087

IN THE SUPREME COURT OF FLORIDA

CURTIS DALE,	:	
Petitioner,	:	
v.	:	CASE NO. 87,691
STATE OF FLORIDA,	:	
Respondent.	:	

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REPLY BRIEF OF PETITIONER ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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I ARGUMENT

ISSUE PRESENTED/CERTIFIED QUESTION

CAN A JURY PERMISSIBLY FIND A BB GUN TO BE A DEADLY WEAPON AND A DEFENDANT GUILTY OF ARMED ROBBERY WHEN THE EVIDENCE SHOWS THAT THE BB GUN WAS FOUND UNLOADED, WITHOUT A CO_2 CARTRIDGE, AND NO EVIDENCE WAS PRESENTED THAT THE BB GUN WAS LOADED AT THE TIME OF THE OFFENSE, WHERE THE DEFENDANT STATED SIMPLY "I HAVE A GUN" DURING COMMISSION OF THE ROBBERY?

Petitioner reasserts his contention made in the initial brief that the issue here could be framed more simply as whether a BB gun - either loaded or unloaded - is a deadly weapon per se. Contrary to the state's argument, that is the essential question behind these undisputed facts - the BB gun was found unloaded, without a CO_2 cartridge, there was no proof it was loaded at the time of the robbery, and the robber said, "I have a gun." Since it lacked any present capability of being used as a deadly weapon, and was not in fact used in a manner likely to cause death or great bodily harm, these

undisputed facts could constitute a jury question only if a BB gun, like a firearm, is a deadly weapon per se.

Petitioner contends that, on the deadly weapon continuum, a BB gun is more like a toy gun or fake gun or fake bomb, or starter pistol, all of which have been held to be non-weapons, since they lack the present ability to cause an injury, than it is like a firearm, or other object which could be found to be a deadly weapon per se. See Brooks v. State, 605 So.2d 874 (Fla. 1st DCA 1992), quashed on other grounds, 630 So.2d 527 (Fla. 1993) (starter pistol); Streetman v. State, 455 So.2d 1080 (Fla. 2d DCA 1984) (fake bomb); Paul v. State, 421 So.2d 696 (Fla. 2d DCA 1982) (toy gun); McCray v. State, 358 So.2d 615 (Fla. 1st DCA 1978) (fake gun - cigarette lighter shaped like gun).

An unloaded BB gun is even more like a toy or fake gun, since, even if a loaded BB gun could be said to have the ability to cause injury, an unloaded BB gun does not.

The state complained about petitioner's discussion of firearms in his initial brief (State's Brief (SB), 5-6), but the point was only to give the discussion needed context. It was ironic, then, that the state favorably quoted cases which held that a defendant can be convicted of armed robbery with a firearm, even though the firearm was not loaded (SB-11). As petitioner has explained before and will again, an unloaded firearm is a deadly weapon only because a statute says it does not matter whether it is loaded or not, as long as it is

"readily convertible" to operable status. No such statute applies to non-firearms, and the state concedes, as it must, that the BB gun is not a firearm.

A. When BB gun is unloaded

In his initial brief, petitioner approached the issue from the seemingly logical perspective of asking the court, first, to find that a BB gun is not a deadly weapon per se. That is, a BB gun could not be found to be a deadly weapon unless it were actually used in a manner likely to cause death or great bodily injury. Only secondarily did petitioner ask the court to find, even assuming arguendo a loaded BB gun could be a deadly weapon per se, that an unloaded BB gun is not a deadly weapon, because it has no present capability of causing any injury.

On reconsideration, petitioner believes the question is much simpler where the BB gun is unloaded, so that, perhaps, it should be answered first. Undersigned counsel continues to believe that this case presents an appropriate opportunity for this court to address the question of whether even a loaded BB gun, if it is not used in a deadly manner, is nevertheless a deadly weapon, an issue on which there are significant disparities among the district courts.

Where the BB gun is unloaded presents a simpler question, because an unloaded firearm remains by statute a firearm, but an unloaded non-firearm does not remain a deadly weapon, even assuming arguendo it were a deadly weapon when loaded. By

statute, a thing remains a firearm as long as it is "readily convertible" to operable status, but ready convertibility applies only to firearms and not to non-firearms. Thus, an unloaded non-firearm, such as the BB gun here, lacking the present ability to cause any injury, is not a deadly weapon. In other cases, district courts have held that, absent a present capability of causing injury, an "unloaded" crossbow (i.e., no arrows) and a fake bomb were not only not deadly weapons, but not weapons at all. Heston v. State, 484 So.2d 84 (Fla. 2d DCA 1986); Streetman, supra. This court should reach the same conclusion here.

