

O/A 4-11-85

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IN THE SUPREME COURT OF FLORIDA

JIMMIE LEE ALEXANDER,)
)
 Petitioner,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Respondent.)

Case No. 65,666

BRIEF OF AMICUS CURIAE

NATIONAL RIFLE ASSOCIATION

On Appeal from the Circuit Court of the 17th Judicial
Circuit, in and for Broward County (Criminal Division), and
on Appeal From Fourth District Court of Appeal

Respectfully submitted
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Did appellant's keeping of a pistol in a closed zippered container, with one snap, in his automobile, fall under the securely encased or otherwise not readily accessible for immediate use exemptions to the concealed carrying statute?

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STATEMENT OF CASE AND FACTS

The petitioner, Jimmie Lee Alexander, was charged by information with carrying on or about his person a concealed pistol, contrary to Florida Statutes section 790.01(2). Alexander pleaded no contest, and having "no prior arrests," the Circuit Court for Broward County, Harry G. Hinckley, Judge, withheld an adjudication and placed Alexander on reporting probation for 18 months. TR 13-14, 17-18. (TR refers to trial record.)

The record reveals that Alexander was employed by Wag's. On September 7, 1982, he was seated peacefully in the driver's seat of his parked automobile in the Wag's parking lot at 1661 South Federal Highway, Fort Lauderdale. TR 22. A container was on the car seat next to Alexander. The container was described in the record in various ways: "a purse - a clutch gun case. . .the handbag. . .this zippered container. . .a man's purse with a zipper on all openings, except one--That one has a snap." TR 3-4, 10.

Alexander was approached by a police officer, who requested identification. Alexander unzipped the container, then zipped the container back up, and informed the police officer that he had no identification. A "bulky object" in the container aroused the police officer's curiosity, and the officer requested to see the container. Alexander handed it over to the officer. The officer then unzipped the container and discovered a pistol

inside the container. TR 3-4, 10. During the entire episode Alexander was cooperative. There is not even a hint in the record to suggest that he carried the pistol for a wicked purpose.

Alexander was subsequently charged with carrying a pistol concealed on or about his person. TR 21. His defense attorney filed a Sworn Motion to Dismiss in the Circuit Court. TR 22. This motion raised the statutory exemption that the pistol was securely encased or was otherwise not readily accessible for immediate use. Florida Statutes section 790.25(5). TR 22. The Circuit Court denied the motion, holding that the container did not come under the umbrella of the statutory exemption. TR 9, 11. A notice of appeal was filed. TR 28.

Following the Fourth District Court's affirmance of petitioner's conviction, Alexander v. State, 450 So.2d 1212 (Fla. App. 1984), this court granted Alexander's prayer for discretionary review.

ARGUMENT

THE ISSUE

The petitioner, Alexander, is a first offender charged with a malum prohibitum offense classified as a felony. The offense occurred in the interior of his automobile parked in his employer's parking lot. We are obviously not dealing with a predatory criminal.

The issue is whether Alexander's peaceful keeping of a pistol in a zippered container, with one snap, in the interior of his automobile falls under the statutory exemption to the concealed carrying of a firearm in a private conveyance. Florida Statutes section 790.25(5) in pertinent part provides as follows:

[I]t is lawful and is not a violation of s. 790.01 to possess a concealed firearm or other weapon for self-defense or other lawful purpose within the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use.

Securely encased is defined by Florida Statutes section 790.001(16) as follows:

"Securely encased" means encased in a glove compartment, whether or not locked; in a snapped holster; in a gun case, whether or not locked; in a zippered gun case; or in a closed box or container which requires a lid or cover to be opened for access.

Readily accessible for immediate use is defined by Florida Statutes section 790.001(15) as follows:

"Readily accessible for immediate use" means that a firearm or other weapon is carried on the person or within such close proximity and in such a manner that it can be retrieved and used as easily and quickly as if carried on the person.

