IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,036

FIRST DISTRICT COURT OF APPEAL

CASE NO. AW-425

MacARTHUR WILLIAMS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent,

PETITIONER'S BRIEF ON THE MERITS

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL, STATE OF FLORIDA

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PRELIMINARY STATEMENT

Petitioner, MacArthur Williams, was the Appellant before the First District Court of Appeal and the Defendant in the trial court. Respondent, the State of Florida, was Appellee before the First District Court of Appeal and the prosecutor in the trial court.

The Record on Appeal consists of one volume of pleadings and trial documents and six volumes of transcript of the trial proceedings. Petitioner will refer to the volume of pleadings as "R", followed by the appropriate page number and "T" followed by the appropriate page number will designate references to the transcript volumes.

STATEMENT OF THE CASE

The State of Florida charged Petitioner by Information with one count of Carrying a Concealed Firearm and one count of Possession of a Firearm by a Convicted Felon, Section 790.01, Florida Statutes (1983) and Section 790.23, Florida Statutes (1983). (R-5). Before trial, Petitioner moved to suppress a pistol, bullets and rolled fingerprints obtained from him by the police because 1) the police seized the items without a warrant 2) there was no probable cause to seize the items 3) there was no well-founded suspicion of criminal activity to seize the items pursuant to a stop and frisk. (R-13-14). The trial court denied the Motion to Suppress. (R 15, T.15).

Prior to the beginning of the trial, Petitioner moved to sever the count of Carrying a Concealed Firearm from the count of Possession of a Firearm by a Convicted Felon. Petitioner cited this Court's decision in Vazquez v. State, 419 So.2d 1088 (Fla. 1982). The trial court granted the Motion to Sever and proceeded to trial on the possession of a firearm by a convicted felon charge. Prior to the trial, Petitioner made a Motion in Limine to prohibit the State from revealing the nature of the felony on the Judgment and Sentence of Petitioner's prior felony conviction. (T. 21). Petitioner asked the Court to excise that portion because it would be unduly prejudicial and it was not necessary for the State to prove the nature of the prior felony. (Id). The trial court denied the motion. (T. 22). Petitioner renewed

his Motion to Suppress and the trial court denied it again (T. 23-24).

During opening statement, the prosecutor advised the jury: "the area of Petitioner's arrest was a high crime area, {There} is a large drug problem in that area and there is a number of armed robberies". (T. 34). Petitioner objected to the statement and moved for a mistrial. (T. 35). The trial court initially sustained the objection motion, but then ruled the State could prove the area was a high crime area and the detectives in the case were on an armed robbery detail. (T. 37-38). Petitioner objected because of the undue prejudice from such testimony especially because Petitioner's prior felony conviction (to prove the Possession of a Firearm by a Convicted Felon) was for armed robbery. (T. 37). The trial court again denied the Motion for Mistrial. (T. 38). During the trial, Detective Sweeney repeated the testimony about the area of Petitioner's arrest being a high crime area. (T. 56-57). Petitioner again moved for a mistrial. The trial court denied the motion. (T. 57).

The State also presented evidence, over Petitioner's Motion for Mistrial, that when asked for identification papers, Petitioner produced papers indicating he was on parole for armed robbery. (T. 61-66). Petitioner also objected to testimony that the arresting officer found bullets in the gun and to introduction of the bullets. (T. 78-79). The trial court denied the Motion for Mistrial. (T. 79).

Later in the trial the State, over objection, introduced a copy of an Information, a jury verdict form and a Judgment and

Sentence. (T. 97-101). Petitioner objected to the portion of the information and sentence which included the nature of the prior felony, armed robbery with a deadly weapon. (T. 100 - 104, 106). After the State rested its case, Petitioner moved for a judgment of acquittal. The trial court denied the motion. (T. 117).

Petitioner called David Warniment, a firearms examiner for the Florida Department of Law Enforcement, as a defense witness. After Mr. Warniment's testimony, Petitioner moved for a Motion for Judgment of Acquittal because 1) if the gun was an antique gun, then the Possession of a Firearm by a Convicted Firearm statute permitted an affirmative defense to the charge, 2) Mr. Warniment testified the gun was manufactured before 1918, 3) the State had not proved beyond a reasonable doubt, in light of the defense testimony, the gun was not an antique or replica of an antique. The trial court denied the motion and sent the case to the jury. The jury found Petitioner, after 3 hours of deliberation, guilty as charged. (R. 30; T-229). The trial court adjudicated Petitioner guilty and sentenced him to 30 months in prison. (R. 31-35; T-247).

Petitioner filed a timely Motion for New Trial, which the trial court denied. (R. 37-39; T. 251-266). Petitioner then appealed to the First District Court of Appeal and raised three issues: 1) The trial court erred in denying the motion to suppress; 2) erred in denying the motion for judgment of acquittal because the State failed to prove the non-existence of an affirmative defense beyond a reasonable doubt; 3) erred in denying Petitioner's motion in limine to prohibit the State from

introducing evidence of the nature of Petitioner's prior felony conviction.

