IN THE SUPREME COURT OF FLORIDA

HUGO U. VELA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 91,795

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:

By way of an amended information, the State charged Petitioner, Hugo U. Vela, with carrying a concealed firearm, resisting an officer without violence, and possession of a firearm by an adjudicated delinquent, for offenses occurring on April 4, 1996. (R. 5-7.) Pursuant to a plea agreement, Petitioner entered a guilty plea to the concealed firearm and resisting arrest charges, and the State nolle prossed the possession charge.[1] (R. 24-26.)

At the sentencing hearing, Petitioner objected to the addition of eighteen points on the guidelines scoresheet for the firearm. (R. 12.) The trial court agreed to strike the points, stating: "I guess I don't have much choice after I ruled in the other case." (R. 13.) The State objected to the striking of these points. (R. 13.)

Originally, Petitioner scored 56.5 total sentence points, which would permit the trial court to impose a state prison sentence. (R. 22.) The scoresheet sentence computation for this point total works out to a permissible sentence of 21.4 minimum state prison months to 35.7 maximum state prison months. (R. 22.)

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[1]The written judgment incorrectly reflects that Petitioner entered a nolo contendere plea, and the Second District Court of Appeal directed that this be corrected on remand. **State v. Vela, 22 Fla. L. Weekly D2432 (Fla. 2d DCA Oct. 17, 1997).**

With the eighteen point deduction, Petitioner's total sentence points dropped to 38.6, which meant that the trial court could not impose a state prison sentence. (R. 22.)

Petitioner did not argue in his brief to the Second District Court of Appeal that addition of the eighteen points violates the prohibition against double jeopardy.

SUMMARY OF THE ARGUMENT

The applicable rule of procedure mandates that eighteen sentence points be added to the scoresheets of those convicted of any felony while possessing a firearm. The statute excepts only certain enumerated felonies from its operation. Since the list of enumerated felonies does not include the crime for which Petitioner was being sentenced, the trial court erred in striking the eighteen points for a possession of a firearm from Petitioner's sentencing guidelines scoresheet. Therefore, the Second District Court of Appeal correctly reversed Petitioner's sentence and remanded the case so that the scoresheet could be corrected and Petitioner could be resentenced.

ARGUMENT

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 convicted of the felony of carrying a concealed weapon. The date of the offense was April 4, 1996. The State sought to have eighteen points included on Petitioner's scoresheet pursuant to **rule 3.703(d)(19)**, which provides:

> Possession of a firearm, semiautomatic firearm, or a machine gun during the commission or attempt to commit a crime will result in additional sentence points. Eighteen sentence points are assessed if 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 firearm as defined in 790.001(6). Twenty-five sentence points are assessed if the offender is convicted of committing or attempting to commit any felony other than those enumerated in subsection 775.087(3) while having in his or her possession a semiautomatic firearm as defined in subsection 775.087(3) or a machine gun as defined in subsection 790.001(9). Only one assessment of either 18 or 25 points shall apply. [emphasis added]

Fla. R. Crim. P. 3.703(d)(19).

According to this rule, the only time the additional sentencing points are not to be added for possession of a firearm is when a defendant is convicted of one of the felonies enumerated in **Section 775.087(2)**. The felonies listed in **Section 775.087(2), Florida Statutes (1995)**, and thereby excluded from operation of **Rule 3.703(d)(19)** are:

> murder; sexual battery; robbery; burglary; arson; aggravated assault; aggravated battery; kidnapping; escape; aircraft piracy; aggravated child abuse; unlawful throwing, placing, or discharging of a destructive device or bomb; carjacking; home-invasion robbery; or aggravated stalking.

In the case at bar, Petitioner pled guilty to the felony charge of carrying a concealed firearm. The offense in question is not one of those enumerated in **Section 775.087(2)**, thus the trial court erred by striking the points from Petitioner's scoresheet, and the Second District correctly reversed and remanded the case for resentencing.

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. **Rule 3.702(d)(12)** corresponds to **Rule 3.703(d)(19)**, as it is the provision for the addition of firearm points for offenses occurring before October 1, 1995.

