IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 90,609

RODNEY WALTON,

Respondent.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the trial court, and the Appellant in the district court, and will be referred to herein as "Petitioner" or "the State." Respondent, RODNEY WALTON, was the defendant in the trial court, and the Appellee in the district court, and will be referred to herein as "Respondent " or "defendant." Pursuant to rule 9.210(b)(3) Florida Rules of Appellate Procedure, citations to the record will specify the volume number of the record followed by the page number.

STATEMENT OF THE CASE AND FACTS

Defendant was charged by information with carrying a concealed firearm (Vlm 1 at 1). Defendant entered a plea of guilty to the charge (Vlm 1 at 5-7). The scoresheet prepared by the state reflected that defendant scored an additional 25 points for having a semi-automatic weapon (Vlm 2 at 4). When the 25 points were included, defendant scored 53 points, which put him in a range requiring incarceration; the permitted range was 18.7 months to 31.25 months incarceration (Vlm 1 at 11).

The trial court found that it was within the court's discretion to access the additional 25 points, and declined to access points for being in possession of a semi-automatic weapon (Vlm 2 at 5). The court noted the state's objection (Vlm 2 at 5).

In the absence of the 25 points, a state prison sanction was not mandated (Vlm 1 at 11). The judge offered defendant a withhold adjudication and 18 months probation (Vlm 2 at 5). Defendant accepted the sentence offered by the judge, and was sentenced accordingly (Vlm 1 at 13-14).

The state timely appealed defendant's sentence to the Fourth District Court of Appeal pursuant to rule 9.140(c)(1)(J), Florida Rules of Appellate Procedure. The fourth district affirmed on the basis of its holding in Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996). In Galloway, the fourth district found that rule

3.702(d)(12)[1] was inapplicable where possession of a firearm is an element of the offense. Id.

The fourth district certified conflict with State v. Davidson, 666 So. 2d 941 (Fla. 2d DCA 1995), Gardner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995), and Smith v. State, 683 So. 2d 577 (Fla. 5th DCA 1996), in which both the second and the fifth district found that rule 3.702(d)(12) applies to all felonies not specifically excluded by the rule, including felonies in which possession of a firearm is an element of the crime.

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[1] Florida Rule of Criminal Procedure 3.702(d)(12), implements section 921.0014, Fla. Stat., which states:

> Possession of a firearm, semiautomatic firearm, or machine gun: 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 semiautomatic firearm as defined in s. 775.087(3) or machine gun as defined in s. 790.001(9), an additional 25 points are assessed.

It should be noted that the statute differs from the rule in that it does not use the word "shall." However, it is clear that the legislature intended the requirement to be mandatory since the language indicates that the points "are assessed".

SUMMARY OF ARGUMENT

I. The clear language of rule 3.702(d)(12) Florida Rules of Criminal Procedure and section 921.0014 Florida Statutes (1994), indicates that additional points must be assessed for possession of a firearm, unless the conviction is for a felony enumerated in section 775.087(2). The statute does not exempt crimes in which possession of a firearm is an element. Therefore, based on the clear and unambiguous language of rule 3.702(d)(12) and its companion statute, section 921.0014 Fla. Stat. (1994), it was error for the district court to hold that 25 points for possession of a firearm need not be assessed where possession of a firearm is an element of the offense.

ARGUMENT

I. RULE 3.702(d)(12) FLORIDA RULES OF CRIMINAL PROCEDURE MANDATES THAT 25 POINTS BE ACCESSED ON THE SENTENCING SCORESHEET WHEN DEFENDANT IS CONVICTED OF CARRYING A CONCEALED FIREARM.

Florida Rule of Criminal Procedure 3.702(d)(12), provides:

> (12) 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. ... Twenty-five sentence points **shall** be assessed where the offender 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 semiautomatic weapon as defined in subsection 775.087(2) or a machine gun as defined in subsection 790.001(9).

(Emphasis added). Rule 3.702(d)(12) implements section 921.0014 Florida Stautes (1994), which states:

> Possession of a firearm, semiautomatic firearm, or machine gun: 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 semiautomatic firearm as defined in s. 775.087(3) or machine gun as defined in s. 790.001(9), an additional 25 point **are assessed**.

(Emphasis added).

The fourth district, relying on the language of the statute which requires that the defendant have in his or her possession a firearm *while* committing a felony not enumerated in the statute, held that rule 3.702(d)(12) is inapplicable where possession of a firearm is an element of the offense. See State v. Walton, 22 Fla. L. Weekly D1204 (Fla. 4th DCA May 14, 1997); State v. Galloway, 680

So.2d 616 (Fla. 4th DCA 1996).

