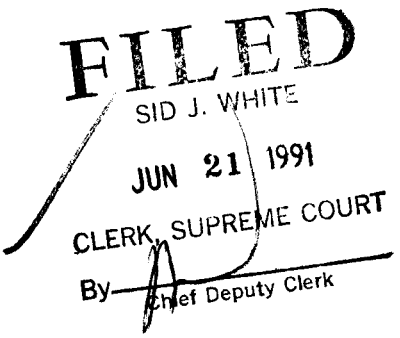
IN THE SUPREME COURT OF FLORIDA

CASE NO: 77,859



THE STATE OF FLORIDA,

Petitioner,

vs.

ANIBAL RODRIGUEZ,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL THIRD DISTRICT OF FLORIDA

RESPONDENT'S ANSWER BRIEF

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INTRODUCTION

The District Court of Appeal - Third District has certified the following question as one of great public importance:

> Does the enhancement provision of subsection 775.087(1), Florida Statutes (1983), extended to persons who do not actually possess the weapon but who commit an overt act in furtherance of its use by a co-perpetrator?

This court has accepted jurisdiction to answer this question.

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STATEMENT OF THE ISSUES

I. WHETHER CONSTRUCTIVE USE OF A WEAPON SUBJECTS A DEFENDANT TO THE ENHANCEMENT PROVISIONS OF F.S. 775.087(1).

II. WHETHER THE FAILURE TO SUBMIT THE ISSUE OF ANIBAL RODRIGUEZ'S USE OF A RIFLE FOR DETERMINATION BY THE JURY PRECLUDES ENHANCEMENT UNDER F.S. 775.087(1).

III. WHETHER CONSTRUCTIVE POSSESSION OF A WEAPON SUBJECTS A DEFENDANT TO THE ENHANCEMENT PROVISIONS OF F.S. 775.087(1).

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STATEMENT OF THE CASE AND FACTS

Respondent Anibal Rodriguez agrees with Petitioner's statement of the case and facts with the following additions and modifications. Petitioner alleges that the passenger reached "between" the passenger's and driver's seat and pulled out a semi-automatic AR-15 rifle. (Petitioner's initial brief at 2). Respondent believes the evidence clearly shows that the passenger reached underneath the seat to retrieve the rifle. (TT. 730, 750, 766, App. D).[1] At no time did Anibal Rodriguez ever touch, handle, use, display, carry, shoot or threaten to use the rifle. (TT. 752, 756, 772, 783, App. E).

The Petitioner alleges that Anibal Rodriguez was charged with "unlawful possession of a firearm while engaged in a criminal offense". Respondent asserts that he was never so charged. (TR. 1-3, Appendix C). Count I charges the Respondent and co-defendant Jose Nodal with attempted murder of officer Steven Rossbach. Count II charges the Respondent and Jose Nodal with attempted murder of Officer Kenneth Nelson. Count III charges only Jose Nodal with unlawful display of a firearm.

[1] Respondent will use the same abbreviations used by Petitioner. References to the Appendix refer to the Appendix filed with Respondent's brief as required by Fla.R.App.P. 9.220.

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SUMMARY OF ARGUMENT

Florida Statute 775.087(1) requires a court to reclassify the degree of severity of a crime upward if "during the commission of [a] felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm...". In this instance, the State's best case is that Anibal Rodriguez drove a car and while attempting to avoid capture the passenger fired a rifle at two pursuing police officers. Anibal Rodriguez was convicted of two counts of attempted first degree murder. Anibal Rodriguez never carried, used, displayed, attempted to use or threatened to use the rifle at any time. The State now seeks to enhance Mr. Rodriguez's crime under the provisions of F.S. 775.087(1) because he either "constructively used" or "constructively possessed" the rifle as a consequence of the passenger's acts in retrieving and firing the rifle.

All cases previously construing this provision of Florida law have held that actual personal possession or actual physical use of a weapon is required before enhancement is permitted. Under the doctrine of lenity, penal statutes are strictly construed. Because "use" is not defined in F.S. 775.087, its ordinary definition applies. "Use" does not mean, as the State suggests, committing an "overt act in support of [anothers] use of [a] gun".[2] This court has rejected an identical argument in construing F.S. 775.087(2).