INTERPRETATION OF THE STATUTORY EXEMPTIONS

"Public policy at a given time finds expression in the Constitution, the statutory law and in judicial decisions." Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 95 (1960). A review of Florida's statutory law, its constitution, and the decisions of this Court requires a finding that Alexander's conduct is in harmony with public policy and comes under the umbrella of the statutory exemptions.

A. Statutory Law:

Florida Statutes section 790.25(4) and (5) mandate that the firearm statute be "liberally construed. . . in favor of the constitutional right to keep and bear arms for lawful purposes. . . [and] be liberally construed in favor of the lawful use, ownership, and possession of firearms and other weapons, including lawful self-defense. . . ." Section 790.25(5) exempts from the proscription against carrying a firearm concealed the keeping of a pistol in an automobile if the firearm is securely encased or is otherwise not readily accessible for immediate use.

A blending of the applicable statutes requires a finding that Alexander did not violate the statute proscribing the concealed carrying of a firearm because the pistol was securely encased.

Florida Statutes section 790.001(16) defines a firearm to be securely encased under the following circumstances:

1. In a glove compartment, whether or not locked.
2. In a snapped holster.
3. In a gun case, whether or not locked.
4. In a zippered gun case.
5. In a closed box.
6. In a container which requires a lid or cover to be opened for access.

A case is "A thing fitted to contain or enclose something else; a receptacle or holder; a box, chest, bag, sheath, covering, etc." OXFORD ENGLISH DICTIONARY.

A survey of GUN DIGEST BOOK OF ACCESSORIES & SERVICES (Jos. J. Schroeder, ed. 1979), reveals that gun case may be either of soft or hard material. The shape, size, and general make up of a gun case includes a resemblance to a purse with straps or handles, an attache case or brief case, a box, or a book-type gun case which is simply a hollowed-out book that holds a pistol. GUN DIGEST at pp. 125, 128, 130, 131, 144. The pages are reproduced in the appendix at A2 to A 6.

It is not uncommon for a gun case to hold not only a pistol but also ammunition, spare magazines, targets, tape, small tools, pencil and pad, score book, spotting scope, shooting glasses, and/or hearing protectors. The

presence of chewing gum or aspirin in a gun case would likewise not be out of the ordinary.

Further statutory exemptions are made for possessing a pistol in an ordinary closed box or in any container which requires a lid or cover to be opened for access. Such a box or container need not be designed specifically as a repository for a pistol.

A container is merely a receptacle to retain, keep, keep in, or confine something within limits or space. A cover or lid is merely a shield or veil which has the effect of hiding from view, protecting, or enclosing an object in a container and which is opened or uncovered in order to obtain access to the object in the container.

Keeping the various exempt containers in mind, one must conclude that a gun case is simply a container with a gun inside it. If it is used to encase a gun, it is a gun case. A gun case need not be specifically designed to carry a gun. It may be used for other purposes. Such a conclusion would in no way undermine the purpose of the statutory exemptions, which is to allow decent people the right to keep a gun out of view and still exercise their right to bear arms in self-defense.

Alexander also did not violate the concealed carrying statute because the pistol was not readily accessible for immediate use. A pistol located in a zippered container with one opening that has a snap on it is not kept under

circumstances so that "it can be retrieved and used as easily and quickly as if carried on the person." Florida Statutes section 790.001(15). A person would have to (1) reach for the container, (2) use two hands to open the container, (3) place one hand inside the container, and (4) finally retrieve the pistol.

A "snapped holster" is mentioned in the statute. What is a holster? The dictionary defines it "as a leather case for a pistol that is often open at the top to facilitate quick withdrawal that often conforms to the pistol's shape." A snap strap or cover on a holster merely secures the pistol. Many snaps have a thumb break device that assures the quick withdrawal of the pistol from the holster. A pistol in such a holster clearly satisfies the statutory exemption. The gun in Alexander's case was not so easily accessible as would be a gun in a statutorily-exempt snap holster. In view of this, one is compelled to agree that Alexander's container also satisfies the statutory exemption.

