IN THE SUPREME COURT OF FLORIDA

JIMMY WAYNE KING,

Petitioner,

vs.

Case No. 91,791

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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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

The Petitioner pleaded guilty in his best interest to charges of attaching an unassigned tag, possession of a short-barrelled shotgun, carrying a concealed firearm, possession of a firearm by a convicted felon, possession of cannabis, possession of drug paraphernalia, and possession of methamphetamine on January 7, 1997. (R35-37, 41-43) The crimes were all committed on August 20-21, 1996. (R15-21) On February 13, 1997, the court sentenced the Petitioner to time served on the misdemeanors and to ten years probation for possession of a short-barrelled shotgun and for possession of a firearm by a convicted felon, and to five years probation for carrying a concealed firearm and possession of methamphetamine. (R30-31, 35-37) The court struck 18 points from the guidelines scoresheet, leaving 49.6 points. (R24, 38-39) The score with the 18 points would have been 67.6. (R39) The plea agreement was contingent on the court's striking the 18 points, and there was no contemplated scoresheet total. (R42)

On February 19, 1997, the state filed a notice of appeal. (R47) The Second District Court of Appeal reversed, holding that the 18 points should not have been struck. State v. King, 22 Fla. L. Weekly D 2435 (Fla. October 17, 1997); Appendix A-l. The Second District Court noted conflict with the decision of the Fourth District Court of Appeal in Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996). The Second District had previously certified the conflict in White v. State, 689 So. 2d 371 (Fla. 2d DCA 1997), review granted, 696 So. 2d 343 (Fla. 1997) (Case No. 89,998), which

is currently pending before this Court. Id. Since Petitioner's plea was conditioned on the eighteen points being stricken, the Second District also held that Petitioner would be given an opportunity to withdraw his plea. Id.

The Petitioner timely filed his notice to invoke the jurisdiction of this Court on November 5, 1997.

SUMMARY OF THE ARGUMENT

The trial court was correct in striking 18 points from the Petitioner's scoresheet. Petitioner was convicted in the trial court of the offenses of possession of a short-barrelled shotgun, carrying a concealed firearm, and possession of a firearm by a convicted felon.

Possession of a firearm is an essential element of the crimes of possession of a short-barrelled shotgun, carrying a concealed firearm, and possession of a firearm by a convicted felon. 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 Constitution.

The Second District Court of Appeal reversed the trial court, but certified a conflict between its decision and the Fourth District Court of Appeal's decision in Galloway v. State, 680 So. 2d (Fla. 4th DCA 1996). The Galloway decision was decided upon its construction of Fla. R. Crim. P. Rule 3.702(d)(12). This Court should reverse the Second District Court of Appeal because the scoring of eighteen points in his case is a violation of double jeopardy principles. In the alternative, Petitioner believes that this Court should adopt the reasoning of Galloway and construe Rule 3.702(d)(12) to be inapplicable in his case.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN STRIKING 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.

In this case, Petitioner was charged with, and convicted of, three offenses involving the possession of the same firearm--possession of a short-barrelled shotgun, carrying a concealed firearm, and possession of a firearm by a convicted felon. (R15-20) The Honorable E. Randolf Bentley struck the 18 points on the scoresheet for the firearm. (T24-25) However, the plea agreement states that the striking of the 18 points became part of the plea agreement because the trial judge had informed the parties he would strike the 18 points for the firearm. (T42)

Petitioner was sentenced under the 1994 Revised Guidelines. Fla. R. Crim. P. 3.702(d)(12) 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 (1993), 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 Petitioner **was** convicted, possession of a short-barrelled shotgun, carrying **a** concealed firearm and possession of a firearm by a felon, are not among the enumerated felonies in Section 775.087(2)(a), Florida Statutes (1993). Nevertheless, the eighteen points should not be scored because a firearm is an essential element of the crimes. Scoring the eighteen points for these crimes 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, Petitioner 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 rejected the double jeopardy argument, but it construed Rule 3.702(d) (12) to be inapplicable to possessory convictions when the convictions are unrelated to the commission of any additional substantive offense. Galloway, 680 So. 2d at 617.

