NOT FINAL UNTIL TIME EXPIRES FOR REHEARING, AND IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION

JENNIFER ROSELL,
Appellant,

v.

STATE OF FLORIDA,
Appellee.
_____/

UCN: 512019AP000062APAXWS
Case No.: 19-AP-62
L.T. No.: 19-MM-852

On appeal from Pasco County Court,
Honorable Anne Wansboro

David J. Joffe, Esq.,
Joffe Law, P.A.,
for Appellant.

Michael B. Cowan,
Assistant State Attorney,
for Appellee.

ORDER AND OPINION

Appellant's constitutional challenge to section 790.01, Florida Statutes (2018), was an as-applied challenge. Appellant failed to properly reserve the right to appeal the denial of the challenge after pleading no contest. Because Appellant did not obtain from the trial court a ruling on her objection to the forfeiture of the brass knuckles as part of her sentence, there is no trial court order for this Court to review. Accordingly, the judgment and sentence is affirmed.

STATEMENT OF THE CASE AND FACTS

During a search incident to Appellant's arrest, law enforcement found brass knuckles in her purse. Appellant was subsequently charged by Information with carrying a concealed weapon in violation of section 790.01(1), Florida Statutes (2018). She filed a written constitutional challenge to the statute.

The Written Challenge

Appellant's challenge argued that Florida applies the intermediate scrutiny test when evaluating the constitutionality of Second Amendment restrictions. "To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Norman v. State*, 215 So. 3d 18, 39 (Fla. 2017) (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

Appellant's motion recited the governmental interest stated in section 790.25(1), Florida Statutes (2018), and argued that the governmental interest is focused on firearms. Appellant's motion then conducted a comparative analysis between her case and the *Norman* opinion. The motion noted that in *Norman*, the Florida Supreme Court held that "the State has satisfied the first prong of intermediate scrutiny, as the government's interest in ensuring public safety by reducing firearm-related crime is undoubtedly critically important."

Appellant's motion argued that even if the State somehow had an interest in public safety in reducing "knuckles-related" crime, section 790.01(1) is not substantially related to the banning of carrying concealed brass-knuckles. Specifically, Appellant wrote: "How can the statue argue that concealed carry supports public safety, yet argue [in *Norman*] that concealed carry opposes public safety?"

Appellant's challenge argued that because brass knuckles are not nearly as dangerous or deadly as a firearm, the justification under immediate scrutiny for firearms should not be applicable to brass knuckles.

The Hearing

At the hearing on Appellant's challenge, Appellee argued that the State has an interest in reducing brass knuckle-related crime and that the statute is substantially related to that interest because knuckles can be concealed and made ready to strike from the privacy of a pocket, purse, or coat jacket. Appellee argued that making it ready in concealment so that a potential victim does not see it coming increases its potential lethality. Thus, the State has an interest in a law that makes sure only certain qualified individuals are allowed to carry this concealed weapon.

Appellee asserted that there is an easy and non-cost-prohibitive process for obtaining a permit to conceal carry brass knuckles. On that basis, Appellee argued that the law is not an outright ban of conceal-carrying brass knuckles.

Appellant responded by repeating the argument in the written challenge that arguing that laws against open carry supports public safety and laws against concealed carry supports public safety are inconsistent. Appellant further responded that the license argument isn't applicable because Appellant's counsel is unaware of any license needed to carry brass knuckles.

The trial court orally denied the challenge, stating that "[t]he statute at issue in *Norman* is not the same as in the case, but by analogy, I agree with the conclusion, and I deny . . . the constitutional challenge." The trial court later issued a written order denying.

Change of Plea

Appellant pled no contest and counsel stated that Appellant "reserves the right to appeal the Court's prior denial of our dispositive motion to dismiss." *COP Hearing Tr. p. 3*. The plea agreement form also states that the right to appeal the dispositive motion to dismiss is reserved. While there was a plea agreement, the parties appeared, at least initially, to disagree regarding the forfeiture of the weapon. Appellee announced that part of the State's offer was that Appellant must "forfeit the weapon involved in the case." *COP Hearing Tr. p. 3*. In response, Appellant's counsel stated "She will resolve anyway. But we're going to formally object to the weapon forfeiture, as statutorily unauthorized and as a further infringement of the right to bear arms." *COP Hearing Tr. p. 3*.

The trial court accepted the plea agreement, including the weapon forfeiture. The trial court did not hold, and Appellee did not stipulate, that the constitutional challenge was dispositive.

STANDARD OF REVIEW

A trial 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).

An appellate court cannot review an illegal sentence on direct appeal if the defendant did not raise a contemporaneous objection before the trial court at the time of sentencing. *Brown v. State*, 225 So. 3d 319, 321 (Fla. 3d DCA 2017).