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[2] State's initial brief at 5.

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In Earnest v. State, 351 So.2d 957 (Fla. 1977) a defendant was sentenced for actively aiding another who possessed a gun during a robbery. The State argued that for purposes of imposition of the three year mandatory term, possession included "vicarious possession". This court ruled that because actual possession was required vicarious possession was not clearly delineated as a basis for the three year mandatory term.

The identical rules apply in construing the enhancement provisions; the State's expanded definition of "use" to include "constructive use" should be rejected.

For the same reasons the State's "constructive possession" argument is also invalid. At all times material to the charged crime (attempted murder) Anibal Rodriguez was driving a car. He never reached for the rifle used by the passenger who did the shooting, he never touched the passenger's rifle, and he most assuredly never fired the weapon. At all times during the commission of the crime the rifle was in the exclusive actual possession of the passenger. Nor was the rifle ever "readily available" to Mr. Rodriguez. Until it was retrieved by the passenger, the rifle was underneath the driver's and passenger's seat. Mr. Rodriguez never made any effort to obtain or use the rifle.

The trial and appellate courts were correct in ruling that Anibal Rodriguez's crime was improperly enhanced under the provisions of F.S. 775.087(1).

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ARGUMENT

I. CONSTRUCTIVE USE OF A WEAPON DOES NOT SUBJECT A DEFENDANT TO THE ENHANCEMENT PROVISIONS OF F.S. 775.087(1).

The State's legal analysis is flawed. It argues that the Third District Court of Appeal misunderstood the scope of F.S. 775.087's enhancement provisions. The State first argues that actual possession is not required for enhancement under F.S. 775.087(1)[3] because the word "possession" is not used in the statute. However, the State fails to note that "carrying", "displaying", "using" or "attempting to use" a firearm (the terms expressly used in the statute) are all possessory terms. There is no definitional difference between the phrase "possesses a firearm during the commission of a felony", and listing the possessory acts of "use", "display" or "carrying" to define the acts of possession. To the contrary, the listing of specific possessory acts imports a narrower, rather than a broader, scope to the statute. S.R.G. Corp. v. Department of Revenue, (Fla.1977).

The concept of vicarious possession, especially in narcotics crimes, is well established. However "vicarious carrying", "vicarious use" or "vicarious display" are not well defined concepts. Thus, the enumerating of specific possessory acts as a predicate to enhancement under F.S. 775.087(1) implies a specific requirement of actual possession. In the context of statutory

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[3] "Unless otherwise provided by law, whenever a person is charged with a felony, expect a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:..."

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construction the express mention of one thing requires the exclusion of things not mentioned. Thayer v. State, 335 So.2d 815 (Fla. 1976). Use of the more general term of "possession" would have suggested, as it did in Earnest v. State, 351 So.2d 957 (FLA. 1977) that vicarious use was a proper basis for enhancement.

In enacting the laws of the state the Legislature is presumed to know the existing law, and unless otherwise defined words are given their ordinary meaning. Southeastern Fisheries Association, Inc. v. Department of Natural Resources, 453 So.2d 1351 (Fla. 1984). When F.S. 775.087 was enacted, Florida already had a vicarious liability statute.[4] Therefore, if the Legislature intended to enhance the culpability of an unarmed defendant for the acts of an armed co-defendant, the Legislature could have clearly indicated its intention by expressly providing that the provisions of F.S. 775.087 apply to unarmed co-defendants. However, the statute does not expressly do so. It therefore cannot be so construed or applied, especially in the context of a penal statute which is to be construed most liberally in favor of lenity. State v. Jackson, 526 So.2d 58 (Fla. 1988); F.S. 775.021(1).

The State next suggests that the Third District Court of Appeal was remiss in blindly following precedent which lacked analytical rigor. This argument overlooks the fact that more than

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[4] Florida Statute 775.087 was first enacted in 1974. Liability for aiding and abetting a felony has been a part of Florida law since 1868. See, Laws of Florida 1868 S. 1,637 Ch. 11 §3, §4.

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one case has construed F.S. 775.087(1) as requiring actual possession before enhancement is appropriate.

