IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,174

JAMES DORELUS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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INTRODUCTION

Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and Appellant in the District Court of Appeal of Florida, Fourth District. Petitioner, James Dorelus, was the Respondent in the trial court and the Appellee in the District Court of Appeal. The parties shall be referred to as they stood in the trial court. All references to the attached appendix will be designated by "App." followed by the appropriate letter and a colon to indicate the appropriate page number.

CERTIFICATE OF TYPE SIZE AND STYLE

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STATEMENT OF THE CASE AND FACTS

The Fourth District Court of Appeal reversed the order granting the sworn motion to dismiss the information charging the Defendant with carrying a concealed firearm.

The Defendant and his co-defendant were stopped for a traffic infraction. An officer standing outside the vehicle observed the "shiny silver butt of a handgun sticking out of the console located underneath the radio." (App. A).

The Fourth District found that whether a partially visible firearm is "concealed" is an issue of fact for the jury. (App. A). Thus, the fact that the handgun was within the arresting officer's "open view" did not preclude a finding that it was a concealed firearm within the meaning of section 790.01(2). (App. A). Because the jury should have resolved the ultimate issue of whether the firearm was concealed, the trial court improperly dismissed the information. (App. A).

This petition follows.

QUESTION PRESENTED

WHETHER THE DISTRICT COURT PROPERLY REVERSED THE ORDER OF DISMISSAL WHERE THE TRIER OF FACT MUST DETERMINE WHETHER A PARTIALLY CONCEALED FIREARM IS "CONCEALED" WITHIN THE MEANING OF THE LAW?

SUMMARY OF THE ARGUMENT

The District Court properly reversed the order of dismissing the Defendant's charge of carrying a concealed firearm. The ultimate decision regarding the concealment of a firearm rests upon the trier of fact under the circumstances of each case. A motion pursuant to Rule 3.190(c)(4), Fla. R. Crim. P., is not a proper vehicle to dismiss a charge of carrying a concealed firearm where the firearm is partially concealed because the determination of concealment is factual.

ARGUMENT

THE DISTRICT COURT PROPERLY REVERSED THE ORDER OF DISMISSAL WHERE THE TRIER OF FACT MUST DETERMINE WHETHER A PARTIALLY CONCEALED FIREARM IS "CONCEALED" WITHIN THE MEANING OF THE LAW.

The Defendant asserts that the District Court erred in reversing the order dismissing the concealed firearm charge. He contends that a partially concealed firearm is, as a matter of law, concealed, and a motion pursuant to Rule 3.190(c)(4), Fla. R. Crim. P., is a proper vehicle to dismiss a charge of carrying a concealed firearm. However, the State submits that the District Court properly reversed the order where the ultimate decision regarding the concealment of a firearm rests upon the trier of fact under the circumstances of each case. Therefore, a motion pursuant to Rule 3.190(c)(4), Fla. R. Crim. P., is not a proper vehicle to dismiss a charge of carrying a concealed firearm where the firearm is partially concealed because the determination of concealment is factual.

A motion to dismiss pursuant to Rule 3.190(c)(4), Fla. R. Crim. P., is akin to a civil motion for summary judgment. *State v. Hart,* 677 So. 2d 385 (Fla. 4th DCA 1996). The motion is decided only on the undisputed facts. *Id.* In considering the evidence, the court must draw all inferences in favor of the state and against the defendant. *Id.* The trial court may not weigh

conflicting evidence or pass on the credibility of witnesses or determine disputed issues of fact. *Id.*

"Motive and intent are states of mind usually inferred from the conduct of the parties and the surrounding circumstances; they are questions for the trier of fact that are generally not appropriate for a motion to dismiss." *Id.* *Burke v. Harbor Estates Assocs., Inc.,* 591 So. 2d 1034, 1037 (Fla. 1st DCA 1991)(intent is issue of fact); *see School Bd. of Leon County v. Hargis,* 400 So. 2d 103, 107 (Fla. 1st DCA 1981)(motivation ordinarily question of fact). Here, too, like motivation and intent, whether a partially concealed firearm is "concealed" within the meaning of the statute, is a question of fact. Interpretation of the facts and credibility of the witnesses is at issue.

In *State v. Sellers,* 281 So. 2d 397 (Fla. 2d DCA 1973), the Second District based its reversal of an order of dismissal of a concealed firearm charge based on the reasoning of this Court in *Sutton v. State,* 12 Fla. 135 (1868) because "the logic of the case still holds good."