Furthermore, it is a well-established principle of law that penal laws should be strictly construed against the state. Any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." Rewis v. United States, 401 U.S. 808, 812 (1971). See also, United States v. Bass, 404 U.S. 336, 347-48 (1971), and United States v. Harris, 177 U.S. 305, 310 (1900).

B. The Constitution:

The Florida Constitution is the supreme law of the state and that instrument enunciates the public policy of the state. The state, after all, is the creation, creature, and servant of the people and not their master. As John Marshall noted: "The state governments did not derive their powers from the general government; but each government derived its powers from the people, and each was to act according to the powers given it." 3 DEBATES ON THE FEDERAL CONSTITUTION 419 (J. Elliot, ed. 1836). Therefore, the location of a right in the Florida Constitution is evidence that the people feel it belongs in the catalog of indispensable freedoms.

"The right to defend oneself from a deadly attack is fundamental." United States v. Panter, 688 F.2d 268, 271 (5th Cir. 1982). The right to keep and bear arms implements this fundamental right. Florida Constitution, article I, section 8. The right to bear arms is "a liberty interest." Rabbitt v. Leonard, 36 Conn. Super. 108, 413 A.2d 489, 491 (1979).

Initially Florida's arms guarantee, article I, section 21, (1838), read: "That the free white men of this State shall have a right to keep and bear arms for their common defense." While Florida courts never interpreted this guarantee, courts in sister states having a guarantee for the "common defense" have held that the individual is guaranteed the right to keep and bear arms, including

pistols of a size suitable for militia use. Glasscock v. City of Chattanooga, 157 Tenn. 518, 11 S.W.2d 678 (1928); Wilson v. State, 33 Ark. 557, 34 Am.Rep. 52 (1878); Andrews v. State, 50 Tenn. 165, 8 Am.Rep. 8 (1871). Andrews reads like a history lesson.

The people subsequently broadened the language of the right to keep and bear arms. Presently article I, section 8 guarantees that "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law."*/ This guarantee protects the right to personal defense and to keep commonly possessed firearms, such as rifles, shotguns, and pistols. Rinzler v. Carson, 262 So.2d 661, 666 (Fla. 1972). Rinzler's pronouncement of what constitutes constitutionally guaranteed firearms has historical support. When British General Gage disarmed Bostonians, the surrendered armament included 1,778 muskets and 634 pistols. R. Frothingham, HISTORY OF THE SEIGE OF BOSTON AND OF THE BATTLES OF LEXINGTON, CONCORD, AND BUNKER HILL 95 (6th ed. 1903). A synthesis of Rinzler and opinions from sister states reveals that protected arms are those suitable for defense that are not weapons of mass destruction or exclusively used by the military.

*State constitutions are reproduced in Caplan, The Right of the Individual to Bear Arms: A Recent Judicial Trend, 1982 Detroit Col. of Law Rev. 789, 790 n.8.

State v. Kessler, 289 Or. 359, 614 P.2d 94 (1980);
Taylor v. McNeal, 523 S.W.2d 148 (Mo. Ct. App. 1975);
People v. Brown, 253 Mich. 537, 235 N.W. 245 (1931);
State v. Kerner, 181 N.C. 574, 107 S.E. 222 (1921);
State v. Shelby, 90 Mo. 302, 2 S.W. 468 (1886).

The Florida legislature recognized these principles when it mandated that the firearms statute be liberally construed in favor of the constitutional right to bear arms. Florida Statutes section 790.25(4) and (5). This court should be mindful of the right to bear arms when Alexander's case is reviewed.

C. Judicial Decisions:

This court has been mindful of the right to bear arms by decent people when construing an arms statute. The leading case is Watson v. Stone, 4 So.2d 700 (Fla. 1941) (en banc), which like the present case involved the keeping of a pistol for personal defense in an automobile. This court narrowly construed the statute so as not to clash with the right to bear arms for personal security. Likewise, this court construed a machine gun statute with the right to keep arms in mind so as not to bring commonly kept arms, such as semi-automatic shotguns, pistols and rifles, within the ambit of the proscription. Rinzler v. Carson, supra.

