IN THE SUPREME COURT OF FLORIDA

ANTHONY D. WHITE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 89,998

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The record on appeal is divided into four parts. "V1" shall refer to the "Transcript Of Record On Appeal" and is numbered 1-92. "V2" shall refer to the "Transcript Of Proceedings" dated April 17, 1995 and is numbered 1-74. This is the transcript of the hearing on Mr. White's motion to suppress. "V3" shall refer to the "Transcript Of Proceedings" dated June 29, 1995 and is numbered 1-10. This is the transcript of the hearing on the motion for order to amend scoresheet. "V4" shall refer to the "Transcript Of Proceedings" dated August 21, 1995 and is numbered 1-14. This is the transcript of the plea and sentencing hearing. "R" shall refer to the page within each volume.

STATEMENT OF THE CASE

Anthony White, Petitioner, was arrested in North Naples, Florida, in Collier County on December 16, 1994. Mr. White was charged by information by the Office of the State Attorney for the Twentieth Judicial Circuit with the offenses of carrying a concealed firearm, in violation of Section 790.01, Florida Statutes (1993), and possession of a firearm by a felon, in violation of Section 790.23, Florida Statutes (1993). (Vl, Rl-2)

Mr. White's motion to suppress the firearm was denied by the trial court on April 17, 1995. (V2, R70) On August 21, 1995, Mr. White entered a plea of nolo contendere to both charges, reserving the right to appeal the denial of the motion to suppress. (V4, R2-9) The Second District Court of Appeal affirmed the trial court's denial of the motion to suppress without discussion on February 21, 1997. White v. State, 22 Fla. L. Weekly D485 (Fla. 2d DCA February 21, 1997).

Mr. White filed a motion for order to amend scoresheet to contest the scoring of eighteen points for possession of a firearm. (V1, R25) This motion was denied by the Honorable Franklin G. Baker, Circuit Judge, Twentieth Judicial Circuit, on June 29, 1995. (V3, R9) Judge Baker sentenced Mr. White to serve thirty-three months in prison on August 21, 1995. (V4, R11; Vl, R58)

The Second District Court of Appeal affirmed the trial court decision on the scoring of the eighteen points, but certified that their decision was in direct conflict with the decision of the Fourth District Court of Appeal in Galloway v. State, 680 So. 2d

616 (Fla. 4th DCA 1996). White v. State, 22 Fla. L. Weekly D485 (Fla. 2d DCA February 21, 1997).

On February 21, 1997, the Second District Court of Appeal issued its opinion. On February 25, 1997, Mr. White timely filed his Notice To Invoke Discretionary Discretion. On March 10, 1997, this Court issued its Order Postponing Decision On Jurisdiction And Briefing Schedule directing Mr. White to serve his brief on the merits on or before April 4, 1997.

STATEMENT OF THE FACTS

On December 16, 1994, Mr. White was driving a motorcycle on Highway U.S. 41 in North Naples, at approximately 10:30 p.m. (V2, R7-8,10,15) Deputy Sheriff Ronald Mosbach of the Collier County Sheriff's Department initiated a stop of Mr, White's motorcycle. (V2, R7-8)

Deputy Mosbach stopped Mr. White because of a BOLO (be on the lookout) he had received at approximately 10:00 p.m. (V2, R10) The BOLO concerned two subjects on a black motorcycle. (V2, R8) Deputy Mosbach could not recall all the details of the BOLO; however, he could recall the following: there had been an incident at K-Mart by Neopolitan Plaza; there had been two subjects; one of the subjects was wearing a black leather jacket; one of the subjects had purchased ammunition for a firearm and had displayed the gun to the clerk attempting to load the gun in K-Mart; and the gun had been put in one of the pockets of the leather jacket. (V2, R8-9,16,23-24,36) Deputy Mosbach testified that the BOLO was put out for officer safety and for the motorcycle to be stopped so the Naples Police Department could proceed with their investigation of the incident at K-Mart. (V2, R8,24) However, there was no description of criminal activity in the BOLO. (V2, R36)

