IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA)
)
Petitioner,)
)
vs.)
)
ERIC ROY JOHNSON,)
)
Respondent.)
)
_____)

CASE NO. 86,532
4TH DCA No. 94-2891

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the appellant in the Fourth District Court of Appeal and the defendant in the Nineteenth Judicial Circuit, In and for Martin County, Florida. Petitioner was the appellee and prosecution below. In this brief the parties will be referred to as they appear before this court.

The symbol "R" will denote Record on Appeal.

STATEMENT OF THE CASE AND FACTS

The Respondent was found guilty of two counts of battery on a law enforcement officer in Case No. 92-752. A notice of appeal was filed in the Fourth District Court of Appeal. The appellant had no prior felony convictions prior to a jury finding him guilty of battery on a law enforcement officer. During the pendency of the Respondent's appeal, he was arrested and charged with possession of a firearm by convicted felon in violation of Fla. Stat. §790.023 (1993) and possession of cocaine. The sole predicate offense for the possession of a firearm by convicted felon were the offenses on appeal. The appellant entered into a plea of nolo contendere to possession of a firearm by convicted felon and was sentenced for the offense. The possession of cocaine offense was nolle prossed by the Petitioner (R 54-60). Thereafter the convictions for battery on a law enforcement Officer were reversed by the Fourth District Court of Appeal and remanded for a new trial. Johnson v. State, 634 So. 2d 1144 (Fla. 4th DCA 1994).

Subsequently, the respondent filed a motion to set aside the conviction for the possession of a firearm by convicted felon because the predicate felony had been reversed on appeal (R 72-73). After a hearing on the appellant's motion, the trial court denied the Respondent's motion to set aside the conviction for possession of a firearm by convicted felon relying on Lewis v. United State, 445 U.S. 55, 100 S.Ct.915, 63 L. Ed.2d 198 (1980) (R 75-76).

Notice of appeal was timely filed in the Fourth District appealing the trial court's order denying the Respondent's motion to set aside the conviction for possession of a firearm by convicted felon (R 77).

On September 20, 1995, the Fourth District Court of Appeal reversed the Respondent's conviction for possession of a firearm by a convicted felon and remanded with directions to vacate the conviction. Johnson v. State, 20 Fla. L. Weekly D2158 (Fla. 4th DCA September 20, 1995). In its decision, the Fourth District considered Burkett v. State, 518 So. 2d 1363 (Fla. 1st DCA 1988) and Wheeler v. State 465 So. 2d 639 (Fla. 2d DCA 1985). However the

Fourth District specifically stated that neither case was controlling in the result in instant case because the predicate convictions in those cases were affirmed on appeal. The Fourth District applied the rule of lenity and construed Fla. Stat. §790.023 in a manner most favorable to the Respondent. The Fourth District adopted the construction of Fla. Stat. 790.023 applied by Wheeler and certified conflict with Burkett.

On September 25, 1995, the Petitioner filed a notice to invoke the discretionary jurisdiction of this court. In addition, on September 26, 1995, the Petitioner filed a motion to stay mandate pending this court's review. On October 26, 1995, this Court granted the Petitioner's motion to stay mandate.

On October 3, 1995 this court postponed the decision on jurisdiction and ordered a briefing schedule. This appeal follows.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeal's opinion in Johnson v. State, 20 Fla. L. Weekly D2158 (Fla. 4th DCA September 20, 1995) must be affirmed. Florida Statute §790.023 fails to define "conviction". The Fourth District was correct in applying the rule of lenity and adopting the statutory construction applied by Wheeler v. State, 465 So. 2d 639 (Fla. 2d DCA 1985). Furthermore it would be fundamentally unfair and a violation of due process for Respondent to be convicted of possession of a firearm by convicted felon where the predicate conviction is reversed on appeal.

Accordingly, this Court must affirm the decision of the Fourth District Court of Appeal.

POINT ON APPEAL

THE DECISION OF THE DISTRICT COURT, HOLDING THAT A CONVICTION FOR POSSESSION OF A FIREARM BY A CONVICTED FELON CANNOT STAND WHERE THE PREDICATE CONVICTION WAS OVERTURNED ON APPEAL, WAS CORRECT AND MUST BE AFFIRMED.

The issue in the instant appeal is whether a defendant may be convicted of possession of a firearm by convicted felon where the predicate felony conviction on appeal is reversed. The Fourth District Court of Appeal in Johnson v. State, 20 Fla. L. Weekly D2158 (Fla. 4th DCA September 20, 1995) held that a conviction for possession of a firearm by convicted felon is void where the predicate conviction was overturned on appeal. In reaching this holding, the Fourth District was required to analyzed the definition of conviction. The First District in Burkett v. State, 518 So. 2d 1363 (Fla. 1st DCA 1988) failed to address the question of whether a conviction for possession of a firearm by a convicted felon could stand where the predicate conviction was overturned on appeal. But the First district concluded that a defendant is "convicted" for purposes of Fla. Stat. §790.23 (1993) (possession of a firearm by convicted felon) when he is adjudicated guilty in the trial court.

