IN THE SUPREME COURT OF FLORIDA

MACARTHUR WILLIAMS,

Petitioner,

vs. CASE NO. 67,036

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

LAWRENCE A. KADEN
ASSISTANT ATTORNEY GENERAL

THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and the appellant in the First District Court of Appeal. The State of Florida was the prosecuting authority in the trial court and the appellee in the First District. The parties will be referred to as they appear before this Court.

References to the record on appeal and the transcript will be made by use of the symbols "R," and "T," respectively, followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts is not written in a light most favorable to sustain the trial court's rulings, the judgment and sentence, and the findings of the First District Court of Appeal, and is unacceptable. The following statement of facts is submitted.

Prior to the hearing on the motion to suppress, the parties stipulated that they would rely upon the facts as stated in the depositions of the two arresting officers. Detective Lynn Sweeney's deposition revealed that he had been working with the Sheriff's Department approximately eleven years and that when he observed Petitioner walking down the street, Petitioner was continually "pulling and prodding something in his shirt and patting it down at the front." (R 56) Sweeney could tell from his experience as a police officer that Petitioner had something in the front of his shirt. The reason he and the other officer were in the area was because there had been a lot of robberies. Sweeney stated that they were checking people in the area, and he characterized Petitioner's conduct as "so unusual as he walked down the street." (R 57) Sweeney further explained that he had carefully observed Petitioner for at least ten seconds and that "[u]sually it's been my experience it's a firearm or weapon of some sort that he wants to conceal on his person." (R 58) Upon further questioning by defense counsel, Sweeney reiterated that what was unusual about Petitioner was "his

actions of continually, in the entire time I observed him and approached him and along side of him, he would continually mess with the front of his waistband of his pants, kept patting it down. He would do something and push it down as if to blend it in." (R 59)

After Petitioner was stopped, the officer observed the bulge in Petitioner's waistband to see if the bulge would flatten out because it was possible that nothing was there (R 60). Once Sweeney learned that Petitioner had been arrested for robbery, he immediately reached for the bulge and felt "a hard handle there; to me it felt like a gun." (R 60) During the initial questioning, Sweeney became certain that something was in Petitioner's waistband because the bulge stayed there (R 62). Sweeney also explained that he didn't want to ask Petitioner what was under his shirt because it might have alerted Petitioner and put Sweeney in a bad situation.

After Petitioner had been advised of his rights, Petitioner told the officer that he bought the gun "off the street for protection." (R 62) Petitioner also said it was wrong to carry a gun (R 63). Sweeney further stated that the gun had been "freshly oiled and it was cleaned up." (R 63) Although the weapon was never tested, Sweeney stated that it appeared operable to him and that it was oiled up and "appeared in good working condition." (R 65) The gun was loaded with live rounds.

The other arresting officer was Detective M. P. Richardson whose deposition corroborated the facts in Sweeney's deposition.

Richardson testified that the bulge "looked like it could have been a weapon; that is where most people carry weapons." (R 74) Richardson stated that in fact he believed it was a weapon. Although there had been no specific calls that evening, Richardson stated that the officers were in the area because "there had been a great influx of robberies in that area." (R 75) According to Richardson, "[t]he reason he was stopped was because he was acting suspicious. He appeared to be hiding something under his shirt, messing with it."

Based on the depositions, the trial court made the following findings of fact when he denied the motion to suppress:

> THE COURT: Okay, I have reviewed the two depositions, in the file that have been stipulated to. I found that Officer Sweeney was patrolling an extremely high crime area of downtown Jacksonville during the time period where there had, by his testimony, been a number of armed robberies recently taken place. That he observed Mr. Williams walking down the street appearing to prod or poke something down into his waistband of his trousers and keep it covered up with his shirt at the same time.
>
> I think according to Mr. Sweeney's testimony, he reasonably suspected that this was an attempt to conceal a firearm or weapon of some kind from this passing police car, and turned around to investigate him and did, in fact, at that time stop Mr. Williams and conduct a Terry frisk, which revealed the revolver.
>
> I find that his suspicion was not a hunch but was based on articularable [sic] and clear suspicions of activity based on identifiable actions of the defendant, and that the conclusion he drew was reasonable under the circumstances.

