W O O A

IN THE SUPREME COURT OF FLORIDA

WILLIE F. VAUSE,

PETITIONER,

VS. CASE NOS. 63,107 & 63,258

STATE OF FLORIDA,

RESPONDENT.
_____/

STATE OF FLORIDA,

PETITIONER,

VS.

WILLIE F. VAUSE,

RESPONDENT.
_____/

ANSWER BRIEF OF THE STATE, AS RESPONDENT

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TOPICAL INDEX

AUTHORITIES CITED

Cases

Statutes

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PRELIMINARY STATEMENT

The State of Florida, the prosecuting authority and appellee below in Vause v. State, 424 So.2d 52 (Fla. 1st DCA 1982), the petitioner here in Case No. 63,258 and the respondent here in Case No. 63,107, will be referred to as "the State". Willie F. Vause, the criminal defendant and appellant below, the respondent here in Case No. 63,258 and the petitioner here in Case No. 63,107, will be referred to as "Vause".

The State submits this answer brief pursuant to its status as respondent in Case No. 63,107.

References to the four-volume record on appeal will be designated "(R)".

STATEMENT OF THE CASE AND FACTS

The State rejects Vause's statement of the case and statement of the facts as overlong. The only matters relevant to a resolution of the issues presented on certiorari may be summarized as follows:

On June 27 1979, an indictment was returned in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, charging Vause with first degree murder in violation of §782.04, Fla.Stat., with "shooting into an occupied vehicle" in violation of §790.19, Fla.Stat., and with "use of a firearm in the commission of a felony" in violation of §790.07(2), Fla.Stat. (R 1-2). At trial, the evidence showed that Vause, following a drunken altercation at a gathering, killed Randy Mayo, a passenger in a departing truck, with a rifle shot. Over defense objection, the trial court permitted Dr. Donald Beeckler, a radiologist, to testify for the State that in his expert opinion, judging from autopsy X-rays, the bullet which killed Mayo had entered his body intact (R 294-309). This testimony was submitted to refute a defense claim that the bullet had ricocheted off a

tree and fragmented before striking the victim.

The jury found Vause guilty of third degree murder in violation of §782.04(4), Fla.Stat., and of violating §790.19 and §790.07(2), Fla.Stat., as charged (R 71-74). He was so adjudicated, and received separate concurrent sentences of twelve, twelve, and five years imprisonment on these counts (R 81-82,86). In addition, Vause was sentenced to a mandatory minimum imprisonment of three years based upon his possession of a firearm during the murder in violation of §775.087(2)(a), Fla.Stat. Upon timely appeal (R 87), the First District affirmed the trial court's decision that Dr. Beeckler was qualified to express his expert opinion that the rifle bullet had entered the victim's body intact, and also affirmed the trial court's imposition of the mandatory minimum three years of imprisonment under §775.087(2)(a). Vause successfully invoked this Court's conflict certiorari jurisdiction over these dispositions, Case No. 63,107. The First District also affirmed Vause's convictions for third degree murder, "shooting into an occupied vehicle", and "use of a firearm in the commission of a felony", but reversed the separate sentence for "shooting into an occupied vehicle" on the basis that this crime was "an element" of third degree murder, and also reversed the separate sentence for "use of a firearm in the commission of a felony" on the basis that this crime was a "necessarily included" offense of "shooting into an occupied vehicle". The State successfully invoked this Court's conflict certiorari jurisdiction over these dispositions, Case No. 63,258.

ISSUE I

THE FIRST DISTRICT PROPERLY AFFIRMED THE TRIAL COURT'S DECISION THAT DR. BEECKLER, A RADIOLOGIST, WAS COMPETENT TO TESTIFY THAT IN HIS OPINION, JUDGING FROM AUTOPSY X-RAYS, THE FATAL BULLET FIRED BY VAUSE HAD ENTERED THE VICTIM'S BODY INTACT AND HAD THEN FRAGMENTED UPON HITTING THE VICTIM'S RIBS.

