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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

JAMES E. SCOTT,

Petitioner,

v. CASE NO. 90,558

STATE OF FLORIDA,

Respondent.

_______________________________/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The facts of this case were set forth in the opinion below as follows:

> Scott pleaded guilty to two counts of dealing in stolen property, grand theft of a firearm and grand theft. Eighteen points should have been added to the scoresheet for the conviction of grand theft of a firearm. ... The failure to do so resulted in a departure sentence of probation instead of incarceration.

State v. Scott, 22 Fla. L. Wkly. D991 (Fla. 5th DCA April 18, 1997) (citations omitted).

This appeal follows.

SUMMARY OF ARGUMENT

This Court should decline to accept jurisdiction of this case. The case cited by Scott does not expressly and directly conflict with the decision of the court below, and the district court did not cite any cases which are presently pending review in this Court.

ARGUMENT

THIS COURT SHOULD DECLINE TO ACCEPT JURISDICTION OF THIS CASE.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

Here, Scott contends that the decision of the lower court conflicts with the decision in Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996). There, the defendant was convicted of carrying a concealed firearm and possession of a firearm by a convicted felon. The court remanded for resentencing, holding that the sentencing guidelines should not be construed so as to allow the scoring of firearm points where having the firearm was itself the crime, as opposed to the firearm being connected to the commission of an additional substantive offense. Id. at 617.

Here, in contrast, the defendant was convicted of grand theft of a firearm. Scott, 22 Fla. L. Wkly. at D991. Scoring firearm points for this conviction does not conflict with Galloway, as

having the firearm was not itself the crime, but rather was tied to an additional substantive offense. The two holdings are therefore in agreement, not in conflict.

Scott also argues that jurisdiction is appropriate based on this Court's decision in Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981). There, this Court held that it had the authority to exercise jurisdiction in cases where the district court cites as controlling law a decision that is pending review in this Court. Scott's reliance on this jurisdictional basis is misplaced.

Scott notes that the case of White v. State, 22 Fla. L. Wkly. D485 (Fla. 2d DCA Feb. 21, 1997), is presently pending review in this Court. Had the lower court in the present case cited White in its decision, this Court would have discretionary jurisdiction over this case as well. However, the mere fact that the lower court *cited* a case (Galloway) which is *also cited* by the White court is not a valid basis for jurisdiction under Jollie.

Scott has failed to demonstrate that the lower court's decision expressly and directly conflicts with any other cases. This Court should therefore decline to accept jurisdiction of this case.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests this honorable Court decline to accept jurisdiction of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished to Michelle A. Lucas, Assistant Public Defender, by delivery to the Public Defender's basket at the Fifth District Court of Appeal, this 27th day of May, 1997.

Kristen L. Davenport
Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

JAMES E. SCOTT,

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v. CASE NO. 90,558

STATE OF FLORIDA,

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RESPONDENT'S APPENDIX

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Brooks, 602 So.2d 630, 631 (Fla. 2d DCA 1992). Stated differently, the court may impute income only if the party has the ability to remedy the situation. *Gildea*; *see also Cushman v. Cushman*, 585 So.2d 485, 486 (Fla. 2d DCA 1991) (court must consider recent work history, occupational qualifications, and prevailing wages when imputing income).

The trial court's finding that Larry is "voluntarily unemployed, but could earn $1,200.00 per month based on his skills, past work and investment talents," is unsupported by the evidence in the record. In fact, the record suggests otherwise. *See Fusco v. Fusco*, 616 So.2d 86 (Fla. 4th DCA 1993) (lack of competent substantial evidence in record to support imputing additional income requires deletion of permanent alimony based upon such imputed income). While it is true that Larry has been voluntarily unemployed since 1984, there is no evidence that he has any skills which will make him employable in today's market. One witness testified that tug masters still serving in Panama were older men in their fifties and late forties and that there had been no new hiring in Panama for some time due to a treaty signed with Panama. Regardless, it seems that Larry will no longer be able to work as a tug master due to his arthritis. In review, Larry has only a ninth grade education, the only trade he knows is that of tug boat mate or master, and he particularly testified he had no skills with which to compete in today's market. Jeanette failed to present any evidence to contradict Larry's assertion that he has limited skills. Rather, she admitted at trial that Larry's only skill is that of tug boat operator. As for the trial court's determination that income could be imputed to Larry based on his "investment talents," the mere fact that Larry took money he received and gave it to an investment counselor to invest does not mean he has "investment talents."

In sum, there is insufficient evidence to support the trial court's finding that Larry could earn $1,200 per month. There is no evidence as to the anticipated source of the imputed income. Moreover, as to Jeanette's needs, the record evidence does not indicate that she is in need of alimony. Jeanette was awarded 43% of the retirement pension, amounting to $1,077.58 per month. She was also awarded about $78,000 cash based on the sale of the parties' marital home and limited partnership. Such awards are sufficient to sustain Jeanette in the "modest standard of living" to which the parties are accustomed.

