IN THE SUPREME COURT OF FLORIDA

GEREMI PIERCE,	:	
Petitioner,	:	
vs.	:	Case No. 94,053
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

An information filed in Hillsborough County Circuit Court on April 23, 1996 charged Geremi Pierce, Petitioner, with possession of a firearm by a convicted felon, carrying a concealed firearm, and three second degree misdemeanors (I, R11-3). The State gave notice of intent to treat Pierce as a habitual offender (I, R14). The charge of felon in possession of a firearm was severed from the other counts and tried before Circuit Judge Chet A. Tharpe and a jury on August 7-8, 1996 (II, III, T8-274).

Immediately prior to trial, defense counsel offered to stipulate to the fact that Pierce had a prior felony conviction (II, T4-5). He argued that it would unfairly prejudice Petitioner if the State was permitted to introduce the prior judgment of conviction for robbery into evidence (II, T5-6). Relying on this Court's decision in Parker v. State, 408 So. 2d 1037 (Fla. 1982), the trial judge ruled that the State could introduce the certified copy of conviction into evidence (II, T8). When the judgment (State's Exhibit 3) was actually offered into evidence, it was received over Petitioner's renewed objection (II, T58-9).

Pierce's motion for judgment of acquittal at the close of the State's case was heard and denied (II, T69-70). After two defense witnesses testified, the renewed motion for judgment of acquittal was denied (II, T109-11). The judge instructed the jury:

> Before you can find the defendant guilty of a felon possessing a firearm, the State must

> prove the following two elements beyond a reasonable doubt.
>
> One, Jeremy Pierce had been convicted of robbery on November the 14th, 1988. Two, ...

(II, T138). The jury returned a verdict of guilty as charged (I, R55, II, T151).

Petitioner's motion for new trial was heard and denied August 16, 1996 (I, R57, II, T166-7). At sentencing, held September 12, 1996, Pierce was found to be a habitual felony offender and sentenced to thirty years imprisonment (2d Supp., T284-93, I, R58-64).

A timely notice of appeal was filed October 2, 1996 (I, R72). The Second District Court of Appeal affirmed Pierce's conviction and sentence in a written opinion issued September 4, 1998 (see Appendix). The court certified the following question of great public importance to this Court:

> SHOULD THE DECISION IN PARKER V. STATE, 408 So. 2d 1037 (Fla. 1982), BE OVERRULED IN FAVOR OF THE ANALYSIS OF THE EVIDENTIARY REQUIREMENTS FOR PROOF OF CONVICTED FELON STATUS IN FIREARM VIOLATION CASES ESTABLISHED FOR FEDERAL COURTS IN OLD CHIEF V. UNITED STATES, 519 U.S. 172, 117 S.Ct. 644, 136 L. Ed. 2d 574 (1997)?

(See Appendix). Petitioner filed his notice to invoke discretionary jurisdiction on September 29, 1998. This Court entered an order on October 7, 1998 postponing its decision on jurisdiction and ordering Petitioner to serve his brief on the merits.

STATEMENT OF THE FACTS

On January 24, 1996 around 1:00 or 1:30 a.m., Tampa police officers noted a vehicle stopped in the middle of an intersection (II, T21-2, 47). When they turned, the vehicle drove away, made a quick U-turn at an intersection, and pulled into a driveway (II, T22, 48). The police made a traffic stop and asked Petitioner for his license and registration (II, T23). Officer Estevez testified that Pierce started reaching for the glove box, and was told to stop (II, T23). The officer said that Pierce made a movement toward the bottom of the seat (II, T23). The officer yelled, pulled his gun, opened the car door, and pulled Petitioner out (II, T23, 30).

Pierce was then arrested for "a routine traffic violation" (II, T24). Officer Estevez searched the vehicle and found a loaded nine millimeter pistol under the driver's seat (II, T24, 26, 32). In the glove box, he found loose rounds of ammunition which were of the correct type for the firearm (II, T25). An open bottle of beer and some takeout Chinese food was also in the front passenger area (II, T28, 34-5).

When Petitioner was questioned by the police, he said that he had just gotten in the car to get Chinese food (II, T38, 43). Later, he said that he had been driving the vehicle since the afternoon (II, T38, 44-5).

Defense witness Angela McKenzie testified that she was Petitioner's wife and the owner of the vehicle that he was driving when he was arrested (II, T73-4, 82). She worked in

housekeeping services at St. Joseph's Hospital (II, T74). On the day in question, she got off work around 4:30 p.m. and went to visit her mother-in-law, Betty Pierce, who lived in the Ponce de Leon housing project (II, T75). She observed a handgun sitting on an electrical box outside Betty Pierce's apartment (II, T76). Because children played in that area, the witness borrowed a towel from her mother-in-law, picked up the gun and placed it under the front seat of her car (II, T77-8). She said that the gun in evidence looked like the one she picked up and put in her car (II, T77).

