe a public offense need not be strictly recited in an indictment or information, but other words conveying the same meaning may be used." SDCL 23A-6-17. The words "acting as such" convey the same meaning as the words "under the color of authority." Furthermore, based upon the documents presented to the Court by defendant's counsel it is clear that the defendants have been able to decipher the state's allegations and to assemble defenses to said claims. Moreover, the state's bill of particulars states specifically what law violation is being alleged. Defendants have failed to show prejudice. Dismissal on this ground is denied.

The defendants put forth a nearly identical argument as to Count II. Without performing a recitation of the authority above, this Court is satisfied that the state set forth the elements of the offense charged and informed the defendants of the charge they must defend against as required. Accordingly, dismissal on this ground is denied.

### Issue II

The second issue raised by the defense is whether or not the indictment describes a public offense as required by SDCL 23A-8-2(5). The defendants argue that the indictment fails to describe a public offense concerning Smith, McCoy, Rector, and Lazalde as they carried concealed weapons legally due to a federal preemption of state law prescribed in 18 U.S.C. 926B.

"[S]tate laws that interfere with, or are contrary to the laws of congress, made in pursuance of the constitution are invalid." Dakota Systems, Inc. v. Viken, 2005 S.D. 27, ¶25, 694 N.W.2d 23, 33. Section two of 18 U.S.C. 926B is entitled "Exemption of Qualified Law Enforcement Officers from State Laws Prohibiting the Carrying of Concealed Firearms." In its relevant parts, it states that:

(a) *Notwithstanding* any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).

(b) This section shall not be construed to supersede or limit the laws of any State that—

(1) permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or

(2) prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park.

18 U.S.C. 926B Section 2 (emphasis added). 'Qualified law enforcement officer' is defined in subsection (c), as an employee of a governmental agency who:

(1) is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of, or the incarceration of any person for, any violation of law, and has statutory powers of arrest;

(2) is authorized by the agency to carry a firearm;

(3) is not the subject of any disciplinary action by the agency;

(4) meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm;

(5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and

(6) is not prohibited by Federal law from receiving a firearm.

Subsection (d) defines identification as photographic identification issued by the governmental agency which employs the individual as a law enforcement officer.

The federal law is clear in its intent to preempt state laws unless either of the exceptions in (b) (1) or (2) apply. While states retain the right to prohibit the possession of firearms on government property and to permit private persons and entities to prohibit the possession of firearms on their

property, they can not restrict qualified law enforcement officers in any other manner.

It is beyond dispute that defendants, Smith, McCoy, Rector, and Lazalde are 'qualified law enforcement officers'. They were qualified to carry firearms, and at the time in question, they were not under the influence of alcohol or any other drug. At the time in question they possessed photographic identification issued by their respective employers.

While caselaw concerning 18 U.S.C. 926B is limited, the case of New York v. Booth, reached a decision based upon facts indistinguishable from those presented. 20 Misc.3d 549, 862 N.Y.S.2d 767, 2008 N.Y. Slip Op. 28206. In New York v. Booth, the Court held that the federal law on possession of a weapon preempted prosecution under state laws when the defendant is a 'qualified law enforcement officer.' Id at 770.

Additional interpretations of 18 U.S.C. 926B were put forth by both the Attorney General of the United States and the Attorney General of the State of South Dakota. The U.S. Attorney General instructed various governmental departments that "with certain imitations and conditions, the Act exempts active . . . qualified law enforcement officers from state laws and local ordinances prohibiting the carrying of concealed weapons." Memorandum from the Office of the Attorney General on the Application of the Law Enforcement Officers Safety Act of

2004 to various Directors of Federal Agencies, January 31, 2005, 70 Fed.Reg. 42, 10673, 10674 (March 4, 2005). The S.D. Attorney General explained that the Act "amended the Federal criminal code to authorize qualified law enforcement officers . . . carrying the photographic identification issued by their governmental agency, notwithstanding State or local laws, to carry a concealed firearm. South Dakota Secretary of State web site available at [www.sdsos.gov/adminservices/concealedpistolpermits.shtm](http://www.sdsos.gov/adminservices/concealedpistolpermits.shtm) (emphasis added).