ARGUMENT

As noted, the evidence adduced at trial showed that Vause, following a drunken altercation at a gathering, killed Randy Mayo, a passenger in a departing truck, with a rifle shot. Over defense objection, the trial court permitted Dr. Donald Beeckler, a radiologist, to testify for the State that in his expert opinion, judging from autopsy X-rays, the bullet which killed Mayo had entered his body intact. This testimony was submitted to refute a defense claim that the bullet had ricocheted off a tree and fragmented before striking the victim. On appeal, the First District affirmed the trial court's decision that Dr. Beeckler was qualified to express his expert opinion that the rifle bullet had entered the victim's body intact.

In seeking to invoke this court's jurisdiction to review the actions of the trial court and the First District, Vause argued that the First District's decision expressly and directly conflicted with the Third District's decision of Salinetro v. Nystrom, 341 So.2d 1059 (3rd DCA 1977), on the question of whether a medical witness is qualified to give expert testimony outside his particular field of medical expertise. In response, the State

pointed out that in Salinetro v. Nystrom, a civil medical malpractice case, the Third District had affirmed the decision of a trial judge that a gynecologist was not competent to express an expert opinion as to whether the performance of a radiologist in taking X-rays of a pregnant woman was medically substandard. In the instant case, by contrast, the First District, in a criminal case, had affirmed the decision of the trial judge that a radiologist was competent to express an opinion as to whether, judging from autopsy X-rays, the fatal bullet had fragmented upon hitting the victim's ribs. Thus, the State argued, the two decisions were compatible in two senses. Both indicated that a radiologist may be competent to express an expert opinion regarding X-rays, and both stood for the unremarkable proposition that the qualification of an expert witness is within the sound discretion of the trial court. Otherwise, the State argued, the two decisions were incomparable. The facts that both incidentally involved radiology and X-rays, and that the trial courts had reached different conclusions regarding the competency of the physician witnesses in the cases, in no way amounted to an express and direct conflict on the same question of law such as would have justified certiorari review, given the obvious procedural, factual, and contextual dissimilarities of the two decisions.

The State frankly believes that this Court's acceptance of jurisdiction over the decision below was predicated upon its desire to resolving the sentencing issues raised by the parties in their bilateral petitions for certiorari, rather than upon its

desire to resolve Vause's claim regarding the testimony of Dr. Beeckler. Consequently, the State stands 100% behind the foregoing jurisdictional argument, and would ask this Court to hold that certiorari jurisdiction over the testimonial issue was improvidently granted.

Alternatively, the State would urge that the trial court and the First District correctly determined that Dr. Beeckler's testimony was admissible under §90.702, Fla.Stat. In Copeland v. State, 50 So. 621 (Fla. 1909), this Court observed that one may be qualified by study without practice or by practice without study, to give an opinion on a medical question. In that particular case, a physician who was without experience regarding cases of strychnine poisoning was properly allowed to testify to the symptoms that would be produced by strychnine poisoning, to the condition the decedent's abdominal viscera would be in and the condition that he found the body with regard to whether the decedent died from strychnine poisoning. The question of competency of a doctor to testify as an expert depends upon whether he can be shown to have the skill, knowledge or experience with respect to the subject matter regarding his testimony. Pearson v. State, 254 So.2d 573 (Fla. 3d DCA 1971).

In Allen v. State, 365 So.2d 456 (Fla. 1st DCA 1978), the First District therein reversed and remanded for a new trial where the trial court disallowed the testimony of a Mr. Boercker as an expert witness:

The testimony sought of him was of particular importance becuase of the conflict as to which of the two occupants were the driver of the Dodge automobile. The state emphasized that although Mr. Boercker had a Bachelor of Arts degree he did not hold a Doctorate and had never before testified in court. Neither are essential to his qualifications. There must always be a first time for everyone and extensive education is not necessarily a prerequisite to expertise. In order to qualify as an expert witness one needs only to have acquired such special knowledge of the subject matter of his testimony either by study or by practical experience that he can give the jury assistance and guidance in solving a problem to which their equipment of good judgment and average knowledge is inadequate. [Citations omitted.] The record reveals that Mr. Boercker had a Bachelor of Arts degree in Physics and as a graduate student at the University of Florida had earned 190 credit hours of Physics toward his Doctorate degree and had co-authored a paper in Physics that had been published. The state also urges that there was insufficient evidence in the record of physical facts and circumstances upon which Mr. Boercker could have based his testimony. Although Mr. Boercker testified on the proffer of his testimony that such additional facts and circumstances would be helpful, he testified that they were not essential as a basis for the testimony sought to be elicited from him. We are of the view that the learned trial judge abused his discretion in rejecting Mr. Boercker as an expert witness.