B. When BB gun may or may not be loaded

The state continues to argue the BB gun is a deadly weapon per se. The state cites a dictionary definition of the diameter of a BB pellet, which is .18 inch, and argues that firing a lead pellet of this size, "contemplat[es] damaging or destroying the target" (SB-7,10). There was simply no proof of this non-self-evident fact at trial below, and the state offers nothing new on appeal.

Whether a BB gun is even in theory capable of causing death or great bodily harm is not determinable by the mere fact of the size of the pellets. Such a thing is not even determinable for a firearm by the size of the bullets. If I hold bullets in my hand without a firearm, and throw them at someone, they are not deadly instruments. They become so only when they are fired with explosive force from a firearm.

The size of BB pellets is either an essentially meaningless fact, or at best, only half the fact the state would have to prove to prove that a BB gun could be a deadly weapon. The size of BB pellets means nothing, unless there were proof as to how much force was used in firing them. It is a principle of physics that mass plus acceleration equals force. Mass alone does not prove force, and that is all the state has offered. It is the projectile plus the force by which it is expelled which determines this fact. The state did not prove the potential force of the BB gun at trial, assuming arguendo this would have been sufficient in the absence of proof that it was actually used in a manner likely to cause death or great bodily harm.

Further, "capable of" causing death or great bodily harm, without either such a designed use or actual use cannot possibly be the standard. If it were the standard, then any robber wearing a tie or a belt or shoes or shoelaces, or carrying anything, such as a toy gun or a nutdriver, but using none of them in a manner "likely to" cause death or great bodily harm, could be convicted of robbery with a deadly weapon, since all of these objects are "capable," under certain circumstances, of causing death or great bodily harm. Ties or belts or shoelaces could be used to strangle someone, but surely this court would require actual use in a deadly manner before it would find an otherwise unarmed robber to have a deadly weapon, because he happened to be wearing shoes with laces.

Because there was no evidence the gun had ever been operational, the decision in Lynn is rather hard to reconcile with the argument that, since it lacks the actual present capability of causing injury, a BB gun could not be a deadly weapon. Lynn v. State, 567 So.2d 1043 (Fla. 5th DCA 1990). The decision in Lynn seemed to turn heavily on the existence of threats which have no counterpart here. Also, the pellets jammed in the gun might indicate that Lynn tried but failed to fire it; a fact also not present here.

"I have a gun" is a verbal indication of its presence. If it could be said to be a threat, it is sort of an implicit threat once removed. It is no threat. It seeks compliance without a threat, and does not indicate what the consequences of non-compliance might be for the victim. Rather, it is a method of avoiding the issue of non-compliance, just as holding a nutdriver under a cloth and claiming to have a gun seeks to coerce compliance and avoid the issue of non-compliance. Other cases, such as the nutdriver case, have held that a non-verbal indication of the presence of a gun does not create a jury question, where the object was not in fact a gun. Bates v. State, 561 So.2d 1341 (Fla. 2d DCA 1990).

This court should reach the same conclusion. It is well-settled that a BB gun is not a firearm. The district court cases finding a BB gun to be a deadly weapon per se, without proof that it was used in a manner likely to cause death or great bodily harm, cannot be sustained because they ignored the

applicable standard without proof of actual use. Finally, a BB gun cannot even be a non-deadly weapon, since "weapons" are defined by statute, and the legislature has not expressly addressed the status of BB guns. Therefore, absent proof that a BB gun was used in a manner likely to cause death or great bodily harm, it cannot be found to be a weapon or a deadly weapon, even if it were loaded.

C. Whether undisputed facts create a jury question

The state's argument that, although the BB gun was found unloaded minutes after the robbery does not mean it was unloaded during the robbery (SB-12) is impermissibly speculative. Where there was no proof the BB gun was loaded at the time of robbery, no jury question is created. Assuming arguendo that it matters whether the BB gun was loaded, the burden was on the state to prove this fact; it failed to do so.

Nor, contrary to the state's argument, do the victim's perceptions determine whether a jury question is created, since Florida follows an objective standard. If the standard were the subjective perception of the victim, then the decisions in the numerous fake or toy gun, starter pistol, and fake bomb cases would all have been different, since presumably the victims' subjective perception was that the objects were capable of causing death or great bodily harm, although objectively they were not capable of causing injury.

