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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JERRY RAY ROBINS, :
Petitioner, :
v. :
STATE OF FLORIDA, :
Respondent. :
_____ :

CASE NO. 78,876

PETITIONER'S JURISDICTIONAL BRIEF

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

✓ ABEL GOMEZ
ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR PETITIONER
FLORIDA BAR #832545

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STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of armed robbery and armed kidnapping in Duval county circuit court. Appendix [A] at 1. The circuit court sentenced petitioner based on a scoresheet that reclassified the kidnapping count as a life felony pursuant to section 775.087(1), Florida Statutes. A.2. At trial, the evidence established that a coperpetrator exhibited a firearm during the commission of the offenses. A.2. However, the evidence failed to establish that petitioner ever possessed the firearm. A.2.

Petitioner appealed to the first district court of appeal. Petitioner argued that section 775.087(1) does not authorize reclassifying an offense where the facts fail to establish that the defendant had actual possession of a firearm. A.2. That is, proof of vicarious possession is insufficient. The district court rejected this argument and affirmed petitioner's sentence on October 8, 1991. A.3-4.

The district court stated that the intent of section 775.087(1) "is to deter the use of firearms and other weapons during the commission of criminal offenses." A.3. The court read section 775.087(1) in pari materia with section 777.011, Florida Statutes which provides that one who aids in the commission of an offense is to be punished as if he actually committed the offense. A.3. The court then held that:

when one is guilty as a principal in the commission of a criminal offense or offenses, if during the commission of a criminal scheme either he or his accomplice wields a weapon in furtherance of the criminal

scheme, application of section 775.087(1)
to enhance his offense is proper.

A.3-4. The court stated that the key factor to be considered "is whether the defendant had the advantage of the presence of a weapon during the commission of an offense in which he took an active part and relied upon the weapon at least in part in the furtherance of the offense." A.4.

In adopting this holding, the district court expressly recognized direct conflict with Willingham v. State, 541 So.2d 1240 (Fla. 2d DCA 1989), rev. denied, 548 So.2d 663 (Fla. 1989); Nagi v. State, 556 So.2d 1130 (Fla. 3d DCA 1989); and State v. Rodriguez, 582 So.2d 1189 (Fla. 3d DCA 1991), rev. granted No. 77,859, (Fla. 1991) (oral argument set for Jan. 9, 1992). However, the court denied petitioner's motion for certification of conflict on October 24, 1991.

Petitioner timely filed a notice to invoke the discretionary jurisdiction of this Court on October 30, 1991.

SUMMARY OF ARGUMENT

The district court held that reclassification under section 775.087(1), Florida Statutes, does not require that the defendant actually possess the weapon. As the court's opinion recognized, this holding is in direct conflict with the decisions of the second and third district courts of appeal. This Court has discretionary jurisdiction since the decision of the district court expressly and directly conflicts with decisions of other district courts. This Court has already granted review and set oral argument in another case certifying this question of law as one of great public importance. This Court should afford petitioner the benefit of its decision on this question by granting review.

ARGUMENT

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF TWO OTHER DISTRICT COURTS ON THE QUESTION OF WHETHER RECLASSIFICATION UNDER SECTION 775.087(1), FLORIDA STATUTES REQUIRES THE DEFENDANT TO ACTUALLY POSSESS THE WEAPON.

The district court held that reclassification under section 775.087(1), Florida Statutes, does not require that the defendant actually possess the weapon. A.4. The court held that the key factor is whether the defendant had the advantage of the presence of a weapon during the commission of a crime in which he was an active participant. A.4.

However, this decision expressly and directly conflicts with the decisions of the second and third district courts of appeal in Willingham v. State, 541 So.2d 1240 (Fla. 2d DCA 1989) rev. denied 548 So.2d 663 (Fla. 1989); Nagi v. State, 556 So.2d 1130 (Fla. 3d DCA 1989); and State v. Rodriguez, 582 So.2d 1189 (Fla. 3d DCA 1991), rev. granted, No. 77,859 (Fla. 1991) (oral argument set for Jan. 9, 1992). Although the district court denied petitioner's request to certify conflict, the court's opinion expressly recognized direct conflict with Willingham, Nagi and Rodriguez. Hence, this Court has discretionary jurisdiction to review the decision below because it expressly and directly conflicts with the decisions of other district courts on the same question of law. Art. V § 3(b)3 Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

This Court should exercise its discretion and grant review. Willingham, Nagi and Rodriguez hold that section

775.087(1) requires that the defendant personally possess the weapon during the commission of the crime. Petitioner argued this question of law in the district court. A.2. The Rodriguez court certified this question as one of great public importance. Id. at 1191. As noted above, this Court has granted review and set oral argument in Rodriguez. It is likely that Rodriguez will ultimately settle the existing conflict among the district courts of appeal. At the same time, this Court should afford petitioner the benefit of its decision on this question by granting review.

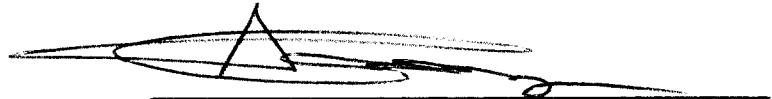
CONCLUSION

This Court had discretionary jurisdiction to review the decision below. This Court should exercise its discretion and consider the merits of petitioner's argument.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been hand delivered to Sara D. Baggett, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 5th day of November, 1991.

