IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC15-650

DCA NO.: 4D12-3525

DALE NORMAN,
Petitioner

-vs-

STATE OF FLORIDA
Respondent.

BRIEF OF PETITIONER ON JURISDICTION

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

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INTRODUCTION

This is a petition for discretionary review by the petitioner/defendant, Dale Norman, based on 1) expressly declaring a state statute valid; 2) expressly construing provisions of the state and federal constitutions; and 3) express and direct conflict with a decision of the Third District Court of Appeals, as per Rules 9.030(a)(2)(A)(i), (ii), and (iv). The symbol "A" refers to the opinion of the lower court, as set forth in the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

Dale Norman was arrested while openly carrying a firearm. (A. 2). Mr. Norman was charged with Open Carrying of a Weapon in violation of Sec. 790.053, Fla. Stat. (A. 2). Mr. Norman filed motions to dismiss challenging the constitutionality of the statute and the application of Sec. 790.25 as an affirmative defense. (A. 2). The trial court denied the motions to dismiss and certified three questions of great public importance to the District Court of Appeal. (A. 2).

The 4th DCA held that Sec. 790.053 was constitutional under both the federal and state constitutions, affirming the ruling of the lower court. (A. 2). It also recognized that the 3rd DCA had previously held that a license to carry a concealed firearm (or any firearm outside the home) was a privilege not a vested

right, and disagreed with the 3rd DCA's holding in *Crane v. Dep't of State, Div. of Licensing*, 547 So. 2d 266, 267 (Fla. 3d DCA 1989). (A. 6, FN3).

SUMMARY OF ARGUMENT

The 4th DCA's decision is in direct conflict with the decision of the 3rd DCA in *Crane*, and fundamentally misconstrues the Supreme Court's rulings in *Heller* and *McDonald* in order to uphold the constitutionality of Sec. 790.053. The decision has created an untenable situation in Florida. The court recognizes a right to carry inside or outside the home, but allows anyone who exercises that right to be arrested. See, *Bethel v. State*, 93 So. 3d 410 (Fla. 4th DCA 2012). This situation is caused by a confluence of statutes and court decisions culminating with the 4th DCA's decision in this case.

The 4th DCA's decision here holds that a person has a right to carry a firearm outside the home, but the Legislature can require the firearm to be concealed. Simultaneously, the carrying of that firearm is a crime, whether concealed or unconcealed. The decision below further claims that the right to carry can be limited to a license that the 4th DCA says a person has a right to obtain, but the 3rd DCA holds is only a privilege.

The decision below is also in direct conflict with decisions of the U.S. Supreme Court. See, *District of Columbia v. Heller,* 554 U.S. 570 (2008) and

McDonald v. City of Chicago, 561 U.S. 742 (2010). In those cases, the U.S. Supreme Court said that a law prohibiting possession of an entire class of firearms in the home is unconstitutional. *Heller* at 628-29 and *McDonald* at 791. Based on the 4th DCA's analysis, any possession of a firearm is a crime. Furthermore, the decision below bans the carrying of any firearm other than a handgun for purposes of self-defense, thereby prohibiting possession of an entire class of arms.

ARGUMENT

I. The decision of the Fourth District Court of Appeal in this case is in direct and express conflict with the decision of the Third District Court in *Crane v. Dep't of State, Div. of Licensing*, 547 So. 2d 266, 267 (Fla. 3d DCA 1989), as to whether a person has a right to obtain a concealed weapon firearm license.

In its decision below, the 4th DCA expressed direct conflict with the 3rd DCA's decision in *Crane*. (A. 6, FN3). Petitioner requested in a motion for rehearing that the 4th DCA certify conflict with *Crane* based on its opinion, but the 4th DCA declined to do so. As a justification for ignoring the *Crane* decision, the 4th DCA reasoned that because *Crane* predates the decisions of the U.S. Supreme Court in *Heller* and *McDonald*, *Crane* is no longer good law to the extent that it limits the carrying of a firearm outside the home to a licensed privilege, with no vested right to a license.

