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IN THE SUPREME COURT OF FLORIDA

MICHAEL ASBELL,

Petitioner,

v.

CASE NO. 91,078
5DCA CASE NO. 96-2926

STATE OF FLORIDA,

Respondent.
_____/

RESPONDE 'S BRIEF ON THE MERITS

ROBERT A, BUTTERWORTH ,
ATTORNEY GENERAL

ROBIN A. COMPTON
ASSISTANT ATTORNEY GENERAL
Fla. Bar #846864
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

SUMMARY OF THE ARGUMENT

POINT ONE: The State respectfully submits that jurisdiction was improvidently granted in this case and the Court's exercise of jurisdiction should be reconsidered.

As to the merits of Petitioner's claim, the State submits that the district court properly concluded that firearm points were 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.

POINT TWO: The trial court properly scored the life felony of attempted premeditated murder with a firearm as a level 10 offense. This specific offense is not ranked under the guidelines, and therefore the trial court properly applied the provision requiring that an unranked life felony be classified as a level'10 offense.

ARGUMENT

POINT ONE

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

Petitioner argues that the district court erred in concluding that firearm points were properly scored in the instant case. Asbell v. State, 696 So.2d 857 (Fla. 5th DCA 1997). The State submits that jurisdiction was improvidently granted in this case and the Court's exercise of jurisdiction should be reconsidered as there is no basis for conflict jurisdiction.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict must be express and direct, that is, 'it must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). In the instant case, the Fifth District affirmed based on Smith v. State, 683 So.2d 577 (Fla. 5th DCA 1996) and noted that Smith conflicts with White v. State, 689 So.2d 371 (Fla. 2d DCA 1997). There is no express and direct conflict in the instant case because Asbell, Smith and White are all in accord as they all uphold the assessment of firearm

points.

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

Petitioner entered a no contest plea to the offenses of attempted first degree murder with a firearm and possession of a firearm by a convicted felon. Under the 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).

Under the sentencing guidelines, Petitioner's crimes are categorized as level 10 and level 5 offenses, respectively, and assigned points according to these categories. §921.0014(1), Fla. Stat. (1995). 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 point6 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.

Asbell does not, and 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). Possession of a

firearm by a convicted felon is not an enumerated offense in that statute. Accordingly, Asbell's offense does not fall under the statutory exception, and firearm points were properly scored under the plain language of the statute.

Asbell's other offense with a firearm, attempted murder, *is* an enumerated felony under this section. Accordingly, firearm points could not have been scored if this had been his only offense -- but it was not his only offense. By also committing the crime of possession of a firearm by a convicted felon, Asbell has committed 'any felony other than those enumerated," and therefore falls under the firearm points requirement.

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 for crimes in which possession of a firearm is an essential element,[1] and this Court

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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 Petitioner.

Had the statute addressing the scoring of firearm points included similar language, Petitioner's argument would have merit. However, it is clear that the Legislature did not choose to exempt

should not second-guess this legislative determination or attempt to create such an exception through case law.

The creation of an inherent element exception to the scoring of firearm points is not required by the Double Jeopardy Clause. Admittedly, the end result of the Legislature% 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.

Petitioner 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.

Petitioner'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.

'essential element" crimes from the firearm points, as was its prerogative, and accordingly Petitioner's argument must fail.

The opinion of the district court follows the clear dictates of the statute. See also, e.a., Smith v. State, 683 So.2d 577 (Fla. 5th DCA 1996), rev. dismissed, 691 So.2d 1081 (Fla. 1977); State v. Davison, 666 So.2d 941 (Fla. 2d DCA 1995); Gardner v. State, 661 So.2d 1274, 1275 (Fla. 5th DCA 1995).

While the Fourth District Court of Appeal has reached a decision contrary to this Court's holding in Smith, that court's opinion contains no reasoning and ignores the clear, unambiguous language of the statute and rule delineating the firearm points requirement. See, Galloway v. State, 680 So.2d 616, 617 (Fla. 4th DCA 1996). The rule does not contain a requirement that the firearm offense be related to the commission of an additional substantive offense, as Galloway seems to require, nor is there an exception for crimes in which possession of a firearm is an essential element, as proposed by Petitioner.

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

While Petitioner 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.

POINT TWO

PETITIONER'S CONVICTION FOR THE LIFE FELONY OF ATTEMPTED FIRST DEGREE MURDER WITH A FIREARM WAS PROPERLY SCORED AS A LEVEL 10 OFFENSE.