The First District Court of Appeal in its March 12,1985, opinion discussed only the issue of the motion for judgment of acquittal. On May 7, 1985, the First District withdrew its March 12 opinion and substituted a revised opinion. In the revised opinion, the Court again discussed the denial of the motion for judgment of acquittal. However, the Court also discussed the introduction of the nature of the prior felony conviction in a possession of a firearm by a convicted felon trial. The First District certified this question to this Court as a matter of great public importance. On May 17, 1985, Petitioner filed his petition for review and consequently, this appeal follows.

STATEMENT OF THE FACTS

The evidence at trial, with a Stipulation on the use of depositions during the hearing on the Motion to Suppress, establish the following facts:

Detectives Sweeney and Richardson were on duty in the Springfield area of Jacksonville on July 21, 1983. (T. 54-55). According to Sweeney, the area was {experiencing} a high rate of crime at that time. During the trial, Petitioner objected to such testimony and contended: 1) the evidence was not relevant to the charge; 2) the prejudicial effect of such evidence outweighed its probative value. (T. 56-57). Petitioner moved for a mistrial. The trial court denied the motion. (T. 57). Around 10:15 P.M., the detectives in an unmarked car observed Petitioner walking south on Main Street. (T. 56, 58). Neither Sweeney nor Richardson knew Petitioner (R. 56, 71). The detectives had not received a call concerning a complaint about a crime by Petitioner or anyone else. (T. 58). Petitioner, as he walked down the street, pulled at his shirt, pushing it in and straightening it. (T. 59). Detective Sweeney stated Petitioner appeared "to be having problems making himself presentable to himself and he had placed something in the front of his pants and he wanted to make sure it wasn't noticeable" (T. 59; R. 59).

Sweeney and Richardson then approached Petitioner on the street. Sweeney pulled out his badge, got out of the car and identified himself. (R. 60; T. 60). Sweeney asked Petitioner for identification and he produced some papers which indicated he was

on parole for armed robbery. As Sweeney questioned Petitioner, he observed a bulge in front of Petitioner's pants. (T. 69; R. 62). However, Sweeney could not tell what the bulge was at that time. (Id). Sweeney then reached up and patted the bulge on Petitioner. The object was hard and Sweeney "knew" it was a pistol. (T. 69, 70). Sweeney removed the gun and placed Petitioner under arrest. The gun taken from Petitioner was a chrome .32 caliber six-shot revolver (T. 75-76). The gun had five rounds of .32 caliber ammunition in it.

The State attempted to prove Petitioner had a prior felony conviction and consequently, he could not possess a firearm under Section 790.23, Florida Statutes (1983). The State introduced a certified copy of Petitioner's 1978 Judgment and Sentence for Armed Robbery. John McKim, a latent fingerprint examiner with the Jacksonville Sheriff's Office, identified Petitioner as the person who made the fingerprints on the 1978 judgment and sentence for armed robbery introduced by the State (T. 114).

Petitioner presented the testimony of David Warniment, a firearms examiner with the Florida Department of Law Enforcement. (T. 121). The Court accepted Warniment as an expert on firearms identification. (T. 123-24). Warniment determined the date of manufacture of the gun found on Petitioner was between 1886 and 1893 by American Arms Company, based on reference books. (T. 125-26). Warniment's expert opinion to a reasonable certainty was that the date of manufacture was between 1886 and 1893. (T.

128-29). There was nothing about the gun to indicate to Warniment the date of manufacture was 1918 or later.

During cross-examination, Warniment stated the dates on the barrel of the firearm, - March, 1883, September 1884, May 1886 - refer to the patent dates of the weapon. (T. 131-33). Warniment conceded a weapon could be manufactured many years after its patent date. (T. 132). Warniment also acknowledged he could not state, with all certainty, the firearm was not manufactured after 1918 (T. 146). However, with reasonable certainty, Warniment's expert opinion was the gun was manufactured between 1886 and 1893. (T. 147-148).

ISSUES FOR REVIEW

1. WHETHER, IN A PROSECUTION FOR UNLAWFUL POSSESSION OF A FIREARM BY A CONVICTED FELON UNDER SECTION 790.23, FLORIDA STATUTES, THE ADMISSION INTO EVIDENCE OF MORE THAN ONE PRIOR FELONY AND THE PARTICULARS OF EACH SUCH CRIME (NONE BEING RELATED TO THE OFFENSE CHARGED), FOR THE PURPOSE OF PROVING THAT THE DEFENDANT WAS A CONVICTED FELON, IS SO PREJUDICIAL TO THE DEFENDANT'S RIGHT TO A FAIR TRIAL AS TO CONSTITUTE REVERSIBLE ERROR?

2. WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL WHEN PETITIONER CREATED, THROUGH EXPERT TESTIMONY, A REASONABLE DOUBT ABOUT WHETHER THE GUN IN QUESTION WAS AN ANTIQUE FIREARM OR A REPLICA THEREBY ESTABLISHING AN AFFIRMATIVE DEFENSE.

3. WHETHER THE COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS BECAUSE THE POLICE MERELY OBSERVED HIM WALKING DOWN A STREET IN A "HIGH-CRIME" AREA PULLING AT THE FRONT OF HIS SHIRT AND CONSEQUENTLY, THERE WAS NO REASONABLE SUSPICION OF CRIMINAL ACTIVITY AND NO PROBABLE CAUSE TO BELIEVE PETITIONER WAS ARMED.

SUMMARY OF ARGUMENT

The First District Court of Appeal certified to this Court the question of the propriety of proving the nature of the prior felony in a possession of a firearm by a convicted felon case. Recently in Reed v. State, Case No. 65,323, May 2, 1985, 10 F.L.W. 255, this Court held it could review the entire decision of a lower court, not merely the question certified to it. In Rupp v. Jackson, 238 So.2d 86 (Fla. 1970), this Court held it must peruse the entire record in a conflict or certified question case. See also, Hillsborough Association for Retarded Citizens, Inc. vs. City of Temple Terrace, 332 So.2d 610 (Fla. 1976). Consequently, Petitioner will discuss the three issues presented to the First District Court of Appeal.

1. THE INTRODUCTION OF THE NATURE OF PETITIONER'S PRIOR FELONY WAS IRRELEVANT TO THE JURY AND SO PREJUDICIAL IT DEPRIVED HIM OF DUE PROCESS AND THE PRESUMPTION OF INNOCENCE. DELETING THE NATURE OF THE PRIOR CONVICTION OR CONDUCTING A BIFURCATED PROCEEDING SIMILAR TO FELONY PETIT CASES WOULD CORRECT THIS PROBLEM.

Possession of a firearm by a convicted felon, Section 790.23, Florida Statutes (1983), is an atypical charge because the State must prove the Defendant has a prior felony conviction. However, the State can prove the status or disability of the Defendant by showing any prior valid felony conviction - any felony from issuing a worthless check to first degree murder will

suffice. Therefore, it is the historical fact of a prior felony conviction and not the nature of the felony, which is relevant to the jury. Introduction of the nature of the prior felony deprives a person of a fair trial - this Court has held in cases of felony petit theft, State v. Harris, 356 So.2d 315 (Fla. 1978), and in severance of a possession of a firearm by a convicted felon charge from other unrelated charges, State v. Vazquez, 419 So.2d 1088 (Fla. 1982), the jury must not learn of the fact of a prior conviction. This Court should extend this rule to the instant case to preserve the presumption of innocence. Petitioner submits the bifurcated procedure approved of in felony petit cases should apply to a possession of a firearm by a convicted felon case. A trial court could alternatively delete the nature of the prior felony conviction from the documentary evidence.

2. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR A JUDGMENT OF ACQUITTAL BECAUSE PETITIONER, THROUGH EXPERT TESTIMONY, CREATED A REASONABLE DOUBT AS TO WHETHER THE GUN IN QUESTION WAS AN ANTIQUE OR REPLICA OF AN ANTIQUE BECAUSE THE GUN WAS PATENTED BEFORE 1918.

Possession of an antique firearm (manufactured before 1918) or a replica of such a gun is an affirmative defense to possession of a firearm by a convicted felon. The State introduced a gun which had, on its barrel, the patent dates of March 1883, September 1884, May 1886. Petitioner presented testimony, by a firearms expert, that the gun was manufactured between 1886 and 1893.

The expert offered this opinion with reasonable certainty. He could not state with all certainty that the gun was manufactured before 1918. However, the issue here is whether Petitioner presented enough evidence to require the State to prove beyond a reasonable doubt the gun was not an antique or a replica. The State produced no evidence as to the date of manufacture. No reasonable jury could find beyond a reasonable doubt the manufacture was past 1918; the patent dates, without any other explanation, establish a reasonable doubt. Even if the gun was not, in fact, manufactured before 1918, there was ample evidence to show it is a replica of a gun made before 1918.

3. THE POLICE ILLEGALLY SEIZED PETITIONER AND THE FIREARM BY FRISKING HIM WHEN THEY MERELY OBSERVED PETITIONER WALKING DOWN THE STREET PULLING AT THE FRONT OF HIS SHIRT IN A "HIGH-CRIME" AREA.

The police illegally seized the firearm from Petitioner. The police were on routine patrol in a so-called "high-crime" area. The testifying officers never defined the "high-crime" area. They observed Petitioner walking down the street pulling at the front of his shirt. The police were not responding to a complaint about a crime; they were not acting on information concerning criminal activity by Petitioner. The arresting officers observed no criminal activity by him. There was no reasonable suspicion Petitioner was committing/about to commit a crime and there was no information Petitioner was armed. If this Court permits this type of search, any individual walking in or

acting "strangely" in a "high-crime area" could face police detentions and searches.