Based upon the plain meaning of the statute along with the interpretations put forth by the Attorney General of the United States, the Attorney General of South Dakota, and the County Court of Orange County, New York, the Court finds that Smith, McCoy, Rector, and Lazalde are exempt from prosecution under South Dakota State Law as a result of the Law Enforcement Officers Safety Act.

### Issue III

The next issue is whether or not prosecution under SDCL 22-14-9.2 violates the Privileges or Immunities Clause of the United States and South Dakota Constitutions. SDCL 22-14-9.2 states that:

[a]ny person who is permitted to carry a concealed pistol in a state with which the secretary of state has entered into a reciprocity agreement pursuant to §§ 23-7-7.3, 22-

14-9.1, 22-14-9.2, 23-7-7, 23-7-7.1, and 23-7-8 may carry a concealed pistol in this state if the permit holder carries the pistol in compliance with the laws of this state. Any violation of this section is a Class 1 misdemeanor.

The state indicted Pingel under SDCL 22-14-9.2 alleging that though he did have authority to carry a concealed weapon in the state of South Dakota he did not do so in compliance with the laws of this state. Namely, the state asserts that Pingel carried a concealed pistol in a licensed on-sale malt beverage or alcoholic beverage establishment that derives over one-half of its total income from the sale of malt or alcoholic beverages in violation of SDCL 23-7-8.1.

Defendant Pingel alleges that the enforcement of SDCL 22-14-9.2 violates the Privileges and Immunities Clauses of both the United States and South Dakota constitutions by subjecting residents to a class 2 misdemeanor while non-residents face a class 1 misdemeanor for an identical crime. The defendants assert that said discrepancy occurs due to the failure of SDCL 22-8-8.1 to specifically include a proscribed penalty making the provisions of SDCL 22-6-1.2 applicable and imposing the penalties associated with a class 2 misdemeanor.

While, at first blush, it appears that SDCL 23-8-8.1 lacks any penalty provision, said penalty is actually outlined in SDCL 22-14-9.2. SDCL 22-14-9.2, while poorly worded, is intended to make any carrying of a concealed weapon in violation of state



law a class 1 misdemeanor. SDCL 22-14-9.2 does not violate the Privileges and Immunities Clauses of either the United States or the South Dakota constitutions as nonresidents are treated no differently than residents of South Dakota.

#### Issue VI

Finally, defendants raise the issue of whether or not the status of Lazalde and Rector as U.S. Customs officers exempts them from prosecution under state laws due to 19 U.S.C. §1589. 19 U.S.C. §1589 states that "subject to the direction of the Secretary of the Treasury, an officer of the customs may . . . carry a firearm." The federal law prohibits the limiting of said authority by anyone other than the Secretary of the Treasury. 19 U.S.C. §1589. Again, when a state law is contrary to the laws of congress, the state law is preempted by the federal statute. Dakota Systems, Inc. v. Viken, 2005 S.D. 27, ¶25, 694 N.W.2d 23, 33. Accordingly, the relevant laws put forth by the State of South Dakota are preempted. Lazalde and Rector are exempt from prosecution for violations of state laws concerning the carrying of a firearm.

#### Conclusion


Based on the foregoing discussion and authorities, it is hereby

ORDERED that the motions to dismiss the indictment as to defendants Smith, Rector, McCoy, and Lazalde be GRANTED and the

motion to dismiss the indictment against defendant Pingel be  
DENIED..

Dated this 14th day of November, 2008.

BY THE COURT:

  
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Warren G. Johnson  
Circuit Court Judge

ATTEST:

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Clerk of Courts

\_\_\_\_\_  
Deputy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true and correct copy of the MEMORANDUM DECISION in the above entitled matter upon the persons herein next designated all on the date below shown, by depositing a copy thereof in the United States Mail at Deadwood, South Dakota, postage prepaid, in envelopes addressed to said addressees, to-wit:

Mr. Jesse Sondreal  
States Attorney  
1425 Sherman Street  
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Mr. Robert Van Norman  
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which addresses are the last addresses of the addressees known to the subscriber.

Dated this 14<sup>th</sup> day of November, 2008.

Cindy Gackle  
Cindy Gackle  
Scheduling Clerk