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IN THE SUPREME COURT OF FLORIDA

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GEORGE ANTHONY SCOTT,

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

Petitioner,

v.

CASE NO. 91,738

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

✓ P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
CHIEF, APPELLATE INTAKE DIVISION
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER
FLA. BAR #197890

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IN THE SUPREME COURT OF FLORIDA

GEORGE ANTHONY SCOTT, :
 :
 Petitioner, :
 :
 v. : CASE NO. 91,738
 :
 STATE OF FLORIDA, :
 :
 Respondent. :
 :
 _____ :

BRIEF OF PETITIONER ON THE MERITS

PRELIMINARY STATEMENT

Petitioner as referred to in this brief was the defendant in the trial court. The one volume record on appeal will be referred to as "R," followed by the appropriate page number in parentheses. Attached hereto as an appendix is the decision of the lower tribunal, which has been reported as Scott v. State, 22 Fla. L. Weekly D2496 (Fla. 1st DCA October 23, 1997).

STATEMENT OF THE CASE AND FACTS

By amended information filed July 29, 1995, petitioner was charged with carrying a concealed firearm (R 1-2). On August 25, 1995, petitioner entered a plea and was placed on two years probation (R 17-18; 24-31). The sentencing guidelines scoresheet scored 18 points for a firearm (R 19-21).

On March 1, 1997, an affidavit of violation of probation was filed (R 35). At a hearing on April 21, 1997, counsel objected to the 18 points for the firearm because petitioner's crime was carrying a concealed firearm, and argued on authority of Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996), that the 18 points should be deleted (R 54-56). The prosecutor cited cases from the Second and Fifth Districts in support of the scoring (R 56-57). The court ruled the assessment of 18 points was proper (R 59).

Petitioner admitted the probation violations (R 59). Petitioner's probation was revoked, and he was adjudicated guilty and sentenced to 15 months in state prison, with credit for time served (R 41-46; 60).

On appeal, petitioner argued that the assessment of 18 points on the scoresheet was incorrect for the crime of carrying a concealed firearm. The lower tribunal affirmed, but

certified conflict. See Appendix.

On October 31, 1997, petitioner timely filed his notice of discretionary review to this Court.

SUMMARY OF THE ARGUMENT

Petitioner will argue in this brief that his sentencing guidelines scoresheet is incorrect. It scores 18 points for use of a firearm. The Fourth District has held that these points cannot be scored when the crime is carrying a concealed firearm. The Second and Fifth Districts have held to the contrary. So apparently has the lower tribunal. But the issue has been certified to this Court, has been fully briefed, and is presently pending decision.

The proper remedy is to reverse the sentence and remand for resentencing after correction of the scoresheet to delete the 18 points.

ARGUMENT

THE SENTENCING GUIDELINES SCORESHEET IS
INCORRECT, BECAUSE 18 POINTS CANNOT BE
ASSESSED FOR CARRYING A CONCEALED FIREARM.

The sentencing guidelines scoresheet in the record contains a total of 43.6 points, and calls for a 15 month state prison sentence (R 19-21). Included in that are 18 points for use of a firearm. Counsel objected to the assessment of these points. Without them, petitioner would fall into the nonstate prison category.

The trial court found the 18 points were proper. This was reversible error. The scoresheet must be corrected and the case must be remanded for resentencing.

Fla. R. Crim. P. 3.702(d)(12) provides, in pertinent part:

(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).

In Galloway, *supra*, the defendant was sentenced for carrying a concealed firearm, just like petitioner, and also

for possession of a firearm by a convicted felon, two status crimes in which the firearm was an essential element. The court 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*, 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 Second and Fifth Districts have held to the contrary. *Gardner v. State*, 661 So. 2d 1274 (Fla. 5th DCA 1995); *State v. Davidson*, 666 So. 2d 941 (Fla. 2nd DCA 1995); *Smith v. State*, 683 So. 2d 577 (Fla. 5th DCA 1996); and *White v. State*, 689 So. 2d 371 (Fla. 2nd DCA 1997), review granted, case no.

89,998 (Fla. March 10, 1997).

The lower tribunal has issued two "citation PCA" opinions in which it has apparently aligned itself with the Second and Fifth Districts. Ramirez v. State, 677 So. 2d 95 (Fla. 1st DCA 1996); and Scott v. State, *supra*.

The Fourth District has recently adhered to its Galloway position, but also certified conflict. State v. Walton, 693 So. 2d 135 (Fla. 4th DCA 1997), *review granted*, case no. 90,609 (Fla. August 20, 1997).

The proper remedy is to decide this case along with the two others currently pending review, strike the 18 points from the scoresheet, reverse the sentence and remand for resentencing after correction of the scoresheet.

CONCLUSION

Based on the foregoing arguments and authorities, petitioner requests that this Court strike the 18 points from the scoresheet, reverse the decision under review, and remand for resentencing.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



P. DOUGLAS BRINKMEYER
Assistant Public Defender
Chief, Appellate Intake
Division
Florida Bar #197890
Leon County Courthouse
Suite 401
Tallahassee, Florida 32301
(904) 488-2458

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Edward C. Hill, Jr., Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to petitioner, this 12 day of November, 1997.



P. DOUGLAS BRINKMEYER

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APPENDIX TO BRIEF OF PETITIONER ON THE MERITS

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SECOND JUDICIAL CIRCUIT

P. DOUGLAS BRINKMEYER
ASSISTANT PUBLIC DEFENDER
CHIEF, APPELLATE INTAKE DIVISION
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(904) 488-2458

ATTORNEY FOR PETITIONER
FLA. BAR #197890

22 Fla. L. Weekly D2496a

GEORGE ANTHONY SCOTT, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 97-1786. Opinion filed October 23, 1997. An appeal from Circuit Court for Wakulla County. Charles D. McClure, Judge. Counsel: Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and Edward C. Hill, Jr., Assistant Attorney General, Tallahassee, for Appellee.

(PER CURIAM.) AFFIRMED. *See White v. State*, 689 So. 2d 371 (Fla. 2d DCA 1997), *review granted*, case no. 89,998 (Fla. March 10, 1997); *Ramirez v. State*, 677 So. 2d 95 (Fla. 1st DCA 1996); *State v. Davidson*, 666 So. 2d 941 (Fla. 2d DCA 1995); *Gardner v. State*, 661 So. 2d 1274 (Fla. 5th DCA 1995).

We certify conflict with *State v. Walton*, 693 So. 2d 135 (Fla. 4th DCA 1997), *review granted*, case no. 90,609 (Fla. August 20, 1997), and *Galloway v. State*, 680 So. 2d 616 (Fla. 4th DCA 1996). (MINER, ALLEN and WEBSTER, JJ., CONCUR.)

* * *