Sister states have also kept in mind the right to bear arms in statutory construction. Schubert v. DeBard, 398 N.E.2d 1339 (Ind. App. 1980); State v. Anonymous, 179

Conn. 516, 427 A.2d 403, 405 (1980); City of Lakewood v. Pillow, 180 Colo. 20, 501 P.2d 744, 745 (1972) (en banc) (citing arms guarantee, art. 2, sec. 13); McKellar v. Mason, 159 So.2d 700, 702 (La. App. 1964); State v. Nickerson, 126 Mont. 157, 247 P.2d 188, 192 (1952).

A construction so as to include Alexander's gun case in the statutory exemptions will in no way defeat the manifest intention of the legislature to regulate the manner of bearing arms and still assure the right to bear arms for personal security.

PRACTICAL CONSIDERATIONS

We are dealing with a petitioner who has no previous arrests charged and convicted of a malum prohibitum offense. At this juncture the results of a recent study should be kept in mind. "It is commonly hypothesized that much criminal violence, especially homicide, occurs simply because the means of lethal violence (firearms) are readily at hand, and thus, that much homicide would not occur Were firearms generally less available. There is no persuasive evidence that supports this view." Wright & Rossi, WEAPONS, CRIME AND VIOLENCE IN AMERICA (Executive Summary) at p. 2 (U.S. Justice Dept., Nov. 1981).

The classical criminologist Cesare Becarria along the same lines noted:

False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because

it burns, and water because one may drown in it; that has no remedy for evils, except destruction. The laws that forbid the carrying of arms are laws of such a nature. They disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code, will respect the less important and arbitrary ones, which can be violated with ease and impunity, and which, if strictly obeyed, would put an end to personal liberty - so dear to men, so dear to the enlightened legislator - and subject innocent persons to all the vexations that the guilty alone ought to suffer? Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man. They ought to be designated as laws not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree. C. Beccaria, ESSAY ON CRIMES AND PUNISHMENTS 87-88 (H. Paolucci transl. 1963).

Courts consistently rule that "there is no constitutional right to be protected by the state against being murdered by criminals or madmen." Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). Furthermore, the police have no duty to protect the individual citizen. Morris v. Musser, 478 A.2d 937 (Pa. Cmwlth. 1984); Weiner v. Metropolitan Transportation Auth., 55 N.Y.2d 175, 448 N.Y.S.2d 141 (1982); Warren v. District of Columbia, 444 A.2d 1 (1981) (en banc).

The role of private citizens in deterring crime is important. "Private citizens inevitably play an important role in controlling crime. By limiting their exposure to risk, investing in locks and guns, . . . private citizens affect the overall level of crime, and the distribution of the benefits and burdens of policing." We should not "forget that private policing was the only form of policing for centuries. . . ."

Those who think of private enforcement as evidence of "dangerous vigilantes forget the value of private crime-control efforts, and the crucial difference between vigilantes and responsible citizens playing their traditional role in crime control."

The legitimate role of private citizens is to "limit their functions to deterrence and, occasionally, apprehension; they neither judge guilt nor mete out punishment." Moore & Kelling, "To Serve and Protect": Learning From Police History, 70 The Public Interest 49, 59 (Winter 1983).

These practical considerations serve as examples why it was not the legislature's intent to prevent people like Alexander from keeping a gun in a case in an automobile for personal defense.

COURT OF APPEAL DECISION

The Court of Appeal's decision is reported as Alexander v. State, 450 So.2d 1212 (Fla. App. 1984). That court made a number of unnecessary comments in affirming Alexander's conviction. Such obiter dicta would ordinarily not be addressed. However, a few comments will be addressed here briefly because the claims are erroneous and may be relied upon in the future.

