IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,859

THE STATE OF FLORIDA,

Petitioner,

vs.

ANIBAL RODRIGUEZ,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

PETITIONER'S BRIEF ON THE MERITS

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INTRODUCTION

This is a criminal prosecution for two counts of attempted first degree murder against a police officer. The State appeals from a Third District Court of Appeal decision certifying the following question of great public importance:[1]

> Does the enhancement provision of Florida Statutes section 775.087 (1990) extend to persons who do not actually possess the weapon but who "use" the weapon by committing an overt act in furtherance of its use or possession?

STATEMENT OF THE CASE AND FACTS

On October 5, 1981, the police was alerted concerning a shooting at 7th Ave. and North West 20th Street in Dade County, Florida. (TT. 745) City of Miami Officers Kenneth Nelson and Stephen Rossbach responded to the BOLO in a marked unit. (TT. 743) The officers spotted a vehicle driven by two Latin males which matched the description in the BOLO. (TT. 762-763) The two individuals in the vehicle were the defendant, Anibal Rodriguez,

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[1] The following abbreviations will be used throughout this brief:
(T.) - transcript of post-conviction hearing.
(R.) - record of post-conviction proceedings.
(TT.) - transcript of trial proceedings, appeal No. 84-2061.
(TR.) - record on appeal, appeal No. 84-2061.

driving the car and another individual, Jose Nodal, sitting in the front passenger seat.

The police engaged their sirens and indicated for the defendant to pull the vehicle to the side of the road but the defendant "just kept throwing his hands up in the air in a gesture as if he didn't understand" and kept conversing with the passenger. (TT. 747) The vehicle did not pull over. A hot pursuit ensued in which the defendant ran a stop sign and blocked the officers' attempts to pass the vehicle. (TT. 749)

As the officers followed, Officer Kenneth Nelson noticed the passenger reach between the passenger's seat and the driver's seat and pull out a semi-automatic AR-15 rifle. (TT. 766) The defendant was carrying on his person a .25 caliber pistol which he later discarded. (TT. 874, 887) Officer Nelson yelled a warning to Rossbach and both officers ducked as the passenger fired the rifle twice piercing and shattering the windshield of the police car. (TT. 692-694, 752) Officer Rossbach, wounded in the ear, pulled the car over to the side of the road and crawled out of the car unto a lawn where he held his bleeding face. Id. As he looked up he noticed the defendant's vehicle slow down, appear to begin reversing and then speeding away. Shrader, an animal control officer who was driving behind the officers, also saw the shooting. The defendants were subsequently apprehended. (TT. 479, 805, 806)

The defendant was charged with two counts of attempted first degree murder and unlawful possession of a firearm while engaged in a criminal offense. (TR. 1-3) A jury trial was held in mid-1984 on the two attempted first degree murder counts before the Honorable D. Bruce Levy. (TT. 1) The jury returned verdicts of guilty as to both counts. After a presentence investigation report, the trial judge, on August 21, 1984, sentenced the defendant to two concurrent life sentences. The defendant filed a direct appeal (84-2061) and the Third District Court in August of 1988 affirmed the decision of the trial court. Rodriguez v. State, 528 So.2d 1373 (Fla. 3d DCA 1988).

On March 8, 1990, the defendant filed a Rule 3.850 motion for post conviction relief alleging the following issues:

> A. The trial court erred in applying s. 775.087(1) F.S. (1983) [enhancement for use of a firearm] in sentencing the defendant.
>
> B. Denial of effective assistance of counsel.

(R. 5-15)

Two hearings were held on the motion on July 19 and July 25, 1990, before the Honorable Fredricka G. Smith, Circuit Court Judge for the Eleventh Judicial Circuit. (T. 1, 3) The trial judge granted the motion based on her finding that although the defendant did carry a pistol during the commission of the crime,

the charging document stated that the weapon used was the rifle and evidence did not show that the defendant ever actually used the rifle.

The State filed an appeal to the Third District Court of appeal. After arguments the Third District affirmed the decision of the trial court. Upon rehearing the Third District certified the following question as one of great public importance:

> Does the enhancement provision of Florida Statutes section 775.087 (1990) extend to persons who do not actually possess the weapon but who "use" the weapon by committing an overt act in furtherance of its use or possession?