(T 14)

Immediately prior to trial, defense counsel orally moved to limit the State from referring to Petitioner's previous armed robbery conviction during its case-in-chief (T 21). However, the State objected because it was a surprise motion. In the alternative, the State argued that it had to prove that Petitioner had previously been convicted of a felony, and the trial court agreed. Defense counsel then acquiesced in the overruling of Petitioner's motion in limine--"I understand, Your Honor. We're just making the motion." (T 22)

Sweeney's testimony at trial was consistent with his deposition. However, he added the fact that once he learned from Petitioner that he was on parole for armed robbery, he was so concerned that he immediately reached into Petitioner's waistband and removed the gun without any further conversation; he further testified that he was concerned for his safety because Petitioner now knew he was a police officer (T 68). He further explained that when he first touched the bulge, he knew it was a gun because it was a metallic, very hard object (T 69). Through Sweeney's testimony, the gun and five bullets which were removed from Petitioner's person were introduced into evidence (T 75). Sweeney demonstrated for the jury how Petitioner had the weapon secured in his waistband, and he explained how the bulge could be observed (T 80). Sweeney also cautiously demonstrated how the bullets could be loaded into the weapon (T 81). The jury heard his testimony that he had dry-fired the weapon and that the weapon seemed to be in an operable condition (T 86, 87).

Detective Richardson's testimony was also consistent with his deposition. The State then introduced the testimony of Detective McKim who was a Criminal Specialist in the Sheriff's Crime Laboratory (T 95). After the defense stipulated he was an expert in the field of latent fingerprint examination and identification, he testified that the fingerprints on a judgment and sentence which was introduced into evidence were those of Petitioner (T 114).

After the State rested, Petitioner moved for a judgment of acquittal on the grounds that the State had not proved that Petitioner had been convicted of a prior offense and the ground that the State had not proved sufficiently that the gun was in fact a firearm (T 116). The motion was denied (T 117).

The defense called David Warniment, a firearms examiner for the Florida Department of Law Enforcement (T 121). After being qualified as an expert in the field of firearm identification, he testified that the gun in evidence was probably manufactured between 1886 and 1893 (T 126). However, on cross-examination he admitted that a weapon could be manufactured many years after it was patented and that the dates stamped on the barrel of the gun were the patent dates (T 132). He also could not state with certainty that the same type of weapon was still being manufactured in the United States today (T 133). He also admitted that one of the books he had relied upon to determine his opinion of when the weapon was manufactured was inaccurate (T 135). Although the

company which had manufactured the weapon had been bought by Marlin Firearms in the early 1900's, the witness admitted on cross-examination that up until 1968, Marlin Firearms had been making weapons with the old company's name on them (T 138). The witness further testified that he could not tell conclusively when the weapon was manufactured (T 140).

The trial court denied Petitioner's renewed motion for judgment of acquittal, and he specifically commented that the date of the manufacture of the weapon was an issue of fact for the jury to decide (T 167). The court recognized that "the law is pretty clear that you can create an issue by vigorous cross-examination, just as you can create an issue by controverting things with rebuttal testimony."

During the hearing on the motion for new trial, Petitioner argued that since he had presented some evidence that the weapon was an antique, the State should have been required to prove beyond a reasonable doubt that it was not an antique. Since the State had presented no evidence but had just cross-examined Petitioner's witness, Petitioner contended that the State's proof failed as a matter of law. However, the prosecution countered with the argument that the State was not required to disprove Petitioner's affirmative defense if Petitioner had not met his burden of persuasion (T 261). The trial court pointed out that the jury did not have to believe Petitioner's witness and that since the question was submitted to the jury whether the firearm was an antique, and since Petitioner was found guilty, the jury must necessarily have rejected

Petitioner's antique firearm evidence (T 266). During the hearing, the trial court commented that the weapon in question had plastic grips on it and that it was not unusual for the jury to have determined that the weapon was not an antique (T 265). The motion for new trial was denied.

