

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

AUG 7 1984

JIMMIE LEE ALEXANDER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

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CASE NO. 65,666

INITIAL BRIEF ON JURISDICTION

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

GARY CALDWELL
Assistant Public Defender

Counsel for Petitioner

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PRELIMINARY STATEMENT

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

STATEMENT OF THE CASE

The state attorney of the Seventeenth Judicial Circuit charged petitioner by information with possession of a concealed firearm in violation of section 790.01(2), Florida Statutes (1981). Petitioner filed a sworn motion to dismiss the information under Florida Rule of Criminal Procedure 3.190 (c)(4). In the motion, he asserted that, when he was arrested, the firearm was "securely encased" within the meaning of Section 790.001(16), Florida Statutes (Supp. 1982). The state filed a "traverse" saying that the firearm was in a black leather hand purse when petitioner was arrested.¹ The trial court conducted a hearing at which he examined the black hand purse, concluded that it was not a zippered gun case, and denied the motion to dismiss.

Petitioner entered a plea of nolo contendere, specifically reserving his right to appeal the denial of the motion to dismiss. The trial court withheld adjudication and placed petitioner on probation.

On appeal, the district Court of Appeal, Fourth District, affirmed the denial of the motion to dismiss and subsequent order withholding adjudication and placing petitioner on probation. The District Court also held Section 790.01(2), Florida Statutes (1981) to be constitutional. Appendix, page 3.

After denial of rehearing, petitioner invoked the discretionary jurisdiction of this court.

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The details of the motion to dismiss and traverse are set forth in the lower court's opinion. Appendix, pages 1-2.

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 the Wag's parking lot. Police Officer Lerman went up to petitioner and asked him for identification. Petitioner said he had identification and began to unzip his black leather hand purse. He then stopped unzipping it, zipped it back up, and said he did not have his wallet or identification on his person at that time. Lerman became suspicious of a bulky object in the pouch. He took the pouch from petitioner, opened it, found a firearm inside, and arrested appellant for possession of a concealed firearm. Also, in the purse were petitioner's wallet, driver's license, and other forms of identification. Appendix, pages 1-2.

REASONS FOR ACCEPTING JURISDICTION

A. Constitutional provisions. Article V, section 3(b)(3), Florida Constitution (1968, as amended) provides that this Court may review a decision of a district court of appeal that expressly declares valid a state statute. It also provides that this Court may review a decision of a district court of appeal which expressly and directly conflicts with a decision of another district court of appeal or of this Court on the same question of law. The requirement of direct and express conflict is met when the opinion under review sets forth a legal basis of the result obtained, and that legal basis conflicts with the legal basis set forth in another appellate decision. In other words, the decision under review need not explicitly identify conflicting district court decisions in its opinion in order to create "express" conflict for the purposes of Section 3(b)(3). Ford Motor Co. v. Kikis, 401 So.2d 1341 (Fla. 1981).

B. Constitutionality of statute. The lower court expressly upheld the validity of Section 790.01(2), Florida Statutes (1981). Appendix, page 3. Thus, there is a valid legal basis for the exercise of this Court's discretionary jurisdiction in this cause. The question remains whether this Court should exercise that jurisdiction in this case.

As the lower court noted, "this is not a run of the mill case." Appendix, page 3. A brief review of recent legal history shows why. In Ensor v. State, 403 So.2d 349 (Fla. 1981), this court indicated that a weapon in a locked glove compartment in a

car could be a weapon concealed "about the person" so as to be a prohibited concealed weapon under Section 790.01(2). 403 So.2d at 354.

The decision in Ensor raised as many questions as it answered. In Cates v. State, 408 So.2d 797 (Fla. 2d DCA 1982) the court speculated upon how Ensor would apply to the possession of a firearm in a zippered case. In Bludworth and Krischer, "C.C.F. -- Before and After Ensor," 56 Florida Bar Journal 461 (May, 1982), the authors wrote: "While the Ensor decision has been the cause of much teeth gnashing and hand wringing, its application and future are not secure." Ibid. 462. They went on to speculate that the concealed firearm statute may be unconstitutionally vague in that it does not provide the citizenry "fair warning" as to what conduct it forbids. Ibid.