> The state also seeks comfort in this court's opinion in Wright v. State, 348 So.2d 26 (Fla. 1st DCA 1977), certiorari denied, 353 So.2d 679 (Fla. 1977). However, it may find no solace there. This court held in that decision only that the evidence there adduced from the expert witness was beyond his scope of expertise. Sub judice we neither accept nor reject the testimony sought to be adduced by Mr. Boercker but only hold that it was error not to permit him to testify.

365 So.2d at 458.

Similarly, in the instant case Dr. Beeckler testified as to his opinion based on the X-ray that he viewed of Randy Mayo's chest. Based on his opinion and the fragments and the dispersement thereof of said fragments, he stated that it was his belief the bullet entered the victim's body intact. Said statement was a reasonable conclusion from an expert radiologist based on the X-ray pictures under consideration. See also United States v. Marler, 614 F.2d 47 (5th Cir. 1980).

Nothing in Vause's brief contravenes the conclusion that, based on the foregoing, Dr. Beeckler's testimony was properly admitted.

ISSUE II

THE FIRST DISTRICT PROPERLY AFFIRMED THE TRIAL COURT'S IMPOSITION OF A THREE YEAR MANDATORY MINIMUM SENTENCE OF IMPRISONMENT UNDER §775.087(2)(a), FLA.STAT.

ARGUMENT

As noted, the jury found Vause guilty of third degree murder in violation of §782.03(4), Fla.Stat., of "shooting into an occupied vehicle" in violation of §790.19, Fla.Stat., and of "using a firearm in the commission of a felony" in violation of §790.07(2), Fla.Stat.[1]

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[1]These statutes read as follows:

782.04 Murder --
(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(This statute has since been slightly amended.)

790.19 Shooting into or throwing deadly missiles into dwellings, public or private buildings, occupied or not occupied; vessels, aircraft, buses, railroad cars, streetcars, or other vehicles. -- Whoever, wantonly or maliciously, shoots at, within, or into, or throws any missile or hurls or projects a stone or other hard substance which would produce death or great bodily harm, at, within, or in any public or private building, occupied or unoccupied, or public or private bus or any train, locomotive, railway car, caboose, cable railway car, street railway car, monorail car, or vehicle of any kind which is being used or occupied by any person, or any boat, vessel, ship, or barge lying in or plying the waters of this state, or aircraft flying through the airspace of this state shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

790.07 Persons engaged in criminal offense, having weapons.--
(2) Whoever, while committing or attempting to commit any felony or while under indictment, displays, uses, threatens, or attempts to use any firearm or carries a concealed firearm is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, and s. 775.084.

Vause was so adjudicated, and received separate concurrent sentences of twelve, twelve and five years of imprisonment on these counts. In addition, he was sentenced to a mandatory minimum sentence of three years of imprisonment based upon his possession of a firearm during the murder in violation of §775.087(2)(a), Fla. Stat.[2] Vause here claims that the First District erred in affirming his three year mandatory minimum sentence under §775.087(2)(a) for the use of a firearm during his crimes because "the firearm was a necessary element of the crime of shooting into an occupied vehicle which was in turn the predicate felony for the defendant's conviction of third degree murder."

Vause's argument appears to be legally predicated upon the twin misconceptions that §775.087(2)(a) either defines a substan-

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[2] §775.087 reads, in pertinent part:

775.087 Possession or use of weapon; aggravated battery; felony reclassification; minimum sentence.--

(1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:

(a) In the case of a felony of the first degree, to a life felony.

(b) In the case of a felony of the second degree, to a felony of the first degree.