Trial counsel persuaded the trial court to rehear the motion for new trial on the ground of whether the State had to disprove Petitioner's affirmative defense by bringing in a new witness. However, the trial court again denied the motion for new trial and ruled that the State did not have to bring in a different witness after the defendant had introduced some evidence of an affirmative defense (T 281, 282). The court noted that it was his opinion that before the defendant could be found not guilty the jury would have to (1) find that Petitioner's witness was an expert, (2) all of the witness' testimony was believable, and (3) the expert would have to testify that the firearm was an antique (T 282). The court pointed out that whether the firearm was an antique was not a question of law, and he again decided that the case had properly been submitted to the jury for that determination. The trial court emphasized that had Petitioner's expert been able to testify for certain that the firearm was an antique, and he "probably would have directed a verdict." (T 283)

On direct appeal, the First District extensively discussed Petitioner's contention that the judgment of acquittal should have been granted because the State allegedly had not failed to prove that the weapon was not an antique. After disposing of

this issue in favor of the State, the First District then explicitly recognized that the State had introduced evidence of only one judgment and sentence for a prior felony conviction in order to prove that Petitioner was a convicted felon. See slip opinion at 5. Yet, the First District then certified as a question of great public importance whether it was reversible error for the State to introduce evidence of multiple prior felony convictions, which was the same question certified in Harris v. State, 449 So.2d 892 (Fla. 1st DCA), review dismissed, 453 So.2d 1364 (Fla. 1984). After this Court's jurisdiction was invoked, the State filed a motion to dismiss on the ground that the Court should not exercise its discretion to review a question which is not germane to the facts adduced at trial--in other words, since there was no dispute that only one judgment and sentence was introduced at trial, it was improper for the First District to utilize this case to have answered a question which was not relevant to what actually occurred at trial.

SUMMARY OF ARGUMENT

This Court should decline to answer the certified question because the question has nothing to do with what actually occurred at trial--at trial only one judgment and sentence was introduced to prove that Petitioner was a convicted felon, yet the certified question asked whether it is prejudicial to introduce multiple judgments and sentences to prove a defendant is a convicted felon. Should, however, the Court decide to consider this issue, Petitioner's judgment and sentence should be affirmed because the legal issue has already been decided by this Court in Parker v. State, 408 So.2d 1037, 1038 (Fla. 1982), which specifically disapproved Fouts v. State, 374 So.2d 22 (Fla. 2d DCA 1979), which espoused the arguments presently being advanced by Petitioner.

The Court should decline to rule on Issue II because to do so would obviate the need to answer the certified question. State v. Hegstrom, 401 So.2d 1343, 1344 (Fla. 1981). In other words, if the Court finds that the judgment of acquittal should have been granted, the Court would not have to reach the question of whether the introduction of a prior felony conviction prejudiced Petitioner. However, should the Court decide to consider the issue, it fails both as a matter of law and as a matter of fact. See Lynch v. State, 293 So.2d 44, 45 (Fla. 1974), and the evidence from which the jury could infer that the gun seized from Petitioner was operable, manufactured after 1918, loaded with live rounds, and thus not an antique.

Even Petitioner's own expert was unable to testify with certainty that the weapon was manufactured prior to 1918.

As with the other two issues, the State respectfully urges the Court not to rule on Issue III. This is because if the Court concludes that the motion to suppress should have been granted, the State would be unable to prove its case (without a weapon) and there would be no need to answer the certified question. State v. Hegstrom, supra. In the alternative, should the Court decide to consider the issue, the trial court's denial of the motion to suppress should be affirmed because he found as a matter of fact that there were sufficient, articulable facts upon which to conclude that Petitioner possessed a concealed weapon. See Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977).

