ORIGINAL

IN THE SUPREME COURT OF FLORIDA

MICHAEL ASBELL,

Petitioner,

versus

CASE NO. 91,078

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PUTNAM COUNTY
AND THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner was charged by informations filed in the Circuit Court of Putnam County, Florida, with aggravated battery; two counts of attempted first-degree murder with a firearm; armed carjacking with a firearm; armed kidnapping; and possession of a firearm by a convicted felon. (R 7, 16-17) On August 15, 1996, he waived his defense of insanity and entered pleas of nolo contendere to simple battery, one count of attempted first-degree (premeditated) murder with a firearm; and possession of a firearm by a convicted felon. (R 55, 169-178) On September 19, 1996, he was sentenced to spend 17 years in prison for attempted first-degree murder and one year in the county jail for battery, and to spend 15 years on probation for possession of a firearm by a convicted felon. (R 163-165, 103-1 1 1)

Petitioner's convictions and sentences were affirmed by the Fifth District Court of Appeal on April 29, 1997. Rehearing was granted and on June 27, 1997, the District Court affirmed on the basis of Smith v. State, 683 So. 2d 577 (Fla. 5th DCA 1996). Asbell v, State, 696 So. 2d 857 (Fla. 5th DCA 1997). (APPENDIX). This Honorable Court accepted jurisdiction on October 20, 1997.

SUMMARY OF ARGUMENT

ISSUE I: It was error to include on Petitioner's sentencing guidelines scoresheet 18 points for possession of a firearm during the commission of his offenses because possession of a firearm is an essential element of possession of a firearm by a convicted felon, one of the crimes for which Petitioner was being sentenced. His primary offense was attempted premeditated murder for which a three-year mandatory minimum prison term was imposed because of the firearm and for which the inclusion of points for "possession of a firearm" is specifically prohibited by the sentencing guidelines.

ISSUE II: Petitioner's sentencing guidelines scoresheet was incorrectly calculated because it ranked his offense of attempted first-degree murder with a firearm at Level 10 even though the correct ranking was Level 9. The statute which authorizes increasing offense severity ranking for use of a firearm was not effective until after the date of Petitioner's offenses and its application in this case would violate the constitutional prohibition against ex post facto laws.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED BY INCLUDING ON PETITIONER'S SENTENCING GUIDELINES SCORESHEET 18 POINTS FOR POSSESSING A FIREARM WHERE THE CHARGE FOR WHICH THE POINTS WERE ASSESSED WAS POSSESSION OF A FIREARM BY A CONVICTED FELON.

At Petitioner's sentencing hearing, the trial court at the prosecutor's urging added 18 points to the sentencing guidelines scoresheet for possessing a firearm in the commission of possession of a firearm by a convicted felon. (R 128, 98) This was improper.

No points could be assessed for "possessing a firearm" in connection with Petitioner's convictions for attempted first-degree murder with a firearm because Rule 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. 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 subsection 790.001(6) or a destructive device as defined in subsection 790.001(4). . . .

(Emphasis supplied.) Attempted first-degree murder, the offense for which Petitioner was convicted, is included in Section 775.087(2) which provides for a three-year mandatory minimum prison sentence for use of a firearm in the commission of certain crimes, so no additional points for "possessing a firearm" could be assessed on that

account. Neither, Petitioner maintains, could points be added for possessing a firearm while possessing a firearm.

In Canterbury v. State, 606 So. 2d 504 (Fla. I st DCA 1992), the District Court held that the trial court had erred by 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 possession of a firearm by a convicted felon. s. 790.23, Fla. Stat. (I 993). The trial court overruled the objection and included the points on the score sheet. Rule 3.990, Fla. R. Crim. P. (R 98, 128)

Petitioner maintains that the principle affirmed by Canterburv 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" an essential element of possession of a firearm by a convicted felon 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 for enhancing the sentence to be imposed. This logic, said Judge Dauksch in State v, Chenault, 543 So. 2d 131 4 at 1315 (Fla. 5th DCA 1989), is "inescapable." See also McNeal v. State, 653 So. 2d 1 I22 (Fla. I st 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 and the Second District Courts of Appeal have decided cases affirming the assessment of points for possessing a firearm in the commission of 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, nor was possession of a firearm an essential element of the crimes. 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. See also Smith v. State, 683 So. 2d 577 (Fla. 5th DCA 1996), which affirmed an 18-point assessment, solely for possession of a firearm by a convicted felon, and solely on the authority of Gardner.

