4-35 047

IN THE SUPREME COURT OF FLORIDA

KENNETH L. MAEWEATHER,

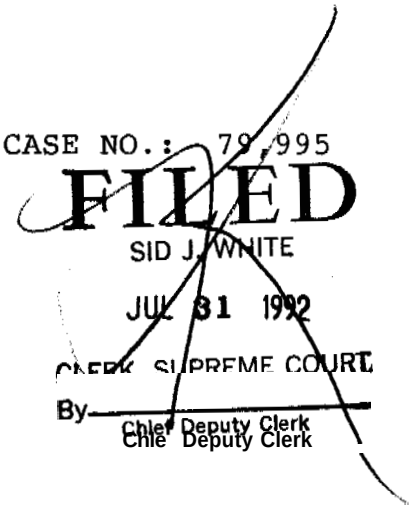
Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO.: 79,995



BRIEF OF RESPONDENT ON THE MERITS

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_____/

RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, KENNETH L. MAEWEATHER, Appellant/Defendant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, Appellee below, will be referred to herein as "Respondent." References to the record on appeal will be by the symbol "R" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Respondent is in agreement with Petitioner's statement of the case and the facts.

SUMMARY OF ARGUMENT

ISSUE I

The trial court properly admitted the testimony of Joe Ramirez where the testimony was relevant to show that Petitioner, who was on trial for possession of a firearm by a convicted felon, had prior possession of the same gun, and to show the entire context of the crime at issue.

The trial court also properly determined that the State's failure to furnish Ramirez' name on its witness list was neither a willful nor substantial discovery violation and had no adverse effect upon Petitioner's ability to present his case where Ramirez' name was mentioned several times in deposition taken three months earlier, and where the defense had ample opportunity to interview him.

ISSUE II

The trial court's use of Petitioner's prior felony record to convict him of possession of a firearm by a convicted felon and to sentence him as a habitual violent felony offender does not violate double jeopardy where the possession is a substantive offense and the habitual offender sentence is independent of the guilt determination. The two statutes serve different purposes and address different evils. The double jeopardy clauses present no substantive limitation on the legislature's power to prescribe multiple punishments.

ISSUE III

A defendant's due process rights are not violated by a habitual violent felony offender sentence even though the present offense is a nonviolent felony. Ross v. State, infra.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN ADMITTING THE TESTIMONY OF JOE RAMIREZ (RESTATED)

The District Court of Appeal below certified two questions in this case as being of great public importance. This is not one of them. In fact, the appellate court affirmed this issue without discussion. The rules of appellate procedure do not provide for review of an evidentiary issue which is not in conflict with cases from other jurisdictions and which is not the subject of a certified question. Nonetheless, Petitioner seeks to bootstrap this issue onto the certified questions in this case and thus slip it before this Court.

Respondent recognizes that this Court may, in its discretion, choose to address this issue although Respondent represents that the issue is devoid of merit and urges this Honorable Court to decline reviewing it. Respondent feels compelled out of an abundance of caution to address the issue, however, and will proceed to do so:

Petitioner was charged with possession of a firearm by a convicted felon (R 77). Subsequent to jury selection, defense counsel objected to State witness Joe Ramirez testifying because his name was not disclosed in writing, although it was provided orally prior to trial (R 165).

The trial court conducted a Richardson[1] hearing (R 159-175) and denied Petitioner's ore tenus motion, stating:

> The court pursuant to Richards(on) versus State at 246 So2d. 771, has conducted an inquiry concerning the admitted failure of the State to furnish the names of two proposed witnesses, Witness Ramirez and Sergeant Nolan. After hearing arguments of Counsel concerning the failure of the State to furnish the names of witnesses to the Defense, the Court finds that the names of the Witness Ramirez was mentioned several times in the deposition of a State witness taken by the defendant in October, over two months prior to the trial; that the defendant had notice of the existence of such witness and the opportunity to interview or depose him.
>
> The Court further finds that the Defense shall be given an opportunity to interview Mr. Ramirez and to have him deposed before he takes the stand should he so elect. As to the Witness Nolan, Counsel agreed that his testimony will be only corroborated or cumulative to other testimony which will be received and that the defendant was made known of the intent of the State to call these two witnesses the day prior to the trial. Therefore, upon the Court further finds that the State's violation was not willful but inadvertent, that it was not substantial and that with the opportunity of the Defense Counsel to interview Witness Ramirez being afforded him at this time, that it will not -- that it does not have any adverse effect upon the ability of the defendant to properly present his case at trial.

