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CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF FLORIDA

OWEN L. TUCKER,

Petitioner,

v.

CASE NO. 91,923

STATE OF FLORIDA,

Respondent.

_____ /

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS:

Respondent relies on the following facts for purposes of its Brief on the Merits:

Petitioner was charged with two counts of attempted first degree murder, armed burglary and shooting into an occupied dwelling. Tucker v. State, 22 Fla.L. Weekly D2556 (Fla. 5th DCA 1997). With respect to the two counts of attempted first degree murder, the jury verdict form found Petitioner "guilty of attempted first degree murder with a firearm as charged in the information." Id. The trial court reclassified the two counts of attempted first degree murder with a firearm, and imposed three-year minimum mandatory sentences for those offenses, due to appellant's use of a firearm. Id.

The Fifth District Court of Appeal held that the jury verdict form satisfied the requirements of this Court's holding in State v. Tripp, 642 So.2d 728 (Fla. 1994). Tucker, 22 Fla.L. Weekly at D2556. The district court noted that the verdict form did not contain a special, separate finding that Petitioner carried or used a firearm in the commission of the two counts of attempted murder. Id. However, the district court distinguished the instant case from Tripp, because the verdict form in the instant case did not merely reference the information but specified that a firearm had been used for both crimes. Id. The district court held that, because the jury had to make a finding the a firearm was used in

each count, the verdict satisfied the "essence of the *Tripp* requirements." Id.

The district court certified the following question as a question of great public importance:

IN A CASE IN WHICH THERE IS ONLY ONE DEFENDANT AND ASSAILANT, WHO HAS BEEN CONVICTED OF CRIMES FOR WHICH THE PENALTIES MAY BE ENHANCED PURSUANT TO SECTION 775.087(1) AND FOR WHICH MANDATORY SENTENCES MAY BE IMPOSED PURSUANT TO SECTION 755.087(2), IF THE DEFENDANT USED A WEAPON OR FIREARM IS IT SUFFICIENT TO SUSTAIN THOSE ENHANCED PENALTIES IF THE JURY FINDS THE DEFENDANT GUILTY OF HAVING COMMITTED THOSE FELONIES "WITH A FIREARM" AS CHARGED IN THE INFORMATION, OR MUST THERE ALSO BE A SEPARATE ADDITIONAL SPECIFIC VERDICT FORM THAT THE JURY FOUND THIS DEFENDANT COMMITTED THOSE CRIMES WITH A WEAPON OR FIREARM?

Tucker, 22 Fla. L. Weekly at D2557.

SUMMARY OF ARGUMENT

POINT ON APPEAL: In the instant case, the verdict form found Petitioner "guilty of attempted first degree murder with a firearm, as charged in the information." Recent caselaw from this Court clarifies that a verdict form which specifically refers to the use of a firearm is sufficient to support reclassification of the offense, and imposition of a minimum mandatory term of imprisonment, for the defendant's use of a firearm. The verdict form in the instant case, which specifically referred to Petitioner's use of a firearm during the commission of both counts of attempted first degree murder, was thus sufficient to support reclassification of the offenses and imposition of the minimum mandatory terms of imprisonment.

ARGUMENT

POINT ON APPEAL

PURSUANT TO RECENT CASELAW FROM THIS COURT, THE VERDICT FORM IN THE INSTANT CASE WAS SUFFICIENT TO SUPPORT RECLASSIFICATION OF THE OFFENSES, AND IMPOSITION OF THE MINIMUM MANDATORY TERMS OF IMPRISONMENT, FOR PETITIONER'S USE OF A FIREARM.

The verdict form in the instant case specifically referred to Petitioner's use of a firearm during the commission of two counts of attempted first degree murder. Recent caselaw from this Court clarifies that a verdict form which specifically refers to the use of a firearm is sufficient to support reclassification of the offense, and imposition of a minimum mandatory term of imprisonment, for the use of a firearm. The verdict form in the instant case was thus sufficient to support reclassification of the offenses, and imposition of the minimum mandatory terms of imprisonment, for Petitioner's use of a firearm.

In the instant case, the Fifth District Court of Appeal held that the jury verdict form, which found Petitioner "guilty of attempted first degree murder with a firearm as charged in the information," satisfied the requirements of this Court's holding in State v. Tripp, 642 So.2d 728 (Fla. 1994). See Tucker v. State, 22 Fla.L. Weekly D2556 (Fla. 5th DCA 1997). In Tripp, this Court held that a jury must make a finding that a defendant used a firearm before a trial court may reclassify a felony for the use of a firearm. Tripp, 642 So.2d at 729. The defendant's crime could not

properly be reclassified in Tripp, where the verdict form stated that the defendant was guilty of the charged felonies "as charged in the information," but there was no special verdict form reflecting a separate finding that the defendant had used a weapon. Id.