In State v. Davidson, the District Court did not find that sentencing enhancement points may be scored for factors which are essential elements of the crime charged, as the District Court did in this **case,** but rather observed 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, 587 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 3.701 (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 not an element of either carrying a concealed firearm or possession of a firearm by a convicted felon that the firearm possessed was a semiautomatic weapon, so Davidson does not control this case in which 18 points were assessed for possession of a "firearm" during the possession of a firearm.

After the decisions in Gardner, supra, and Davidson, supra, the Fourth District Court of Appeal issued its decision in Gallowav v. State, 680 So. 2d 616 (Fla. 4th DCA 1996), which affirmed Galloway's convictions for carrying a concealed firearm and for possession of a firearm by a convicted felon but held:

> 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, 61 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.

In this case, possession of a firearm by a convicted felon was not Petitioner's only substantive offense; but the sentencing guidelines specifically prohibit inclusion of points for "possession of a firearm" for attempted first-degree murder, so the additional points cannot be justified under that rationale. "Firearm possession" points, likewise, cannot be included for the offense of possessing the firearm.

The trial and District courts erred by approving the inclusion of 18 points for possession of a firearm during the commission of possession of a firearm by a convicted felon. Eighteen points should be deducted from Petitioner's sentencing guidelines scoresheet and this cause remanded for resentencing upon a recalculated scoresheet.

ISSUE II

THE TRIAL COURT ERRED BY SENTENCING PETITIONER PURSUANT TO A GUIDELINES SCORESHEET WHICH INCORRECTLY RANKED HIS OFFENSE ONE LEVEL HIGHER THAN THE PROPER LEVEL.

An additional error was made by the trial court when it ranked Petitioner's offense of attempted first-degree murder with a firearm at Level 10. See Feller v. State, 637 So. 2d 91 1 (Fla. 1994) (having jurisdiction on the basis of a question certified by the District Court, the Supreme Court has jurisdiction over all other issues in the case).

Petitioner's primary offense at conviction was attempted premeditated murder, a first-degree felony. § §782.04(1)(a)1.; 777.04(4)(c), Fla. Stat. (1995). Under Section 921 .0012(3)'s offense severity ranking chart, attempted first-degree murder is to be classified at Level. 9, for which level of offense 91 initial points are to be assigned. 0921 .0012(3)(i), Fla. Stat. (1995); Rule 3.990(a), Fla. R. Crim. P. Petitioner's sentencing guidelines scoresheet, however, was amended at his sentencing hearing to rank his offense at Level 10, and 1 16 initial points were assigned. (R 97, 125-127, 131) At his re-sentencing, this error must be corrected.

Presently, Section 775.087(1)(c) (reclassification of offenses for use of a firearm) provides:

> For purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944, a felony offense which is reclassified under this section is ranked one level above the ranking under s. 921 .0012 or s. 921.0013 of the felony offense committed.

Petitioner's offenses were committed on July 12, 1994, and March 13, 1995.

(R 7, 16-17) The amendment to Section 775.087(1)(c) which might have authorized increasing the severity ranking of attempted premeditated murder to Level 10 is applicable only to offenses committed after October 1, 1995. Ch. 95-184, s. 19, Laws of Florida. Applying a statute which increases the severity of a defendant's punishment to offenses committed before its effective date violates the Constitutions' prohibition against ex post facto laws. Art. I § 10, Fla. Const.; Art. I § 10, U. S. Const.