In reaction to Ensor, the legislature passed Sections 790.25(5), 790.001(15), and 790.001(16), Florida Statutes (Supp. 1982). In those provisions, the legislature effectively overruled the dicta in Ensor pertaining to the possession of a firearm in a glove compartment, and also answered the question raised by the Second District Court of Appeal in Cates pertaining to the possession of a firearm in a zippered case in a car. Section 790.001(16) provides that in both circumstances the firearm is "securely encased" so as not to be a forbidden concealed firearm. The case at bar presents this Court with an early opportunity to pass upon the validity of, and to construe, the concealed firearm statute as amended in response to Ensor.

In addition to this classic interplay between the legislative and judicial branches, this case also involves a broader struggle pertaining to the nature of our society and the safeguards of our constitution. Some (such as the lower court, as exemplified by its language at page 3 of its opinion) might characterize this as a struggle between the constitutional right of the people to protect themselves by the possession and use of firearms, and the right of the government to protect its officers in an armed populace which contains a sufficient number of criminals and mentally deranged persons as to require the strict regulation of ownership and use of firearms.² In this struggle, each side bases its claim of right upon Article I, Section 8, Florida Constitution (1968), which protects the right to bear arms "except that the manner of bearing arms may be regulated by law."³ In this cause, this Court is faced with construing our new concealed firearm statutory scheme in a manner consistent with these competing interests.

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It is not clear that our police officers themselves favor the protectionist attitude of the state. A recent survey of police officers showed that "the vast majority... of police officers polled felt private citizens have a right to own a gun," and that the majority also felt that most persons with guns have them for the protection against crime and that the enactment of more firearm laws would not serve the ends of law enforcement. "Pro and Cons Fly Over Handgun Controls," Florida Fraternal Order of Police Journal (Spring 1982), page 30.

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The last provision derives from the English Bill of Rights of 1688, which provided for the right to bear arms "as allowed by law." The "as allowed" clause was originally intended simply to permit the "legal definition of appropriate use." Malcolm, "The Right to Keep and Bear Arms: The Common Law Tradition," 10 Hastings Constitutional Law Quarterly 285,313 (Winter 1983).

From the foregoing, it is clear that the simple facts of this case give rise to substantial policy consideration of great interest to the people of this state. Accordingly, this Court ought to take jurisdiction of this cause to determine whether, as Bludworth and Krischer suggested might happen, our law with respect to concealed firearms has become so incomprehensible as to be void for vagueness.

C. Conflict Jurisdiction. The lower court determined that, since the sworn motion to dismiss stated that petitioner had the gun in "a zippered pouch," Appendix, page 2, and the state's traverse termed the container "a black leather hand purse," Appendix, page 2, there was a question of material fact as to whether the pouch or purse constituted an authorized container for a concealed firearm and the trial court correctly denied the motion to dismiss. Appendix, page 6.

In Simmons v. State, 160 Fla. 626, 36 So.2d 207 (1948), this Court wrote that issues of fact in a criminal case are "disputes between the State and the defendant as to what actually existed occurred at the particular time and place in question." 36 So.2d at 208. Where the underlying historical facts are undisputed, the legal effect of those facts is a question of law. Brannen v. State, 94 Fla. 656, 114 So. 429, 431 (1927), Crockett v. State, 137 Fla. 450, 188 So. 214, 215 (1939). These principles apply where the state, notwithstanding the filing of a traverse, essentially agrees to the relevant historical facts. State v. Holliday, 431 So.2d 309 (Fla. 1st DCA 1983), Kuhn v. State, 439 So.2d 291 (Fla. 3rd DCA 1983).

At bar, there was agreement that appellant, while parked at his place of employment, had a firearm in a purse or pouch. Appendix, pages 1-2. The trial court examined the object and rendered his opinion that, as a matter of law, it was not an authorized receptacle for a concealed firearm. Appendix, page 6.

Had the lower court complied with Simmons, Brannen, Crockett, Holliday, and Kuhn, it would have found that there was no disputed issue of historical fact so that this cause involved only a matter of law susceptible to resolution by way of a sworn motion to dismiss. The lower court did not do so, finding that there was a question of fact.

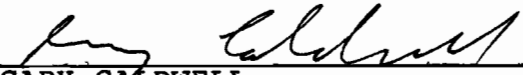
Accordingly, the decision below directly and expressly conflicts with the foregoing decisions insofar as it finds that the trial court was confronted with a question of fact and not a question of law. Thus, this Court should exercise its conflict jurisdiction and review the decision of the lower court.

CONCLUSION

This Court should accept jurisdiction over this cause.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150



GARY CALDWELL
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to the Honorable Marlyn Altman, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, 33401, this 3rd day of August, 1984.



Of Counsel