IN THE SUPREME COURT OF FLORIDA

JAMES EDWARD SCOTT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 90,558

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Petitioner entered pleas of guilty to the following offenses: Count I, dealing in stolen property; Count II, dealing in stolen property; Count III, grand theft of a firearm; and Count IV, grand theft. (R 35-36) Defense counsel objected to the inclusion of points for possession of a firearm on the sentencing guidelines scoresheet for the conviction of grand theft of a firearm. (R 20) The trial court agreed with defense counsel and the State appealed to the Fifth District Court of Appeal. On appeal to the Fifth District Court of Appeal, the State argued that in calculating Petitioner's guidelines scoresheet, the trial court should have assessed 18 points for possession of a firearm pursuant to Florida Rule of Criminal Procedure 3.702(d)(12). On April 18,1997, the Fifth District issued its opinion reversing Petitioner's sentence. See State v. Scott, 692 So. 2d 234 (Fla. 5th DCA 1997). (Appendix A) In rejecting Petitioner's argument that assessment of the 18 points would have been improper, the court

noted that the Fourth District Court of Appeal reached a contrary decision in Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996). (Appendix B)

A timely notice to invoke this Court's discretionary jurisdiction was filed in the Fifth district Court of Appeal on May 2, 1997. A Jurisdictional Brief was filed with this Court on May 9, 1997. This Honorable Court accepted jurisdiction on July 31, 1997. This appeal follows.

SUMMARY OF THE ARGUMENT

The trial court properly excluded points for possession of a firearm on Petitioner's sentencing guidelines scoresheet because possession of a firearm is an essential element of grand theft of a firearm and Petitioner was not being sentenced for any other non-firearm offenses for which it might have been proper to score "firearm" points.

The Fifth District Court of Appeal erred in reversing the trial court's ruling below. Petitioner maintains that this Court should reverse the Fifth District Court of Appeal's decision because the assessment of the eighteen additional points for possession of a firearm when the crime was grand theft of a firearm violates the Double Jeopardy Clause of the United States Constitution and the Florida Constitution. Petitioner pled guilty to grand theft of a firearm. Petitioner's sentence was already enhanced due to the firearm. The "firearm" enhanced the grand theft charge from a level two offense to a level four offense. The State should not be permitted to further increase this sentence by including an additional eighteen points based on the same firearm.

Although, the Fourth District Court of Appeal in Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996) seemed to reject the argument based on double jeopardy grounds the Fourth District Court of Appeal, did, however, conclude that it would be improper to score an additional eighteen points pursuant to Rule 3.702(d)(12), Florida Rule of Criminal Procedure where the offenses were 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. Similarly, in the instant case, the trial court noted that there were no

additional substantive offenses related to the charge of grand theft of a firearm that would support the inclusion of an additional eighteen points pursuant to Rule 3.701(d)(12), Florida Rules of Criminal Procedure. Thus, this Court should quash the decision of the Fifth District Court of Appeal's decision and affirm the trial court's original ruling.

ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN REVERSING PETITIONER'S SENTENCE AND ORDERING PETITIONER TO BE RESENTENCED TO A SCORESHEET INCLUDING EIGHTEEN ADDITIONAL POINTS FOR POSSESSION OF A FIREARM, WHERE THE FIREARM IS ONE OF THE ESSENTIAL ELEMENTS OF THE CRIME FOR WHICH PETITIONER WAS BEING SENTENCED.

Petitioner entered pleas of guilty to Count I, dealing in stolen property; Count II, dealing in stolen property; Count III, grand theft of a firearm; and Count IV, grand theft. (R 35-36) Defense counsel objected to the inclusion of points for possession of a firearm on the sentencing guidelines scoresheet for the conviction of grand theft of a firearm because possessing a firearm was an essential element of the crime for which Petitioner was being sentenced. (R 20) The trial court agreed stating that "the offense itself would not exist without the firearm." (R 21) At Petitioner's plea and sentencing hearing the following colloquy occurred:

> The Legislature has determined that grand theft of a firearm is a stand alone sort of offense. Grand theft is a level two offense. Grand theft of a firearm is a level four offense.
>
> It seems to me that it's inappropriate to have the firearm enhancement when you can't have the crime without the firearm. And when the Legislature has already made special provisions for the firearm, I think that it's inappropriate under grand theft of a firearm to assess the eighteen points.

