IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,859

THE STATE OF FLORIDA,

Petitioner,

vs.

ANIBAL RODRIGUEZ,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

REPLY BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

JORGE ESPINOSA
Florida Bar No. **0779032**
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CONT'D.

OTHER AUTHORITIES

INTRODUCTION

This is a criminal prosecution for two counts of attempted first degree murder against a police officer. The State replies to the Appellee's answer brief from a 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?

CORRECTION TO DEFENDANT'S STATEMENT OF CASE AND FACTS

Officer Nelson's testimony specified that he saw the victim reach "down between him and the driver." (TT. 766). Although the officer did testify that "[i]t appeared to be as if he was going under the seat" it is evident that the gun was in the space next to the driver and not directly under the passenger or next to the passenger door. Such a location would make a weapon as large as a rifle readily accessible to both defendants.

---

[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.
(App.Brf) - Appellee/Respondent's brief.

ARGUMENT

I.

UNLIKE THE MINIMUM MANDATORY PROVISION THE ENHANCEMENT PROVISION OF F.S. 775.087(1) DOES NOT REQUIRE "POSSESSION" OF THE FIREARM BUT INSTEAD MERE "USE" OR "ATTEMPT TO USE".[2]

The defendant attempts to do through challenges to the consistency of the State's initial brief what he cannot do through legally sound analysis. He attempts unpersuasively to defend the reasoning of the lower court. At most the defendant's repeated allegations that the State has misunderstood the various issues on appeal reflect the defendant's own misunderstanding of the law.

The defendant begins by alleging that "'carrying', 'displaying', 'using' or 'attempting to use' a firearm are all possessory terms and that therefore there is no difference between "possession" of a firearm and "use" of a firearm. This absurd proposition, apart from being definitionally wrong, begs the question of why the legislature chose to use the different language. The defendant's incredible answer is that by listing these various definitions, the legislature intended to narrow the scope of the statute. According to this rationale, the terms "attempting to use", let alone simple "use", is narrower than "possession."

Although the State was able to locate the case partially cited by the defendant in support of this proposition, S.R.G. Corp. v. Department of Revenue, 365 So.2d 687 (Fla. 1978), the basis for the cite has totally eluded discovery. Nothing in S.R.G. Corp., lends support to the defendant's backward

---

[2] Since Counts I and III of the defendant's answer brief generally deal with the State's single count on appeal the State will reply to both these in the instant section. The defendant's Count II, which raises a new issue, will be addressed separately.

interpretation of terms. Moreover, the S.R.G. Corp. lends support to the State's position. The court concluded with regards to the two terms in that case, "recognition" and "realization" that the two terms have distinct and different meanings. Moreover, the Court noted that legislative intent must be gleaned from the language of the statute because the legislature must be assumed to know the meaning of the words and to have intended to use the words found in the statute. S.R.G. Corp., 365 So.2d at 689.

The defendant perpetuates his initial definitional mistake when he states that "use of the more general term of 'possession' would have suggested, as it did in Earnest v. State, 351 So.2d 957 (FLA.[sic.] 1977), that vicarious use was a proper basis for enhancement." (Ans.Brf. 5). Earnest deals specifically with subsection two of the statute in which the legislature chose to require not just "use" or "attempted use" but "possession". The Court determined that "possession" under subsection two did not include vicarious possession. In reaching this conclusion Earnest notes that the legislature had narrowed the scope of the section from an original wording of "involving a firearm". Id. at 959 n. 8.

The defendant correctly notes the established maxim that "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." (Ans.Brf. 5). He, however, ignores the ordinary use of the statutory terms. "Use" is ordinarily defined as:

> To avail oneself of; to imply; to utilize; to carry out a purpose or action by means of; to put into action or service, especially to attain an end.

State v. Howard, 221 Kan. 51, 557 P.2d 1280, 1281:

> ...to enjoy, hold, occupy, or have some manner of benefit thereof.

Black's Law Dictionary, 1382 (5'th ed. 1979).

> To put or bring into action or service; to employ for or apply to a given purpose.

Beggs v. Texas Dept. of Mental Health and Mental Retardation, 496 S.W.2d 252, 254.

"Possession" on the other hand requires:

> [The] immediate occupancy and control of the party.

Field Furniture Co. v. Community Loan Co., 257 Ky. 825, 79 S.W.2d 211, 215.

> The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment.... The condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons.