"Attempted first-degree murder with a firearm" is not a statutorily created offense, separate from "attempted first-degree murder." "Attempted first-degree murder" is the offense, and the use of a firearm ***reclassifies*** the original offense but does not create a new "unlisted" offense. The amendment to Section 775.087(1) that provides for a one-level increase in offense ranking would serve no purpose if the Legislature had intended that aggravation of an offense by use of a firearm would "uhlist" an offense that it had specifically listed in Section 921 .0012.

The sentencing guidelines statute initially failed to provide for an increased ranking for, in general, offenses when they are committed with a firearm. That perceived shortcoming in the sentencing guidelines statute needed to be addressed by legislation and, in 1995, it was. The Legislature had not acted in this regard, however, by the date of Petitioner's offenses and the desired correction to the legislative omission cannot be made retroactively by judicial interpretation. Petitioner must be re-sentenced pursuant to a sentencing guidelines scoresheet which ranks his primary offense at Level 9.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse the District Court's decision in this cause and order that his sentences be vacated and this cause remanded to the trial court for resentencing pursuant to a sentencing guidelines scoresheet omitting 18 points for using a firearm and ranking Petitioner's primary offense at Level 9.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Michael Asbell, P. 0. Box 510, Vernon, Florida 32462-0510, this 14th day of November, 1997.

ATTORNEY

IN THE SUPREME COURT OF FLORIDA

MICHAEL ASBELL,

Petitioner,

versus

CASE NO. **91,078**

STATE OF FLORIDA,

Respondent.

APPEAL FROM THE CIRCUIT COURT
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APPENDIX

supply Weeks with the substance of statements taken or given by its employees, agents, or attorneys regarding the alleged accident does constitute an abuse of discretion. This court has held that statements made by witnesses to, and statements made by, a party or its agents are nondiscoverable work product. *See Florida Cypress Gardens, Inc. v. Murphy, 471* So.2d 203, 205 (Fla. 2d DCA 1985); *Winn-Dixie Stores, Inc. v. Gonyea,* 455 So.2d 1342, 1344 (Fla. 2d DCA 1984). There has been no showing of the "rare and exceptional circumstances" necessary to authorize the trial court's order requiring Wal-Mart to produce the statements. See *Surf Drugs, Inc. v. Vermette,* 236 So.2d 108, 113 (Fla.1970); *Dade County School Bd. v. Soler,* 534 So.2d 884, 885 (Fla. 3d DCA 1988). However, the trial court correctly held that Wal-Mart may be compelled to provide the names and addresses of individuals who have furnished statements in anticipation of litigation. *See Cunningham v. Anchor Hocking Corp., 558* So.2d 93, 100 (Fla. 1st DCA), review denied, 574 So.2d 139 (Fla.1990); Soler, 534 So.2d at 885. Consequently, the petition is granted as to the portion of the order requiring Wal-Mart to give the substance of statements taken by or given to its agents concerning the subject accident and is otherwise denied as it relates to the interrogatories.

Accordingly, the petition for writ of certiorari is denied in part and granted in part. That portion of the order requiring Wal-Mart to provide Weeks with the substance of the statements it has taken or given concerning this litigation is quashed.

DANAHY, A.C.J., and PATTERSON and WHKTLEY, JJ., concur.

Michael ASBELL, Appellant,

v.

STATE of Florida, Appellee.

No. 96–2926.

District Court of Appeal of Florida, Fifth District.

April 29, 1997.

Order Granting Rehearing June 27, 1997.

Appeal from the Circuit Court for Putnam County; Stephen L. Boyles, Judge.

James B. Gibson, Public Defender, and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Kristen L. Davenport, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED.

COBB, W. SHARP and GRIFFIN, JJ., concur.

ON MOTION FOR REHEARING

PER CURIAM.

We grant the motion for rehearing and affirm based on *Smith v. State, 683* So.2d 577 (Fla. 5th DCA 1996), although we note *Smith* conflicts with White *v. State, 689* So.2d 371 (Fla.1997).

AFFIRMED.

COBB, W. SHARP and GRIFFIN, JJ., concur.