The decision of the fourth district court of appeal directly conflicts with decisions of the fifth and second district courts of appeal. In Gardner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995), the fifth district held that the meaning of rule 3.701(d)(12) is clear and "any felony" not enumerated was subject to having the additional 18 points assessed because a handgun was involved. Since Gardner was convicted of trafficking in cocaine and possession of marijuana with intent to sell, felonies which were not enumerated in subsection 775.087(2), the fifth district affirmed the addition of 18 points on defendant's scoresheet for possession of a firearm.

In Smith v. State, 683 So. 2d 577 (Fla. 5th DCA 1996), the fifth district, relying on its finding in Gardner that the language of rule 3.701 is clear, held that the assessment of 18 points was proper where defendant was convicted of possession of a firearm by a convicted felon.

In State v. Davidson, 666 So. 2d 941 (Fla. 2d DCA 1995), the second district held that rule 3.702(d)(12) can permissibly affect a guidelines computation where the predicate felony is carrying a concealed firearm. The court specifically agreed with the result reached in Gardner, and further explained that 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.

The reasoning of the second and the fifth districts is sound, and is in accord with this court's decision in Capers v. State, 678 So. 2d 330 (Fla. 1996). In Capers this court found that the plain meaning of statutory language is the first consideration of statutory construction, and only when a statute is doubtful of meaning should matters extrinsic to the statute be considered in construing the language employed by the legislature. Id. at 332. In the instant case the language of section 921.0014 and rule 3.70(d)(12), which implements section 921.0014, is clear. The statute mandates that 25 points "are assessed" where the offender is convicted of committing "any felony" other than those enumerated in subsection 775.087(2) while having in his or her possession a semiautomatic weapon. This court recognized that the assessment of points for carrying a firearm in the commission of a felony was mandatory and specifically stated in rule 3.702(d)(12) that the points "shall" be assessed, unless defendant is convicted of a felony enumerated in section 775.087(2).

Carrying a concealed firearm is a felony of the third degree. See §790.01(2) Florida Statutes. Carrying a concealed firearm is

not one of the felonies enumerated in section 775.087(2)[2]. Contrary to the implication of the fourth district in Warner, defendant did commit the crime of carrying a concealed firearm *while* possessing a firearm. The fact that one can not commit the charged felony in the absence of a firearm, does not eliminate the fact that defendant did commit the crime *while* possessing a firearm.

Further, there is no exception in rule 3.702(d)(12) for felonies in which a firearm is a necessary element, even though the statute does specify other exceptions. In Capers this court found that a court could properly depart based on vulnerability of a victim due to age, even if vulnerability of a victim due to age is an element of the offense for which defendant was convicted. This court, relying on Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976),

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[2] Section 775.087(2) states in pertinent part:

> (2) Any person who is convicted of a felony or an attempt to commit a felony and the conviction was for: (a) Murder; (b) Sexual battery; (c) Robbery; (d) Burglary; (e) Arson; (f) Aggravated assault; (g) Aggravated battery; (h) Kidnaping; (I) Escape; (j) Aircraft piracy; (k) Aggravated child abuse; (l) Unlawful throwing, placing, or discharging of a destructive device or bomb; (m) Car jacking; (n) Home-invasion robbery; or (o) Aggravated stalking, and during the commission of the offense, such person possessed a "firearm", as defined in s. 791.001(6), or "destructive device", as defined in s. 790.001(4), shall be sentenced to a minimum term of imprisonment of 3 years.

held that it is a general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. Id. at 332. This court reasoned that if the legislature had intended to prohibit departure based on vulnerability due to age where it is an inherent component of the crime, it could have expressly stated this as it did in other sections of the statute. Id. Likewise, in the instant case, if the legislature had intended to exclude felonies in which possession a weapon was an inherent component of the crime, it would have expressly stated the exception when it stated which felonies were exempt from the rule.

Thus, because carrying a concealed firearm is a felony not enumerated in section 775.087(2), under the clear mandate of the rule and the statute the points were required to be assessed, and the fourth district erred in affirming the trial court's failure to assess the required points. When the additional 25 points are added to the scoresheet, defendant scores 53 points. According to rule 3.702(d)(16), Rules of Criminal Procedure, if the total sentence points are greater than 52, defendant, absent departure, must be sentenced to state prison (Vlm 1 at 11). Because defendant in the instant case was sentenced to probation, and no written reasons were given for the departure, remand for resentencing is appropriate. In light of the fact that a corrected scoresheet

mandates prison time, defendant should be given the opportunity to withdraw his plea.

CONCLUSION

Wherefore, based on the foregoing authorities, the state requests that this court REVERSE defendant's sentence and REMAND to the trial court for resentencing pursuant to a properly prepared scoresheet or withdrawal of defendant's plea.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was sent by courier, to Anthony Calvello, 421 Third Street, Suite 300, West Palm Beach, Florida 33401, this 23d day of June, 1997.

DENISE S. CALEGAN
Assistant Attorney General