Petitioner argues that the trial court erred in scoring his attempted murder conviction as a level 10 offense, rather than a level 9 offense. This argument should be rejected.

Petitioner entered a no contest plea to the charge of attempted premeditated murder *with a firearm.* (R 100-101, 169) Under section 775.087(1)(a), Petitioner's use of a firearm in the commission of this crime resulted in a reclassification of his offense from a first degree felony to a life felony.

The life felony of attempted premeditated murder with a firearm is not included as one of the offenses specifically ranked in section 921.0012 of the sentencing guidelines.[2] Accordingly, because Petitioner's specific crime is not listed in this section, it must be classified according to the provisions of section 921.0013. Under this section, a life felony is ranked as a level 10 offense.

The trial court properly scored Petitioner's crime under the

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[2]The *first* degree felony of attempted premeditated murder, presumably without a firearm as there is no mention of one, is listed in this section as a level 9 offense. While similar, this is not the specific offense that Asbell was convicted of.

sentencing guidelines. His argument that the "one-level-up" provision of section 775.087 does not apply to his crimes is correct, but irrelevant, as this provision was not applied to his case.[3] Petitioner's sentence should be affirmed by this Court.

[3]Had Asbell's crime been committed after the effective date of this provision, it would have been subject to a one level rise after being scored under section 921.0013 -- in other words, it would have been scored as a level 11 offense (if there was such a level).

CONCLUSION

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

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

-ROBIN A. COMPTON
ASSISTANT ATTORNEY GENERAL
Fla. Bar #846864
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief of Respondent has been furnished by interoffice mail/delivery to Brynn Newton, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, FL, 32114-4310, this 31 day of December, 1997.

Robin A. Compton
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

MICHAEL ASBELL,

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CASE NO. 91,078
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APPENDIX

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBIN A. COMPTON
ASSISTANT ATTORNEY GENERAL
Fla. Bar #846864
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

subsection (c), the legislature *intended* to also amend the definition of "domestic violence," it is not our place to amend clear and unambiguous statutory language,'

It appears, therefore, that in order for Ms. Sharpe to qualify for a domestic violence injunction, she must be a rclativt by marriage of appellant and must have resided with him in a single dwelling unit. Since there is "living issue" of Ms. Sharpe's marriage to her deceased husband, she continues to be related by marriage to appellant. See Crosby *v. State,* 90 Fla. 381, 106 So. 741 (Fla. 1925). However, there is nothing in Ms. Sharpe's petition which claims that she and the appellant ever resided in the same household. Under the current law, statutory domestic violence between the pair has not occurred and cannot occur.

In order to be entitled to a domestic violence injunction, it seems axiomatic that one must both plead and prove one's entitltmcnt to the protection of the statute. Ms. Sharpe simply failed to do so.

REVERSED and REMANDED. (PETERSON, C.J., and GRIFFIN, J., concur.)

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[1]We recognize that this language is inconsistent with the provisions of tbc form authorized by section 741.30(3)(b), but it appears that legislative intent is better reflected in its statutory language than in its forms.

'But see the alternative basis for possible relief contained in section 901:01 Florida Statutes as discussed in Oliver v. *Haspil.* 152 So. 2d 758 (Fla. 3d DCA 1963); and *Drake v. Henson*, 448 So. 2d 1205 (Fla. 3d DCA 1984).

[3]*State v. Jett*, 626 So. 2d 691 (Fla. 1593); it is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language.

* * *

MICHAEL ASBELL, Appellant. v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-2926. Option filed June 27, 1997. Appeal from the Circuit Coun for Putnam County, Stephen L. Boyles, Judge. Counsel: James B. Gibson, Public Defender, and Brynn Newton, Assistant Public Defender, Dayma Beach. for Appellant. Robert A. Butterworth, Attorney General. Tallahassee, and Kristen L. Davcnpon. Assistant Attorney General, Daytona Beach. for Appellee.

ON MOTION FOR REHEARING

(PER CURIAM.) We grant the motion for rehearing and affirm based on ***Smith v. Stare, 683 So,*** 2d 577 (Fla. 5th DCA 1996). ***although we*** note ***Smirh*** conflicts with *White v.* Stare, 22 F.L.W. D485 (Fla. Feb. 21, 1997).

AFFIRMED. (COBB, SHARP, W., and GRIFFIN, JJ., concur.)

