

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC15-650

DALE NORMAN,

Petitioner,

-versus-

STATE OF FLORIDA,

Respondent

RESPONDENT'S BRIEF ON JURISDICTION

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Preliminary Statement

Petitioner was the Defendant and Respondent was the Prosecution in the County Court for St. Lucie County, Florida. Petitioner was Appellant and Respondent was Appellee in the District Court of Appeal of Florida, Fourth District. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

Statement Of The Case And Facts
(limited to the issue of jurisdiction)

Noting that in determining jurisdiction, this Court is limited to the facts apparent on the face of the opinion, Hardee v. State, 534 So. 2d 706, 708 n.1 (Fla. 1988), Respondent will present the facts as they appear in the opinion below:

Dale Norman (“Defendant”) was arrested while openly carrying a firearm. Video taken before his arrest showed that the gun was completely exposed to public view, in its holster, and not covered by Defendant's shirt. Defendant was subsequently charged with Open Carrying of a Weapon (a firearm) in violation of section 790.053, Florida Statutes (2012). The trial court initially reserved ruling on Defendant's motions to dismiss, and following a jury trial Defendant was found guilty of this charge. The county court considered Defendant's motions challenging the statute's constitutionality, and although the court ultimately denied these motions, it certified three questions of great public importance to this court:

I. Is Florida's statutory scheme related to the open carry of firearms constitutional?

II. Do the exceptions to the prohibition against open carry constitute affirmative defenses to a prosecution for a charge of open carry, or does the State need to prove beyond a reasonable doubt that a particular defendant is not conducting himself or herself in the manner allowed?

III. Does the recent “brief and open display” exception unconstitutionally infect the open carry law by its vagueness?

Norman v. State, 159 So. 3d 205, 209 (Fla. 4th DCA 2015).

Petitioner sought discretionary review of the certified questions in the Fourth District. The Fourth District granted Petitioner’s request and accepted jurisdiction to address the certified questions. Id. at 209-10.

On appeal, Petitioner claimed that § 790.053, Fla. Stat. (the statute that generally prohibits the open carry of firearms),¹ unconstitutionally infringes his Second Amendment right to “keep and bear arms,” arguing that the constitutional right includes the ability to openly carry a gun outside the home for self-defense without the need for a permit. *Id.* at 210. After conducting a thorough analysis of the right to bear arms under both the federal and Florida constitutions, the Fourth District concluded that “Florida’s ban on open carry, while permitting concealed carry, does not improperly infringe on Florida’s constitutional guarantee, nor does it infringe on the ‘the *central component*’ of the Second Amendment – the right of

¹ Section 790.053, Fla. Stat., provides as follows:

(1) Except as otherwise provided by law and in subsection (2), it is unlawful for any person to openly carry on or about his or her person any firearm or electric weapon or device. It is not a violation of this section for a person licensed to carry a concealed firearm as provided in s. 790.06(1), and who is lawfully carrying a firearm in a concealed manner, to briefly and openly display the firearm to the ordinary sight of another person, unless the firearm is intentionally displayed in an angry or threatening manner, not in necessary self-defense.

(2) A person may openly carry, for purposes of lawful self-defense:

(a) A self-defense chemical spray.

(b) A nonlethal stun gun or dart-firing stun gun or other nonlethal electric weapon or device that is designed solely for defensive purposes.

(3) Any person violating this section commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

self-defense.” Id. at 219 (emphasis in original) (quoting Dist. Of Columbia v. Heller (Heller I), 554 U.S. 570, 599 (2008)). Next, the Fourth District examined Florida’s statutory scheme utilizing an intermediate level of scrutiny. Id. at 220-23. The Court rejected the notion that a heightened level of scrutiny (i.e., strict scrutiny) should be applied, noting that most federal circuits have applied intermediate scrutiny to Second Amendment challenges. Id. at 220-22. The Fourth District agreed with the State that the statute was substantially related to the stated objective of public safety. Id. at 222-23. The Fourth District further agreed that the Declaration of Policy found in § 790.25, Fla. Stat.,² sufficiently established that a reasonable fit exists between § 790.053 and the Legislature’s stated

² Section 790.25(1) provides:

The Legislature finds as a matter of public policy and fact that it is necessary to promote firearms safety and to curb and prevent the use of firearms and other weapons in crime and by incompetent persons without prohibiting the lawful use in defense of life, home, and property, and the use by United States or state military organizations, and as otherwise now authorized by law, including the right to use and own firearms for target practice and marksmanship on target practice ranges or other lawful places, and lawful hunting and other lawful purposes.

