

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

JUL 14 1995

CLERK, SUPREME COURT

BY \_\_\_\_\_  
Chief Deputy Clerk

JOHN ANDREW KNIGHT,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

CASE NO. 85,654

District Court of Appeal,  
Fifth District, No. 94-1003

APPEAL FROM THE CIRCUIT COURT  
IN AND FOR SEMINOLE COUNTY  
AND THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON, PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON  
ASSISTANT PUBLIC DEFENDER  
Florida Bar Number 175150  
112-A Orange Avenue  
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904-252-3367

ATTORNEY FOR PETITIONER

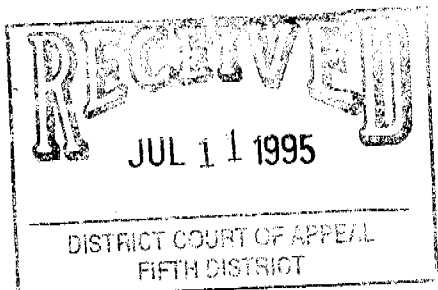


TABLE OF CITATIONS

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CASES CITED:

McKendry v. State,  
641 So. 2d 45 (Fla. 1994)

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State v. Weller,  
590 So. 2d 923 (Fla. 1991)

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State v. Wimberly,  
498 So. 2d 929 (Fla. 1986)

1

OTHER AUTHORITY:

Rule 3.390(a), Florida Rules of Criminal Procedure

2

ARGUMENT IN REPLY

IN REPLY TO THE STATE AND IN SUPPORT  
OF THE ARGUMENT THAT THE DECISION IN  
STATE v. WELLER, 590 So. 2d 923 (Fla.  
1991), APPLIES IN THIS CASE AND  
REQUIRES THAT THE TRIAL COURT  
INSTRUCT THE JURY ON MANDATORY  
MINIMUM PENALTIES WHICH ARE DEPENDENT  
UPON THE JURY'S FACTUAL FINDINGS.

Respondent, the State, has argued that the holding in State v. Weller, 590 So. 2d 923 (Fla. 1991), does not apply in this case partly because the jury's verdict that Petitioner was guilty of aggravated assault with a firearm was consistent with the evidence. (Respondent's Brief on the Merits, Page 3). The evidence in Weller likewise appears to have been sufficient to support the jury's verdict that he trafficked in more than 400 grams of cocaine; but the **issue** in Weller, as it is in this case, was whether the trial court properly refused to inform the jury that the minimum mandatory punishment for the same-degree offense is greater depending upon a particular factual finding. Weller was entitled to have his jury instructed on all the "degrees" of trafficking in cocaine and be given all the factual options to make findings that would subject Weller to greater or lesser punishments. This is very similar to the policy in this state that juries are allowed to convict of lesser offenses under Florida's recognition of the jury's right to exercise its "pardon power." See State v. Wimberly, 498 So. 2d 929 (Fla. 1986). Petitioner likewise was entitled to have his jury instructed that the penalty for aggravated assault would be a greater, mandatory minimum sentence, if they found that the weapon used in its commission was a firearm.

Petitioner further replies that Rule 3.390(a)'s language, that a trial judge shall not instruct a jury on penalties, is mandatory only with respect to "the sentence that may be imposed for the offense for which the accused is on trial." (Emphasis supplied.) In this case, as in Weller, the erroneously denied request was that the jury be informed that, depending on their special verdict, there was a mandatory minimum penalty which must be imposed.

Petitioner further replies and repeats that McKendry v. State, 641 So. 2d 45 (Fla. 1994), is inapplicable to the issue in this case. McKendry did not involve the issue of whether the jury at McKendry's trial was properly instructed on the law but only whether, upon McKendry's conviction, the trial judge had any option other than to impose the mandatory minimum penalty prescribed by the Legislature.

CONCLUSION

For the reasons expressed herein and in his Brief on the Merits, Petitioner respectfully requests that this Honorable Court reverse the District Court's decision affirming his convictions for aggravated assault and shooting at or into a building and remand this cause to the trial court for a new trial. In the alternative, Petitioner respectfully requests that this Honorable Court order that his conviction for aggravated assault be reversed and this cause remanded to the trial court for a new trial.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. John A. Knight, 1817 Harding Avenue, Sanford, Florida 32771, this 11th day of July, 1995.



ATTORNEY