

**IN THE COUNTY COURT OF THE NINETEENTH JUDICIAL CIRCUIT  
IN AND FOR ST LUCIE COUNTY, FLORIDA**

**STATE OF FLORIDA**  
Plaintiff,

vs.

Case No. 562012MM000530  
Judge: Clifford H. Barnes

**DALE NORMAN**  
Defendant.

**FIRST DEFENSE MOTION TO DISMISS  
AND TO DECLARE FLORIDA STATUTE 790.053 UNCONSTITUTIONAL**

COMES NOW the Defendant, DALE NORMAN, by and through undersigned counsel, and pursuant to Florida Rules of Criminal Procedure and the Florida Constitution, respectfully moves this Honorable Court to dismiss Count one (1) of the Information, charging the Defendant, DALE NORMAN, with Open Carry of a Weapon, a violation of Fla. Stat. 790.053, and as grounds therefore, the Defense would show as follows:

1. On February 19, 2012, the Defendant, DALE NORMAN, was arrested by the Fort Pierce Police Department for a violation of *Fla. Stat. 790.053*, Open Carry of a Weapon.

2. That Dale Norman has a carry concealed weapons permit.

3. That subsequent to the Defendant's arrest, the Office of the State Attorney filed a one count Information charging the Defendant, DALE NORMAN, with that offense in violation of *Fla. Stat. 790.053*.

4. That pursuant to U.S.C.A. V and XIV, Article I, Section 9 of the Florida Constitution, due process concerns are implicated where a criminal statute *fails to provide adequate notice* of the conduct it prohibits and under those circumstances is *void for vagueness*.

5. The Defendant, DALE NORMAN, respectfully moves this Honorable Court pursuant to *Fla. R. Crim. Proc. 3.190*, U.S.C.A. V and XIV, and Florida Constitution Article 1, Section 9, to dismiss the instant information asserting that the instant Statute, *Fla. Stat. 790.053*, is void for vagueness because it fails to provide adequate notice of the conduct it prohibits and is thus unconstitutional.

6. Further, the Defendant, DALE NORMAN, avers that the Statute is constitutionally infirm as overbroad as it criminalizes conduct that is otherwise innocent in nature.

7. The Defendant, DALE NORMAN, also asserts that the Statute as written, encourages arbitrary discriminatory and erratic enforcement and is thus also constitutionally infirm in this basis.

8. That as a result, the Defendant, DALE NORMAN, moves this Honorable Court for an Order dismissing Count one (1) of the instant information declaring *Fla. Stat. 790.053* unconstitutional for any and/or all of the reasons asserted herein.

9. That all other grounds shall be argued *ore tenus*.

### **MEMORANDUM OF LAW**

The Defendant, DALE NORMAN, avers that *Fla. Stat. 790.053* is constitutionally infirm in that it is impermissibly vague and does not provide a person of normal intelligence notice of what the Statute itself prohibits. Further, the Defendant, DALE NORMAN, represents that the Statute is unconstitutionally overbroad as it potentially criminalizes lawful conduct. Finally, the Defendant, DALE NORMAN, asserts that the Statute itself is unconstitutional as it encourages arbitrary, discriminatory, and erratic enforcement of the Statute by law enforcement.

#### **I. FLA. STAT. 790.053 IS CONSTITUTIONALLY INFIRM AS THE STATUTE IS VAGUE AND AMBIGUOUS AND IS THUS SUBJECT TO VOID FOR VAGUENESS CHALLENGE:**

Under Florida law, when reasonably possible and consistent with constitutional rights, all doubts regarding a statute should be resolved in favor of its validity. *State v. Wershow*, 343 So.2d 605, 607 (Fla. 1977). The Florida Supreme Court has also held, however, that when there is doubt about a statute in the context of a vagueness challenge, the result should be resolved in “favor of the citizen and against the State.” *State v. Wershow*, at 608; *Brown v. State*, 629 So.2d 841 (Fla. 1994), (Where sufficient doubt about a statute exists, such doubt must be resolved in favor of the citizen and against the State).

