IN THE SUPREME COURT OF FLORIDA

ANDREW SULLIVAN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 91,850

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

CYNTHIA J. DODGE
Assistant Public Defender
FLORIDA BAR NUMBER 0345172

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

On February 13, 1997, Petitioner pleaded no contest to the charge of carrying a concealed firearm. (R4-10, 11-13, 14-16) The court, based on a negotiated plea agreement and without objection to the sentence, sentenced Petitioner to two years probation. (R12, 17) Judge Bentley ordered the 18 points struck. (R6) The scoresheet appears in the record with the 18 points for possession of a firearm pursuant to Rule 3.702(d)(19), Rules of Criminal Procedure, with a notation to strike the 18 points. (R11-12) The total points, including the 18 points, is 46.2. (R12) The total points without the 18 points is 28.2 (R11-12)

The negotiated plea agreement called for a six-month jail cap, no state prison time, and probation. (R15-16) This agreement was signed by an assistant State Attorney. (R15) All parties specifically agreed that the plea contemplated a sentencing guidelines scoresheet total of 52 or less. (R15) The state did not ask to withdraw from the agreement, but filed a notice of appeal on February 19, 1997. (R20)

By order dated November 12, 1997, the Second District Court of appeal reversed, holding that the trial court should not have struck the 18 points for a firearm off the Petitioner's scoresheet. However, since the decision did not change the sentence, the sentence was not reversed. State v. Sullivan, 22 Fla. L. Weekly D2607c (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 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 his notice to invoke the jurisdiction of this Court on November 17, 1997. (Appendix A-2)

SUMMARY OF THE ARGUMENT

I. 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 contingent on an anticipated guidelines range of 52 points. With the addition of the 18 points, Petitioner scored 46.2 points, which is less than 52 points and which allowed the court to sentence Petitioner to probation in its discretion, with or without an agreement. Furthermore, 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.

II. 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 carrying a concealed firearm. Petitioner was not convicted of any other felony offense. Possession of a firearm is an essential element of carrying a concealed firearm. 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 was decided upon its construction of Fla. R. Crim. P. Rule 3.702(d)(12). 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.

ARGUMENT

ISSUE I

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 carrying a concealed firearm. (R2-3, 15) The court, based on a negotiated plea agreement, without objection to the sentence, sentenced Petitioner to two years probation. (R12, 17) Although it made no difference in sentencing, Judge Bentley ordered the 18 points struck. (R6) The scoresheet appears in the record with the 18 points for possession of a firearm pursuant to Rule 3.702(d)(1-9), Rules of Criminal Procedure, with a notation to strike the 18 points. (R11-12) The total points, including the 18 points, is 46.2. (R12) The total points without the 18 points is 28.2 (R11-12)

The negotiated plea agreement called for a six-month jail cap, no state prison time, and probation. (R15-16) This agreement was signed by Assistant State Attorney Sheri Scarborough. (R15) All parties specifically agreed that the plea contemplated a sentencing guidelines scoresheet total of 52 or less. (R15) Even if the total were 46.2, under the agreement, the state is not entitled to withdraw. (R15-16) 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 Petitioner 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.

ISSUE II

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.

If Respondent does have a right of appeal in this case, the decision should be reversed. 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 only felony for which Petitioner was convicted, carrying a concealed firearm, 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 possessing a firearm is an essential element of that 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 was already factored into his sentence by the degree classification of the felony and by the 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

ant to Fla. R. App. P. 9.140(i) from the Circuit Court for Pinellas County; Nelly N. Khouzam, Judge.

[Original Opinion at 22 Fla. L. Weekly D2335a]

BY ORDER OF THE COURT:

Appellee having filed a motion for rehearing/clarification, upon consideration, it is ordered that the motion is granted and this court's opinion dated October 3, 1997, is hereby withdrawn and the attached opinion is substituted.

(PER CURIAM.) Affirmed. (SCHOONOVER, A.C.J., and FULMER and NORTHCUTT, JJ., Concur.)

* * *

Criminal law—Sentencing—Trial court to award defendant correct amount of credit for time served

JENICE K. PELLEGRINO, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 96-00931. Opinion filed November 12, 1997. Appeal from the Circuit Court for Hillsborough County; Barbara Fleischer, Judge. Counsel: Christopher M. Sierra of Sierra, Gustafson & Sierra, Tampa, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and William I. Munsey, Jr., Assistant Attorney General, Tampa, for Appellee.

(CAMPBELL, Judge.) Appellant argues that the trial court erred in failing to award her credit for 171 days served in county jail on one of her sentences. After a review of the record, we agree.

Appellant was sentenced in two separate cases for violating her probation. In case no. 94-11203, appellant was sentenced to 364 days in jail with credit for time served. In case no. 94-439, appellant was sentenced to five years' incarceration with credit for 159 days served in accordance with the original state credit time log filed on January 25, 1996. An amended log, however, was filed on February 22, 1996, which indicated that appellant was entitled to 171 days' credit.

We therefore affirm appellant's convictions and sentences, but remand to the trial court so that she can be given the correct amount of credit for time served. *See Newman v. State*, 575 So. 2d 724 (Fla. 2d DCA 1991). (PARKER, C.J., and THREADGILL, J., Concur.)

