ORIGINAL

IN THE SUPREME COURT OF FLORIDA

JAMES E. SCOTT,

Petitioner,

v. CASE NO. 90,558

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

First of all, the State respectfully submits that jurisdiction was improvidently granted in this case, and the Court's exercise of jurisdiction should be reconsidered. As is even more apparent after reading Scott's Initial Brief, there is no basis for conflict jurisdiction.

As to the merits of Scott's claim, the State submits that the district court properly concluded that firearm points should have been scored. Under the clear, unambiguous language of the guidelines statute, firearm points must be assessed where the defendant possessed a firearm during the commission of his offense. There is no statutory exception to this rule for offenses in which the possession of a firearm is an inherent component, and this Court should not create such an exception in the face of the clear language of the statute.

ARGUMENT

THE DISTRICT COURT PROPERLY CONCLUDED THAT FIREARM POINTS SHOULD HAVE BEEN SCORED.

Scott contends that the district court erred in concluding that firearm points should have been scored under the circumstances of this case. State v. Scott, 692 So, 2d 234 (Fla. 5th DCA 1997). The State submits that it is readily apparent, from Scott's own Initial Brief, that the decision of the court below does not conflict with other cases.

In seeking jurisdiction, Scott relied on the holding of another district court that the scoring of firearm points is improper where having the firearm is itself the crime -- as opposed to the firearm being connected to the commission of an ***additional*** substantive offense. Galloway v. State, 680 So. 2d 616, 617 (Fla. 4th DCA 1996). Here, Scott's having the firearm was clearly not itself the crime, but rather was tied to the commission of the additional substantive offense of grand theft. Accordingly, even under Galloway the firearm points **were** properly scored, and there is no conflict between these cases.

Should this Court reject the above argument, the State submits that the district court's decision should be approved.

Under the 1994 sentencing guidelines, felony offenses are listed in an "Offense Severity Ranking Chart." § 921.0012, Fla. Stat. (1995). Offenses range from level 1 (the least severe) to level 10 (the most severe), according to the Legislature's determination of the severity of the offense and the harm or potential harm to the public. See Fla. R. Crim. P. 3.702(c). The new guidelines supersede prior case law conflicting with the principles and provisions of the new statute and rule. Fla. R. Crim. P. 3.702(b).

In this case, Scott entered a guilty plea to the offense of grand theft of a firearm, in violation of section 812.014(2)(c)(5), Florida Statutes. Under the sentencing guidelines, this crime is categorized as a level 4 offense. Level 4 offenses are automatically assigned 22 points. § 921.0014(1), Fla. Stat.

In addition to points for the offense level, the guidelines call for extra points to be scored if certain circumstances apply to the crime. For example, 4 extra points are scored if the defendant has committed a "legal status violation"; 6 extra points are scored for each violation of a release program; and, most relevant to the case at bar, 18 extra points are scored if the defendant had a firearm in his possession at the time of the offense. Id. The district court held that the 18 firearm points

should have been scored in this case, and it is these points which are the subject of this appeal.

Scott does not, and indeed cannot, contend that he did not have a firearm in his possession at the time of his offense. Rather, he contends that the firearm points should not have been scored because possession of a firearm is an inherent part of his crime. This argument ignores the clear, unambiguous language of the statute.

Scoring for firearms is explained in the statute as follows:

> Possession of a firearm or destructive device: If the offender is convicted of committing or attempting to commit any felony other than those enumerated in s. 775.087(2) while having in his possession a firearm as defined in s. 790.001(6), an additional 18 sentence points are added to the offender's subtotal sentence points.

§ 921.0014(1), Fla. Stat. See also Fla. R. Crim. P. 3.702(d)(12).

Thus, under the clear language of the statute, firearm points must be added to the scoresheet of any offender who possesses a firearm during the commission of his offense, unless that offense already carries a three-year mandatory minimum term for the firearm, as provided in section 775.087(2).

Grand theft of a firearm is not subject to the mandatory minimum term, as it is not an enumerated offense in that statute. Accordingly, Scott's offense does not fall under the statutory exception, and firearm points should have been scored under the plain language of the statute.

Clearly, the Legislature had the knowledge and ability to create an exception to the firearm points requirement, as it did in the case of the mandatory minimum offenses. The Legislature chose not to create a second scoring exception, as proposed by Scott, for crimes in which possession of a firearm is an essential element,[1] and this court should not second-guess this legislative determination or attempt to create such an exception through case law.