Florida Statute 790.053, in pertinent part, reads as follows:

(1) Except as otherwise provided by law and in subsection (2), it is unlawful for any person to openly carry on or about his or her person any firearm or electric weapon or device. It is not a violation of this section for a person licensed to carry a concealed firearm as provided in s. 790.06(1), and who is lawfully carrying a firearm in a concealed manner, to briefly and openly display the firearm to the ordinary sight of another person, unless the firearm is intentionally displayed in an angry or threatening manner, not in necessary self-defense.

The Defendant, DALE NORMAN, avers that to survive the scrutiny of a void-for-vagueness challenge, the language of the pertinent Statute must provide adequate notice of the conduct it prohibits. *Brown, supra* at 843.

In *Brown, supra*, for instance, the defendants raised challenges to *Fla. Stat. 893.13(1)(I)(1990)*, which imposed enhanced penalties on those who sold, purchased, manufactured, delivered or possessed a controlled substance within 200 feet of a public housing facility. Specifically, the defendants challenged whether the phrase “public housing facility” was unconstitutionally vague for failing to provide adequate notice of what conduct is prohibited and whether, because of its imprecision, it invited arbitrary and discriminatory enforcement. *Brown* at 842.

The *Brown* Court further clarified that the testing for vagueness under Florida Law is whether the Statute itself gives a person of ordinary intelligence a fair notice of what constitutes forbidden conduct. *Brown* at 842; *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Specifically, the *Brown* Court points out that the language of the Statute must provide a definite warning of what conduct is required or prohibited, measured by common understanding and practice.

The *Brown* Court found that the phrase “public housing facility” simply does not give citizens a fair warning of what conduct is forbidden. Because the phrase “public housing facility” is so “imprecise that it is impossible to tell from the statute’s plain language what the legislature intended to target,” the Court found that an arbitrary discriminatory enforcement was likely and that the Statute was void-for-vagueness. *Brown* at 843.

The *Brown* Court further focused on the lack of notice problem created by the phrase “public housing facility.” The Court found that no matter what the goals of the legislature are, a law “must include sufficient guidelines to put those who will be affected on notice as to what will render them liable to criminal sanctions.” *Id.*

The Defendant, DALE NORMAN, avers that the Statute in the instant case, like *Brown*, is constitutionally infirm because of its failure to place a person of ordinary intelligence on notice as to what the Statute intends to prohibit. The Statute itself states that “it is not a violation of this section for a person licensed to carry a concealed firearm as provided in s. 790.06(1), and who is lawfully carrying a firearm in a concealed manner, to briefly and openly display the

firearm to the ordinary sight of another person, unless the firearm is intentionally displayed in an angry or threatening manner.” *Fla. Stat. 790.053*.

Therefore, based on Florida law, someone who is licensed to concealed carry, like the Defendant DALE NORMAN is, can lawfully openly display the firearm to the ordinary sight of another person, so long as it is not in an “angry or threatening manner,” and so long as it is done so “briefly.” The Statute itself, as well as the sum total of all Statutes in Section 790 covering weapons and firearms, does not define the term briefly.

Based on the Statute, there is no possible way that a person of ordinary intelligence could have fair warning of what conduct is prohibited based on the complete lack of definition provided for the word briefly. Is it lawful to open carry for 3 minutes? Is it lawful to open carry for 5, 10, or 15? Based on the language of the Statute it is unclear what the legislature meant by brief. The term briefly is impermissibly vague and does not express clearly to a person of common or ordinary intelligence what is criminal.

Because of the vagueness challenges in this case and the doubt as to the precision of the Statute, the Defendant, DALE NORMAN, asserts that under Florida Law such doubt must be resolved in favor of the Defendant and against the State. *Brown* at 843. *Warshow, supra, see also State v. Wells*, 965 So.2d 834, Fla. 4DCA (2007). The Defendant, DALE NORMAN, therefore respectfully requests that, on this basis alone, the Court GRANT this, the Defendant’s Motion to Dismiss Count one (1) of the instant Information and declare Fla. Stat. 790.053 unconstitutional and void for vagueness.

