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IN THE SUPREME COURT OF FLORIDA

CASE NO.
80,174

ERIC ARNAZ ASHLEY,

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

****

ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

****

PETITIONER'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The Petitioner, Eric Ashley, was charged by Information in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, with the offense of CARRYING A CONCEALED FIREARM in addition to some misdemeanor offenses. (R16-17)

That on June 26, 1991, the Petitioner, caused to be filed pursuant to Fla.R.Crim.P. 3.190(c)(4) a SWORN MOTION TO DISMISS COUNT I ON THE GROUNDS OF FIREARM BEING "NOT READILY ACCESSIBLE FOR IMMEDIATE USE". (R33) The undisputed material facts alleged in that motion were:

> 1. That the Defendant was driving an automobile in which a firearm was found on the right front passenger floorboard against the hump of the transmission or console area.
> 2. That the firearm was not loaded.
> 3. That there was no ammunition anywhere in the automobile or on the Defendant's person. (R33-34)

No Traverse was filed to this motion. (R3) Further, the record does not reveal the filing of a Demurrer; however, the Respondent did present argument orally in opposition to the motion

on the basis of "case law". (R3-13)

On July 12, 1991, the Honorable Robert W. Tyson, Jr., Circuit Court Judge, entered an order granting the Petitioner's Motion to Dismiss. (R39)

On July 29, 1991, the Respondent filed a timely Notice of Appeal from the trial court's order. (R40-41) The District Court of Appeal, Fourth District, with Judge Dell dissenting, reversed the trial court with the majority noting its decision to be in direct conflict with Amaya v. State 580 So.2d 885 (Fla. 2d DCA 1991). State v. Ashley 601 So.2d 1230 (Fla. 4th DCA 1992).

Based upon the aforesaid conflict, this court has accepted jurisdiction and this proceeding follows.

SUMMARY OF THE ARGUMENT

Section 790.01(2) Fla.Stat. proscribes the carrying of a concealed firearm on or about one's person. Section 790.25(5) Fla.Stat. permits what would otherwise be a violation of the aforesaid statute if the concealed firearm is securely encased or otherwise not readily accessible for immediate use. Further, the application of Section 790.25 (5) Fla.Stat. is to be construed liberally in favor of the lawful use, ownership, and possession of firearms.

With this in mind, the District Court of Appeal of the State of Florida, Second District in Amaya v. State, supra, correctly held that a firearm which is not loaded is not "readily accessible for immediate use".

Therefore, it is submitted that in the case of your Petitioner, his otherwise lawful possession of an unloaded firearm in a private conveyance by definition is not readily accessible for immediate use. This is especially true under the facts of this case, since there was no ammunition in the Defendant's possession or anywhere within his vehicle if he even wanted to make use of the firearm.

ARGUMENT

A FIREARM IN A PRIVATE CONVEYANCE IS NOT "READILY ACCESSIBLE FOR IMMEDIATE USE" IF THE FIREARM IS UNLOADED ESPECIALLY WHEN THERE IS NO AMMUNITION WITHIN THE PRIVATE CONVEYANCE.

Prior to the enactment of section 790.25(5) Fla.Stat. Judge Ryder in his concurring opinion in Cates v. State, 408 So.2d 797 (Fla.2d DCA 1982), observed as follows about chapter 790 Fla.Stat.:

> ...It is an area of law where honest citizens can be caught unaware and can be charged with serious crime despite no intention to violate the law....It is an area of law where honest citizens are daily left to the arbitrary decisions of the police as to whether an arrest will be made. The police prefer certainty as well.

It is in this light that section 790.25(5) Fla.Stat. came into being which allowed the carrying of an otherwise concealed firearm, not on the person, provided that the firearm is "securely encased or is otherwise not readily accessible for immediate use." Further, the aforesaid sub-section was enacted with a legislative directive as to how it should be applied, to wit:

> This subsection shall be liberally construed in favor of the lawful use, ownership, and possession of firearms and other weapons including lawful self-defense as provided in s.776.012

With this background it is clear that the answer to the question of whether or not an unloaded firearm being carried in a private conveyance, without ammunition, is "securely encased or ... otherwise not readily accessible for immediate use" is YES!

The reason that "yes" is the answer can be ascertained by first analyzing the phrase "is securely encased or is otherwise not readily accessible for immediate use." Black's Law Dictionary defines the word "otherwise" as meaning "in different manner; in another way, or in other ways." Therefore, the concept of being "securely encased" is but one way or manner of how a firearm is "not readily accessible for immediate use." This interpretation is clearly supported by this court's decision in Alexander v. State, 477 So.2d 557,559-560 (Fla. 1985), where it was observed:

> Section 790.01 Florida Statute's (1981), proscribes carrying a concealed weapon. An exception to that proscription is provided in Section 790.25(5), Florida Statutes (Supp. 1982), which allows for carrying a concealed weapon in a private conveyance, if "the firearm is securely encased or not otherwise readily accessible for immediate use." "securely encased" and "readily accessible for immediate use" are defined in the statutory scheme....We agree with the state that by using the "or is otherwise" phrase the legislature clearly indicated that the primary requirement is that the firearm not be "readily accessible for immediate use."

