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IN THE SUPREME COURT OF FLORIDA

JERRY RAY ROBINS, :
Petitioner, :
v. :
STATE OF FLORIDA, :
Respondent. :
_____ :

CASE NO. 78,876

PETITIONER'S REPLY BRIEF ON THE MERITS

NANCY A. DANIELS
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SECOND JUDICIAL CIRCUIT
LEON COUNTY COURTHOUSE
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REBUTTAL ARGUMENT¹

THE RECLASSIFICATION PROVISION IN SECTION
775.087(1), MUST BE CONSTRUED TO REQUIRE
PHYSICAL POSSESSION BY THE DEFENDANT OF THE
FIREARM OR WEAPON.

The state defends the district court's decision by arguing that section 775.087(1), Florida Statutes, when read in pari materia with section 777.011, Florida Statutes, allows reclassification for vicarious possession of a firearm. AB.13. According to the state, such a construction is necessary because "the obvious intent of § 775.087 'is to deter the use of firearms and other weapons during the commission of criminal offenses,' Robins v. State, 587 So.2d 581,582 (Fla. 1st DCA 1991)". AB.10.

While the purpose of section 775.087 is to deter the use of firearms, it does not follow that the legislature intended to effectuate this purpose by applying subsection (1) to defendants who do not physically possess the firearm.² Hence, the only relevant question is whether the legislature intended actual physical possession.

To answer this question, as Robins has argued (IB.11), this court must first look to the statute's text. The state

¹References to the state's merit answer brief will be as AB.(page number). References to Robins's merit initial brief will be as IB.(page number).

²In spite of the statute's general purpose, this court has already required physical possession for application of the mandatory minimum term in subsection (2). Earnest v. State, 351 So.2d 957 (Fla. 1977); IB.12.

argues that Robins has wrongly assumed the statute's words connote physical possession. AB.13. The state argues: "one could easily display or threaten to use a weapon without ever touching it." AB.14. Yet the state provides no examples of how one could easily display or threaten to use a weapon in another's possession.³ The statute's text unambiguously requires physical possession. The statute states that "the defendant" must carry, display, use, threaten or attempt to use a firearm. § 775.087(1), Fla. Stat. (1989). These verbs connote physical possession by the defendant. For example, a defendant can not carry or display a weapon being carried or displayed by another.

The state argues that the question certified in Rodriguez v. State, 582 So.2d 1189 (Fla. 3d DCA 1991), must be answered in the affirmative, "if the statute is to be given its intended effect, and if the statute is to be harmonized with § 777.011." AB.13. (emphasis supplied). However, the statute does not need to be harmonized with the section 777.011 if it does not require physical possession, as the state argues. Either a contradiction is inherent in the state's positions, or it agrees that the statute requires physical possession. The the state and the district court have failed to understand that

³Moreover, the state fails to argue that the facts show Robins vicariously displayed or threatened to use the firearm the co-perpetrator possessed.

since the text is unambiguous, there is no need to read the statute in pari materia with section 777.011.

In reply to the state's other arguments, Robins relies on the arguments in his merit initial brief.

CONCLUSION

Based on the foregoing rebuttal argument and on the initial brief, Robins requests that this Court quash the district court's decision.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been hand delivered to Assistant Attorney General James W. Rogers and Assistant Attorney General Sara D. Baggett in Tallahassee, Florida, on 30 March 1992.

Respectfully submitted,



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