In the instant case, the district court noted that the verdict form did not contain a special, separate finding that Petitioner carried or used a firearm in the commission of the two counts of attempted murder. Tucker, 22 Fla.L. Weekly at D2556. However, the district court distinguished the instant case from Tripp, because the verdict form in the instant case did not merely reference the information but specified that a firearm had been used for both crimes. Id. Specifically, the jury form stated that the jury found Petitioner "guilty of attempted first degree murder *with a firearm* as charged in the information." Id. The district court held that, because the jury had to make a finding the a firearm was used in each count, the verdict satisfied the "essence of the *Tripp* requirements." Id.

The district court certified the following question as a question of great public importance:

IN A CASE IN WHICH THERE IS ONLY ONE DEFENDANT AND ASSAILANT, WHO HAS BEEN CONVICTED OF CRIMES FOR WHICH THE PENALTIES MAY BE ENHANCED PURSUANT TO SECTION 775.087(1) AND FOR WHICH MANDATORY SENTENCES MAY BE IMPOSED PURSUANT TO SECTION 755.087(2), IF THE DEFENDANT USED A WEAPON OR FIREARM IS IT SUFFICIENT TO SUSTAIN THOSE ENHANCED PENALTIES IF THE JURY FINDS THE

DEFENDANT GUILTY OF HAVING COMMITTED THOSE FELONIES "WITH A FIREARM" AS CHARGED IN THE INFORMATION, OR MUST THERE ALSO BE A SEPARATE ADDITIONAL SPECIFIC VERDICT FORM THAT THE JURY FOUND THIS DEFENDANT COMMITTED THOSE CRIMES WITH A WEAPON OR FIREARM?

Tucker, 22 Fla. L. Weekly at D2557.

The issue presented by this certified question has been resolved by this Court's opinion in State v. Hargrove, 694 So.2d 729, 731 (Fla. 1997). In Hargrove, this Court clarified the type of jury finding which is necessary to support enhancement or imposition of a minimum mandatory for the use of a firearm. 694 So.2d at 731. This Court discussed its earlier decision in State v. Overfelt, 457 So.2d 1385, 1387 (Fla. 1984), which held that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for the use of a firearm, "the jury must make a finding that the defendant committed the crime; while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." Hargrove, 694 So.2d at 730 (quoting Overfelt, 457 So.2d at 1387). In Hargrove, this court further considered the type of jury finding necessary to support enhancement for the use of a firearm, and held:

While a specific question or special verdict form is the clearest way by which the jury can make the finding necessary to support this enhancement, we note that Overfelt only requires "a clear jury finding." Accordingly, the mandatory minimum can be based on jury verdicts which specifically refer to the use of a firearm, or to the information where the information

contained a charge of a crime committed with the use of a firearm.

Hargrove, 694 So.2d at 731.

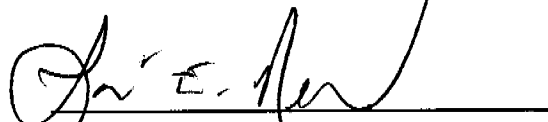
In the instant case, the verdict form found Petitioner "guilty of attempted first degree murder with a firearm as charged in the information." Tucker, 22 Fla.L. Weekly at D2556. The verdict specifically referred to the use of a firearm, and constituted "a clear jury finding" on the issue of whether Petitioner used a firearm. Hargrove, 694 So.2d at 731. The verdict was therefore sufficient to support the reclassification of the offenses, and the imposition of the minimum mandatory terms of imprisonment, for Petitioner's use of a firearm.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays that this honorable Court affirm the decision of the Fifth District Court of Appeal in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

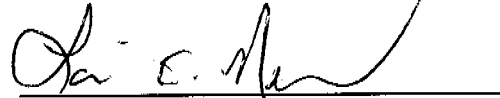
A handwritten signature in cursive script, appearing to read "Lori E. Nelson", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been furnished by U.S. Mail to Owen L. Tucker, February 19, DC # OVO1204, Everglades Correctional Institution, P.O. Box 659001, Miami, Florida, 33265-9001, this 19th day of February, 1998.



Lori E. Nelson
Of Counsel