IN THE SUPREME COURT OF FLORIDA

JOHN ANDREW KNIGHT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

FSC CASE NO. 85,654
5TH DCA CASE NO. 94-1003

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

Amended

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The language of Florida Rule of Criminal Procedure 3.390(a) is mandatory that the trial judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial. The application of this Court's decision in State v. Weller, 590 So. 2d 923 (Fla. 1991), is limited to the unique problems presented by the drug trafficking statute, Section 893.135(1)(b), Florida Statutes (1989), and does not require that the jury be instructed on the three year mandatory minimum penalty in every case involving possession of a firearm in the commission of an enumerated felony under Section 775.087(2)(a), Florida Statutes (1993).

ARGUMENT

THIS COURT'S DECISION IN STATE V. WELLER, 590 SO. 2D 923 (FLA. 1991), DOES NOT REQUIRE THAT THE TRIAL COURT INSTRUCT THE JURY ON THE THREE YEAR MANDATORY MINIMUM SENTENCE FOR POSSESSION OF A FIREARM IN THE COMMISSION OF A FELONY PURSUANT TO SECTION 775.087(2)(a).

Because Section 893.135(1)(b), Florida Statutes (1989), the drug trafficing statute, created a situation where a defendant could be convicted of three different first degree felonies resulting in three different mandatory minimum sentences depending on the quantity of the substance involved, this Court ruled in State v. Weller, 590 So. 2d 923, 927 (Fla. 1991), that the jury should be instructed that the mandatory minimum penalty is greater depending on the quantity of the substance involved. The jury would then determine from the evidence adduced at trial the quantity of the contraband involved and thereby, in effect, advise the court as to the appropriate mandatory minimum penalty.

Petitioner contends that Weller requires a jury instruction on the possible penalties in every case involving a mandatory minimum, despite the clear language of Florida Rule of Criminal Procedure 3.390(a), that the judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial. Respondents would assert that Weller carves out a narrow exception to that rule to be applied only in first degree felony drug trafficking cases under Section 893.135(1)(b), Florida Statutes, requiring the jury to determine from the evidence at trial whether the quantity of the contraband involved

in the offense was 28 grams or more but less than 200 grams, 200 grams or more but less than 400 grams or 400 grams or more up to 150 kilograms. The jury is simply asked to make a factual determination concerning the quantity of the contraband involved.

In the instant case, there is no such problem. The jury was simply asked to determine from the evidence adduced at trial whether or not Petitioner possessed a firearm during the commission of the offense of aggravated assault. Either Petitioner possessed a firearm or he did not. The evidence was unrefuted. Petitioner admitted possessing and firing a firearm during this incident. The jury returned a verdict consistent with the evidence and made the specific finding that Petitioner possessed a firearm during the commission of the aggravated assault. (Appendix II, R73).

A related problem was confronted by this Court last year in McKendry v. State, 641 So. 2d 45 (Fla. 1994). In that case, a trial court judge had tried to circumvent the mandatory minimum five year penalty for possession of a short-barreled shotgun by suspending the sentence and placing the defendant on community control to be followed by probation. This Court cited its decision in State v. Coban, 520 So. 2d 40 (Fla. 1988), in concluding that the courts have no discretion in whether or not to impose the mandatory sentence prescribed by the legislature. In his concurring opinion, Justice Overton stated that the legislature should be extremely careful in directing the imposition of mandatory sentences and should consider reinstating to some extent the trial judge's discretion under Section 948.01,

Florida Statutes (1993). In his dissent, Justice Shaw suggested that the majority had lost sight of the ultimate goal, "simple justice for a common man".

While the legislature has apparently chosen not to heed the advice of Justice Overton, it cannot be said that the sentence imposed in the instant case denied Petitioner simple justice. The testimony and other evidence presented at trial clearly establish that, on September 6, 1993, after a physical altercation over a near traffic accident, Petitioner went to his car, got out a gun and fired several shots into the victim's home. There were bullet holes in the walls of the victim's bedroom and that of his daughter and bullets were recovered from over his daughter's closet and from behind a couch. The victim stated that Petitioner fired at least one shot in his direction on the porch. Although Petitioner testified that he had not intended to hit anyone, he is most fortunate that no one was injured during the shooting and that he did not face even more serious charges and penalties. Petitioner had a prior record for disorderly conduct and for battery. (Appendix III, R103). Apparently, Petitioner failed to learn his lesson about controlling his temper from the experience of those convictions. The legislature enacted Section 775.087(2), Florida Statutes, twenty years ago to discourage the possession of a firearm in the commission of a felony and, hopefully, to save some lives thereby. Chapter 74-383, Section 9, Laws of Florida, effective July 1, 1975. All things considered, the minimum three year sentence of imprisonment required by this conviction cannot be

said to be unjust under the circumstances in this case. The jury made the correct factual finding based upon the evidence adduced in this case. The trial court properly assessed the penalty mandated by the legislature. The question certified in Knight v. State, 21 Fla. L. Weekly D 862 (Fla. 5th DCA April 7, 1995), should be answered in the negative. (Appendix I).

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this Honorable Court either decline to exercise its discretionary jurisdiction or approve the decision of the Fifth District Court of Appeal below and answer the certified question in the negative.

Respectfully submitted,

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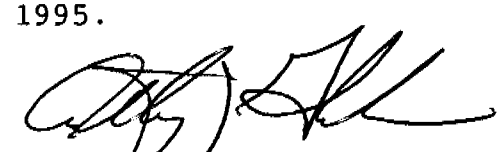
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been delivered to Brynn Newton, Esquire, Office of the Public Defender, Counsel for Petitioner, 112-A Orange Avenue, Daytona Beach, Florida 32114-4310, this 22nd day of June, 1995.



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APPENDIX

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