In **Davidson**, the district court rejected the argument that application of **Rule 3.702(d)(12)** violated double jeopardy protections or constituted an improper enhancement of the sentence based on an essential element of the underlying offense. The court explained:

> The circumstances in the instant cases are distinguishable from those in which we have reversed felony sentences stemming from a single act constituting separate firearm related crimes. [citations omitted] [The defendants'] reliance upon these cases is misplaced. They have each experienced only one conviction, arising

> from a single criminal act, condemned by only one statute, section 790.01(2). Rule 3.702(d)(12), unlike section 790.01(2), does not create a crime. Rather, the rule simply distinguishes between types of firearms and manifests nothing more than legislative recognition of the need to deter through enhanced punishment the use of semiautomatic firearms and their potential for the infliction of severe injury during the commission of criminal acts.

Davidson, 666 So. 2d at 942.

Respondent notes that Petitioner was convicted of carrying a concealed firearm, the exact charge at issue in **Davidson**. Although the instant case does not involve a semi-automatic weapon, the reasoning in **Davidson** applies since the rule does not create a separate crime, but provides an enhanced penalty for the possession of *any* firearm during the commission of those felonies not excluded by the rule.

Davidson was followed by the Fifth District Court of Appeal in **Smith v. State, 683 So. 2d 577 (Fla. 5th DCA 1996).** In **Smith**, the defendant appealed the trial court's addition of eighteen points on his scoresheet following his conviction for possession of a firearm by a convicted felon. The court held that the eighteen points were properly assessed since possession of a firearm by a convicted felon is not one of the felonies enumerated in **Section 775.087(2).** The court explained that it had decided in **Gardner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995)**, that "any felony not enumerated was subject to having the additional 18 points assessed because a handgun was involved." **Smith, 683 So. 2d at 579.**

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 the handgun at issue in the instant case, a close reading of the Second District's opinion shows that it did not rely on that factual distinction to support its conclusion, rather, the district court 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.

Petitioner argues 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.

Respondent first asserts that the double jeopardy argument is waived because it was not made to the Second District Court of Appeal. Secondly, Respondent contends that 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. The additional points do not create a separate offense, **Davidson**, nor was Petitioner subjected to multiple punishments or trials for the same offense. Moreover, the legislature is free to impose an increased penalty for crimes committed by a defendant who is carrying a firearm.

The legislature obviously knows how to exclude crimes from operation of this rule, and could have excluded concealed weapons offenses if it so intended. However, since the legislature 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.

Even if this Court were to decide that the eighteen points constituted a multiple punishment, Respondent submits that this would not be improper here since it is clearly what the legislature intended. As this Court explained in **Borges v. State, 415 So. 2d 1265 (Fla. 1982)**, the legislature itself may impose multiple punishments for an offense; it is the courts that may not impose a multiple punishment for an offense where the legislature did not so intend:

> The Double Jeopardy Clause forbids the state to seek and the courts to impose more than one punishment for a single commission of a legislatively defined offense. "But the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized." Id. at 688, 100 S.Ct. at 1436. The Double Jeopardy Clause "presents no substantive limitation on the legislature's power to prescribe multiple punishments," but rather, "seeks only to prevent courts

> either from allowing multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense." State v. Hegstrom, 401 So.2d 1343, 1345 (Fla.1981) (footnote omitted). [emphasis added]

Borges, 415 So. 2d at 1267.

This Court should likewise reject Petitioner's alternative argument that this Court should follow **Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996)**, 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 this rule, which 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 (1995)**, that requires inclusion of the additional points.

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 the crime of carrying a concealed firearm. By promulgation of this rule, the legislature of this state has adequately put citizens on notice that the act of outfitting oneself with a firearm and concealing it can lead to more severe punishment.

Contrary to Petitioner's assertions, the additional points assessed pursuant to **Rule 3.703(d)(19)** 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 **Clarington v. State, 636 So. 2d 860 (Fla. 3d DCA), review denied, 648 So. 2d 721 (Fla. 1994)**, upon which Petitioner relies, are inapplicable here.

Under the plain language of the rule, the trial court erred in striking the eighteen points for a firearm from Petitioner's guidelines scoresheet prior to sentencing him, and the Second District correctly reversed and remanded to the trial court for readdition of those eighteen points and resentencing based on the corrected scoresheet.

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 eighteen points for a firearm from Petitioner's sentencing guidelines scoresheet.

Respectfully submitted,

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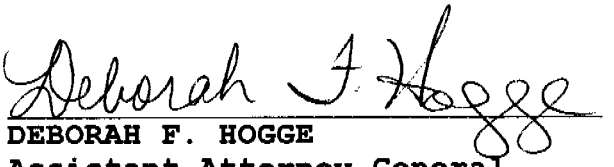

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CERTIFICATE OF SERVICE

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, on this 16th day of December, 1997.

Deborah F. Hogge

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