IN THE SUPREME COURT OF FLORIDA

JAMES ROBERT HANKS, :

Petitioner, :

vs. : Case No. 91,794

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
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On October 4,1995, the State Attorney for the Tenth Judicial Circuit Court for Polk County, Florida, filed an information charging the Appellant, JAMES ROBERT HANKS, with possession of a firearm by a convicted felon in violation of section 790.23, Florida Statutes (1995). (R1-2) Mr. Hanks pleaded guilty to the charge on pursuant to a negotiated plea agreement. (R18-20) The agreement called for a sentence of probation and did not anticipate a guidelines score as a condition of the agreement. (R19) At sentencing, Petitioner objected to the inclusion of 18 points for possession of a firearm. (R5-6) The trial court agreed and struck the points. (R6) Petitioner's guidelines scoresheet including the 18 points, is 46. (R16) The total points without the 18 points is 28. (R15-16)

The Honorable E. Randolph Bentley sentenced the Appellant to three years probation, and the state filed a notice of appeal on January 9, 1997. (R12-14, 22-23, 24)

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. Hanks, 22 Fla. L. Weekly D2435c (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 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.

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 offense of possession of a firearm by a convicted felon. Mr. Hanks 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.

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.

The Second District Court of Appeal lacked jurisdiction in this case. The state appealed the trial court's striking of 18 points from the guidelines scoresheet. However, Petitioner had entered into a negotiated plea agreement which excluded state prison. The agreement was not contingent on an anticipated guidelines range. With the addition of the 18 points, Petitioner

scored 46 points, which is less than 52 points and which allowed the court to sentence the Appellee to probation in its discretion. The state did not ask to withdraw from the plea agreement. Since Appellee's sentence is not illegal, nor is it outside the guidelines with or without the points, the state has no right of appeal.

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.

Mr. Hanks 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 Mr. Hanks was convicted, possession of a firearm by a felon, is 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 crime. Scoring the eighteen points for this crime 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, Mr. Hanks 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.

Prior to its ruling in Mr. Hanks'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 Mr. Hanks'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 Mr. Hanks'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.

ISSUE II

WHETHER THIS COURT HAS JURISDICTION OF AN APPEAL TAKEN BY THE STATE IN WHICH THE TRIAL COURT STRUCK 18 POINTS FROM THE GUIDELINES BUT OTHERWISE IMPOSED A LEGAL SENTENCE, PURSUANT TO A NEGOTIATED PLEA, WITHIN THE GUIDELINES WITH OR WITHOUT THE 18 POINTS.

In this case, Petitioner was convicted of the single offense of possession of a firearm by a convicted felon. (R12) The total points, including the 18 points, is 46. (R16) The total points without the 18 points is 28. (R15-16) The negotiated plea agreement called for probation and excluded state prison time and county jail time. (R18-19) This agreement was signed by Assistant State Attorney Joseph G. Jarret. (R19) All parties specifically agreed that the plea was not conditioned on an anticipated guidelines score. (R19) Furthermore, the state did not ask to withdraw from the agreement.

The sentence is not a guidelines departure because the trial court had the discretion to impose probation with or without the 18 points. Fla. R. Crim. P. 3.702(d)(16). Even if the trial court would have exercised its discretion to impose some prison time, the agreement did not call for prison time. The only way the points might matter would be if the Appellee were to violate his probation. At that time, the state could argue the 18 points were improperly struck. However, with the addition of 4 status points the total would still be under 52 (46 plus 4 equals 50). The state

and the trial court agreed at sentencing that because of the agreement, the issue did not make any difference. (R5-8)

Appeals taken by the state are limited in nature. State v. Fudge, 645 So. 2d 23 (Fla. 2d DCA 1994)(state's right of appeal in criminal cases depends on statutory authorization and is governed strictly by statute). The state may appeal only those sentences which are illegal or outside of the guidelines. Section 924.07, Florida Statutes (1995); Fla. R. App. P. 9.140; State v. Davis, 559 So. 2d 1279 (Fla. 2d DCA 1279). Since the alleged error in this case does not render the sentence outside of the guidelines or illegal, the state is not entitled to an appeal of this issue. For these reasons, this Court should reverse the decision of the Second District ordering a change in Petitioner's scoresheet.

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

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

* * *

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

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

ER CURIAM.) In this appeal filed pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), e appellant, William Otis Jones, challenges the revocation of s community control, which he admittedly violated. The public fender suggests that Jones' sentence and certain court costs be viewed for possible error. We affirm Jones' sentence; how-er, we reverse and remand with respect to the imposition of urt costs.

The judgment entered upon the revocation of Jones' community control orders Jones to pay $20 in costs pursuant to section 0.20, Florida Statutes; $3 pursuant to section 943.25(3); $2 rsuant to section 943.25(13); and $269.75 in "other" costs, ith no citation to statutory authority.

