IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Appellant, v. WILLIE POTTS, JR., Appellee.	)	CASE NO. 71,765

INITIAL BRIEF OF APPELLANT

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida 32399-1050

LEE ROSENTHAL
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
Telephone (305) 837-5062

Counsel for Appellant

TABLE OF CONTENTS

LIST OF CITATIONS

PRELIMINARY STATEMENT

Appellee was the defendant and Appellant was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Appellee was the Appellant before the Fourth District Court of Appeal and the Appellant, State of Florida, was the Appellee before the district court.

In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal except that Appellant may be referred to as the "State" or the "prosecution."

The following symbol will be used:

R Record on Appeal.

STATEMENT OF THE CASE

Appellee was charged with one count of carrying a concealed firearm, one count of possession of a firearm by a convicted felon and one count of possession of a firearm while under indictment in an Information filed in the Fifteenth Judicial Circuit, in and for Palm Beach County (R 238, 239).

Appellee, however, went to trial only on the charge of possession of a firearm while under indictment. After hearing testimony from two state's witnesses and from Appellee, receiving jury instructions, and deliberating, the jury found Appellee guilty as charged (R 182, 257). Appellee was sentenced to fifteen years incarceration on April 9, 1986 (R 265). The sentence was an upward departure from the sentencing guidelines recommendation of two and one-half to three and one-half years (R 261). Appellee's motions for a new trial (R 260, 262), motion for mitigation of sentence, and for rehearing were denied.

Appellee did not raise the issue of the constitutionality of Fla. Stat. §790.07(2), until just before trial (R 27). Upon hearing Appellee's motion to dismiss, the trial judge responded that this issue should have been raised "weeks ago" (R 27). The trial judge then summarily denied Appellee's motion (R 28).

On appeal, the Fourth District Court of Appeal reversed Appellee's conviction, and ordered the trial court to discharge Appellee. The district court concluded that §790.07(2), Fla. Stat. (1985), was unconstitutional insofar as it penalized those under indictment more severely for carrying a concealed weapon than those not under indictment. Potts v. State, 13 F.L.W. 78 (Fla. 4th DCA December 30, 1987). (Appendix).

The State timely filed its notice of appeal on January 13, 1988. The appeal follows.

STATEMENT OF THE FACTS

Boynton Beach Police Officer Marie Lavoie was on duty during the early morning hours of July 8, 1985 when she encountered a green car with a license tag that did not belong to the car (R 36, 37). The car pulled into a convenience store parking lot and stopped. Officer Lavoie followed (R 38). Appellee, who was driving the car, told the officer he did not know the tag was improper. She asked Appellee for a driver's license and registration. Appellee did not have one (R 39). Appellee stated his name. Officer Lavoie ran a name check on the driver's license.

Officer Tortoricci drove up to their location as a backup officer. He asked Appellee to step out of the car, which he did (R 40). Officer Lavoie received information that Appellee's driver's license had been suspended. Appellee, who had gotten back into his car, was asked to step out of his car again. Officer Tortoricci saw a .20 gauge shotgun between the door and the seat (R 43). It was loaded with four shells (R 44).

Officer Lavoie told Appellee to put his hands on the car. She told Appellee he was being placed under arrest for carrying a concealed firearm (R 50). Appellee stated "I keep it for my own protection" (R 51). Officer Lavoie handcuffed Appellee and placed him in the front of her patrol vehicle.

On cross-examination, Officer Lavoie testified that the car did not belong to Appellee. It belonged to Appellee's father (R 56). Appellee did not make any threatening gestures or movements. He did not reach down and try to pick up the weapon (R 57). The gun was not re-

ported stolen (R 66). The gun was not preserved for fingerprint evidence (R 68).

Officer John Tortoricci corroborated the testimony of Officer Lavoie (R 73-79).

Appellee took the witness stand and testified that his brother's girlfriend had asked him to drive her home because Appellee's brother was too drunk to drive. Appellee did not own a car so he took his father's car (R 98). When he got into his father's car, he saw the gun laying there (R 99). Appellee did not think anything about it. He was going to be in the car for only ten minutes anyway (R 100). Appellee corroborated Officer Lavoie's testimony concerning the stop at the convenience store and the initial conversation concerning the license tag (R 101, 102). Appellee claimed he had forgotten about the gun until he was exiting the car. At that point he became nervous and realized he shouldn't be near the gun (R 103). Appellee claimed that the gun did not belong to him. He thought it was his father's gun or his brother's gun (R 104). The gun had been placed in the car because someone had driven by his residence several weeks before and had shot at the house and car (R 105). Appellee maintained that was why the gun was in the car (R 106). Appellee said he did not tell Officer Lavoie he (Appellee) put the gun in his car for his protection. Appellee said he told the officer that the gun was in the car for protection (R 107). Appellee did not know the gun was loaded. Appellee did not touch the gun and did not do anything to attempt to conceal it (R 108).

