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**FILED**

IN THE SUPREME COURT OF FLORIDA

SID J. WHITE

NOV 4 1997

JOE L. MOBLEY,

Petitioner, :

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

vs.

Case No. 91,528

STATE OF FLORIDA,

Respondent. :

\_\_\_\_\_ :

DISCRETIONARY REVIEW OF DECISION OF THE  
DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Joe L. Mobley, Appellant, was charged by information on January 12, 1996, by the Office of the State Attorney, Twentieth Judicial Circuit, with dealing in stolen property, in violation of Section 812.019(1), Florida Statutes (1995); and possession of a firearm by a convicted felon, in violation of Section 790.23, Florida Statutes (1995) (Case No. 95-969CF). (VI, R18-19) These second degree felonies occurred between and including the dates of November 12, 1995, and December 15, 1995. (VI, R18-19)

Mr. Mobley was also charged by information on March 4, 1996, by the Office of the State Attorney, Twentieth Judicial Circuit, with battery on a law enforcement officer, in violation of Section 784.07, Florida Statutes (1995); and resisting an officer with violence, in violation of Section 843.01, Florida Statutes (1995) (Case No. 96-91CF). (VI, R2-3) These third degree felonies occurred on January 30, 1996. (VI, R2-3)

Additionally, Mr. Mobley was charged with violation of probation in two other cases (Case Nos. 94-786CF and 95-236CF). (VI, R 49, 52-53, 89, 92-93)

On April 23, 1996, Mr. Mobley and the state entered into a plea agreement and was sentenced, (VI, R4-6, 21-23,133-152) The plea agreement consisted of the following: the state nolle prossed the offenses of dealing in stolen property (Case No. 95-969CF) and battery on a law enforcement officer (Case No.96-91CF); Mr. Mobley entered a plea of no contest to possession of a firearm by a convicted felon (Case No. 95-969CF) and resisting an officer with

violence (Case No. 96-91CF); Mr. Mobley admitted to the violations of probation (Case Nos. 94-786CF and 95-236CF); Mr. Mobley was to be sentenced to 37.5 months in prison on the two new offenses to run concurrent with each other; Mr. Mobley was allowed to reserve the right to appeal the scoring of eighteen points for possession of a firearm on the guidelines scoresheet; and Mr. Mobley was sentenced to 15.6 months in prison on the violations of probation to run concurrent with each other as well as with the prison sentence on the new charges.

On April 24, 1996, Mr. Mobley filed a timely notice of appeal. (VI, R114-115)

On September 24, 1997, the Second District Court of Appeal issued an opinion affirming Mr. Mobley's sentence. However, the Second District Court of Appeal certified a conflict with Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996). (See Appendix) The issue certified in Mr. Mobley's case is the same issue currently pending before this Court in White v. State, 689 So. 2d 371 (Fla. 2d DCA 1997), rev. granted, 696 So. 2d 343 (Fla. 1997)

On September 30, 1997, Mr. Mobley filed his "Notice To Invoke Discretionary Jurisdiction." On October 8, 1997, this Court issued its "Order Postponing Decision On Jurisdiction And Briefing Schedule."

SUMMARY OF THE ARGUMENT

Petitioner, Joe L. Mobley, was convicted in the trial court of the offense of possession of a firearm by a convicted felon.

The trial court included eighteen points on the guidelines scoresheet for possession of a firearm. This resulted in Mr. Mobley being sentenced to an additional eighteen months in Florida State Prison.

Possession of a firearm is an essential element of the crime for which Mr. Mobley was convicted. Scoring eighteen points for possession of a firearm in this instance is a violation of the double jeopardy protections of both the United States and Florida Constitutions.

The Second District Court of Appeal affirmed the trial court, but certified a conflict between its decision and the Fourth District Court of Appeals decision in Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996).

Mr. Mobley believes that this Court should reverse the Second District Court of Appeal because the scoring of the eighteen points in his case is a violation of double jeopardy principles. In the alternative, Mr. Mobley believes that this Court should adopt the reasoning of Galloway and construe Rule 3.703 (d)(19) to be inapplicable in his case.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY ASSESSING EIGHTEEN POINTS ON THE GUIDELINES SCORESHEET FOR POSSESSION OF A FIREARM WHEN A FIREARM IS ONE OF THE ESSENTIAL ELEMENTS OF THE CRIME FOR WHICH PETITIONER WAS BEING SENTENCED?

Mr. Mobley was sentenced under the 1995 Revised Guidelines. Fla. R. Crim. P. 3.703(d)(19) **allows** the addition of eighteen points for predicate felonies involving firearms in the following language:

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)....

