IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
v.	:	**CASE NO. SC14-1856** **L.T. No. 1D12-3333**
CHRISTOPHER DOUGLAS WEEKS,	:	
Respondent.	:	

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ANSWER BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

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ANSWER BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

The respondent, Mr. Weeks, was the Defendant in the trial court and the Appellant in the district court. The trial proceedings were held in the Circuit Court for Santa Rosa County, Judge David Rimmer, circuit judge, presiding. The record on appeal consists of three volumes and one supplemental volume. Citations to the record will appear as "R," followed by the appropriate volume and page number, e.g., (R.I,1).

STATEMENT OF THE CASE AND FACTS

Appellant accepts the Petitioner's statement of the case and facts subject to the following corrections. In the statement of the case and facts, Petitioner properly states that Respondent's rifle was equipped with a "scope." (IB, 3). In the "argument" section, however, Petitioner argues that Respondent's rifle was equipped with a "fiber optic scope." (IB, 12,19). In fact, the term "fiber optic scope" does not appear in the record. Only the term "scope" appears in the record.

Second, Petitioner describes Respondent's rifle as having an "added" scope. (IB, 7,12). This assertion may originate in the district court opinion which announced that the scope was "added by [Weeks]." Weeks v. State, 146 So. 3d 81, 84 (Fla. 1st DCA 2014)(revised opinion). The record, however, does not show that the scope was added by Weeks. The record does not address whether the scope was installed by the manufacturer or installed by Weeks after the purchase of the rifle. On this record, there is no support for a finding that Weeks added the scope to the rifle.

The Petitioner erroneously quoted section 790.001(1), Florida Statutes, defining "antique firearm." (IB,10). The statute provides:

> (1) "Antique firearm" means any firearm manufactured in or before 1918 (including any matchlock, flintlock, percussion cap, or similar early type of ignition system) or replica thereof, whether actually manufactured before or after the year 1918, *and also any firearm using fixed*

> *ammunition manufactured in or before 1918*, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

§ 790.001(1), Fla. Stat. (2012)(italicized portion erroneously omitted from Petitioner's initial brief).

At hearing on the motion to dismiss, Mr. Weeks testified that he was a convicted felon.[1] (R.II,4). He wanted to go hunting, however. (R.II,4). Weeks did some research on the internet and concluded that, under Florida law, he could lawfully possess a "black powder muzzle loader that required a percussion cap firing system." (R.II,5). Mr. Weeks understood such a weapon to be a replica of an antique weapon. (R.II,5). His wife purchased such a weapon for him at Christmas. (R.II,5). Weeks was not sure whether the presence of a "scope" had any implication as to whether he could lawfully possess the weapon, so he asked his father. (R.II,6).

Respondent's father is a retired firearms instructor for the Escambia County Sheriff's Office. (R.II,5). The father, Sergeant Scott Weeks, examined the weapon and advised his son that he could lawfully possess the weapon. (R.II,6).

Respondent's wife, Talesha Weeks, testified that she researched the Florida statute. (R.II,7). She thought a convicted felon could lawfully possess an "antique

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[1] The information alleged that appellant was previously convicted of the February 15, 2000, offense of dealing in stolen property. (R.I,24).

replica firearm, black powder muzzle loader, that had a percussion cap and the black powder." (R.II,8). Talesha purchased such a firearm at Bass Pro Shop in Alabama. (R.II,8). Talesha did not even have to show identification to make the purchase. (R.II,8). There was never any intent to break the law. They researched the matter for about a month "to make sure." (R.II,9). Respondent's father agreed that Mr. Weeks could lawfully possess the weapon. (R.II,9). In fact, respondent's father purchased the black powder and the percussion caps. (R.II,9).

Mr. Weeks explained the operation of the gun. First, you load black powder down the barrel. (R.II,10). Then you use a ram rod to push the projectile and powder down the barrel. (R.II,10). Next you insert the percussion cap into the breech. (R.II,10). Close the weapon. Cock the hammer, and fire. (R.II,10). To unload the weapon you open the breech and pull out the percussion cap. This requires unscrewing a plug. Remove the remainder of the projectile and the used black powder. (R.II,10).

