IN THE SUPREME COURT OF FLORIDA

ROSE BENTLEY, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. 68,014

PETITIONER'S INITIAL BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

TATJANA OSTAPOFF
Assistant Public Defender

Counsel for Petitioner

TABLE OF CONTENTS

AUTHORITIES CITED

OTHER AUTHORITIES CITED

OTHER AUTHORITIES CITED (continued) PAGE

PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Seventeenth Judicial Circuit, In and For Broward County,Florida and the Mrs. Bentley in the District Court of Appeal, Fourth District. Respondent was the prosecution and Appellee in the lower courts. In the brief, the parties will be referred to by name.

The symbol "R" will denote record on appeal.

STATEMENT OF THE CASE AND FACTS

According to the State's witnesses, Mrs. Bentley, a 45-year-old woman with no prior criminal record (R 165), brought her car in for repair at Sammy White's (a/k/a "Yogi") auto repair shop on February 22, 1983 (R 24). White told Mrs. Bentley he could fix the car for $5, and he did the necessary work while she waited (R 24). When Mrs. Bentley drove the car around the block to check the repair, her radiator hose fell off (R 26, 57). White got a workman to install a second hose and agreed to charge Mrs. Bentley $20 total (R 27, 57).

At this point, difficulties developed. Accordingly to White, Mrs. Bentley then refused to pay (R 27), but kept changing her mind, until White told the workman to take the hose off the car (R 28, 58, 76). Apparently, Mrs. Bentley wanted a receipt, but White would only give her one if she also paid sales tax, which she did not want to do (R 38). When Mrs. Bentley refused to let the workman take the radiator hose from her car, White proceeded to do so (R 28). White said Mrs. Bentley told him, "If you touch my car again I'll kill you" (R 29), as she reached into her purse and got a gun. White immediately grabbed the gun (R 29, 61, 78, 88), which was not loaded (R 41). White then told Mrs. Bentley to leave, and when she refused to do so, he called the police (R 31, 89), who arrested her (R 20).

Mrs. Bentley was charged with aggravated assault with a firearm as a result of this incident (R 192-193). A jury found her guilty as charged (R 196). She was accordingly adjudged guilty and sentenced to serve a mandatory three-year prison

sentence, (R 201, 202) despite the trial court's reluctance to do so, because of the circumstances of this case. (R 184, 190) and despite the fact that defense counsel was not allowed to argue the mandatory minimum sentence to the jury (R 114-115).

On appeal, the Fourth District Court of Appeal upheld Mrs. Bentley's conviction and sentence, but certified the following two questions to this Court:

> 1. DOES THE DISPLAY OF AN UNLOADED FIREARM, WITHOUT PROOF OF READILY AVAILABLE AMMUNITION, WITH ACCOMPANYING THREATS TO USE THE FIREARM DURING THE COMMISSION OF AN AGGRAVATED ASSAULT, INVOKE THE THREE YEAR MANDATORY SENTENCING PROVISION OF SECTION 775.087(2), FLORIDA STATUTES (1983)?
>
> 2. IS AN UNLOADED FIREARM DESIGNED TO, OR IS IT READILY CONVERTIBLE TO, EXPEL A PROJECTILE ABSENT A SHOWING OF AVAILABLE AMMUNITION?

This Court entered its order accepting jurisdiction in this cause on December 11, 1985.

SUMMARY OF ARGUMENT

POINT I

The State has the burden of proving that a handgun displayed during an assault is operable. Failure to do so, especially when the handgun displayed was not loaded, precludes imposition of the mandatory three-year minimum.

POINT II

Jury instructions must be given as a whole, not in bits and pieces. Although the trial court has been given limited discretion to allow bifurcation of a specific portion of the jury charge, this does not extend to allowing a break in the middle of the instructions, for the sole purpose that an alternate juror may be given lunch at the county's expense before being discharged.

POINT III

Counsel are always permitted, in their arguments to the jury, to apply the law pertinent to the facts as established by proof or permissible inference. In a case involving the mandatory minimum for use of a firearm, counsel must also be allowed to demonstrate to the jury the seriousness of the case and the importance of the jury's resolution thereof.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN IMPOSING THE THREE-YEAR MANDATORY MINIMUM WHERE THE HANDGUN DISPLAYED BY MRS. BENTLEY WAS UNLOADED AND THE STATE NEVER PROVED IT OPERABLE.

Section 775.087(2), Florida Statutes (1983) provides in pertinent part that a person convicted, inter alia, of aggravated assault

> who had in his possession a "firearm" as defined in § 790.001(6) ... shall be sentenced to a minimum term of imprisonment of 3 calendar years....