Respectfully submitted,



ABEL GOMEZ
ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR PETITIONER
FLORIDA BAR # 832545

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

APPENDIX

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JERRY RAY ROBINS,
Appellant,

* NOT FINAL UNTIL TIME EXPIRES
* TO FILE REHEARING MOTION AND
* DISPOSITION THEREOF IF FILED.

V.

* CASE NO. 90-3115

STATE OF FLORIDA,
Appellee.

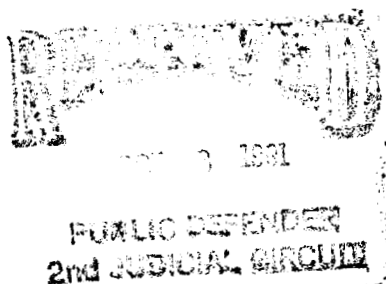
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Opinion filed October 8, 1991.

An Appeal from the Circuit Court for Duval County.
David C. Wiggins, Judge.

Nancy A. Daniels, Public Defender; Abel Gomez, Assistant Public
Defender, Tallahassee, for appellant.

Robert A. Butterworth, Attorney General; Sara D. Baggett,
Assistant Attorney General, Tallahassee, for appellee.



WIGGINTON, J.

Appellant appeals a judgment and sentence in which he was found guilty of armed robbery and armed kidnapping. He challenges his armed robbery conviction and the reclassification of his kidnapping conviction from a first-degree felony punishable by life to a life felony, which was the primary offense for sentencing guidelines scoresheet purposes. We affirm.

Appellant first asserts that the trial judge erred in denying his motion for judgment of acquittal on the armed robbery count because the evidence was insufficient to establish that he was a principal in the commission of that particular offense. We find that denial of the motion was proper because the evidence clearly supports a determination that, as a participant in a criminal scheme, appellant was a principal in that offense pursuant to section 777.011, Florida Statutes. As stated in Jacobs v. State, 396 So.2d 713 (Fla. 1981):

One who participates with another in a common criminal scheme is guilty of all crimes committed in furtherance of that scheme regardless of whether he or she physically participates in that crime. [Citations omitted]

Appellant next asserts that the trial judge erred in sentencing him based on a scoresheet that reclassified the kidnapping count as a life felony pursuant to section 775.087(1), Florida Statutes, since the evidence showed that only appellant's co-perpetrator had actual possession of a firearm during the commission of their crimes. The evidence shows that appellant actively participated in the kidnapping of the victim, and, during the commission of the crime, his co-perpetrator wielded a gun and snatched gold chains from the victim's neck. Appellant relies upon Willingham v. State, 541 So.2d 1240 (Fla. 2d DCA 1989), review denied, 548 So.2d 663 (Fla. 1989), in which the court held that application of section 775.087(1) requires proof that the defendant actually carried or used a weapon during the course of an offense. See also Ngai v.

State, 556 So.2d 1130 (Fla. 3d DCA 1989) and State v. Rodriguez, 582 So. 2d 1189 (Fla. 3d DCA 1991).

In Rodriguez, the defendant led police on a high speed chase while his accomplice shot at them. Under the principal theory, the defendant was convicted of attempted first-degree murder which was reclassified under section 775.087(1). On appeal, the court found the reclassification to be error since the defendant did not have actual possession of the firearm. On rehearing, the court certified to the supreme court the question of whether the enhancement provision of section 775.087(1) extends to one who does not actually possess the weapon but who commits an overt act in furtherance of its use by a co-perpetrator. Since that case is still pending, we do not now have the benefit of the supreme court's resolution of this matter.

We are of the view that the intent of section 775.087(1) is to deter the use of firearms and other weapons during the commission of criminal offenses. We note that section 777.011, Florida Statutes, provides that one who aids in the commission of an offense is to be punished as if he actually committed the offense. Therefore, to give meaning to the obvious intent of the two statutes when read in pari materia, we find that when one is guilty as a principal in the commission of a criminal offense or offenses, if during the commission of that criminal scheme either he or his accomplice wields a weapon in furtherance of the criminal scheme, application of section

775.087(1) to enhance his offense is proper. In so holding, we reject the Willingham requirement of actual physical possession of the firearm on the part of the defendant in all circumstances. Thus, we specifically recognize our direct conflict on this point with Willingham, Rodriguez and Ngai and trust that the conflict will be reconciled by the supreme court's review of the certified question in Rodriguez.

We find support for our position in this court's previous opinion in Menendez v. State, 521 So.2d 210 (Fla. 1st DCA 1988) in which, on admittedly different facts, the court found that

an offender does not have to have physical possession of the firearm under [775.087(1)]; but if the firearm is readily available to him, that is sufficient.

In our view, the key factor to be considered for application of section 775.087(1) is whether the defendant had the advantage of the presence of a weapon during the commission of an offense in which he took an active part and relied upon the weapon at least in part in the furtherance of the offense.

AFFIRMED.

SMITH and KAHN, JJ., CONCUR.