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CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

VS.

CASE NO.: 85,202
DCA NO.: 93-00618

DAVID ALLEN SNYDER,
Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL FOR THE SECOND DISTRICT
STATE OF FLORIDA

ANSWER BRIEF OF THE RESPONDENT ON THE MERITS

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INTRODUCTION

This matter is before the Court on discretionary review from the District Court of Appeal, Second District. The Respondent, DAVID ALLEN SNYDER, shall be referred to as the "Respondent", "Appellant", "Defendant", or by name. The Petitioner, the State of Florida shall be referred to as the "Petitioner", "Appellee", or the "State".

References to the record of the proceedings in the trial court below shall be indicated by (R-) including the appropriate page number.

STATEMENT OF THE CASE

On July 23, 1992, the State of Florida filed it's Direct Information charging the Appellant with Possession Of A Firearm By A Convicted Felon, a violation of §790.23 Fla. Stat. (R-73) On October 16, 1992, the Defendant filed a Motion To Dismiss. (R-76) On October 21, 1992 the State filed it's Traverse in response to the Defendant's Motion To Dismiss. (R-78) Additionally, on October 21, 1992 the Defendant's Motion To Dismiss was brought to Hearing before the Honorable Joe R. Young, Jr., Circuit Judge. (R-4) The Defendant's Motion presented the issue that the Information should be dismissed against the Defendant because he possessed the firearm in question during the pendency of his appeal on the predicate felony conviction. (R-4-15) The lower Court denied the Defendant's Motion at R-14. The case proceeded to Bench Trial before the Honorable J. Dale Durrance, Circuit Judge, on December 16, 1992. (R-16) At R-64 the Circuit Court found the Defendant guilty and remanded him to the custody of the Sheriff to be held without bond pending sentencing. The Defendant was sentenced on February 15, 1993, before the Honorable J. Dale Durrance. (R-65) The Defendant was sentenced to three and one half (3 1/2) years Florida State Prison and given a three-hundred dollar (\$300.00) fine and Court costs. (R-69) On February 18, 1993 the Defendant filed his timely Notice Of Appeal in this matter. (R-92)

On direct appeal the District Court of Appeal, Second District reversed Mr. David Snyder's conviction in a written opinion issued on January 27, 1995. In that opinion the Second District expressly stated that it directly conflicted with the First District's opinion in Burkett v. State, 518 So.2d 1363 (Fla. 1DCA 1988).

STATEMENT OF THE FACTS

On March 6, 1991, David Allen Snyder, the Appellant, was convicted of a Felony in CF90-039983-XX. (R-76) On March 26, 1991, Mr. Snyder filed a Notice Of Appeal in CF90-039983-XX, challenging his conviction. (R-76) The District Court Of Appeal of Florida, Second District, affirmed that conviction in an opinion filed April 17, 1992 and which became final on May 8, 1992. (R-76) See, Snyder v. State, 597 So. 2d 384 (Fla. 2DCA 1992) Prior to the District Court Of Appeal's opinion in that case, on April 8, 1992 Sergeant Greg Warner of the Avon Park Police Department responded to a shots fired call at the Defendant's residence. (R-35) Additionally Deputy Bennett, of the Highlands County Sheriff's Department, was also at the Defendant's residence attempting to serve a Subpoena. (R-36) Upon Sergeant Warner's arrival at the Defendant's residence he spoke to the Defendant whom he recognized. Without reading the Defendant his miranda rights the Sergeant engaged in dialogue with the Defendant which led to the Defendant's statement that he had a round jammed in a gun and that he took it outside and shot it in his back yard, because of the jam. (R-37) Further, the Defendant, David Snyder, turned a Colt AR-15 rifle over to Sergeant Warner, stating it was the weapon that had been jammed and fired. (R-37,38, and 40) Upon further questioning, the Defendant stated that he bought the rifle from the Avon Park Pawn Shop in Avon Park, Florida. (R-39) Sergeant Warner testified that at the time of the incident on April 8, 1992, he told David Snyder that he was concerned about him having weapons because he had been convicted of a felony recently. (R-38)

Ms. Sondra Price testified at the trial below that she worked at the Avon Park Pawn Shop. (R-19) Further, she testified that on April 2, 1992 she sold the suspect Colt AR-15 rifle to the Defendant, David Allen Snyder. (R-20) Further, Ms. Price testified that the Defendant had completed the forms required by Federal law for the purchase of firearms and that she received an approval number for the sale from the State of Florida. (R-23) Ms. Price stated that upon calling a State agency in Tallahassee, Florida that she received an appropriate firearm sale approval number which cleared the proposed sale to Mr. Snyder with the State. (R-26 and 27) Apparently, prior to the sale and the phone call to the state agency, Mr. Snyder agreed to pay the clerk either a three dollar (\$3.00) or five dollar (\$5.00) charge for the phone call and related background check. (R-27) Mr. Snyder agreed to pay the charge and did not indicate any concern over his being approved. (R-28) As far as the background check and sales approval from Tallahassee was concerned, as Ms. Price put it, "it was fine". (R-29) However, Ms. Price testified that on the form required by Federal law to be filled out by a prospective firearms purchaser, the Defendant indicated that he was not a convicted felon. (R-31) Ms. Price testified that sometimes the State agency that approves the sale of firearms would give a conditional okay and that this would require the sale to be held up three (3) days pending further investigation by the State. However, in this case the State said to Ms. Price, "free and clear", regarding the background of the Defendant. (R-33)

