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CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

PATRICIA HILTON SHIVER, :

Petitioner, :

vs. : Case No. 91,793

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

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

The State Attorney for the Tenth Judicial Circuit filed an information on December 2, 1994, charging the Petitioner, PATRICIA HILTON SHIVER, with carrying a concealed weapon, driving with a suspended license, and operating with an expired registration plate. The date of the ofenses was November 12, 1994. (R2-4) On May 11, 1995, after having pleaded no contest to the charges, the Honorable Dennis P. Maloney, sentenced the Appellant to two years probation for carrying the concealed firearm and to six months probation for driving with a suspended license. (R5-7) As agreed, the state dismissed the tag offense. The guidelines at that time allowed a nonstate prison sanction with a total score of 40.4. (R8-9)

On September 29, 1995, the Department of Corrections filed an amended affidavit of violation of probation. (R21) On November 17, 1995, the Petitioner admitted the violation and the court placed her on two years community control to be followed by three years probation. (R23)

On February 12, 1996, the state filed an information charging the Petitioner with possession of a firearm by a convicted felon and sale, delivery, or possession of a firearm with an altered serial number[1]. The date of the offenses was October 9, 1995. (R28-30) The Department then filed an affidavit of violation of community control on June 20, 1996, alleging the Petitioner was

[1] Section 790.27(2), Florida Statutes (1995), makes the crime a first-degree misdemeanor.

away from her apporved residence and that she had absconded from supervison. (R32-33)

The Petitioner entered into a negotiated plea agreement on April 12, 1996, for the new charges (possession of a firarm by a convicted felon and the sale or delivery of a firarm with an altered serial number). (R65-67) The agreement contemplated a score of less than 52 and provided for a sentence of 2 years community control and three years probation. The Petitioner would plead to the felony and the state would dismiss the misdemeanor. Id.

On December 30, 1996, the Honorable E. Randolph Bentley held a sentencing hearing on the violation and new substantive charge. At the hearing, Petitioner's counsel objected to the addition of 18 points for the firearm on both scoresheets. (R37-40) The court agreed, and struck the 18 points for the firearm. (R40) The court sentenced the Petitioner to two years community control to be followed by three years probation for the new felony and for the felony for which the court revoked community control. (R53-54) The court also gave the Petitioner credit for time served on supervision prior to the violation and imposed court costs. Id. The state then filed its notice of appeal on January 3, 1997. (R72)

By order dated October 17, 1997, the Second District Court of appeal reversed the Petitioner's sentence, holding that the trial court should not have struck the 18 points for a firearm off the Petitioner's scoresheets. State v. Shiver, 22 Fla. L. Weekly

D2437A (Fla. 2d DCA 1997);(Appendix A-1). 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 the same 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.

Petitioner then timely filed her notice to invoke the jurisdiction of this Court on November 5, 1997. (Appendix A-2)

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 carrying a concealed firearm and possession of a firearm by a convicted felon. Petitioner was not convicted of any other felony offense. Possession of a firearm is an essential element of 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. 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.

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 constued Fla. R. Crim. P. Rule 3.702(d)(12), in a way that excludes possessory crimes. In addition to the constitutional infirmity, Petitoner 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

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.

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 offenses for which Petitioner was convicted, carrying a concealed firarm 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 those crimes. Scoring the eighteen points in this case 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.

Furthermore, the reasoning of the Fourth District Court of Appeal in Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996), is correct on this issue. In Galloway, the Fourth District Court rejected the double jeopardy argument, but construed Rule 3.702(d)-(12) 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 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). The Rule 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 if the felonies for which a defendant is

convicted are offenses in which a firearm was an essential element of the crime, then the eighteen points should not be scored.

The Fifth District Court of Appeal has also 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.