LAW AND ANALYSIS

I. Constitutional Challenge to Section 790.01, Florida Statutes (2018)

A. Reservation of the Right to Appeal

Appellant first argues that the trial court erred when it found section 790.01, Florida Statutes (2018), constitutional. This Court holds that Appellant failed to properly reserve her right to appeal the trial court's denial of her constitutional challenge. "A defendant may not appeal from a guilty or nolo contendere plea except as follows: A defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved." Fla. R. App. P. 9.140(b)(2)(A)(i). Failure to expressly reserve the right to appeal a specific dispositive issue deprives an appellate court of jurisdiction to review the trial court's order on that issue.

Additionally, there must be a finding by the trial court or stipulation with the State that the issue was dispositive. *See Pamphile v. State*, 65 So. 3d 107, 108 (Fla. 4th DCA 2011 ("Without both an express reservation of the right to appeal and a finding that the issue is dispositive, through either a trial court's ruling or a stipulation by the state, a defendant who pleads guilty or nolo contendere has no right to a direct appeal").

In *T.A.R. v. State*, 2 So. 3d 993, 994 (Fla. 2d DCA 2008), the defendant sought to appeal the trial court's denial of a motion to suppress. The Second District Court of Appeal held that trial counsel failed to reserve the right to appeal and thus there was no appealable issue, writing "In response to our order, T.A.R. acknowledges that his trial counsel did not identify with particularity the point of law being reserved and he did not seek a stipulation or an order that a dispositive issue existed."

In the instant case, while Appellant asserted that she was reserving her right to appeal her challenge and asserted that the challenge was dispositive, she did not seek a ruling by the trial court or a stipulation from Appellee that the challenge was dispositive. And nowhere in the record before this Court did the trial court so hold or Appellee so stipulate. Therefore, Appellant failed to properly reserve her right to appeal her constitutional challenge. However, that is not the end of this Court's analysis.

B. Facial and As-Applied Constitutional Challenges

When conducting appellate review of a constitutional challenge, the failure to reserve does not always prevent an appellate court from exercising jurisdiction. A trial court's lack of subject-matter jurisdiction can be raised on appeal from a judgment and sentence resulting from a plea agreement with the State regardless of whether the issue was properly reserved. *See* Fla. R. App. P. 9.140(b)(2)(A)(ii)(a) ("A defendant who pleads guilty or nolo contendere may otherwise directly appeal only . . . the lower tribunal's lack of subject matter jurisdiction").

A facially unconstitutional statute is a statute under which there is no set of factual circumstances where the challenged statute could be constitutional. *Abdool v. Bondi*, 141 So. 3d 529, 538 (Fla. 2014). Thus, a facially unconstitutional statute "creates no subject-matter jurisdiction pursuant to which a court may convict the accused." *Alexander v. State*, 450 So. 2d 1212, 1216 (Fla. 4th DCA 1984), reversed on other grounds, 477 So. 2d 557, 560 (Fla. 1985). Because a facially unconstitutional statute results in a lack of subject-matter jurisdiction, a facial constitutional challenge can be raised on appeal from a no contest plea regardless of whether the challenge was properly reserved. *See* Fla. R. App. P. 9.140(b)(2)(A)(ii)(a).

In an as-applied challenge, on the other hand, a statute is alleged to be unconstitutional based upon the specific facts of the case and therefore "has no such [jurisdictional] infirmity." *Id*. An as-applied challenge focuses not on the entire statutory scheme, but on how the statute was applied to the specific facts of the defendant's case. *See, e.g., City of Fort Lauderdale v. Dhar*, 185 So. 3d 1232, 1236 (Fla. 2016) (holding that a red-light camera statute that treats short term renters of cars differently than registered owners or lessees of cars "is unconstitutional as applied to short-term vehicle renters such as Dhar"); *B.C. v. Dep't of Children & Families*, 864 So. 2d 486, 491 (Fla. 5th DCA 2004) (holding that an assertion that section 39.01(14)(a) was unconstitutional because it permitted an adjudication of dependency when there is a non-offending parents willing and able to take immediate custody was an as-applied challenge but reversing on other grounds without answering the constitutional question).

Because an as-applied challenge does not attack subject-matter jurisdiction and is not one of the enumerated "Appeals Otherwise Allowed" under Florida Rule of Appellate

Procedure 9.140(b)(2)(A)(ii), a defendant who pleads guilty or no contest must reserve the right to appeal an as-applied constitutional challenge. *See* Fla. R. App. P. 9.140(b)(2)(A)(i).