The offenses enumerated in Section 775.087(2)(a), Florida Statutes (1995), are the following: murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, an attempt to commit any of the aforementioned crimes, or any battery upon a law enforcement officer or firefighter.

The offense for which Mr. Mobley was convicted, possession of a firearm by a felon, is not among the enumerated felonies in Section 775.087(2)(a), Florida Statutes (1995). Nevertheless, Mr.

Mobley believes that the eighteen points should not be scored because a firearm is an essential element of the **crime** for which he was convicted. The eighteen points should not be scored in this instance because it would be a violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Florida Constitution.

In the alternative, Mr. Mobley requests that this Court follow the reasoning of the Fourth District Court of Appeal in Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996). In Galloway, the Fourth District Court of Appeal rejected the double jeopardy argument, but held that they construed Rule 3.702(d)(12) (which is identical to Rule 3.703 (d) (19)) to be inapplicable to convictions for carrying a concealed firearm and possession of a firearm by a convicted felon when the convictions were unrelated to the commission of any additional substantive offense. Galloway, 680 So. 2d at 617.

In Galloway, the Fourth District Court of Appeal placed importance on the language of Rule 3.702(d)(12) that provided assessment of the eighteen points when convicted of a felony "while having in his or her possession a firearm." (Emphasis added.) Galloway, 680 So. 2d at 617. This led the Galloway Court to rule that where the only felonies that a defendant was convicted of were offenses in which a firearm was an essential element of the crime and the defendant was not convicted of any other felonies, then the eighteen points should not be scored. The reasoning of the Galloway opinion supports Mr. Mobley's argument that the eighteen points should not have been scored in his case.

The Fifth District Court of Appeal considered this issue in Gardner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995). In Gardner, the defendant was convicted of trafficking in cocaine, possession of marijuana with intent to sell, and carrying a concealed firearm. The firearm **was** secreted in Mr. Gardner's waist band of his trousers at the time he was committing the other two crimes. Gardner, 661 So. 2d at 1275.

In Gardner, eighteen points had been assessed for possession of a firearm pursuant to Rule 3.702(d)(12). The Gardner Court rejected Mr. Gardner's argument that the eighteen points should not be scored because a firearm was an essential element of the crime of carrying a concealed firearm. The Gardner Court construed Rule 3.702(d)(12) to allow the scoring of the eighteen points because it provided that the points should be assessed when a person committed "any felony." In **Mr.** Gardner's case, "any felony" included the offenses of trafficking in cocaine and possession of marijuana with the intent to sell. (Emphasis added.) Gardner, 661 So. 2d at 1275.

Mr. Mobley believes that the Gardner Court did not address the exact issue being raised in his case. Furthermore, Mr. Mobley believes that it is implied, but not directly stated in Gardner, that if the only offenses a defendant is convicted of are felonies where a firearm is an essential element of the crimes and no other substantive offenses are involved, then the eighteen points should not be scored. Essentially, on this issue, ~~Gardner~~ and ~~Galloway~~ would appear to be in agreement.

Prior to its ruling in Mr. Mobley's case, the Second District Court of Appeal addressed a similar issue in State v. Davidson, 666 so. 2d 941 (Fla. 2d DCA 1995). Mr. Davidson had been convicted of carrying a concealed firearm. The State wanted twenty-five points scored because the firearm was a semiautomatic weapon. Davidson, 666 So. 2d at 942.

Fla. R. Crim. P. 3.702(d) (12) provides:

...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).

In Davidson, the trial judge declined to score the twenty-five points. The Second District Court of Appeal reversed the trial judge. In doing so, the Davidson Court rejected the double jeopardy argument and the argument that the scoring of the additional points **was** an improper enlargement of the sentence solely as a result of an essential element of the underlying offense; i.e., the firearm. Davidson, 666 So. 2d at 942.

Davidson can be distinguished from the issue in Mr. Mobley's case. A semiautomatic weapon or a machine gun is not per se an essential element of the crime of carrying a concealed firearm. Although a semiautomatic weapon or a machine gun is a firearm, it is a valid sentencing consideration to enhance the punishment an offense may carry due to the nature of the firearm. Machine guns and semiautomatic weapons pose a special danger to society, and

increased punishment for their possession may be valid without offending double jeopardy or other prohibitions.