Despite the holding of the 4th DCA, the holding of *Crane* is still binding in the 3rd DCA and presumably in other DCAs as well. A person living in the 3rd DCA has no vested right to a concealed weapon or firearms license (CWFL). *Crane v. Dep't of State, Div. Of Licensing*, 547 So.2d 266, 267 (Fla. 3d DCA 1989). A person living in the 4th DCA does have a right to a CWFL. (A. 6 and 15). The result of this split is that in the 3rd DCA there is no right to bear arms outside the home. In the 4th DCA there is a right to bear arms outside the home, but it is limited to a licensed privilege.

This Court should accept jurisdiction to resolve this direct conflict between the 3rd DCA and 4th DCA, as to whether a person has a vested right to a CWFL. Resolution of this question is imperative to answer the larger question certified by the trial court: "Is Florida's statutory scheme related to the open carry of firearms constitutional?"

The decision below is also in conflict with this Court's decision in *Mackey v. State*, 2012 Fla. LEXIS 1324 (Fla. 2012). In *Mackey,* this Court held that carrying a concealed weapon is a crime. The crime is subject to the affirmative defense of possession of a CWFL. By considering *Mackey* and the decision of the 4th DCA in the instant case together, the inescapable conclusion is that the exercise of the right to bear arms in Florida is a crime. To exercise the right, a person must

commit the felony of concealed carry of a firearm, subject to showing a judge after arrest that they have a CWFL. No other right requires the commission of a felony that can lead to arrest, in order to exercise it in the most basic fashion.

So long as a conflict exists between the 3rd DCA and the 4th DCA as to the validity of *Crane*, neither the people of Florida, nor the Dept. of Agriculture and Consumer Services, knows whether citizens have a right to the issuance of a CWFL, or whether they truly have a right to bear arms in the State of Florida.

II. The decision of the Fourth District Court of Appeal expressly construes the Second Amendment to the Constitution, and Art. I, Sec., 8 of the Florida Constitution, to hold that even though a person has a right to carry a firearm outside the home, the State may prohibit the carrying of a firearm without a license, as long as a license is issued as a matter of right.

The 4th DCA's decision delves deeply into express construction of both the Second Amendment and Art. I, Sec. 8 of the Florida Constitution. The court construed the Second Amendment to allow not only for the prohibition of concealed carry as recognized by *Heller*, but also to allow the banning of unconcealed, or open carry. (A. 7-8). In so construing the meaning of the Second Amendment, the 4th DCA became the first post-*Heller* court to directly hold that unconcealed carry may be prohibited consistent with the Second Amendment.

A. Interest balancing by any other name is still interest balancing.

The Court below asserted that it was applying intermediate scrutiny to Mr. Norman's claim that Sec. 790.053 is unconstitutional. The test actually applied by the lower court was the interest balancing test expressly rejected by the U.S. Supreme Court. *Heller* at 634. The lower court did not identify any important governmental interest, other than a general interest in public safety, and did not explain how prohibiting the unconcealed carry of firearms would advance that or any other governmental interest. (A. 20-21)

B. The lower court improperly used legislative intent from one statute, to justify a statute passed 20 years later.

According to the 4th DCA, the Declaration of policy in Sec. 790.25 establishes a "reasonable fit" between the government's interest and the ban on unconcealed carry. Notably, 790.053 does not include anything akin to Sec. 790.25's Declaration of Policy or Construction expressed in the statute or anywhere in its nearly non-existent legislative history. Nothing in Sec. 790.25 purports to address the construction given to the entirety of Chapter 790. The "act" referenced in Sec. 790.25(4), predates the enactment of Sec. 790.053 by two decades. The lower court improperly relied upon the legislative intent of a statute that was not challenged to uphold the statute at issue. (A. 9).

The Court then went a step further and claimed that because of a lack of empirical evidence as to the efficacy of the regulation at issue, it would not declare Sec. 790.053 unconstitutional. It is well established that under intermediate scrutiny, it is the government's obligation to bring forth evidence of the efficacy of the regulation and its fit to the stated interest. It is not the burden of the citizen.

