ORIGINAL

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

REPLY BRIEF OF PETITIONER ON THE MERITS

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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?

A first time felony offender charged with carrying a concealed firearm under the sentencing guidelines in effect at the time of Mr. White's sentencing hearing (and still in effect in 1997) would be facing state prison time, if this Court accepts the argument of Respondent. This was clearly not the intent of the legislature.

A first time felony offender charged with carrying a concealed firearm would receive twenty-eight points because this is a level five offense. This would not qualify the offender for state prison time. However, if you add eighteen points for possession of a firearm, then this increases the offender's score to forty six points. Forty points is required to even be eligible for a state prison sentence. This results in a presumptive state prison sentence of eighteen months.

Mr. White's argument that the eighteen points is an improper enhancement of punishment is illustrated by this situation. This is a similar problem as the issue addressed in Gonzalez v. State, 585 So. 2d 932 (Fla. 1991). In Gonzalez, (cited in petitioner's initial brief) this Court held that it was improper to enhance a conviction for third-degree murder because of the use of a firearm where the

use of a firearm was an essential element of the crime for which the defendant had been convicted. Gonzalez, 585 So. 2d at 933.

The logic of the Gonzalez opinion has inescapable application to Mr. White's case. Respondent argued in its answer brief that Gonzalez "is not helpful here." It certainly is not helpful to Respondent's position. However, it is critical to this Court's decision because it goes to the heart of the matter before the Court.

In fact, if this Court accepts Mr. White's argument that the eighteen points should not be scored for firearm possession where the only offenses have possession of a firearm as an essential element of the crime, it would be consistent with the legislative intent of Rule 3.702 (d) (12). The legislature specifically excluded felonies which carried a three-year minimum mandatory sentence for possession of a firearm.

The legislature did not intend to punish defendants twice for possession of firearms. That is the inevitable effect of allowing the eighteen points to be scored for offenses like carrying a concealed firearm and possession of a firearm by a convicted felon where possession of a firearm is an essential element of the crime and is a factor which the legislature has already factored into the guidelines by determining what offense level the crime should have.

Moreover, what the legislature intended was situations like that found in Gardner v. State, 661 SO. 2d 1274 (Fla. 5th DCA 1995). In Gardner, the defendant was charged with trafficking in cocaine and possession of marijuana with the intent to sell in

addition to carrying a concealed firearm. An offender convicted of trafficking in cocaine and possession of marijuana with the intent to sell would not be eligible for the three-year minimum mandatory sentence for possession of a firearm. It was these types of crimes for which the legislature intended enhanced punishment.

Again, Mr. White argues that the reasoning of Fourth District Court of Appeal in Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996) is persuasive in resolving this issue.

On the other hand, the cases cited in Respondent's answer brief concerning double jeopardy, Allen v. State, 684 So. 2d 819 (Fla. 1996); Gaber v. State, 684 So. 2d 189 (Fla. 1996) (cited incorrectly as Garber in Respondent's answer brief); M.P. v. State, 682 So. 2d 79 (Fla. 1996); State v. Maxwell, 682 So. 2d 83 (Fla. 1996), have little or no application to the issue before the Court.

These cases dealt with double jeopardy issues involving multiple adjudication, conviction, or sentence for offenses where possession of a firearm was an essential element of each crime. These cases would have application in Mr. White's case if he was arguing that double jeopardy prohibited a conviction for both carrying a concealed firearm and possession of a firearm by a convicted felon, However, that is not the argument that Mr. White has presented to this Court.

Therefore, Mr. White respectfully requests this Court to rule that the eighteen points provided for in Rule 3.702 (d) (12) should not be allowed in the calculation of a guidelines scoresheet in his

case and to remand his case to the trial court for a new sentencing hearing.

ISSUE II

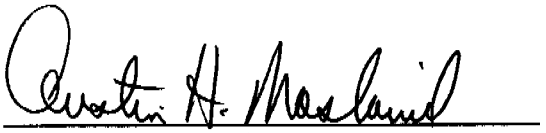
DID THE TRIAL COURT ERR BY NOT GRANTING PETITIONER'S MOTION TO SUPPRESS BECAUSE THE STATE FAILED TO PROVE THAT THE SEARCH OF PETITIONER WAS LAWFUL?

Mr. White relies upon his argument made in his initial brief.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Tonja J. Vickers, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 13th day of May, 1997.

Respectfully submitted,



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