IN THE SUPREME COURT OF FLORIDA

S. CT. NO. 1999-60
DCA NO. 98-2037

MARIO VENERO
Appellant,

vs.

THE STATE OF FLORIDA
Appellee.

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The appellee, the State of Florida was the prosecution and the appellant, Mario Venero, was the defendant in the Circuit Court of the Eleventh Judicial Circuit, in Miami-Dade County. In this brief, the parties will be referred to as "the state" and "the defendant".

The following abbreviations will be used to designate references to the transcript of proceedings and record on appeal:

"R"	Record on Appeal
"S.R."	Supplemental Record on Appeal
"T"	Transcript of Proceedings
"S.T.	Supplemental Transcript
"Vol."	Volume

STATEMENT OF THE CASE

On December 23, 1997, the petitioner, Mario Venero, was charged by information with armed trafficking in cocaine in excess of 400 grams, carrying a concealed firearm, battery, and unlawful possession of a firearm or weapon by a violent career criminal. (R. 1) Each offense occured on October 31, 1997. (R.1) Prior to trial, Venero, through court-appointed counsel filed a motion to suppress evidence of the firearm and cocaine. (R. 19) As grounds for the motion Venero claimed that he was illegally seized and searched without a warrant. A hearing on the motion was held on June 2, 1998. (S.T. 6-18). The trial court denied the motion, finding that based on the facts police officers acted reasonably in conducting a pat-down search of the defendant. (S.T. 17-18). Following a trial by jury Venero was found guilty of armed trafficking in cocaine in excess of 400 grams, carrying a concealed firearm, and unlawful possession of a firearm or weapon by a violent career criminal. (R. 93). Venero was sentence to serve two concurrent 15 year terms with a mimum mandatory sentence of 10 years and one concurrent life sentence as a habitual violent felony offender. (R. 103, S.R. 27).

On June 25, 1998, through court-appointed counsel, Venero appealed his judgment and sentence in the Third District Court of Appeal. On appeal Venero

claimed that: (1) the trial court erred in denying his motion to suppress evidence; (2) the prosecutor's questions about his prior convictions were improper; (3) the prosecutor's closing argument comment on his failure to call a witness was error and; (4) the trial court erred in its sentencing of the defendant. In an opinion filed on September 22, 1999 certifying conflict with *Thompson v. State*, 708 So.2d 315 (Fla. 2d DCA), *rev granted,* 717 So 2d 538 (Fla. 1998), Venero's judgment and sentence were affirmed. The mandate issued on November 19, 1999. The instant *pro se* petition for discretionary follows.

STATEMENT OF THE FACTS

Detective Ronald Rebozo along with Officer Ravello responded to a dispatch reference two males in a physical altercation at the Days Inn Hotel at 7250 N.W. 11th Street between 12:40 and 12:48 a.m. (Vol. I, T. 6-8). When the officers arrived the front desk clerk told them that the defendant had been harassing customers in the lobby and that he had just fought with the hotel shuttle bus driver. (Vol. I, T. 8, 16). The shuttle driver told the officers that the defendant had been arguing with the general manager and harassing customers. (Vol. I, T. 9). When the driver attempted to intervene to de-escalate the argument the defendant became irate and struck the driver. (Vol. I, T. 9). The security guard reported the same facts to the officers as

had the general manager and the shuttle driver. (Vol. I, T. 9). The guard also stated that the defendant refused to leave after being asked several times to do so. (Vol. I, T. 9). While the detective was speaking with the security guard the defendant returned to the lobby in an agitated state. (Vol. I, T. 10). The defendant appeared to have been drinking, was loud, and his demeanor was aggressive. (Vol. I, T. 10). The defendant was threatening the shuttle driver. (Vol. I, T. 10, 14). Detective Rebozo testified that had he not been in the lobby when the defendant returned he believed that the defendant would have started another fight with the shuttle driver. (Vol. I. T. 11). The detective believed that the defendant might have a weapon when he observed him with a fanny pack on his shoulder. (Vol. I. T. 11). For his own safety the detective conducted a cursory pat-down of the defendant's waistband *and* the shuttle driver. (Vol. I, T. 11, 15). The detective could tell by patting down the defendant's clothing that the defendant had a weapon. (Vol. I, T. 11). The search revealed a .38 caliber semi-automatic firearm in the defendant's waistband. (Vol. I, T. 11). The defendant was immediately taken into custody. (Vol. I, T. 11-12). A further search of the defendant incident to arrest also produced cocaine in two zip lock bags. (Vol. I, T. 12).