Finally, it appears that both of the parties desire to continue their retirement and custom of living that they have both enjoyed for the last ten years of their marriage. Their standard of living was primarily financed by Larry's pension benefits and both seemed content with that. The portion of those benefits that are considered marital assets are now being divided between them as are the proceeds from the sale of the home and other investments. If either party desires to supplement such income, they certainly may do so as they are good candidates for training in minimum wage type jobs. In fact, the minimum wage was seized upon by the trial court to impute income to Larry. But there is no reason to eliminate Jeanette as a candidate for a minimum wage employee.

There is concern, however, for the uncertain future medical requirements that Jeanette may encounter in view of her history of cancer. The record reflects that she is unable to obtain medical insurance to replace the health care previously available to her as a spouse of a military veteran. Due to that uncertainty, although Jeanette does not have current burdensome medical expenses, and because this is a marriage of long duration, we believe that it is appropriate that we remand to the trial court for consideration of a nominal award of permanent periodic alimony that is capable of being modified should Jeanette's medical expenses become burdensome through no fault of her own. While medical insurance would be the desirable method of funding such expenses, Jeanette's testimony that insurance is unavailable remains unrefuted.

The final judgment of dissolution is affirmed except for that portion requiring Larry to pay permanent periodic alimony based upon an imputation of income.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART. (SHARP, W. and GOSHORN, JJ., concur.)

* * *

Criminal law—Sentencing—Guidelines—Scoresheet—Error to fail to score points for conviction of grand theft of firearm—Resentencing required where error resulted in departure sentence

STATE OF FLORIDA, Appellant, v. JAMES E. SCOTT, Appellee. 5th District. Case No. 96-969. Opinion filed April 18, 1997. Appeal from the Circuit Court for Brevard County, Jere E. Lober, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, and Michael D. Crotty, Assistant Attorney General, Daytona Beach, for Appellant. James B. Gibson, Public Defender, and M. A. Lucas, Assistant Public Defender, Daytona Beach, for Appellee.

(THOMPSON, J.) The state appeals the trial court's failure to assess James E. Scott eighteen scoresheet points at sentencing. We reverse the sentence of probation and remand for resentencing.

Scott pleaded guilty to two counts of dealing in stolen property, grand theft of a firearm and grand theft. Eighteen points should have been added to the scoresheet for the conviction of grand theft of a firearm. *See e.g.*, *Smith v. State*, 683 So. 2d 577 (Fla. 5th DCA 1996); *State v. Davidson*, 666 So. 2d 941 (Fla. 2d DCA 1995); *contra*, *Galloway v. State*, 680 So. 2d 616 (Fla. 4th DCA 1996). The failure to do so resulted in a departure sentence of probation instead of incarceration.

REVERSED AND REMANDED for resentencing consistent with this opinion. (SHARP, W. and GOSHORN, JJ., concur.)

* * *

Criminal law—Habeas corpus—Venue—Where petition was originally filed in county in which petitioner was incarcerated, petitioner's later transfer to another county provided grounds for transfer of venue, as requested by Parole and Probation Commission, rather than dismissal of petition

SAMUEL H. WIGFALS, Appellant, v. FLORIDA PAROLE COMMISSION, Appellee. 5th District. Case No. 96-842. Opinion filed April 18, 1997. Appeal from the Circuit Court for Orange County, Reginald K. Whitehead, Judge. Counsel: Samuel H. Wigfals, Sanderson, pro se. No appearance for Appellee.

(PER CURIAM.) Samuel H. Wigfals appeals the trial court's order dismissing his petition for habeas corpus while he was incarcerated in the Orange County Central Florida Reception Center. After the trial court ordered the Florida Probation and Parole Commission to respond to the petition, Wigfals was transferred to and incarcerated in the Baker Correctional Institution.

When the Florida Probation and Parole Commission (FPPC) responded to the trial court's order to show cause why Wigfals' petition should not be granted, FPPC filed its motion to transfer venue to Baker County. The motion to transfer venue followed Wigfals' notice of voluntary dismissal of his petition for habeas corpus, his notice of address change to Baker County and finally his request for reinstatement of his initial petition. Instead of transferring venue, the trial court in Orange County reasoned that it no longer had jurisdiction because section 79.09, Florida Statutes (1995) requires writs to be filed in the county where a prisoner is detained.

Wigfals' initial selection of venue in Orange County was appropriate since he was incarcerated there. His later transfer to Baker County provided grounds for the transfer of venue to Baker County as requested by FPPC rather than dismissal of the petition.

We therefore vacate the order of dismissal and remand for an order transferring the matter to the circuit court for Baker County.

ORDER VACATED; REMANDED. (PETERSON, C.J., SHARP, W., and GOSHORN, JJ., concur.)

* * *