ARGUMENT

ISSUE I

THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETIONARY JURISDICTION.

It is the State's position that this Court should decline to exercise its discretion to answer the certified question in this case for at least several reasons. First and foremost is the reason that the certified question has nothing to do with what actually occurred at trial since only one judgment and sentence was introduced at trial. See the State's motion to dismiss which has been previously filed in this case.

Second, the Court should not exercise its discretion to answer the certified question because the question was never properly before the First District Court of Appeal. The record reveals that the State objected at trial to the motion in limine because it was a surprise motion for which the State had been given no notice (T 21). Also, the ground of the motion was that the defense wanted "the court to excise the part that mentions specific felony of armed robbery." At no time did defense counsel contend that the introduction of multiple judgments and sentences was so prejudicial as to deny Petitioner a fair trial. Accordingly, since this Court has recently refused to answer a certified question when it was not properly presented to the trial court, the same should be true in Petitioner's case. See Tillman v. State, 10 F.L.W. 305, 306 (Fla., opinion filed June 6, 1985), in which this

Court noted that "[i]n order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved. E.g., Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982)."

In addition to the fact that the issue was not preserved because it was never properly presented to the trial court (because only one judgment and sentence was involved), another reason exists for the Court not to answer the certified question. This is because the question has already been answered by the Court in Parker v. State, 408 So.2d 1037, 1038 (Fla. 1982), which specifically disapproved the Second District's opinion in Fouts v. State, 374 So.2d 22 (Fla. 2d DCA 1979), which had relied upon the arguments now being advanced by Petitioner. In Parker, this Court noted that the test for admissibility was relevance and that relevant evidence would be admissible unless its probative value was substantially outweighed by the danger of unfair prejudice. The Court held that evidence of a prior felony conviction was admissible even though the defense had offered to stipulate to the felony conviction because proof of a prior felony conviction was essential to the crime of possession of a firearm by a convicted felon. This is precisely the situation in Petitioner's case.

As previously stated, this Court disapproved Fouts v. State, supra, which, like Petitioner has in this case, relied upon the Fifth Circuit's reasoning in United States v. Spletzer,

535 F.2d 950 (5th Cir. 1976). See Fouts, supra at 374 So.2d 25. Since counsel for Petitioner has cited Parker, supra, he certainly should have been aware that Fouts v. State had been disapproved by this Court and that reliance upon Spletzer was erroneous. In any event, since Parker held that proof of a prior felony judgment in order to prove the crime of possession of a weapon by a convicted felon could be made by entry of a single judgment and sentence into evidence, Petitioner's argument is without merit.

Petitioner's attempt to distinguish Parker on the ground that the defendant in Parker apparently did not object to the introduction of the nature of the prior felony should not be persuasive. The fact remains that this Court specifically held that introduction of the nature of the prior felony through the introduction of the judgment and sentence was proper because such evidence was relevant.

The State further submits that this Court should not be persuaded by Petitioner's assertion that Parker is "partially erroneous." (Brief of Petitioner at 17.) To support his contention that Parker is incorrect, Petitioner has urged the Court to make a distinction between proof of the fact that a defendant was convicted of a prior felony and proof of the nature of such prior felony. However, unfortunately for Petitioner, this was precisely the argument adopted by the Second District in Fouts v. State, supra--which was specifically disapproved by this Court in Parker.

Finally, should the Court reach the certified question despite the State's previously discussed reasons for not doing so, the State respectfully urges the Court to affirm the First District. First, the evidence of the nature of the prior felony is relevant and thus admissible under Parker. Second, in cases involving multiple prior felonies, it is entirely possible that a defendant might seek to obtain collateral relief if the only prior felony upon which his conviction for possession of a firearm by a convicted felon was based is subsequently vacated. Thus, there is a reason to introduce multiple judgments and sentences if such multiple judgments and sentences are applicable and relevant to a particular defendant.

