O/a 4-11-85

IN THE SUPREME COURT OF FLORIDA

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MAR 21 1985
CLERK, SUPREME COURT
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JIMMIE LEE ALEXANDER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO.65,666

REPLY BRIEF ON THE MERITS

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AUTHORITIES CITED

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division 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 AND OF THE FACTS

Appellant relies on the statements in his initial brief on the merits.

POINT I

SECTION 790.01(2), FLORIDA STATUTES (1981) AS MODIFIED BY SECTIONS 790.25(5), FLORIDA STATUTES (1982 SUPP.) AND 790.001(16), FLORIDA STATUTES (1982 SUPP.) IS FACIALLY UNCONSTITUTIONAL.

In its answer brief, the state has proposed that the statutory scheme pertaining to concealed firearms be read such that where a citizen has a firearm "securely encased" in an automobile, the citizen may nevertheless be guilty of carrying a concealed firearm if the firearm is "readily accessible for immediate use." The state's proposal ignores three things: first, the history leading up to the present enactment; second, the rule of lenity; and third, that its position requires a complete rewriting of our law on this subject, and a conviction may not be justified by such an after-the-fact reconstruction of a statute.

A. The legislature passed the present statutory scheme after a furor arose concerning dicta in Ensor v. State, 403 So.2d 349 (Fla. 1981) to the effect that a weapon in a locked glove compartment in a car would be a weapon concealed "about the person" so as to be a prohibited concealed weapon. 403 So.2d at 354. See Bludworth and Kischer, "C.C..F. -- Before and After Ensor," 56 Fla.Bar J. 461 (May, 1982).[1] The district courts responded to Ensor with some puzzlement. In Cates v. State, 408 So.2d 797 (Fla. 2nd DCA 1982), the court posed, but did not answer, the question: "Is a gun in a zippered or partially zippered case securely encased?" Likewise, in State v. Molins, 424 So.2d 29 (Fla. 3rd DCA 1982) wrote that, in light of Ensor,

[1] Bludworth, himself a prominent prosecutor, noted that Ensor "threw law enforcement and prosecutors into a turmoil." Ibid.

it was unclear whether the concealed firearm statute forbade the possession of a gun in a zippered case in a car. In the earlier case of Rogers v. State, 336 So.2d 1233 (Fla. 4th DCA 1976), the court ruled that the statute forbade carrying a firearm in a closed briefcase.

When the legislature passed section 790.001(16), Florida Statutes (Supp. 1982), it addressed the questions raised in Cates, Molins, and Rogers. The new statute provided that in all such circumstances the firearm was "securely encased" so that the car driver would not be guilty of carrying a concealed firearm.

It would make no sense for the Legislature to provide on the one hand that such a weapon was securely encased, so that its possession was legal, but on the other hand provide that the weapon might nevertheless be readily accessible so that it possession was not legal. The state's position is contrary to the history of the statute.[2]

B. Under the rule of lenity articulated in, e.g., Watson v. Stone, 148 Fla. 516, 4 So. 700 (1941), criminal statutes are to be construed strictly in favor of the accused. Contrary to this rule, the state would apparently have this Court construe the statute strictly against the accused. The state's position is wrong under Watson and the cases cited therein.

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[2] The state's position is also contrary to prior law. See State v. Butler, 325 So.2d 55 (Fla. 3rd DCA 1976) ("if the weapon is 'securely encased,' it is exempt and there is no need to determine whether the weapon is in 'close proximity of the driver.'"), and State v. Hanigan, 312 So.2d 785 (Fla. 2nd DCA 1975) (defendant entitled to dismissal where gun in strapped holster under driver's seat and therefore "securely encased" even though otherwise readily accessible.).

C. As noted at footnote 2, supra, prior cases construing the prior statutory scheme held that one was not guilty of carrying a concealed firearm so long as the firearm was "securely encased," even if the firearm was otherwise readily accessible. State v. Butler, 325 So.2d 55 (Fla. 3rd DCA 1976), State v. Hanigan, 312 So.2d 785 (Fla. 2nd DCA 1975). See also the discussion in Cates v. State, 408 So.2d 797, 798-99 (Fla. 2nd DCA 1982). Thus the state now asks this Court to rewrite prior law substantially and recast the statute. Such an after-the-fact construction of the statute cannot justify a conviction (or, in this case, denial of a motion to dismiss, acceptance of a plea of nolo contendere, and entry of an order placing the defendant on probation). Bouie v. City of Columbia, 378 U.S. 347, 352-355, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) ("when a[n] ... unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime"), Douglas v. Buder, 412 U.S. 430, 432, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973) (revocation of probation violative of due process where revocation founded upon construction of state law contrary to prior state law).