This appeal follows.

SUMMARY OF THE ARGUMENT

The Third District Court has misconstrued the intentionally broad language of the enhancement provisions of section 775.087(1) Florida Statutes (1990). Since the enhancement provisions of the relevant statute punish "use" of a firearm, enhancement is appropriate where the defendant does not possess but commits some overt act in support of the use of the gun. This interpretation is consistent with recent authority from this Court. The evidence showed that the defendant maneuvered the vehicle to assist in shooting at the officers and that he encouraged his passenger to shoot. The defendant even stated that the only reason he did not shoot was because he was driving.

Furthermore, while the defendant drove the escape vehicle, a rifle, which the passenger used to shoot at and wound the police officers, was between the passenger seat and the driver's seat within easy reach of the defendant. Accordingly, since the rifle was readily available to the defendant at the commencement of the crime, when the passenger at the driver's insistence formed premeditation to shoot, the defendant was in constructive possession of the rifle. Contrary to the Third District Court's conclusion the enhancement provision could properly be applied to the defendant under the theory of constructive possession.

POINT ON APPEAL

WHETHER THE ENHANCEMENT PROVISION OF FLORIDA STATUTES SECTION 775.087 (1990) EXTENDS TO PERSONS WHO DO NOT ACTUALLY POSSESS THE WEAPON BUT WHO "USE" THE WEAPON BY COMMITTING AN OVERT ACT IN FURTHERANCE OF ITS USE OR POSSESSION?

ARGUMENT

A PERSON WHO DOES NOT ACTUALLY POSSESS THE FIREARM USED IN A CRIME BUT WHO COMMITS AN OVERT ACT IN FURTHERANCE OF ITS USE, FALLS WITHIN THE BROAD LANGUAGE OF THE ENHANCEMENT PROVISION OF SECTION 775.087 FOR PERSONAL USE AS WELL AS FOR CONSTRUCTIVE USE OF THE WEAPON.

A. Statutory punishment of use.

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

> Does the enhancement provision of Florida Statutes section 775.087 (1990) extend to persons who do not actually possess the weapon but who "use" the weapon by committing an overt act in furtherance of its use or possession?

The State submits that the Third District Court of Appeal erred in affirming the decision of the trial court refusing to allow the enhancement of the defendant's sentence where he sat driving the vehicle, maneuvering the car into a position to fire at the police officers and encouraging his passenger to shoot.

The enhancement provision of Florida Statutes section 775.087 (1990), unlike the minimum mandatory sentence provision, does not require actual possession of the weapon used in the crime. In its opinion the Third District stated that "the enhancement provisions of section 775.087(1), Florida Statutes

(1977), . . . require that the defendant personally possess the weapon during the commission of the crime involved." State v. Anibal Rodriguez, Case No. 90-1907 (January Term 1991). This conclusion is based on the Third District's earlier ruling in Postell v. State, 383 So.2d 1159 (Fla. 3d DCA 1980), which relies, without legal analysis, on this Court's ruling in Earnest v. State, 351 So.2d 957 (Fla. 1977). This lack of legal analysis has perpetuated a misunderstanding by the Third District Court of the scope of the statute's enhancement provisions.

In Earnest this Court addressed the minimum mandatory sentence provisions of the statute and not the enhancement provisions. Section 775.087(2), Florida Statutes (1975), prescribes a three year minimum term of imprisonment for any person convicted of robbery "who had in his possession" a "firearm" or "destructive device". This Court in Earnest interpreted this "possession" requirement to exclude vicarious possession. The enhancement provision of the statute, however, **does not contain a possession requirement.**

The enhancement portion of section 775.087 states:

> (1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such a felony **the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm,** or during the commission of such a felony the defendant

> commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows...