(c) In the case of a felony of the third degree, to a felony of the second degree.

(2) Any person who is convicted of:

(a) Any murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, or aircraft piracy, or any attempt to commit the aforementioned crimes...and who had in his possession a "firearm," as defined in s. 790.001(6), or "destructive device," as defined in s. 790.001(4), shall be sentenced to a minimum term of imprisonment of 3 calendar years...

tive offense in and of itself, or dictates a reclassification of the magnitude of a felony along the lines of §775.087(1), hence lengthening the maximum sentence to which a defendant may be exposed. In truth, §775.087(2)(a) merely prescribes that, when a defendant commits certain substantive offenses while possessing either a firearm or a destructive device, a set portion of the sentence he receives upon adjudication must be served in actual confinement. The First District recognized the inapplicability of Vause's argument in that court as follows:

> Appellant contends that the trial court erred in applying the three year mandatory minimum sentence for use of a firearm under section 775.087, Florida Statutes (1979). He maintains that the use of the weapon was necessary to prove the crime itself and cannot be considered as a separate facet of the offense sufficient to justify an aggravated penalty. Section 775.087, Florida Statutes (1979), provides...[Statute omitted].
>
> In Blanton v. State, 388 So.2d 1271 (Fla. 4th DCA 1980), rev. denied, 399 So.2d 1140 (Fla. 1981), that court pointed out that the two subsections of 775.087 serve two different functions. Subsection (1) provides for reclassification of a felony to a higher degree where a weapon or firearm is used and the use of the weapon had not already resulted in the offense being upgraded to a higher degree. Subsection (2) does not increase the punishment but provides for mandatory minimum imprisonment for a person who has been convicted of certain crimes while possessing a firearm.
>
> Defendant Vause was given a mandatory minimum sentence under section 775.087(2), Fla.Stat. (1979). Defendant's third degree murder conviction with use of a firearm authorized the three year mandatory minimum sentence. Blanton v. State, supra; See also Crook v. State, 385 So.2d 1136 (Fla. 1st DCA 1980), in which this court held that a conviction of attempted burglary with a firearm required the trial court to impose a three year mandatory minimum sen-

> tence notwithstanding that the firearm was an element of the committed offense. The distinction between subsections (1) and (2) of section 775.087 was not argued in the case of Skipper v. State, 400 So.2d 797 (Fla. 1st DCA 1981), rev'd. on other grounds, 420 So.2d 877 (Fla. 1982). To the extent that Skipper is inconsistent with Blanton and this opinion, we hereby recede from Skipper.
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> Appellant Vause has cited Webb v. State, 410 So.2d 944,945 (Fla. 1st DCA, 1982), for support, but Webb relates to section 775.087(1) rather than 775.087(2) of the Florida Statutes.

424 So.2d 52,55,56.

The State stands by this reasoning. Alternatively, the State would note that the trial court's imposition of the three year mandatory minimum sentence of imprisonment under §775.-087(2)(a) would be proper even if the Court accepts Vause's erroneous contention that the statute defines a substantive offense in and of itself. Commencing with State v. Pinder, 375 So.2d 836 (Fla. 1979), running through State v. Hegstrom, 401 So.2d 1343 (Fla. 1981); Borges v. State, 415 So.2d 1265 (Fla. 1982); State v. Cantrell, 417 So.2d 260 (Fla. 1982); State v. Carpenter, 417 So.2d 986 (Fla. 1982); State v. Gibson, ___ So.2d ____ (Fla. Feb. 17, 1983), 8 F.L.W. 76, reh. pending; Smith v. State, 430 So.2d 448 (Fla. May 12, 1983); Bell v. State, ___ So.2d ____ (Fla. June 9, 1983), 8 F.L.W. 199, reh. pending; and concluding, for the time being, with State v. Getz, ___ So.2d ____ (Fla. July 14, 1983), 8 F.L.W. 233, this Court has struggled with the question of when a criminal defendant, who has been charged and convicted for committing separate criminal offenses in the course of a criminal transaction, may receive separate sentences for each conviction. The