ISSUES ON APPEAL

I. Whether the petitioner has standing to challenge his violent career criminal sentence based upon the constitutionality of § 775.084(1)(c), the Gort Act .

II. Whether the trial court erred in denying the petitioner's pre-trial motion to suppress physical evidence.

III. Whether the trial court erred in its sentencing of the defendant.

A. Whether it was error to convict and sentence the defendant for carrying a concealed firearm and unlawful possession of a firearm by a convicted felon.

B. Whether the trial court imposed a "doubly enhanced" sentence.

IV. Whether the prosecutor's comment during closing argument on defendant's failure to call a witness was error which denied Venero a fair trial.

SUMMARY OF THE ARGUMENT

I

The State submits that Vernero does not have standing to challenge his violent career criminal sentence imposed upon him because the opportunity to challenge the sentence, based upon the constitutionality of the statute, ended on October 1, 1996.

II

The State submits that the trial court did not err in denying Venero's motion to suppress evidence because the circumstances leading to the discovery of the contraband were sufficient to cause a reasonable police officer to be concerned for his or her safety or the safety of property in the vicinity and therefore, it was not seized as a result of an illegal arrest.

III

Convicting Venero for both carrying a concealed firearm and possession of a firearm by convicted felon, based on the same underlying conduct, was not violate errore jeopardy, because each offense requires proof of an element which the other does not. Further, that the trial court did not err in enhancing Venero's sentence under both section 775.084(4)(c), Florida Statutes and section 790.235, Fla. Stat. because the plain language of section 790.235 expresses the legislature's intent to incarcerate defendants who meet the violent career criminal criteria and possess a

firearm for longer periods of time than nonrecidivist.

IV

The prosecutor's comments on the defendant's failure to call "Marlene" as a witness was not error because the defense theory raised the implication that if she had been called to testify she would have done so in a manner favorable to the defendant's theory that the evidence seized incident to his arrest did not belong to him.

ARGUMENT

I
PETITIONER VENERO DOES NOT HAVE STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE "GORT STATUTE", §775.084(1)(c), FLORIDA STATUTES.

Venero contends that his sentence as a violent career criminal pursuant to § 775.084(1)(c), Florida Statutes (1995), the "Officer Evelyn Gort and All Fallen Officers Career Criminal Act of 1995", should be reversed because the Act violates the single subject rule of the Florida Constitution embodied in Article III, section 6. Notwithstanding this Court's recent opinion in *Thompson v. State*, No. 92831 (Fla. Dec. 22, 1999), the State submits that Vernero does not have standing to challenge the violent career criminal sentence imposed upon him because the opportunity to challenge his sentence, based upon the constitutionality of the statute, ended on October 1, 1996. *See Salters v. State,* 731 So.2d 826, 826 (Fla. 4th DCA 1999). That is to say that the enactment of chapter 96-388, Laws of Florida, with an effective date of October 1, 1996, cured any alleged single subject rule problems in chapter 95-182. *See* (Once reenacted as portion of Florida Statutes, chapter law is no longer subject to challenge on grounds that it violates single subject requirement). *See State v. Johnson*, 616 So.2d 1 (Fla. 1993).

See Scott v. State, 721 So.2d 1245 (Fla. 4th DCA 1998). The defendant in this case, committed his offense on October 31,1997, after the close of the window period.

II
THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE. (Restated)

As a second point of error Venero contends that his arrest for misdemeanor battery was illegal and that evidence that he possessed a semi-automatic firearm and two bags of cocaine should have been suppressed by the trial court because the . offense did not occur in the presence of the arresting police officer. The State submits that the trial court did not err in denying the defendant's motion to suppress evidence because the evidence was not seized as a result of an illegal arrest.

When circumstances are sufficient to cause a reasonable person to be concerned for his or her safety or the safety of property in the vicinity, a warrantless arrest is valid. *State v. Coron*, 411 So.2d 237 (Fla. 3d DCA. 1982) ; *State v. Presley* 458 So.2d 847 (Fla. 5th DCA 1984). (Calling a big guy in a bar an asshole or an Iranian, being kicked out of the bar and standing in the roadway yelling is sufficient evidence to give an officer substantial reason to believe the person is creating a public disturbance.).

