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IN THE SUPREME COURT OF FLORIDA

PATRICIA HILTON SHIVER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 91,793

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

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information in circuit court case no. 94-4939 with carrying a concealed firearm, in violation of Section 790.01, Florida Statutes (1993); driving with a suspended driver's license, in violation of Section 322.34, Florida Statutes (Supp. 1994); and operating a motor vehicle with an expired license plate, in violation of Section 320.07, Florida Statutes (1993) (R 2-4). She pled nolo contendere pursuant to a plea bargain to the charge of carrying a concealed firearm and driving while her license was suspended, and the expired license plate charge was nolle prosequied (R 10-12, 16-17). On May 11, 1995, Petitioner was adjudicated guilty and placed on probation for 2 years on count 1 and 6 months on count 2, the probationary terms to run concurrently (R 5-7).

On August 15, 1995, a warrant and affidavit of violation of probation were filed against Petitioner alleging that she had absconded from her approved residence (R 18-19). She admitted the charged violation, and her probation was modified on September 5, 1995 to add a required condition of 100 ACS hours (R 20).

On September 29, 1995, a second warrant and affidavit of probation violation were filed against Petitioner alleging 9 violations, 8 of which were criminal offenses (R 21-22). She admitted the violations and was sentenced on November 17, 1995, to 9 months in jail followed by 2 years on community control followed by 3 years probation (R 23-25).

On February 12, 1996, in circuit court case no. 96-597, Petitioner was charged by information with possession of a firearm by a convicted felon, in violation of Section 790.23, Florida Statutes (1995), and sale, delivery, or possession of a firearm with an altered serial number, in violation of Section 320.07, Florida Statutes (1995) (R 28-30).

On June 20, 1996, a third warrant and affidavit of probation violation were filed against Petitioner alleging that she had absconded from her approved residence (R 32-33).

On December 30, 1996, Petitioner pled guilty to the firearm possession charge in case no. 96-597 pursuant to a plea bargain, and the State nolle prossed the other count (R 65-67, 69). She also admitted violating her community control in case no. 94-4939 (R 68). The guidelines scoresheets presented by the State at sentencing (R 59-64) included 18 points for a firearm or destructive device, for a total of 58.4 sentence points in case no. 94-4939 and 57.5 sentence points in case no. 96-597 (R 60, 63). Petitioner challenged the inclusion of the firearm points on both scoresheets on the ground that such points should be added only when the firearm in question is not an essential element of the charged offense, noting that this issue had been raised and PCA'd in *State v. Haygood*, 681 So. 2d 286 (Fla. 2d DCA 1996) (R 38-39, 46). The prosecutor responded that PCA's have no precedential value and that this principle was particularly applicable in *Haygood* inasmuch as Haygood had less than 52 guidelines points even with 18 firearm

points included, so that his sentence would have been discretionary with the trial court in any event (R 39-41, 44). The prosecutor additionally relied on *Smith v. State*, 683 So. 2d 577 (Fla. 5th DCA 1996), arguing that it supported the State's position on the fire-arm points issue in the instant case (R 41-44).

Although agreeing with the State that PCAs do not constitute binding precedent, the trial court ruled in Petitioner's favor (R 45-46, 49), noting:

> It may be suggested, and it may be persuasive, but I've been around long enough and I know some PCAs that would -- or apparently the courts felt that was what justice required in that case, but would turn the law in its head in certain areas if they had announced a ruling based on that.
>
> However, in this particular case, I am going to strike eighteen points and maybe we'll get some law in the Second DCA at some point in time.

(R 45-46)

In case no. 94-4939, Petitioner's probation was revoked, and she was given concurrent sentences in both cases of 6 months in jail followed by 2 years community control followed by 3 years probation (R 68-71). The State filed its notice of appeal on January 3, 1997 (R 72).

The Second District reversed Petitioner's sentence in an opinion dated October 17, 1997, holding that the 18 points for a fire-arm had been properly included on her sentencing guidelines score-sheets by the prosecutor but certifying conflict with *Galloway v.*

State, 680 So. 2d 616 (Fla. 4th DCA 1996). *State v. Shiver*, 22 Fla. L. Weekly D2437 (Fla. 2d DCA Oct. 17, 1997).

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 her, 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 CRIME 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 firearm by a convicted felon and nolo contendere to 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 neither 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 in both cases involved 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 and that she 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 re-classification 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 *Clarington 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 both of Petitioner's guidelines scoresheets prior to sentencing her and that the Second District correctly reversed and remanded to the trial court for readdition of those 18 points to her scoresheets and resentencing based on the corrected scoresheets.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Honorable Court approve the decision of the Second District Court of Appeal reversing the trial court's striking of 18 points for a firearm from Petitioner's sentencing guidelines scoresheets.

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 15th day of December, 1997.

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