Deputy Mosbach observed Mr. White's motorcycle on Highway U.S. 41 exceeding the posted speed limit. (V2, Rll-12) Deputy Mosbach followed Mr. White and observed that Mr. White's vehicle reached a speed of eighty-five miles per hour, ran a red light, and had to

take evasive action to avoid hitting another vehicle when he ran the red light. (V2, R12-14)

At this point, Deputy Mosbach put on his emergency lights, pursued Mr. White, and stopped Mr. White's motorcycle in the parking lot of Perkin's restaurant. (V2, R14-15) Mr. White and his passenger fit the description from the BOLO. (V2, R16)

Mr. White and his passenger, Ryan Luplow, got off the motorcycle before Deputy Mosbach exited his vehicle. (V2, R37) Deputy Mosbach exited his vehicle and waited for a backup unit. (V2, R15-16)

Deputy Mosbach observed that Mr. White would not stand still and tried to walk away from him. (V2, R16) Mr. White kept asking if he could have a cigarette while reaching towards the left pocket of his jacket. (V2, R16-17) Mr. White told Deputy Mosbach to "relax" and asked if he could get a cigarette. (V2, R17) Deputy Mosbach said "no," and ordered Mr. White to put his hands on a nearby wooden railing, which he did. (V2, R18)

Deputy Mosbach became more nervous and suspicious when Mr. White asked for a cigarette two more times. (V2, R18-19) Deputy Mosbach had observed no criminal activity or suspicious behavior on the part of Mr. White other than possible traffic violations. (V2, R34) Deputy Mosbach said that it was only "possible" that he was going to arrest Mr. White for reckless driving. (V2, R43) Nevertheless, Deputy Mosbach ordered Mr. Luplow to lay down on the ground and ordered Mr. White to continue holding his hands on the wooden railing. (V2, R18)

Immediately after a backup unit arrived, Deputy Mosbach walked up to Mr. White and frisked him, finding a .25 caliber Raven semi-automatic handgun in Mr. White's front left pocket of his leather jacket. (V2, R19) Deputy Mosbach arrested Mr. White for carrying a concealed firearm, but did not charge him with any traffic infractions because "he did not want to add salt to Mr. White's wound." (V2, R45)

Mr. Luplow testified that the light had been yellow, but he did acknowledge that Mr. White was speeding and that he did have to take evasive measures to avoid hitting another vehicle. (V2, R51, 55-57) Mr. Luplow said that he and Mr. White were going to eat at Perkin's when they saw Deputy Mosbach's emergency lights. (V2, R51) Mr. Luplow and Mr. White were in the process of getting off the motorcycle when Deputy Mosbach arrived followed by another officer "in a matter of seconds." (V2, R51-52) Deputy Mosbach immediately put Mr. White against a pillar and frisked him, while Mr. Luplow was put on the ground. (V2, R51-52) Mr. Luplow never saw Mr. White reach for his pockets or ask for a cigarette until after he was arrested. (V2, R52-53) Mr. Luplow never heard Deputy Mosbach tell Mr. White not to reach into his pockets. (V2, R53)

Later, Mr. White was charged by information with possession of a firearm by a felon along with the charge of carrying a concealed firearm. (Vl, Rl-2)

SUMMARY OF THE ARGUMENT

Petitioner, Anthony White, was convicted in the trial court of the offenses of carrying a concealed firearm and possession of a firearm by a convicted felon. Mr. White was not convicted of any other felony offenses.

The trial court included eighteen points on the guidelines scoresheet for possession of a firearm. This resulted in Mr. White being sentenced to an additional eighteen months in Florida State Prison.

Possession of a firearm is an essential element of both crimes for which Mr. White was convicted. Scoring eighteen points for possession of a firearm in this instance is a violation of the double jeopardy protections of both the United States and Florida Constitution.