A firearm is defined in the following terms in Section 790.001(6)

> 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 question presented by the instant cause is whether an unloaded gun which the State never proved was operational meets the definition for a "firearm" such that Mrs. Bentley's possession thereof requires imposition of a mandatory three-year minimum sentence. Although this issue has apparently not been directly addressed in the decisional law of this State prior to the Fourth District Court of Appeal's opinion in the present case, other cases do provide guidance in determining the answer. Initially, it must be observed that the mandatory minimum sentencing statute must be strictly construed in favor of the person against whom the penalty is to be imposed. Palmer v. State, 438 So.2d 1 (Fla. 1983). This Court has determined that, in the absence of express language mandating a contrary result,

the imposition of consecutive mandatory minimum terms for offenses occurring during a single criminal episode is not authorized. Id. Thus, only if there is no other reasonable interpretation of Section 775.087(2) but that which requires imposition of the mandatory minimum for possession of an unloaded, non-operable gun is such a mandatory sentence justified.

Whether the gun involved meets the definition of a firearm is a matter which the State must prove beyond a reasonable doubt. In Morales v. State, 431 So.2d 648 (Fla. 3d DCA 1983), the State never established that the starter gun in question could be readily converted to fire a projectile. The district court of appeal held that absent such proof, the mandatory minimum could not be imposed. In the present case, the State never proved the gun was operable. The State consequently did not make he preliminary showing necessary to justify imposition of the mandatory minimum in this case.

Moreover, even if it may be presumed - as it may not - that the gun carried by Mrs. Bentley was capable of being fired, the State's own case proved that the gun was unloaded. In similar circumstances, the First District Court of Appeal held that the mandatory minimum could not be utilized. Wilson v. State, 438 So.2d 108, 109 (Fla. 1st DCA 1983), where the Court held:

> The facts described to the trial court at the hearing in this case show only that appellant stole the gun during the burglary and that the gun was later found in appellant's home during a search. The state failed to indicate that any facts existed, such as whether the gun was loaded at the time of the burglary or whether appellant possessed both the gun and ammunition during the burglary, which were similar to the circumstances held

> sufficient to sustain imposition of the three-year minimum mandatory minimum sentence in Mills v. State, 400 So.2d 516 (Fla. 5th DCA 1981), Fowler v. State, 375 So.2d 879 (Fla. 2d DCA 1979), and State v. Dopson, 323 So.2d 644 (Fla. 4th DCA 1976). Accordingly, this case is governed by our decision in Sanders [v. State, 352 So.2d 1187 (Fla. 1st DCA 1977)], and Williams [v. State, 378 So.2d 1258 (Fla. 1st DCA 1979) quashed on other grounds, 395 So.2d 520 (Fla. 1981)].

Thus, Wilson declined to uphold imposition of the mandatory three year minimum sentence where the gun in question is unloaded and the defendant did not have any ammunition in his possession.

This holding is consistent with the emphasis placed on limiting application of Section 775.087 to only those situations expressly mandated by the statute. Palmer v. State, supra; see also, State v. Overfelt, 457 So.2d 1385 (Fla. 1984) [absent specific jury finding that defendant used a firearm, trial court could not impose mandatory minimum sentence]; State v. Perez, 449 So.2d 818 (Fla. 1984) [mandatory minimum applies only to felonies, not misdemeanors]. This analysis also avoids the draconian operation of a mandatory minimum sentence in circumstances accurately described as "poignant" by the Fourth District Court of Appeal in the present case. The facts which led to the instant prosecution are tellingly summarized by Judge Letts in his opinion as follows:

> An irate defendant, found guilty of aggravated assault with a firearm, refused to pay for defective repairs to her car. During the argument over payment, she became infuriated when the mechanic retaliated by commencing to render her car inoperable, so she produced a handgun and threatened to kill him if he refused to cease and desist. The gun was not loaded and after the mechanic easily disarmed her the police were called.

> This cause deserves an opinion because of the poignant circumstances. The gun contained no bullets and the female defendant was obviously incapable of carrying out her threat. Nonetheless by reacting as she did, she ran afoul of yet another statute which mandates her incarceration for three years in the state penitentiary - a sentence much more savage than that received by many a hardened, violent criminal under the guidelines. A reading of the sentencing proceeding leaves no doubt the trial judge was unhappy to have to sentence this woman, with three dependent children, and no prior criminal record, to three years in prison. However, as he remarked: "I have no choice under the law." Bentley v. State, 10 F.L.W. 2477 (Fla. 4th DCA November 6, 1985).

In fact, the trial judge below did not have a choice: in the absence of the proof requisite to imposition of the three year mandatory minimum, it was error for him to impose such a sentence. This error may now be corrected by this Court, which should approve the rationale of Wilson v. State, supra, and apply it to the present case. Both certified questions should consequently be answered in the negative.

POINT II

THE TRIAL COURT ERRED IN BIFURCATING THE JURY INSTRUCTIONS.