Black's Law Dictionary, 1382 (5'th ed. 1979).

These definitions leave no doubt as to the broader scope of the word "use" and the evidently greater statutory proscription intended by the legislature.

The defendant's half-hearted defense of the precedential soundness of the Third District opinion perpetuates a regrettable misreading of the relevant case law. As explained in preceding analysis the opinion in Earnest v. State, 351 So.2d 957 (Fla. 1977), has absolutely nothing to do with the instant case. The opinion in Postell v. State, 383 So.2d 1162 (Fla. 3d DCA 1980) does not state there is no definitional distinction between subsection one and two. Postell never clarifies the reasons that underlie its unsupported, unexplained and unreasoned decision to "a fortiori require that the defendant personally possess the weapon during the commission of the crime involved." Id. at 1162. Whether or not the court found a definitional distinction or instead decided to enter its ruling based on some undisclosed public policy concern is unclear.

The defendant's assertion that "[e]very case that has construed Florida Statutes 775.087(1) has required actual possession" is simply wrong. The Third District retreated from the unsupported and intransigent definition

reached in Postell several years later when in Williams v. State, 531 So.2d 1033 (Fla. 3d DCA 1988), the court recognized the applicability of subsection one offenses to offenses where the defendant does not possess a gun, but has one readily available. In Smith v. State, 438 So.2d 10, 14 (Fla. 2d DCA 1983), rev. denied, 447 So.2d 888, the Second District affirmed an enhancement sentence under subsection one where the police found a gun within the defendant's immediate grasp, although not in his possession.

The cases of Willingham v. State, 541 So.2d 1240 (Fla. 2d DCA 1989) and Ngai v. State, 556 So.2d 1130 (Fla. 3d DCA 1990), do not, as the defendant suggests, require that the defendant actually "carry" a weapon during the crime. They require that the gun be **carried or used** during the commission of the crime. Willingham at 1241. Willingham did not reject an enhancement where the gun was readily available. Instead the court determined that since the gun was in the **actual possession** of a codefendant during the commission of the crime it was not "carried or used" by the defendant. In terms of constructive possession analysis, this means that the defendant could not be in constructive possession of a gun that was already in the actual possession of another. Neither of these situations apply in the instant case.

The defendant's contention that Menendez v. State, 521 So.2d 210 (Fla. 1st DCA 1990), is a "personal possession case" is a mistakenly narrow reading of the opinion. In Menendez the First District formulated a two part question:

> 1) What constitutes "carries" or "uses" a firearm under section 775.087(1), and 2) whether the evidence that appellant carried or used a firearm while trafficking in cocaine was such that no view that the jury could lawfully take of it favorable to the state could be sustained under the law.

Id. at 212.

The court's answer to the first question is so illuminating to the instant case that it warrants verbatim reproduction:

> As to the first question, section 775.087(1), at issue here, is unlike section 775.087(2). Section 775.087(2) calls for the imposition of a three year 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 775.087(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 at 212 (citations and footnotes omitted; emphasis added)

Although the court did make reference to the fingerprint found on the gun as support for the jury's verdict, such evidence was superfluous in view of the court's answer to the earlier question. This is hardly a case which stands for the proposition that actual possession is required.

In his final paragraph to Count I the defendant enunciates the gist of his position. "[T]he 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." This position totally misses the point. Unlike the case of felony murder in which a person becomes liable for any deaths which occur as a result of a crime in which he participates, the defendant in this case intentionally carried and encouraged the use of guns in his crime. He is not merely a vicarious participant: he knew of the of presence of the gun, directed and encouraged its use. He committed multiple overt acts in furtherance of the offense.

"Shoot, shoot, shoot" are not the urgings of an ignorant co-perpetrator who is only vicariously associated with the use of the gun. (T. 889). By his own admission the defendant urged the co-defendant to shoot the gun and did

not personally shoot because he was busy driving. Id. The passenger's use of the gun was an extension of the defendant's will to fire the weapon and the gun was essential to the commission of the intended crime.

The defendant begins the final section of his answer brief with a convoluted variety of allegations against the State's position in which the defendant, presumably unintentionally, concedes that section 775.087(1) is applicable to cases where the weapon is readily available but not in the personal control of the defendant. (Ans.Brf. 16). The defendant's only argument is that the gun was not accessible. This contention is misfocused since the Rule 3.850 judge below did not rule on whether the gun was readily available but instead held that, as a matter of law, the defendant must possess the weapon. (T. 25-27). By the defendant's own admission the Rule 3.850 judge was legally incorrect.

