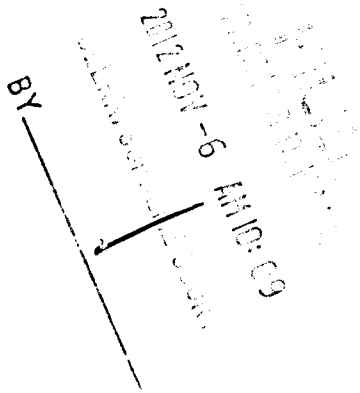
IN THE SUPREME COURT OF FLORIDA



CASE NO. SC 12-573

DCA NO. 3D10-2415

ANTHONY MACKEY,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

In this brief, "R." will designate the record on appeal, "Tr." the transcript of the trial proceedings, "S.R." the supplemental record, and "D." the deposition of Officer Alexander May, which was introduced into evidence and has been supplemented to the record.

ARGUMENT

THE POLICE MAY NOT, CONSISTENT WITH THE FOURTH AMENDMENT, STOP ANY PERSON CARRYING A CONCEALED WEAPON OR FIREARM, TO CHECK FOR A LICENSE, WHERE THERE IS NEITHER REASONABLE SUSPICION TO BELIEVE THEIR POSSESSION IS UNLAWFUL, NOR REASONABLE SUSPICION OF SOME OTHER INDEPENDENT CRIMINAL OFFENSE.

Openly carrying a firearm is against the law, and the only lawful way to carry a firearm is to carry it concealed. Compare § 790.053(1), Fla. Stat., with § 790.053(1), Fla. Stat. The Third District's holding, that the mere possession of a concealed firearm creates a reasonable suspicion of criminal conduct, however, makes the only lawful means of carrying a firearm presumptively illegal. Even with limitations on the right to bear arms, the very exercise of that right cannot be presumptively illegal without nullifying the right altogether. The State initially embraced the Third District's position, but filed an amended brief after the filing of the Amicus brief in support of the Petitioner's position. (Am. Resp't Br. 18-19.)

The State now chiefly argues that the totality of the circumstances gave Officer May reasonable suspicion to believe Mr. Mackey had no license. But the State's totality-of-the-circumstances argument omits some rather important circumstances:

1. Officer May did not observe Mr. Mackey engaging in any other criminal or suspicious behavior. (D. 6.)
2. This was the middle of the day. (D. 6.)

3. Mr. Mackey did not flee after two officers exited marked police cars and approached him. (D. 4, 9-10.)
4. Mr. Mackey never attempted to terminate the encounter to avoid an inquiry that might lead to the discovery of his firearm. (See D. 8.)
5. Officer May testified that he did not draw his gun because Mr. Mackey kept his hands visible. (D. 18.)
6. Officer May never asked Mr. Mackey whether he had a firearm on his person. (D. 8, 10.)
7. Officer May never asked to see Mr. Mackey's concealed firearms permit. (D. 8, 10.)
8. Officer May did not know if Mr. Mackey had a prior record. (D. 6.) Nor was there testimony that Mackey looked too young to qualify for a permit.
9. There was no testimony suggesting that asking for Mr. Mackey's concealed firearms license would have been impractical.

Ignoring the above, the State asks this Court to accept its argument solely based on two facts: 1) that Officer May was in a "high crime" area; and 2) that Mr. Mackey said "no" when May asked: "Do you have anything on you?" Characterizing Mackey's answer as a "lie," the State essentially argues that Regalado's[1] mere possession rule does not apply.

However, the record does not support the inference that Mr. Mackey "lied." In fact, the record reveals that the trial court based its holding solely on controlling Third District case law, while explaining that it would otherwise have followed Regalado:

> Well, there seems to be no question if [sic] I were in the Fourth District, I'd follow Regalado to the opposite conclusion because they use the carrying analysis. And they don't say anything about burden of proof being on the defense to show that he had a carry and

[1] Regalado v. State, 25 So. 3d 600 (Fla. 4th DCA 2010)

> concealed permit so, no, even that's against the law having a gun without a permit.
>
> **** **** ****
>
> All right. Well, so I'm going to follow the law in the Third District. And I think the Fourth is very compelling, but we're not in the Fourth. So this is how we get to the supreme court on an issue I guess.