SUMMARY OF THE ARGUMENT

The trial court erred in finding the Respondent, David Allen Snyder, guilty of the crime of possession of a firearm by a convicted felon in that the State of Florida approved the sale of the suspect firearm to the Respondent, and here the Respondent apparently relied upon the background check conducted by the State prior to the sale which determined him "free and clear" to purchase the firearm. The actions of the State of Florida here violate principles of fairness so excessively, that the Respondent's Florida and Federal due process protections are also violated. Additionally, the Respondent was not a "convicted felon" for purposes of the violation of law charged. His appeal below on the predicate felony conviction had not been decided while he possessed the firearm.

The conflict recognized by the Second District in its opinion below should be resolved in favor of the reasoning contained in that court's Wheeler and Snyder opinions, supra.

**ARGUMENT
ISSUE PRESENTED**

The trial court erred in finding the Respondent guilty of the crime of Possession of a Firearm by a Convicted Felon, where the Respondent was not a "convicted felon" according to the opinion of Wheeler v. State, 465 So.2d 639 (Fla. 2DCA 1985), and the State of Florida approved the sale of the suspect weapon to the Respondent.

One of the cornerstones of American freedom is that one charged with a crime is innocent until proven guilty beyond a reasonable doubt. Once a person is found guilty of a serious crime American's believe that person should loose most, if not all, of their civil rights and privileges. This case presents to this Honorable Court some of the more intricate operational questions of how these two American principles embodied in Florida law should work together. Additionally, this cause asks this Court if a prospective firearms buyer can be negligently entrapped by the State.

The record is clear that David Allen Snyder possessed a Colt AR-15 rifle from April 2, 1992 until April 8, 1992. However, despite his conviction in the trial court of a felony on March 6, 1991 the Respondent was still not a "convicted felon" for purposes of §790.23 Fla. Stat., the statute prohibiting possession of firearms by convicted felons. Mr. Snyder's appeal on the March 6, 1991 conviction had not been decided by the Second District when he possessed the firearm. An opinion was not filed by that court until April 17, 1992. see, Snyder v. State, 597 So.2d 384 (Fla. 2DCA 1992) In the case of Wheeler v. State, 465 So. 2d 639 (Fla. 2DCA 1985) the Second District held that an individual is not a "convicted felon" for purposes of §790.23 Fla. Stat. if the predicate felony conviction is on appeal, and undecided, at the

time the firearm is possessed. In Wheeler the court held, "a conviction is not final and cannot be relied upon to convict a subsequent felony offender until the Appellate Court affirms the conviction." relying on Joyner v. State, 158 Fla. 806, 30 So.2d 304 (Fla. 1947). However, in the case of Burkett v. State, 518 So.2d 1363 (Fla. 1DCA 1988) the First District Court of Appeal held that "...the holding in Wheeler is incorrect...", after acknowledging conflict between it and the Second District. The First District relied on the authority of Stevens v. State, 409 So.2d 105 (Fla. 1982) in concluding that an individual is a "convicted felon" for purposes of §790.23 Fla. Stat. when a conviction is entered at the trial court level, even though an appeal is taken. It does not appear that this conflict had been previously resolved by this Honorable Court, and therefore, Wheeler, controlled in this case below. It should be noted that the rule contained in Wheeler had been the jurisprudence of the State since 1973 when the Burkett court rendered it's opinion. The Wheeler rule was first announced in the case of Coleman v. State, 281 So.2d 226 (Fla. 2DCA 1973).

The argument contained in the Petitioner's Initial Brief on the Merits overlooks the principle that justice requires that those who are erroneously adjudicated guilty of a felony should bear no further sanction or burden from, or as a result of, that conviction. The rule contained in Burkett while assisting the State in it's war on crime, further penalizes those who have been wrongfully convicted. The Burkett rule imposes immediate sanctions before an appeal is decided. In the pursuit of fairness and due process can't we as a society afford the additional weapons amnesty

period provided under Wheeler and Snyder. If we do so we preserve the fair treatment of criminal defendants that sets our nation far apart from the rest of the world. If our court's should err, let them err on the side of individual freedom.

If however, this Court decides against the Respondent on the Wheeler v. Burkett conflict, then the State of Florida has still violated Mr. Snyder's due process protections warranting reversal.