(R 174, 175).

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[1] Richardson v. State, 246 So.2d 771 (Fla. 1971).

Petitioner's firearm possession charge was premised upon a gun found in the couch on which he was laying when he was arrested. The arrest was based on Joe Ramirez' allegation that Petitioner had shot him in the head the day before, but Petitioner was not on trial for the shooting, nor did Ramirez testify about the shooting (R 24-33).

Petitioner contends that the testimony was irrelevant and that the evidence should have been excluded on the basis of the discovery violation. Respondent disagrees.

Petitioner claims that Ramirez' testimony that Petitioner possessed the gun in question at another location less than 24 hours prior to the instant charge could have no relevancy to the separate instance of possession for which he was charged. Petitioner is incorrect in his assertion. Instances of prior possession of a firearm have been upheld as relevant to the separate instance of possession charged. In United States v. Donofrio, 450 F.2d 1054 (5th Cir. 1971), a prior instance of possession was held relevant and admissible. The prior possession was relevant to show that the defendant had knowledge of the presence of the firearm and the ability to acquire actual possession of the firearm where the charge was constructive possession and the prosecution had to prove both knowledge and the ability to exercise dominion and control over the firearm.

Similarly, in this case, Petitioner was charged with owning or having in his "care, custody, possession or control" the firearm in question. Accordingly, the exercise of actual control over the firearm hours before the incident charged was very relevant to show knowledge of the presence of the firearm under the cushions on which Petitioner lay. The prior possession was also relevant to show his ability to exercise actual possession and control over the firearm.

In addition, the earlier incident was also relevant to show the entire context of the crime at issue. The prior possession was part of an inseparable crime. Evidence of collateral crimes is admissible where those crimes are so "inextricably intertwined with the crimes charged that an intelligent account of the criminal episode" charged could not be given without reference to the other. Austin v. State, 500 So.2d 262, 265 (Fla. 1st DCA 1986), *rev. denied,* 508 So.2d 13 (Fla. 1987). See also Erickson v. State, 565 So.2d 238 (Fla. 4th DCA 1990).

In Erickson, the defendant was charged with indecent assault on a child under sixteen. The assault occurred at a picnic attended by several young children and their parents. At trial, in addition to the testimony regarding the specific offense charged, there was also testimony relating to another similar assault on another child. The Erickson court held that the testimony concerning the second assault was admissible because it was inseparably linked in time and circumstance to the evidence of the acts charged.

Here, the instance of possession at the time of arrest occurred an the afternoon after the instance of possession to which Ramirez testified. In addition, Petitioner was found in possession of the firearm in the same location that he had been since leaving the bar where he had been seen with the firearm by Ramirez. Moreover, the sole reason Petitioner was found with the firearm, was that the arresting officers were in the process of investigating an allegation of aggravated battery with a firearm upon Ramirez when the firearm was discovered. As in Austin, there could have been no intelligent account of the arrest and discovery of the weapon given without reference to the incident in the bar.

This Court recently held that:

> considerable leeway is allowed even on direct examination for proof of facts that do not bear directly on the purely legal issues, but merely fill in the background of the narrative and give it interest, color, and lifelikeness.

Gillion v. State, 573 So.2d 810 (Fla. 1991). Here, the evidence of the earlier possession was relevant to show not only knowledge of and ability to control the firearm, but also to fill in the background of the entire event and explain the presence of the law enforcement officers at the residence where Petitioner was arrested.

The testimony that Petitioner had previously possessed the same gun that he was arrested with also relevant to rebut

defense witness Shirlene Crusaw's subsequent testimony that "a guy named Snake" had slept on the couch the previous Friday and may have left the gun there (R 54).

Petitioner further contends that testimony of the reason that he was arrested constituted inadmissible collateral crime evidence. The record of the trial shows, however, that no objection was made on this ground and the only objections made were on the ground of relevancy (R 26, 31).

