

O/a 4-11-85

017

IN THE SUPREME COURT OF FLORIDA

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

Case No. 65,660

FILED

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ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Seventeenth Judicial Circuit, in and for Broward County, Florida and appellant in the Fourth District Court of Appeal. Respondent was the prosecution and appellee respectfully in the aforementioned courts. In this brief the parties will be referred to as they appear before this Honorable Court.

The letter "R" will denote the Record on Appeal. All emphasis in this brief is supplied by respondent unless otherwise indicated.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case.

STATEMENT OF THE FACTS

On September 7, 1982, petitioner, an employee of Wag's, was sitting in the driver's seat of his car, which was parked in Wag's parking lot (R 22, 24). Police Officer Lerman went up to petitioner and asked him for identification (R 22,24). Petitioner said he had identification and began to unzip his black leather purse which was on his lap (R 22,24). Petitioner stopped unzipping the purse, zipped it back up real quick, and then told Officer Lerman that he did not have his wallet or any identification on his person at that time (R 22, 24-25). Lerman became suspicious of a bulky object in petitioner's purse and asked petitioner if he could inspect the purse himself (R 24-25). Petitioner handed the purse to Officer Lerman, who opened it and found a small pistol as well as petitioner's driver's license and other forms of identification (R 8, 11, 22-26).

POINTS INVOLVED

POINT I

WHETHER SECTION 791.01(2) FLORIDA STATUTES
(1981) AS REFINED IN SECTIONS 790.25(5),
FLORIDA STATUTES (1982), 790.001(15), FLORIDA
STATUTES (1982), and 790.001(16), FLORIDA
STATUTES (1982) IS FACIALLY UNCONSTITUTIONAL?

POINT II

WHETHER THE DISTRICT COURT OF APPEAL CORRECTLY
UPHELD THE DENIAL OF PETITIONER'S MOTION FOR
DISCHARGE?

SUMMARY OF ARGUMENTS

POINT I: The challenged statutory scheme is rationally related to its purpose as it proscribes the carrying of a concealed weapon which is readily accessible for immediate use and it is clear and definite enough for men of ordinary intelligence to understand what conduct is prohibited.

POINT II: The district court of appeal properly sustained the trial court's denial of petitioner's motion for discharge because the state's traverse clearly revealed a dispute as to a material fact.

ARGUMENT

POINT I

SECTION 791.01(2), FLORIDA STATUTES (1981)
AS REFINED IN SECTIONS 790.25(5), FLORIDA
STATUTES (1982), 790.001(15), FLORIDA
STATUTES (1982), AND 790.001(16), FLORIDA
STATUTES (1982) IS NOT FACIALLY UNCONSTITUTIONAL.

Section 790.25(5) Florida Statutes (1982) provides that it is not unlawful to possess a concealed firearm for a lawful purpose, if the firearm is securely encased or is otherwise not readily accessible for immediate use. Section 790.001(15) and (16) Florida Statutes (1982) define the pertinent terms as follows:

(15) "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.

(16) "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.

Petitioner erroneously asserts that the foregoing statutory scheme is violative of due process in that it is not rationally related to a legitimate state purpose and that it is so vague that it does not give persons of ordinary intelligence fair notice of what conduct is being proscribed.

A. THE STATUTES ARE RATIONALLY RELATED TO
A LEGITIMATE STATE INTEREST.

As a preliminary matter, respondent points out that petitioner did not raise the issue of whether these statutes have a rational relationship to a legitimate state interest to the district court below, thus he has waived this argument by failing to raise it below. Trushin v. State, 425 So.2d 1126, 1131 (Fla. 1983).

Assuming this Court will nonetheless address this issue as it did in Trushin, supra, so as to avoid the misconception that this Court did not wholly sustain the statutory scheme, respondent now addresses petitioner's arguments on the merits.