Section 790.25(4) further provides:

This act shall be liberally construed to carry out the declaration of policy herein and in favor of the constitutional right to keep and bear arms for lawful purposes. This act is supplemental and additional to existing rights to bear arms now guaranteed by law and decisions of the courts of Florida, and nothing herein shall impair or diminish any of such rights.

objective. Id. at 223. Thus, reasoned the Fourth District, § 790.053 is constitutional. Id.

Petitioner also asserted that § 790.053 was unconstitutional in that it was “overbroad” because it infringed on constitutionally protected conduct. Id. at 223. The Fourth District rejected Petitioner’s invitation to apply First Amendment standards (i.e., a strict scrutiny analysis) to Second Amendment questions. Id. at 223-24.

Regarding the constitutionality of § 790.053, the Fourth District concluded that the Legislature could constitutionally choose to regulate the carrying of firearms by enacting a statutory scheme allowing for either the open or concealed carrying of firearms. Id. at 226. Noting that the Legislature had chosen to liberally allow for the issuance of concealed, rather than open, carry permits, the Fourth District further held that:

section 790.053 does not effectively enjoin responsible, law-abiding citizens from the right to carry a firearm in public for self-defense. Rather, it permits the typical responsible, law-abiding citizen the ability to bear arms in public, albeit with constitutionally permissible restrictions, for the lawful purpose of self-defense. . . . Through its “shall issue” permitting scheme, Florida has provided a viable alternative outlet to open firearms carry which gives practical effect to its citizens' exercise of their Second Amendment rights

Id.

Turning to the second certified question, Petitioner argued that the exceptions provided in § 790.25(3) are elements that the State must prove to

support a violation of the open carry statute. Id. at 226. The State argued the exceptions were affirmative defenses that must be raised by a defendant and supported with evidence. Id. The Fourth District held that because the exceptions are not located in the enacting clause of § 790.053, but are instead located in a separate statute altogether, the trial court correctly determined the exceptions are affirmative defenses. Id.

Finally, regarding the third certified question, Petitioner argued that § 790.053 was unconstitutionally vague as to what constitutes a “brief” and open display of a firearm. Id. at 227. The Fourth District held that Petitioner lacked standing to assert this claim because he openly displayed his weapon at all times, and as such, the display was not “brief.” Id.

Summary Of The Argument

This Court may exercise its discretionary jurisdiction because the opinion of the Fourth District Court expressly declares a state statute valid.³

³ The State's silence regarding Petitioner's other arguments in favor of this Court accepting jurisdiction should not be construed as the State's implied agreement with those claims.

Argument

THIS COURT MAY REVIEW THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL BECAUSE THE OPINION EXPRESSLY DECLARES A STATE STATUTE VALID.

Petitioner asserts that the decision of the Fourth District in the present case expressly declares § 790.053, Fla. Stat., valid. Article V, § 3(b)(3) of the Florida Constitution provides that this Court may review the decision of a district court of appeal if it expressly finds that the law in question is valid.

In the case at bar, the Fourth District considered and directly passed upon the question of the constitutionality of § 790.053, Fla. Stat. Therefore, this Court may exercise its discretionary jurisdiction to review the constitutionality of the statute.

Conclusion

WHEREFORE, based on the foregoing argument and authorities, Respondent respectfully submits that this Court may grant review in the above-styled cause.

Respectfully submitted,

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Certificate Of Service And E-Mail Transmission

I HEREBY CERTIFY that on this 1st day of May, 2015, in accordance with Fla. R. Jud. Admin. 2.516, a .pdf copy of the foregoing with an electronic signature has been e-mailed to Eric J. Friday, Esquire, Fletcher & Phillips, 541 East Monroe Street, Suite 1, Jacksonville, Florida, 32202-2861, at familylaw@fletcherandphillips.com and efriday@fletcherandphillips.com. Additionally, in accordance with Administrative Order 2013-01 of the Florida Supreme Court, a .pdf copy of the foregoing with an electronic signature has been electronically filed at <https://myflcourtaccess.com>.

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Certificate Of Type Size And Style

In accordance with Fla. R. App. P. 9.210(a)(2), Respondent hereby certifies that the instant brief has been prepared with Times New Roman 14 point font.

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