In Correll v. State, 523 So.2d 562 (Fla. 1988), cert. den., 488 US 871 (1988), this Court unanimously held that even when a prior motion in limine has been denied, the failure to object at the time that collateral crime evidence is introduced at trial waives the issue for appellate review. As no objection was made on this ground, it was not preserved for further review, and the appellate court properly refused to address it.[2]

In fact, the State never introduced evidence of the collateral shooting. The only evidence in that regard was elicited by defense counsel prior to Ramirez' testimony when cross-examining Officer Tate (R 21). A defendant may not take advantage on appeal of an error which he himself induced. Sullivan v. State, 303 So.2d 632 (Fla. 1974).

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[2] Respondent would note that preservation of this ground was argued below.

Finally, Petitioner argues that the Richardson hearing conducted in this case was inadequate. Richardson, *supra*, provides that in the event that the State fails to provide the name of a witness in a timely fashion, that the trial court is to inquire as to:

> whether the state's violation was inadvertent or willful; whether the violation was trivial or substantial; and most importantly, what effect, if any, did it have upon the ability of the defendant to properly prepare for trial.

Id. at 775. Absent an abuse of discretion, the trial court's determination of the prejudice to the defense will not be disturbed on appeal. Hatcher v. State, 568 So.2d 472 (Fla. 1st DCA 1990), and Smith v. State, 499 So.2d 912 (Fla. 1st DCA 1986).

In this case, the trial court heard argument and testimony that the defense had knowledge of the existence and potential testimony of the witness for more than two months prior to his being listed by the State as a witness. Based upon the information revealed in the inquiry the trial court found that the witness Ramirez had been known to the defense more than two months prior to the trial, that the defense had opportunity to interview or depose Ramirez prior to trial, and that the defense would be given an opportunity to depose Ramirez after the inquiry and prior to trial. The trial court further found that the State's "violation" was not willful but inadvertent, that

the "violation" was not substantial, and that because defense counsel was to be given an opportunity to depose Ramirez prior to trial, that the inadvertent "violation" did not have an adverse affect upon the ability of the defense to prepare for trial. Petitioner claims that those findings were not supported by the record and thus constituted an abuse of the court's discretion.

As to the willfulness of the violation, Petitioner correctly concedes that the State honestly believed that it had properly disclosed Ramirez' name to the defense through Deputy Dyal's deposition (R 161). The violation was, therefore, not willful.

As to the prejudicial effect, Petitioner was not prejudiced by the late official notice, as he had actual notice of Ramirez' existence more than two months earlier. In addition, Petitioner also claims that the trial court's conclusions that the violation was not substantial and that there was no adverse effect upon the defense's ability to present its **case** were without basis in the record. Relying on Hatcher v. State, *supra*, Petitioner claims that the use of Ramirez as a witness changed the State's theory of the case, so that the opportunity to depose Ramirez was not sufficient to cure the prejudice **created.**

Petitioner's reliance on Hatcher, however, is misplaced. In Hatcher the State revealed a new witness on rebuttal which

changed the prosecution's theory regarding the defendant's knowledge of the accident at issue. In that case the defendant was clearly prejudiced as the defense had been totally unaware of the existence of the rebuttal witness, and more importantly, had no opportunity to rebut the claims of the new witness since the defense had already rested its case. The Hatcher Court stated:

> the procedural prejudice in the state's alteration of the theory of its case after the defendant has testified and the defense has rested is inherent.

Id. at 474, 475.

Here, Ramirez and his involvement in the case were known to the defense months before trial, the defense was given a specific opportunity to depose Ramirez before trial, and the purposes for using Ramirez as a witness were known before the trial began. Moreover, Petitioner's assertion that deposition of the witness was inadequate was proven false by Petitioner's direct examination of his own witnesses. In his defense, Petitioner called two witnesses, himself and Shirlene Crusaw. Both he and Crusaw contradicted Ramirez' testimony that Petitioner possessed the gun at the bar. Therefore, even if using Ramirez did alter the State's case, Petitioner was able to use the deposition in presentation of his defense to rebut Ramirez' testimony. The trial court was correct in concluding that the deposition would cure the discovery violation.