ISSUE II

THE TRIAL COURT CORRECTLY DENIED PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL.

Although the State recognizes that the Court has the discretion to consider this issue since it has jurisdiction to decide this case, the State respectfully urges the Court not to exercise such discretion. Tillman, supra. This is because if the Court decides that a judgment of acquittal should have been granted, there will be no need to answer the certified question (assuming that the Court decides to answer the question in light of the arguments presented in Issue I). See State v. Hegstrom, 401 So.2d 1343, 1344 (Fla. 1981), in which the Court refused to accept the case for review on one basis and then reverse on another ground which would cause the Court not to reach the issue upon which review had been predicated. Thus, if Petitioner were correct in his contention that there was insufficient evidence to support his conviction, there would be no need to decide whether Petitioner was prejudiced by the admission of the judgment and sentence for the prior felony.

However, should the Court decide to rule on this issue, the State submits that it is without merit. Initially, the State would point out that at the judgment of acquittal stage, the State does not have to disprove every hypothesis of innocence. Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). A judgment of acquittal should not be granted unless there is

no view of the evidence which would allow the jury to find guilt. Spinkellink v. State, 313 So.2d 666, 670 (Fla. 1975), cert. denied, 428 U.S. 911, 96 S.Ct. 2227, 49 L.Ed.2d 1221 (1976). See also Lincoln v. State, 459 So.2d 1030, 1031 (Fla. 1984), which relied upon State v. Allen, 335 So.2d 823, 826 (Fla. 1976). In accord Heiney v. State, 447 So.2d 210 (Fla. 1984), and Rose v. State, 425 So.2d 521 (Fla. 1982), cert. denied, 461 U.S. 909, 103 S.Ct. 1883, 76 L.Ed.2d 812 (1983).

It is the State's position that the rationale of the above cases should be applicable in this case even though an affirmative defense was involved. It is always the State's burden to prove its case beyond a reasonable doubt regardless of an affirmative defense, and under the facts of this case, such burden was more than adequately met. For example, the police officers testified that the gun appeared to be operable and that it contained live bullets. Also, the trial court noted at one point that the gun had plastic grips. Since the gun was admitted into evidence, surely the jury was permitted to infer that a gun with plastic grips was not manufactured prior to 1918.

Petitioner seems to be arguing that just because he presented some evidence that the gun might be an antique, the judge should have so found as a matter of law. This contention overlooks the function of the jury--to decide factual questions. Of course, whether the gun was manufactured prior to 1918 was the ultimate factual question. In that regard, it should be remembered that even Petitioner's expert was unable to state

with certainty that the weapon was an antique.

Of course, what Petitioner is really asking for is a ruling of law from this Court which would state that a judgment of acquittal should be granted if the defendant presents any evidence of his affirmative defense. In other words, there would be no way for the State to prove its case beyond a reasonable doubt if the defendant has presented any evidence, no matter how minute. It is the State's position that the burden to prove its case beyond a reasonable doubt remains with the State throughout the entire trial and that it is for the jury to determine, after proper instructions, whether the State has met such burden. In that regard, the First District correctly held that just because the defendant presented some expert testimony to support his affirmative defense, it did not follow that the jury necessarily had to believe such testimony. And this should be especially true in this case in light of the fact that even Petitioner's own expert was unable to testify that the weapon was an antique. Although Petitioner has now argued in this Court that the firearm was a replica, this argument was not advanced below, and in any event, should not be persuasive in light of the testimony from the officers that the gun appeared to be operable and was loaded with live ammunition.