Under intermediate scrutiny the government, not the citizen, must show that the challenged legislative enactment is substantially related to an important governmental interest. *Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195, 1246 (11th Cir. 2014). Any lack of evidence of efficacy should have been in Mr. Norman's favor, not the State's.

III. The decision of the Fourth District Court of Appeal expressly declares Sec. 790.053, Fla. Stat., to be valid.

The decision below along, with the certified question from the trial court, required the court to expressly pass on the constitutionality of Sec. 790.053, Fla. Stat. (A. 2).

A. The lower court's decision ignores the substantive due process implicated by the right to bear arms, contrary to the U.S. Supreme Court decision in *McDonald*.

The decision below relies on Florida's carry licensing scheme, procedural due process, to violate Norman's right to substantive due process. Under the

decision, a person's right to bear arms has been nullified unless and until the person goes through a licensing procedure to regain their right to bear arms. The U.S. Supreme Court has rejected this argument and held that the right to bear arms is a substantive guarantee that cannot be denied merely by creating a procedure for the recovery or exercise of the right. *McDonald* at 746 and 780.

Contrary to the holding below and the holdings of other federal courts, the *McDonald* Court also rejected the idea that the right to bear arms be subjected to a "different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause." *McDonald* at 780.

B. The lower court's decision ignores or rejects substantial precedent that formed the basis for the U.S. Supreme Court ruling in *Heller*.

The lower court's claim that "no decision interpreting the Second Amendment can be cited for the proposition that a state must allow for one form of carry over another" is patently false. (A. 23). The 4th DCA inserted a footnote claiming that *Heller I* cited several cases holding that one mode of carry can be prohibited when others are allowed. (A. 23, FN 17) The truth is that every single case so cited by the U.S. Supreme Court held that while the state could regulate concealed carry, it could not similarly regulate unconcealed carry. See e.g. *Nunn v. State*, 1 Ga. 243, 251 (Ga. 1846)(holding that the state could "suppress the

practice of carrying certain weapons secretly", but "that so much of it, as contains a prohibition against bearing arms openly, is in conflict with the Constitution, and void . . .); and *State v. Reid*, 1 Ala. 612, 619(1840)(holding, "we incline to the opinion that the Legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence").

In fact, the *Reid* case expressly rejected the 4th DCA's logic, and the "alternative outlet" theory, and held that while the privilege of concealed carry could be regulated, the right of open carry could not be so banned in favor of a legislatively granted privilege. *Reid* at 619. It should be noted that within the past 3 years, both Alabama and Georgia have given statutory protection to this long existing common law precedent.

Heller rejected the idea that a state can ban the possession of handguns by allowing the possession of long guns. *Heller* at 629. Nothing in *Heller* can be read to make Florida's prohibition on bearing long guns in favor of handguns any more permissible.

C. The decision below subjects all law abiding gun owners to arrest and prosecution.

The lower court's determination that Sec. 790.25 is valid cannot be reconciled with the U.S. Supreme Court decisions in *Heller* and *McDonald*. In each case the Supreme Court was clear that it cannot be a crime for a person to possess a firearm in their home. The decision below holds that in Florida it is a crime to carry a firearm, and that it is an affirmative defense, under Sec. 790.25 if you are in your home, or under 790.06 if you have a license.

Allowing the decision below to stand, places the Florida courts in direct conflict with the decisions of the U.S. Supreme Court in violation of the federal supremacy clause. Art. VI, Const. of the United States.

CONCLUSION

The decision in this case expressly conflicts with a decision of the 3rd DCA, expressly construes provisions of the Florida and federal constitutions, and declares a state statute to be constitutional. The 4th DCA has rejected both the holding and the reasoning of the U.S. Supreme Court, and has denied all Floridian's their substantive due process right to bear arms as recognized in *McDonald*.

Petitioner respectfully requests the Court exercise its jurisdiction under Article V, Section 3(b)(3), Florida Constitution, to resolve the conflict, and definitively rule on the constitutionality of the statute at issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served via e-Service this 13th day of April 2015 on the following:

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CERTIFICATE OF FONT COMPLIANCE

I hereby certify that the typ used in this brief is 14 point proportionally spaced, Times New Roman.

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