The Court of Appeals seemed to assume that the presence of firearms causes deaths. This assumption has been drained of credibility by a U.S. Justice Department study. Amicus curiae brief at 11. Furthermore, a recent study demonstrates

that five of the most crucial assumptions about firearms were found to be substantially at variance with the evidence. Those erroneous assumptions are as follows: (1) Guns are five times deadlier than the weapons most likely to be substituted for them in assaults in which guns are not available. (2) The sight of a gun can elicit aggression, due to the learned association between guns and violence. (3) If guns are made more expensive, more difficult to obtain, or legally risky to own, people will do without them. (4) Guns are useless for self-defense or protection of one's family, home, or business, and have no deterrent effect on criminals. (5) Homicides are largely "crimes of passion" committed by otherwise law-abiding citizens not distinguishable from other people. Therefore, laws must be directed at all gun owners rather than select criminal subgroups. Kleck & Bordua, The Factual Foundation For Certain Key Assumptions of Gun Control, 5 Law & Policy Quarterly 271 (July 1983). The article is reproduced in the appendix at A7 to A21.

The claim of the Court of Appeal that most contemporary constitutional scholars agree that the Second Amendment concerns only the militia and guarantees only a collective right, which really is no right at all, is erroneous. Recently a historian noted, "But advocates of the control of firearms should not argue that the Second Amendment did not intend for Americans of the late eighteenth century to possess arms for their own personal defense, for the defense of their states and their

nation, and for the purpose of keeping their rulers sensitive to the rights of the people." Shalhope, The Ideological Origins of the Second Amendment, 69 Jour. Am. History 599, 614 (1982).

In accord is Watson v. Stone, 4 So.2d 700, 703 (Fla. 1941) (en banc) (Buford, J., concurring). A list of twenty-two (22) articles and one book supporting the view that the Second Amendment guarantees an individual right is reproduced in the appendix at A22 to A23. The material spans a period from 1960 to 1984.

Ignoring history is merely a reminder that fidelity to the constitution and to the intent of the framers does not always prevail. West Virginia Supreme Court Justice Richard Neely realistically wrote, "Lawyers, certainly, who take seriously recent U.S. Supreme Court historical scholarship as applied to the Constitution also probably believe in the Tooth Fairy and the Easter Bunny." R. Neely, HOW COURTS GOVERN AMERICA 18 (1981).

The claim that "English constables still walk their beats without weapons" is inaccurate. The carrying of guns by British police is no longer restricted to "where it is absolutely unavoidable, as for diplomatic protection." British Police even shoot common criminals: "Last week police shot and injured two men found in suspicious circumstances in a London post office." Sir Kenneth Newman, the metropolitan police commissioner of London, presented a chart that "shows an alarming increase in the use of guns by criminals over the ten years from 1972." Police - Too Many Guns, THE ECONOMIST, June 23, 1984, p. 53.

More importantly, the early decision of Vanhornes' Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 308-309 (1795), sets out the critical difference between our form of government and the British form.

[I]n England, the authority of the Parliament runs without limits, and rises above controul. . . .The power of Parliament is absolute and transcendant. . . . Besides, in England there is no written constitutionIn America the case is widely different: Every State in the Union has its constitution reduced to written exactitude and precision. . . .The Constitution is. . .the supreme law. . . ; it is paramount to the power of the Legislature. . . .The Constitution is the sun of the political system, around which all Legislative, Executive and Judicial bodies must revolve. . . .The Constitution of a State is stable and permanent, not to be worked upon by the temper of the times, nor to rise and fall with the tide of events. . . .

CONCLUSION

The public policy of Florida provides for the keeping of a pistol out of ordinary view in the interior of a private conveyance if the pistol is (1) securely encased or (2) is otherwise not readily accessible for immediate use. This remedial legislation was enacted in the wake of Ensor v. State, 403 So.2d 349 (Fla. 1981).

For the reasons cited herein the court should find that the circumstances under which Alexander kept the pistol in a container in his automobile constituted (1) being securely encased and/or (2) otherwise not being readily accessible for

immediate use, and the court should reverse the trial court's denial of petitioner's Sworn Motion to Dismiss.

Respectfully submitted,

A handwritten signature in black ink that reads "Robert Dowlut". The signature is written in a cursive style with a large, prominent initial "R".

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of February, 1985,
I mailed a copy of the Brief of Amicus Curiae National Rifle
Association, with postage prepaid, to Florida Attorney General,
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