DA. 4-7-93 047

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 REPLY BRIEF ON THE MERITS

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I.

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.

As in the opinion under review, the Respondent has failed to recognize and appreciate the individual requirements of each of the material elements of various statutes regulating firearms. Though this court's decisions in Bentley v. State, 501 So. 2d 600 (Fla. 1987), and Hardee v. State 534 So. 2d 706 (Fla. 1988), properly interpret that sections 775.087(2) and 810.02(2)(b) Fla. Stat., are triggered even with an unloaded firearm, these cases actually have no impact on the issue to be decided here. In Bentley v. State, supra, this court in its opinion held that the legislative intent of section 775.087(2) Fla.Stat., was concerned with the "perception of the victim" and that, therefore, the "display" of an unloaded firearm, without proof of readily available ammunition, invokes the three year minimum mandatory sentence." (emphasis supplied)

Subsequently, when this court was confronted with the facts in Hardee v. State, supra, the decision was obvious. The statute only required that a burglar be "armed or arms himself" with a gun. There is no dispute that the item in the Petitioner's car was a "gun" since obviously if it were not a "gun" he would not have even been arrested for carrying a concealed firearm. Similarly, even if Mrs. Bentley's gun or Mr. Hardee's gun had been securely encased they would have still been subject to the penalties against them

since even a holstered gun, to paraphrase the Respondent, "may be used in a threatening manner in the commission of a crime, such as a robbery or assault," without ever being unsecured.

Again, as this court noted in Bentley v. State, supra, the legislative intent of statute's which call for minimum sentences and/or enhanced punishment for those who aggravate the commission of another felony by their possession or display of a firearm is concerned with the perception of the victim of that other crime. These statutes do not contain an expressed legislative intent that they be construed "liberally" in favor of an interpretation of lawful use and possession by a defendant. Section 790.01 Fla.Stat. is part of a regulatory scheme dealing with the manner in which firearms may be carried absent an appropriate license. As such these proscriptions may very well be classified under the broad heading of "victimless crimes" or at least a crime which has no clearly identifiable victim. Section 790.25(5) Fla.Stat., unlike the statutes under consideration in Bentley and Hardee, focuses the "concern" with the possessor of the firearm or other weapon and requires the statute to be "liberally construed" in his or her favor, as an answer to Judge Weider's concerns in Cates v. State, 408 So. 2d 797 (Fla. 2d DCA 1982), since this is "an area of law where honest citizens can be caught unaware...."

Similarly the Respondent's search for support in section 790.25(3)(m) and 790.151(2) are also distinguishable. In the case of section 790.25(3)(m) Fla.Stat., we were dealing with an exception limited to firearms (as opposed to other weapons) and

which does not limit that they be in a "private conveyance". Also, interestingly, even the Respondent must agree that if a person such as the one described in the aforesaid statute committed a burglary on his way home he would still be subject to the rule in Hardee v. State, supra. Section 790.151 Fla.Stat., is similarly distinguishable in scope, construction and intent. This statute, which was enacted subsequent to section 790.25(5) Fla.Stat., is a specific prohibition against intoxicated persons having loaded firearms actually in their hands and/or firing them unless necessary to defend themselves or their property. This section does not require a private conveyance, requires manual possession, is aimed at preventing a very specific act and most importantly, does not contain a legislative directive of liberal construction.

The Respondent mistakingly fails to recognize that the statute is not triggered by mere ready accessibility but rather the weapon must not only be readily accessible but must be "readily accessible for immediate use" (emphasis supplied). One need only realize that a firearm, in a holster, with a strap snapped across the hammer can be displayed or pointed at someone in a threatening manner, even at a police officer who would then be just as justified in shooting as if the gun were not in a holster. (see Respondent's brief, pp. 11-12)

The Respondent's reliance on State v. Gomez, 508 So. 2d 784 (Fla. 5th DCA 1987), results from a misunderstanding of the facts. Though the court found that the firearm was "readily accessible for immediate use" even though a police officer had to spend a few

seconds to grasp the weapon reaching under the front seat, from the rear, this indicated to the court that the gun was readily accessible from the front where the Defendant was seated. (emphasis supplied) id. at 786.

Likewise, the Respondent's reliance on State v. Swoveland, 413 So. 2d 166 (Fla. 2d DCA 1982), is also off the mark. First, this case was decided prior to the enactment of section 790.25(5) Fla.Stat. and thus was limited to deciding whether or not the Defendant's actions came within the exception provided by section 790.25(3)(l) Fla.Stat., which limited the exception to weapons "securely encased" and did not further extend it to weapons which were "not otherwise readily accessible for immediate use". Also, the court relied in part on its earlier decision in Cates v. State, 408 So. 2d 797 (Fla. 2nd DCA 1982), which is no longer an accurate statement of the law. See City of Miami v. Swift, 481 So. 2d 26 (Fla. 3rd DCA 1985). Lastly, even though Swoveland deals with section 790.25(3)(l) Fla.Stat., the court's reasoning together with the reasoning of the earlier case of State v. Hanigan, 312 So. 2d 785 (Fla. 2d DCA 1975), cited therein, actually supports the Petitioner's position. In both of the aforesaid cases, the District Court of Appeal of Florida, Second District seized on the fact that what made the gun securely encased when a leather strap was snapped over the hammer was that the gun could not be fired. State v. Hanigan, supra, at 786; State v. Swoveland, supra, at 167. (see also Respondent's brief page 13)

Certainly, if lack of ability to be fired bears on whether or

not a loaded firearm is "securely encased", then certainly the absence of ability to be fired by virtue of no ammunition in the gun and vehicle bears on whether or not the firearm is "otherwise not readily accessible for immediate use." (emphasis supplied)

Lastly, the Respondent's assertion on page 16 of their brief, that the use of the words "or is otherwise", refers back to "securely encased", clearly places the cart before the horse and overlooks this court's decision in Alexander v. State, 477 So. 2d 557, 559-560 (Fla. 1985), where this court held that the use of those words indicated that the primary requirement of the statute was that the firearm not be "readily accessible for immediate use" and not, as Respondent asserts, a requirement that it be securely encased by being within a container.

CONCLUSION

Wherefore, based on the above and foregoing arguments and authorities together with those contained in the Petitioner's Initial Brief, Eric Arnaz Ashley respectfully requests this Court to quash the decision of the District Court of Appeal, Fourth District in State v. Ashley, 601 So. 2d 1230 (Fla. 4th DCA 1992), and affirm the order of the Circuit Court of the Seventeenth Judicial Circuit of Florida, dismissing the charge of carrying a concealed firearm against your Petitioner.

Respectfully submitted,

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BY: _____
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I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 22 day of December, 1992, to:

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BY: _____
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