ARGUMENT

I. THE INTRODUCTION OF THE NATURE OF PETITIONER'S PRIOR FELONY WAS IRRELEVANT TO THE JURY AND SO PREJUDICIAL IT DEPRIVED HIM OF DUE PROCESS AND THE PRESUMPTION OF INNOCENCE. DELETING THE NATURE OF THE PRIOR CONVICTION OR CONDUCTING A BIFURCATED PROCEEDING SIMILAR TO FELONY PETIT CASES WOULD CORRECT THIS PROBLEM.

A. The nature of a prior felony conviction is irrelevant to the jury in a possession of a firearm by a convicted felon case, Section 790.23, Florida Statutes (1983).

Section 790.23, Florida Statutes (1983) creates the crime of possession of a firearm by a convicted felon. The State must prove two elements: 1) The defendant had in his care, custody, possession, or control a firearm as defined in Section 790(6), Florida Statutes (1983), 2) the defendant has a prior felony conviction. Section 790.23 is unlike most crimes because it requires proof of a status or disability of the defendant - the fact of a prior felony conviction. A defendant falls within this generic status by having a felony conviction. This felony could be any felony in the courts of this state, a crime against the United States designated as a felony or an offense in any other state, territory, or country punishable by imprisonment for a term exceeding 1 year. Section 790.23(1), Florida Statutes (1983).

So long as a defendant has a conviction for a crime defined as a felony in Section 790.23(1), the nature of the felony does not change the status of the defendant (unless civil rights are subsequently restored). The defendant could have a conviction for anything from issuing a worthless check over $50.00 to first

degree murder. The relevant fact for a jury on such a charge is the historical fact of a felony conviction. The jury does not decide whether the particular prior conviction is a felony. This determination will always be a matter of law for the trial judge, not the jury.

Proof of the prior conviction is a substantive essential element of the crime. State v. Vazquez, 419 So.2d 1088 (Fla. 1982). Therefore, the issue for this Court to decide is 'should the jury hear evidence on the nature of the prior felony to determine if the State has proven this essential element? A jury does not decide whether defendant's prior conviction is, as a matter of law, a felony. The question of whether the judgment and sentence is a valid conviction is also a question of law. In the instant case, the trial judge did not instruct the jury on all the felonies in the State of Florida so they could determine whether Petitioner's prior conviction was, in fact, a felony. The trial judge instructed the jury as follows:

> "Before you can find the defendant guilty of possession of a firearm by a convicted felon, the state must prove the following two elements beyond a reasonable doubt.
> First: That MacArthur Williams has been convicted of armed robbery.
> Second: That after the conviction, MacArthur Williams had in his possession, custody, care or control, a firearm" (T. 215).

The State introduced a judgment and sentence for armed robbery. Consequently, the trial judge took judicial notice (although none of the parties asked him to do so) of the fact that Petitioner's prior conviction for armed robbery was, as a matter of law, a

felony. The fact of the prior conviction being a felony is relevant only for the trial judge. Relevant facts are those which have a logical tendency to prove or disprove a fact which is of consequence to the outcome of the action. Section 90.401, Florida Statutes (1983); Gibbs v. State, 394 So.2d 231 (Fla. 1st DCA 1981), affirmed 406 So.2d 1113 (1981). The definition of relevancy in Section 90.401 consists of two parts: (1) a logical tendency to prove or disprove a fact; (2) the evidence must tend to prove or disprove a material fact. See Ehrhardt, Florida Evidence §401.1 pg. 83-85 (2d Ed. 1984).

The nature of the prior felony conviction does tend to prove a fact - the fact of whether a defendant's prior conviction is a felony. However, that fact is not material (relevant because it is a fact which is of consequence to the outcome of the action) to the jury. The only material fact to the jury is the historical fact of any prior felony conviction, regardless of its nature. The nature of the prior conviction is material only to the trial judge because he determines whether that conviction is a felony. The standard jury instructions for Section 790.23 illustrate this point. The pertinent portions of the instructions read:

> Before you can find the defendant guilty of (crime charged), the State must prove the following two elements beyond a reasonable doubt:
>
> 1. (Defendant) had been convicted of (prior offense).
>
> 2. After the conviction (defendant)

a. {owned} {had in his care, custody, possession or control}

{a firearm}

. . . .

Definitions: "Convicted" means that a judgment has been entered in a criminal proceeding by a competent court pronouncing the accused guilty".

Florida Standard Jury Instructions in Criminal Cases, 2nd Edition pg. 112.

The jury in a prosecution for possession of a firearm by a convicted felon does not determine whether the prior offense is a felony. Under the standard instructions, the jury determines whether the defendant was convicted of whatever crime the state alleges. The jury does not decide whether the particular crime alleged by the State is a felony under the laws of Florida or any other jurisdiction. Therefore, evidence of the nature of the prior felony is irrelevant to the jury's determination.

