IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 65,638

LEWIS ABAYOMI TEAGUE,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

HAROLD C. ARNOLD, ESQUIRE
220 EAST FORSYTH STREET
JACKSONVILLE, FLORIDA 32202
(904) 356-0220

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 65,638

LEWIS ABAYOMI TEAGUE,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Respondent, Lewis Abayomi Teague, respectfully submits that the sole issue in this proceeding is whether transporting a rifle, uncovered and fully visible, on the front seat of a vehicle with lawfully tinted windows constitutes carrying a concealed firearm as a matter of law. Contrary to Petitioner's suggestion, this Court should not exercise its discretion to review matters other than directly related to the question certified by the district court. The district court correctly decided that the denial of Respondent's Motion To Dismiss was not automatically mandated by the State's traverse, since the traverse did not specifically deny a material allegation of the motion and the Respondent stipulated to any factual variance between the motion and the traverse. The district court's decision on this issue should be final; therefore, the Respondent respectfully declines to brief and argue the issue before this Court. Sandie v. State, 422 So.2d 308, 312 (Fla. 1982).

Reference herein to the Record on Appeal shall be use of the symbol "R", and to the Transcript of the hearing in the circuit court by the symbol "T", followed by the appropriate page numbers. The Petitioner, the State of Florida, shall be referred to as the Petitioner or the State. The Respondent, Lewis Abayomi Teague, shall be referred to as Respondent. Amicus Curiae, the Department of Highway Safety And Motor Vehicles, shall be referred to as Amicus Curiae.

Finally, Respondent generally accepts Petitioner's Statement of the Case and Facts with the exception that the facts alleged in the Motion To Dismiss were not specifically denied by the State's traverse, and, as the district court concluded, any variance between the facts alleged was stipulated to by Respondent (T-3). See, also, Slip Opinion at p.2.

ARGUMENT

ISSUE

WHETHER TRANSPORTING A RIFLE, UNCOVERED AND FULLY VISIBLE, ON THE FRONT SEAT OF A VEHICLE WITH LAWFULLY TINTED WINDOWS CONSTITUTES CARRYING A CONCEALED FIREARM, A VIOLATION OF §790.01(2), FLORIDA STATUTES, AS A MATTER OF LAW.

Contrary to Petitioner's reasoning, it is first submitted that the certified question posed by the district court, as applied to the facts of the instant case above, is properly answered as a question of law, rather than a question of fact dependent upon the particular circumstances. Obviously, the trier of fact should not be permitted to reach different conclusions in different cases when the facts are identical and are undisputed. A person who transports a firearm, without any attempt to conceal the firearm, in a vehicle equiped with lawfully tinted windows, either is or is not committing the offense of carrying a concealed firearm as prescribed by §790.01(2), Florida Statutes. It is respectfully submitted that the question certified by the district court should be answered in the negative.

Petitioner, relying on Ensor v. State, 403 So.2d 349 (Fla. 1981), suggests that the question of whether or not transporting a firearm in a vehicle with lawfully tinted windows is, ipso facto, a third degree felony and a violation of §790.01(2), Florida Statutes, is a question which can only be answered by a jury. However, Respondent submits that Ensor does not compel such a conclusion. In Ensor, this Court held that "absolute invisibility" of a firearm is not essential to a violation of §790.01(2), Florida Statutes, and that whether or not a firearm is "concealed" within the meaning of the statute is a question of fact to be resolved by the trier of fact. While the principles

stated in Ensor establish the general rule, certainly that rule is not absolute and without any conceivable exception. "In all instances, common sense must prevail." Ensor, supra, at 354-55.

In his specially concurring opinion below, Judge Smith noted in reviewing several Florida cases that so far as the issue of "concealment" is concerned, it has been viewed as involving some attempt to hide the firearm, citing Powell v. State, 369 So.2d 108 (Fla. 1st DCA 1979) (handle of firearm protruding from rear pants pocket); State v. Riocabo, 372 So.2d 126 (Fla. 3rd DCA 1979) (portion of pistol observed inside defendant's purse); McGraw v. State, 387 So.2d 444 (Fla. 1st DCA 1980) (pistol partially covered by wet suit on front seat of car); Ensor, supra, (portion of derringer protruding from under car seat). It clearly appears from a review of Florida cases that a violation of §790.01 requires an intent to conceal the weapon. Dawson v. State, 401 So.2d 819, 820-21 (Fla. 1st DCA 1981), review denied, 408 so.2d 1092 (Fla. 1981); State v. A.D.H., 429 So.2d 1316, 1318 (Fla. 5th DCA 1983). In State v. A.D.H. supra, the court reasoned:

> "... if the appellee was innocently carrying the butcher knife (in a shopping bag to her house after purchasing it, for instance; or to a picnic, for another instance) then the trier of facts would be the one to acquit her. Carrying a concealed butcher knife is not per se lawful in view of the statutory language. Of course, neither is that conduct per se unlawful.

