DISTRICT COURT OF APPEALS, FOURTH DISTRICT

DALE NORMAN
Appellant/ Defendant,

CASE NO.: 4D12-3525

LT: **562012-MM-000530**

v.

STATE OF FLORIDA
Appellee.
_____/

APPELLANT'S MEMORANDUM IN SUPPORT OF EXERCISE OF DISCRETIONARY JURISDICTION

The county Court below certified this case as involving questions of great public importance. This case involves Defendant Dale Norman who according to the findings of fact below, was in possession of an openly carried firearm. Mr. Norman holds a Concealed Weapon Firearm License (CWFL) issued by the State of Florida. Norman testified in his own defense that the weapon was concealed when he left his home on the date of the offense. Mr. Norman was not charged with any other offense, and was lawfully in possession of his firearm. It was only the manner in which it was carried for which he was charged.

This case is unique. Had Mr. Norman not had a CWFL he would have been charged with a felony and would have had an appeal to this Court as a matter of right. However, because he attempted to follow the law and obtained a CWFL prior to carrying his firearm the same conduct was only a misdemeanor, and this

appeal is only discretionary. The prosecution of an individual whose gun became exposed while walking down the street is in contravention of the stated intent and legislative history of SB 234 (amending Sec. 790.053, Fla. Stat., 2011) and should be addressed by this Court as a question of great public importance.

Since the U.S. Supreme Court's rulings in the cases of *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3024 (2010), the appellate courts of Florida have not had an opportunity to thoroughly review the impact of those cases on the right to keep and bear arms in Florida. In light of these new rulings, their applicability to the current laws of Florida and a determination of whether Florida law is in accord with these decisions is a question of great public importance not suitable to determination by a circuit court in its appellate capacity.

The right to keep and bear arms in the Florida Constitution has been widely recognized by the legislature and the courts of Florida. Secs. 790.06, 790.25, and 790.33, Fla. Stat., and *Davis v. State*, 146 So. 2d 892 (Fla. 1962). Despite, or possibly because of, the long recognition of this right no appellate court has ruled directly on the constitutionality of Sec. 790.053, Fla. Stat. Additionally, the Florida legislature recently amended Sec. 790.053 to specifically provide for a person to "briefly and openly display" a firearm. The legislature provided no guidance as to what was meant by a brief display and the language of the statue is

so vague as to not give clear notice to a person of ordinary intelligence as to exactly what conduct is prohibited.

The exact boundary of the right to keep and bear arms in light of both federal cases and pronouncements of the Florida courts and legislature is an open question. There are nearly 1 million CWFL holders in Florida, not to mention the numerous other gun owners who keep a firearm in their home or place of business. These are questions of great importance not only to those who lawfully own and/ or carry firearms, but also to law enforcement officers who need guidance as to what is permissible in the bearing of arms in Florida. These questions involve both considerations of constitutional law as well as the interpretation of statutory law with a wide ranging applicability and are therefore of great public importance.

There is presently a tangentially similar case before the Florida Supreme Court, *Mackey v. State of Florida*, SC12-573. At issue in *Mackey,* is whether the possession of a CWFL is an element of the crime of carrying a concealed weapon or merely an affirmative defense. Similarly in this case, is the question of whether Sec. 790.25, Fla. Stat. which states that it is supreme over any conflicting statute, is an affirmative defense or an element of the crime charged herein.

There is an interesting conflict in Florida law that cannot be reconciled except by a decision of this Court. The *Heller* and *McDonald* cases make clear that there is a fundamental individual right to keep and bear arms under the United

States Constitution. The Florida Constitution and Legislature in recognition of this right and of the limitation authority in Article I Sec. 8, Fl. Const., has decided to regulate the carrying of arms to only allow concealed firearms with limited exceptions. Arguably under *Davis* 146 So. 2d 892 (Fla. 1962), this might have met constitutional muster, but *Davis* was decided on a very narrow ground that the restriction did not apply to all arms.

The *Davis* court made clear that it reached its decision because only a limited class of weapons was subject to licensing, pistols and winchester repeaters. Under the current licensing scheme all firearms must be concealed in order to be carried, and the citizen must obtain a license at substantial expense. *Davis* went even further and explained in its holding that the only reason the licensing could be allowed was to control the bearing of arms by the unskilled, irresponsible and lawless, adjective hardly appropriate to one who has passed all state requirements for the bearing of arms. *Davis v. State*, 146 So. 2d 892, 894 (Fla. 1962)

The current licensing scheme is complicated by the fact that it does not secure the rights recognized by the federal or state constitutions or by general law. The courts have been clear that the current licensing scheme is only a privilege. *Crane v. Dep't of State, Div. of Licensing*, 547 So. 2d 266, 267 (Fla. 3d DCA 1989)(holding that "a license to carry a concealed weapon or firearm is a privilege and not a vested right"). Carrying a firearm is either a right or a privilege. It

cannot be both. It is of great public importance that this Court rule as to the applicability and boundaries of the right to keep and bear arms, as opposed to the privilege of carrying a concealed firearm as recognized in *Crane*.

Justice Buford of the Florida Supreme Court recognized as long ago as 1941 that Florida's licensing scheme violated the federal and state constitutions as well as the natural right of people to self defense. *Watson v. Stone*, 4 So. 2d 700 (Fla. 1941)(concurring opinion). Justice Buford went on to explain that the licensing had long been considered unconstitutional but not challenged because it was widely recognized to only apply to the negro laborers in the turpentine and lumber camps.

It is a question of great public importance whether the bigoted and racist roots of Florida's firearm licensing scheme will be allowed to continue for another century, or whether the natural rights recognized by the Florida Supreme Court in 1941 will finally be given full effect to all the citizens of Florida. *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941)(stating, [t]hese people, in the opinion of the writer, should not be branded as criminals in their effort of self preservation and protection, but should be recognized and accorded the full rights of free and independent American citizens).

Mr. Norman respectfully requests this Court exercise its discretionary jurisdiction and hear his appeal in this case.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served via US Mail this ___ day of October 2012 on the following :

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