## **II. FLORIDA STATUTE 790.053 IS OVERBROAD IN THAT IT CRIMINALIZES BEHAVIOR THAT IS CONSTITUTIONALLY PROTECTED**

The Defendant, DALE NORMAN, avers that, in conjunction with arguments in Section I and III, that the Statute itself is overbroad as it criminalizes what is clearly constitutionally protected behavior. (*See* the Second Amendment, discussed further in the Second Defense Motion to Dismiss). Florida Statute criminalizes the non-brief open carry of a firearm, even if the gun owner has a lawful permit and is attempting to comply with the concealed carry requirement. To this end, if a person with a concealed carry permit has a holstered gun, covered by a garment and the garment becomes caught or stuck and the gun is revealed, even if unknown to the gun owner, if such un-concealment is not “brief” then such carrying would be criminal behavior, as there is no *mens rea* requirement written into the law. The litany of innocent behavior

criminalized by such an overbroad law is limitless. Where a statute is so overly broad that it encompasses innocent behavior, it is constitutionally infirm and must be struck down and found to be unconstitutional.

**III. THE VAGUENESS AND OVERBREADTH OF THE STATUTE WOULD LEAD TO COMPLETELY ARBITRARY AND CAPRICIOUS RESULTS**

In conjuncture with the arguments raised in I and II, the Defendant, DALE NORMAN, points out that, 790.053 not only potentially criminalizes innocent and constitutionally protected conduct (*see* the Second Amendment), and is inherently unclear as to what conduct it does prevent, but that its statutory construction would lead to arbitrary and capricious results in its enforcement.<sup>1</sup> Because of the lack of definition for the term “brief,” the statute surely will be applied arbitrarily and capriciously as one jurisdiction’s running definition of brief surely will not match another’s, nor will one officer’s definition of “brief” necessarily coincide with another officer’s definition. As such, all the discretion whether the open carry is proscribed or legal rests solely in the hands of the officers. Clearly, the ability to enforce the Statute on a capricious basis is evident. The Defendant, DALE NORMAN, asserts that the Statute’s construction encourages arbitrary, discriminatory and erratic enforcement and thus cannot stand.

The Defendant, DALE NORMAN, further proffers that, since no severability clause exists, the Statute may not be salvaged by striking a portion of the Statute that may be unconstitutional. Hence, if any portion of the Statute is unconstitutional, it must fall as a whole.

WHEREFORE, the Defendant, DALE NORMAN, by and through undersigned counsel, and pursuant to Fla. R. Crim. Pro. 3.190, U.S.C.A. V and XIV, and the Florida Constitution, Article I, Section 9 moves this Honorable Court for an Order Dismissing the instant information and declaring Fla. Stat. 790.053 unconstitutional.

BEFORE ME the undersigned authority, personally appeared, DALE NORMAN, who is personally known to me and who being duly sworn, deposes and says that the facts set forth in the above motion are true.

By: \_\_\_\_\_  
DALE NORMAN

---

<sup>1</sup> This is further evidenced in the fact that since this Statute has become law there have been no prosecutions on record to date, that the undersigned could uncover through diligent research, of this Statute.

SWORN AND SUBSCRIBED before me this \_\_\_\_\_ day of June, 2012.

By: \_\_\_\_\_  
NOTARY PUBLIC-STATE OF FLORIDA

I HEREBY CERTIFY that a copy hereof has been furnished to Frank Alessi, Assistant State Attorney, by in open court on September 4, 2012.

Respectfully submitted,

BY: \_\_\_\_\_  
Fender & Minton, P.A.  
Ashley N. Minton  
Florida Bar Number 23734  
207 S. Second Street  
Fort Pierce, Florida 34950  
(772) 465-0029