IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

LEWIS ABAYOMI TEAGUE,

Respondent.

_____/

CASE NO. 65,638

REPLY BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Lewis Abayomi Teague was the defendant in the Circuit Court of Duval County, and the appellee in the District Court of Appeal, First District. The State of Florida was the prosecuting authority and the appellant, respectively. The parties will be referred to as they appear before this Court.

Citations to the record on appeal will be made by use of the symbol "R," followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Counsel for Respondent has emphasized that the rifle was seen by Officer Leaptrot in open view after the door to Respondent's automobile was opened. However, Respondent has not disputed the fact that the officer alleged in his deposition and the State alleged in its traverse that the rifle "could not be seen from outside of the vehicle unless the doors were opened or the windows rolled down." (State's traverse, R 15). Respondent has also not disputed that the State's traverse also alleged that "[d]ue to the degree of tinting of said car windows, said rifle was 'concealed from the ordinary sight of another person,' i.e. Officer Leaptrot." (R 15) This, of course, was the ultimate question.

The State specifically disagrees with Respondent's assertion in his preliminary statement that the State's traverse "did not specifically deny a material allegation of the motion . . . . (Brief of Respondent at 1). The State submits that there simply is no way to read the traverse without coming to the conclusion that Officer Leaptrot was unable to see the rifle from outside the vehicle. That is a factual assertion rather than a legal assertion.

ARGUMENT

ISSUE I

THE LOWER COURT SHOULD BE REVERSED BECAUSE THE STATE'S TRAVERSE PLACED MATERIAL FACTS IN ISSUE.

Although Respondent has not contested the State's argument, the State would reiterate that the traverse did place material facts in issue. See, e.g., the discussion of the facts contained in Petitioner's statement of the case and facts found in this brief. Accordingly, since material facts were placed in issue, the motion to dismiss should have been summarily denied.

ISSUE II

THE QUESTION CERTIFIED BY THE FIRST DISTRICT CANNOT BE ANSWERED AS A QUESTION OF LAW BECAUSE WHETHER A WEAPON IS CONCEALED IS A FACTUAL QUESTION WHOSE ANSWER DEPENDS ON THE FACTS AND CIRCUMSTANCES OF A PARTICULAR CASE.

Respondent has focused his argument on the contention that someone cannot be convicted of carrying a concealed weapon unless that person has the intent to carry a concealed weapon. However, while this argument may be interesting, it is not supported by the plain language of the statute which requires only that a concealed firearm be carried on or about a person before a conviction can be obtained. The statute says nothing about an intent to conceal the weapon--and the State submits that contrary to Respondent's argument, no such intent requirement should be read into the statute.

The problem with Respondent's argument is that he wishes to make it his decision, rather than the Legislature's, as to what constitutes a violation of the statute. In other words, what Respondent is saying is that he should be able to determine as a matter of law what constitutes prohibited conduct. This flies in the face of our criminal justice system which has traditionally used "triers of fact" to determine whether particular conduct falls within the scope of a criminal statute. All that has happened in this case is for the Respondent to say that his conduct is outside the statute and for the State to say that Respondent's conduct is within the statute--the

resolution of the conflict must be made by the finder of fact, i.e., the jury, rather than the judge who interprets the law.

Respondent has offered several hypotheticals to support his contention that whether a weapon is concealed should be a question of law under certain (his) circumstances. While not addressing the hypotheticals specifically, the State would merely point out that all of them present the factual question of whether a particular weapon was concealed. As this Court stated in Ensor v. State, 403 So.2d 349, 355 (Fla. 1981), the answer to this question depends upon whether a person standing next to a vehicle "may by ordinary observation know the questioned object to be a firearm." The Court went on to state that it was the jury, rather than the trial judge who must decide the question based upon the facts of a particular case. Id.

It must be remembered that by denying the motion to dismiss, the trial court would not have been finding that as a matter of law Respondent was guilty of carrying a concealed firearm. Rather, all the denial of the motion to dismiss would have meant was that there was a possibility, based upon the facts and circumstances of Respondent's case, that the jury might have been able to conclude that the rifle was not recognizable to Officer Leaptrot as a firearm through Officer Leaptrot's "ordinary observation." Id. In that regard, it cannot be overemphasized that the State's traverse specifically stated that "[d]ue to the degree of tinting of said car

windows, said rifle was 'concealed from the ordinary sight of another person,' i.e. Officer Leaptrot." (R 15)

Other district courts of appeal have rejected the precise argument being advanced by Respondent. For example, in State v. Ballew, 445 So.2d 645 (Fla. 4th DCA 1984), the court held that under Ensor, whether a weapon was concealed must be resolved by the jury. Similarly, in State v. Martinez, 422 So.2d 1090 (Fla. 3d DCA 1982), the court held that under Ensor, even though a weapon was observed between the center console and seat of a vehicle, the ultimate question of whether the weapon was concealed was for the jury:

> The "(c)(4) motion" in question was grounded upon an arrest form which stated that the officer observed the weapon in open view. Elsewhere in the arrest form the officer states that the weapon was observed between the center console and driver's seat of the vehicle. It is apparent upon the face of the motion which incorporates the arrest form that an issue is presented which requires resolution by a trier of fact. The motion is not sufficient as a matter of law. Ensor v. State, 403 So.2d 349 (Fla. 1981); State v. Bethea, 409 So.2d 1139 (Fla. 2d DCA 1982); McGraw v. State, 404 So.2d 817 (Fla. 1st DCA 1981).
>
> Reversed and remanded for further proceedings.

State v. Martinez, supra, at 422 So.2d 1090.

Concerning the application of the rule of lenity, the State would merely respond with the principle of law that the rule of lenity is never applied when statutes are unambiguous. Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981).

Respondent also emphasized in his brief that it would be too great a leap if the scope of the concealed weapons statute was expanded to cover the concealment of the carrier of the weapon as well as the weapon itself. While this was a concern of one of the judges in the lower court, it is a concern which should be addressed by the Legislature rather than by the judicial system. Moreover, the State sees nothing wrong with applying (rather than expanding) the scope of the statute to individuals who voluntarily place themselves inside vehicles which are tinted to such an extent that persons standing outside the vehicle cannot see inside. After all, isn't the harm sought to be prevented by the concealed weapons statute the use on the weapon by the person who has the weapon concealed by an unsuspecting victim? Surely, it is within the Legislature's prerogative to make criminal the conduct of carrying a weapon concealed on one's person. It would also be within the Legislature's prerogative to make criminal the conduct of holding a weapon in the open while concealing oneself inside a building--but this the Legislature has not chosen to do. And that is precisely why Respondent's argument must fail.

The State submits that whether a weapon is concealed will always be a question of fact which must be resolved by the finder of fact. Contrary to Respondent's argument, no exceptions are found in the statute, and no exceptions should be created in order to allow people like Respondent to hide weapons from the ordinary sight of another person by rolling

up car windows which they surely must know prevent visibility of whatever is inside the vehicle. The motion to dismiss should have been summarily denied. The State submits that the First District's opinion should be quashed and that the information filed in this case should be reinstated. Then, if Respondent is able to convince the jury that the weapon was not concealed, despite the fact that Officer Leaptrot could not see the weapon until the door of the car was opened, justice will be done.

CONCLUSION

Based on the facts and foregoing argument, the State respectfully requests that the decision of the First District Court of Appeal be quashed and that the information be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Harold C. Arnold, Esquire, 220 East Forsyth Street, Jacksonville, Florida, 32202, on this 17th day of October, 1984.

Lawrence A. Kaden
LAWRENCE A. KADEN

OF COUNSEL