This Court's decision in Parker v. State, 408 So.2d 1037 (Fla. 1982) on this point is partially erroneous. In Parker, supra, the State introduced a certified copy of the judgment and sentence of a felony conviction (Burglary) in a possession of a firearm by a convicted felon case. This Court decided two issues: 1) whether the state could refuse the defendant's offer to stipulate to the prior felony conviction and 2) prove the conviction by the use of certified copy of the

judgment and sentence where the fact of the conviction is an essential element of the crime charged.

Justice McDonald, writing for the court, held first the state is not bound by the offer of stipulation and secondly, proof of the prior conviction is necessary because it is an essential element. Proof by the copy of the judgment and sentence is appropriate under 90.403, Florida Statutes (1983). The Parker court held the probative value of the judgment and sentence was not substantially outweighed by any of the considerations outlined in 90.403 (unfair prejudice, confusion of issues, misleading of jury, needless presentation of cumulative evidence). However, in Parker, the Defendant never objected to the introduction of the nature of the prior felony. See Parker v. State, 389 So.2d 336, 337 (Fla. 4th DCA 1980). Therefore, this Court did not directly address the issue presented in this case.

Proof of a prior felony conviction is necessary and introduction of the judgment and sentence is obviously probative of the legal question of whether the prior conviction is a felony. The probative value - prejudicial effect analysis of Parker, supra; Harris v. State, 449 So.2d 8921 (Fla. 1st DCA 1984, pet. for rev. dismissed, 453 So.2d 1364 (Fla. 1984), and the First District in this case below is inappropriate because the nature of the prior conviction has no probative value for the jury. The nature of the prior conviction does have probative value for the trial judge; the issue of whether the prior conviction is a felony is a matter of law. Therefore, the use

of Section 90.403, as applied in Parker, would not apply to the trial judge.

B. The probative value of the nature of Petitioner's prior conviction (armed robbery) was outweighed by the prejudicial effect under Section 90.403, Florida Statutes (1983).

Even if the nature of the prior felony conviction has probative value for a jury, the prejudicial effect of such evidence outweighed the probative value of the evidence in the instant case. Petitioner's prior conviction was for Armed Robbery. This fact distinguishes this case from Parker v. State, supra. In Parker, supra, the prior felony conviction was for burglary. The mere fact of a prior felony conviction for armed robbery may render the presumption of innocence meaningless in a possession of a firearm by a convicted felon case.

The Fifth Circuit Court of Appeal in an escape case has held the nature of the prior conviction would unduly prejudice the jury. United States v. Spletzer, 535 F.2d 950 (5th Circuit 1976). The Fourth Circuit Court of Appeal in United States v. Poore, 594 F.2d 39 (4th Cir. 1979) followed this rationale. An Illinois intermediate appellate court also followed this reasoning in People v. Slaughter, 84 Ill. App. 3d 88, 404 N.E. 2d 1058 (Ill. 3d DCA 1980). The Slaughter court decided the trial court should delete the nature of the defendant's prior conviction and the length of the sentence from the documents introduced at trial. This procedure would not hamper the State in its proof of the escape and it avoids the serious potential for prejudice

inherent in informing the jury of the nature of the prior offense and the punishment. 404 N.E. 2d at 1064. The jury in the instant case received the judgment and sentence of Petitioner. Even if the judgment of conviction is arguably irrelevant, the sentence has absolutely no probative value. The jury may speculate about why a defendant received a certain sentence or about other prior convictions.

The method of proof by the State in the instant case exacerbated the prejudice arising from the armed robbery conviction. In opening statement, the State informed the jury the area of Petitioner's arrest was a high crime area, {There} is a large drug problem in that area and there is a number of armed robberies. (T. 34) Petitioner moved for a mistrial, which the trial court denied. (T. 35-38). The jury could have drawn the inference that Petitioner (who had a prior conviction for armed robbery) was carrying a firearm to commit a robbery. During testimony, Detective Sweeney stated the area of Petitioner's arrest was a "high-crime" area. (T. 56-57). Petitioner again moved for mistrial. The State also presented evidence that when asked for identification papers, Petitioner produced papers indicating he was on parole for Armed Robbery. (T. 61-66). The State additionally introduced evidence that the arresting officer found bullets in the gun. All this evidence, coupled with the introduction of the nature of the prior felony, gave the jury the impression Petitioner was carrying a firearm to commit an armed robbery. This evidence is completely irrelevant to the charge of Possession of a Firearm by a Convicted Felon. Any such inference,

even on the facts produced, would be rank speculation. However, such speculation is possible from the evidence and innuendoes produced by the State.

