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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 90,609

RODNEY WALTON,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

RICHARD L. JORANDBY
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PRELIMINARY STATEMENT

Respondent was the Defendant in the trial court and the Appellee in the Fourth District Court of Appeal. He will be referred to as Respondent in this brief. Petitioner, the State of Florida, was the prosecution in the trial court and the Appellant in the Fourth District Court of Appeal.

R = Record on Appeal

T = Transcripts of Plea Conference and Sentencing Hearing

STATEMENT OF THE CASE AND FACTS

Respondent, Rodney Walton, accepts Petitioner's statement of the case and facts as found in the Initial Brief.

SUMMARY OF ARGUMENT

The addition of 25 points for committing a felony "while having in his or her possession a semiautomatic weapon" pursuant to *Fla. R. Crim. P.* 3.702(d)(12) is inapplicable to Respondent because he was convicted of carrying a concealed firearm in violation of Section 775.087(2), *Florida Statutes* (1995). Respondent relies on the plain meaning *Fla. R. Crim. P.* 3.702(d)(12) which allows the addition of 25 points for "any felony" (other then those enumerated in subsection 775.87(2)) "while having in his or her possession a semiautomatic weapon". The word "while" used in this rule is a conjunction. Conjunctions require the act of conjoining, the joining together of two separate entities. Respondent did not commit a felony "while" having possession of a semiautomatic weapon. The possession of the semiautomatic firearm was the very essence or core evil of Respondent's felony. There was no unrelated substantive offense pending before the trial court for sentencing. Therefore, this rule does not apply to gun possessory offenses where there is **no** additional element of gun possession with which to conjoin the main(separate) offense. The the Fourth District correctly interpreted the applicable rule in the instant cause and in *Galloway v. State*, 680 So. 2d 616 (Fla. 4th DCA 1996), (See Appendix) by ruling that the trial court did not err in declining to score 25 points for possession of a semiautomatic weapon where Respondent was convicted *solely* of carrying a concealed firearm.

ARGUMENT

FLORIDA RULE OF CRIMINAL PROCEDURE 3.702(d)(12)DOES NOT REQUIRE THE IMPOSITION OF 25 ADDITIONAL SENTENCE POINTS ON RESPONDENT'S GUIDELINE SCORESHEET BECAUSE HE WAS CONVICTED SOLELY OF CARRYING A CONCEALED FIREARM.

Respondent pled guilty to the offense of carrying a concealed firearm in violation of section 790.01(2), *Florida Statutes* (1995).[1] He was subsequently sentenced pursuant to the 1994 revised Florida sentencing guidelines, *Florida Rule of Criminal Procedure* 3.702(d)(12)[2] which allows the scoring of additional sentence points as follows:

> 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).... Twenty five points shall be assessed where the offender is convicted

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[1]Section 790.01(2), *Fla. Stat.* provides: "Whoever shall carry a concealed firearm on or about his person shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084."

[2]Respondent's offense occurred after the effective date of the 1994 revised sentencing guidelines, January 1, 1994. Florida Rule of Criminal Procedure 3.702(d)(12), adopted by this Court in *Amendments to Florida Rules of Criminal Procedure Re Sentencing Guidelines,* 628 So. 2d 1084, 1091 (Fla.1993), implements section 921.0014, *Fla.Stat.* (1993), as created by chapter 93-406, Laws of Florida.

> 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).
>
> (Emphasis added).

One of the fundamental principles of Florida law is that penal statutes must be construed according to their letter. *Perkins v. State*, 576 So. 2d 1310, 1312 (Fla.1991). Criminal statutes are to be construed strictly in favor of the accused. *Id.*; *State ex rel. Cherry v. Davidson*, 103 Fla. 954, 958, 139 So. 177, 178 (1931); Section 775.021(1), *Fla.Stat.* (1995) (rule of lenity). Moreover, this Court in *Flowers v. State*, 586 So. 2d 1058 (Fla. 1991), in order to resolve conflicting opinions, utilized our lenity statute, section 775.021(1), *Florida Statutes* (1995), and held that our sentencing guidelines, when susceptible of different interpretations, must be construed in favor of the defendant. Lenity, although codified by our legislature in section 775.021(1), is founded on the due process requirement that criminal statutes must apprise ordinary persons of common intelligence as to what is prohibited. *Perkins,* 576 So. 2d at 1312-13. Lenity applies "not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Carawan v. State*, 515 So. 2d 161, 165 (Fla. 1987), quoting *Albernaz v. United States*, 450 U.S. 333, 342, 101 S. Ct. 1137, 1144 (1981).

The Fourth District in *Galloway v. State, supra*, held that the 18 additional

firearm points may **not** be scored for an offender convicted solely of possession of a firearm by a convicted felon. The Fourth District explained:

> Florida Rule of Criminal Procedure 3.702(d)(12) permits assessment of these additional points where the defendant is convicted of committing any 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.*
>
> 680 So. 2d at 617. [Emphasis Added].