The Second District Court of Appeal affirmed the trial court, but certified a conflict between its decision and the Fourth District Court of Appeal's decision in Galloway v. State, 680 So. 2d (Fla. 4th DCA 1996). The Galloway decision was decided upon its construction of Fla. R. Crim. P. Rule 3.702(d)(12).

Mr. White believes that this Court should reverse the Second District Court of Appeal because the scoring of eighteen points in his case is a violation of double jeopardy principles. In the alternative, Mr. White believes that this Court should adopt the reasoning of Gallowav and construe Rule 3.702(d)(12) to be inapplicable in his case.

Additionally, Mr. White believes the trial court erred in not granting his motion to suppress the firearm. The BOLO and the circumstances observed by the police officer did not authorize a search of Mr. White's person. Therefore, the firearm was obtained by an illegal search and should have been suppressed.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY ASSESSING EIGHTEEN POINTS ON THE GUIDELINES SCORESHEET FOR POSSESSION OF A FIREARM WHEN A FIREARM IS ONE OF THE ESSENTIAL ELEMENTS OF THE CRIME FOR WHICH PETITIONER WAS BEING SENTENCED?

Mr. White was sentenced under the 1994 Revised Guidelines. Fla. R. Crim. P. 3.702(d)(12) allows the addition of eighteen points for predicate felonies involving firearms in the following language:

> Possession of a firearm, destructive device, semiautomatic weapon, or a machine gun during the commission or attempt to commit a crime will result in additional sentence points. Eighteen sentence points shall be assessed where the defendant is convicted of committing or attempting to commit any felony other than those enumerated in subsection 775.087(2) while having in his or her possession a firearm as defined in 790.001(6)....

The offenses enumerated in Section 775.087(2)(a), Florida Statutes (1993)I are the following: murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, an attempt to commit any of the aforementioned crimes, or any battery upon a law enforcement officer or firefighter.

The offenses for which Mr. White was convicted, carrying a concealed firearm and possession of a firearm by a felon, are not among the enumerated felonies in Section 775.087(2)(a), Florida

Statutes (1993). Nevertheless, Mr. White believes that the eighteen points should not be scored because a firearm is an essential element of each of the crimes for which he was convicted. The eighteen points should not be scored in this instance because it would be a violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution.

In the alternative, Mr. White requests that this Court follow the reasoning of the Fourth District Court of Appeal in Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996). In Gallowav, the Fourth District Court rejected the double jeopardy argument, but held that they construed Rule 3.702(d)(12) to be inapplicable to convictions for carrying a concealed firearm and possession of a firearm by a convicted felon when the convictions were unrelated to the commission of any additional substantive offense. Galloway, 680 So. 2d at 617.

In Galloway, the Fourth District Court of Appeal placed importance on the language of Rule 3.702(d)(12) that provided assessment of the eighteen points when convicted of a felony "while having in his or her possession a firearm." (Emphasis added.) Galloway, 680 So. 2d at 617. This led the Galloway Court to rule that where the only felonies that a defendant was convicted of were offenses in which a firearm was an essential element of the crime and the defendant was not convicted of any other felonies, then the eighteen points should not be scored. The reasoning of the Gallowav

opinion supports Mr. White's argument that the eighteen points should not have been scored in his case.

The Fifth District Court of Appeal considered this issue in Gardner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995). In Gardner, the defendant was convicted of trafficking in cocaine, possession of marijuana with intent to sell, and carrying a concealed firearm. The firearm was secreted in Mr. Gardner's waist band of his trousers at the time he was committing the other two crimes. Gardner, 661 So. 2d at 1275.

In Gardner, eighteen points had been assessed for possession of a firearm pursuant to Rule 3.702(d)(12). The Gardner Court rejected Mr. Gardner's argument that the eighteen points should not be scored because a firearm was an essential element of the crime of carrying a concealed firearm. The Gardner Court construed Rule 3.702(d)(12) to allow the scoring of the eighteen points because it provided that the points should be assessed when a person committed "any felony." In Mr. Gardner's case, "any felony" included the offenses of trafficking in cocaine and possession of marijuana with the intent to sell. (Emphasis added.) Gardner, 661 So. 2d at 1275.