However, as in Mr. Mobley's case, the enhancement of punishment for a crime such as possession of a firearm by a convicted felon because of a factor which is an essential element of the crime is improper. The scoring of the eighteen points would amount to multiple or enhanced punishment for the same offense in violation of double jeopardy protections. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which is enforceable against the State of Florida through the Fourteenth Amendment to the United States Constitution, forbids multiple punishment for the same offense. Lippman v. State, 633 So. 2d 1061 (Fla. 1994). Additionally, Article I, Section 9, of the Florida Constitution provides defendants with at least as much protection from double jeopardy as is provided by the United States Constitution. Wright v. State, 586 So. 2d 710 (Fla. 1991).

Mr. Mobley's offense, possession of a firearm by a convicted felon, requires possession of a firearm as an essential element of the crime. Double jeopardy has been found to be a bar to adjudicate a defendant guilty for possession of a firearm during commission of a felony where other counts are enhanced for use of the same firearm. Cleveland v. State, 587 So. 2d 1145 (Fla. 1991); Clarrington v. State, 636 So. 2d 860 (Fla. 3d DCA 1994).

In Gonzalez v. State, 585 So. 2d 932 (Fla. 1991), this Court held that where a firearm is an essential element of the crime for which the defendant is convicted, the sentence cannot be enhanced

because of the use of a firearm. In Gonzalez, the defendant was found guilty of third-degree murder with a firearm, a second-degree felony\* The trial judge enhanced the charge to a first-degree felony because of the use of a firearm. Gonzalez v. State, 585 So. 2d at 933. This Court reversed the trial court, relying upon the reasoning of then Judge Anstead's dissenting opinion in Gonzalez v. State, 569 So. 2d 782 at 784-85 (Fla. 4th DCA 1990). See also, Lareau v. State, 573 So. 2d 813 (Fla. 1991).

Consequently, the scoring of eighteen points on the guidelines scoresheet in Mr. Mobley's case is an error. Mr. Mobley should not have to serve an additional eighteen months in prison where his possession of a firearm is an essential element of the crime for which he was convicted. Mr. Mobley's possession of a firearm in his offense is already factored into his sentence by what degree of felony it is classified and by what offense severity ranking each offense receives (possession of a firearm by a convicted felon--second-degree felony--level five offense severity ranking). Therefore, Mr. Mobley should be given a new sentencing hearing based on a guidelines scoresheet that does not include eighteen points for possession of a firearm.

CONCLUSION

Petitioner respectfully requests that this Honorable Court reverse the trial court and the Second District Court of Appeal. Mr. Mobley's case should be remanded for a new sentencing hearing. This Court should instruct the trial court to prepare a new guidelines scoresheet without scoring the eighteen points for possession of a firearm and sentence Mr. Mobley according to the sentencing guidelines.

APPENDIX

PAGE NO.

1. Second District Court of Appeal's opinion dated September 24, 1997. Al-A3



Appellant challenges the addition of eighteen points to his scoresheet for possession of a firearm since possession of a firearm was an essential element of appellant's crime. We affirm.

Appellant entered a negotiated plea to, among other things, possession of a firearm by a convicted felon. When he entered his plea, appellant reserved the right to appeal the scoring of eighteen additional points on his scoresheet for possession of a firearm. On appeal, he maintains that eighteen months of his 37.5month term are the result of those eighteen points.

Under Florida Rule of Criminal Procedure 3.703(d)(19), eighteen points are to be assessed when the defendant is convicted of any felony other than those enumerated in subsection 775.087(2) if the felony was committed while the defendant was in possession of a firearm. Since the offense to which appellant pled, possession of a firearm by a convicted felon, is not among the offenses enumerated, the court assessed the eighteen points. Appellant argues, however, that even though this offense was not among those enumerated, there is still another reason that the points should not be scored. It is his position that since possession of a firearm is an essential element of his offense, the addition of the eighteen points would be a violation of his right not to be subjected to double jeopardy.

Since this court rejected that argument and held in White v. State, 689 So. 2d 371 (Fla. 2d DCA 1997), rev. granted, 696 So. 2d 343 (Fla. 1997), that the scoring of the eighteen points is proper under Florida Rule of Criminal Procedure 3.703(d)(19), we affirm appellant's sentence here. We also certify conflict with

Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996), as was done in White.

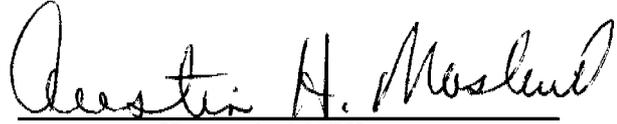
FRANK and PATERSON, JJ., Concur.

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CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ronald Napolitano, Suite 700, ~~2002~~ 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 27<sup>th</sup> day of October, 1997.

Respectfully submitted,



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