This Court in State v. Vazquez, supra ,held a trial court must sever a count of possession of a firearm by a convicted felon from other unrelated counts. Severance is necessary to prevent the defendant from being deprived of the presumption of innocence. This Court in State v. Williams, 444 So.2d 13 (Fla. 1984), considered the problem of proof of the validity of an arrest in an escape case. The Williams noted the defendant would undoubtedly be prejudiced by introduction of the required proof of the details of the nature of the arrest.

It would be incongruous for this Court to hold a jury cannot learn of a prior felony conviction in an escape case or in severance of a possession of a firearm by a convicted felon case from other charges. Introduction of the nature of the prior felony will destroy the presumption of innocence, distract and unduly prejudice the jury. This Court should follow Vazquez and Williams and overrule Parker to the extent that it conflicts with them.

Section 90.610, Florida Statutes (1983), Conviction of certain crimes as impeachment, also prohibits the jury from learning of the nature of the prior conviction used for impeachment. The party impeaching a witness may ask the witness if he has been convicted for a felony or a crime involving dishonesty or false statement. As long as the witness answers truthfully about the existence and number of the prior convictions, the state

cannot inquire into the nature of the offenses. Goodman v. State, 418 So.2d 308 (Fla. 1st DCA 1982); Whitehead v. State, 279 So.2d 99 (Fla. 1973).

The issue of credibility obviously has probative value for the jury. However, it is the historical fact of a prior conviction for a felony and not the nature of the felony which is relevant to the jury. Any questions about whether the prior conviction is a valid conviction or falls within Section 90.610 is a question of law for the trial judge. See State v. Page, 449 So. 2d 813 (Fla. 1984).

C. Deleting the nature of the prior conviction from documents introduced into evidence or conducting a bifurcated proceeding similar to felony petit cases would achieve due process.

This Court has recognized that informing the jury of prior felony convictions can destroy the presumption of innocence. State v. Vazquez, supra; Shargaa v. State, 102 So.2d 809 (Fla. 1958). If this Court continues to follow Parker, supra, it will not achieve due process and it will have to engage in a time-consuming case-by-case analysis under Section 90.403. Under Parker, this Court will have to review each possession of a firearm by a convicted felon case and balance the probative value against the prejudicial effect. Petitioner suggests this Court consider two alternatives to avoid case-by-case analysis and protect the presumption of innocence.

1. The trial court could delete the nature of the prior convictions from the documents introduced into evidence.

This Court could protect the defendant's presumption of innocence by requiring the trial judge to delete the nature of the prior conviction from the documentary evidence. As the jury does not decide whether the prior conviction is a felony, this would permit the jury to determine whether the defendant has a conviction under the Standard Jury Instructions. The Illinois court in People v. Slaughter, supra, approved of this procedure. The Slaughter court stated:

> "Such a procedure would allow the state to establish the prior conviction and incarceration, some of the necessary elements of escape, while also preventing the jury from hearing the potentially prejudicial facts as to the nature of the earlier offense and the sentence imposed". 404 N.E. at 1064.

2. The trial court could conduct a bifurcated hearing similar to felony petit cases as approved of in State v. Harris, 356 So.2d 315 (Fla. 1978).

This Court faced a similar problem of dealing with prior convictions and the presumption of innocence in State v. Harris, supra. The issue in Harris, was the constitutionality of the felony petit theft statute, Section 812.021 (3), Florida Statutes (1978). This Court held the prior petit theft convictions were elements of the charge. Therefore, the State must specifically allege and prove the prior convictions. 356 So.2d at 316. The Harris court realized the jury, as in the instant case, must decide on guilt or innocence and the historical fact of a prior conviction and return a verdict as to both.

If the jury learned of the nature of the prior conviction, this Court opined:

> "It appears to us that the product of such a procedure would substantially destroy the historical presumption of innocence which clothes every defendant in a criminal case and in the mind of the average juror would in measure place upon the Accused the burden of showing himself innocent rather than upon the State the responsibility of proving him guilty". 356 So.2d at 317.

The Harris court stated "although the legislature had the right to create the substantive offense of felony petit theft, {we} have the right to dictate the procedure to be employed in the courts to implement it". 356 So.2d at 317. The method of proving felony petit theft would be: (1) The charge of felony petit theft would not bring to the attention of the jury the fact of prior convictions as an element of the new charge (2) Upon conviction for the third petit larceny, the Court shall in a separate proceeding, determine the historical fact of the prior convictions and questions regarding the identity of the accused within the general principles of law and Section 775.084, Florida Statutes (1978) which allows for a hearing in open court with the full rights of confrontation, cross-examination and representation by counsel. This type of procedure in a possession of a firearm by a convicted felon case would also achieve due process and protect the presumption of innocence.

II. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR A JUDGMENT OF ACQUITTAL BECAUSE PETITIONER THROUGH EXPERT TESTIMONY, CREATED A REASONABLE DOUBT AS TO WHETHER THE GUN IN QUESTION WAS AN ANTIQUE OR A REPLICA OF AN ANTIQUE BECAUSE THE GUN WAS PATENTED BEFORE 1918.