Initially, the State would point out that battery was not the only misdemeanor

Venero was charged with on the night of his arrest. Venero was taken into custody on charges of disorderly conduct, carrying a concealed firearm, possession of a firearm by a convicted felon, threats against a public servant, and trafficking in cocaine. (S.R. 1-7). Therefore, Venero's argument that he was arrested for a misdemeanor that the police officer did not personally observe is factually inaccurate because the facts demonstrate that Venero's disorderly conduct was observed by the arresting officer.

Detective Ronald Rebozo along with Officer Ravello responded to a dispatch reference two males in a physical altercation at the Days Inn Hotel at 7250 N.W. 11th Street between 12:40 and 12:48 a.m. (Vol. I, T. 6-8). When the officers arrived the front desk clerk told them that Venero had been harassing customers in the lobby and that he had just fought with the hotel shuttle bus driver. (Vol. I, T. 8, 16). The shuttle driver told the officers that Venero had been arguing with the general manager and harassing customers. (Vol. I, T. 9). When the driver attempted to intervene to de-escalate the argument Venero became irate and struck the driver. (Vol. I, T. 9). The security guard reported the same facts to the officers as had the general manager and the shuttle driver. (Vol. I, T. 9). The guard also stated that the defendant refused to leave after being asked several times to do so. (Vol. I, T. 9). While the detective was speaking with the security guard Venero returned to the lobby in an agitated state.

(Vol. I, T. 10). Venero appeared to have been drinking, was loud, and his demeanor was aggressive. (Vol. I, T. 10). Venero was threatening the shuttle driver. (Vol. I, T. 10, 14). Detective Rebozo testified that had he not been in the lobby when the Venero returned he believed that Venero would have started another fight with the shuttle driver. (Vol. I. T. 11). The detective believed that Venero might have a weapon when he observed him with a fanny pack on his shoulder. (Vol. I. T. 11). For his own safety the detective conducted a cursory pat-down of Venero's waistband ***and*** the shuttle driver. (Vol. I, T. 11, 15). The detective could tell by patting down Venero's clothing that Venero had a weapon. (Vol. I, T. 11). The search revealed a .38 caliber semi-automatic firearm in Venero's waistband. (Vol. I, T. 11). Venero was immediately taken into custody. (Vol. I, T. 11-12). A further search of the defendant incident to arrest also produced cocaine in two zip lock bags. (Vol. I, T. 12).

The State further submits that the facts listed in the arrest affidavit and offenseincident report include the elements of trespass after warning[1] as well as

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[1]The trespass statute provide in relevant part that:

810.08 Trespass in structure or conveyance

(1) Whoever, without being authorized, licensed, or invited, willfully enters or remains in any structure or conveyance, or, having been authorized, licensed, or

assault.[2] (S.R. 1-7). *State v. In Interest of M.A.D.*, 721 So.2d 412, 23 (Fla. 3 DCA 1998). (Where juvenile was identified by the police as someone which both the police and the store's management had warned on previous occasions not to congregate in front of the store, the police officer certainly had a well founded suspicion that juvenile was committing a trespass in his presence on the date in question. The officer was therefore justified in stopping and detaining the juvenile. Because the officer had probable cause or reasonable suspicion to arrest M.A.D. for the misdemeanor crime of trespass, the officer was further justified in searching the backpack).

III

THE TRIAL COURT DID NOT ERR IN ITS SENTENCING OF THE DEFENDANT. (Restated).

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invited, is warned by the owner or lessee of the premises, or by a person authorized by the owner or lessee, to depart and refuses to do so, commits the offense of trespass in a structure or conveyance.

[2]784.011. Assault

(1) An "assault" is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

(2) Whoever commits an assault shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

Third, Venero contends that it was error to convict and sentence him for both carrying a concealed firearm and unlawful possession of a firearm by a violent career criminal. The State submits that convicting Venero for both offenses based on the same underlying conduct, did not violate double jeopardy, because each offense required proof of an element which the other did not. *State v. Craft,* 685 So.2d 1292, 22 (Fla. 1996) ; *State v. Maxwell,* 682 So.2d 83 (Fla.1996).

The elements of carrying a concealed firearm require the state to prove that the defendant knowingly carried on or about his person a firearm and that the firearm was concealed from the ordinary sight of another person. §790.01(2), Fla. Stat. The elements of unlawful possession of a concealed firearm by a convicted felon require that a defendant has been convicted of a prior offense and that after the conviction the defendant knowingly had in his possession a firearm. §790.23(1), Fla. Stat.

