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,

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

PETITIONER'S REPLY BRIEF ON THE MERITS

LOUIS O. FROST, JR.
PUBLIC DEFENDER

JAMES T. MILLER
ASSISTANT PUBLIC DEFENDER
401 Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-8550

ATTORNEY FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner relies upon the Preliminary Statement in the Initial Brief on the Merits. Petitioner will respond to the points raised by Respondent in the order and in connection with the issues framed in the Initial Brief.

STATEMENT OF THE CASE AND FACTS

Petitioner does not dispute the accuracy of the particular facts cited by Respondent. However, Petitioner relies on his Statement of the Case and Facts in the Initial Brief because those facts are more relevant to the issues presented in this appeal.

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 ON CONDUCTING A BIFURCATED PROCEEDING SIMILAR TO FELONY PETIT CASES WOULD CORRECT THIS PROBLEM.

Respondent has not directly addressed Petitioner's contentions in Argument I. Respondent maintains this Court should not exercise its discretionary jurisdiction because the question certified by the First District does not exactly correspond with the issues presented at trial. The First District certified, in its opinion below, the following question in this case:

> 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?

The First District used the question certified in Harris v. State, 449 So.2d 892 (Fla. 1st DCA 1984), pet. for review dismissed, 453 So.2d 1364 (Fla. 1984), for the instant case. The Harris v. State, supra, case did involve the introduction of more than one prior felony conviction in a possession of a firearm by a convicted felon prosecution. The instant case does involve the introduction of only one prior conviction. This difference should not prevent this Court from hearing this case because the First

District inadvertently added the language of, "more than one prior conviction". The certified question also contains the language, "And the particulars of each such crime". It is clear in the instant case the First District reviewed the question of whether it is error to introduce the nature of any prior felony conviction. The First District in its opinion noted just before it delineated the certified question:

> The second issue meriting discussion is whether the trial court erred in holding that the State could introduce evidence of the nature of Appellant's prior felony conviction in proving that he is a convicted felon. (See Appendix to Petitioner's Brief on the Merits, page 5.)

The First District unquestionably intended to certify the question presented by the facts of this cause: Is it error to introduce the nature of a prior felony conviction in a possession of a firearm by a convicted felon case? Petitioner properly objected to the introduction of the nature of the prior felony and the First District found no waiver of this objection. Petitioner, prior to trial, made a Motion In Limine to prohibit the State from revealing the nature of the prior felony. (T.21). Alternatively, he requested the trial court to excise the portion of the Judgment and Sentence showing the prior conviction. (Id.) The trial court denied the motions. (T.22). Petitioner then moved for a mistrial during opening statement when 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 these statements because of its undue prejudice because the trial court had

previously ruled the State could prove the nature of Petitioner's prior conviction - in this case a conviction for armed robbery (T.37-38). Petitioner also objected to and moved for mistrial when the State elicited testimony from Petitioner that he was on parole for armed robbery. (T.61-66). Later in the trial the State, over objection, introduced a copy of an Information, a jury verdict form and a Judgment and Sentence for the prior armed robbery. (T.97-101). Petitioner again timely objected to this evidence. (T.100-104,106).

The language in the certified question, "of more than one prior felony" is mere inadvertent surplusage. The issues presented in Harris, supra, and the certified question subsume the actual questions presented in this case: Is it error to introduce the nature of the prior felony conviction(s) in a possession of a firearm by a convicted felon case? Logically, if it is error to introduce the nature of one prior felony, then it is error to introduce the nature of more than one prior felony conviction. This Court must consider the issues presented in this case to reach the exact question as certified by the First District. Consequently, this Court should exercise its jurisdiction and decide the present case.

> 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).

Respondent has not directly dealt with Petitioner's assertions that the nature of a prior felony conviction is

irrelevant for the jury. The nature of the prior felony is not relevant to the jury because the judge decides whether the prior conviction is, as a matter of a law, a felony. The jury merely decides whether the defendant was convicted for the offense alleged by the State. See Florida Standard Jury Instructions in Criminal Cases, 2nd Edition, pg. 112. The historical fact of a prior conviction for any felony and not the specific nature of the felony alleged is the relevant fact for a jury.

Respondent does contend this Court's decision in Parker v. State, 408 So.2d 1037 (Fla. 1982), has previously answered the certified question in this case. This Court did not address the specific issue raised in this cause. In Parker, supra, the defendant did not object to the introduction of the nature of the prior felony. See Parker v. State, 389 So.2d 336, 377 (Fla. 4th DCA 1980). This Court decided two issues in Parker, 1) whether the State could refuse the offer to stipulate and 2) prove the conviction by the use of a certified copy of the judgment and sentence of the prior felony. First, this Court held the State was not bound by the offer of stipulation. Secondly, proof of the prior conviction by the judgment and sentence was appropriate. Petitioner agrees proof by the judgment and sentence is appropriate. However, the issue presented by this case is whether the jury should learn of the nature of the prior felony and the attendant sentence in the judgment. The Parker court ostensibly did not consider this issue. This Court did not specifically discuss this issue in the written opinion. Even if the Court did consider the issue presented here in Parker, it should reconsider

the Parker holding in light of the unique facts of this case and the proposed solutions to the problem suggested by Petitioner.