A. The provisions of Section 790.001, Florida Statutes (1983) - Definition of Firearm, Antique Firearm.

Section 790.23 prohibits a convicted felon from possessing a firearm. Section 790.001 (6) defines firearm:

> "Firearm" means any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term "firearm" does not include an antique firearm unless the antique firearm is used in the commission of a riot; the inciting or encouraging of a riot; or the commission of a murder, an armed robbery, an aggravated assault, an aggravated battery, a burglary, an aircraft piracy, a kidnapping, or a sexual battery".

Section 790.001 (1) defines Antique Firearm as:

> (1) "Antique firearm" means any firearm manufactured in or before 1918 (including any matchlock, flintlock, percussion cap, or similar early type of ignition system) or replica thereof, whether actually manufactured before or after the year 1918, and also any firearm using fixed ammunition is no longer manufactured in the United States and is not readily manufactured in the United States and is not readily available in the ordinary channels of commercial made.

Section 790.23, as defined, prohibits a convicted felon from possessing a firearm unless it is an antique or a replica of an antique firearm. This exception is an affirmative defense. State v. Thompson, 390 So.2d 715 (Fla. 1980).

B. Petitioner, through expert testimony, created a reasonable doubt as to whether the gun in question was an antique or a replica of an antique because the gun was patented before 1918.

Petitioner, through an expert in firearms examination, David Warniment of the Florida Department of Law Enforcement, demonstrated the gun in question was manufactured before 1918. This evidence would constitute an affirmative defense because the gun would be an antique. The First District below held Petitioner did not establish the affirmative defense because the expert testified only within a reasonable certainty the gun was manufactured before 1918. He also admitted the gun could have been manufactured after 1918. Therefore, the First District reasons the jury could have concluded the dates stamped on the gun (the patent date of 1883, 1884, 1886) were patent dates and not the manufacture dates.

Petitioner agrees the jury could have possibly reached this conclusion. However, the First District completely overlooks the fact that Section 790.001(1) excludes an antique or a replica thereof, whether or not manufactured before 1918. There was uncontradicted testimony that the gun in question was patented before 1918. Even if the gun was manufactured after 1918, it is obviously a replica of an antique firearm - a gun patented and manufactured before 1918. Even if the jury completely rejected the expert's opinion, the gun introduced into evidence had the patent dates of 1883, 1884, 1886 - therefore, the jury had to necessarily conclude the gun was actually an antique or a replica of an antique.

Petitioner through Mr. Warniment's testimony demonstrated the gun in question was either an antique (actually manufactured before and patented in 1883, 1884, 1886) or a replica thereof (irrespective of the date of manufacture). Therefore, the jury should have only concluded that there was a reasonable doubt of innocence following Petitioner's expert testimony and the introduction of the gun by the State. (Showing the patent dates of 1883, 1884, 1886). Therefore, Petitioner met the tests enunciated by this Court in Holmes v. State, 374 So.2d 944 (Fla. 1979), cert. denied, 446 U.S. 913, 100 S.Ct. 1845, 64 L.Ed 2d 267 (1980), and Jones v. State, 332 So.2d 615 (Fla. 1976). Petitioner and the State itself produced the requisite evidence to shift to the burden to the state to disprove the nonexistence of the affirmative defense. In this case, the State should have proved the gun in question was not an antique or a replica thereof.

The First District below erred in its analysis because it neglected to consider whether the gun was a replica of an antique instead of being an actual antique. There was evidence before the jury about the gun being a replica (the patent dates of 1883, 1884, 1886) and the trial judge instructed the jury on the antique/replica exception - affirmative defense. The jury had before it the evidence and instruction to necessarily conclude there was a reasonable doubt about whether the gun was an antique or a replica of an antique. The burden shifted to the State and it produced no testimony regarding the status of the gun. Therefore, the trial judge should have granted the Motion for Judgment of Acquittal.

III. THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO SUPPRESS BECAUSE THE POLICE MERELY OBSERVED HIM WALKING DOWN A STREET IN A "HIGH-CRIME" AREA PULLING AT THE FRONT OF HIS SHIRT AND CONSEQUENTLY, THERE WAS NO REASONABLE SUSPICION OF CRIMINAL ACTIVITY AND NO PROBABLE CAUSE TO BELIEVE PETITIONER WAS ARMED.

A. The Standard for a Stop and Frisk

Detectives stopped Petitioner because he was in a "high-crime" area and he pulled at the front of his shirt as he walked down the street. Although the area was allegedly experiencing a series of crimes, the Detectives did not know Petitioner nor was he a suspect in any crime. There was no evidence about the exact dates and locations of these crimes, modus operandi or descriptions of suspects. The police also did not observe Petitioner committing any type of nascent criminal behavior. In fact, the Detectives observed Petitioner for only a few seconds. Detectives Sweeney and Richardson stopped and frisked Petitioner, based on this inherently innocuous and seemingly innocent conduct.