As his final sub-point Venero argues that because §790.235, Fla. Stat. reclassifies possession of a firearm from a third degree felony to a first degree felony if the offender meets the violent career criminal criteria, it is error to enhance the already reclassifed offense under §775.084(4)(c), Fla. Stat. (A. B. 23). The State submits that the plain language of section 790.235 expresses the legislature's explicit intent to incarcerate defendants who meet the violent career criminal criteria and

possess a firearm for longer periods of time than nonrecidivist.

Supporting this conclusion is the language of section 790.235 which provides:

> (1) Any person who meets the violent career criminal criteria under s. 775.084(1)(c), regardless of whether such person is or has previously been sentenced as a violent career criminal, who owns or has in his or her care, custody, possession, or control any firearm or electric weapon or device, or carries a concealed weapon, including a tear gas gun or chemical weapon or device, commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. A person convicted of a violation of this section shall be sentenced to a mandatory minimum of 15 years' imprisonment; *however, if the person would be sentenced to a longer term of imprisonment under s. 775.084(4)(c), the person must be sentenced under that provision.*

The penalty under section 790.235 is 15 years; the penalty under section 775.084(4)(c) is life. The state submits, therefore, that under the plain language of section 790.235 the trial court did not err in sentencing the defendant under both statutes.

IV

THE PROSECUTOR'S COMMENTS ON THE DEFENDANT'S FAILURE TO CALL "MARLENE" WAS NOT ERROR WHERE DEFENSE THEORY THAT POLICE PLANTED EVIDENCE RAISED IMPLICATION THAT IF WITNESS HAD BEEN CALLED TO TESTIFY SHE WOULD HAVE DONE SO IN A MANNER FAVORABLE TO THE DEFENDANT'S THEORY OF THE CASE.

Venero contends that it was error for the prosecutor "to comment upon a missing witness particularly where the defense had not raised the issue." (A. B. 19). The state submits that the prosecutor's comments were appropriate because Venero's theory of defense was that evidence had been planted and that "Merlene" would testify that the contraband recovered from the defendant could not have been his because he did not have the fanny pack in which the evidence was found.

Generally, comments by a prosecutor that a defendant has failed to call a witness are error because they may lead the jury to believe that the defendant has the burden of proving his innocence. An exception to this rule allows comment when the defendant asserts certain defenses, such as alibi, self-defense, defense of others, or relies on facts that could be elicited from a witness who is not equally available to the state. *Thomas v. State,* 22 Fla. L. Weekly D2135,(Fla. 4th DCA 1997) (Citations omitted). However, comments on defendant's failure to call witnesses which do not fit one of the exceptions are not reversible error where the defense raises implication

that a witness will be called or, if called, that a witness would testify in a manner which is favorable to defendant's theory of the case. *Thomas.*

Here, Venero did not assert alibi, self-defense, or defense of others as a theory, but he did claim that the police set him up by planting the gun and cocaine found during his search. (Vol. II, T. 262, 264-265). Venero testified that he checked into the hotel with nothing but his wallet and the clothes he was wearing and that he did not own a black fanny bag. (Vol. II, T. 267, 264). Venero's testimony made it appear that there was a witness who could corroborate that he checked into the hotel without the fanny pack and therefore by implication without the gun or cocaine thus supporting his theory that the police planted evidence.

CONCLUSION

Based on the foregoing arguments and authorities, the State requests that this Court affirm the judgment of conviction and sentence in this cause.

Respectfully submitted,
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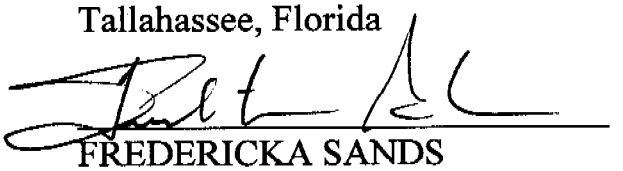

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CERTIFICATE OF TYPE SIZE AND STYLE

This brief utilizes 14 point Times New Roman and contains a line count of 392.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief of appellee was provided by U.S. Mail to Mario Venero, pro se, D.C # 423893, Everglades Correctional Institution, P.O. Box 659001, Miami, Florida 33265-9001 this 10th day of February 2000.

FREDERICKA SANDS