Defense counsel also noted that the arresting officer testified that when he saw Weeks with this type of rifle he immediately suspected Weeks was a convicted felon. (R.II,11). Officer Royce Johnson sees many "muzzle loaders" because convicted felons believe they can possess such weapons as replicas of antique weapons. (R.II,11).

Defense counsel argued that the statute was unconstitutionally vague, but admitted that the district court in Bostic[2] had rejected the argument. (R.II,12-15). The prosecutor asked the trial court to follow Bostic. (R.II,15). The trial court recognized it was required to follow Bostic. (R.II,15-16). The trial court, therefore, denied the motion to dismiss. (R.II,16). The court added only the following comment:

> I'll tell you what, after listening to all that testimony about that gun, he would be in a world of hurt if a bear was charging after him to reload.

(R.II,16).

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[2] Bostic v. State, 902 So. 2d 225 (Fla. 5th DCA 2005), rev. denied, 912 So. 2d 1217 (Fla. 2005).

SUMMARY OF THE ARGUMENT

ISSUE (restated)

Section 790.23, Florida Statutes, is unconstitutionally vague on the question whether the black powder percussion cap muzzle loader rifle possessed by Mr. Weeks qualified as an antique firearm which may be lawfully possessed by a convicted felon.

Some words are inherently vague. The term "replica" is one such example. Other examples include "apparent" and "imminent." As noted by the district court below, the term replica is sometimes understood as a copy *similar* to the original, "a very close reproduction or copy." The ambiguity in the normal usage of the term "replica" causes section 790.001(1), Florida Statutes, defining "antique firearm," to be unconstitutionally vague. But for the inclusion of a "scope," appellant's black powder percussion cap muzzle loader rifle would undoubtedly qualify as an antique firearm under section 790.001(1), Florida Statutes. Even with the scope, however, a reasonable person of ordinary intelligence would believe that the rifle possessed by Mr. Weeks qualifies as an "antique firearm" because it bears the definitive characteristic specifically identified in the statute, i.e., a "percussion cap" firing system. On the whole, the rifle bore the basic characteristics of a vintage, or Civil

War era, rifle. The First District Court of Appeal correctly held the statute unconstitutionally vague as to the rifle possessed by Mr. Weeks.

ARGUMENT

ISSUE (restated)

Section 790.23, Florida Statutes, is unconstitutionally vague on the question whether the black powder percussion cap muzzle loader rifle possessed by Mr. Weeks qualified as an antique firearm which may be lawfully possessed by a convicted felon.

STANDARD OF REVIEW

"A court's decision regarding the constitutionality of a statute is reviewed de novo as it presents a pure question of law." State v. Catalano, 104 So. 3d 1069, 1075 (Fla. 2012)(citing Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm'n, 838 So. 2d 492, 500 (Fla. 2003)). "[I]n a vagueness challenge, any doubt as to a statute's validity should be resolved in favor of the citizen and against the State." Dufresne v. State, 826 So. 2d 272, 274 (Fla. 2002)(citing State v. Brake, 796 So. 2d 522, 527 (Fla. 2001)).

MERITS

Some words are inherently vague. The term "replica" is one such example. Other examples include "apparent" and "imminent." As noted by the district court below, the term replica is sometimes understood as a copy *similar* to the original, i.e., "any very close reproduction or copy." Weeks v. State, 146 So. 3d 81, 84 (Fla. 1st DCA 2014)(quoting *Webster's New Universal Unabridged Dictionary (Deluxe Second Edition)*). The ambiguity in the normal usage of the term "replica" causes section 790.001(1), Florida Statutes, defining "antique firearm," to be unconstitutionally vague. But for the inclusion of a "scope," appellant's black powder percussion cap muzzle loading rifle would undoubtedly qualify as an antique firearm under section 790.001(1), Florida Statutes. Even with the scope, however, a reasonable person of ordinary intelligence would believe that the rifle possessed by Mr. Weeks qualifies as an "antique firearm" because it bears the definitive characteristic specifically identified in the statute, i.e., a "percussion cap" firing system. On the whole, the rifle bore the basic characteristics of a vintage, or Civil War era, rifle. The First District Court of Appeal correctly held the statute unconstitutionally vague as to the rifle possessed by Mr. Weeks.