Section 901.151, Florida Statutes (1983), permits a police officer to detain a person if the circumstances reasonably indicate the person has committed, is committing, or is about to commit a law violation. The police officer may frisk the person if he has probable cause to believe the person is armed. The officer must have a "founded" suspicion of criminal activity - Freeman v. State, 433 So.2d 9 (Fla. 2d DCA 1983). A founded suspicion is a suspicion which has some factual foundation in the circumstances observed by the officer, when those circumstances

are interpreted in light of the officers' knowledge. State v. Stevens, 354 So.2d 1244 (Fla. 4th DCA 1978). Mere suspicion is no better than random selection, sheer guesswork, or hunch, and has no objective justification and will not support a stop. Mullins v. State, 366 So.2d 1162 (Fla. 1978); Colodonato v. State, 348 So.2d 326 (Fla. 1977).

A court can consider the following factors to determine whether there is a founded suspicion:

(1) Time
(2) day of week
(3) location
(4) physical appearance of suspect
(5) behavior of suspect
(6) appearance and manner of operation of any vehicle involved
(7) anything incongruous or unusual in the situation as interpreted in light of the officers' knowledge State v. Stevens, 354 So.2d at 1247.

This Court must review these factors to determine whether the officers in this case had a founded suspicion or merely used hunches and guesswork to stop Petitioner.

B. The facts of the instant case do not constitute founded suspicion - the police merely acted on a hunch to stop Petitioner.

Petitioner will review the facts of the present case according to the factors outlined above.

(1) Time- The time of Petitioner's stop was 10:15 P.M. The time here is not significant. Detectives Sweeney and Richardson stated there were other people on Main Street. This factor did not form a part of their decision to stop.

(2) day of the week - Not relevant here.

(3) location - Detectives Sweeney and Richardson called the area a "high-crime" area. This hackneyed cliche is not a significant fact. The Detectives did not define the area nor did they give details of where and how the crimes occurred. The detectives did not relate Petitioner's location and actions with these crimes. This Court cannot permit officers to justify a stop merely because a person is in a high crime area. Mere presence in a high crime area does not justify a stop and frisk. Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed 2d 357 (1979). This Court cannot allow the area of town to determine the extent of the protections of the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution.

(4 & 5) physical appearance and behavior of suspect - The detectives in this case did observe Petitioner walking down the street pulling at the front of his shirt. This fact is not particularly unusual on its face and without any other information of criminal activity this activity is not founded suspicion.

(6) appearance and manner of operation of any vehicle involved - not applicable.

(7) anything incongruous or unusual in the situation as interpreted in light of the officers' knowledge - Officer Sweeney testified that he observed a bulge underneath Petitioner's shirt. However, he could not determine whether the bulge was a gun. The mere observation of a bulge, without any accompanying information about a weapon, does not support a founded suspicion.

McNamara v. State, 357 So.2d 410 (Fla. 1978); State v. Navarro, 464 So.2d 137 (Fla. 3d DCA 1984).

Detective Sweeney merely acted on a hunch that Petitioner had a gun. Detective Sweeney testified:

> "The only thing that was unusual about McArthur Williams that night was his action of continually, in the entire time I observed him an approached him and alongside of him, he would continually mess with the front of his waist band of his pants, kept patting it down. ... that is the only thing he did that was strange to me. To me it was enough to bear out investigating". (R - 59).

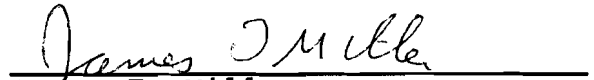
This Court should not permit a stop and frisk of a citizen merely because he is in a "high-crime" area and acting strangely in the officer's subjective opinion. This Court cannot allow an officer to "investigate" a citizen merely because, in the officer's opinion, he is acting in an unusual manner. There was no evidence of any incipient criminal activity by Petitioner; consequently, under Section 901.151 the stop of him was illegal.

CONCLUSION

This Court should reverse this cause and remand this case to the trial court for any of the three reasons submitted by Petitioner. The trial court erred in permitting the jury to learn of the nature of Petitioner's prior armed robbery conviction. This Court should require the trial judge to either delete the nature of the prior conviction from the documentary evidence or adopt the bifurcated procedure used in felony petit cases. The trial court also erred in denying the Motion for Judgment of Acquittal. Both the State and Petitioner introduced evidence to show the gun in question was either an antique or a replica thereby establishing an affirmative defense. The trial court additionally erred in denying the Motion to Suppress. The arresting officers acted on a mere hunch when they stopped Petitioner; They observed no nascent or overt criminal activity by him. The later frisk was illegal and the fruits of that search are inadmissible.

RESPECTFULLY SUBMITTED,

LOUIS O. FROST, JR.
PUBLIC DEFENDER



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished, by mail, to Lawrence Kaden, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, this 6th day of June, A.D., 1985.

James J Mills