In the case below, Appellant challenged the constitutionality of Florida's conceal-carry statute, section 790.01, Florida Statutes (2018). Her argument was that section 790.01 was unconstitutional under the facts of her case. Specifically, she argued that because she was carrying brass knuckles, a less deadly weapon than a firearm, and because she was merely carrying them and not using them, section 790.01 was unconstitutional. She did not argue that there were no set of factual circumstances under which section 790.01 could be constitutional. Therefore, her constitutional challenge was an as-applied challenge and not a facial challenge. Because she did not properly reserve the right to appeal her as-applied challenge, this Court does not have jurisdiction to review the trial court's order and the order is affirmed.

C. The Facial Constitutionality of Section 790.01 Has Already Been Determined

Even if it could be argued that Appellant's constitutional challenge was a facial challenge that could be raised on appeal regardless of reservation, Appellant would still not be entitled to relief. Before the trial court, the parties relied upon another facial challenge case: *Norman v. State*, 215 So. 3d 18 (Fla. 2017). However, *Norman* addressed the constitutionality of the Open Carry Law, section 790.053, Florida Statutes, not the conceal-carry statute, section 790.01.

Had the facial constitutionality of section 790.01 not previously been addressed, *Norman* would have been a reasonable case for the parties to rely on. While addressing a different statute, the *Norman* decision established a detailed analytical framework that can be applied to any statute that infringers upon Second Amendment rights. *Id*. at 35-39. However, the Florida Supreme Court has previously addressed the facial constitutionality of section 790.01.

While holding that it was unconstitutional as applied to a particular defendant, the Florida Supreme Court held that section 790.01 is facially constitutional. *See Alexander v. State*, 477 So. 2d 557, 559-560 (Fla. 1985) ("We hold that section 790.01(2), Florida Statutes (1981), as modified by section 790.25(5) and 790.01(15) & (16), Florida Statutes (Supp. 1982), is not unconstitutional"); *State v. Gomez*, 508 So. 2d 784, 785-86 (Fla. 5th

DCA 1987) (holding that the Florida Supreme Court upheld the constitutionality of section 790.01(1) and 790.01(2)).

It should be noted that *Alexander* was decided prior to the United States Supreme Court decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). The United States Supreme Court in *Heller* held that the rational basis test cannot be applied where a federal statute infringes on a Second Amendment right. *Norman*, 215 So. 3d at 36 (citing *Heller*, 554 U.S. at 628 n.27). *McDonald* applied *Heller* to state statutes. *McDonald*, 561 U.S. at 791. As a result of *Heller* and *McDonald*, when conducting its constitutional analysis of section 790.053, the Florida Supreme Court in *Norman* applied the intermediate scrutiny test. Whereas the Florida Supreme Court applied a less stringent test in *Alexander*. *Alexander*, 477 So. 2d at 559 ("We have held that a statue is constitutional if it bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary, or oppressive"). Therefore, the continued validity of the Florida Supreme Court's analysis in *Alexander* is questionable.

That said, until the facial constitutionality of section 790.01 is revisited by the Florida Supreme Court, lower courts are bound by the *Alexander* decision. The Florida Supreme Court does not overrule itself by implication. *W. Villages Improvement Dist. v. N. Port Rd. & Drainage Distr.*, 36 So. 3d 837, 840 (Fla. 2d DCA 2010) (citing *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002)). And Florida circuit and county courts are bound to adhere to the Florida Supreme Court's rulings. *State v. Dwyer*, 332 So. 2d 333, 335 (Fla. 1976).

II. Forfeiture of the Brass Knuckles as Part of Plea Agreement

Appellant next argues that the trial court erred by ordering her to forfeit her brass knuckles as part of her sentence. Appellant raises two bases in support of this argument: that the forfeiture is unconstitutional under the Second Amendment and that it is not required by section 932.701, Florida Statutes (2018).

While Appellant initially objected to the forfeiture, she eventually agreed to the forfeiture as part of her plea agreement. As a result, she never obtained a trial court ruling on her objection to the forfeiture. There being no order or ruling on the objection for this Court to review, the judgment and sentence is affirmed as to this issue as well.

CONCLUSION

Because Appellant did not reserve her right to appeal her as-applied constitutional challenge to section 790.01, Florida Statutes (2018), and because she failed to obtain a ruling from the trial court on her objection to forfeiture of her brass knuckles as part of her sentence, the judgment and sentence is affirmed.

It is therefore ORDERED and ADJUDGED that the order of the trial court is hereby AFFIRMED.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this ___ day of _____, 2020.

Original Order entered on August 24, 2020, by Circuit Judges Daniel D. Diskey, Linda Babb, and Lauralee Westine.

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