Mr. White believes that the Gardner Court did not address the exact issue being raised in his case. Furthermore, Mr. White believes that it is implied, but not directly stated in Gardner, that if the only offenses a defendant is convicted of are felonies where a firearm is an essential element of the crimes and no other substantive offenses are involved, then the eighteen points should

not be scored. Essentially, on this issue, Gardner and Galloway would appear to be in agreement.

Prior to its ruling in Mr. White's case, the Second District Court of Appeal addressed a similar issue in State v. Davidson, 666 So. 2d 941 (Fla. 2d DCA 1995). Mr. Davidson had been convicted of carrying a concealed firearm. The State wanted twenty-five points scored because the firearm was a semiautomatic weapon. Davidson, 666 So. 2d at 942.

Fla. R. Crim. P.3.702(d)(12) provides:

> . ..Twenty-five sentence points shall be assessed where the offender is convicted of committing or attempting to commit any felony other than those enumerated in subsection 775.087(2) while having in his or her possession a semiautomatic weapon as defined in subsection 775.087(2) or a machine gun as defined in subsection 790.001(9).

In Davidson, the trial judge declined to score the twenty-five points. The Second District Court of Appeal reversed the trial judge. In doing so, the Davidson Court rejected the double jeopardy argument and the argument that the scoring of the additional points was an improper enlargement of the sentence solely as a result of an essential element of the underlying offense; i.e., the firearm. Davidson, 666 So. 2d at 942.

Davidson can be distinguished from the issue in Mr. White's case. A semiautomatic weapon or a machine gun is not per se an essential element of the crime of carrying a concealed firearm. Although a semiautomatic weapon or a machine gun is a firearm, it is a valid sentencing consideration to enhance the punishment an offense may carry due to the nature of the firearm. Machine guns

and semiautomatic weapons pose a special danger to society, and increased punishment for their possession may be valid without offending double jeopardy or other prohibitions.

However, as in Mr. White's case, the enhancement of punishment for a crime such as carrying a concealed firearm or possession of a firearm by a convicted felon because of a factor which is an essential element of the crime is improper. The scoring of the eighteen points would amount to multiple or enhanced punishment for the same offense in violation of double jeopardy protections. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which is enforceable against the State of Florida through the Fourteenth Amendment to the United States Constitution, forbids multiple punishment for the same offense. Lippman v. State, 633 So. 2d 1061 (Fla. 1994). Additionally, Article I, Section 9, of the Florida Constitution provides defendants with at least as much protection from double jeopardy as is provided by the United States Constitution. Wright v. State, 586 So. 2d 710 (Fla. 1991).

Mr. White's offenses, carrying a concealed firearm and possession of a firearm by a convicted felon, require possession of a firearm as an essential of element of the crime. Double jeopardy has been found to be a bar to adjudicate a defendant guilty for possession of a firearm during commission of a felony where other counts are enhanced for use of the same firearm. Cleveland v. State, 587 So. 2d 1145 (Fla. 1991); Clarington v. State, 636 So. 2d 860 (Fla. 3d DCA 1994).

In Gonzalez v. State, 585 So. 2d 932 (Fla. 1991), this Court held that where a firearm is an essential element of the crime for which the defendant is convicted, the sentence cannot be enhanced because of the use of a firearm. In Gonzalez, the defendant was found guilty of third-degree murder with a firearm, a second-degree felony. The trial judge enhanced the charge to a first-degree felony because of the use of a firearm. Gonzalez v. State, 585 So. 2d at 933. This Court reversed the trial court, relying upon the reasoning of then Judge Anstead's dissenting opinion in Gonzalez v. State, 569 So. 2d 782 at 784-85 (Fla. 4th DCA 1990). See also, Lareau v. State, 573 So. 2d 813 (Fla. 1991).