The defendant attempts to retreat from the quagmire he created by conceding the validity of the "readily available" standard through an interesting mis-interpretation. He takes the case of Smith v. State, 438 So.2d 10 (Fla. 2nd DCA 1983) and reads an inference that the defendant "carried the gun immediately prior to the point of his arrest". (Ans.Brf. 16). In Smith the court stated:

> Appellant Wagner was in a van which contained bales of marijuana. He was behind the driver's seat. After ordering Wagner and the others out of the van, a customs agent saw a .32 caliber pistol in the immediate area where Wagner had been while inside the van. The weapon was within Wagner's immediate grasp. The evidence supports the finding that each appellant carried a firearm while in the act of possessing marijuana.

Smith 438 So.2d at 14 (emphasis added).

The opinion's unambiguous wording does not try to determine whether the gun was in the defendant's physical possession at any time during the crime. To

do so would require an analysis of the defendant's presumptive hypothesis of innocence that he never possessed the gun. Instead the court, consistently with Menendez, merely notes that the gun was within the defendant's reach.

Having misread the relevant caselaw, the defendant proceeds to misinterpret the facts of the instant case. The defendant incorrectly states that the rule 3.850 court entered two findings below (1) that binding precedent requires actual possession and (2) that the facts do not support a finding of constructive possession (and presumably a finding of "readily available"). This contention is wrong and intuitively inconsistent. If the court found actual possession was necessary why would it reach the later question. The answer is that it did not.

The Rule 3.850 judge grounded her ruling on the belief that "the defendant never personally carried or displayed the firearm that's alleged in the Information during the commission of the felony." (T. 25). When confronted with Menendez the judge discounted the case as one in which there was circumstantial evidence that the defendant and not his accomplice possessed the weapon during the offense. (T. 26). The defendant does not quote any reference where the trial judge considered and rejected that the defendant used the weapon through an overt act in furtherance of its use or through the narrower "readily available" standard because no such reference exists. The Rule 3.850 court made an erroneous determination of law that actual possession was required by the statute and then found that there was no actual possession.

The defendant's bald contention that there was no evidence that the defendant knew about the rifle is refuted by the record. At trial the jury was shown the weapon so they could judge its size and appearance. (TT. 750-751). Miami police officer Hector Martinez testified that the defendant told

him in a post-arrest statement that he brought a .25 caliber semi-automatic pistol and his codefendant, the passenger, brought a Colt AR-15 semiautomatic rifle in the car that day because they were afraid of a drug rip-off due to the quantity of drugs they were transporting drugs in the trunk of the car. (TT. 995-996, 1017)[3] When a picture of the rifle was later shown to the 3.850 judge to demonstrate its size and to show that the passenger could not have suddenly pulled the rifle out of hiding without the driver's knowledge, defense counsel stated "I would stipulate to that picture because I don't see any way where someone can both drive that car and have that weapon readily available." (T. 19). Clearly the jury could determine that the defendant approached the crime knowing of the presence of the weapons and fully intending to use the weapons if he deemed it necessary.

Finally, what the defendant describes as the continuing "felony theory" of the case is only necessary if this Court decides to take make a narrow reading of the statute. The State is primarily urging this Court to find that when a defendant takes part in a crime knowing that a gun integral to the commission of the crime and, in the course of committing the crime, he acts in furtherance of the criminal goal he should be equally subject to the enhancement provision with the person who actually fired the weapon. This reading of the enhancement provision is fully consistent with this Courts ruling in State v. G.C., 572 So.2d 1380 (Fla. 1991). This reading of the statute is also consistent with, if somewhat narrower than, enhancement provision in other statutes. See Jenkins v. State, 448 So.2d 1060 (Fla. 4th DCA 1984)(robbery); Hillman v. State, 410 So.2d 180 (Fla. 2nd DCA 1982)(robbery); Hardee v. State, 516 So.2d 110 (1987) approved 534 So.2d 706

---

[3] The defendant was carrying fifteen pounds of marijuana, 1500 quaaludes and a small amount of cocaine in the trunk of the car for the purpose of completing a drug deal. (TT. 995)

(burglary). Furthermore such a reading advances the apparent goal of discouraging criminals from committing crimes with guns. The statutory goal would be completely defeated if criminals could avoid the enhanced punishment by simply designating one person to carry the gun during the crime as is often done with narcotics in street sales.