In Galloway, the defendant was convicted of carrying a concealed firearm and possession of a firearm by a convicted felon. The Fourth District Court of Appeal disagreed with the Second District's interpretation of the language of Rule 3.702(d)(12),

that provides for assessment of the eighteen points when a defendant is convicted of a felony "while having in his or her possession a firearm." (Emphasis added.) The Fourth District reasoned that although the addition of the points did not offend principles of double jeopardy, the plain language of the Rule requires a conviction of another substantive offense during which a defendant possesses a firearm. Galloway, 680 So. 2d at 617. The Galloway Court held 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 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 the waistband of Gardner's 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 Fifth District rejected 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." However, in 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.

Petitioner believes that the Gardner Court did not address the exact issue being raised in his case. Furthermore, Petitioner 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.

In this case, Petitioner was also convicted of the possession of methamphetamine, a third-degree felony. The state did not argue in the trial court that the points should be scored because of the drug felony. See State's brief, Appendix A-2. No evidence was presented below that Petitioner was in possession of the firearm while in possession of drugs. The state did not argue that point on appeal, nor did the appellate court hold that the drug felony was committed at the same time as the possession of the firearm.

Prior to its ruling in Petitioner's case, the Second District Court of Appeal addressed a similar issue in State v. Davidson, 666 so. 2d 941 (Fla. 2d DCA 1995). 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 Petitioner'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 could be argued that the punishment is enhanced because of the dangerous 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 Petitioner's case, the enhancement of punishment for a crime such as carrying a concealed firearm, possession of a short barrelled shotgun, or possession of a firearm by a convicted felon because of a factor which is an essential element of the crime is improper and it is not called for by the Rules. 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).

Petitioner's offenses require possession of a firearm as an essential of 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); Clarington 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 Petitioner's case is an error. His possession of a firearm in each offense is already factored into his sentence by what degree of felony it is classified and by what offense severity ranking each offense receives (e.g. possession of a firearm by a convicted felon is a second-degree felony and a level five offense severity ranking). For these reasons, Petitioner's sentence should be affirmed.

CONCLUSION

In light of the foregoing arguments and authorities, Petitioner respectfully requests that this Honorable Court reverse the decision of the Second District court and affirm Petitioner's sentence in the trial court.

APPENDIX

Fla. 1994). (SCHOONOVER, A.C.J., QUINCE and NORTHCUTT, JJ., Concur.)

* * *

Criminal law-Costs--Trial court erred in failing to assess mandatory costs, because court lacks discretion to dispense with mandatory costs--Trial court incorrectly imposed $20 mandatory costs pursuant to section 960.20 for Crimes Compensation Trust Fund, where statute had been amended to increase such mandatory costs--Discretionary cost stricken where cost was not orally pronounced at sentencing--Imposition of "other" costs stricken, where costs were not orally pronounced at sentencing and statutory authority for such costs was not indicated--On remand, state may seek reimposition of all discretionary costs provided defendant is given notice and opportunity to be heard, and written judgment is prepared to reflect statutory authority for each cost

WILLIAM OTIS JONES, Appellant, v. STATE OF FLORIDA. Appellee. 2nd District. Case No. 96-01874. Opinion filed October 17, 1997. Appeal from the Circuit Court for Highlands County; J. David Langford, Judge. Counsel: James Marion Moorman, Public Defender. Bartow, and Timothy J. Ferreri, Assistant Public Defender, Banow, for Appellant, Robert A. Butterworth, Attorney General, Tallahassee, and Dale E. Tarpley, Assistant Attorney General, Tampa, or Appellee.

PER CURIAM .) In this appeal filed pursuant to *Anders v. Calibmia, 386* U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), he appellant, William Otis Jones, challenges the revocation of iis community control, which he admittedly violated. The public lefender suggests that Jones' sentence and certain court costs be eviewed for possible error. We affirm Jones' sentence;, however, we reverse and remand with respect to the imposition of :ourt costs.