After visiting with Betty Pierce for a short while, Ms. McKenzie drove home (II, T78-9). Her husband, Petitioner, was home, but she didn't tell him about the pistol (II, T79-80). Sometime after 9:00 p.m., she asked Petitioner to get some Chinese food for them (II, T80). She gave him the keys to her car and he drove off (II, T80-1). The next time she heard from him, he had been arrested and was asking her about the gun that had been found in the car (II, T81).

Betty Jean Pierce testified that Petitioner is her son (II, T93-4). She corroborated Angela McKenzie's testimony about a pistol being found outside her apartment (II, T95-7). However, she never actually saw the gun (II, T101).

SUMMARY OF THE ARGUMENT

Since the Second District issued its opinion on September 4, 1998, this Court has answered the same certified question in another case, Brown v. State, Case No. 91,764 (October 15, 1998). Like Brown, Petitioner should also be granted a new trial because he properly preserved the issue for appeal. Furthermore, the error is not harmless.

ARGUMENT

ISSUE

THE QUESTION CERTIFIED BY THE SECOND DISTRICT IS THE SAME AS THIS COURT ANSWERED IN BROWN V. STATE, Case No. 91,764 (October 15, 1998) AND SHOULD ALSO BE ANSWERED IN THE AFFIRMATIVE.

This Court recently decided the question certified by the Second District. In Brown v. State, 23 Fla. L. Weekly S535 (Fla. October 15, 1998), this Court receded from Parker v. State, 408 So. 2d 1037 (Fla. 1982) and held that when a defendant charged with possession of a firearm by a convicted felon offers to stipulate to being a convicted felon, the State and trial court must accept the stipulation. While the State may put the actual judgment and sentence into the record, these documents should not be shown to the jury.

Writing for the Brown majority, Justice Anstead adopted the rationale of Old Chief v. United States, 519 U.S. 172 (1997) where the U.S. Supreme Court held that allowing proof of the nature of the prior felony was irrelevant to establishing the defendant's legal status in a prosecution for possession of a firearm by a convicted felon. The risk of unfairly prejudicing the jury by revealing the nature of the prior felony conviction is clearly evident when it might be suspected that the defendant was about to commit a similar offense. In footnote 1 to the opinion, this Court specified which defendants could qualify for relief:

> We grant relief in this case because Brown timely objected to the introduction of his prior felony convictions into evidence, preserved this issue for appeal and argued it before the Third District, and subsequently did the same upon review by this Court. ... However, other than this case, and those cases pending where the issue has been preserved, our decision is prospective only and will have no retroactive application to cases final as of the date this opinion is released.

23 Fla. L. Weekly at S538.

Petitioner qualifies for relief under Brown. He filed his Notice to Invoke Discretionary Jurisdiction with the Second District on September 29, 1998. His case was pending in this Court when the Brown opinion was released on October 15, 1998. He preserved this issue for review by offering to stipulate to his status as a convicted felon prior to trial (II, T4-6). When the judgment was actually offered into evidence, he renewed his objection (II, T58-9). This issue was argued on appeal to the Second District, persuading that court to certify the same question that the Third District certified in Brown. Therefore, Pierce should also be granted a new trial on his possession of a firearm by a convicted felon charge.

Should the State try to argue that allowing the jury to consider evidence of Pierce's prior conviction for robbery was only harmless error, this Court should look to the prosecutor's comments at Petitioner's sentencing. He stated to the judge:

> I think it's safe to assume or presume that a man like Mr. Pierce when he has a gun has it for a purpose and that purpose is not a lawful or good purpose. I think we're all fortunate that today he's here simply charged as

> a felon in possession of a firearm as opposed to another armed robbery or a murder or something where someone was hurt.

(2d Supp., T291). The jury may also have thought along the same lines and convicted Petitioner because they suspected he was about to commit another robbery.[1]

Another reason why the error is not harmless is the testimony of the defense witnesses, which if believed, could exonerate Petitioner because it was evidence that he may not have known that the firearm was in the car. It is noteworthy that the jury apparently had some difficulty in deciding the case because they returned questions before arriving at their verdict (I, R54, II, T150-1). Accordingly, the error in allowing the jury to consider the nature of Petitioner's prior felony conviction is not harmless and, like Brown, he should be granted a new trial.

[1]If Petitioner's prior felony conviction had been for something such as passing a worthless check, this type of assumption or presumption probably wouldn't have been made.

CONCLUSION

Based upon the foregoing argument, reasoning and authorities, Geremi Pierce, Petitioner, respectfully requests this Court to quash the decision of the Second District, vacate his conviction and sentence, and remand this case for a new trial in the circuit court.

STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier, a font that is not proportionally spaced.

APPENDIX

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ann Pfeiffer Howe, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of September, 1999.

Respectfully submitted,

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