* * *

Name change—Denial of petition for change of name affirmed without prejudice to file petition complying with statutory requirements

RAYMOND SMITH, Appellant, v. HARRY K. SINGLETARY, JR., Appellee. 2nd District. Case No. 95-04317. Opinion filed November 12, 1997. Appeal from the Circuit Court for Hendry County; Franklin G. Baker, Judge. Counsel: Raymond Smith, pro se. Robert A. Butterworth, Attorney General, Tallahassee, and Joseph H. Lee, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) Raymond Smith challenges the trial court's order denying his petition for change of name. We affirm the court's denial of the petition without prejudice to file a petition that complies with the requirements of section 68.07, Florida Statutes (Supp. 1994). *See Barton v. Circuit Court of the Nineteenth Judicial Circuit*, 659 So. 2d 1262 (Fla. 4th DCA 1995). (BLUE, A.C.J., and FULMER, J., and MALONEY, DENNIS P., ASSOCIATE JUDGE, Concur.)

* * *

Criminal law—Sentencing—Trial court lacked discretion to delete points from sentencing scoresheet for possession of a firearm, where felony of carrying a concealed firearm was not enumerated exception to rule, even though possession of firearm was essential element of crime for which defendant was convicted—Conflict certified—Scoresheet to be corrected

STATE OF FLORIDA, Appellant, v. ANDREW SULLIVAN, Appellee. 2nd District. Case No. 97-00994. Opinion filed November 12, 1997. Appeal from the Circuit Court for Polk County; E. Randolph Bentley, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, and Jean-Jacques Darius, Assistant Attorney General, Tampa, for Appellant. James Marion Moorman, Public Defender, and Cynthia J. Dodge, Assistant Public Defender, Bartow, for Appellee.

(DANAHY, Acting Chief Judge.) The appellant, the State of Florida, challenges the trial court's sentencing order based on a scoresheet in which the trial court deleted, over the State's objection, eighteen points. The State claims the trial court had no discretion to delete these eighteen points, added pursuant to Florida Rule of Criminal Procedure 3.703(d)(19), for possession of a firearm when the appellee's only crime at sentencing was carrying a concealed firearm. We agree.

Rule 3.703(d)(19) requires that eighteen points be assessed when the defendant is convicted of any felony other than those enumerated in subsection 775.087(2) if the felony was committed while the defendant was in possession of a firearm. The appellee's conviction is for a crime that is not enumerated in section 775.087(2). The trial court should have allowed those eighteen points to be assessed even though possession of a firearm is an essential element of the crime for which the appellee was convicted. This court has previously found that the eighteen points should be assessed even though possession of a firearm is an essential element of the offense. *White v. State*, 689 So. 2d 371 (Fla. 2d DCA), *review granted*, 696 So. 2d 343 (Fla. 1997).

Although adding these eighteen points back into the scoresheet will not affect the actual sentence the appellee received, which was agreed to in a plea bargain based on a range of points on the scoresheet, the scoresheet must be corrected at this time.[1] As in *White*, we also certify conflict with *Galloway v. State*, 680 So. 2d 616 (Fla. 4th DCA 1996).

Sentence affirmed but cause remanded for correction of the scoresheet in accord with this opinion. (PATTERSON and QUINCE, JJ., Concur.)

---

[1]At sentencing the appellee received a term of probation and the scoresheet must be corrected in the event he faces a future revocation of that probation.

* * *

Criminal law—Probation—Special conditions—Requiring defendant to pay for either alcohol or drug testing is special condition of probation which must be announced at sentencing—Statute providing that defendant on supervision may be required by Department of Corrections to pay for drug urinalysis and that failure to pay may be considered a ground for revocation, supports conclusion that probation condition requiring defendant to pay for drug testing is general condition that need not be orally pronounced, although court and Florida Supreme Court have stated otherwise—Question certified: Should the requirement that a defendant pay for drug testing be treated as a general condition of probation for which notice is provided by section 948.09(6), Florida Statutes (1995), or should it be treated as a special condition that requires oral announcement?—Condition requiring defendant to waive extradition upon violation of supervision, was special condition, which is stricken where it was not orally pronounced—Court costs stricken where order of probation gives no statutory authority for imposition—Costs of prosecution stricken because trial court was without authority to impose costs absent request and documentation—Costs may be reimposed upon remand provided statutory requirements are met

TERRY L. SMITH, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 96-03383. Opinion filed November 12, 1997. Appeal from the Circuit Court for Lee County, Isaac Anderson, Jr., Judge. Counsel: James Marion Moorman, Public Defender, and A. Victoria Wiggins, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and William I. Munsey, Jr., Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) The defendant, Terry L. Smith, pleaded no contest to possession of cocaine and possession of marijuana, reserving his right to appeal the dispositive motion to suppress. We affirm the convictions without discussion, but strike certain portions of the order of probation for the possession of cocaine conviction.

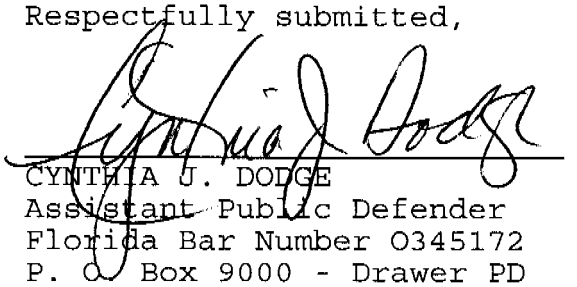
As to condition twelve dealing with drug and alcohol testing and treatment, the defendant contends that he was given no notice

A-1

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Jean-Jacques Darius, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 16 day of December, 1997.

Respectfully submitted,



JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

CYNTHIA J. DODGE
Assistant Public Defender
Florida Bar Number 0345172
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/cjd