> In this particular case the firearm enhancement would only apply to the -- and I think this is agreed to the by the State -- would only apply to the grand theft of a firearm count, correct, Mr. Brown?
>
> Mr. Brown(Assistant State Attorney): Correct.
>
> The Court: Okay. Now, if in the course of the grand theft of the other merchandise, whatever it was here, VCR or whatever, he used a firearm in the commission of that grand theft and it was charged as a grand theft with the use of a firearm and not the grand theft of the firearm, I think then the enhancement would be appropriate. But under the circumstances the way the case is charged, I think it is not and I will strike the eighteen points from the -- from the sentencing guidelines score sheet. (R 22-23)

Petitioner, Appellee below argued that it would have been improper to assess 18 points for possession of a firearm pursuant to Florida Rule of Criminal Procedure 3.702(d)(12) where his offense at sentencing was grand theft of a firearm. The Fifth District rejected this argument but noted that the Fourth District Court of Appeal in Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996) had reached the direct opposite conclusion wherein it held that Florida Rule of Criminal Procedure 3.702(d)(12) is inapplicable to convictions for possession of a firearm by a convicted felon when unrelated to the commission of any additional substantive offense. In Galloway, the Fourth District Court of Appeal relied upon the wording of Rule 3.702(d)(12) which provides for the assessment of the eighteen points when convicted of a felony "while having in his or her possession a firearm." (Emphasis added)

In Canterbury v. State, 606 So.2d 504 (Fla. 1st DCA 1992), the District Court held that the trial court erred in imposing a sentence for escape based upon a score sheet that assessed points for "legal constraint," because, as the State had conceded, legal constraint is an essential element of the crime of escape. Likewise, possession of a firearm is an essential element of grand theft of a firearm.

Rule 3.702(d)(12) provides that additional sentence points are to be included for possession of a firearm during the commission of any felony other than those enumerated in Section 775.087(2). Petitioner maintains that the principle affirmed by Canterbury remains valid under the 1994 sentencing guidelines. Just as "in custody serving a sentence" is an element of the crime of escape, so too is "possession of a firearm" and essential element of grand theft of a firearm and, in both cases, these elements are already factored into the "primary offense" on the sentencing guidelines scoresheet and thus should not be used as a ground of enhancing the sentence to be imposed. This logic, said Judge Dauksch in State v. Chenault, 543 So.2d 1314, 1315 (Fla. 5th DCA 1989), is "inescapable." See also McNeal v. State, 653 So.2d 1122 (Fla. 1st DCA 1995), wherein the District Court held that the trial court had erred by accepting a scoresheet that had reclassified for use of a weapon an offense of which use of a weapon was an essential element.

The Fifth District Court of Appeal and the Second District Court of Appeal have recently decided cases affirming the assessment of points for possession of a firearm; but neither Gardner v. State, 661 So.2d 1274 (Fla. 5th DCA 1995), nor State v. Davidson, 666 So.2d 941 (Fla. 2d DCA 1995) applies to the facts of this case.

In Gardner, the Fifth District Court of Appeal approved the assessment of 18 points for possession of a firearm even though one of Gardner's convictions was for carrying a concealed firearm, because his other convictions, for drug offenses, were not among the crimes enumerated in Section 775.087(2), and points clearly could be scored for his possession of a firearm during the commission of those offenses. Trafficking in cocaine was scored as Gardner's primary offense. Id., 661 So.2d at 1275. Gardner merely held, in other words, that the inclusion of an offense of which possession of a firearm was an essential element did not preclude assessing, on the same scoresheet, points for possessing a firearm during the commission of the "primary offense" of which possession of a firearm was not an element.

In State v. Davidson, the Second District Court of Appeal did not find that sentencing enhancement points may be scored for factors which are essential elements of the crime charged, but rather observe that the issue in that case did not involve double jeopardy. The defendants in Davidson were each convicted of carrying a concealed firearm and were assessed 25 points for having in their possession a semiautomatic weapon. The District Court wrote:

> The circumstances in the instant cases are distinguishable from those in which we have reversed felony sentences stemming from a single act constituting separate firearm related crimes. Cleveland v. State, 586 So.2d 1145 (Fla. 1991); Hall v. State, 517 So.2d 678 (Fla. 1988). Lizardo and Davidson's reliance upon these cases is misplaced. They have each experienced only one conviction, arising from a single criminal act, condemned by only one statute, section 790.01(2). Rule 3.702(d)(12), unlike section 790.01(2), does not create a crime. Rather, the rule simply distinguishes between types of firearms and manifests nothing more than legislative recognition of the need to deter through enhanced punishment the use of semiautomatic firearms and their potential for the infliction of severe injury during the commission of criminal acts.

> Finally, we express agreement with the result in Gardner v. State, 661 So.2d 1274 (Fla. 5th DCA 1995), in which the rule withstood challenges paralleling Lizardo's and Davidson's.
>
> Lizardo and Davidson were each in possession of a semiautomatic weapon; thus, we reverse and remand for the trial court to resentence them in accordance with this opinion.