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).

Respondent has completely ignored Petitioner's contention that the probative value of the nature of Petitioner's conviction was outweighed by its prejudicial effect. The State introduced Petitioner's Judgment and Sentence for armed robbery. During the trial the jury learned 1) Petitioner was in a high crime area - the scene of armed robberies; 2) Defendant was on parole for armed robbery. The jury heard this testimony notwithstanding the fact that the police had absolutely no information Petitioner had committed or was about to commit an armed robbery. This prejudicial evidence outweighed its probative value because the jury might have inferred Petitioner was carrying a gun to commit an armed robbery. The facts of this case distinguish it from Parker v. State, supra, and the other cases cited by Respondent.

The only relevant issues for the jury in this case were 1) Did Petitioner have a firearm in his possession? and 2) Was he a convicted felon? The facts produced by the State are similar to the State informing the jury that a defendant on trial for armed robbery has a prior conviction for armed robbery. This Court has held this type of procedure violates the presumption of innocence. State v. Vazquez, 419 So.2d 1088 (Fla. 1982). Even if

this Court ultimately holds the jury can learn of the nature of the prior conviction, it should reverse this cause because of the additional inflammatory and prejudicial evidence adduced by the State.

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

Respondent has not discussed Petitioner's suggestions that the court can avoid the case-by-case analysis outlined in Section 90.403, Florida Statutes (1983), and Parker, supra, by either 1) conducting a bifurcated proceeding similar to felony petit cases as created by State v. Harris, 356 So.2d 315 (Fla. 1978), or 2) deleting the nature of the prior conviction from documentary evidence as approved of in United States v. Spetzer, 535 F.2d 950 (5th Cir. 1976), and People v. Slaughter, 84 ILL.App.3d 88, 404 N.E.2d 1058 (ILL. 3d DCA 1980). Either of these two methods would both give the State its opportunity to prove all elements of the charge and protect the accused's presumption of innocence.

II. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR 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.

The trial court should have granted the Motion For Judgment of acquittal because the gun in question was either an antique (actually manufactured in 1918) or a replica of an antique (manufactured after 1918). The controlling factor in this case is the phrase "or replica thereof, whether actually manufactured before of after the year 1918" in Section 790.001(1), Florida Statutes (1981). Respondent has not taken issue with the unequivocal language of Section 790.001(1). Petitioner concedes the evidence presented a jury question as to whether the gun was a genuine antique - actually manufactured after 1918. Respondent, on this point, correctly points out the gun had plastic grips and consequently must have been manufactured after 1918.

The State did not carry its burden of proving, beyond a reasonable doubt, the gun in this case was not a replica of a gun manufactured before 1918. Petitioner's expert testified the gun had the patent dates of 1883, 1884 and 1886. The State did not challenge this fact through cross-examination. Therefore, the gun in question was unquestionably a replica of a gun patented and manufactured before 1918, notwithstanding the plastic handles. Respondent argues the gun is not an antique or a replica because it was operable and had live ammunition in it. Respondent has

cited no authority to show these facts make Section 790.001(1) inapplicable. Section 790.001(1) creates no such exception.

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 FROM OF HIS SHIRT AND, CONSEQUENTLY, THERE WAS NO REASONABLE SUSPICION OF CRIMINAL ACTIVITY AND NO PROBABLE CAUSE TO BELIEVE PETITIONER WAS ARMED.

Petitioner asks this Court to review carefully the facts, as opposed to conclusory statements, which allegedly supported the stop and frisk of Petitioner. Respondent ignores the argument that the initial stop and seizure and resultant frisk of Petitioner was illegal. The officers relied on the "oft-invoked yet rarely defined" police buzzword of "high-crime area". The officers never related the high-crime area to Petitioner or his actions. The officer's statement that Petitioner's pulling at his shirt was consistent with him having a gun is patently preposterous. Pulling at one's shirt does not inexorably lead to the conclusion that the person is hiding a gun; pulling at one's shirt could simply be an innocent readjustment of one's clothing. The officers in this case acted on a hunch and stopped and seized Petitioner to "check him out". Therefore, the resultant frisk of Petitioner was illegal and the fruits of that search are inadmissible.

CONCLUSION

This Court should reverse this cause for any of the three reasons raised by Petitioner. The trial court erred in permitting the jury to learn of Petitioner's prior conviction for armed robbery. The trial court should have granted the Motion For Judgment of Acquittal because Petitioner created a reasonable doubt as to whether the gun was a replica of an antique gun actually manufactured before 1918. The trial court also erred in denying the Motion To Suppress. The officers in this case acted on a mere hunch and stopped Petitioner to "check him out".

Respectfully submitted,

LOUIS O. FROST, JR.
PUBLIC DEFENDER

JAMES T. MILLER
ASSISTANT PUBLIC DEFENDER
401 Duval County Courthouse
Jacksonville, Florida 32202
(904) 633-8550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Office of the Attorney General, The Capital Building, Tallahassee, Florida 32301 this 26th day of July, A.D., 1985.

JAMES T. MILLER
ASSISTANT PUBLIC DEFENDER