IN THE SUPRME COURT OF THE STATE OF FLORIDA

CASE NO. 88,412

FILED
SID J WHITE
AUG 21 1996
CLERK, SUPREME COURT
By
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

vs.

NATHANIEL HARGROVE,

Respondent.

RESPONDENT'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts presented by Petitioner in its Initial Brief on the Merits.

SUMMARY OF ARGUMENT

POINT ON APPEAL

The trial judge erred in imposing a three year "firearm" mandatory minimum of incarceration as part of Appellant's sentence on Count I of the Indictment, since the jury below failed to specifically find the defendant's verdict that Appellant used a firearm in the commission of the charged offense. As a result, the Fourth District Court of Appeal's decision in Hargrove v. State, 21 F.L W. D1418 (Fla. 4th DCA June 19, 1996) correctly ordered the deletion of the mandatory minimum portion of Appellant's sentence, since the rationale supporting this Court's decision in State v. Overfelt, 457 So. 2d 1385 (Fla. 1984), which mandated that express jury findings before imposing a "firearm" mandatory minimum sentence, that a post-verdict judicial finding concerning a firearm used during a crime would usurp a jury's fact-finding motion, has not been undercut by subsequent Supreme Court case on the subject, and since the rule has not proven impossible to apply in practice, Petitioner's Petition for Review must be denied.

ARGUMENT

POINT ON APPEAL

THE RULE IN OVERFELT THAT A FIREARM MANDATORY MINIMUM SENTENCE CANNOT BE IMPOSED WITHOUT A SPECIFIC JURY FINDING REQUIRES AFFIRMANCE OF THE FOURTH DISTRICT COURT OF APPEALS DECISION IN HARGROVE V. STATE, 21 F.L.W. D1418 (FLA. 4TH DCA, JUNE 19, 1996).

Initially, Respondent would note that Petitioner did not submit the argument presented to this Court to the Fourth District Court of Appeal. Indeed, at p. 17 of Petitioner's Answer Brief the State of Florida conceded error on this subject, citing this Court's opinion in State v. Overfelt, 457 So, 2d 1385, 1387 (Fla. 1984), admitting that the verdict formed below did not "answer a specific question regarding use of a firearm" concerning Petitioner's criminal activity, Answer Brief at p. 17. Accordingly, this issue is not properly subject to judicial review in this Court.

Nor can Petitioner succeed on the merits. In State v. Overfelt, 457 So. 2d 1385 (Fla. 4th DCA 1984), this Court held that before a "firearm" mandatory term of incarceration can be imposed pursuant to Florida Statutes, Section 775.087 (1989), a criminal defendant's jury must make a specific actual finding in its verdict that the defendant "actually possessed a firearm," id. at 1386. In reaching this decision, this Court found that:

> [t]he question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by a jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow the judge to find that an accused actually possessed a firearm when committing a felony in order to imply the enhancement or a mandatory sentencing provisions of Section 775.087 would be an invasion of the jury historic function . . .

457 So. 2d at 1387. This rationale has not been undercut by subsequent cases from this Court; on the contrary, in State v. Tripp, 642 So. 2d 728, 730 (Fla. 1994), this Court cited Overfelt, for precisely that proposition in vacating a reclassification of an attempted armed robbery conviction for a Tripp where Tripp's jury made no specific finding concerning use of a weapon, id. at 730. Both Tripp and Overfelt properly reflect application of the general notion that a criminal defendant's right to due process in trial by jury requires jury, not judicial, findings of guilt concerning every element of the crime for which a defendant is charged, see e.g. United States v. Gaudin, __ U.S. _ 158 S. Ct. 2310, 2313, 2316, 2320, 132 L.Ed.2d 444 (1995). Thus, a proper application of stare desis counsels against overruling Overfelt.

Nor has the holding of Overfelt proven burdensome in its application. Both Petitioner, in its Initial Brief on the Merits, and the Fourth District Court of Appeal, in dicta, express "astonishment" that a jury finding concerning possession of a firearm might be necessary where a criminal defendant's trial defense renders "uncontested" the "fact" of his possession of a firearm. Moreover in Chapman v. State, 597 So. 2d 431, 432 (Fla. 2d DCA 1992) and Bowser v. State, 638 So. 2d 1042, 1043 (Fla. 1st DCA 1994), the Second and First DCAs had no problem applying Overfelt even in the face of "undisputed" evidence, since factual findings, no matter how strong the evidence, are properly by a jury, not a judge, 597 So. 2d at 432; 638 So. 2d at 1043. Nor can the jury's failure to specifically find that Respondent possessed a firearm below be automatically regarded as a mistake; Florida law recognizes a jury's power to "pardon" a criminal defendant by convicting him of a lesser-included offense, with which he supposes that the "lesser" offense will involve a smaller potential penalty:

> . . . Our law has always been somewhat schizophrenic. . . because in the jury's de facto power to find a defendant guilty

> of a lesser-included offense, Florida law has always recognized that the jury, in fact, has a pardon power. , , we routinely accept -- and do not set aside based on misconduct -- the verdict where the jury has, in effect, ignored [jury instructions] and found the defendant guilty of a lesser-included offense, although it may be convinced based on highly persuasive evidence [and, indeed, such evidence maybe uncontradicted] that the charged offense, was, in fact committed; we call such a verdict a "jury pardon" and do not disturb it. This long-standing practice may not be intellectually satisfying to legal purists, but, on the other hand, it allows juries to do substantial justice in extenuating circumstances, something which the law has always prized.

Nurse v. State, 658 So. 2d 1074, 1078, n.2 (Fla. 3d DCA 1995). In this case, Respondent defended below on the basis that his act of shooting the victim was premised on a mental disease-induced delusion concerning the victim's sexual involvement with Respondent's wife. In such circumstances, Respondent's jury may well have wished to punish Respondent for his action, but not require the imposition of lengthy mandatory minimum sentences as a result therefrom. In any event, Petitioner's claim that a substantial injustice occurred below in terms of Respondent's sentencing liabilities is belied by the authorities cited herein by Respondent.

Accordingly, this Court must approve the result rendered by the Fourth District Court of Appeal in Hargrove v. State, and answer the certified question in the affirmative.

Respectfully submitted,

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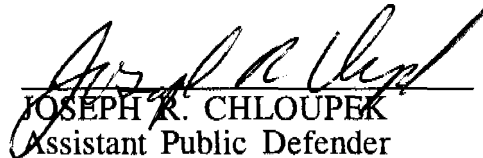

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to DON ROGERS, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401 by courier this 19th day of August, 1996.

Attorney for Nathaniel Hargrove