IN THE SUPREME COURT OF FLORIDA

ROBERT FENNELL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 72,841

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the Appellant in the court below and the defendant in the trial court. Respondent was the Appellee in the court below and the prosecution in the trial court. A copy of the district court's opinion is attached to this brief as part of the Appendix.

The following symbols will be used in this brief:

"R"	Record on Appeal
"A"	Appendix

STATEMENT OF THE CASE AND FACTS

On November 18, 1986, Petitioner, Robert Fennell, was charged by information with two counts of attempted first degree murder, two counts of aggravated battery, and one count of armed burglary (R259-261). A jury trial was held on February 16, 17, and 18, 1987. At trial there was evidence that Petitioner inflicted injury upon the victims (R39-41). Petitioner was found and adjudged guilty of two counts of attempted second degree murder, lesser included offenses of first degree murder, and one count of armed trespass, a lesser included offense of armed burglary (R292). On April 7, 1987, Petitioner was sentenced to fifteen (15) years in prison on each of the attempted murder convictions with the sentences to run concurrently (R294,295). Petitioner was also sentenced two (2) years in prison for the armed trespass conviction which is to run concurrent to his other sentences (R296). Petitioner's recommended guideline sentence was 12 to 17 years in prison (R298). Points for victim injury were used to compute the guideline score (R298). On April 15, 1987, Petitioner timely filed his notice of appeal (R300).

On May 8, 1988, the Fourth District Court of Appeal affirmed Petitioner's sentence (A1-2). Petitioner timely filed a motion for rehearing and certification of conflict on May 31, 1988. On July 6, 1988, the district court granted Petitioner's motion in part and certified that its decision was in conflict with Smith v. State, 501 So.2d 139 (Fla. 2d DCA 1987) (A3).

On August 1, 1988, Petitioner timely filed his notice to invoke this Court's discretionary review. On August 4, 1988, this Court set forth a briefing schedule for this review.

SUMMARY OF THE ARGUMENT

Since victim injury is not an element of attempted murder or armed trespass, it was reversible error to score points for victim injury in computing Petitioner's guideline sentence. Petitioner's sentence must be reversed and this cause remanded for resentencing with directions that points for victim injury not be scored when recomputing Petitioner's guideline score.

ARGUMENT

POINT INVOLVED

IT WAS ERROR TO SCORE POINTS FOR VICTIM INJURY WHERE VICTIM INJURY WAS NOT AN ELEMENT OF THE OFFENSES OF ATTEMPTED SECOND DEGREE MURDER OR TRESPASS.

Petitioner was adjudicated guilty of, and the guideline scoresheet was computed on the basis of, the offenses of attempted second degree murder and armed trespass (R292,298). In computing the guideline scoresheet, forty-two (42) points were scored for victim injury (R298).

Florida Rule of Criminal Procedure 3.701(d)(7) makes it clear that points for victim injury shall not be scored unless victim injury is an element of the offenses scored as either a primary or additional offense.[1] In the present case it is not disputed that there was victim injury during the commission of the offenses of attempted murder or armed trespass. However, as explained in Smith v. State, 501 So.2d 139 (Fla. 2d DCA 1987) victim injury is not a statutory element of attempted murder and therefore it is error to score points for victim injury:

> For the same reason, the trial court incorrectly included 21 points for victim injury involved in the first degree murder conviction. Because victim injury is not an element of

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1 This requirement was subsequently eliminated on July 1, 1987. See Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), 509 So.2d 1088 (Fla. 1987). However, because the instant offense occurred before that date, the amendment eliminating the requirement is not applicable. Miller v. Florida, ___ U.S. ___, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987).

> first degree murder, see §§ 782.04(1) and 777.04, Fla. Stat. (1985), the trial court additionally erred in including 21 points for victim injury in that offense. Fla.R.Crim.P. 3.701(d)(7); Toney v. State, 456 So.2d 599 (Fla. 2d DCA 1984).

501 So.2d at 139. Nor can it be argued that victim injury is an element of armed trespass. See § 810.08, Fla. Stat. (1985). Again, for victim injury to be scored it must be an element of the scored offense at conviction. State v. Whitfield, 487 So.2d 1045 (Fla. 1986) (error to score 36 points for victim injury where victim injury was not an element of aggravated assault).

In holding that victim injury could be scored for attempted murder in this case, the district court relied on Moore v. State, 469 So.2d 947 (Fla. 5th DCA 1985) quashed on other grounds, 489 So.2d 1130 (Fla. 1986) for the proposition that victim injury could be scored even where not an element of attempted murder as long as "specific injury is charged in the information and demonstrated by the evidence." (A2). Reliance on Moore, supra, in this manner is not justified. Moore does not stand for the proposition offered by the Fourth District. In Moore the appellate court noted that victim injury was a statutory element and thus could be scored if alleged in the charging document:

> Next, Moore argued the trial court should not have assessed points for victim injury because the offense for which he was sentenced may be committed without victim contact. While this latter contention is true, the "lewd and lascivious assault" statute is written in the disjunctive so that physical contact may constitute an element.

469 So.2d at 948-949 (emphasis added). Thus, even Moore supports the proposition that victim injury must be a statutory element of the offense in order to score points for victim injury. To hold otherwise, is to ignore Florida Rule of Criminal Procedure 3.701 (d)(7).

Finally, it should be noted that victim injury was not an element of attempted murder as read in the instructions to the jury:

> [THE COURT] Before you can find the defendant guilty of an attempt to commit second degree murder as to Count I, the state must prove the following elements beyond a reasonable doubt.
>
> First, that Mr. Fennell did some act towards committing the crime of second degree murder that went beyond just thinking or talking about it.
>
> Second, he would've committed that crime except that someone prevented him from committing the crime of second degree murder or that he failed.

(R201-202). Also, the instruction to the jury on the offense of armed trespass did not include victim injury as an element. Since victim injury was not an element of attempted murder or armed trespass, Petitioner's sentence must be reversed and this cause remanded for resentencing with directions that, upon recomputation of the guideline score, points not be included for victim injury.

CONCLUSION

Based on the foregoing argument and authorities cited therein, Petitioner would request this Honorable Court to reverse the decision of the district court with directions that Petitioner's sentence be reversed and this cause remanded for resentencing without computation of points for victim injury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to GEORGINA JIMENEZ-OROSA, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 24th day of August, 1988.

Jeffrey L. Anderson
Of Counsel