Thus, the Fifth District recognized that "innocent conduct" (absence of an intent to violate the statute) could serve as a basis to acquit a defendant, even though the weapon was, in fact, concealed. Similarly, in Dawson, supra, the First District held that evidence of "guilty knowledge" was relevant to the proof of a violation of §790.01(2).

In the instant case, the facts are undisputed that Respondent did not cover or conceal the rifle in any manner; the rifle was lying completely uncovered on the front seat of Respondent's vehicle and no attempt was made to hide the firearm from the police officer upon being stopped (R-13-16; T-3). Rather, Petitioner suggests that Respondent should be subject to the penalties of a third degree felony because he happened to own and drive a vehicle with lawfully tinted windows. By analogy, it should be noted that if transporting an otherwise unconcealed firearm in a vehicle with tinted windows authorizes a jury to convict a defendant of carrying a "concealed" firearm, then, likewise, carrying an otherwise unconcealed firearm in an elevated vehicle (a truck with large tires or a semi-truck), at night, during bad weather, or even in a vehicle with dirty windows, places a person's fate in the hands of a jury. Surely the legislature did not intend such a result by the enactment of §790.01(2), Florida Statutes.

Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. Busic v. United States, 446 U.S. 398, 406, 100 S. Ct. 1747, 1753, 64 L.Ed.2d 381 (1980). The circumstances to which the statute now before the Court applies are not readily apparent. Clearly, Florida courts have applied the statute differently on almost identical facts. As Justice Boyd noted in his dissenting opinion in Ensor, Supra:

> The majority opinion tries earnestly to define a vague statute and explains how several appellate courts have disagreed in construing the statute in almost identical circumstances. I think instead of trying to save the statute by stating our own views of what the law should provide we should firmly urge the legislature to define what acts and circumstances constitute carrying a concealed weapon.
>
> * * * *

> Ambiguities in criminal laws must be construed against the state. Since Florida appellate courts would likely disagree on whether the petitioner's possession of the derringer under his car seat was a violation of law I would reverse the district court and direct it to affirm the trial court's dismissal of the criminal charge.

Id., at 355.

Thus, because criminal statutes should be strictly construed and because of the rule of lenity, this Court should not extend the operation of §790.01(2) into an area not clearly within the legislature's intentions. Or, in the words of Judge Smith: "(w)e would seem to be taking a giant leap should we expand the scope of this statutory offense. The crux of which is concealment of the weapon itself, to encompass circumstances under which the weapon is deemed 'concealed' <u>because the carrier himself is 'concealed'</u>. I do not believe that expansion of the offense to embrace the latter circumstance is warranted under the statute as presently written." Slip Opinion a p.6 (emphasis added).

The potential difficulties in result arising from such an expansion of §790.01(2) are apparent when one considers that if a person walked into a building openly carrying a rifle (such as an indoor shooting range), he would himself be "concealed" from passersby outside the building and would arguably be guilty of a third degree felony. While this analogy borders on the extreme, it is submitted that the reasoning advanced by Petitioner is virtually identical in application and would support a conviction resulting in the above situation.

Both Petitioner and Amicus Curiae attempt to support the expansion of §790.01(2) by arguing, first, that this Court should adhere to its opinion in Ensor, and second, that the Court should consider the potential effect a failure to expand the statute to include tinted windows might have on the lives and safety of Florida's police officers. In response to the first argument, Judge Wigginton distinquished Ensor and its progeny, as Respondent has herein, by noting that Ensor, the defendant had partially concealed the firearm itself, while in the instant case, the rifle was completely uncovered and Respondent was merely a victim of his environment (a car with tinted windows). See Slip Opinion at p. 3. As to the second argument, it is conceded that the lives and safety of Florida's police officers are important policy considerations which deserve to be weighed. However, since this "weighing" involves important rights of the motoring public as well as police officers, and because defining what conduct is criminal is the exclusive prerogative of the legislature, this Court should allow the responsibility for this weighing of rights to fall upon the shoulders of the body dictated by constitution - the legislature.

Accordingly, Respondent respectfully submits that the reasoning of Ensor is properly limited to cases where the evidence indicates that an individual has made some effort to conceal a weapon, and should not be applied when the weapon is otherwise not concealed save being transported in a certain type of vehicle (such as one with tinted windows). The district court's certified question should be answered in the negative.

CONCLUSION

Wherefore, pursuant to arguments made and authorities cited hereinabove, this Court should answer the certified question in the negative and approve the district court decision below.

Respectfully submitted,

ARNOLD and BURRELL

HAROLD C. ARNOLD, ESQUIRE
220 East Forsyth Street
Jacksonville, Florida 32202
(904) 356-0220

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Lawrence A. Kaden, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301 and Michael J. Alderman, Assistant General Counsel, Department of Highway Safety and Motor Vehicles, Neil Kirkman Building, Tallahassee, Florida 32301, this 21st day of September, 1984.

HAROLD C. ARNOLD, ESQUIRE