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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.)
)
 SAMUEL LEE BROWN,)
)
 Respondent.)
 _____)

CASE NO. 66,140

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

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SAMUEL LEE BROWN,)
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 Respondent.)
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CASE NO. 66,140

RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

SAMUEL LEE BROWN, the defendant and appellant in Brown v. State, 458 So.2d 313 (Fla. 5th DCA 1984), will be referred to herein as Respondent. The State of Florida, the prosecution and appellee below, will be referred to as Petitioner or the state.

Citations to the Record on Appeal will be indicated parenthetically as "R", with the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts set out in Petitioner's Brief on the Merits.

SUMMARY OF ARGUMENT

Section 775.087(1), Florida Statutes (1983) operates to reclassify the degree of certain felony offenses when, "during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm." Reclassification of the felony clearly does not depend on whether the weapon is merely carried or actually "used".

A felony "in which the use of a weapon or firearm is an essential element", is specifically excluded from the operation of section 775.087(1). Every case on point in Florida law interpreted this exclusion to apply to felonies which require the "use" of a weapon in a general sense of the word, such as armed robbery. No case has limited the operation of the exclusion clause to offenses which require the actual display or discharge of a weapon. The distinction made in State v. Gibson, 452 So.2d 553 (Fla. 1984) between "using" and "carrying" a weapon is not relevant to the determination of whether to apply section 775.087(1).

ARGUMENT

WHETHER A CONVICTION FOR ROBBERY
WHILE CARRYING A FIREARM OR OTHER
DEADLY WEAPON CAN BE RECLASSIFIED
FROM A FIRST DEGREE FELONY TO A
LIFE FELONY PURSUANT TO SECTION
775.087(1)(a), FLORIDA STATUTES
(1983), WHEN THE FIREARM IS USED
DURING THE ROBBERY?

Respondent was charged by information with violating Florida Statute 812.013, which reads in pertinent part:

(1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear.

(2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in §775.082, §775.083, or §775.084. (emphasis added).

Specifically, the information referred to Section 812.13(2)(a), robbery with a firearm or other deadly weapon (R649). If the evidence produced at trial by the State is accepted, clearly it was correct to charge Respondent under this statute. The weapon carried by Respondent's accomplice during commission of the offense was proven to be a firearm, and Respondent is responsible for the actions of his accomplice (R469).

Robbery with a firearm or other deadly weapon is a "first degree felony punishable by life" and not a "life felony". Garvin v. State, 413 So.2d 34 (Fla. 1st DCA 1981); Sentencing Guidelines Commission, Guidelines Manual,

Appendix B, page 17. The trial court elevated the offense to a "life felony" and scored it as such, accepting the State's view that Florida Statute Section 775.087 applies in this case (R604,670-671). This was error. Section 775.087 states in pertinent part:

(1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:

(a) In the case of a felony of the first degree, to a life felony. (emphasis added).

The State argued at sentencing that the use of any deadly weapon makes robbery a first degree felony, while the use of a firearm makes robbery a life felony (R604). This argument simply ignores the statutory language and the case law. Florida cases uniformly hold that robbery with any weapon is already an enhanced charge under the robbery statute, thus Section 775.087 cannot be applied to enhance the charge a second time. Hill v. State, 438 So.2d 513, (Fla. 5th DCA 1983); Tittle v. State, 405 So.2d 1007 (Fla. 1st DCA 1981); Richardson v. State, 398 So.2d 1010 (Fla. 1st DCA 1981); Lee v. State, 400 So.2d 1238 (Fla. 1st DCA 1981).

On appeal to the Fifth District Court of Appeal the state abandoned the "deadly weapon vs. firearm" distinction that it had successfully made in the trial court. Further

the state conceded that the holdings in Hill, Tittle, Richardson and Lee, supra supported Respondent's position and argued those decisions should be reconsidered in light of the State's new argument on appeal. The state argued that Respondent's sentence could be enhanced once (under §812.13(2)(a)) because he carried a firearm, and a second time (under §775.087(1)) because the firearm was in fact used.

The Fifth District Court of Appeal rejected this argument. The State takes the same position here, arguing that this Court's decision in State v. Gibson, 452 So.2d 553 (Fla. 1984) supports its view.

The Gibson decision stated that the "use or display" of a firearm or other deadly weapon is not an essential element of the offense of robbery while armed. Thus it appears to support the position that §775.087(1) can be applied to reclassify armed robbery, since the exception to §775.087(1) excludes only offenses "in which the use of a weapon or firearm is an essential element."