Id. (Emphasis supplied.) It is not an element of grand theft of a firearm that the firearm possessed was a semiautomatic weapon, so Davidson does not control this case in which points were assessed for possession of a "firearm."

This Honorable Court should quash the Fifth District Court of Appeal's decision in the instant case where Petitioner was convicted and sentenced for grand theft of a firearm. Petitioner's sentence was already enhanced because of the firearm, from a level two offense to a level four offense and furthermore the language of the Rule 3.702(d)(12) contemplates that the firearm was used "while" committing another felony offense which did not occur in the instant case.

CONCLUSION

Based upon the foregoing cases, reasons and authorities cited herein, Petitioner respectfully requests that this Honorable Court quash the decision of the Fifth District Court of Appeals and affirm the trial court's original ruling.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

M. A. LUCAS
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: James Edward Scott, 89 Stephenson Street, West Melbourne, FL 32904 on this 25th day of August, 1997.

M. A. LUCAS
ASSISTANT PUBLIC DEFENDER

JAMES EDWARD SCOTT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 90, 558

APENDICES

Appendix A -- State v. Scott, 692 So. 2d 234 (Fla. 5th DCA 1997)

Appendix B -- Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996)

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR PETITIONER

1

STATE of Florida, Appellant,

v.

James E. SCOTT, Appellee.

No. 96–969.

District Court of Appeal of Florida, Fifth District.

April 18, 1997.

Defendant was convicted in the Circuit Court, Brevard County, Jere E. Lober, J., pursuant to his plea of guilty to two counts of dealing in stolen property, grand theft of firearm, and grand theft, and sentence of probation was imposed. State appealed. The District Court of Appeal, Thompson, J., held that, for conviction of grand theft of firearm, 18 points should have been added to scoresheet at sentencing.

Reversed and remanded.

Criminal Law ⇐1208.6(4)

For conviction of grand theft of firearm, 18 points should have been added to scoresheet at sentencing.

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, Judge.

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.

W. SHARP and GOSHORN, JJ., concur.

2

In re ESTATE OF Madalyn HINTERLEITER, Deceased.

STATE of Florida, AGENCY FOR HEALTH CARE ADMINISTRATION, Appellant,

v.

Myron CONNER and Madalyn Skiles, Individually and as Personal Representative of the Estate of Madalyn Hinterleiter, Deceased, Appellees.

No. 96–02518

District Court of Appeal of Florida, Second District.

April 18, 1997.

In probate proceedings, the Circuit Court, Highlands County, Robert E. Pyle, J., determined that granddaughter's interest in house devised by grandmother was entitled to state constitutional homestead exemption from forced sale. Creditor of estate appealed. The District Court of Appeal, Northcutt, J., held that granddaughter was not grandmother's "heir" for purposes of homestead exemption.

Reversed and remanded; question certified; conflict certified.

Homestead ⇐142(2)

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10, § 4(a); West's F.S.

See publication
for other judicial co
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Teresa Cooper Wa
Appellant.

H. Scott Macbeth,
Myron Conner.

Clifford M. Ables,
lee Madalyn Skiles.

NORTHCUTT, Ju

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Robert A. Butterworth, Attorney General and Cynthia A. Greenfield, Assistant Attorney General, for appellee.

Before LEVY, GODERICH and SHEVIN, JJ.

PER CURIAM.

Affirmed. *Cannady v. State*, 620 So.2d 165, 169 (Fla.1993); *Chestnut v. State*, 538 So.2d 820 (Fla.1989); *Zeigler v. State*, 402 So.2d 365, 373 (Fla.1981).

Debra GALLOWAY, Appellant,

v.

STATE of Florida, Appellee.

No. 95-3395.

District Court of Appeal of Florida, Fourth District.

Oct. 9, 1996.

Defendant was convicted in the Nineteenth Judicial Circuit Court, St. Lucie County, Joe Wild, J., of carrying concealed firearm and possession of firearm by convicted felon. Defendant appealed. The District Court of Appeal held that: (1) convictions did not violate double jeopardy principles, but (2) assessment of additional scoresheet points for possession of firearm was reversible error.

Conviction affirmed; sentence reversed and remanded.

1. Double Jeopardy ⇐140

Defendant's convictions for carrying concealed firearm and possession of firearm by convicted felon did not violate double jeopardy principles. U.S.C.A. Const.Amend. 5.

2. Double Jeopardy ⇐30

Rule permitting assessment of additional scoresheet points where defendant is convicted of committing felony other than enumerated felonies while possessing firearm does not offend double jeopardy principles. U.S.C.A. Const.Amend. 5; West's F.S.A. RCrP Rule 3.702(d)(12).