The *Galloway* decision relies on the plain meaning of Rule 3.702(d)(12) which allows the addition of 25 points for "any felony" (other then those enumerated in subsection 775.87(2)) "while having in his or her possession a semiautomatic weapon." The word "while" used in this rule is a conjunction. Conjunctions require the act of conjoining, the joining together of two separate entities. "While" designates an occurrence together in time or space. Here, there is no conjoining. There is no "while" about Respondent's criminal offense for Respondent did not commit a felony "while" having possession of a semiautomatic weapon. The possession of the semiautomatic weapon firearm was the very essence or core evil of Respondent's

felony and under these circumstances, "while" the conjunction, designates "and." Thus, this rule cannot apply to gun possessory crimes where there is **no** additional element of gun possession with which to conjoin the main (separate) offense. As the Fourth District explained in *Galloway* "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." *Id.* at 617. There was no unrelated substantive offense pending before the trial court for sentencing in the instant case.

This interpretation of the rule is in harmony with the principle of law recognized by the Court in *Gonzalez v. State* 585 So. 2d 932 (Fla. 1991), wherein this Court held that where a firearm is an essential element of the offense for which the Defendant is convicted, the sentence cannot be enhanced because of the use of a firearm.

In *State v. Davidson*, 666 So. 2d 941 (Fla. 2d DCA 1995), the Second District did conclude that a defendant could receive the additional points for use of a firearm against the defendant's argument that scoring points for possession of a firearm constitutes an improper enhancement of the sentence for an essential element of the underlying offense i.e., the firearm. However, Respondent urges this Court to resolve this issue by reference to the plain meaning of the rule as written. The significance of the language "while having in his or her possession" was not considered and thus not decided in *Davidson.*

In addition, *Gardner v. State*, 661 So. 2d 1274, 1275 (Fla. 5th DCA 1995), cited by Petitioner-State in its Brief (PBp 6) is inapplicable here because Respondent was convicted solely of one offense involving a single firearm. In *Gardner,* the Fifth District noted:

> However, Gardner contends that the eighteen points should not have been assessed because one of his offenses was possession of a concealed firearm. He asserts that, since the possession of a firearm is an essential element of the offense, the addition of eighteen points for carrying a concealed firearm would constitute an enhancement in penalty not intended by the legislature, as well as twice punishing him for the same crime. We disagree. The meaning of rule 3.701(d)(12) is clear. The rule refers to "any felony", which in the instant case includes *trafficking in cocaine and possession of marijuana with intent to sell.* We reject Gardner's argument that the additional eighteen points cannot be scored simply because he was simultaneously convicted of possessing a concealed firearm.
>
> *Id.*, at 1275. [Emphasis Added].

Therefore, for the reasons overlooked or not considered in either *Gardner* or *Davidson*, and based on the plain meaning of the conjunction "while," the sentencing judge here did not err in declining to score the additional 25 points for use of a semiautomatic weapon in the instant case because Respondent was charged solely with carrying a concealed firearm with no additional substantive offenses. Hence, Respondent respectfully requests this Honorable Court to **affirm** the decision of the Fourth District Court of Appeal.

Respondent respectfully notes that he entered his guilty plea to the instant offense after the trial judge declined to assess the 25 points for possession of a semiautomatic weapon. T5. The prosecutor objected to this ruling by the trial court. T5. The trial judge then offered Respondent a withhold adjudication and eighteen (18) months probation. T5. Respondent accepted the disposition offered by the trial court and was sentenced according to his plea with the trial court. R13-14.

Assuming arguendo, that this Honorable Court reverses the opinion of the Fourth District Court of Appeal, Respondent most respectfully should be given an opportunity to withdraw his plea.[3] "If on remand it should appear that the plea negotiated and the sentence imposed by the court are not viable, the defendant shall be given the opportunity to withdraw her plea." See *State v. Brown*, 542 So. 2d 1371,1372 (Fla. 4th DCA 1989); *State v. Nichols*, 536 So. 2d 1052 (Fla. 4th DCA 1988).

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[3]Petitioner-State commendably acknowledges that Respondent should be given an opportunity to withdraw his plea. PB p10.

CONCLUSION

Respondent respectfully requests this Honorable Court to affirm the opinion of the Fourth District Court of Appeal in the instant cause.

Respectfully Submitted,

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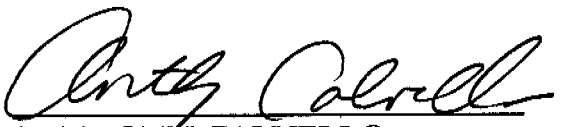
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to DENISE CALEGAN, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this 27th day of JUNE, 1997.



ANTHONY CALVELLO
Assistant Public Defender

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Appendix has been furnished by courier, to DENISE CALEGAN, Assistant Attorney General, 1655 Palm Beach Lakes Blvd., Third Floor, West Palm Beach, Florida 33401, this 27th day of JUNE, 1997.

ANTHONY CALVELLO
Assistant Public Defender