Petitioner asserts the principal purpose of the statutes appears to protect the unwary public, particularly police officers, "from sudden assaults committed by persons producing weapons from places of concealment." The Fourth District found the purpose of legislation "is to promote firearms safety and to curb and prevent the use of firearms and other weapons in crime and by incompetent persons without prohibiting their lawful use in defense of life, home or property, by state and federal military, and in other lawful uses..." Alexander v. State, 450 So.2d 1212, 1214 (Fla. 4th DCA 1984). Although the Fourth District's finding of the purpose

of this legislative scheme is stated more broadly than petitioner's, they are essentially the same. Respondent asserts that a reading of §§ 790.01(2) Fla.Stats. (1981) together with §§ 790.001(15), 790.001(16) Fla.Stats. (1982) and 790.25(5) Fla.Stats. (1982), clearly reveals that the statute is reasonably related to a legitimate purpose.

The statute permits possession of a securely encased concealed firearm which is not readily accessible for immediate use. Petitioner argues that under the definition of "securely encased" it may be possible to possess a weapon concealed in a container which still allows the weapon to be easily accessible. However, § 790.025(5) cannot be interpreted through § 790.001(16) (definition of securely encased) alone. Rather it must be read and interpreted in conjunction with § 790.001(15), (defining readily accessible for immediate use). Section 790.25(5) proscribes the possession of a concealed firearm which is not securely encased or otherwise readily accessible for immediate use. By using the "or otherwise" language the legislature clearly indicated that the primary requirement is that the firearm not be readily accessible for immediate use. It is obviously not sufficient that the firearm fit the definition of "securely encased"; it must also be not readily accessible for immediate use.

Respondent asserts there clearly is a rational relation between the statutory scheme and its purpose. By proscribing the possession of a concealed weapon which is readily accessible for immediate use, the statute fulfills its purpose of "protecting the unwary public (and especially police officers) from sudden, unforeseen assaults" and for promoting firearms safety and preventing the use of firearms in crimes by prohibiting their lawful use. Alexander, supra.

B. THE STATUTE SUFFICIENTLY APPRISES PERSONS OF ORDINARY INTELLIGENCE WHAT CONDUCT IS BEING PROSCRIBED.

Petitioner erroneously asserts that "a person reading the various applicable statutes could not reach any certain conclusion as to whether Mr. Alexander's bag was a 'container' or 'gun case' under the statute." Sub judice, the trial judge did not have to guess at the meaning of the statute and had no difficulty in finding that "this purse does not constitute a zippered gun case." (R 11). Nor would the citizen of ordinary intelligence have difficulty distinguishing a purse from a gun case. Additionally, a gun in a purse on the seat next to the individual charged, must be considered "readily accessible for immediate use," and this circumstance makes inapplicable Section 790.25 Florida Statutes (1982) as a defense to the crime charged. In regard to the constitutionality of the instant statute, the man of ordinary intelligence would realize that

the legislative intent of the statute was to prohibit the conveyance of a concealed weapon in a manner making it readily accessible for immediate use. The legislature specifically approved of carrying a gun in a gun case, but it did not approve of carrying a gun in a purse. The distinction is apparent and clearly, a purse does not become a gun case just because a gun is contained within.

Respondent notes that, this Court has the duty, if reasonably possible, and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality. Falco v. State, 407 So.2d 203 (Fla. 1981). In deciding whether a statute is constitutional, every presumption is to be indulged in favor of the validity of the statute. Griffin v. State, 396 So.2d 152, 155 (Fla. 1981). The fact that "marginal" factual situations may arise under a statute does not, in itself, render the enactment vague. City of St. Petersburg v. Waller, 261 So.2d 151, 157 (Fla. 1972).

Finally, respondent reiterates that the statute at hand is not so vague or indefinite that men or ordinary intelligence cannot understand the conduct prohibited. Moreover, in light of the basic rules of statutory construction this Court should uphold the constitutionality of the challenged statute.

POINT II

THE DISTRICT COURT OF APPEAL CORRECTLY
UPHELD THE DENIAL OF PETITIONER'S MOTION
FOR DISCHARGE.

Petitioner contends that the man's purse constituted a zippered gun case and that therefore the Motion to Dismiss should have been granted. In the state's traverse, it was noted that the purse contained petitioner's wallet and other identification and that therefore the purse or handbag did not constitute a gun case. Respondent maintains that whether or not the purse should be considered a zippered gun case in accordance with Section 790.001(16) Florida Statutes (1982) is a question for the trier of fact and consequently the trial court correctly denied the Motion to Dismiss.

