IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,766

MAJOR VANCE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent .

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF RESPONDENT ON THE MERITS

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PREFACE

The Petitioner, Major Vance, was the Appellant in the District Court of Appeal and the Defendant in the trial Court. The Respondent, the State of Florida, was the Appellee in the District Court of Appeal and the Prosecution in the trial court. In this brief, the parties will be referred to as they appeared before the trial court.

The opinion of the District Court of Appeal herein is reported at Vance v. State, 452 So.2d 994 (Fla. 3d DCA 1984).

The following symbols are used in this brief:

(T) for the transcript of proceedings consisting of pages T1 - T126.

(R) for the record-on-appeal consisting of pages R1 - R51.

I

STATEMENT OF THE CASE

The Defendant's Statement of the Case is substantially accurate except for his repeated characterization that the evidence below only showed one act of display of a firearm under Section 790.10 Florida Statutes. The evidence below was, to the contrary, consistent with a finding that there were two displays of the firearm within the meaning of Section 790.10.

During the trial the victim Catherine Jackson testified that the Defendant "displayed" a firearm by pointing it at her and then pointed it at the other victim, Micheal Flemming:

> "A. [BY THE WITNESS, JACKSON]: I asked the manger where the trailer was and he was working in front of it, he says, "Right here" and we knocked on the door--Michael Flemming knocked on the door, and he came to the door.
>
> "Q. Now, what happened when he came to the door? Did you say anything to him?
>
> "A. Yes.
>
> "Q. What did you say to him, Ma'am?
>
> "A. I told him--I asked him for my

money back.

"Q. What did he say to that?

"A. He told me, 'I'll give it to you this afternoon.'

"Q. Did you say anything in response to that?

"A. I told him I would have to have it then because he had promise to return it and I was on my way to file the suit against him. If he didn't give it to me, then I was going to

"Q. What did he do upon you telling him that?

"A. He lifted up his shirt.

"Q. Stand up for the jury and demonstrate what he did.

"A. The trailer door was open and was standing at the door with the side and I was standing, like, here he lifted up the shirt and I saw the gun. I said "Oh he's got a gun' because I was scared when I saw it.

"Q. What did he do with the gun, ma'am?

"A. He reached in and pointed--got it out and pointed it at me. He said, 'You think you are better than anyone else' and he pulled the gun in on Michael Flemming because Michael was standing in front of the door I was standing right behind it, he said, 'I heard you were around here last night looking for me. Get away from here and never come back here again.'

"Q. Catherine, how far away from him were you when he pointed the gun from you?

"A. Proably as far from here where I'm to there (indicating) because I was right in front of the door.

"Q. Where on your body did he point the gun?

"A. Well, he was inside the trailer door and I was down on the ground, so it was along my chest area that he was pointing."

T39 - T40

The other victim, Michael Flemming, corroborated Jackson's testimony to the effect that there were two separate "displays" of the firearm:

"Q. [BY THE PROSECUTOR]: Michael, what happened next?

"A. He told us get out of his yard. He pulled his gun out and told us to get from around his house.

"Q. Stand up for the jury and demonstrate for them what he did.

"A. He was standing in the doorway (indicating) and he reached--pulled his shirt up, pulled his gun out and told both of us to get from in front of his house and don't come back no more.

"Q. Did he point the gun at you?

"A. Yes.

"Q. What part of your body did he point the gun?

"A. In my chest area because he was, like up. The trailer got steps about three feet high.

"Q. About how far away were you from him when he pointed the gun?

"A. I was about maybe three feet, four feet away.

"Q. Did he also point the gun at Catherine Jackson?

"A. Yes.

T48.

II

QUESTION PRESENTED

WHETHER THE DEFENDANT HAS PRESENTED ANY ERROR IN HIS DUAL CONVICTIONS AND SENTENCES FOR IMPROPER EXHIBITION OF A DANGEROUS WEAPON UNDER SECTION 790.10 FLORIDA STATUTES?

III

SUMMARY OF ARGUMENT

The evidence supported a finding that there were two displays of a firearm within the meaning of Section 790.10 Florida Statutes. The Defendant's dual convictions and sentences for two distinct crimes during the same transaction is therefore lawfully correct.

IV

ARGUMENT

THE DEFENDANT HAS NOT SHOWN ERROR IN HIS DUAL CONVICTIONS AND SENTENCES FOR IMPROPER EXHIBITION OF A DANGEROUS WEAPON UNDER SECTION 790.10 FLORIDA STATUTES.

In its analysis, the District Court necessarily held that alleged error in sentencing a Defendant for multiple offenses, where the evidence only supported one offense, is not fundamental error. See Vance v. State, 452 So.2d 994, at 995 n1 (Fla. 3d DCA 1984). The District Court however did not have the benefit of this Court's pronouncement in Troedel v. State, Case No. 61,957 (Fla. December 6, 1984), wherein this Court held that such a claim was fundamental error:

> "Appellant's challenges to his convictions and sentences do not include the argument that he was improperly convicted of two separate counts of buglary when there was in fact only one commission of this statutory offense. However, we reach the issue anyway because we believe that a conviction imposed upon a crime totally unsupported by evidence constitutes fundamental error."

The Defendant's lengthy discussion of the various procedural arguments below is therefore apparently no longer relevant. See, id.