Consequently, the scoring of eighteen points on the guidelines scoresheet in Mr. White's case is an error. Mr. White should not have to serve an additional eighteen months in prison where his possession of a firearm is an essential element of the crime for which he was convicted. His possession of a firearm in each offense is already factored into his sentence by what degree of felony it is classified and by what offense severity ranking each offense receives (carrying a concealed firearm--third-degree felony--level five offense severity ranking; possession of a firearm by a convicted felon--second-degree felony--level five offense severity ranking). Therefore, Mr. White should be given a new sentencing hearing based on a guidelines scoresheet that does not include eighteen points for possession of a firearm.

ISSUE II

DID THE TRIAL COURT ERR BY NOT GRANTING PETITIONER'S MOTION TO SUPPRESS BECAUSE THE STATE FAILED TO PROVE THAT THE SEARCH OF PETITIONER WAS LAWFUL?[1]

Mr. White submits that Deputy Sheriff Mosbach illegally frisked and searched him. Mr. White concedes that he was stopped lawfully for speeding and perhaps for running a red light, two non-criminal traffic infractions. However, Mr. White disputes the lawfulness of the frisk and search that located the firearm which is the basis for the only criminal charges against him. (V1, R1-2)

Mr. White suggests that this case is governed by section 901.151, Florida Statutes (1993), known as the "Florida Stop and Frisk Law," and Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 2317, 20 L. Ed. 2d 889 (1968). Section 901.151, Florida Statutes (1993), and Terry, as well as the multitude of cases which have flowed from them, provide guidelines which control police conduct to avoid violations of citizen's rights under the Fourth Amendment of the United States Constitution and Article I, Section 12, of the Florida Constitution.

The principles of Terry were adopted by the Second District Court of Appeal in State v. Hetland, 366 So. 2d 831, (Fla. 2d DCA 1979), and approved by this Court in Hetland v. State, 387 So. 2d

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[1] Petitioner is raising two issues decided against him by the Second District Court of Appeal. Once this Court takes jurisdiction over a case, all issues - not just those presented to obtain jurisdiction - may be decided - Bakers Multiple Line Ins. Co. v. Farish, 464 So. 2d 530 (Fla. 1985); Bould v. Touchette, 349 So. 2d 1181 (Fla. 1977): and State v. Smith, 573 So. 2d 306 (Fla. 1990).

963 (Fla. 1980). Hetland involved issues concerning police acting on information from anonymous tips and summarized the principles of Terry as follows:

> The basic Terry principle is that a stop is permissible if based on reasonable suspicion that criminal activity is afoot, and a frisk of the person stopped is permissible if the officer has reason to believe that the person stopped is armed and dangerous. Thus, under Terry, a frisk following a stop is not automatically permissible. The validity of a stop and the validity of a frisk are assessed separately, but a frisk can never be upheld if the initial stop was improper.

Hetland, 366 So 2d at 834.

Section 901.151, Florida Statutes (1993), codifies the Terry principles as Florida Law. Section 901.151(2), Florida Statutes (1993), allows police officers to temporarily detain citizens if the officer has reason to believe a citizen has committed or is about to commit a criminal offense under state, municipal or county laws. Section 901.151(5), Florida Statutes (1993) allows a search of a temporarily detained citizen only if the officer has probable cause to believe the citizen is armed with a dangerous weapon, and is a threat to the safety of the officer or other citizens.

Deputy Mosbach was justified in stopping Mr. White for speeding and perhaps running a red light. However, non-criminal traffic violations justify only a temporary detention solely to issue a traffic citation. E.H. v. State, 593 So. 2d 243 (Fla. 5th DCA 1991). In E.H., a passenger in the vehicle kept reaching in his pocket and the officer searched him finding cocaine rocks. The Court in E.H., found that there was no indication that a crime was

being committed and the officer made no observation of a bulge or any other indications that a dangerous weapon was present. E.H., 593 So. 2d at 243-44. Deputy Mosbach observed no bulge, only that Mr. White was reaching for his pocket and asking for a cigarette (V2, R17) and Mr. White would not stand still and tried to walk away. (V2, R16) Moreover, these subjective and self serving statements by Deputy Mosbach were disputed by Mr. Luplow. (V2, R52-53) See also, Hamilton v. State, 612 So. 2d 716 (Fla. 2d DCA 1993).