A trial court "has no discretion to dispense with [mandatory] sts." *Reyes v. State*, 655 So. 2d 111, 116 (Fla. 2d DCA 1995). hough the instant judgment properly imposes $3 in mandatory sts pursuant to section 943.25(3), Florida Statutes (1993), it ils to assess $200 in mandatory costs pursuant to section 3455(1) and incorrectly imposes $20 in mandatory costs pur-ant to section 960.20 for the Crimes Compensation Trust nd. The crimes here occurred on October 13, 1994. By that me, section 960.20 had been amended to increase the mandato-cost for the Crimes Compensation Trust Fund to $50. *See* 60.20, Fla. Stat. (Supp. 1992). *See also Reyes*, 655 So. 2d at 7. Since the foregoing errors are due, at least in part, to the use an outdated judgment form, we remand for preparation of a roper written judgment reflecting all mandatory costs and the atutory bases for such.

Further, the $2 cost imposed pursuant to section 943.25(13) is discretionary cost, which was not orally pronounced at sentenc-ng. *See Reyes*. That cost is therefore stricken. The $269.75 in other" costs are likewise stricken, as those costs were not oral-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 reimpo-tion of all discretionary costs provided that Jones is given notice nd an opportunity to be heard, and the written judgment is other-ise prepared to reflect the statutory authority for each cost. *See irby*, 695 So. 2d at 890 (citing *Sutton v. State*, 635 So. 2d 1032 Fla. 2d DCA 1994)).

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

* * *

Criminal law—Sentencing—Guidelines—Scoresheet—Order triking points from scoresheet for possession of firearm re-ersed—Where rule provides points are to be assessed for felony onvictions other than those enumerated in section 775.087(3) if lefendant 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.

Appellee 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 concealed 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. 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—Sentencing—Guidelines—Scoresheet—Although trial court erred in striking points from scoresheet for possession of firearm, order placing defendant on probation affirmed, since addition of 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 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 Appellant.

(CAMPBELL, Judge.) The state appeals the trial court order striking eighteen points from appellee's scoresheet 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 granted*, 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 371. 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

done in *White*, 689 So. 2d 371. (DANAHY, A.C.J., and LAZZARA, J., Concur.)

* * *

Dissolution of marriage—Attorney's fees—Where it is clear from record that husband is in a better financial position to pay attorney's fees and costs than is wife, portion of judgment requiring each party to pay own attorney's fees and costs is reversed—On remand court directed to determine what portion of a reasonable fee husband be required to pay on behalf of wife

LEONARD PALMISANO, Appellant/Cross-Appellee, v. EVELYN PALMISANO, Appellee/Cross-Appellant. 2nd District. Case No. 96-04427. Opinion filed October 17, 1997. Appeal from the Circuit Court for Lee County; James R. Thompson, Judge. Counsel: Michael C. Tice, Fort Myers, for Appellant. Karol K. Williams, Tampa, for Appellee.

(CAMPBELL, Judge.) Appellant/husband challenges the final judgment of dissolution awarding alimony to appellee/wife. We find no merit in the three issues raised by the husband on direct appeal and therefore affirm. We do, however, find merit in one of the six issues raised by the wife on cross-appeal regarding the trial court's failure to award her attorney's fees and costs. It is clear from the record that the husband is in a better financial position to pay attorney's fees and costs than is the wife. Accordingly, we reverse that portion of the judgment requiring each party to pay their own attorney's fees and costs and direct that on remand the court determine what portion of a reasonable fee the husband be required to pay on behalf of the wife. (DANAHY, A.C.J., and LAZZARA, J., Concur.)

* * *

Criminal law—Sentencing—Guidelines—Scoresheet—Trial court erred in assessing points for slight victim injury where record lacked testimony as to injury—Costs—Error to require defendant to pay for random testing for alcohol because it was a special condition of probation which was not announced at sentencing—Error to fail to announce restitution as condition of probation and to list police department as recipient of restitution—Error to require defendant to pay discretionary cost which was not announced at sentencing

LARRY R. RUDD, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 96-01694. Opinion filed October 17, 1997. Appeal from the Circuit Court for Polk County; J. Tim Strickland, Judge. Counsel: James Marion Moorman, Public Defender, and Richard P. Albertine, Jr., Assistant Public Defender, Clearwater, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Helene S. Parnes, Assistant Attorney General, Tampa, for Appellee.

(PATTERSON, Judge.) Larry Rudd appeals from his judgment and sentence for resisting arrest with violence, battery on a law enforcement officer, resisting arrest without violence and simple battery. We affirm Rudd's convictions, strike certain probation conditions and costs, and remand for resentencing with a scoresheet which does not include points for slight victim injury.

