

IN THE SUPREME COURT OF FLORIDA

JAMES ROBERT HANKS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 91,794

047
FILED

MD J. WHITE

DEC 18 1997

CLERK, SUPREME COURT
By _____

Chief Deputy Clerk

FILED

MD J. WHITE

DEC 18 1997

CLERK, SUPREME COURT
By _____

Chief Deputy Clerk

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

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

The plea agreement anticipated a guidelines score of less than 52 total sentence points, failing which either side was entitled to withdraw from the agreement (R 19). The trial court struck the 18 points for a firearm over the prosecutor's objection (R 8). Petitioner was sentenced on January 8, 1997 (R 12-13, 23).

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.

The Second District Court of Appeal had jurisdiction to review the instant case. The State appeal was proper because Rule 3.701(d), Florida Rules of Criminal Procedure, requires the use of an accurate sentencing guidelines scoresheet, and, if an inaccurate scoresheet is used, the resulting sentence is illegal. Moreover, even assuming arguendo that the scoresheet error in question was not reviewable by appeal, it was reviewable by common law certiorari.

ARGUMENT

ISSUE I: 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 case at bar, Petitioner 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.

The offense in question to which Petitioner pled guilty is a felony, but not 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 the instant case. 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 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.

Petitioner asserts that addition of eighteen points for a firearm violates double jeopardy in that a firearm is an essential element of the 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 possession of a firearm by a convicted felon. The legislature of this

state has adequately put convicted felons on notice that the act of outfitting oneself with a firearm 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 offense is not merely the firearm. Rather, the state had to present proof that Petitioner was a convicted felon. If the state had been unable to prove this additional element, Petitioner's judgment 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 and resentencing based on the corrected scoresheet.

ISSUE II: WHETHER THE SECOND DISTRICT COURT OF APPEAL HAD JURISDICTION OF AN APPEAL TAKEN BY THE STATE WHERE THE TRIAL COURT HAD STRICKEN THE 18 POINTS FOR A FIREARM FROM THE SENTENCING GUIDELINES SCORESHEET BUT WHERE THE SENTENCE IMPOSED WAS AUTHORIZED UNDER THE GUIDELINES BASED ON EITHER THE CORRECT OR THE INCORRECT TOTAL SCORE.

Rule 3.701(d), Florida Rules of Criminal Procedure, requires the use of an accurate sentencing guidelines scoresheet at sentencing. If an inaccurate scoresheet is used, the resulting sentence is illegal for purposes of appellate review, and the district court of appeal therefore has jurisdiction of a state appeal challenging the accuracy of the scoresheet, Rule 9.140(c)(I), Florida Rules of Appellate Procedure. Accordingly, the Second District had jurisdiction of the State's appeal in this case. As noted by the Second District in its opinion, the scoresheet error in the instant case was not immaterial inasmuch as it might become necessary to utilize this scoresheet again in the future. *State v. Hanks*, 22 Fla. L. Weekly D2435 (Fla. 2d DCA Oct. 17, 1997).


Even assuming arguendo that the scoresheet error in question was not reviewable by appeal, it was reviewable by common law certiorari. See *State v. Smith*, 586 So. 2d 1237 (Fla. 2d DCA 1991).


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 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 Cynthia J. Dodge, Assistant Public Defender, P.O. Box 9000—Drawer PD, Bartow, Florida 33830, this 15th day of December, 1997.


COUNSEL FOR RESPONDENT