Deputy Mosbach did not arrest Mr. White for reckless driving as there was no basis for that. Deputy Mosbach's testimony that he would have arrested Mr. White for reckless driving if he had not found the gun (V2, R45-46) does not make Deputy Mosbach's search of Mr. White lawful because that is not the reason he searched Mr. White.

Deputy Mosbach searched Mr. White because of the BOLO. (V2, R8-9,16,23-24,36) Mr. White concedes that in certain circumstances a BOLO may lead to a basis for a lawful search. The problem with a BOLO is the source of the information and what it actually describes.

If a BOLO is obtained from reliable sources and describes a crime that is already committed or is about to be committed, then an officer may be authorized under Section 901.151, Florida Statutes (1993) to stop and frisk a citizen. However, if the BOLO is based on anonymous sources or somewhat less reliable sources, and does not describe criminal activity, then an officer may not

detain and frisk a citizen under Section 901.151, Florida Statutes (1993).

In Whiting v. State, 595 So. 2d 1070 (Fla. 2d DCA 1992), there was a BOLO that said "there was a black female driving a black Cougar in the area of 20th and Orange and had a firearm in her car." Within thirty minutes an officer stopped Ms. Whiting and ordered her to exit her vehicle. Ms. Whiting told the officer she had a gun in the vehicle underneath the seat and after a search of her vehicle, she was arrested. This Court reversed the trial court and ordered the firearm to be suppressed. Whiting, 595 So. 2d at 1070-71.

Whiting was reversed for two reasons: the BOLO did not put the officer on notice as to any criminal conduct, and if criminal conduct could be inferred from the tip, the officer had no independent evidence to corroborate that information. Whiting, 595 So. 2d at 1070-71.

Further support for Mr. White's position is found in Cunninsham v. State, 591 So. 2d 1058 (Fla. 2d DCA 1991). The Second District Court of Appeal reversed the trial court is similar circumstances as Whiting. Cunninsham emphasizes that even if an anonymous tip is corroborated, "there must be independent evidence of criminal activity apart from the otherwise verified anonymous tip to support a search of the described suspect." Cunninqham, 591 So. 2d at 1061. See also, Strons v. State, 495 So. 2d 191 (Fla. 2d DCA 1986).

The BOLO in Mr. White's case did not come from a police officer observing criminal conduct. It came from some unknown store clerk at K-Mart and is no different from an anonymous tip. Moreover, Deputy Mosbach did not observe any independent evidence of criminal activity to give him probable cause to search Appellant pursuant to Section 901.151, Florida Statutes (1993).

In conclusion, Mr. White submits that the BOLO did not provide a lawful basis for his stop and frisk. The BOLO and the circumstances observed by Deputy Mosbach did not rise to the level required by Terry and Section 901.151, Florida Statutes (1993) to validate the stop and frisk of Appellant that led to the discovery of the evidence against him.

CONCLUSION

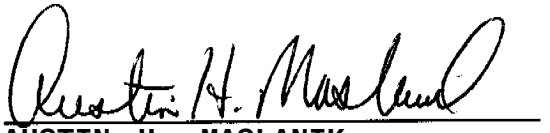
Petitioner respectfully requests that this Honorable Court reverse the trial court and the Second District Court of Appeal. Mr. White's case should be remanded for a new sentencing hearing. This Court should instruct the trial court to prepare a new guidelines scoresheet without scoring eighteen points for possession of a firearm and sentence Mr. White according to the sentencing guidelines.

Additionally, the trial court's order denying Mr. White's motion to suppress the firearm should be reversed.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Tonja R. Vickers, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this day 31st of March, 1997.

Respectfully submitted,



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