recent enactment into law of an amended §775.021(4), Fla.Stat., renders it unnecessary to revisit all of the aforecited decisions in all of their twists and turns.[3] Here, it need be noted only that the more recent and hence controlling aforecited cases collectively establish in principle, although some unfortunately misapply in practice, that neither obsolete "single transaction" principles, nor double jeopardy principles, nor the unamended §775.021(4).[4] prevent a criminal defendant from receiving separate sentences upon conviction for commission of multiple criminal violations in the course of a criminal transaction unless it is statutorily impossible to violate one statute without violating one or more of the others. Whether it would have been impossible for the defendant to have committed one offense without having committed one or more

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[3]Effective June 22, 1983, §775.021(4) reads:

775.021 Rules of construction.--

(4) Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

[4]The unamended §775.021(4) reads:

775.021 Rules of construction.--

(4) Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

of the others, as the offenses were charged, is irrelevant. Whether it would have been impossible for the defendant to have committed one offense without having committed one or more of the others, under the proof adduced at trial, is also irrelevant. All the Court need ask is whether it is statutorily impossible to violate one statute without violating one or more of the others. See particularly Borges v. State, State v. Cantrell, State v. Carpenter, and State v. Getz.

In the instant case, it is statutorily possible to commit a third dgreee murder in violation of §782.04(4) without violating §775.087(2)(a) and vice versa. For example, one may commit a third degree murder in violation of §782.04(4) by killing someone in the course of committing a false imprisonment in violation of §787.02, Fla.Stat., without possessing a firearm or a destructive device during the course of an ennumerated felony in violation of §775.087(2)(a). Conversely, one may obviously possess a firearm or a destructive device during the course of an ennumerated felony without committing a third degree murder.[5]

[5]Although the three year mandatory minimum sentence under §775.087(2)(a) was imposed only pursuant to Vause's adjudication for third degree murder, the State would note, as a point of academic interest, that it is also statutorily possible to violate §790.19 and §790.07 without violating §775.087(a)(a), and vice versa. One may actually "shoot into an occupied vehicle" in violation of §790.19 by hurling a stone into an occupied vehicle without possessing a firearm or a destructive device during the course of an ennumerated felony in violation of §775.087(2)(a). Conversely, one may obviously possess a firearm or a destructive device during the course of an ennumerated felony without "shooting into an occupied vehicle". One may also actually "use a firearm in the commission of a felony" in violation of §790.07(2) by displaying a firearm while under indictment without possessing a firearm or a destructive device during the course of an ennumerated felony in violation of §775.087(2)(a). Conversely, one may obviously possess a destructive device during the course of an ennumerated felony without displaying a firearm.

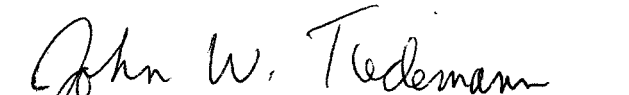
Thus, even if the Court accepts Vause's erroneous premise that §775.087(2)(a) defines a substantive offense in and of itself, the trial court's imposition of the three year mandatory minimum sentence of imprisonment under §775.087(2)(a) would still be proper. Such imposition would also be proper even if the Court accepts Vause's erroneous co-premise that §775.087(2)(a) dictates a reclassification of the magnitude of a felony along the lines of §775.087(1). See Strickland v. State, 437 So.2d 150 (Fla. July 28, 1983), 8 F.L.W. 282, in which the court held that a criminal defendant who was convicted of attempted first degree murder in violation of §782.04, Fla.Stat., §777.04, Fla.Stat., could receive an enhanced sentence of life imprisonment based upon his use of a firearm in violation of §775.087(1) during the crime because "when we look at the statutory elements of the offense, we find the use of a firearm not to be an essential element of the crime of attempted first degree murder."

CONCLUSION

WHEREFORE, the State submits that the indicated testimonial and sentencing dispositions of the First District be AFFIRMED.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of the State, as Respondent, has been furnished to Philip J. Padovano, Attorney for Petitioner/Respondent, Post Office Box 873, Tallahassee, Florida, 32301, this 3/5th day of August, 1983.

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