Since the enactment of 790.25(5) Florida Statute's, the court's of this state have found guns and other weapon's within the aforesaid subsection in a variety of situations. In State v. Gomez, 508 So.2d 784 (Fla. 5th DCA 1987), a sheathed knife found in a closed console between the front seats was held to be not "readily accessible for immediate use." In Urquiola v. State, 590 So.2d 497 (Fla. 3d DCA 1991), the court in a per curiam opinion held that a gun hanging from the dashboard of a car in a plastic pouch with a flap laid over it was "securely encased"

notwithstanding the fact that the flap was not secured by a zipper, or attached in some way. In City of Miami v. Swift, 481 So.2d 26 (Fla. 3d DCA 1985), the court easily concluded that a .25 caliber revolver in a lidded console/ armrest between the two front seats of an automobile was "securely encased" and that to hold otherwise would "frustrate the intent of the legislature since it is no less readily accessible for immediate use." (emphasis supplied)

Similarly, this court in Alexander v. State, supra, held to be lawful the carrying of an apparently loaded firearm in a zipped black leather hand purse which also contained a wallet and various forms of identification since it also was "no less readily accessible for immediate use."

With this body of precedent the District Court of Appeal of Florida, Second District correctly held that a firearm under the passenger's seat of an automobile was not "readily accessible for immediate use" notwithstanding the fact that the clip and bullets for that gun were found lying separately in open view upon the seat. Amaya v. State, 580 So.2d 885 (Fla. 2d DCA 1991). Further, in so ruling, the court specifically rejected the state's contention that the statutory exception contained in Section 790.25(5) was not applicable because a firearm need not be operable in order to be accessible for immediate use, e.g., for use in pointing it at someone in a threatening manner. The court also rejected the state's argument that the statutory exception would not be applicable because the firearm could have been loaded and become operable by merely referring to the obvious requirement of

the statute i.e. that the firearm be "readily accessible for immediate use." id at 886.

In conformance with Amaya v. State, supra, the trial court granted the Petitioner's Motion to Dismiss (R39). The decision of the District Court of Appeal of Florida, Fourth District can be found reported as State v. Ashley, 601 So.2d 1230 (Fla. 4th DCA 1992). In that opinion, two of the three judges assigned to the panel declined to follow the correct conclusion in Amaya v. State, supra, relying primarily on two points.

The first point constitutes approximately one half of the entire decision, namely that even if unloaded a firearm is still a firearm. id at 1231-1232. Though this is an accurate statement of the law, it has nothing to do with whether or not it is "readily accessible for immediate use". Certainly the item found in the Petitioner's private conveyance was a firearm. Further, for purposes of the issue to be resolved here, it is assumed to be concealed. What section 790.25(5) Fla.Stat. provides is that a firearm that is concealed in a private conveyance (not on the person) does not constitute a violation of section 790.01 (2) Fla.Stat. unless it is not securely encased or is otherwise readily accessible for immediate use.

The second rationale relied upon in the court below centers upon the definition of the term "readily accessible for immediate use" as found in section 790.001 (15) Fla.Stat. State v. Ashley, supra, at 1231. Specificly, the statutory definition reads as follows:

> (15)"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.

Though the court places much significance on the fact that the statute employs the word "used" and not the word "fired" the reason clearly does not carry the same significance as the opinion below attributes to it. The definition is worded to be used in the context of either firearms or other weapons. Other weapons cannot be fired, only firearms can. This is the obvious reason for the choice of the word "used". The meaning of the word "used" must be interpreted logically, based upon the nature of the weapon involved. Metallic knuckles or a billie would be used by striking, a dirk or knife would be used by slashing or throwing and a firearm would be used by firing.

It is further submitted that due to the fact that there was not even any ammunition anywhere in the vehicle (R33-34) the firearm in this case is even less readily accessible than the one in Amaya v. State, supra. If the Petitioner in this cause wanted to "use" the firearm in his private conveyance he would first have to find a place where ammunition is available, drive to that location, obtain the ammunition, and then load the gun. Such a situation cannot possibly constitute a violation of section 790.01(2) Fla.Stat. in light of section 790.25(5) Fla.Stat.

Certainly the legislature could not have intended to arrive at results so inconsistent that the Petitioner here would be liable for carrying an unloaded firearm without possessing any bullets to

load into it while a person carrying a fully loaded firearm hanging from his dashboard in a plastic pouch with merely a flap laid over the top as in Urquiola v. State, supra, would be in compliance with the law. As Judge Danahy noted in State v. Swoveland, 413 So.2d 166 (Fla. 2d DCA 1982), in discussing the rationale of the concept of "securely encased":

> Those actions by a handgun user requires some lapse of time and cause for thought - events the legislature anticipated in carving out this exception to the proscription of the concealed gun law.

Certainly the lapse of time and pause for thought required to obtain ammunition and load a gun is similarly the type of event that the legislature anticipated and as such the firearm in this case, by statutory definition, was not "readily accessible for immediate use." To hold otherwise would, as stated in Alexander v. State, supra, "frustrate the intent of the legislature since it is no less readily accessible for immediate use."

CONCLUSION

Therefore, based upon the law and policies as set forth herein, it is respectfully requested that this court quash the decision of the District Court of Appeal of Florida, 4th District in State v. Ashley, 601 So.2d 1230 (Fla. 4th DCA 1992) and affirm the order of the Circuit Court, Broward County, dismissing the charge of carrying a concealed firearm against your Petitioner.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 12 day of November, 1992, to:

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