The trial court aggravated Appellee's sentence for the following reasons:

1. Defendant had a juvenile record involving numerous juvenile dispositions that would have been convictions, had they been committed by adults. Weems v. State, 451 So.2d 1027 (Fla. 2nd DCA 1984).

2. This Court finds that the defendant is an immoral person who should be segregated from society. He testified that he was well aware of the fact that he was a convicted felon and should not have had the gun in his possession. Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984).

3. The defendant was on parole and violated his parole at the time of this offense.

4. The recommended sentence under the guidelines would be inadequate for rehabilitation or deterrence to the defendant and others. Williams v. State, 454 So.2d 751 (Fla. 1st DCA 1984).

(R 273).

POINT ON APPEAL

WHETHER SECTION 790.07(2), FLORIDA STATUTES (1985), VIOLATES SUBSTANTIVE DUE PROCESS?

SUMMARY OF THE ISSUE

Section 790.07(2), Florida Statutes (1985) does not violate substantive due process because the State has chosen a means reasonably related to achieve the intended end of protecting the health and safety of the public. There is a rational basis for concluding that individuals who are under indictment pose a greater risk to society than individuals who are not under indictment. The rights of those under indictment must give way to the legitimate invocation of police power, legislated for the public interest.

ARGUMENT

SECTION 790.07(2), FLORIDA STATUTES (1985), DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS.

The Fourth District Court of Appeal, though agreeing that there is a legitimate interest in protecting the health and safety of the public, nonetheless concluded that punishing someone under indictment more severely for carrying a concealed weapon than other persons, is unconstitutional. The district court reasoned that a person "under indictment" cannot be considered more dangerous than an individual not under indictment, because an individual is presumed innocent until proven guilty. Potts v. State, 13 F.L.W. 78, 79 (Fla. 4th DCA Dec. 30, 1987).

Appellant submits that persons posing a threat to society may justifiably by treated differently under the law than other citizens. See, §907.041, Fla. Stat. (1985); Article I, §14 Florida Constitution; see also, Sirianni v. Coleman, 379 So.2d 176 (Fla. 5th DCA 1980). Appellant further asserts that this difference in treatment in no way affects the presumption of innocence accorded a defendant at trial.

The gist of the district court's holding is that §790.07(2), Fla. Stat. (1985), violates substantive due process because the State has not chosen a means "reasonably related" to achieve the intended end of protecting the health and safety of the public. 13 F.L.W., at 79. Appellant disagrees with this conclusion and maintains that the controverted statute may be reasonably construed as expedient for pro-

tection of public health and safety. Hamilton v. State, 366 So.2d 8, 10 (Fla. 1979).

> Under the police power doctrine, the state may interfere with otherwise protected areas if the interfering regulation bares a 'reasonable relationship to the public safety, health, morals, and general welfare.' Stadnik v. Shell's City, Inc., 140 So.2d 871, 874 (Fla. 1962).

Coca Cola Company, Food Division v. State, Department of Citrus, 406 So.2d 1079, 1084-1085 (Fla. 1981). As long as there is some rational relationship to the end of protecting the public safety, the controverted statute should pass constitutional muster. Id., at 1085; see also, Lasky v. State Farm Insurance Company, 296 So.2d 9, 15-16 (Fla. 1974). All doubt should be resolved in favor of the constitutionality of a statute. State v. Kinner, 398 So.2d 1360, 1363 (Fla. 1981); see also, Griffin v. State, 396 So.2d 152, 155 (Fla. 1981).

This Court has previously noted that:

> The legislature has declared that the objectives of Chapter 790 are 'to promote firearm's safety and to curb and prevent the use of firearms and other weapons in crime ...