> **The statute was not intended to infringe upon the rights of any citizen to bear arms for the 'common defense.' It merely directs how they shall be carried, and prevents individuals from carrying concealed weapons of a dangerous and deadly character, on or about the person, for the purpose of committing some malicious crime, or of taking some undue advantage over an unsuspecting adversary. When no such evil**

> **intentions possess the mind, men in vexed assemblies or public meetings, concious [sic] of their advantage in possessing a secret and deadly weapon, often become insulting and overbearing in their intercourse, provoking a retort or an assault, which may be considered as an excuse for using the weapon, and a deadly encounter results, which might be avoided where the parties stand on a perfect equality, and where no undue advantage is taken.**

Thus, the purpose of the law against carrying a concealed firearm is not to infringe upon the right to bear arms, as the Defendant alludes to, but to direct how firearms shall be carried in order to prevent individuals from carrying concealed weapons of a dangerous and deadly character, on or about their person. The only way to determine whether a partially concealed firearm is concealed within the meaning of the statute is to have the trier of fact determine whether the firearm, on or about their person, is concealed from others by weighing the evidence and the credibility of the witnesses.

Subsequently, this Court, in *Ensor v. State,* 403 So. 2d 349 (Fla. 1981), recognized this policy when it established a two-fold test to determine concealment.

> **For a firearm to be concealed, it must be (1) on or about the person and (2) hidden from the ordinary sight of another person. The term 'on or about the person' means physically on the person or readily accessible to him. This generally includes the interior of an automobile and the vehicle's glove**

> **compartment, whether or not locked. The term 'ordinary sight of another person' means the casual and ordinary observation of another in the normal associations of life. Ordinary observation by a person other than a police officer does not generally include the floorboard of a vehicle, whether or not the weapon is wholly or partially visible.**

***Id.*, 403 So. 2d at 354. This Court further stated that "[t]he ultimate decision must rest upon the trier of fact under the circumstances of each case." *Id.*, 403 So. 2d at 355. Thus, as a matter of law, the trier of fact must determine whether the firearm is concealed under section 790.01, i.e., is on or about the person and is hidden from the ordinary sight of another person.**

"[A]bsolute invisibility is not a necessary element to a finding of concealment." *Id.*, 403 So. 2d at 354. Since minds may differ about "whether an individual, standing near a person with a firearm or beside a vehicle in which a person with a firearm is seated, may by ordinary observation know the questioned object to be a firearm," *Id.,* 403 So. 2d at 355, a motion to dismiss must be denied in order for the trier of fact to make a factual determination.

The First District in *Goodman v. State,* 689 So. 2d 428 (Fla. 1st DCA 1997) reads the language of *Ensor* to mean that whether a firearm is concealed is a question of fact to be resolved by the trier of fact, because

> **it is not at all clear from the agreed facts that an individual standing beside the car in which appellant was a passenger would, by "casual and ordinary observation", have known that there was a firearm on the floorboard of the car, behind appellant's heel.**

Id., **689 So. 2d at 429 (citations omitted). Since it is possible for reasonable minds to differ even where the facts are undisputed, the determination of whether a firearm is concealed is a question of fact. Thus, a motion to dismiss a charge of carrying a concealed firearm, even where the facts are undisputed, must be denied.**

The Defendant misconstrues the holding of *State v. Teague,* 475 So. 2d 213 (Fla. 1985). The Defendant asserts that this Court held that the trial court properly granted the motion to suppress the firearm because the officer could see the gun barrel lying on the seat, and thus, the firearm was not concealed. However, this Court did not even reach the merits of the argument regarding the concealment of the firearm, but instead held that "tinted motor vehicle windows by themselves do not make an otherwise legally carried firearm a concealed firearm under section 790.01(2)." *Id.,* 475 So. 2d at 214. This Court agreed with the specially concurring opinion below which reasoned that the issue is the concealment of the weapon itself and not where the weapon is deemed "concealed" because the carrier himself is "concealed." *Id.* Therefore, this

Court did not bend the *Ensor* ruling that the ultimate decision of concealment rests upon the trier of fact.

The statute prohibiting the carrying of a concealed firearm was designed to protect the public from individuals "carrying concealed weapons of a dangerous and deadly character, on or about the person." *Sutton.* Since it is possible for reasonable minds to differ even where the facts are undisputed, the determination of whether a firearm is concealed is a question of fact. Thus, a motion to dismiss a charge of carrying a concealed firearm, even where the facts are undisputed, must be denied.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that the Court affirm the decision of the Fourth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was mailed to GARY CALDWELL, Assistant Public Defender, Criminal Justice Building, 6th Floor, 421 3rd Street, West Palm Beach, Florida 33401 on this _____ day of _____, 1999.

_____

LARA J. EDELSTEIN
Assistant Attorney General