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IN THE SUPREME COURT OF FLORIDA

JIMMY WAYNE KING,  
Petitioner,  
V.  
STATE OF FLORIDA,  
Respondent.

Case No. 91,791

*[Handwritten signature]*  
1991  
12-1-91

ON PETITION FOR REVIEW FROM THE SECOND DISTRICT COURT OF APPEALS  
STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case with the following additions and corrections:

Petitioner 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, Petitioner 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). Petitioner 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 Petitioner's request and over the prosecutor's objection, and Petitioner's scoresheet was recalculated (R 24-25, 38-40). The recal-

culuation of Petitioner's scoresheet reduced his total sentence points from 67.6 to 49.6 (R 39). The trial court offered Petitioner a jail term followed by probation or a prison term followed by a shorter probationary period, and Petitioner chose the former (R 30-33). Accordingly, in a judgment rendered on February 13, 1997, Petitioner 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 Petitioner's sentencing guidelines scoresheet prior to sentencing him, and the Second District Court of Appeal therefore correctly reversed Petitioner's sentence. 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 Petitioner's.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN STRIKING 18 POINTS ON PETITIONER'S SENTENCING GUIDELINES SCORESHEET FOR A FIREARM WHERE POSSESSION OF A FIREARM IS ONE OF THE ESSENTIAL ELEMENTS OF THE PERTINENT CRIMES FOR WHICH PETITIONER WAS BEING SENTENCED.

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).

In the cases at bar, Petitioner pled guilty to possession of a short-barreled shotgun, possession of a firearm by a convicted felon, and carrying a concealed firearm. 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.

The offenses in question to which Petitioner pled guilty are felonies, but none of them is one of those enumerated in Section

775.087(2). Therefore, under the plain language of the rule, for any felony in which Petitioner possessed a firearm other than those excepted felonies, the additional points were required to be assessed here. Fla. R. Crim. P. 3.702(d)(12).

In *State v. Davidson*, 666 So. 2d 941 (Fla. 2d DCA 1995), the Second District Court of Appeal held that the additional points requirement of Rule 3.702(d)(12) was applicable to defendants charged, as was Petitioner here, 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, also like the instant case, involved defendants charged with possession of a firearm by a convicted felon.

Petitioner asserts that addition of eighteen points for a firearm violates double jeopardy in that a firearm is an essential element of each offense upon which the addition of those points was based. In the alternative, Petitioner argues that this Court should apply the reasoning of the Fourth District in *Galloway v. State*, 680 so. 2d 616 (Fla. 4th DCA 1996), because here, as in *Galloway*, no additional substantive felony was committed. Respondent's position, however, is that these points were properly added by the prosecutor.

Double jeopardy does not apply here because, in order to qualify for the additional points, a defendant must commit a felony other than one of the enumerated exceptions and must have a firearm in his or her possession while doing so. Possession of a firearm

is not an element of all felonies, and the legislature is free to impose an increased penalty for crimes committed by a defendant who is carrying a firearm. This is not a separate offense, *Davidson*, nor was Petitioner subjected to multiple punishments or trials for the same offense.

This Court should likewise reject Petitioner's alternative argument that this Court should follow *Galloway*, which held that Rule 3.702(d)(12), Florida Rules of Criminal Procedure, is applicable only where the offender has been convicted of an additional substantive offense. This is not a reasonable interpretation of the legislature's intent in promulgating Rule 3.702(d)(12).

That rule plainly reads that it is the possession of a firearm while attempting to commit or committing a felony other than those enumerated in Section 775.087(2), Florida Statutes (1993), that requires inclusion of the additional points. There is no reason why this rule could not have been drafted so as to exclude carrying a concealed firearm or other possessory crimes; our legislature having failed to do this, eighteen points must be added to a defendant's score whenever that offender has committed "any felony" while in possession of a firearm. Respondent submits that the Fifth District in *Gardner v. State*, 661 So. 2d 1274 (Fla. 5th DCA 1995), was correct in holding that the language of rule 3.702(d)(12), means "any felony." Since misuse of firearms is a crucial issue in this state, it is certainly fair to interpret this provision as an intentional effort to further penalize convicted felons



who illegally possess a firearm even if the crime itself is carrying a concealed firearm. The legislature of this state has adequately put convicted felons on notice that the act of outfitting oneself with a firearm and concealing it can lead to more severe punishment.

Petitioner's contention that Davidson can be factually distinguished from this case in a meaningful fashion is incorrect. Although Davidson was charged with carrying a concealed semiautomatic firearm, rather than a revolver, the Second District did not hang its proverbial hat on that factual distinction but rather agreed with the result reached in Gardner, which did not involve a semiautomatic weapon. The critical fact was that Davidson had committed or was attempting to commit a felony, concealment of a firearm, while in possession of a firearm.

Likewise, here the gravamen of the offenses is not merely the firearm. Rather, the state had to present proof that Petitioner was a convicted felon, that the firearm in question met the statutory definition of a short-barreled shotgun, and that he was concealing the firearm. If the state had been unable to prove these elements, Petitioner's judgments could not stand.

Contrary to Petitioner's assertions, the additional points assessed pursuant to Rule 3.702(d)(12) cannot be compared to reclassification or the kind of enhancement of a *conviction* prohibited where use of a firearm is an essential element of the crime. Thus, *Gonzalez v. State*, 585 So. 2d 932 (Fla. 1991); *Cleveland v.*

*State*, 587 So. 2d 1145 (Fla. 1991); and *Clarrington v. State*, 636 so. 2d 860 (Fla. 3d DCA 1994), review denied, 648 So. 2d 721 (Fla. 1994), upon which Petitioner relies, are inapplicable here.

It is clear that, under the plain language of the rule, the trial court erred in striking the 18 points for a firearm from Petitioner's guidelines scoresheet prior to sentencing him and that the Second District correctly reversed and remanded to the trial court for readdition of those 18 points to his scoresheet, with an opportunity to withdraw his plea.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Honorable Court approve the opinion of the District Court below.

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 Cynthia J. Dodge, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33830, this 16th day of December, 1997.

  
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