Petitioner's reliance on Copeland v. State, 566 So.2d 856 (Fla. 1st DCA 1990), and Jones v. State, 514 So.2d 432 (Fla. 4th DCA 1987), is likewise misplaced. Unlike the trial court here, the trial court in Copeland failed to hold any Richardson inquiry. Also unlike the case at bar, the inquiry held by the trial court in Jones was clearly inadequate as that court made no finding of willfulness or prejudice where the factual scenario indicated otherwise. Here, the inquiry was held, and the appropriate findings made which were based on information revealed at the inquiry.

Accordingly, as the trial court did make a proper inquiry as to the prejudice of the alleged late notice of witness Ramirez, as the findings were supported by the record and did not constitute an abuse of the trial court's discretion, and as the testimony presented was relevant to a fact at issue, the trial court did not err in allowing witness Ramirez to testify,

Petitioner's conviction must consequently be upheld.

ISSUE II

WHETHER THE DOUBLE **JEOPARDY** CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WERE VIOLATED BY THE TRIAL COURT'S USE OF THE SAME PRIOR CONVICTION AS THE BASIS FOR THE CHARGE OF POSSESSION OF A FIREARM BY A CONVICTED FELON AND FOR CLASSIFICATION OF THE APPELLANT AS A HABITUAL VIOLENT FELONY OFFENDER.

AND

DOES SECTION 775.084(1)(B) VIOLATE THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE **JEOPARDY** BY INCREASING **A** DEFENDANT'S PUNISHMENT DUE TO THE NATURE OF **THE** PRIOR OFFENSE?

Petitioner contends that the trial court's use of his prior felony record to convict him of possession a firearm by a convicted felon and to sentence him to an extended term as a habitual violent felony offender violates the the constitutional prohibitions against double jeopardy. The appellate court rejected this contention but nonetheless certified the above questions as ones of great public importance. Respondent urges this Honorable Court to answer the certified questions in the negative.

In Eutsey v. State, **383** So.2d 219, 223, (Fla. 1980), this Court discussed the purpose of the habitual offender statue:

> The purpose of the habitual offender act is to allow enhanced penalties for those defendants who meet objective guidelines indicating recidivism. The **enhanced** punishment, however, is anly an incident to the last offense. The act does not create a new substantive offense. It merely prescribes a longer sentence for the

> subsequent offenses which triggers the operation of the act. The determination of whether one may be sentenced as an habitual offender is independent of the determination of guilty of the underlying substantive offense, and new findings of fact separate and distinct from the crime charged are required. Reynolds v. Cochran, 138 So.2d 500 (Fla. 1962).

See also Washington v. Mayo, 91 So.2d 621 (Fla. 1956) (habitual offender sentencing involves neither double jeopardy nor double punishment for the same offense).

The double jeopardy clauses of the United States and Florida constitutions prohibit multiple punishments for the same offense. State v. Hegstrom, 401 So.2d 1343 (Fla. 1981); Whalen v. United State, 445 U.S. 684 (1980). However, the fifth amendment presents no substantive limitation on the legislature's power to prescribe multiple punishments. Whalen, supra; Albernaz v. United States, 450 U.S. 333 (1981).

As noted in Eutsey, supra, the habitual offender statute does not create a new substantive offense, and habitual offender sentencing is independent of the guilt determination regarding the underlying substantive offense. Petitioner was convicted of possession of a firearm by a convicted felon pursuant to 8790.23, F.S., which states in pertinent part that

> It is unlawful for any person who has been convicted of a felony in the courts of this state or of a crime against the United States which is designated as a felony or convicted of an offense in any other state,

> territory, or country punishable by imprisonment for a term exceeding 1 year to own or to have in his care, custody, possession, or control any firearm or electric weapon or device or to carry a concealed weapon, including all tear gas guns and chemical weapons or devices.