> The standard for testing vagueness under Florida law is whether the statute gives a person of ordinary intelligence fair notice of what constitutes forbidden conduct.

> Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). "The language of the statute must 'provide a definite warning of what conduct' is required or prohibited, 'measured by common understanding and practice.'" Warren v. State, 572 So. 2d 1376, 1377 (Fla. 1991)(quoting State v. Bussey, 463 So. 2d 1141, 1144 (Fla. 1985)).

Brown v. State, 629 So. 2d 841 (Fla. 1994).

Relevant to the present case, section 790.23(1)(a), Florida Statutes, states that a convicted felon may not possess a firearm. The term "firearm" is defined in section 790.001(6), Florida Statutes. The term "firearm," however, does not include an "antique firearm" unless the antique firearm is used in the commission of a crime. § 790.001(1)(6), Fla. Stat.

> (1) "Antique firearm" means any firearm manufactured in or before 1918 (including any matchlock, flintlock, percussion cap, or similar early type of ignition system) or replica thereof, whether actually manufactured before or after the year 1918, and also any firearm using fixed ammunition manufactured in or before 1918, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

§ 790.001(1), Fla. Stat.

The first matter of note is that the recent manufacture of the firearm does not disqualify the weapon as an "antique firearm" because a replica of a weapon manufactured in or before 1918 (including any matchlock, flintlock, percussion cap,

or similar type of ignition system) comes within the definition of an "antique firearm." It was well established in the record that appellant possessed a black powder muzzle loader rifle with a percussion cap firing system. It was also well established in the record that a weapon with this type of ignition system or firing system is of an ancient vintage. This weapon must be loaded by forcing the black powder and ammunition down the barrel with the aid of a ram rod. This type of rifle harkens back to the days of the Civil War. This weapon also required the use of a "percussion cap," a type of ignition system specifically identified in the statute as a distinguishing characteristic of an "antique weapon."

While the concept of constitutional "vagueness" is nebulous, Mr. Weeks makes the following observations. Under the statutory definition of "antique firearm," the type of ignition system or firing system is a preeminent characteristic. Anecdotal information is relevant. If Weeks, his wife and father may be regarded as persons of "ordinary intelligence," one may conclude that the statute did not place them on fair notice of the conduct proscribed. Each referred to the statute, performed investigation, and concluded that the rifle possessed by appellant qualified as an "antique weapon" as defined by Florida Statute, and could lawfully be possessed by Mr. Weeks. By this standard, Mr. Weeks was not reasonably on notice that it was unlawful to possess the weapon. It may be argued, however, that Weeks and his

family are not unbiased observers; they all had a stake in the outcome. Owing to this consideration, respondent considers the observations and opinions of disinterested parties as to the meaning and import of the statute.

The record of the Bostic case, as indicated by the dissenting opinion of Judge Sharp, presents a broader survey of statutory interpretation by persons not only of "ordinary intelligence," but extensive experience and expertise in the area of firearm law and operation. In Bostic, as in the present case, the defendant likewise possessed a percussion cap, black-powder, muzzle loading rifle. Bostic, 902 So. 2d at 230 (Sharp, J., dissenting). A number of firearms experts testified as to their understanding of the statute. Curtis Bartlett, Chief of the Firearms Technology Branch of ATF, testified that this rifle "qualified as an antique firearm under federal law." Id. at 230. Chad Albritton, a law enforcement officer with the Florida Fish and Conservation Commission testified that convicted felons may lawfully hunt with such weapons under Florida law. Id. Sergeant Ben Allen, a game officer with the Florida Fish and Wildlife Conservation Commission, testified that such a rifle may lawfully be possessed by a convicted felon because it qualifies as an "antique firearm" under Florida law. Id.

Cheryl Brill, a federally licensed firearms dealer at Wal-Mart testified that the purchase of such a rifle does not even require a background check because it does not

even qualify as a "firearm." According to Brill, the percussion cap and black powder makes this a "primitive weapon." Warren Schroeder, a federally licensed firearms dealer, testified that such a rifle is classified as an antique weapon under federal law because of the percussion ignition system. Id. According to Schroeder, such a weapon does not even qualify as a "firearm" under Florida law. Id. According to Schroeder, "[t]he purchase of the Thompson Black Diamond muzzle loading rifle by a convicted felon does not require a background check." Id.