(S.R. 27-28.)

If the trial court found that the Petitioner had "lied" to the police, then Regalado would not have been controlling, as there would have been record facts well beyond Mr. Mackey's "mere possession" of the weapon.

The State made this same argument before, and this Court, in accepting jurisdiction, properly rejected it.

Moreover, although the State no longer overtly argues that possession of a concealed firearm is inherently illegal, its reliance on Mr. Mackey's answer necessarily includes this position. The reason is that his answer would only be incriminating if possession of a concealed firearm were **so obviously illegal** that anyone who was asked "Do you have anything on you?" would feel compelled to reveal that they had a concealed firearm, because any other answer would be evasive. Thus, while the State has changed its tone, its argument is still that the mere possession of a concealed firearm is presumptively illegal.

The State's reliance on May's question further assumes that lawful carriers have a duty to volunteer that they are carrying a concealed firearm, and that the

failure to do so would be "a lie." (Am. Resp't Br. 9, 14-15.) While seven states place an affirmative duty on permit-holders to inform the police of their concealed firearms **and** licenses, Florida does not.[2] The only responsibility Floridians have is to produce their license upon demand by the police. § 790.06(1), Fla. Stat. Indeed, this case would be different had Officer May just asked Mr. Mackey, as per Florida Statute 790.06(1), to produce a concealed firearms permit.

In a second jurisdictional argument, the State says that it is not necessary to decide whether the mere observation of a concealed firearm gives rise to reasonable suspicion (as well as whether licensure is an affirmative defense). (Am. Resp't Br. 10, 14-15.) But the State's argument here succeeds only if this Court accepts the Third District's position that possession of a concealed firearm is presumptively illegal. Only then could a citizen be expected to volunteer that they have a firearm on their person whenever asked by the police, "Do you have anything on you?"

If it is not inherently illegal, as held by the Fourth District, then such a question could not reasonably be expected to elicit disclosure of a concealed

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[2] La. Rev. Stat. Ann. § 40:1379.3(2) (2012); Mich. Comp. Laws §28.425f(3) (2012) (requirement for residents); Neb. Rev. St. Ann. § 69-2440(2) (2012); N.C. Gen. Stat. §14-415.11(a) (2012); Ohio Rev. Code Ann. §2923.12(B)(1) (2012); Okla. Stat. tit. 21 §1290.8 (2012) (must be disclosed "during the course of any arrest, detainment, or routine traffic stop"); S.C. Code Ann. § 23-31-215(K) (2012).

firearm. No more than "Do you have anything on you" could be expected to elicit, "I have my prescription medication on me." Accordingly, this case cannot be decided without first deciding whether the Third District correctly concluded that: 1) licensure is an affirmative defense; and that 2) possession of a concealed firearm is consequently inherently illegal.

Mr. Mackey adopts the position of the Amicus brief that licensure is not an affirmative defense. He alternatively argues that even if it is an affirmative defense, that defense does not make possession inherently illegal. And therefore, the police would still need reasonable suspicion of independent criminal activity, or information suggesting the possession was unlawful, before conducting a Fourth Amendment seizure.

Finally, the State attempts to distinguish Mr. Mackey's cited cases by contending that many of them are contrary to Florida v. J.L., 529 U.S. 266 (2000). ((Am. Resp't Br. 15-18.) However, even assuming that these decisions might have been different in light of J.L., these cases were all decided on the grounds that the information known to the police—that the person was carrying a concealed firearm—was insufficient because possession of a firearm is not inherently illegal.

CONCLUSION

Based on the foregoing facts, authorities and arguments, petitioner respectfully requests this Court to quash the decision of the Third District Court of Appeal, and remand this case with instructions that the defendant's motion to suppress be granted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to the Office of the Attorney General, Criminal Division, 444 Brickell Avenue, Suite 650, Miami, Florida, this 5th day of November, 2012.

BY:/s/ Michael T. Davis
MICHAEL T. DAVIS
Assistant Public Defender

CERTIFICATE OF FONT COMPLIANCE

I hereby certify that the type used in this brief is 14 point proportionately spaced Times New Roman.

BY:/s/ Michael T. Davis
MICHAEL T. DAVIS
Assistant Public Defender