The key to this issue is whether the weapon was "readily accessible for immediate use." It is respondent's position that a gun inside a man's purse placed on the seat next to the individual is "readily accessible for immediate use." Certainly, on the facts, the trial court could not reasonably conclude as a matter of law that the gun was "securely encased or not otherwise readily accessible for immediate use." The order of the trial judge denying the Motion to Dismiss was in accord with previous decisions.

Ensor v. State, 403 So.2d 349 (Fla. 1981); State v. Martinez, 422 So.2d 1090 (Fla. 3rd DCA 1982); Cates v. State, 408 So.2d 797 (Fla. 2nd DCA 1982); State v. Molins, 424 So.2d 29 (Fla. 3rd DCA 1982); State v. Swoveland, 413 So.2d 166 (Fla. 2nd DCA 1982).

Petitioner attempts to draw an analogy to cases "where there is a question as to whether a particular object is a firearm as defined in Section 790.001 Florida Statutes (1983). The caselaw is that, where there is no dispute but that a particular object is not capable of firing projectiles, the issue of whether the object is a firearm involves a question of law and not a question of fact."

By statutory definition a "firearm" means any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive...Section 790.001(6) Florida Statutes (1983). Clearly, where the particular object is not capable of firing projectiles, the issue does not concern a question of fact, but one of law. However, if the issue were whether the object could be readily converted to expel a projectile by the action of an explosive, then there would be a factual question as to whether the object should be considered a firearm.

A more analogous question to the one posed in the case at bar is whether a particular object is a dangerous weapon. This has traditionally been considered a question of

fact. Goswick v. State, 143 So.2d 817 (Fla. 1962); Austin v. State, 336 So.2d 480 (Fla. 3rd DCA 1976).

In Bass v. State, 232 So.2d 25 (Fla. 1st DCA 1970), the court was faced with the factual question of whether an unloaded gun was a deadly weapon. Similarly, in M.M. v. State, 391 So.2d 366 (Fla. 1st DCA 1980), the court stated that the question of whether the starter gun was a deadly weapon was a question of fact to be resolved by the trier of fact. The court therefore concluded that the motion to dismiss based on the allegation that there were no material disputed facts and the undisputed facts did not establish a prima facie case, was properly denied.

Respondent would also note that by enacting Section 790.25(5)Florida Statutes, the legislature was attempting to promote firearm safety, and curb unlawful use of firearms while, at the same time not prohibiting the lawful possession and use of firearms. It may be relevant to note that when asked for his identification, petitioner began to unzip his purse but then quickly zipped it back up and stated that he did not have any identification (R 24-25). However, both petitioner's wallet and other identification were found within the purse (R 25). Therefore, petitioner's surreptitious actions may have indicated "guilty knowledge." Thus, whether or not he possessed the "concealed firearm for self-defense or other lawful purpose" is an issue also within the realm of the trier

of fact. For this reason also, it would have been improvident for the trial court to grant petitioner's Motion to Dismiss.

The rules of statutory construction mandate a reviewing court with the duty, if reasonably possible, and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality. Falco v. State, 407 So.2d 203 (Fla. 1981). In deciding whether a statute is constitutional, every presumption is to be indulged in favor of the validity of the statute. Griffin v. State, 396 So.2d 152, 155 (Fla. 1981).

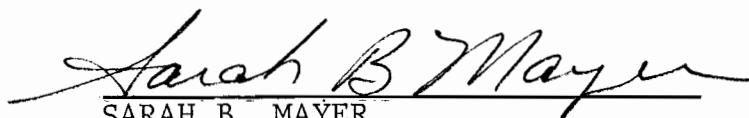
Clearly, in the instant case, there remained a dispute of a material fact which needed to be resolved by the trier of fact and therefore, the Motion to Dismiss was properly denied.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities cited therein, respondent respectfully requests that the Judgment and Sentence of the lower court be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 25th day of February, 1985 by Mail/Courier to GARY CALDWELL, ESQUIRE, Assistant Public Defender, Harvey Building, 13th Floor, 224 Datura Street, West Palm Beach, Florida 33401.



OF COUNSEL