

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,  
 Petitioner,  
 vs.  
 SAMUEL L. BROWN,  
 Respondent.

CASE NO. 66,140

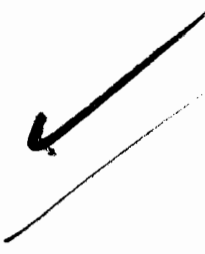
PETITIONER'S BRIEF ON MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent was charged by amended information dated April 6, 1983, with two counts of robbery while carrying a firearm or other deadly weapon, in violation of section 812.13(2)(a), Florida Statutes (1983) (R 648).<sup>1</sup> 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). Respondent was in possession of a pellet gun, while his accomplice carried a firearm (R 327, 393, 469).

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

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<sup>1</sup>(R ) refers to the record on appeal.

to be sentenced under the guidelines (R 606). The scoresheet prepared by the assistant state attorney scored both robberies 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 on 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. This court accepted jurisdiction and dispensed with oral argument by order dated March 25, 1985.

SUMMARY OF ARGUMENT

The trial court correctly scored respondent's two armed robbery convictions as life felonies in computing the recommended guidelines sentence. The robbery statute classifies the crime as a first degree felony when the robber carries a firearm. The use of a firearm is not an element of this offense. If the robber uses the firearm during the commission of the robbery, the crime can properly be reclassified to a life felony.

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 tried and convicted of two counts of robbery while carrying a firearm or other deadly weapon in violation of section 812.13(2)(a), Florida Statutes (1983). The robbery was classified as a first degree felony by virtue of the fact that respondent carried a firearm.

After adverse jury verdicts, respondent was sentenced on October 7, 1983. He elected to be sentenced under the guidelines. The scoresheet counted the two robberies as life felonies, which corresponded to a recommended guidelines sentence of five and one-half (5 1/2) to seven (7) years incarceration. The trial court imposed sentence within the guidelines of seven (7) years incarceration.

On direct appeal to the District Court of Appeal, Fifth District, respondent successfully contended that reclassification of the robberies from first degree felonies to life felonies was improper. He claimed that the correct recommended guidelines range should be three and one-half (3 1/2) to four and one-half (4 1/2) years incarceration.

Petitioner asserts that reclassification was wholly proper. Armed robbery is classified as a first degree felony when the robber carries a firearm. The offense can be reclass-



sified to a life felony pursuant to section 775.087(1)(a), Florida Statutes (1983), when the robber displays or uses the firearm. Carrying a firearm is the minimal conduct required for armed robbery; if the robber also uses the firearm, the armed robbery becomes a life felony.

In the instant case, the proof adduced at trial demonstrated that respondent and his accomplice entered a Winter Park convenience store wearing nylon masks and robbed two victims at gunpoint of their watches and wallets. Money was taken from the cash register also. Respondent's accomplice carried a firearm, while respondent carried a pellet gun. Before leaving the store, at least one shot was fired, although no one was hurt.

This honorable court's decision in State v. Gibson, 452 So.2d 553 (Fla. 1984), made it clear that the use of a firearm is not an essential element of robbery while carrying a firearm. 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. This honorable court held that carrying a firearm, required for a conviction for armed robbery, 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 at 556. If separate convictions and sentences can be imposed for the separate crimes of robbery

while carrying a firearm and the use of the firearm during the commission of a felony, then it must be proper to reclassify the crime based upon those same two separate factors.

The Fifth District erred by failing to perceive this difference. 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 reclassification was proper. The robbery statute classified the crime as a first degree felony based upon the fact that the defendant carried a weapon. Section 775.087(1)(a), Florida Statutes (1983), reclassified the felony from first degree to life based upon the fact that the weapon was used and displayed. As Judge Cowart observed in his dissent, there is no legal reason why a robber who uses or displays a firearm should not be subjected to the possibility of a longer guidelines sentence than a robber who merely carries the weapon in the minimal manner necessary to be convicted of armed robbery. If the distinction between using and carrying a weapon can support separate convictions, then there is no error in reclassifying the degree of one crime on the same basis.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Brief on Merits has been furnished, by mail, to Daniel J. Schafer, Assistant Public Defender for respondent, at 1012 South Ridgewood Avenue, Daytona Beach, Florida 32014 this 15th day of April, 1985.

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