3. Weapons ⇐17(8)

Rule permitting assessment of additional scoresheet points where defendant is convicted of committing felony other than enumerated felonies while possessing firearm was inapplicable to convictions for carrying concealed firearm and possession of firearm by convicted felon when unrelated to commission of any additional substantive offense. West's F.S.A. RCrP Rule 3.702(d)(12).

Richard L. Jorandby, Public Defender, and Margaret Good-Earnest, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Joan Fowler, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

[1] We affirm Appellant's convictions for carrying a concealed firearm and for possession of a firearm by a convicted felon. *See Skeens v. State*, 556 So.2d 1113 (Fla.1990); *Washington v. State*, 661 So.2d 1294 (Fla. 4th DCA 1995), *cause dismissed*, 669 So.2d 252 (Fla.1996); *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). We have considered *State v. Stearns*, 645 So.2d 417 (Fla.1994), in which the supreme court reversed a dual conviction, on double jeopardy grounds, for armed burglary and carrying a concealed weapon, but do not deem it applicable here. We do not read *Stearns* as proclaiming a general exception to *Blockburger*, or to the application of section 775.021(4), Florida Statutes, in all circumstances in which a firearm is an element of companion offenses, each otherwise containing an element or elements not contained in the other. We note conflict on this point with *Bell v. State*, 673 So.2d 556 (Fla. 1st DCA 1996), and *Maxwell v. State*, 666 So.2d 951 (Fla. 1st DCA), *rev. granted*, No. 87,290, 673 So.2d 30 (Fla. Apr. 11, 1996).

We also affirm as to an evidentiary issue raised, regarding whether certain testimony falls under the hearsay rule, without addressing it, as its admission, if error, in any event would be harmless. *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986).

[2, 3] We reverse Appellant's sentence and remand for resentencing due to scoresheet error in assessing 18 additional points for possession of a firearm. Florida Rule of Criminal Procedure 3.702(d)(12) permits assessment of these additional points where the defendant is convicted of committing a felony, other than those enumerated in subsection 775.087(2), Florida Statutes, "*while* having in his or her possession a firearm." (Emphasis added) We recognize that two districts appear to have decided this issue otherwise. *See State v. Davidson*, 666 So.2d 941 (Fla. 2d DCA 1995); *Gardner v. State*, 661 So.2d 1274, 1275 (Fla. 5th DCA 1995). We do not disagree with the conclusion in *Davidson* and *Gardner* that assessing the additional scoresheet points does not offend principles of double jeopardy. But we construe rule 3.702(d)(12) as inapplicable to convictions of these two offenses when unrelated to the commission of any additional substantive offense.

We remand for resentencing under an amended scoresheet.

GUNTHER, C.J., and STONE and PARIENTE, JJ., concur.

Edward PERIERA, Appellant,

v.

FLORIDA POWER & LIGHT COMPANY, Appellee.

No. 95–2390.

District Court of Appeal of Florida, Fourth District.

Oct. 9, 1996.

Motorcyclist who was injured when he struck guy wire to utility pole owned by power company while he was riding on bike path at night brought action against power company. Company moved for summary judgment, and the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, James R. Stewart, Jr., J., granted motion based on lack of duty. Motorcyclist appealed, and the District Court of Appeal, Klein, J., held that: (1) motorcyclist's request for continuance was properly denied; (2) motorcyclist's violation of statute prohibiting use of motor vehicle on bike path was only evidence of negligence and did not relieve power company of duty; and (3) whether duty existed was fact issue precluding summary judgment.

Reversed, and conflict certified.

1. Judgment ⇐186

Plaintiff's request for continuance in order to complete discovery was properly denied, and consideration of motion for summary judgment was proper, where outstanding discovery about which plaintiff complained was not initiated until three days before summary judgment hearing and over three years after filing of action. West's F.S.A. RCP Rule 1.150(f).

2. Judgment ⇐185.3(21)

Fact issue as to whether power company owed duty to motorcyclist who was injured when he struck guy wire of pole owned by company while he was riding at night on bike path precluded summary judgment; fact that operation of motorcycle on bike path violated statute was prima facie evidence of negligence, but did not relieve power company of duty as matter of law. West's F.S.A. § 316.1995.

3. Automobiles ⇐147

Violation of provision of traffic code which prohibits operation of motorized vehicles on bike paths or sidewalks is prima facie evidence of negligence, and not negligence per se. West's F.S.A. § 316.1995.

Scott A. Mager and Carl F. Schoeppl of Mager & Associates, P.A., Fort Lauderdale, for appellant.