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 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 offense, carrying a concealed firearm and possession of a firearm by a convicted felon, 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 (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

Criminal law—Sentencing—Guidelines—Scoresheet—Points properly added for possession of firearm where defendant was convicted of possession of firearm by convicted felon and carrying concealed firearm—Conflict certified—Error to strike firearm possession points from scoresheets

STATE OF FLORIDA, Appellant, v. PATRICIA HILTON SHIVER, Appellee. 2nd District. Case No. 97-00884. 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 for possession of a firearm from both of appellee's scoresheets, arguing that the addition of such points is proper under Florida Rule of Criminal Procedure 3.702(d)(12). We agree.

Appellee pled guilty to possession of a firearm by a convicted felon in case number 96-00597 and to violating her community control in case number 94-04939 (carrying a concealed firearm and driving with a suspended license). She received concurrent sentences in both cases of six months in jail followed by two years' community control followed by three years' probation.

Under Florida Rule of Criminal Procedure 3.702(d)(12), eighteen points are to be assessed when a defendant is convicted of any felony other than those enumerated in subsection 775.087(2), Florida Statutes (1995), while having in his or her possession a firearm. Since possession of a firearm by a convicted felon and carrying a concealed firearm are not among the offenses enumerated, the addition of the eighteen points on both of appellee's scoresheets was proper and should not have been stricken. *See White v. State*, 689 So.2d 371 (Fla. 2d DCA 1997), *review granted*, 696 So.2d 343 (Fla. 1997).

We therefore reverse and remand to the trial court so that appellee can be resentenced in accordance with the corrected scoresheets. Since appellee's plea was conditioned upon her scoring less than fifty-two points, on remand, appellee must be given the opportunity to withdraw her plea. We also certify conflict with *Galloway v. State*, 680 So.2d 616 (Fla. 4th DCA 1996), as was done in *White*, 689 So. 2d 371. (DANAHY, A.C.J., and LAZZARA, J., Concur.)

* * *

Criminal law—Evidence—Prior convictions—Nature—Trial court erroneously prohibited defendant from testifying about nature of his prior felony convictions—Where credibility was at issue and defendant wanted to testify that his prior conviction was for drug offense, not for an offense involving dishonesty or false statement, error was not harmless—New trial required where state did not meet its burden of showing error was harmless—Discovery—Trial court should have conducted *in camera* review of victim's HRS records where records may have contained information relevant to victim's credibility and ability to remember

WILLIAM SCURRY, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 95-04869. Opinion filed October 15, 1997. Appeal from the Circuit Court for Sarasota County; Harry M. Rapkin, Judge. Counsel: Susan J. Silverman, Sarasota, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and John M. Klawikofsky, Assistant Attorney General, Tampa, for Appellee.

(BLUE, Judge.) William Scurry appeals his conviction for sexual battery. He presents several issues for this court's consideration. Because the trial court erroneously prohibited Scurry from testifying about the nature of his prior felony conviction, and because such error was not harmless error, we reverse and remand for a new trial.

Scurry and a co-defendant were charged with the sexual battery of the victim. The two were tried together and Scurry's co-defendant was acquitted. Scurry testified in his own defense. He argues that the trial court erred by not allowing him to testify to the criminal charge underlying his prior felony conviction. He relies on a line of cases that involve allowing a testifying defendant "anticipatory rehabilitation." *See Lawhorne v. State*, 500 So. 2d 519 (Fla. 1986); *Ziermann v. State*, 696 So. 2d 491 (Fla. 4th DCA 1997); *Johnson v. State*, 679 So. 2d 791 (Fla. 3d DCA 1996), *review denied*, 689 So. 2d 1070 (Fla. 1997); and *Vann v. State*, 666 So. 2d 176 (Fla. 5th DCA 1995). In *Lawhorne*, the issue was whether the defendant could testify that he had entered pleas in his prior cases, rather than proceed to trial. The State argues that *Lawhorne* does not authorize testimony as to the nature of the prior felony conviction itself.