The judgment entered upon the revocation of Jones' community control orders Jones to pay $20 in costs pursuant to section)60.20, Florida Statutes; $3 pursuant to section 943.25(3); $2)ursuant to section 943.25(13); and $269.75 in "other" costs, vith no citation to statutory authority.

A trial court "has no discretion to dispense with [mandatory] osts." *Reyes v. State*, 655 So. 2d 111, 116 (Fla. 2d DCA 1995). 'hough the instant judgment properly imposes $3 in mandatory osts pursuant to section 943.25(3), Florida Statutes (1993), it ails to assess $200 in mandatory costs pursuant to section 7.3455(1) and incorrectly imposes $20 in mandatory costs pur uant to section 960.20 for the Crimes Compensation Trust 'und. The crimes here occurred on October 1, 1994. By tha ime, section 960.20 had been amended to increase the mandatoy cost for the Crimes Compensation Trust Fund to $50. *See* ; 60.20, Fla. Star, (Supp. 1992). *See also Reyes*. 655 So. 2d a 17. Since the foregoing errors are due, at least in part. to the use f an outdated judgment form. we remand for preparation of a roper written judgment reflecting all mandatory costs and the tatutory bases for such.

Further. the $2 cost imposed pursuant to section 943.25(13) is discretionary cost. which was not orally pronounced at sentencng. See *Reyes*. That cost is therefore stricken. The $269.75 in "other" costs arc likewise stricken, as those costs were not orally pronounced at sentencing and the statutory bases for such were ot otherwise indicated. *Id. See also Kirby v. State, 695 So.* 2d 89 (Fla. 2d DCA 1997). On remand, the state may seek reimposition of all discretionary costs provided that Jones is given notice nd an opportunity to bc heard, and the written judgment is otherwise prepared to reflect the statutory authority for each cost. SEE *Kirby*, 695 So. 2d at 890 (citing *Sutton v. Starr, 635 So.* 2d 1032 Fla. 2d DCA 1993)).

Affirmed in part, reversed in part, and remanded for further roceedings. (FRANK, A.C.J., THREADGILL and ALTENBERND, JJ., Concur.)

* * *

Criminal law-Sentencing-Guidelines-S&resheet-Order striking points from scoresheet for possession of firearm reversed-Where rule provides points are to be assessed for felony convictions other than those enumerated in section 775.087(3) if defendant is in possession of firearm, addition of points was Proper where offenses involved were not. among enumerated offenses-Where plea was conditioned upon points being stricken, defendant should be given opportunity to withdraw plea—Conflict certified

STATE OF FLORIDA, Appellant, v. JIMMY WAYNE KING, Appellee. 2nd District. Case No. 97-00996. Opinion filed October 17, 1997. Appeal from the Circuit Court for Polk County; E. Randolph Bentley, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, and Susan D. Dunlevy, Assistant Attorney General, Tampa, for Appellant. James Marion Moorman, Public Defender, and Cynthia J. Dodge, Assistant Public Defender, Bartow, for Appellee.

(CAMPBELL, Judge.) The state challenges the trial court order striking eighteen points from appellee's scoresheet for possession of a firearm. We reverse.

Appellec pled guilty to a seven count information which included, among other drug and motor vehicle related offenses, possession of a short-barreled shotgun, carrying a conceded firearm, and possession of a firearm by a convicted felon. On appeal, appellee maintains that the scoring of eighteen additional points for possession of a firearm would be improper since the three offenses involved the possession of the same firearm and was an essential element of his offense.

Under Florida Rule of Criminal Procedure 3.702(d)(12), eighteen points are to be assessed where the defendant is convicted of any felony other than those enumerated in subsection 775.087(2) if the defendant is in possession of a firearm. Since possession of a firearm by a convicted felon, carrying a concealed firearm, and possession of a short-barreled shotgun are not among the offenses enumerated, the addition of the eighteen points was proper. See *White* v. *State,* 689 So.2d 371 (Fla. 2d DCA 1997), *review granted,* 696 So.2d 343 (Fla. 1997).