The only suggestion, in Bostic, that the rifle at issue was not a "replica" of an antique firearm, was the installation of a "fiber optic sight" uncharacteristic of an antique weapon. But the installation of the fiber optic sight did not deter the firearm experts from concluding that the rifle was an "antique firearm" under the relevant Florida statute. In the present case, the record shows that appellant's rifle was equipped with a "scope." Similarly, the installation of a "scope" does not deter a reasonable person of ordinary intelligence from concluding that the rifle qualifies as an antique firearm because the essential and primary characteristic of the weapon is its black powder muzzle loading and percussion cap firing system. If firearms experts with advanced knowledge of the applicable Florida law conclude that the muzzle loading rifle, even with advanced siting technology, qualifies as an "antique weapon" under Florida law, then a citizen of ordinary intelligence may reasonably conclude,

a fortiari, that the rifle is an antique weapon under Florida which may be possessed by a convicted felon.

The opinions of these firearms experts are relevant in determining whether a person of ordinary intelligence is placed on fair warning of whether the rifle possessed by Weeks qualified as an "antique firearm." As stated by this Court on a prior occasion:

> We do not see how the average citizen could be more successful than a trained professional in defining this term.

Warren v. State, 572 So. 2d 1376 (Fla. 1991)(finding the phrase "house of ill fame" unconstitutionally vague).

Respondent notes that Harris v. State, 843 So. 2d 856 (Fla. 2003), is not the least bit helpful in determining whether the statutory definition of "antique firearm" placed him on reasonable notice that his black powder, percussion cap, muzzle loader rifle did not qualify as an antique firearm. In Harris, this Court discussed the reasonableness of the trial court's admission of a plastic "replica" of a makeshift or homemade firearm, and concluded that the trial court did not err in admitting the plastic replica as demonstrative evidence. In so ruling, the Court noted that demonstrative evidence must be a "reasonably exact reproduction or replica" of the original object so as not to confuse the jury. Id. at 863. In this context, Respondent

notes that the test for admission of evidence and the test for constitutional vagueness are unrelated legal concepts. Harris is, therefore, of no value to the present analysis.

Petitioner's reliance on Williams v. State, 492 So. 2d 1051 (Fla. 1986), receded from on other grounds, Brown v. State, 719 So. 2d 882 (Fla. 1998), is also misplaced. Williams held, merely, that the trial court did not err in denying the defendant's motion of judgment of acquittal, where Williams claimed his concealed pistol was an antique. This Court noted that Williams failed to carry his burden on the affirmative defense of "antique" because there existed a factual question on the date of manufacture of the pistol. The legal test applicable on motion for judgment of acquittal bears no relation to the test for constitutional vagueness. This Court also appeared concerned about the fact that his pistol was concealed, because the possession of a concealed firearm is itself a crime. In any event, the pistol carried by Williams did not satisfy the statutory definition of "antique" because the pistol used "fixed ammunition" which was "readily available in the ordinary channels of commercial trade." § 790.001(1), Fla. Stat. (1983). This Court noted that the pistol was "obviously operable and loaded with live ammunition." Id. at 1054. Williams, therefore, does not apply to the present case.

For the foregoing reasons, the Florida statute defining "antique firearm" is unconstitutionally vague "as applied" to the black powder muzzle loader rifle with a percussion cap firing system possessed by Mr. Weeks.

CONCLUSION

Based upon the foregoing argument and authority, Mr. Weeks respectfully requests the Court to adopt the well reasoned decision of the First District Court of Appeal reversing his conviction for the offense of possession of a firearm by a convicted felon.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to Trisha Meggs Pate, Office of the Attorney General, the Capitol, at crimapptlh@myfloridalegal.com, as agreed by the parties, and by U.S. Mail to Appellant, Mr. Christopher Weeks, 617 McCarroll Rd., Pensacola, FL 32507, on this 3rd day of March, 2015.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Times New Roman, 14 point.

Respectfully submitted,

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