It is only if the Court refuses this natural and consistent reading of the statute that the State urges, at minimum, a reading which allows punishment of defendants who have the weapons readily available during the commission of the crime. For such analysis it is clear that the crime begins when the premeditation is formed. The defendant states that premeditation without a subsequent act does not constitute attempted murder and the State agrees. However, once a subsequent act has been committed the formulation of premeditation constitutes the commencement of the crime. See Keen v. State, 504 So.2d 396 (Fla. 1987); Lane v. State, 388 So.2d 1022 (Fla. 1980).

Based on the clear language of the statute and on the evidence presented below the defendant's sentence was properly enhanced for use of a firearm. The enhancement provisions of Florida Statutes section 775.087(1) should be interpreted to include any criminal who participates in a crime by committing an overt act in furtherance of the joint criminal purpose, knowing that a gun is available and integral to obtaining the criminal objective. Alternatively, section 775.087(1) should apply to any criminal who has a weapon readily available to him at any point during the commission of a crime, including during the formation of premeditation. In either case this Court should reverse and remand with instructions that the defendant's enhanced sentence be reinstated.

II.

THE DEFENDANT IS PROCEDURALLY BARRED FROM RAISING A CHALLENGE TO THE ADEQUACY OF THE JURY INSTRUCTION GIVEN AT TRIAL WHERE HE SPECIFICALLY ASKED THAT THE JURY INSTRUCTION NOT BE GIVEN AND WHERE HE FAILED TO RAISE THE ISSUE ON APPEAL.

The defendant's second contention, that the trial court committed a sentencing error by not properly instructing the jury, was never presented to the Third District Court[4] and was procedurally barred before the Rule 3.850 judge. According to the defendant, the jury verdict did not include a specific finding that the defendant used a firearm and the jury was not instructed that a weapon was an essential element of the crime. It is a well known point of law that enhancement for use of a firearm is amply supported by a verdict which finds the defendant "guilty as charged" where the defendant is charged as having committed the crime "with a firearm". See Fischer v. State, 488 So.2d 145 (Fla. 3d DCA 1986); Luttrell v. State, 513 So.2d 1298 (Fla. 2d DCA 1987). Since the verdict returned below is therefore adequate, the only valid issue raised by the defendant is whether it was error, as per the defendant's request, to fail to instruct the jury regarding the presence of a firearm. This point is not properly before this Court.

This Court's certiorari jurisdiction is intended to review the "decisions of district courts of appeal." Fla.R.App.P. Rule 9.030 (a)(2)(A) (1991). Defenses that may have existed before the trial court but were not raised before the district court and did not constitute part of the reviewing court's determination are waived and should not be reviewed on certiorari. See Winn-Dixie, Inc. v. L.J.Goodman, 276 So.2d 465 (Fla. 1973); E.E.Marshall

---

[4] Although the issue was mentioned as a two paragraph section of the general argument in the text of the defendant's answer brief, it was not raised as a separate count nor as a valid ground for relief through cross-appeal.

v. Hollywood, Inc., 236 So.2d 114 (Fla. 1970). The defendant in the instant case challenged the adequacy of the jury instructions in his Rule 3.850 petition but did not raise the defense before the Third District Court of Appeal. Failing to do so he may not now address it as a new issue in his response before this Court.

Moreover, this alleged jury instruction error could and should have been addressed on direct appeal and may not be raised in a motion for post-conviction relief. Raulerson v. State, 420 So.2d 567 (Fla. 1982) cert. denied 463 U.S. 1229, 103 S.Ct. 3572, 77 L.Ed.2d 1412 (1983); Merrill v. State, 364 So.2d 42 (Fla. 1st DCA 1978) cert. denied, 372 So.2d 470 (Fla. 1979). In the instant case the defendant did not challenge his jury instructions on direct appeal. He first raised the claim before the Rule 3.850 judge. Based on Raulerson and Merrill the claim was waived and could not be raised below.

It is ironic to note that the defendant induced the error which he is now alleging and from which he is trying to gain benefit before this Court. At trial the defense counsel stated:

> MR.ROSIN: My client has requested there be no lesser included offenses.
>
> THE COURT: Period?
>
> MR.ROSIN: Period.