The seminal case is Earnest v. State, 351 So.2d 957 (Fla. 1977). In Earnest a defendant was convicted of armed robbery. She was sentenced to an additional three year sentence pursuant to F.S. 775.087(2) because her accomplice was armed during the robbery. Both the trial court and the First District Court of Appeal found that enhancement was appropriate under a theory of vicarious possession with respect to an aider and abettor. This court rejected that argument under the doctrine of lenity. Because the statute used the phrase "in his possession" as a pre-requisite to enhancement this court ruled that vicarious possession was not clearly contemplated as a basis for imposing a three year minimum jail sentence to an unarmed co-defendant. This court ruled that actual possession was required.

The Third District Court of Appeal in Postell v. State, 383 So.2d 1162 (Fla. 3rd DCA 1980) ruled that the same analysis applied to F.S. 775.087(1) and that actual possession of a weapon was required before a sentence could be enhanced. The court reasoned, albeit in a footnote, that there was no definitional distinction between a requirement that a defendant "possess" a weapon and that a defendant "carry, display, use, threaten or attempt to use the weapon or firearm". Id. at 1162 n. 7.

Every case that has construed F.S. 775.087(1) since then has required actual physical possession. In fact, in one case the State confessed error when a defendant was given an enhanced

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sentence pursuant to F.S.775.087(1) but did not actually carry a weapon during the commission of a felony. Williams v. State, 531 So.2d 1033 (Fla. 3rd DCA 1988). See also, Ngai v. State, 556 So.2d 1130 (Fla. 3rd DCA 1990) ("mastermind" of a robbery/murder could not have his sentence enhanced since he did not possess a weapon during the commission of the felony); Willingham v. State, 541 So.2d 1240 (Fla. 2nd DCA) (a defendant who comes into possession of a weapon after the completion of the original felony is not subject to enhancement under F.S. 775.087(1)); Johnson v. State, 560 So.2d 1379 (Fla. 5th DCA 1990); and Spellman v. State, 529 So.2d 305 (Fla. 1st DCA) review denied 536 So.2d 245 (1988).

Even the case most heavily relied on by the state, Menendez v. State, 521 So.2d 210 (Fla. 1st DCA 1988) is a personal possession case. Any suggestion to the contrary is a misreading of the case. In Menendez the defendant was convicted of trafficking in cocaine. The hotel room in which he was arrested contained a pistol under a mattress with his fingerprint on it. The defendant was subject to the enhancement provisions of F.S. 775.087(1) because, the court reasoned, trafficking is an ongoing endeavor. Since the defendant's fingerprint was on the gun it could be concluded that he personally possessed the gun at some point in time while trafficking in cocaine.[5] Thus, even Menendez

[5] "In the instant case competent, substantial evidence supports the trial court's finding that appellant carried or used a firearm in the course of trafficking in cocaine." Menendez at 212.

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stands for the proposition that actual personal possession is a necessary element under F.S. 775.087(1).

The facts of this case are consistent and unambiguous. While attempting to evade capture the passenger, in a car driven by Anibal Rodriguez reached under the car seat, produced a rifle, held it between his legs, then aimed the gun at pursuing police officers and fired. (TT. 750, 751). Defendant did nothing with respect to the carrying, use, display or attempted use of the weapon at any time from the moment the gun was first retrieved until it was fired. Giving the State the benefit of the doubt that the "premeditation to shoot" was formed before the passenger retrieved the rifle, this Defendant still does not fall within the definition of F.S. 775.087(1). There is no evidence that Anibal Rodriguez maneuvered the car into a firing position before shots were fired.[6] (TT. 692, 693). Even if he did, that still does not qualify as personal use of a weapon as required by the statute.

The State's next effort to create a "constructive use" of the gun focuses on two car theft cases, G.C. v. State, 560 So.2d 1186 (Fla. 3rd DCA 1990) affirmed 572 So.2d 1380 (Fla. 1991) and G.D. v. State, 557 So.2d 123 (Fla. 3rd DCA 1990). The State relies on these cases for the proposition that "use" may occur indirectly when a co-defendant rides as a passenger in a stolen car.

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[6] Such maneuvering, if it occurred, happened after the first series of shots were fired. (TT. 695, 755, 780).

