IN THE SUPREME COURT OF FLORIDA

ROSE BENTLEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 68,014

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent was the Appellee before the Fourth District Court of Appeal.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal.

The following symbols will be used:

R	Record on Appeal
PB	Petitioner's Brief

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and her Statement of the Facts to the extent that they present an accurate, non-argumentative recitation of proceedings in the trial court, with the following additions and clarifications:

When threatened by Petitioner, Mr. White was unaware of the fact that her gun was unloaded (R. 45). The weapon held by Petitioner was described by police as a silver revolver (R. 18). After completing jury instructions regarding the elements of the crime charged (R. 130-132), lesser included crimes (R. 132-134), the presumption of innocence (R. 135-136), credibility of witnesses (R. 37), and other matters the trial judge recessed for lunch (R. 142-143). No objection to this recess was made by Petitioner. After returning from lunch, the jury was instructed as to the procedure for selecting a foreperson (R. 144), and then the jury was retired from the courtroom to consider the verdict (R. 145).

POINTS ON APPEAL

POINT I

WHETHER THE TRIAL COURT CORRECTLY IMPOSED THE THREE-YEAR MANDATORY MINIMUM SENTENCE?

POINT II

WHETHER THE TRIAL COURT COMMITTED ERROR IN RECESSING FOR LUNCH BEFORE COMPLETING JURY INSTRUCTIONS?

POINT III

WHETHER THE TRIAL COURT CORRECTLY SUSTAINED THE STATE'S OBJECTION TO PETITIONER'S ARGUMENT CONCERNING THE MANDATORY MINIMUM PENALTY REQUIRED UPON CONVICTION AS CHARGED IN THIS CASE?

SUMMARY OF THE ISSUES

POINT I

The trial court was obliged to impose the three-year mandatory minimum because a handgun need not be operable to meet the legislative definition of "firearm."

POINT II

Petitioner made no objection to the trial court's "bifurcating" the jury instructions. Under the circumstances, sub judice, no prejudicial error could possibly have resulted from the trial court's recess.

POINT III

The trial judge correctly stated applicable law in force at the time of trial and correctly instructed the jury that the ultimate penalty to be imposed rests solely with the court.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY IMPOSED THE THREE-YEAR MANDATORY MINIMUM SENTENCE.

Petitioner asserts that the State should have the burden of proving that an unloaded gun is a "firearm" as defined by §790.001 Fla. Stat. (PB 6). She contends that the State did not prove her gun was "operable," and attempts to equate the case at bar with Morales v. State, 431 So.2d 648, 650 (Fla. 3rd DCA 1983), where the district court held that the State must prove that a starter pistol could be readily converted to fire a bullet in order to be properly classified as a "firearm."

In the instant case Petitioner displayed a handgun, described at trial as a "silver revolver" (R. 18). Although the gun was unloaded (R. 41), when Mr. White was confronted with it, this fact was unknown to him (R. 45).

In Nash v. State, 374 So.2d 1090 (Fla. 4th DCA 1979), the district court relied on the decision, Bass v. State, 232 So.2d 25 (Fla. 1st DCA 1970), in which that district court held the gist of aggravated assault is found in the character of the weapon, and a gun is a deadly weapon whether loaded or unloaded. Bass, supra at 27. More recently, in Watson v. State, 437 So.2d 702, 705 (Fla. 4th DCA 1983), the district court held that a handgun need not be operable to

meet the legislative definition of a "firearm." In making the Watson decision, the court noted, with disapproval, the holding of Morales v. State, 431 So.2d 648 (Fla. 3rd DCA 1983), the case-in-chief cited by Petitioner, stating:

> In our view, the legislature's inclusion of the frame or receiver of a weapon and of mufflers and silencers within the definition of a firearm indicates that the legislature did not intend to require a finding that an operable handgun be involved in order to sustain a conviction of robbery with a firearm. While it is not entirely clear, it appears that the legislature, like the Bass court, was concerned about the perception of the victim in determining whether the weapon used should be classified as a firearm. We must apply the legislature's definition.

Watson v. State, supra at 705. Moreover, in State v. Watson, 453 So.2d 810, 811 (Fla. 1984), this Court expressly approved the Fourth District Court's statutory interpretation. Thus it appears to be settled law that a gun, other than a starter pistol, is a "firearm," pursuant to §775.087(2) Florida Statutes (1983). Petitioner, in essence, presses foward a definition of the term "firearm" that would thwart legislative purpose, and would be at odds with the everyday definition of the term, which to a layperson, includes nothing regarding operability. Webster's New Collegiate Dictionary (1973), defines the word "firearm" as:

> [A] weapon from which a shot is discharged by gunpowder.