(TT. 1239)

When the trial judge stated that he would still give the instruction for aggravation due to use of a firearm the defendant the defendant disagreed:

> MR.ROSIN: I understand that, Judge, but the instruction reads, "And you also find that during the commission of the crime he carried a firearm," and I don't believe there is any evidence that during the commission of the crime this happened. Later, there is possibly evidence, but during the commission of the crime there is no evidence he carried a firearm.

> THE COURT: The only point is--what I am telling you is, I only charge them the way they charged and if they come back as charged, then if he is convicted, to be sentenced the way he is charged with the firearm and it kicks it up--
>
> MR.ROSIN: I understand.
>
> THE COURT: If you don't want it, you don't need it. That's fine with me.
>
> MR.ROSIN: I don't want it, Judge.

(TT. 1240-1241)

The defendant specifically waived the instruction and now claims error for receiving what he wanted from the Court.

This Court has previously ruled that a defendant fails to preserve any challenge to the propriety of jury instructions where he does not object or request an alternate instruction. Roman v. State, 475 So.2d 1228 (Fla. 1981) cert. denied, 475 U.S. 1090, 106 S.Ct. 1480, 80 L.Ed.2d 734. The omission of any element of a crime of which a defendant is convicted is fundamental error only when such omission or error is pertinent or material to an issue which the jury must decide in order to convict. Stewart v. State, 420 So.2d 862 (Fla. 1982) cert. denied, 103 S.Ct. 1802, reh. denied, 103 S.Ct. 3099; Williams v. State, 400 So.2d 542 (Fla. 3d DCA 1981). However, the mere fact that a firearm is used in the commission of a crime does not make the firearm an essential element of that crime. Gonzalez v. State, 569 So.2d 782 (Fla. 4th DCA 1990). Since the firearm was not an essential element of the crime, the error was waived both by trial counsel's acquiescence and by defendant's failure to raise the issue on direct appeal.

It is also important to note that no fundamental error exists "where for purposes of deliberation the jury was given the charging document, which fully described all the elements" of the relevant offense. Morton v. State, 459 So.2d 322 (Fla. 3d DCA 1984) rev. denied, 486 So.2d 597 (Fla. 1986). In

the instant case the jury was given the information to take with them into the jury room for deliberation. (T. 1350). The information in the instant case states:

> [Anibal Rodriguez] did unlawfully and feloniously attempt to commit a felony, to-wit: MURDER IN THE FIRST DEGREE, upon OFFICER STEVEN ROSSBACH, and in furtherance thereof, the defendants ANIBAL RODRIGUEZ and JOSE NODAL with felonious intent and from a premeditated design to effect the death of a human being, attempted to kill OFFICER STEVEN ROSSBACH, a human being and in such attempt did SHOOT a FIREARM to-wit: a RIFLE at OFFICER STEVEN ROSSBACH, in violation of 782.04(1) and 777.04(1) and 775.087 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

(R. 1)(emphasis added)

Count two states in similar language the attempted murder of Officer Kenneth Nelson. (R. 2). Clearly the jury knew that both defendants must be found to have used a rifle, the only rifle discussed in evidence, to commit their crime.

Moreover, under the reasoning in Williams 400 So.2d 542, the defendant has not shown that the omission was pertinent to a material issue. The fact that the gun was under the seat between the defendants is clear on the record. The only issue raised by the defendant is legal and not factual. Since the defendant urged that the appropriate instruction not be given and did not raise the matter on appeal the issue was waived and is not properly before this Court.

CONCLUSION

Based on the foregoing arguments and citations of authority the State urges this Honorable Court to answer the Third District Court's certified question by interpreting the statute to apply to any criminal who participates in a crime knowing that a gun is carried by a codefendant in order to achieve the goals of the crime. Alternatively, the State urges this Honorable Court to interpret the statute to apply to any criminal who has a weapon readily available to him at any point during commission of the crime including during the formation of premeditation. In either case this Court should reverse and remand with instructions that the defendant's enhanced sentence be reinstated.

Respectfully submitted

ROBERT A. BUTTERWORTH
Attorney General

JORGE ESPINOSA
Florida Bar No. 0779032
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF PETITIONER was furnished by mail to Michel Ociacovski Weisz, Special Assistant Public Defender, 3191 Coral Way, Suite 510-A, Miami, Florida 33145 on this 26th day of July, 1991.

JORGE ESPINOSA
Assistant Attorney General