IN THE SUPREME COURT OF FLORIDA

ANDREW SULLIVAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 91,850

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

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, was the Appellant in the district court, and the prosecution in the trial court; this brief will refer to Respondent as such, the prosecution, or the State. Petitioner was the Appellee in the district court, and Defendant in the trial court; this brief will refer to Petitioner as such, Defendant, or by proper name. The symbol "R" will refer to the record on appeal.

The issue of this case is also pending before this Court in ***Vela v. State, appeal docketed,*** No. 91,795 (Fla. 1997), and ***White v. State,*** 689 So.2d 371 (Fla. 2d DCA 1997, ***review granted,*** 696 So.2d 343 (Fla. 1997).

STATEMENT OF THE CASE AND FACTS

On 16 October 1996, the State filed an information, charging the appellee with carrying a concealed firearm. (R 2). The record indicates that on 12 December 1996, the appellee agreed to plead guilty to the charge and to receive a sentence of probation and up to six months jail, contingent upon a sentencing guideline score of less than 52 points. (R 14-16). His 13 February 1997 scoresheet shows that he scored 46.2 points; however, over the State's objection, the sentencing judge, The Honorable E. Randolph Bentley, struck the 18 points that were added because of the firearm, reducing the score to 28.2 points. (R 6, 11-12). Judge Bentley withheld adjudication and placed the appellee on probation for two years. (R 8, 17-19).

On 19 February 1997, the State filed a timely notice of appeal. (R 20). On 12 November 1997, the Second District Court of Appeal rendered an opinion remanding the case for re-addition of the eighteen points, but certified conflict with ***Galloway***[1]. ***See State v. Sullivan***, No. 97-00994, 22 Fla. L. Weekly D2607 (Fla. 2d DCA November 12,1997).

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[1]***Galloway v. State***, 680 So.2d 616 (Fla. 4th DCA 1996).

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal correctly remanded the case so that the deleted eighteen points for firearm can be re-added to the scoresheet because the applicable rule mandates that eighteen sentence points be added to the guidelines scoresheets of those convicted of any non-enumerated felony while possessing a firearm.

ARGUMENT

ISSUE PRESENTED/CERTIFIED QUESTION

DID THE DISTRICT COURT COMMIT REVERSIBLE ERROR BY REVERSING THE TRIAL COURT'S REFUSAL TO ALLOW ASSESSMENT OF EIGHTEEN POINTS ON THE PETITIONER'S GUIDELINES SCORESHEET FOR POSSESSION OF A FIREARM WHEN THE FIREARM IS AN ESSENTIAL ELEMENT OF THE CRIME FOR WHICH PETITIONER WAS BEING SENTENCED? (Restated).

Petitioner was convicted of the felony of carrying a concealed weapon. Eighteen points were added to his guidelines scoresheet for the firearm, but the trial court deleted the eighteen points in spite of the State's objection. Pursuant to the State's appeal, the Second District Court of Appeal remanded the case to allow the addition of the eighteen points.

Initially, the petitioner argues that the district court did not have jurisdiction to review the issue. This argument is without merit. The district court had jurisdiction pursuant to Fla.R.App.P. 9.140(c)(1), which authorizes the State to appeal a departure from the recommended range of the sentencing gudelines scoresheet.

Next, the petitioner argues that the addition of the eighteen points would violate his protection against double jeopardy because his possession of the firearm was an essential element of the crime of carrying a concealed weapon. 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, both the Second and Fifth District Courts have rejected the double jeopardy argument. ***State v. Davidson***, 666 Sol. 2d 941 (Fla. 2d DCA 1995): ***Gardner v. State***, 661 So. 2d 1274, 1275 (Fla. 5th DCA 1995); ***see also Galloway*** at 617 (agreeing that double jeopardy does not preclude the assessment of the points, but finding the rule inapplicable).

Assessment of the eighteen points is permissible under Fla.R.Crim.P. 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; kidnaping; 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 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 ***Coleman v. State***, No. 97-1787, 23 Fla. L. Weekly D20C (Fla. 5th DCA December 19, 1997) and ***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 is 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.

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. 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 multiple convictions or reclassification of a *conviction* for the same prohibited use of a firearm. 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. Moreover, in ***M.P. v. State***, 682 So.2d 79(Fla. 1996), this Court held that adjudication for both carrying concealed weapon and possession of firearm, in connection with same weapon and same incident, did not violate

double jeopardy. See also ***Davidson*** at 942 (distinguishing the ***Cleveland*** case).

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 remanded the case to the trial court for re-addition of those eighteen points.

CONCLUSION

Based on the foregoing facts and argument, Respondent respectfully requests this Honorable Court approve the decision of the Second District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF ON THE MERITS** 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 5th day of January, 1997.

COUNSEL FOR RESPONDENT