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Neither of those cases supports the State's position in this case. The State, first and most importantly overlooks the fact that insofar as theft is concerned "use" is statutorily defined. See, F.S. 812.012(2). Thus, in construing that statute the legislative definition is operative. Under the legislative definition of use, riding as a passenger in a stolen car without the owner's permission constitutes "use". That definition does not carry over to the statute at issue here, F.S. 775.087, which does not define any of its terms.

Next, G.D. v. State, 557 So.2d 123 (Fla. 3rd DCA 1990) merely holds that an aider and abettor can be punished as a principal. In G.D. the defendant, although not a party to the original theft, helped hide a stolen car after taking a joy ride in it. He was therefore properly convicted of auto theft. G.D. has nothing to do with "use" or its definition and more importantly it has nothing to do with F.S. 775.087(1). Similarly, State v. G.C., 572 So.2d 1380 (Fla. 1991) has no bearing on this case. G.C. dealt with auto theft and the statutory definition of use. Interestingly, the case held that while one may "use" a stolen car by being a passenger in it, one may not be convicted of theft without proof that the passenger formed the necessary specific intent to "take" the car. Thus, in G.C. the adjudication of delinquency was revered because statutory "use" was not a sufficient basis to also prove intent.

The State next argues that unarmed co-defendants can be convicted of the same degree of criminality as an armed co-defendant. Thus, unarmed accomplices can be guilty of armed

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robbery if a co-defendant is armed. The State cites two cases for this proposition. However, the State's reliance on Jenkins v. State, 448 So.2d 1060 (Fla. 4th DCA 1989) and Hillman v. State, 410 So.2d 180 (Fla. 2nd DCA 1982) is again off base. With respect to robbery, both Jenkins and Hillman held that all co-defendants could be convicted of armed robbery even if only one of the defendants was armed. However, both cases held that the enhancement provisions of F.S. 775.087(2) could not be applied to the unarmed robbers and their sentences thereunder were vacated. The permissible conviction of an aider and abettor to the highest degree of crime committed by a co-defendant is well established. An unarmed criminal assumes all liabilities for the most serious crimes committed by any cohort. In fact, Anibal Rodriguez was convicted of attempted murder on the same theory by virtue of the actions of the passenger. But, as expressly held in both Jenkins and Hillman, the fact that an armed felon may subject himself to separate enhanced statutory penalties for particular acts does not mean such enhancements apply vicariously to unarmed cohorts. Anibal Rodriguez's lack of personal possession or use of the rifle during the course of the commission of the attempted murder

prohibits the enhancement of his sentence pursuant to F.S.775.087(1).[7]

[7] The State gratuitously argues that Anibal also possessed a .25 caliber hand gun. It is unclear whether the State is suggesting that this weapon can be used as a basis to enhance Mr. Rodriguez's crime under F.S. 775.087(1). If it is, then the argument is made in bad faith. That weapon was not charged in the information, was not part of the jury instructions, and was not a basis of his conviction. As such, it has no place in this appeal. As will be argued in the following section, in order to enhance a penalty under F.S. 775.087(1) the weapon used must be charged and the use of the weapon must be specifically found by a jury. See State v. McKinnon, 540 So.2d 111 (Fla. 1989).

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II. THE FAILURE TO SUBMIT THE ISSUE OF ANIBAL RODRIGUEZ'S USE OF A RIFLE FOR DETERMINATION BY THE JURY PRECLUDES ENHANCEMENT UNDER F.S. 775.087(1).

The State's argument fails for another reason. The case law is clear that the enhancement provisions of F.S. 775.087(1) cannot be applied unless a jury has specifically found that the defendant used or possessed a weapon during the commission of a felony. A case on point is Lopez v. State, 470 So.2d 58 (Fla. 3rd DCA 1985). In that case defendant Lopez was convicted of attempted murder and robbery with a firearm. During the attempted robbery a cohort of Lopez's shot and wounded a store owner. The information specifically charged defendant Lopez and his co-defendants with attempted murder by use of a pistol. The jury returned a verdict of guilty as to Count I (Attempted First Degree Murder without weapon) but that verdict did not include a specific finding that Lopez committed the offense with a firearm. The appellate court reversed the enhanced conviction of Mr. Lopez of attempted first degree murder with a firearm. See also State v. Overstreet, 457 So.2d 1385 (Fla. 1984) (holding that the question of whether an accused actually possessed a weapon is a question which must actually be decided by a jury).