The essential facts of this case are undisputed - within minutes after the store was robbed, the police found in a house

nearby a bag from the store, the clothes Dale had changed from, and an unloaded BB gun. The state argued to the district court and the district court found that the facts created a jury question. With all due respect, undisputed facts do not create a jury question. Rather, undisputed facts create a question of law, not of fact.

For example, in Boswink v. State, 636 So.2d 584 (Fla. 2d DCA 1994), the Second District held the defendant could not be convicted of carrying concealed firearms, because the guns were not "readily accessible." Boswink was carrying a 44-inch long rifle and a 28-inch long shotgun in his truck. Both were "partially enclosed in a professionally made gun case attached to the back of the truck's seat cover." The butts of the guns were visible when the driver's door was opened. First, the district court said that "[c]ases deciding whether the particular firearm at issue comes within the definition of 'readily accessible' are intensely 'fact specific,'" citing Ashley v. State, 619 So.2d 294 (Fla. 1993). Then the court said:

> The trial court, unable to fit this situation within a precedential fact pattern, decided that it was up to the jury to decide whether the guns were "readily accessible."

636 So.2d at 585.

This was incorrect however:

> Contrary to the trial court's view, the undisputed facts imposed upon it the task of deciding as a matter of law whether the guns were "readily accessible."

Id. The court analyzed the issue thus:

> Because of the length of the weapons and their position behind the driver's seat, Boswink could only retrieve the guns by opening the door and awkwardly reaching behind the seat. In all probability, he could not accomplish the feat without actually exiting the truck. As a matter of law, the guns could not have been retrieved "as easily and quickly as if carried on the person," and Boswink's possession of them in his truck was not illegal.

Id.

Many other cases have held that undisputed facts do not create a jury question. See e.g., Kepple v. Aetna Casualty & Surety Co., 634 So.2d 220 (Fla. 2d DCA 1994); see also USP Real Estate Investment Trust v. Discount Auto Parts, 570 So.2d 386, 393 (Fla. 1st DCA 1990). In State v. Munoz, 629 So.2d 90 (Fla. 1993), an entrapment case, the Florida Supreme Court said:

> The third question under the subjective test is whether the entrapment evaluation should be submitted to a jury. Section 777.201 directs that the issue of entrapment be submitted to the trier of fact. Such direction is consistent with the subjective evaluation of entrapment because the two factual issues above ordinarily present questions of disputed facts to be submitted to the jury as the trier of fact.

Id. at 100. The court continued:

> However, if the factual circumstances of a case are not in dispute. . ., then the trial judge has the authority to rule on the issue. . .as a matter of law because no factual [question] is at issue. . .

Id. The court continued, even more strongly:

> We reject any construction of section 777.201 that would require such an issue of law to be submitted to a jury. Under the constitution of this state, juries, as the finders of fact, decide factually disputed issues and judges apply the law to the facts as those facts are found by the jury. To construe section 777.201

> as mandating that the issue of entrapment is to be submitted to the jury for determination as a matter of law would result in an unconstitutional construction that would violate article I, section 9, of the Florida Constitution. Consequently, we construe section 777.201 as requiring the question of predisposition to be submitted to the jury when factual issues are in dispute or when reasonable persons could draw different conclusions from the facts. In certain instances, however. . ., the trial judge and appellate courts clearly have the authority to rule on the issue as a matter of law. To hold otherwise would violate procedural due process.

Id.

This court went through this explanation because of the provision of section 777.201 that the question of entrapment was for the trier of fact to determine. The court explained, in essence, that this was true and could be constitutional only where there were disputed facts or disputed inferences. This principle is generally applicable in the law, both criminal and civil, however, and not limited to the entrapment scenario. Because the evidence here was undisputed, it created a question of law for a court to decide; it was not a jury question.

II CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court reverse the district court decision, and order his conviction be reduced to simple robbery and remand for resentencing.

Respectfully submitted,

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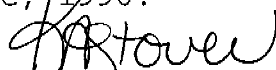
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Jean-Jacques Darius, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Mr. Curtis Dale, inmate no. 783245, Gulf Correctional Institution, P.O. Drawer 130, Wewahitchka, Florida 32465-0130, this 21 day of June, 1996.



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