The Second District in Wheeler v. State, 465 So. 2d 636 (Fla. 2d DCA 1985) took a different approach in defining "convicted" for purposes of Fla. Stat. §790.23 (1993). The Court in Wheeler Id. held that a judgment of conviction on appeal could not be relied upon to convict a defendant under Fla. Stat. §790.23 until the appellate court affirms the predicate conviction on appeal.

The Fourth District in Johnson v. State, supra, specifically stated that neither Burkett nor Wheeler was controlling as to the result sub judice since both defendants' predicate convictions were affirmed on appeal. Therefore the Fourth District turned to the statutory language to ascertain when a defendant is "convicted" for purposes of Fla. Stat. §790.23.

The said statute states the following:

> (1) It is unlawful for any person to own or to have in his or her care custody, possession or control any firearm or electric weapon or device, or to carry a concealed weapon, ...if the person has been:
> (a) Convicted of a felony or found to have committed a crime against the United States which is designated as a felony.

Fla. Stat. §790.23 fails to define "convicted" and is susceptible to two differing interpretation. The Fourth District applied the rule of lenity since the said statute failed to define "convicted". When statutory language is susceptible of differing constructions, it shall be construed most favorably to the accused. Fla. Stat. §775.021(1); Perkins v. State, 576 7So. 2d 1310 (Fla. 1991). The Fourth District correctly adopted the construction of §790.23 applied by Wheeler and certified conflict with Burkett.

The Petitioner's position is that Burkett is the correct statutory interpretation, although the legislature failed to state when a conviction is final pursuant Fla. Stat. §790.023. Additionally the Petitioner asserts that the Respondent made no reservation of a right to appeal during the plea hearing for possession of a firearm by convicted felon. It is the Respondent's position that without the predicate conviction for Fla. Stat. §790.023, the Respondent would be convicted on a nonexistent crime. A court is required to set aside a conviction for all nonexistent crimes even without a contemporaneous objection. Achin v. State, 436 So. 2d 30 (Fla. 1982); Adams v. Murphy, 394 So. 2d 411 (Fla. 1981); Williams v. State, 601 So. 2d 1253) (Fla. 5th DCA 1992). The Respondent urges this court to affirm Johnson v. State, supra and adopt the statutory interpretation of the Second District in Wheeler.

In a similar case, the Washington Supreme Court in State v. Gore, 681 P.2d 227 (Wash. 1984) rejected Lewis v. United States, 445 U.,S. 55, 100 S. Ct. 915, 63 L. Ed. 2d 198 (1980)(the case relied on by the trial court in denying the Respondent's motion to set aside a conviction under Fla. Stat. §790.023) concluding that the word "convicted" in its statute, which is similar to Fla. Stat. 790.023, was ambiguous and, under the rule of lenity, had to interpreted in favor of the accused.

Moreover in Joyner v. State, 158 Fla. 806, 30 So. 2d 304 (Fla. 1947), superseded on other grounds as recognized in State v. Barnes, 595 So. 2d 22 (Fla. 1992), this court addressed the use of a conviction that was on appeal to enhance the sentence imposed in a subsequent case stating:

> It appears to be very well settled that before a prior conviction may be relied upon to enhance the punishment in a subsequent case such prior conviction must be final. If an appeal has been taken from a judgment of guilty in the trial court that conviction does not become final until the judgment of the lower court has been affirmed by the appellate court.

Likewise in the case at bar, a predicate felony conviction does not become final until the judgment of the trial court has been affirmed by the appellate court in order for a defendant to violate Fla. Stat. §790.023. Where a conviction is reversed on appeal, it is considered void. Kaminski v. State, 72 So. 2d 400 (Fla. 1954); Ex parte Livingson, 116 Fla. 640, 156 So. 612 (1934); Griffith v. State, 654 So. 2d 936, 943 n.14 (Fla. 4th DCA 1995). It would be fundamentally unfair and a violation of due process for a defendant to be convicted of possession of a firearm by convicted felon where the predicate conviction used to convict the defendant is reversed on appeal.

The Respondent urges this court to apply the rule of lenity to the instant case and adopt the construction of Fla. Stat. §790.023 applied by Wheeler and Johnson. Thus the Fourth District's decision in Johnson v. State, supra must be affirmed.

CONCLUSION

Based on the foregoing Argument and the authorities cited therein, Appellant respectfully requests this Honorable Court to affirm the decision of Johnson v. State, 20 Fla. L. Weekly D2158 (Fla. 4th DCA September 20, 1995).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to EDWARD GILES, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401 by courier this 13th day of November, 1995.

Attorney for ERIC ROY JOHNSON