In the middle of its charge to the jury, the trial court broke for lunch (R 142), for the sole reason that the judge wanted the alternate juror to be able to eat lunch at the county's expense prior to being discharged (R 143). After lunch, the instructions proceeded to their conclusion. This was error. R.Crim.P. 3.390 and Section 918.10, Florida Statutes, both provide that the jury shall be charged on the law at the conclusion of the case. Only recently has any bifurcation of the charge been approved, and that only in limited circumstances. Matter of Use by Trial Courts of Standard Jury Instructions, 431 So.2d 594, 596 (Fla. 1981):

> We approve the recommendation of the committee that the trial judge be authorized in his discretion to bifurcate his charge to the jury by giving a portion of the general instructions prior to the taking of evidence, with the remaining instructions being given at the close of the evidence and after argument of counsel. The following instructions may be given prior to the taking of evidence: 2.02 and 2.02(a), 2.03, 2.04 [but not the instructions in 2.04(a) through (e)], 2.05 and 2.07. When bifurcating the instructions, the trial judge should repeat instructions 2.02, 2.02(a), 2.03 and 2.04 after argument of counsel. Although bifurcation is left to the judge's discretion, we believe, as did the committee, that giving the above-numbered instructions at the beginning of the case will provide the jury with a better understanding of their responsibilities and duties. We therefore encourage the use of this jury instruction technique.

No provision was made for bifurcating the instruction to before and after a lunch break, for a purpose which, while perhaps considerate, is hardly inspired by concerns relating to either party's right to a fair hearing. To the contrary, the giving of the jury instructions is designed to present a unitary, "whole picture of a particular subject." See, Jackson v. State, 317 So.2d 454, 455 (Fla. 4th DCA 1975). As such, the general practice in this State has been, so far from breaking during the middle of the charge, to require all those in the courtroom at the time the instructions are commenced to remain there, so that the jurors will not be distracted by the movement of spectators in and out of the courtroom. By taking a recess in the middle of the charge to the jury, the trial court broke the critical flow of the instructions, unduly emphasized those given after the break, and fatally prejudiced Mrs. Bentley's right to a fair trial. Mrs. Bentley's conviction must consequently be reversed.

POINT III

THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION TO MRS. BENTLEY'S ARGUMENT CONCERNING THE MANDATORY MINIMUM PENALTY REQUIRED UPON CONVICTION AS CHARGED IN THIS CASE.

It is true that R.Crim.P. 3.390(a) has been amended to provide:

> The presiding judge shall charge the jury only upon the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge shall not instruct the jury on the sentence which may be imposed for the offense for which the accused is then on trial.

However, this amended instruction only became effective for trials conducted after January 1, 1985. The Florida Bar Re: Amendments To Rules - Criminal Procedure 362 So.2d 386 (Fla. 1984). Prior to that time, R.Crim.P.3.390(a) required instruction on the maximum and minimum penalties at the request of either the State or the defendant.

The instant case was, of course, tried in June, 1983, more than a year before the Supreme Court announced the change in the rule. And, the trial court did instruct on penalties, including the mandatory three year minimum, as it was required to do by notice of the Supreme Court's decision in Tascano v. State, 393 So.2d 540 (Fla. 1980) (R 139-140). But, when defense counsel, in apprising the jury of the seriousness of the instant cause, sought to explain the mandatory nature of the three-year minimum term to the jury (R 114), the State objected, and its objection to that portion of counsel's closing argument was sustained (R 115). This was error.

Although counsel may not instruct the jury on the law during closing argument, counsel may certainly apply the law to the facts of the case before the jury, thus impressing upon it the legal ramifications of its factual determinations. [cf., McCampbell v. State, 426 So.2d 1072 (Fla. 1982) and Welty v. State, 402 So.2d 1159 (Fla. 1981) [error in failing to instruct on penalties cured by defense attorney's remarks informing jury of maximum and minimum sentences.] A jury is never required to convict, even in the face of overwhelming evidence of guilt. Indeed, the power of the jury to pardon is the quintescence of its function. The power of the jury to brook the power of the judiciary ("judicial despotism" they called it) constituted its major attraction for the founding fathers. The Federalist, No. 83, at 499 (Signet ed. 1961) (A. Hamilton). This precious safeguard against "arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary conviction," id., is of especial importance where the legislature has set a mandatory punishment which the trial judge has no power to decrease, a fact which the standard jury instructions-obfuscate.[1] Moreover, it can never be wrong for defense counsel to impress upon the jury the seriousness of the offense for which the accused stands in jeopardy.[2]

---

1 "I will now inform you of the maximum and minimums possible penalties in this case. The penalty is for the Court to decide. You are not responsible for the penalty in any way because of your verdict." (R 139).

2 Thus, even though penalties will not specifically be instructed upon on retrial, the error in restricting defense counsel's argument in this regard may still be corrected on retrial.

Consequently, the trial court erred in sustaining the State's objection to defense counsel's argument. This error was particularly egregious in the instant case, where neither the trial judge (R 184, 190) nor the State (See, R 177) were convinced that the interest of society really demanded imposition of the mandatory three-year minimum on Mrs. Bentley, a 45 year-old who had never previously been in trouble with the law (R 165) and the gun she displayed was, in any event, unloaded. See, Argument Point II, infra. Reversal for a new trial is thus the appropriate cure for the improper limitation of defense counsel's argument.

CONCLUSION

Based upon the foregoing Argument and the authorities cited therein, Mrs. Bentley respectfully requests this Honorable Court to reverse the judgment and sentence of the trial court and remand this cause with such directives as may be deemed appropriate.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

TATJANA OSTAPOFF
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to LEE ROSENTHAL, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 30th day of December, 1985.