The Defendant complains in this cause that he cannot lawfully be convicted and sentenced for two counts of improper exhibition of a firearm citing Solomon v. State, 442 So.2d 1030 (Fla. 1st DCA 1983). In Solomon the Defendant had first pointed a gun at one victim and then apparently pointed the gun at a second victim. Id, at 1031. Citing the language, "in the presence of one or more persons" contained in Section 790.10 the Solomon court concluded that the Legislature intended by such language that a Defendant could only be lawfully convicted of one count under Section 790.10, no matter how many persons he pointed the gun at. Id, at 1032-1033. The Solomon facts are identical to those herein. See, T40; T48; T56.

In Grappin v. State, 450 So.2d 480 (Fla. 1984), the Defendant had similarly contended that he could not be convicted and sentenced for the unlawful taking of two or more firearms during the same transaction. In citing the relevant statute, the Grappin court noted that the statute specifically used the article "a" in reference to the punishable theft of "a firearm." See, §812.014 (2)(b) 3 Fla.Stat. The Court reasoned that therefore the Legislature evinced an intent that each taking of a firearm was "a separate unit of prosecution," and that the Defendant could be so prosecuted. See, also, State v. Getz, 415 So.2d 789 (Fla. 1983); Borges v. State, 415 So.2d 1265 (Fla. 1982).

In the present circumstance, the first offense of displaying a dangerous weapon, "in the presence of one or more persons," was completed when the Defendant first produced the gun and pointed the weapon at the victim, Flemming. See, T40; T56;. At that point the weapon had been displayed, "in the presence of one or more persons." The second chargeable offense under Section 790.10 occurred when the Defendant apparently then pointed the weapon at the victim, Jackson. See T40; T48; T56. Each offense clearly had a "temporal distinction." Under Grappin and the foregoing authority the multiple charges and conviction herein are thus authorized [1].

Solomon is not consistent with Grappin. In analyzing the offenses in Section 790.10 the Solomon court failed to account for the proper analysis of when an offense is complete an thus separately chargeable as an offense in any given transaction. See Gilbert v. State, 410 So.2d 609 (Fla. 5th DCA 1982); Bass v. State, 380 So.2d 1181 (Fla. 5th DCA 1980); Hearns v. State, 378 So.2d 70 (Fla. 3d DCA 1979); Booth v. State, 332 So.2d 157 (Fla. 1st DCA 1976); Ellis v. State, 298 So.2d 527 (Fla. 2d DCA 1974), cert. dism., 298 So.2d 411 (Fla. 1974); Griffin v. State, 286 So.2d 220 (Fla. 4th DCA 1973). The proper analysis as to whether multiple offenses have

[1] The undersigned would not that in Solomon the State failed to file a brief and thus the Solomon court failed to account for the foregoing analysis.

occurred, when they are the same crime, is whether there is a "temporal distinction" in the crimes as they occur. See, Booth v. State, 332 So.2d at 158; see also, Hearns v. State; Bass v. State, Gilbert v. State, supra. In Booth the Defendant had similarly contended that he could not be separately sentenced for two robberys and two assaults with intent to commit murder. In rejecting this reasoning the Booth court explained that separate sentences were appropriate because the crimes had a "temporal distinction". The same result should obtain in the case at the bar, See, also, Hearns v. State, supra. Solomon is clearly wrong under Grappin and the foregoing authority. and should be overruled.

Two distinct policy reasons also serve as a basis to reject the holding in Solomon. First of all, the Solomon analysis completely contravenes the clear Legislature intent to aborogate the single transaction rule. See, Borges, v. State, supra; §775.02(4) Fla.Stat. Under the Solomon analysis a Defendant would be permitted "free" offenses such that he could point a gun or other dangerous weapon with impunity at each person in a room or a stadium full of people as the Solomon court seems to concede. See, 442 So.2d at 103-1033. Borges and Section 775.021(4) expressly repudiate such a result.

Secondly, the Solomon court's analysis that the present statute creates a multitude of offenses, if for example a Defendant waived a weapon, "in a crowed stadium," is simply not relevant and was rejected as grounds for limited interpretation of Legislature authority in Grappin v. State, supra. Cf. at p.483 (Adkins, J., dissenting). It is entirely within the Legislature pergotive to cr ate such offenses and it wholly within a prosecutor's discretion to charge such offenses. It is however, wholly unlikely that any prosecutor would ever file forty thousand (40,000) informations in order to charge the mulitple of offenses which the Solomon court complains of[2]. Such is not the case here and this Court should therefore affirm the convictions and sentences based upon the substantive law and Section 775.021(4).

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[2]. It is more likely that such a Defendant would be dealt with uner Rule 3.126 Florida Rules of Criminal Procedure and/or Section 394.451 et. seq. Florida Statutes ("Baker Act")

CONCLUSION

WHEREFORE, upon the foregoing, the Respondent, THE STATE OF FLORIDA, submits that the District Court judgement should be affirmed as modified, consistent with the views herein.

RESPECTFULLY SUBMITTED, on this 22nd day of February 1985, at Miami, Dade County, Florida.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was caused to be served by mail upon BETH C. WEITZNER, Assistant Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125, on this 22nd day of February, 1985.

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