Although the jury verdict in this case found Mr. Rodriguez guilty as charged in Count I, there is no specific finding that he used a firearm. In fact, the specific language of the verdict is, "Anibal Rodriguez, as charged in Count I of the information (Attempted First Degree Murder). Guilty." (App. F). The information actually charges Mr. Rodriguez with Attempted First

Degree Murder by shooting a rife. (App. C). However, the issue of Anibal Rodriguez's use of a gun is not carried over into the verdict. Furthermore, the jury instructions delivered by the court nowhere indicated that the use of a firearm was an element of the crime charged.[8] (App. G.). In fact, the word rifle, or weapon is not used at all in any part of the jury instructions. See also, Lamarca v. State, 515 So.2d 309 (Fla. 3rd DCA 1987) (wherein the court of appeal reversed a trial court's determination reclassifying a kidnapping offense from a first degree felony to a life felony in the absence of a specific jury finding that the defendant used a weapon during the kidnapping), and Douglas v. State, 523 So.2d 704 (Fla. 2nd DCA 1988).

The failure of the trial court to instruct the jury that use of a weapon was an essential element of the crime charged, and the jury's further failure to specifically find by interrogatory or otherwise that the defendant used a firearm in the commission of the charged crime, precludes enhancement under F.S. 775.087(a)(1). In fact, the State concedes that Mr. Rodriguez was guilty of attempted murder as an accomplice, not as the personal user of the weapon.[9] At trial the State never argued that Mr. Rodriguez ever used the weapon, or that he even possessed the rifle.

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[8] The verdict form finds Mr. Rodriguez guilty of "attempted first degree murder", not of "attempted first degree murder with a weapon". See Davis v. State, 486 So.2d 45 (Fla. 5th DCA 1986) wherein a verdict form found Davis guilty of attempted second degree murder with a firearm rather than the alternative, guilty of attempted second degree murder without a firearm. Because of this specific finding, enhancement pursuant to F.S. 775.87(1) was appropriate. See also, Denmark v. State, 544 So.2d 266 (Fla. 1st DCA 1989).

[9] See TT. p. 644-645 attached as App. H.

The failure to submit this issue for resolution by the jury is a fundamental error and bars the State from bootstrapping the verdict to the information. Williams v. State, 400 So.2d 52 (Fla. 3rd DCA 1981). Williams stands for the proposition that the failure to instruct a jury of an essential element is fundamental error if the omitted element is "pertinent or material to what must actually be considered by jury in order to convict." Id. at 543. The case further holds that the element must have been in dispute before it's omission from the jury charge can be deemed fundamental error. See also, Thomas v. State, 526 So.2d 183 (Fla. 3rd DCA 1988), and Douglas v. State, 523 So.2d 704 (Fla. 2nd DCA 1988) (enhancement pursuant to F.S. 775.087(1) was vacated because issue of whether defendant had used a firearm was never submitted to the jury).

In this case the entire defense presented by Mr. Rodriguez rested on the fact that he never possessed or fired the weapon. The defense rested on the premise that the shooting was accomplished by a co-defendant over whom Mr. Rodriguez had no control. (TT. p. 1288, 1290, 1294, 1302, App.I). His use of the weapon, as well as in his acquiescence to the use of the weapon by the co-defendant was the central issue to be decided. The failure to instruct the jury that Mr. Rodriguez's personal use of the weapon was necessary for conviction was an omission of the centrally disputed factual question and is fundamental error, especially where such personal use is a pre-requisite to sentencing under F.S. 775.087(1).

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III. CONSTRUCTIVE POSSESSION OF A WEAPON DOES NOT SUBJECT A DEFENDANT TO THE ENHANCEMENT PROVISIONS OF F.S. 775.087(1).

The State finally urges that even if "constructive use" is inapplicable "constructive possession" is sufficient.