Accordingly, appellee's sentence is reversed and remanded to the trial court so that appellee can be resentenced in accordance with the corrected scoresheet. Since appellee's plea was conditioned upon the eighteen points being stricken, on remand, appellee should be given the opportunity to withdraw his plea. We also certify conflict with *Galloway* v. *Stare,* 680 So.2d 616 (Fla. 4th DCA 1996), as was done *in White,* 689 So. 2d 371. (DANGHY, A.C.J, and LAZZARA, J., Concur.)

* * *

Criminal law—Sentencing—Guidelines—Scoresheet--Although trial court erred in striking points from scoresheet for possession of firearm, order placing defendant on probation affirmed. since addition o! points does not affect sentence—Remanded with directions to correct scoresheet by adding disputed points—Error not immaterial, even though it does not effect defendant's present sentence, because it is important that scoresheet be correct if it becomes necessary to use it in the future--Conflict certified

STATE OF FLORIDA. Appellant; v. JAMES ROBERT HANKS, Appellee. 2nd District. Case No. 97-00862. Opinion filed October 17. 1997. Appeal frotn the Circuit Court for Polk County; E. Randolph Bentley, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee. and Susan D. Dunlevy, Assistant Attorney General, Tampa, for Appellant. James Marion Moorman, Public Defender. and Cynthia J. Dodge. Assistant Public Defender, Bartow. for Appellant.

(CAMPBELL, Judge.) The state appeals the trial court order striking eighteen points from appellee's scoreshect for possession of a firearm pursuant to Florida Rule of Criminal Procedure 3.702(d)(1). Although we conclude that the eighteen points should not have been stricken under *State v. Davidson, 666 So.* 2d *941* (Fla. 2d DCA 1995), and *White v. State, 689 So.* 2d 371 (Fla. 2d DCA 1997). *review grunted,* 696 So. 2d 343 (Fla. 1997), since the addition of the points does not affect appellee's sentence, we affirm the order placing him on three years' probation. We remand this case, however, with directions to the trial court to correct the scoresheet by adding the disputed eighteen points pursuant to our holding in *Davidson, 666 So.* 2d 941, and *White*, 689 So. 2d 37 1. Because it might become necessary to use the scoresheet in the future, it is important that it be correct, and therefore, the lack of effect on appellee's present sentence does not render the error immaterial. We also certify conflict with *Galloway v. State,* 680 So. 2d 616 (Fla. 4th DCA 1996), as was

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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

STATE OF FLORIDA, Appellant, v. JIMMY WAYNE KING, Appellee.	Case No. 97-996

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR FOLK COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

This is an appeal by the State, pursuant to Florida Rule of Appellate Procedure 9.140(c)(1)(J), wherein the trial court's sentence constitutes prejudicial error. The State brought this to the trial court's attention (R 24), and thereafter the sentence was imposed adversely to the State's interest.

Appellee was charged by information (second amended information) filed *on* October 31, 1996, with attaching an unassigned license plate to a motor vehicle, in violation of Section 320.261, Florida Statutes (1995) (the information incorrectly cites the statute as Section 320.161); possession of a short-barreled shotgun, in violation of Section 790.221, Florida Statutes (1995); carrying a concealed firearm, in violation of Section 790.01, Florida Statutes (1995); possession of a firearm by a convicted felon, in violation of Section 790.23, Florida Statutes (1995); possession of cannabis, in violation of Section 893.13(6), Florida Statutes (1995); possession of drug paraphernalia, in violation of Section **893.147**(1), Florida Statutes (1995); and possession of amphetamines, in violation of Section 893.13, Florida Statutes (1995), on August 20-21, 1996 (R 15-21). On January 7, 1997, Appellee pled guilty as charged pursuant to a plea agreement with the trial court that any points included on the sentencing guidelines scoresheet for a firearm would be stricken (R 27, 41-43). Appellee came before the trial court for sentencing on February 13, 1997 (R 23).

