

TOPICAL INDEX

	<u>Pages</u>
STATEMENT OF THE CASE AND FACTS -----	1-3
ISSUE: WHETHER THE DECISION IN <u>BROWN V.</u> <u>STATE</u> , 9 FLW 2000 (FLA. <u>5TH DCA</u> <u>SEPTEMBER 20, 1984</u>), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION IN <u>STATE V. GIBSON</u> , 452 SO.2D 553 (FLA. 1984)? -----	4
ARGUMENT -----	4-6
CONCLUSION -----	7
CERTIFICATE OF SERVICE -----	7

AUTHORITIES CITED

Cases

Pages

Brown v. State,
9 FLW 2000 (Fla. 5th DCA September 20, 1984) ---- 4

State v. Gibson,
452 So.2d 553 (Fla. 1984) ----- 4,5,6

STATUTES

§ 775.087(1)(a), Fla. Stat. (1983) ----- 2,5,6

§ 812.13(2)(a), Fla. Stat. (1983) ----- 1,5

STATEMENT OF THE CASE AND FACTS

Respondent was charged by amended information dated April 6, 1983, with two counts of robbery with a firearm or other deadly weapon, in violation of Section 812.13(2)(a), Florida Statutes (1983) (R 648).¹ The trial by jury commenced on July 19, 1983, in the Circuit Court of the Ninth Judicial Circuit, Honorable Lawrence R. Kirkwood presiding (R 1).

The state's witnesses testified that two men entered the Little General Store on Park Avenue, Winter Park, Orange County, Florida on December 29, 1981 (R 194-196). The two men wore masks and carried weapons (R 197). They robbed the store clerk and a delivery man of their watches and wallets (R 201-202). They took money from the cash register (R 202). At gunpoint, the store manager was ordered to empty the safe (R 202). As the two men fled the store, at least one shot was fired, but no one was hurt (R 204). Respondent was apprehended within a few minutes of the robbery and found to be in possession of the stolen watches (R 349-351). Two guns were discovered in the area which were connected to the offense (R 327, 393).

Following deliberations, the jury returned a verdict of guilty on each count of robbery with a firearm or other deadly weapon (R 656-657).

Respondent was sentenced on October 7, 1983, and elected to be sentenced under the guidelines (R 606). The scoresheet prepared by the assistant state attorney scored both robberies

¹(R) refers to the record on appeal.

as life felonies pursuant to Section 775.087(1)(a), Florida Statutes (1983). Respondent was sentenced to seven (7) years imprisonment within the recommended guidelines range (R 670).

Respondent filed a timely notice of appeal on October 25, 1983 (R 672). The Office of the Public Defender was appointed for purposes of appeal (R 676). The initial brief was filed January 13, 1984, the answer brief was filed February 2, 1984, and the reply was filed February 21, 1984. Oral argument was waived on April 26, 1984.

On September 20, 1984, the Fifth District Court of Appeal rendered its decision in this cause. Judge Sharp, writing for the majority, framed the issue as "whether the trial court erred in enhancing the armed robbery offense by applying Section 775.087(1)(a), Florida Statutes (1983)." The court held that armed robbery "is already an enhanced charge under the robbery statute . . . whether the proof at trial establishes that the defendant carried or used a firearm." The sentence was vacated and remanded for resentencing. Impliedly the judgment was affirmed. Judge Cowart's dissent correctly noted that use of a firearm was not an essential element of armed robbery. Further, Judge Cowart found ". . . no legal reason why Section 775.087(1)(a), Florida Statutes, should not be applied to enhance a conviction for armed robbery where the robber does in fact display or use a weapon or firearm and does not merely carry it as required for the basic conviction for armed robbery."

Motion for Rehearing was timely filed by the state on October 2, 1984, and was denied November 1, 1984. Notice to

Invoke Discretionary Jurisdiction was timely filed by Petitioner
on November 5, 1984.

ISSUE

WHETHER THE DECISION IN BROWN V. STATE, 9 FLW 2000 (FLA. 5TH DCA SEPTEMBER 20, 1984), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION IN STATE V. GIBSON, 452 SO.2D 553 (FLA. 1984)?

ARGUMENT

Petitioner requests this Honorable Court exercise its certiorari jurisdiction to address an express and direct conflict between this decision and another of this Court, State v. Gibson, 452 So.2d 553 (Fla. 1984).

Gibson addressed the propriety of convictions for robbery while armed and use or display of a firearm during the commission of a felony, both arising from the same act or factual event. The decision made it clear that carrying a firearm, required for a conviction of robbery while armed, was separate and distinct from using or displaying a firearm.

The offense of robbery while armed contains, in addition to its other constituent elements, the element that the accused carried a firearm or other deadly weapon. The elements of the crime do not include displaying the weapon or using it in perpetrating the robbery.

State v. Gibson, 452 So.2d 553, at 556.

The decision in the instant case directly and expressly conflicts with the Gibson decision because the Fifth District Court of Appeal failed to adhere to this distinction.

The defendant was charged with robbery while carrying a firearm or other deadly weapon, to wit: a handgun. Carrying a firearm or other deadly weapon is all that is required for

conviction of armed robbery under Section 812.13 (2)(a), Florida Statutes (1983). The two armed robbery convictions were enhanced from first degree felonies to life felonies pursuant to Section 775.087(1)(a), Florida Statutes (1983), which provides in pertinent part:

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 . . . the felony for which the person is charged shall be reclassified as follows: (a) in the case of a felony in the first degree to a life felony.

Id. (emphasis added)

The use of a firearm is not an essential element of armed robbery according to Gibson. Nevertheless, the Fifth District Court of Appeal determined that the trial court improperly enhanced the two robberies to life felonies, based upon the finding "that armed robbery is already an enhanced charge under the robbery statute . . . whether the proof at trial establishes that the defendant carried or used a firearm."

The State contends that the enhancement was proper. The robbery statute reclassified the felony from second to first degree based upon the fact that the defendant carried a weapon. Section 775.087(1)(a), Florida Statutes (1983), enhanced the felony from first degree to life based upon the fact that the weapon was used, carried, and displayed. As Judge Cowart observed in his dissent,

Certainly the maximum statutory punishment for an armed robbery is greater than that for an unarmed robbery. However

that is no legal reason why Section 775.087(1)(a), Florida Statutes, should not be applied to enhance a conviction for armed robbery where the robber does in fact display or use a weapon or a firearm and does not merely carry it as required for the basic conviction for armed robbery. Neither is that an adequate legal reason why a robber who actually displays or uses a weapon or a firearm in an armed robbery should not be subjected, under the sentencing guidelines, to the possibility of a longer sentence than an armed robber who merely carried the weapon or firearm in the minimal manner necessary to be guilty of armed robbery.

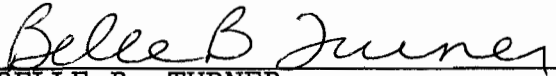
The majority decision below failed to adhere to the decision in Gibson. Accordingly, to dispel confusion and disharmony in the law of the state based upon this express and direct conflict, Petitioner prays this Honorable Court will entertain this cause through exercise of certiorari jurisdiction.

CONCLUSION

Based on the arguments and authorities cited herein, Petitioner respectfully prays this Honorable Court exercise its discretionary jurisdiction in this cause.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



BELLE B. TURNER
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Ave., 4th Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Brief on Jurisdiction has been furnished, by delivery, to Daniel J. Schafer, Assistant Public Defender for Respondent (1012 S. Ridgewood Ave., Daytona Beach, Florida 32014), this 16th day of November, 1984.



BELLE B. TURNER
COUNSEL FOR PETITIONER