

Supreme Court of Florida

DEXTER MITCHELL,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

No. 91,107

[December 18, 1997]

SHAW, J.

We have for review Mitchell v. State, 698 So. 2d 555, 557 (Fla. 2d DCA 1997), wherein the district court certified:

If the State fails to prove that a BB pistol is loaded and operable at the time of an offense, can it be classified as a dangerous or deadly weapon when the defendant's actions cause the victim to reasonably believe that the BB pistol is loaded and operable?

We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We recently addressed this issue in Dale v. State, 22 Fla. L. Weekly S670 (Fla. Oct. 23, 1997), wherein we held that whether a BB gun--loaded or unloaded--is a deadly weapon is a jury question. We approve Mitchell.

It is so ordered.

KOGAN, C.J., and HARDING, WELLS and

ANSTEAD, JJ., and GRIMES, Senior Justice, concur.

OVERTON, J., "I dissent for the reasons expressed in my dissent in Dale v. State, No. 87,691 (Fla. Oct. 23, 1997)."

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Second District - Case No. 95-02169

(Pinellas County)

James Marion Moorman, Public Defender and Carol J. Y. Wilson, Assistant Public Defender, Tenth Judicial Circuit, Clearwater, Florida,

for Petitioner

Robert A. Butterworth, Attorney General; Robert J. Krauss, Senior Assistant Attorney General, Chief of Criminal Law and Wendy Buffington, Assistant Attorney General, Tampa, Florida,

for Respondent