In summary, the Court does not need to decide this issue because to do so would obviate the need to answer the certified question. If the Court decides to answer the issue, the First District should be affirmed because the jury did not have

to believe Petitioner's expert testimony. Furthermore, there is no constitutional requirement that the State must disprove an affirmative defense--all that is required is that the State prove its entire case beyond a reasonable doubt. See Patterson v. New York, 432 U.S. 197, 210, 97 S.Ct. 2319, 53 L.Ed.2d 281, 292 (1977). The jury in this case was instructed that Petitioner could not be found guilty if the firearm was an antique, and an antique firearm was defined as a firearm manufactured before 1918 or any firearm for which ammunition was no longer manufactured and was not readily available (T 217, 218). Since the jury found Petitioner guilty, it necessarily had to reject the antique firearm evidence. Accordingly, Petitioner's argument is without merit.

ISSUE III

THE TRIAL COURT CORRECTLY DENIED PETITIONER'S MOTION TO SUPPRESS.

As with the previous issue, it is the State's position that the Court should decline to consider this issue because to do so would obviate the need to decide the certified question. State v. Hegstrom, supra. In other words, if the Court ruled that the firearm should have been suppressed, there never would have been any evidence to support the possession of a firearm charge. Should, however, the Court decide to consider the issue, it is the State's position that the trial court's ruling on the motion to suppress was correct. See McNamara v. State, 357 So.2d 410 (Fla. 1978).

In Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), the Court upheld the seizure of a firearm from a defendant after a police officer noticed a large bulge under the defendant's jacket. The Supreme Court held that the legal issue was disposed of by Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and that the seizure was proper. "The bulge in the jacket permitted the officer to conclude that Mimms was armed and thus posed a serious and present danger to the safety of the officer. In these circumstances, any man of 'reasonable caution' would likely have conducted the 'pat-down.'" Id. at 434 U.S. 112, 54 L.Ed.2d 337.

Should Petitioner attempt to argue that the initial stop was illegal, the State would rely upon Florida v. Royer,

460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229, 236 (1983), which recognized that law enforcement officers were permitted to approach citizens to ask questions. See also Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), in which it was found permissible for a law enforcement officer to reach into a vehicle and remove a weapon from the driver's waistband.

It should not be forgotten that a "bulge" means something more to a trained law enforcement officer than it does to a private citizen. Brown v. Texas, 443 U.S. 47, 52, 99 S.Ct. 2637, 61 L.Ed.2d 357, 362, n. 2 (1979). Also, the fact that the officers knew from Petitioner that he was on parole for armed robbery is a factor which can be considered when evaluating the propriety of the officers' actions. Phillips v. State, 360 So.2d 1310, 1311 (Fla. 1st DCA 1978).

Florida law is consistent with the United States Supreme Court cases. See, e.g., State v. Francois, 355 So.2d 127, 128 (Fla. 3d DCA 1978), in which it was found permissible for a police officer while questioning a suspect to remove a gun from the suspect's leg after the officer noticed a bulge under the defendant's pants. See also Bentley v. State, 411 So.2d 1361, 1363 (Fla. 5th DCA 1982).

Finally, should the Court disagree with all the State has argued to this point, the State would point out that the trial court's denial of the suppression motion should be affirmed because the officers acted in good faith. In other words, exclusion of the firearm will not deter police misconduct

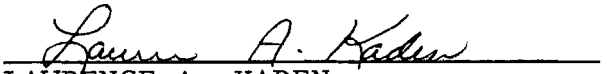
because the officers believed that they acted reasonably. United States v. Leon, ___ U.S. ___, 82 L.Ed.2d 677 (1984); Massachusetts v. Sheppard, ___ U.S. ___, 82 L.Ed.2d 737 (1984).

CONCLUSION

Based on the facts and foregoing arguments, the State respectfully requests that the petition be dismissed.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



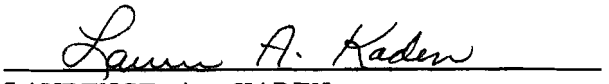
LAWRENCE A. KADEN
Assistant Attorney General

The Capitol
Tallahassee, Florida 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to James T. Miller, Assistant Public Defender, 407 Duval County Courthouse, Jacksonville, Florida, 32202, on this 9th day of July, 1985.



LAWRENCE A. KADEN

OF COUNSEL