D. From the foregoing, the state's construction of the statute has no basis in our law.

POINT II

THE DISTRICT COURT OF APPEAL ERRED BY UPHOLDING THE DENIAL OF APPELLANT'S MOTION FOR DISCHARGE

The state asserts that it "may be relevant to note" that appellant's actions were surreptitious, which "may have indicated 'guilty knowledge,'" so that there might be a question of fact as to whether petitioner had the firearm "for self-defense or other lawful purpose." Answer brief, page 12. Petitioner replies that there is a difference between a genuine issue concerning "material disputed facts" under Florida Rule of Criminal Procedure 3.190(c)(4), and the sort of idle speculation set forth in the state's brief.

In any event, the state's position on this point is completely contrary to its position in the trial court, where it agreed that the issue of whether the purse in question is a proper repository for a firearm in an automobile under the statute was dispositive. R13. Relying on the state's representations, the trial court repeatedly advised petitioner that the issue would be heard on appeal. R13-14, R18. Certainly if the State Attorney did not intend for the issue to be reviewed and did not feel that the issue was squarely preserved for appellate review, he would not have had photographs of the purse included in the record on appeal. R19. The state now unfairly imputes a "hidden agenda" to its counsel below.

From the foregoing, the state now takes a completely contrary position from that which it took in the trial court, and its argument is improper under State v. Evans, 388 So.2d 1105 (Fla. 4th DCA 1980). If the State reneges on its bargain,

petitioner will be entitled to withdraw his plea since the condition of the plea agreement (that he would obtain appellate review of the issue of whether the purse was a sanctioned carrying case) will not be fulfilled. Such a result would be contrary to the intent of everyone but the state's appellate counsel.

Finally, the state's position opens up yet further constitutional problems with the statute, such as: How is a jury to be instructed as to what a lawful purpose is? By what law (federal, foreign or local) is a "purpose" lawful? Further, the state's position would ultimately result in a case by case approach which would thwart the manifest need of the people of Florida for a clear statement of law as to when one may carry a concealed weapon in one's car. See the wise remarks in Cates v. State, 408 So.2d 797 (Fla. 2nd DCA 1982):

> Because of the conflicting emotions which surround the subject, the legislature may be understandably reluctant to venture into a statutory revision involving the regulation of firearms. Yet, the people of Florida deserve to know when and under what circumstances they are entitled to carry guns. As it now reads, chapter 790 is a mass of conflicting rules which seem calculated to ensnare the unwary and to provide little guidance for our law enforcement officers.
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> 408 So.2d at 797
>
> ....
>
> Not only do I concur in the above opinion, but also voice my special concern relating to the state of the law as it presently reads in chapter 790, Florida Statutes. Over the years, this chapter has often been amended to the point that some sections appear out of tune with others. I am here suggesting that the legislature restore harmony to this important part of the state law. Elements of this chapter present an almost catch-22 situation to

> the citizenry. It is an area of law where honest citizens can be caught unaware and can be charged with serious crime despite no intention to violate the law. Oft times, a later showing of that lack of intent is costly. It is an area of law where honest citizens are daily left to the arbitrary decisions of the police as to whether or not an arrest will be made. The police prefer certainty as well.
>
> Chapter 790 should receive the full attention and scrutiny of the Florida legislature with a view towards amendment and overhaul so as to give not only the citizenry, but law enforcement, simple and long lasting guidelines as to what is and what is not illegal as it relates to the use, possession, licensing and carrying of firearms.
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> 408 So.2d at 797-798
> (Ryder, J., concurring).

The state's position would add uncertainty rather than certainty to an area of our law already bedevilled by much confusion. Appellant is entitled to have the information dismissed.

CONCLUSION

Based upon the foregoing arguments and the authorities cited therein, petitioner respectfully requests this Honorable Court to reverse the decision of the Fourth District Court of Appeal and remand this cause with such directives as may be deemed appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Marlyn Altman, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, 33401 this 19th day of March, 1985.

Of Counsel