Alexander v. State, 477 So.2d 557, 559 (Fla. 1985). The promotion of safety of persons and property has always been at the core of the State's police power. Kelley v. Johnson, 425 U.S. 238, 96 S.Ct 1440, 47 L.Ed.2d 708, 715 (1976). In contrast, the right of an individual to bear arms is not guaranteed by the federal constitution. United States v. Cruikshank, 92 U.S. 588 (1875); Presser v. Illinois, 116 U.S. 252, 265 (1886); Quilici v. Village of Morton Grove, 695 F.2d

261, 269 (7th Cir. 1982); Rinzler v. Carson, 262 So.2d 661, 667 (Fla. 1972).

In Florida, the right to bear arms is still subject to police regulations. Rinzler, supra, at 666. Florida courts have held that the prohibition against carrying a concealed weapon is reasonably related to the purpose of preventing the use of firearms in crimes. Alexander, supra, at 560. Certain types of firearms have been held to be properly prohibited because of the propensity those weapons have for being employed for criminal purposes. Robarge v. State, 432 So.2d 669, 671-672 (Fla. 5th DCA 1983); Rinzler, supra, at 665. This Court also has approved legislation which prohibits convicted felons from possessing pistols. Id. One might argue that this type of legislation violates the Double Jeopardy Clause and that convicted felons should have the same right to bear arms as anyone else, once they have served their time. Appellant submits that the same rational basis supporting §790.23, exists in support of §790.07(2). It is not arbitrary to assume that persons under indictment pose a more serious threat to society than those not under indictment.

Although the Fourth District Court of Appeal has held that an indictment is no more than an accusation, Fratello v. State, 496 So.2d 903, 911 (Fla. 4th DCA 1986), the fact is an indictment must be returned with the concurrence of at least twelve grand jurors. §905.23, Fla. Stat. (1985). An indictment must state a prima facie case, Goff v. State, 60 Fla. 13, 53 S. 327, 328 (1910), and the legal presumption is that the official acts of grand juries in finding and

presenting indictments are legally done. English v. State, 31 Fla. 356, 12 S. 689, 694 (1893). Perhaps because grand juries are investigative bodies, Kelley v. Sturgis, 453 So.2d 1179, 1182 (Fla. 5th DCA 1984), indictments have been noted to have an evidentiary character. Josey v. State, 336 So.2d 119, 120 (Fla. 1st DCA 1976); Smith v. State, 48 Fla. 307, 37 So. 573 (1904).

The United States Supreme Court has noted that:

> A grand jury performs two basic functions: (1) The determination of whether there is probable cause to believe a crime has been committed and (2) the protection of citizens against unfounded criminal prosecutions.

Branzburg v. Hayes, 408 U.S. 665, 686-687, 92 S.Ct 2646, 2659, 33 L.Ed. 2d 626 (1972); see also, United States v. Di Bernardo, 775 F.2d 1470, 1476 (11th Cir. 1985). In Florida, persons accused of capital crimes must be indicted, Art. I, §15 Florida Constitution, and undersigned counsel has observed that most all persons under indictment have either been accused of capital crimes or of participating in organized crime.

Appellant, therefore, submits that there is a rational basis for the controverted statute, and certainly the statute has a legitimate objective. Appellant does not question the right of an accused to be presumed innocent. The statute in question does not diminish this right one iota, at trial, and Appellant asserts that even though §790.07(2) may run counter to the interests of those under indictment, their rights must give way to the legitimate invocation of police power, legislated for the public interest. See, City Commission of Fort Pierce v. State, 143 So.2d 879, 888 (Fla. 2nd DCA 1962).

Therefore, the decison of the Fourth District Court of Appeal should be reversed and the trial court's judgment and sentence should be affirmed.

CONCLUSION

Based on the foregoing argument and authorities cited, the decision of the Fourth District Court of Appeal should be reversed and the trial court's judgment and sentence should be affirmed.

Respectfully submitted,

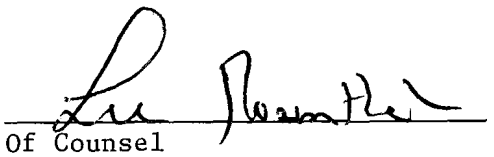
ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida 32399-1050

LEE ROSENTHAL
Assistant Attorney General
111 Georgia Avenue - Suite 204
West Palm Beach, Florida 33401
Telephone (305) 837-5062

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been furnished, by courier delivery, to ELLEN MORRIS, ESQUIRE, attorney for Appellee, The Governmental Center, 301 North Olive Avenue, West Palm Beach, Florida 33401, on this 10th day of March, 1988.



Of Counsel