Florida Statutes 775.087 (1990)(emphasis added)

Possession is not required. Unlike the minimum mandatory sentence provision for the enhancement provision of the statute, **use or attempts to use are sufficient.**

The Third District Court incorrectly distinguished the holding in Menendez v. State, 521 So.2d 210 (Fla. 1st DCA 1988), as a case in which the defendant constructively possessed the firearm during the course of a continuing offense. The holding in Menendez, specifically recognizes the broader "use" language found in the enhancement provision. According to the Court in Menendez:

> **[S]ection 775.087(1) at issue here is unlike section 775.087(2).** Section 775.087(2) calls for the imposition of a three year minimum mandatory minimum sentence when persons commit certain crimes while having in their "possession" a firearm. The courts have interpreted that subsection as requiring the actual physical possession of the firearm. However, **under section 775.87(1), which calls for enhancement of certain felonies committed when the offender "carries" or "uses" a firearm, actual physical possession of the weapon is not required in all cases.** We find that an offender does not have to have physical possession of the firearm under subsection (1); but if the firearm is readily available to him, that is sufficient.

Menendez 521 So.2d at 212 (citations omitted).

Although the defendant herein did not actually possess the gun it was readily available to him during the commission of the crime. Premeditation is an essential element of attempted first degree murder. Stone v. State, 564 So.2d 225 (Fla. 4th DCA 1990). In its earlier opinion in this case, the Third District Court affirmed the defendant's conviction for attempted first degree murder noting that the defendant participated in the attempt by driving evasively and maneuvering the car so as to enable the codefendant to attempt to fatally wound the pursuing officers. Rodriguez v. State, 528 So.2d 1373 (Fla. 3d DCA 1988). At the time when the defendant was maneuvering the car and forming premeditation with the codefendant, the gun was readily available to the defendant and he could be said to be in constructive possession. Subsequently, when the codefendant took the gun and fired at the officers, the defendant was "using" the gun as much as if he was pulling the trigger since he was committing overt acts to aid the shooting.

Such a reading of the term "use" is consistent with this Court's recent decision in G.C. v. State, 560 So.2d 1186 (Fla. 3d DCA 1990) affirmed 572 So.2d 1380 (Fla. 1991). In G.C., this Court interpreted the term "use" in the Florida Theft Statute to include actions by passengers in stolen vehicles who never actually control the vehicle, but who aid or participate in the taking of the vehicle. This opinion was clarified subsequently in G.D. v. State, 557 So.2d 123 (Fla. 3d DCA 1990) in which the Third District Court held that the commission of an overt act in

furtherance of the theft was sufficient to make the defendant guilty of the theft of the vehicle. In G.D. the mere shouting of an instruction and pointing out a hiding place was deemed sufficient to implicate the defendant as a user although the defendant exercised no control over the vehicle.

The legal situation in the instant case is similar to that in G.D. Although the defendant never actually handled the rifle in question, he shouted instructions to his codefendant encouraging him to fire on the police officers. Simultaneously, the defendant slowed his vehicle and positioned it to directly aid in the attempt on the officers. When asked why he did not fire himself, the defendant did not claim he would not have done so, but only explained that he did not because he was driving. (TT. 889-890)

It is inconceivable to think that the defendant in the instant case is less guilty of the attempted murder against the officers than the defendant in G.D. was guilty of the theft of the automobile. Although it is true that the defendant did not actually possess the gun, it is equally true that the shooting would not have taken place had the defendant not been shouting "Shoot, shoot, shoot" to his partner and had the defendant not purposefully maneuvered his vehicle to set up the shooting. Moreover, since the defendant did not demonstrate any compunction against shooting at the officers, it is not improbable that had the codefendant refused to fire, the defendant would have

maneuvered the police car next to them and fired himself with the revolver which he was carrying.

It is evident from the broad language of the statute that the legislature did not intend this type of use of arms to go unpunished. Although the minimum mandatory provision unquestionably requires actual possession, the enhancement provision of the statute does not. Here, the defendant used the gun as much as the defendants in G.C. and G.D. used the stolen vehicles. The legislature could not reasonably be said to have intended a more restrictive definition of the term "use" in a statute which can usually involve crimes threatening human life than it did in a crime generally involving property. Moreover, the fact that the legislature purposefully excluded the possession language from the enhancement provision of the firearm statutes speaks loudly as to their intent.

Florida courts have interpreted other enhancement provisions to include acts of persons, not in possession of the instrumentality of the crime, who commit some overt act in furtherance of the crime. The Florida Burglary statute punishes the unauthorized use of the property of another and enhances the punishment if the suspect "is armed or arms himself" during the commission of the crime. Florida Statutes Section 810.02 (1990). In Hardee v. State, 516 So.2d 110 (1987) approved 534 So.2d 706, the Fourth District determined that a defendant could be convicted of the crime and have his sentence enhanced for being

armed although there was no evidence that he and not his codefendant was armed during the offense. The Court reasoned that the theft of the handgun by the codefendant was an act in furtherance of a common design to commit the crime and the defendant was a willing participant.