Contrary to Scott's argument, the creation of an inherent element exception to the scoring of firearm points is not required

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[1]In fact, the Legislature has created just such an exception for firearms in another context. The statute requiring the *reclassification* of offenses involving a firearm specifically excludes offenses in which the use of a firearm is an essential element. § 775.087(1), Fla. Stat. (1995). It was this express exception which formed the basis for the court's holding in McNeal v. State, 653 So. 2d 1122 (Fla. 1st DCA 1995), cited by Scott.

Had the statute addressing the scoring of firearm points included similar language, Scott's argument would have merit. However, it is clear that the Legislature did not choose to exempt "essential element" crimes from the firearm points, as was its prerogative, and accordingly Scott's argument must fail.

by the Double Jeopardy Clause. Admittedly, the end result of the Legislature's chosen scoring structure is that offenses with possession of a firearm as an essential element will always end up scoring more than just their "level" points. That points are scored on more than one line of the scoresheet, however, does not demonstrate a Double Jeopardy violation.

There can be little question that the Legislature could have chosen to simply assign 40 points to the offense of grand theft of a firearm, and this is, in effect, what the Legislature did -- only the points are listed as 22 (for level 4) plus 18 (for the firearm) rather than as 40. Splitting up the score in this manner is not double punishment -- it is a method of structuring the scoresheet so it can apply generically to all criminal offenses.[2]

Scott is not being punished twice for his offense simply because it results in two numbers on his scoresheet -- any more than a person who commits an offense inherently involving victim injury (such as manslaughter) is punished twice because that crime results in "level" points plus 'extra" victim injury points.

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[2]Further, such a structure serves the purpose of keeping this crime as a level 4 offense, which affects other "level" considerations, such as the scoring of this offense in the future (as Prior Record the offense will simply be scored as level 4).

Scott has been convicted of one crime, condemned by one statute. Adding points for the firearm does not create a new crime or punishment.

The opinion of the district court follows the clear dictates of the statute. See also, e.g., Smith v. State, 683 So. 2d 577 (Fla. 5th DCA 1996), rev. dismissed, 691 So. 2d 1081 (Fla. 1997); State v. Davidson, 666 So. 2d 941 (Fla. 2d DCA 1995); Gardner v. State, 661 So. 2d 1274, 1275 (Fla. 5th DCA 1995). Accordingly, to the extent that the opinion in Galloway, 680 So. 2d 616, is in conflict with the decision of the court below, it should be disapproved, as there is absolutely no basis for concluding, as the Galloway court did, that firearm points may only be scored if related to the commission of an additional substantive offense. Such a conclusion ignores the clear, unambiguous language of the statute and rule delineating the firearm points requirement.

It is a "fundamental principle of statutory construction that where the language of a statute is plain and unambiguous there is no occasion for judicial interpretation." Pardo v. State, 596 So. 2d 665, 667 (Fla. 1992). The statute in the present case is clear

and unambiguous,[3] and the Legislature should be held to have meant that which it has clearly expressed.

While Scott, and the trial court, may question the wisdom of the scoring for his offense, that opinion should be expressed to the Legislature, not this Court. See Baker v. State, 636 So. 2d 1342, 1343 (Fla. 1994) ("The proper remedy for a harsh law will not be found through construction or interpretation; it rests only in amendment or repeal."); Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 454 (Fla. 1992) (where a statute is unambiguous, courts have no power to "evade its operation by forced and unreasonable construction").

The clear and unambiguous statutory language was properly applied by the district court, and the court's decision should be approved.

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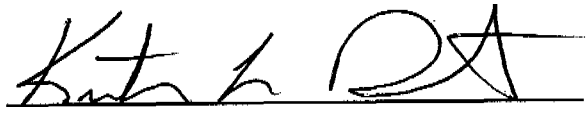
[3]Scott's reliance on Canterbury v. State, 606 So. 2d 504 (Fla. 1st DCA 1992), and State v. Chenault, 543 So. 2d 1314 (Fla. 5th DCA 1989), is misplaced. Those cases deal with the old sentencing guidelines, which were based on an entirely different system of categorizing and scoring.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests this honorable Court affirm the decision of the district court in all respects.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Respondent's Brief on the Merits has been furnished to M.A. Lucas, Assistant Public Defender, by delivery to the Public Defender's Basket at the Fifth District Court of Appeal, this 15th day of September, 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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APPENDIX

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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. But&worth, 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 199.5); *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.

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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.