In contrast, to be sentenced as a habitual violent felony offender, a defendant must have been previously convicted of one of eleven enumerated specific violent felonies, or an attempt or conspiracy to do so, as well as meeting several other criteria. In the first instance, a defendant is being punished for possessing a firearm after having been convicted of *any* felony, and in the second instance, for his or her violent behavior as evidenced by his or her felony history. The *two* statute thus serve different purposes and address different evils and do not violate double jeopardy. See State v. Smith, 547 So.2d **613 (Fla. 1989).**

In Perkins v. State, **583 So.**2d **1103** (Fla. **1st DCA** 1991), jurisdiction accepted, 590 **So.2d 421** (Fla. **1991),** the First District Court of Appeal stated:

> The appellant argues that section 775.084(1)(b) violates the constitutional protection against double jeopardy by increasing his punishment due to the nature of a prior offense. Although section **775.084(1)(b)** does involve consideration of prior criminal history, it has long been established that this is a constitutionally permissible aspect of habitual offender enactments. ***See elg., Washington v. Mayo*, 91** So.2d 621 (Fla. 1956); ***Cross v. State, 96* Fla. *768*, 119 So.380 (1928);** see ***also, Reynolds v.***

> *Cochran,* **138** So.2d 500 (Fla. 1962). These cases generally indicate that the need for an enhanced sentence may be predicated upon a consideration of the offender's prior criminal history in connection with the current offense, but that the enhanced punishment pertains only to the current offense and thus does not offend the protection against double jeopardy. Although *Henderson*[3] notes that the issue has not been addressed with regard to the habitual violent felony offender provision of section **775.084(1)(b),** the reasoning **of** these cases is equally applicable to this enactment. Because the appellant's enhanced punishment is an incident of his current offense, section 775.084(1)(b) does not violate the protection against double jeopardy.

Id. at **1104, 1105.**

In State v. Whitehead, 472 So.2d 730 (Fla. 1985), this Court held that the determination of punishment for crimes is a legislative matter. In discussing whether pursuant to §775.087(1), Florida Statutes, **a** defendant's sentence may be enhanced and a minimum mandatory sentence imposed, this Court stated that "(a)bsent an indication from the legislature that these subsections are an either/or proposition, both subsections will be followed." Id. at **732.**

Similarly, by not prohibiting that a defendant convicted pursuant to the possession of a firearm by a convicted felon statute may be sentenced pursuant to the habitual offender statute, the legislature has clearly indicated its intention.

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[3] Henderson v. State, **569** So.2d 925 (Fla. 1st DCA 1990).

Double jeopardy concerns are not implicated by Petitioner's sentence, as he was convicted of the instant offense, and then given a minimum mandatory habitual offender sentence based on his prior criminal history, the instant offense being only incidental to that sentence. Petitioner was thus not twice punished for one crime. See State v. Harris, 356 So.2d 315 (Fla. 1978).

Petitioner's sentence must consequently be upheld.

ISSUE III

DOES IT VIOLATE A DEFENDANT'S SUBSTANTIVE DUE PROCESS RIGHTS WHEN HE IS CLASSIFIED AS A VIOLENT FELONY OFFENDER PURSUANT TO SECTION 775.084 AND THEREBY SUBJECTED TO AN EXTENDED TERM OF IMPRISONMENT, IF HE HAS BEEN CONVICTED OF AN ENUMERATED VIOLENT FELONY WITHIN THE PREVIOUS FIVE YEARS, EVEN THOUGH HIS PRESENT OFFENSE IS A NONVIOLENT FELONY?

This Court answered the above question in the negative in Ross v. State, 17 FLW S367 (Fla. June 18, 1992), stating that:

> the entire focus of the statute is not on the present offense, but on the criminal offender's prior record. Provided the offender is charged with an offense punishable by more than a year in prison, that offender remains subject to habitualization if the other terms of the statute are met; and this is true even if the present offense is not itself violent. §775.084(1)(b), Fla. Stat. (Supp. 1988). There is nothing irrational about this process. The State is entirely justified in enhancing an offender's present penalty for a nonviolent crime based on an extensive or violent criminal history.

Id. at S 368.

Petitioner's sentence must consequently be upheld.

CONCLUSION

Based on the above arguments and citations of legal authorities, Respondent urges this Honorable Court to approve the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Kathleen Stover, Assistant Public Defender, Leon County Courthouse, Fourth Floor, North, 301 South Monroe Street, Tallahassee, Florida 32301, this 31st day of July 1992.

Bradley R Bischoff

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