Petitioner's "constructive possession" argument is a jumble of non-sequiturs, misstatements of law and a general hodge-podge of inconsistent ideas seeking a hook on which to justify an unjustifiable position. Two types of possession exist. Actual possession wherein an individual physically and presently holds an object; and constructive possession wherein an individual can control an instrumentality either through his own efforts of dominion and control or through an intermediary. Constructive possession requires proof of dominion and control of the instrumentality and knowledge of its presence. See e.g. Brown v. State, 428 So.2d 250 (Fla. 1983) certiorari denied 103 S.Ct. 3541. Florida Statute 775.087(1) requires actual possession of a weapon before its provisions apply. No case has ever found this statute applicable in an instance of constructive possession.

At page 14 of its brief, the State seemingly agrees with this proposition although the State seeks to extend actual possession to include a weapon that is "readily available". However, "readily available" does not mean constructive possession; it means, as defined in Smith v. State, 438 So.2d 10 (Fla. 2nd DCA 1983) that a weapon is within the immediate grasp of the defendant. In Smith, a defendant in a drug transaction was seen inside a van behind the

driver's seat. When arrested after exiting the van, a pistol was observed in the immediate area vacated by the defendant. The clear inference of this fact was that the gun was in his immediate grasp moments before he exited the van, i.e., that he carried the gun immediately prior to the point of his arrest, if it was not in his grasp at the moment of his arrest, it was instantly available. As so construed "readily available" is a slight enlargement of the scope of actual possession.[10] This is consistent with all prior case law, including Menendez v. State which requires actual possession for enhancement under F.S. 775.087(1)[11]. In vacating Anibal Rodriguez's enhancement conviction under F.S. 775.087(1) the trial court found that Anibal Rodriguez did not carry, use or display the rifle during the attempted murder. Neither was it readily available to him. That finding is uncontroverted in the record. Anibal Rodriguez never had the rifle. Without carrying, displaying, using, threatening to use, or attempting to use the rifle Anibal Rodriguez could not be sentenced pursuant to F.S. 775.087(1). The trial court's finding as affirmed by the appellate court should not be disturbed on appeal.

The State then argues that Mr. Rodriguez could have stopped the car, grabbed the rifle and fired. Yet Anibal Rodriguez did

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[10] Florida Statute 790.001(15) (weapons and firearms) states: "Readily accessible for immediate use" means that a firearm or other weapon is carried on the person or within such close proximity and in such a manner that it can be retrieved and used as easily and quickly as if carried on the person". While this definition is not necessarily binding it sets viable guidelines for when a weapon is readily available.

[11] At page 15 of its brief, the State again urges that Menendez v. State is a "constructive possession" case. It is not. Menendez recognizes that "readily available" is a form of actual possession. However, Menendez's conviction does not depend on the weapon being readily available. It rests on the premise that Menendez personally carried a gun while trafficking in cocaine.

none of those things. The very context of the State's argument, requiring various steps to be taken by Anibal Rodriguez before he could access the rifle prior to its use underscores the fallacy of its argument that the rifle was "readily available". Further, there is no evidence that Anibal Rodriguez attempted any of those acts. He was driving the car during what the State characterizes as a "hot" pursuit. He was running stop lights, driving on curbs and trying to block a police car from pulling alongside. Those actions contradict any inference that Anibal Rodriguez had "readily available" for immediate use a rifle tucked underneath the front seat of the car. The trial court's decision that Anibal Rodriguez could not be sentenced pursuant to F.S. 775.087(1) because he never handled the weapon is the key element in this case as well as the key element of the statute. The State's argument that the trial court never considered constructive possession is erroneous. The trial court rejected constructive possession as a basis for enhancement for two independent grounds. First, binding precedent requires actual possession. Second, the facts do not support a finding of constructive possession with respect to the use of the weapon. See, e.g., L.J. v. State, 553 So.2d 286 (Fla. 3rd DCA 1989).

After making these conclusory observations about constructive possession, the State abandons this line of argument and in the following paragraph makes three distinctly separate arguments for conviction. (See page 16 of the State's initial brief). The State argues that 1) the jury verdict incorporates a finding of use of

the weapon; 2) the trial court disregarded a "evidence" of constructive possession; and 3) the Defendant carried a pistol which could be used as a basis for conviction. Incredibly, these unsupported statements are followed in the next paragraph by a fourth theory for conviction: That the attempted murder began when the premeditation to shoot was formed and that the premeditation was formed before the passenger retrieved the gun. Therefore, since at some point the gun was under the seat after the premeditation to shoot had formed, Anibal Rodriguez "carried, used, displayed, threatened to use or attempted to use the rifle" and is amenable to sentencing pursuant to F.S. 775.087(1).