On June 30, 1995, Bartow Police Officer David Matos placed Rudd under arrest. Rudd was loud, aggressive, and uncooperative during the booking process. When Officer Matos attempted to take Rudd's fingerprints, Rudd pulled his arm away and acted as if he was going to strike the officer. Officer Matos began to grapple with Rudd, and Rudd kicked and punched the officer. With the assistance of other officers, Rudd was handcuffed and returned to a holding cell where he started banging his head against the door. Noticing that Rudd had sustained injuries to his forehead, Officer Matos requested that Rudd receive medical attention. Bartow Police Officer Chauncey accompanied Rudd to the local hospital emergency room for treatment. When Officer Chauncey attempted to hold Rudd down to make him lie still for a CAT scan, Rudd reached over and struck Officer Chauncey with his fist which prompted a struggle. With assistance from hospital personnel, Officer Chauncey managed to subdue Rudd.

As to Officer Matos, the jury found Rudd guilty of resisting arrest with violence and battery on a law enforcement officer. As to Officer Chauncey, the jury found Rudd guilty of the lesser-included offenses of resisting without violence and battery. At the sentencing hearing, defense counsel objected to the imposition of four sentencing points for slight victim injury. Counsel pointed out that neither officer testified that he had been injured in his altercation with Rudd. The trial court stated that it could "reasonably infer that being kicked and punched hurts" and, thus, the court allowed the points for slight injury.

We agree that the trial court erred in assessing points for slight victim injury because no testimony in the record supports the addition of the points to Rudd's score. *See Mincey v. State*, 468 So. 2d 473 (Fla. 4th DCA 1985). In *Mincey*, police officers testified that they had been punched or kicked while arresting the defendant; however, they did not state that they had been injured. Because testimony as to injury was lacking, the court held that no victim injury points could be scored. On the basis of *Mincey*, we remand for resentencing with a corrected scoresheet.

Rudd also correctly argues that the trial court erred in: (1) requiring him to pay for random testing for alcohol because it was a special condition of probation which was not announced at sentencing, *see Scott v. State*, 681 So. 2d 738 (Fla. 2d DCA 1996); (2) failing to announce restitution as a condition of probation and listing the police department as the recipient of restitution, *see Williams v. State*, 588 So. 2d 660 (Fla. 1st DCA 1991), and *Bain v. State*, 559 So. 2d 106 (Fla. 4th DCA 1990); and (3) requiring Rudd to pay a fine under section 775.083, Florida Statutes (1993), a discretionary cost which was not announced at sentencing. *See Reyes v. State*, 655 So. 2d 111 (Fla. 2d DCA 1995).

We find no merit to Rudd's remaining points on appeal. Accordingly, we affirm Rudd's convictions, strike certain conditions of probation, and remand for resentencing with a corrected scoresheet.

Affirmed in part, reversed in part, and remanded. (PARKER, C.J., and FULMER, J., Concur.)

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Criminal law—Sentencing—Guidelines—Departure—Trial judge erred in imposing departure sentence without entering written order of departure—Remand for resentencing within guidelines

FLOYD LaFOUNTAIN, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 95-02528. Opinion filed October 15, 1997. Appeal from the Circuit Court for Hillsborough County; Susan Sexton, Judge. Counsel: James H. Harris, Tampa, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Ann Pfeiffer Corcoran, Assistant Attorney General, Tampa, for Appellee.

(BLUE, Acting Chief Judge.) Floyd LaFountain appeals his convictions and sentences for first-degree murder (count one), burglary of a dwelling with a battery committed therein while armed with a weapon (count two), and attempted robbery with a firearm (count three). We find merit only in LaFountain's issue concerning his sentences on counts two and three. Therefore, we affirm his convictions and the sentence for the first-degree murder. We reverse the guidelines departure sentences imposed on counts two and three and remand for resentencing within the guidelines.

LaFountain correctly argues that the trial judge improperly imposed departure sentences on counts two and three. The sentencing guidelines scoresheet indicated sentences of no more than 201.2 months in prison. The scoresheet was before the trial judge and discussed at the sentencing hearing. The trial judge imposed the following departure sentences: A life sentence on count two and a thirty-year sentence on count three - the maximum sentence allowed by law on each offense. Although the trial judge was aware that the sentences departed from the guidelines, she failed to enter a written order of departure. A trial judge is required to enter a written order of departure when deviating from the sentencing guidelines. *See* Fla. R. Crim. P. 3.701(d)(11). Because the trial judge failed to do so, we reverse the sentences on counts two and three and remand to the trial court for resentencing within the guidelines. *See Morris v. State*, 640 So. 2d 213, 214 (Fla. 2d DCA 1994).

Convictions affirmed; sentence on count one affirmed; sentences on counts two and three reversed and remanded for resentencing within the guidelines. (FULMER and WHATLEY, JJ., Concur.)

* * *

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 26 day of November, 1997.

Respectfully submitted,

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