Using even narrower language, the Florida Robbery statute permits enhancement of the defendant's offense if "in the course of committing the robbery the offender carried a firearm or other deadly weapon." This provision has been interpreted to extend to defendants who never actually carried the firearm or weapon. See Jenkins v. State, 448 So.2d 1060 (Fla. 4th DCA 1984); Hillman v. State, 410 So.2d 180 (Fla. 2nd DCA 1982). As noted previously, the enhancement provision at bar extends far more broadly to anyone who "carries, displays, uses, threatens, or attempts to use any weapon or firearm".

It is therefore the State's position that the Third District Court has overlooked or misunderstood the law pertaining to the enhancement provisions of section 775.087. To allow the present opinion to stand would constitute an inconsistent interpretation of statutory terms and would greatly disadvantage the punitive power of the State of Florida. Therefore, this Honorable Court is urged to reverse the decision below.

B. Applicability of constructive possession.

Even if this Court determines that the statutory language and public policy does not mandate the State's suggested interpretation of the statute, the decision below incorrectly rejects the proper applicability of the theory of constructive possession. When a defendant uses a firearm in the commission of an attempted murder, a first degree felony, the conviction may be reclassified to a life felony for purposes of sentencing. § 775.087(1), Florida Statutes (1985). For purposes of such an enhancement the defendant must personally possess the weapon used during the commission of the crime. Postell v. State, 383 So.2d 1159 (Fla. 3d DCA 1980). Alternatively, the State may also show that the weapon was "readily available" to the defendant although he did not actually take "physical possession". Menendez v. State, 521 So.2d 210, 212 (Fla. 1st DCA 1988); Williams v. State, 531 So.2d 1033 (Fla. 3d DCA 1988). Where the evidence shows that the defendant participated in the crime while in the possession of a firearm, even where the defendant did not fire the weapon, the defendant's sentence may properly be enhanced. Junco v. State, 510 So.2d 909 (Fla. 3d DCA 1987).

At trial, Officer Patrick Burns, the arresting officer, testified as follows:

> Q. Did he [the defendant] say he tried to stop the car or anything of that nature?

> A. When he took off and after he told me that during the chase that when he was running, the reason he ran was because of the drugs in the car, I **asked him why didn't he shoot the police officers. He said that he was driving. He said, "Jose, he is a crazy fucker. He is the one that did the shooting."**
>
> Q. Were those his words?
>
> A. Yes, sir, and I said, "**Why didn't you shoot?" and he said, again, he said he was driving and I said, "Did you tell Jose to shoot?" and he said he was nervous and scared and he yelled, "Shoot, shoot, shoot."** What he was trying to tell me was, I believe, is that he was going to be able to get away-- let me see--

(TT. 889-890)(emphasis added)

Previously, the officer testified that the defendant had personally carried a .25 caliber pistol which he discarded during his flight from the police. (TT. 874, 887)

The Rule 3.850 judge below reasoned that "the defendant never personally carried or displayed the firearm that's alleged in the Information during the commission of the felony." (T. 25) "Although, the evidence is that the Defendant Rodriguez used or possessed a firearm, a different firearm, it was not the firearm alleged in the information." Id. The judge then distinguished Menendez v. State, 521 So.2d 210 (Fla. 1st DCA 1988), a case in which constructive possession was found, because in Menendez a fingerprint was found on the offending firearm. The judge instead relied on the opinion in Willingham v. State, 541 So.2d 1240 (Fla. 2d DCA 1989), a case in which the court ruled that actual possession of the offending weapon must

be shown and that an enhancement may not be based on a principle theory.