This buckshot of theories is unsupported either in law or in fact. First, the issue of the verdict incorporating the information and a specific finding that Anibal Rodriguez used a gun has been previously addressed. The issue of Anibal Rodriguez's use of the weapon was never presented to, or deliberated by, the jury. The verdict form contains no finding that he used a weapon. The State's argument on this issue is unsupportable.

Second, there was no evidence of constructive possession. The gun was underneath the seat while Anibal Rodriguez was driving a car. There is no evidence he knew the gun was there before it was retrieved by his co-defendant. There is no evidence that while driving the car he could have reached the rifle, that he attempted to reach the rifle, or that if the passenger was not there he would have tried to reach the rifle. This argument is unsupported.

Third, the pistol was not charged in the information, deliberated by the jury or found by the jury to have been used by Anibal Rodriguez. This theory cannot be the basis of a conviction under F.S. 775.087(1).

With respect to the "continuing felony" theory the State misconstrues the crime of attempted murder as well as the evidence. Attempted murder requires two elements, a premeditation and an overt act in furtherance of the attempt which acts goes beyond mere preparation. Lentz v. State, 567 So.2d 997 (Fla. 1st DCA 1990). Premeditation without a subsequent act does not constitute attempted murder.

The State's first problem with this theory is that factually there is no evidence that Anibal Rodriguez knew the gun was under the seat. Neither is there any evidence that he formed the intent to commit murder before the passenger retrieved the gun. In fact, the evidence suggests that the gun was retrieved by the passenger and held in front of him between his legs for a period of time before he began to shoot. Although there is evidence of conversation between the Defendant and passenger before the gun was retrieved, no one has offered any evidence as to what the contents of that conversation was. Thus, there is no proof to indicate the time at which premeditation was formed.

The next problem with this theory is that the overt act Anibal Rodriguez is said to have performed was the positioning of the car to allow the passenger a clear shot at the officers. However, the only testimony with respect to positioning the car demonstrates

that such positioning occurred after the shots were fired by the passenger. Thus, before Anibal Rodriguez had committed an overt act in furtherance of the attempted murder the gun was already held and fired by the passenger. The gun was therefore never carried, used, displayed or attempted to be used by Anibal Rodriguez. Nor could it have been. It was at all times carried, used and displayed by Jose Nodal. Thus, during the commission of the felony the gun was in the exclusive possession of Jose Nodal. See Ngai v. State, 556 So.2d 1130 (Fla. 3rd DCA).

The State concludes this portion of its argument with the statements that Anibal Rodriguez "persuaded" the passenger to pick up the rifle and shoot. These statements are not statements of fact. There is no citation to the record to support these statements, nor is there any support for the conclusion that Anibal Rodriguez would have shot the weapon himself had he not been driving. The one statement of fact relied on by the State that Anibal Rodriguez allegedly told the detective after his arrest that he had told the co-defendant "shoot, shoot, shoot" does not indicate that such statements were made before the passenger shot the weapon.

It is unclear whether the State is arguing "constructive possession" in its true sense, or whether the State is arguing that the rifle was "readily available" to Anibal Rodriguez. In either instance, the law does not permit enhancement under a constructive possession theory, and the facts do not support a readily available theory.

CONCLUSION

Every district court of appeal that has addressed this issue has required actual use of a weapon before enhancement under F.S. 775.087(1) is appropriate. The clear language of the statute mandates this conclusion. Factually Anibal Rodriguez never used the rifle, (nor did he display, carry, attempt to use or threaten to use the weapon). His conviction under F.S. 775.087(1) was properly vacated by the trial court and that ruling was correctly affirmed by the Third District Court of Appeal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF was delivered by U.S. Mail to **JORGE ESPINOSA**, Esquire, Assistant Attorney General, Department of Legal Affairs, 401 N.W. Second Avenue, Suite N921, Miami, Florida 33128 on this 20 day of June, 1991.

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