The guidelines scoresheet prepared by the prosecutor included 18 points for a firearm, but the trial court struck those 18 points at Appellee's request and over the prosecutor's objection, and Appellee's scoresheet was recalculated (R 24-25, 38-40). The recalculation of Appellee's scoresheet reduced his total sentence points from 67.6 to 49.6 (R 39). The trial court offered Appellee a jail term followed by probation or a prison term followed by a shorter probationary period, and Appellee chose the former (R 30-33). Accordingly, in a judgment rendered on February 13, 1997, Appellee was adjudicated guilty of all 7 counts; sentenced to time served on counts 1, 5, and 6; and placed on 4 years drug offender probation followed by 6 years probation on counts 2 and 4 and 5 years probation on counts 3 and 7 with the special condition that he serve a year in jail, the probationary periods to run concurrently (R 35-37, 44-46). The State's notice of appeal was filed on February 18, 1997 (R 47).

SUMMARY OF THE ARGUMENT

The trial court erred in striking the 18 points for a firearm from Appellee's sentencing guidelines scoresheet prior to sentencing him. Rule 3.702(d)(12), Florida Rules of Criminal Procedure, coupled with the applicable statutes, requires that these points be included under circumstances such as Appellee's.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN STRIKING THE 18 POINTS FOR A FIREARM FROM APPELLEE'S SENTENCING GUIDELINES SCORESHEET.

Rule 3.702(d)(12), Florida Rules of Criminal Procedure, sets forth the rules for preparing a criminal defendant's sentencing guidelines scoresheet. Rule 3.702(d)(12) provides in pertinent part:

> 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)....

(Emphasis supplied).

Appellee pled guilty to possession of a firearm by a convicted felon. The felonies enumerated in Section 775.087(2), Florida Statutes (1995), are:

> murder; sexual battery; robbery; burglary; arson; aggravated assault; aggravated battery; kidnaping; escape; sale, manufacture, delivery, or intent to sell, manufacture, or deliver any controlled substance; aircraft piracy; aggravated child abuse; unlawful throwing, placing, or discharging of a destructive device or bomb; carjacking; home-invasion robbery; or aggravated stalking.

Two of the offenses to which Appellee pled guilty, carrying a concealed firearm and possession of a short-barreled shotgun, are felonies but are not among those enumerated in Section 775.087(2). Therefore, under the plain language of the rule, for any felony

other than those excepted in which the defendant possesses a firearm, the additional points must be assessed. Fla. R. Crim. P. 3.702(d)(12).

In State *v.* Davidson, 666 *So.* 2d 941 (Fla. 2d DCA 1995), this Court held that the additional points requirement of Rule 3.702-(d)(12) was applicable to defendants charged with carrying a concealed firearm. *Davidson* has been followed by the 5th DCA in *Smith v.* State, 683 So. 2d 577 (Fla. 5th DCA 1996), which, like the instant case, involved defendants charged with possession of a firearm by a convicted felon.

It is clear that, under the plain language of the rule and the controlling case law, the trial court erred in striking the 18 points for a firearm from Appellee's guidelines scoresheet prior to sentencing him and that the instant case must be reversed and remanded to the trial court for readdition of those 18 points to his scoresheet and resentencing based on the corrected scoresheet.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Appellant respectfully requests that this Honorable Court reverse and remand this case for readdition of the 18 points for a firearm to Appellee's sentencing guidelines scoresheet and resentencing based on the corrected scoresheet.

Respectfully submitted,

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CERTIFICATE OF SERVICE

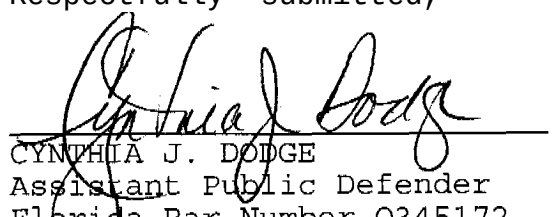
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to James Marion Moorman, Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33830, this 13th day of June, 1997.

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Susan D. Dunlevy, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 9th day of December, 1997.

Respectfully submitted,



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