Petitioner maintains however that when the legislature used the phrase "use of a weapon or firearm" in section 775.087(1) it had to mean "carries, displays, uses, threatens or attempts to use any weapon or firearm". In this particular statute the word "use" must be given this broader meaning, otherwise the statute is logically absurd.

The State argues that Section 775.087(1) can be

applied in Respondent's case because a firearm was "used" during the offense. But if the exclusion clause is interpreted as the state asks, section 775.087(1) can be used to reclassify any armed robbery, because as Gibson points out, use of a weapon is never an essential element of armed robbery.

Suppose Respondent had committed his offense with a weapon in his pocket, never displaying or using it. Under the state's theory the crime could still be classified a first degree felony under section 812.13(2)(a) because a weapon was carried, and then reclassified as a life felony under section 775.087(1)(a), again because a weapon was carried. The exclusion clause of section 775.087(1) would not apply because "use of a weapon or firearm" is never an essential element of robbery with a firearm or other deadly weapon. Thus robbery with a firearm or other deadly weapon would always be a life felony. Why would the legislature set out to make this crime a life felony in such a round-about way? Respondent contends the most logical conclusion is that the legislature had no such intention. The reclassification effected by section 775.087 was meant to apply where the carrying or use of a weapon was not already taken into account as an element of the offense charged. That is the point behind excluding certain felonies from the operation of section 775.087(1).

The holding of the Fifth District Court in this case and the position taken by the Respondent herein are not

in conflict with State v. Gibson, supra.

Gibson did not address the issue decided in Respondent's case. Respondent never argued, nor did the District Court hold, that there is no distinction between using and carrying a weapon. The Court held only that this distinction is not relevant to the determination of whether to apply section 775.087(1) to enhance an already enhanced armed robbery charge.

It should also be emphasized that Respondent is not arguing, nor did the District Court hold, that the legislature could not enhance punishment for an offense once if a weapon was carried, and again if the weapon was actually displayed or used. But this the legislature clearly did not do in section 775.087(1), even if the exclusion clause in the statute is read as the state suggests. The exclusion applies to offenses that contain a certain "essential element" and is not dependant upon the particular facts of the case. Thus the real issue to be decided here is, did the legislature intend that section 775.087(1) apply to every armed robbery or to no armed robbery?

Respondent maintains the section does not apply to armed robbery or any other offense in which "use of a weapon" (in the general sense, including carrying a weapon) is an element of the offense. This position is uniformly supported by every Florida case on point Respondent was able to locate. Lee v. State, 400 So.2d 1238 (Fla. 1st DCA 1981); Richardson

v. State, 398 So.2d 1010 (Fla. 1st DCA 1981); Tittle v. State, 405 So.2d 1007 (Fla. 1st DCA 1981); Hill v. State, 438 So.2d 513 (Fla. 5th DCA 1983); Fowler v. State, 375 So.2d 879 (Fla. 2d DCA 1979); Crook v. State, 385 So.2d 1136 (Fla. 1st DCA 1980); Pooley v. State, 403 So.2d 593 (Fla. 1st DCA 1981); Perry v. State, 425 So.2d 1195 (Fla. 1st DCA 1983); Garvin v. State 413 So.2d 34 (Fla. 1st DCA 1981); Trent v. State, 403 So.2d 1131 (Fla. 4th DCA 1981). In every case listed above the offense involved had as an element the "use" of a weapon. In none of these cases did the statute involved require "use" of a weapon in the sense that the weapon had to be displayed or discharged. If the legislature meant to apply section 775.087(1) to offenses such as Respondent's it certainly did not say so clearly. As the District Court said in its opinion in the instant case, "Criminal statutes should be construed strictly in the defendant's favor, when there is any ambiguity or lack of clarity." Brown v. State, supra. citing Ferguson v. State, 377 So.2d 709 (Fla. 1979); State v. Winters, 346 So.2d 991 (Fla. 1979). Further, Chapter 775 itself contains the following rule of construction:

The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible to differing constructions, it shall be construed most favorably to the accused.

Section 775.021(1), Fla.Stat. (1983). Section 775.087(1) has existed in its current form for over ten years. In all that time it has never been construed to apply to armed


robbery. To do so now would hardly be a construction favorable to the accused. This Honorable Court should affirm the decision of the Fifth District Court of Appeal.

CONCLUSION

Based on the authorities and arguments cited herein, Respondent respectfully requests that this Honorable Court affirm the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General at 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014 and to Mr. Samuel Lee Brown, Inmate No. 093217, Apalachee Correctional Facility P.O. Box 699 Sneads, Florida 32460 on this 6th day of May 1985.



DANIEL J. SCHAFER
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