The record of the proceeding below is clear on the point that the Respondent, David Allen Snyder, received approval from the State of Florida to purchase the Colt AR-15 rifle that he was charged with having in his possession, after he was convicted of a felony. (R-33) Further, the record is equally clear that the Respondent agreed to allow the firearm's store clerk to perform a background check with the State and that he would pay for such a background check. (R-27,28) Additionally, the firearm sales clerk testified that Mr. Snyder did not purchase the firearm until State approval for the sale of the firearm had been given. (R-28) After the State has approved such a sale of a firearm to an individual, criminal liability should not attach to that individual, when after being approved, cleared, and authorized to buy a firearm, they do so. Surely, it was error for the trial court to find that the Defendant below committed a crime by his reliance on the representations of the State of Florida. This is the same State, and thereby the same sovereign entity, that approved the suspect sale of the firearm to David Allen Snyder.

In its simplest form this subissue may be restated as "May the State of Florida punish someone under it's criminal laws who

commits a certain act, when that act has been approved by a State of Florida regulatory agency in advance?" At first blush our collective American values says that something isn't quite fair about the imposition of such criminal punishment. However, Respondent concedes that what most Americans consider as being fair play is not always expressed in the operation of law. In times of conflict between values and the law, the law would control. Unless of course, the conflict between what is fair and what the law provides is so severe that the law would violate the minimum standards of fair play imposed upon the State by either the Florida or United States Constitutions. The conflict that arose from time to time between fair play and the law is precisely what led to the establishment of the Courts of Equity and Chancery. That conflict leads this Court to the dispositive inquiry of the case at bar, "What specifically does the law provide on these facts, and then does the contents of the law provide for the fair treatment of the Appellant by the State of Florida?"

Below the State never proved that the Appellant knew he was a convicted felon. Here, the Appellant argues that the record indicates that he did not know he was a convicted felon. Mr. Snyder's dialogue with Sergeant Warner, and the results of the State performed background checks indicate that the Appellant did not know he was a "convicted felon". (R-34-43)

On the day Mr. Snyder purchased the Colt AR-15 rifle from the Avon Park Pawn Shop, April 2, 1992, Florida law mandated that the store clerk call the Department of Law Enforcement and have a background check performed by the State of Florida. see, §790.065 Fla. Stat.; §1, Chapter 89-191 and §1, Chapter 90-065 established

the firearm sales routine followed by the sales clerk, the Appellant, and the Department of Law Enforcement on April 2, 1992. The compliance by all parties with the statutory sale formality resulted in an approval and unique number being assigned the transaction. see, §790.065 (1) (d) Fla. Stat.

The law itself provides for civil immunity to parties who follow the statutory regime during a firearms sale when a weapon is delivered to any person who has been convicted of a crime punishable for a prison term exceeding one (1) year. §790.065 (11) Fla. Stat. Even though the legislature recognized the fairness of providing immunity to parties who relied on the State's background check, it extended the immunity to only civil cases. Should only laws of a civil nature be fair? The fair immunity recognized by Statute, but only extended to civil cases lacks symmetry. This Honorable Court should provide this needed symmetry, and extend the immunity to criminal cases by judicial caveat.

The excessive violation of fairness by the totality of the State's action here constitutes a violation of the Respondent's due process guarantees under the Florida and Federal Constitutions.

"Defining the limits of due process is difficult because, due process, unlike some legal rules is not a technical conception with a fixed content unrelated to time, place, and circumstances. See, Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L. Ed. 817 (1951) Rather, due process is a general principle of law that prohibits the government from obtaining convictions brought about by methods that offend a sense of justice. See, Rochin v. California, 342 U.S. 173, 72 S.Ct. 205, 96 L. Ed 2d 183 (1952)",

from the opinion of State v. Williams, 623 So.2d 462 (Fla. 1993).

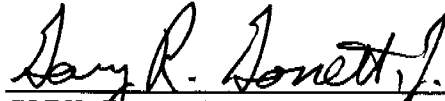
In conclusion, the Respondent should not be punished for what amounted to here as the State's negligent entrapment of Respondent.

The record reflects that David Snyder did not know he was a convicted felon and he asked the State to conduct a background check on him. The State told the clerk that Mr. Snyder was "free and clear" to buy a firearm. After Mr. Snyder purchased the firearm the State charged him with criminal liability for possession of the same firearm. A conviction resulted, which in turn violates fundamental fairness and both Florida and Federal due process Constitutional protections. This Court should right this wrong and reverse the Respondent's conviction either by affirming the Second District's opinion below, or by separate opinion.

CONCLUSION

Wherefore, the Respondent, by and through counsel, prays that this Honorable Court approve the opinion of the Second District below, reverse his conviction and remand this matter below for the entrance of an appropriate judgement of acquittal.

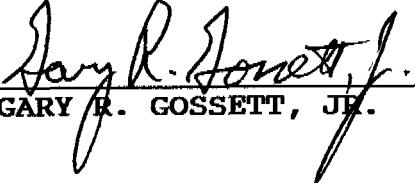
Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the HELENE S. PARNES, ESQUIRE, Assistant Attorney General, at 2002 N. Lois Avenue, Suite 700, Westwood Center, Tampa, Florida 33607-2366, this the 10th day of April, 1995.



GARY R. GOSSETT, JR.