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Criminal law-Appeals--Defense counsel's objection **sufficient** to preserve for appellate **review** error in admitting **expert testimony** that child's behavior was consistent with child **who** had **been sexually** abused-Evidence-Polygraph

RICHARD **BEAULIEU**, Appellant/Cross-Appellee, v. **STATE** OF FLORIDA, Appellee/Cross-Appellant. 5th District. Case No. 95605. Opinion filed June 27, 1997. Appeal from the Circuit Court for Orange County, John H. Adams, Sr.. Judge. Counsel: William F. Jung, of Black & Jung, P.A., Tampa, for Appellant/Cross-Appellee. Robert A. Butterworth, Attorney General, Tallahassee, and Steven J. Guardiano, Sr. Assistant Attorney General. Daytona Beach, for Appellee/Cross-Appellant.

ON REMAND
MOTION FOR REHEARING
(Original Opinion at 22 Fla. L. Weekly D 1240d]

(HARRIS, J.) We grant rehearing solely to address the cross appeal filed by the State. The trial court admitted evidence of a polygraph on the basis of ***United States v. Piccinonna, 885*** F. 2d 1529 (11th Cir. 1989). Wc decline to adopt Piccinonna which conflicts with our more recent decision in *Cassamassima v. State*, 657 So. 2d 906 (Fla. 5th DCA 1995), and direct the court to follow *Cassamassima* on remand. We do not change our position on the sufficiency of Defendant's objection below.

The supreme court has remanded this case to us to determine testimony on the basis that it was not reliable" in order to preserve the issue for appeal.

We cannot help but compare the dilemma facing defense counsel below with the dilemma faced by Orr in Joseph Heller's *Catch-22:*

> There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All hc had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions . . , If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to . . . "That's some catch, that Catch-22," he [Yossarian] observed. "It's the best there is." Doc Daneeka agreed.

At the time of the trial below, we had issued our opinion in Toro *v. State,* 642 So. 2d 78, 82 (Fla. 5th DCA 1994), citing that portion of ***State v. Townsend, 635*** So. 2d 949,958 (Fla. 1994), which held:

> If relevant, a medical expert witness may testify as to whether, in the cxpcrt's opinion, the behavior of a child is consistent with the behavior of a child who has been sexually abused.

Defense counsel's dilemma, therefore. was whether to object to this type testimony in face of Toro and ***Townsend*** and have his competency questioned or to not object only to see the supreme court recede from *Townsend*[1] and have all doubt removed. The defense counsel took a middle ground.

Defense counsel objected as follows:

> MR. GOODMAN [Defense Counsel]: I think he is about to elicit an answer which would be an improper answer. She [the psychologist] can't-she can give a diagnosis, if she can. She can't testify what she believes as to whether the child has been molested. . . She can give a diagnosis, for example. stress syndrome or whatever, or any other recognized psychological diagnosis, but she can't testify about whether in her opinion the child has been molested.
>
> MR. SAVITZ: She can testify and I think the case law backs us up-she did testify that he shows signs consistent with being sexually abused.
>
> MR. GOODMAN: I don't think it says that.

We find that the admission of the profile testimony was not harmless, and under the facts of this case and under the law as it existed at the time of the trial below. we hold that the objection was sufficient to preserve the issue for appeal and reverse Beaulieu's conviction and remand to the trial court for further action consistent with the opinion of the supreme court *in Hadden v. State*, 22 Fla. L. Weekly S55 (Fla. February 6, 1997).

REVERSED and REMANDED. (SHARP, W., and ANTOON, JJ., concur:)

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[1]The supreme court has now held: "That expert testimony offered to prove the alleged victim of sexual abuse exhibits symptoms consistent with one who has been sexually abused should not be admitted." *Hadden* v. *State.* 22 Fla. L. Weekly S55, 56 (Fla. February 6, 1997).

* * *

Criminal law-Probation **revocation—Sentencing—Guidelines—Departure—Increase** in sentence more than one cell-Belated **appeal**

ROBERT WILSON, Appellant, v. **STATE** OF **FLORIDA**, Appellee. 5th District. Case No. 96-2691. Opinion filed June 27. 1997. Appeal from the Circuit Court for Volusia County, Gaylc Graziano, Judge. Counsel: Robert Wilson, Blountstown, pro se. Robert A. Butterworth, Attorney General, Tallahassee. and Roberta J. Tylke, Assistant Attorney General, Daytona Beach, for Appellee.

(THOMPSON, J.) Robert Wilson files this belated appeal to correct an improper departure sentence.' The trial court sentenced Wilson for violation of probation in two separate cases in 1991 and ordered him to serve concurrent five year departure sentences in each case Because none nf the reasons given by the