The above definition goes a long way towards distinguishing the Morales holding from the district court's holding in the case at bar. Respondent further submits that Petitioner's cited case of Wilson v. State, 438 So.2d 108 (Fla. 1st DCA 1983) was based upon distinguishable facts, and was incorrect. The Wilson holding was based upon facts showing that a gun was stolen during the course of a burglary, and the district court reasoned that a theft of a gun committed after entering a structure is insufficient, per se, to establish an armed burglary. Supra at 109. The First District Court then went on to expand this theory of law to the mandatory minimum statute. Respondent respectfully submits that to the extent the Wilson language conflicts with the instant case and with the Bass, Nash, and Watson cases, it should be overruled.

Respondent is aware of the circumstances peculiar to this case and the lack of any prior offenses committed by Petitioner (R. 200). Respondent must point out, however, that the legislative intent is clear in both §'s 790.001(6) and 775.087(2), Fla. Stat. (1983) and that Chapter 940, Fla. Stat. (1983) places the power of clemency exclusively in the Chief Executive. See, Sullivan v. Askew, 348 So.2d 312, 314 (Fla. 1977). Where, as here, there was sufficient evidence to uphold the conviction and no error occurred in jury instructions, an appellate court is powerless to reverse the judgment or sentence. Laird v. State, 394 So.2d 1121, 1122 (Fla. 5th DCA 1981).

Thus, despite the reluctance of the trial judge to impose the sentence, and the district court to uphold it, the judgment and sentence at bar should be affirmed.

POINT II

THE TRIAL COURT COMMITTED NO ERROR IN RECESSING FOR LUNCH BEFORE COMPLETING JURY INSTRUCTIONS.

After completing jury instructions regarding the elements of the crime charged (R. 130-132), lesser included crimes (R. 132-134), the presumption of innocence (R. 135-136), credibility of witnesses (R. 137), and other matters, the trial judge recessed for lunch (R. 142-143). No objection to this recess was made by Petitioner. Respondent therefore submits this issue has not been properly preserved for appeal. Castor v. State, 365 So.2d 701, 704 (Fla. 1978).

After returning from lunch, the jury was instructed as to the procedure for selecting a foreperson (R. 144), and then the jury was retired from the courtroom to consider the verdict (R. 145). Respondent submits that, under these circumstances, no prejudicial error could possibly have occurred. See, Kennedy v. State, 455 So.2d 351, 354 (Fla. 1984); Palmes v. State, 397 So.2d 648, 653 (Fla. 1981). Therefore the trial court's judgment and sentence should be affirmed.

POINT III

THE TRIAL COURT CORRECTLY SUSTAINED THE STATE'S OBJECTION TO PETITIONER'S ARGUMENT CONCERNING THE MANDATORY MINIMUM PENALTY REQUIRED UPON CONVICTION AS CHARGED IN THIS CASE.

Petitioner correctly states that the trial judge did instruct the jury regarding the penalties. (R. 139-140). In addition, however, the trial judge, in sustaining the prosecutor's objection to the improper pressure defense counsel attempted to exert on the jury, instructed:

> THE COURT: Ladies and gentlemen of the jury, the ultimate penalty to be imposed rests solely with the Court. You will be informed at an appropriate time during the course of my instructions that in the event that the accused is found guilty as charged she would be facing a minimum period of incarceration of three years, and a maximum period of incarceration of five years in The Department of Corrections.
>
> You will be further instructed that the nature of the penalty, if any, to be imposed by the Court is solely the province of the Court and is not to be considered by you in deliberating on the evidence.
>
> (R. 115).

Respondent submits that the trial judge correctly stated applicable law in force at the time of trial, and Respondent further submits no cases are cited by Petitioner to the contrary, e.g., Welty v. State, 402 So.2d 1159 (Fla. 1981); cf., McCambell v. State, 421 So.2d 1072, 1074 (Fla. 1982).

CONCLUSION

Based upon the foregoing reasons and citations of authority, Respondent respectfully submits that the judgment and sentence of the lower court should be affirmed, and that the certified questions of the Fourth District Court of Appeal be answered in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief on the Merits has been furnished this 20th day of January, 1986, by courier, to: TATJANA OSTAPOFF, Assistant Public Defender, 224 Datura Street, Harvey Building - 13th Floor, West Palm Beach, Florida 33401.

Lee Rosenthal

Of Counsel