The judge's reliance on Willingham shows a basic misunderstanding of constructive possession. To establish constructive possession the State does not need to argue a principal theory. Instead, the State must establish that the offending firearm was readily available to the defendant at the time of the crime. Herein, the officer testified that the rifle was drawn from between the passenger seat and the driver's seat, a place which would be within easy reach of the driver. (TT. 766) Furthermore, the defendant admitted to the arresting officer that the only reason he encouraged the passenger and did not personally fire on the officers was because he was busy driving. (TT. 889-890)

The defendant's argument below that "I don't see any way where someone can both drive that car and have that weapon readily available" (T. 19), belies the driver's ability to stop the car, grab the rifle and fire or to have the passenger handle the steering while the defendant fired the rifle. The judge's clear concern was that "[t]here is no evidence he [the defendant] had the weapon in his hand" and not that he rejected or even considered constructive possession. (R. 19)

The charging document stated that the defendant committed the crime by shooting a firearm to-wit; a rifle. (R. 1-2) The

jury returned a verdict of guilty as charged. (TR. 234-235) This finding was sufficient predicate for the trial judge to enhance the defendant's sentence for use of a firearm through constructive possession. See Cf. Fischer v. State, 488 So.2d 145 (Fla. 3d DCA 1986). The trial judge clearly disregarded the evidence which supported a finding of constructive possession of the rifle. Furthermore, since the defendant was himself carrying a pistol, the evidence showed that he possessed a firearm during the commission of the offense even if it was not the rifle charged in the information.

The Third District's analysis that the weapon was not possessed at the time the crime was committed is mistaken. According to the lower court's opinion the attempted murder occurred when the codefendant/passenger pulled the trigger and, since he possessed the gun at that time, the defendant could not have been simultaneously in constructive possession. The State submits, however, that the attempted first degree murder began with the creation of premeditation to commit the act. At the point at which the gun was between the defendant and the passenger and the defendant was maneuvering the car into position and urging the passenger to get the gun and fire, the attempted murder was already in process. At that point when the defendant could easily have grabbed the gun himself, he was in constructive possession.

This Court has previously recognized the fact that the crime of premeditated murder or, by inference, an attempt to commit premeditated murder, begins when the premeditated design is formulated. In Lane v. State, 388 So.2d 1028 (Fla. 1980), the defendant was convicted of first degree premeditated murder for killing a person by beating him in the State of Alabama. This Court held in reviewing a claim on jurisdiction that part of the crime occurred in Florida and therefore Florida shared jurisdiction with Alabama where one of the essential elements of the offense, premeditation, occurred within the State of Florida. This Court reaffirmed this position seven years later in Keen v. State, 504 So.2d 396 (Fla. 1987). Referring to the earlier decision in Lane the Court stated that the "first-degree murder, was commenced in Florida and concluded in Alabama."

This reasoning leads to the inevitable conclusion that the crime herein, the attempted murder, had already commenced during the formulation of premeditation when the rifle was readily available to the defendant. It was during this time that the passenger was persuaded by the defendant pick up the rifle and shoot. It was also during this time that the defendant as a matter of convenience decided to use the passenger as his surrogate shooter. The Third District has naturally restricted the definition of constructive possession. The decision below should be reversed.

CONCLUSION

Based on the foregoing arguments and citations of authority, the decision below should be reversed and the defendant's conviction and sentence reaffirmed.

Respectfully submitted,

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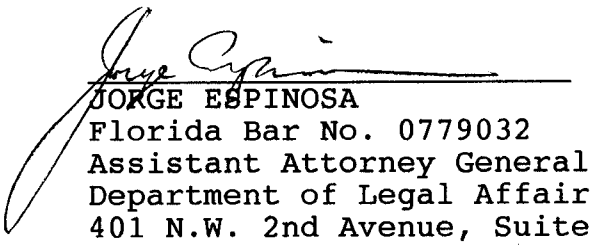

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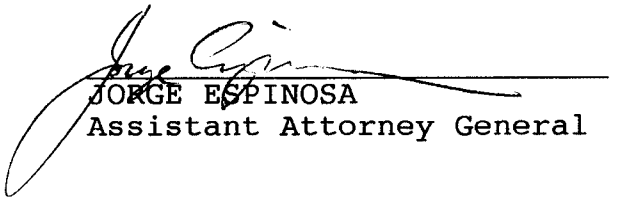
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S BRIEF ON THE MERITS was furnished by mail to MICHAEL OCIACOVSKI WEISZ, 3050 Biscayne Boulevard, Suite 707, Miami, Florida 33137, on this 29th day of May, 1991.



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