Lawhorne discusses cases that state when a witness is impeached by prior criminal convictions, he may "state the nature of the crime." 500 So. 2d at 522. "The party presenting the testimony of the witness may delve into the nature or circumstances of the convictions for the purpose of rehabilitating the witness by attempting to diminish the effect of the disclosures." 500 So. 2d at 522 (citations omitted). Scurry wanted to testify that his prior conviction was for a drug offense, not for an offense involving dishonesty or a false statement. In light of the credibility issue involved in this case, Scurry's proposed testimony was relevant. Indeed, in its closing, the State argued, "Convicted felons are not paragons of virtue either. Please consider that when you're evaluating testimony and credibility."

The burden is on the State to prove beyond a reasonable doubt that the error did not contribute to the verdict. *See State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Credibility was clearly an issue. Not only did the jury reject the victim's testimony as to the sexual battery by the co-defendant, but the prosecutor specifically argued Scurry's lack of credibility because of his status as a convicted felon. The physical evidence that connected Scurry to the offense was not clearly convincing. Therefore, the State has not met its burden of showing that the error was harmless and we are required to reverse Scurry's conviction.

We reject without discussion Scurry's remaining issues, except for the issue concerning the denial of his motion to compel the production of the victim's HRS records. In *State, Department of Health and Rehabilitative Services v. Lopez*, 604 So. 2d 2 (Fla. 4th DCA 1992), the Fourth District denied a petition for writ of certiorari to review the trial court's granting of a criminal defendant's motion for *in camera* review of a juvenile's records. The trial court had concluded that the defendant had the right to know whether the records contained information necessary to his defense.

We agree with Scurry that the court should have conducted an *in camera* review of the victim's HRS records. In fact, the attorney representing HRS offered to allow the judge to review the files. Although Scurry may have been "fishing," the records may very well contain some information relevant to the victim's credibility and ability to remember. In light of our reversal for a new trial, on remand the trial court shall conduct an *in camera* hearing of the victim's HRS records.

In conclusion, we reverse Scurry's conviction for sexual battery and remand for a new trial. (SCHOONOVER, A.C.J., and FULMER, J., Concur.)

* * *

Child support—Uniform Reciprocal Enforcement of Support Act—URESA does not prohibit but rather contemplates establishment of multiple judgments for child support—Existence of support order entered pursuant to chapter 61, Florida Statutes, could not nullify subsequent support order made pursuant to URESA, but amount of support paid pursuant to one order would be credited toward obligations of second order—Even under trial court's view that petitioner's only remedy was to seek modification, court should not have denied petition for support under URESA where all that was needed was an amendment of petition to check-off modification rather than establishment and dismissal prejudiced petitioner's efforts to demonstrate inadequacy of prior support

STATE OF FLORIDA, DEPARTMENT OF REVENUE, o/b/o COLLEEN MONAHAN-JACOBS, Appellant, v. FRANKLIN H. DOWNWARD, Appellee. 2nd District. Case No. 96-04154. Opinion filed October 15, 1997. Appeal from the Circuit Court for Pinellas County; Bonnie S. Newton, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee and Barbara A. Ard,

A-1

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

PATRICIA SHIVER, :

Defendant, Petitioner, :

vs. : Case No. 97-0884

STATE OF FLORIDA, :

Plaintiff, Respondent. :

_____ :

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

Notice is hereby given that the Petitioner, PATRICIA SHIVER, invokes the discretionary jurisdiction of the Supreme Court of Florida to review the decision of this court rendered on October 17, 1997. The decision expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Susan Dunlevy, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 5th day of November, 1997.

Respectfully submitted,

JAMES MARION MOORMAN
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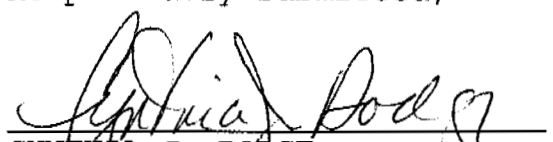
CJD/lbw

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Susan Dunlevy, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 26 day of November, 1997.

Respectfully submitted,



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