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IN THE SUPREME COURT OF FLORIDA

ALVIN JAMES COLEMAN,)
)
 Petitioner/Appellant,)
)
 versus)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

S.C.T. CASE NO. 92,134

DCA CASE NO. 97-1787

**ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL**

MERIT BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner, Alvin Coleman, was charged by information with two drug offenses and possession of a firearm by a convicted felon (R19-21). Petitioner entered a nolo contendere plea to the firearm charge, and the State agreed to recommend two years community control followed by one year probation, with drug and alcohol treatment (R34-35). The drug charges were dropped.

At the plea and sentencing hearing in the Circuit Court for Orange County, Petitioner reserved the right to appeal the scoring of 18 points for the use of a firearm (R2-4). Petitioner's recommended sentence was 26.925-43.875 months imprisonment (R42). The parties stipulated to a downward departure (R4) and Petitioner was sentenced as contemplated in the plea agreement (R44-50).

Petitioner appealed to the Fifth District Court of Appeal. The Fifth DCA relied on its own opinions in Gardner v. State, 661 So.2d 1274 (Fla. 5th DCA 1995) and State v. Scott, 692 So.2d 234 (Fla. 5th DCA 1997), and the Second DCA opinion in White v. State, 689 So.2d 371, (Fla. 2d DCA 1997), and affirmed the sentence. The Court certified conflict with the Fourth District case of Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996). This appeal follows.

SUMMARY OF THE ARGUMENT

Petitioner argues that in the conflict between the Fifth and Second Districts on one hand and the Fourth District on the other, the more reasonable view is that adopted by the Fourth in Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996). Galloway held that scoring enhancement points for possession of a firearm pursuant to Fla. R. Crim. P. 3.702 (d)(12) is error when the possession charge is the only crime with which the defendant was charged. Such is the case here. No crime Appellant committed was made more dangerous by the use of a gun. There was no reasonable basis for enhancement. This Court should vacate Appellant's sentence and remand for correction of the scoresheet.

POINT

THE FIFTH DISTRICT COURT ERRED BY
AFFIRMING ENHANCEMENT OF
PETITIONER'S SENTENCE BY EIGHTEEN
POINTS, WHEN PETITIONER'S ONLY CRIME
WAS POSSESSION OF A FIREARM BY A
CONVICTED FELON.

In this case the only crime Petitioner was charged with was possession of a firearm by a convicted felon. The cocaine offenses took place eight days prior to the firearm crime (R19-21). Florida Rule of Criminal Procedure 3.703(d)(19) calls for eighteen points to be added to a defendant's scoresheet when the defendant possesses a firearm while committing or attempting to commit a crime. The prior rule was 3.702(d)(12) which was identical. Appellant was not committing or attempting to commit a crime while he possessed the firearm.

The Fourth District has held that the enhancement should not occur when the firearm crime takes place when no other crime is charged or is being attempted, Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996), State v. Walton, 693 So.2d 135 (Fla. 4th DCA 1997) and Aguilar v. State, 22 Fla. L. Weekly D2205 (Fla. 4th DCA September 17, 1997).

The basis for the holdings of the Fourth DCA is obvious. The Rule was meant to enhance sentencing when a defendant uses a firearm to commit a crime. If the defendant's only crime is possession of the firearm, no enhancement is called for.

The Fifth District Court cases on this issue, such as Gardner v. State, 661 So.2d 1274 (Fla. 5th. DCA 1995) and Smith v. State, 683 So.2d 577 (Fla. 5th DCA 1996) involved defendant's who were charged with firearms offenses and other criminal charges. Those cases are thus distinguishable from Galloway. One Fifth District case on this issue is now before

this Court, Scott v. State, review pending Case Number 90,558.

The Second District has ruled that enhancement does not violate double jeopardy, in State v. Davidson, 666 So.2d 941 (Fla. 2d DCA 1995), White v. State, 689 So.2d 371 (Fla. 2d DCA 1997). This could be true, but it doesn't deal with the fact that the language of Rule 3.703(d)(19) excludes enhancements in cases like this because the defendant was not using a gun to commit a crime. In fact, all of these cases may be read as not being in conflict, but as looking at 3.703 (d)(19) from different angles.

It should perhaps be noted here that Petitioner's sentence was a downward departure, and Petitioner did not receive prison time. The error here was still harmful because, should Petitioner violate probation, the improper points will increase his sentence.

This Court must order that eighteen points be removed from Petitioner's guideline scoresheet.

CONCLUSION

BASED UPON the argument and authorities contained herein, Petitioner respectfully requests that this Honorable Court remand this cause and order the trial judge to remove 18 points from Petitioner's sentencing guidelines scoresheet.

Respectfully submitted,

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal, and mailed to Alvin James Coleman, 1522 Mafle Butler Avenue, Orlando, Florida 32805, on this 3rd day of February, 1998.

Kenneth Witts

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

ALVIN JAMES COLEMAN,)	
)	
Appellant/Petitioner,)	
)	
vs.)	S.CT. CASE NO. 92,134
)	
STATE OF FLORIDA,)	DCA CASE NO. 97-1787
)	
Respondent.)	
_____)	

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JULY TERM 1997

97-629
K

ALVIN COLEMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL THE TIME EXPIRES
TO FILE REHEARING MOTION, AND,
IF FILED, DISPOSED OF.

CASE NO. 97-1787

Opinion filed December 19, 1997

Appeal from the Circuit Court
for Orange County,
Dorothy J. Russell, Judge.

James B. Gibson, Public Defender,
and Kenneth Witts, Assistant Public
Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and Robin A.
Compton, Assistant Attorney General,
Daytona Beach, for Appellee.

DAUKSCH, J.

Appellant was convicted of possession of a firearm by a convicted felon. He says he should not be assessed firearm points for sentencing, presumably because the possession of the weapon is inherent in the charge and to assess additional points is unjust. Interestingly, appellant was given the mercy of a downward departure sentence which nearly renders his point moot. However, because he will be on probation, and may violate it, he could become subject to an enhancement on account of the firearm

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possession. Given his demonstrated attitude, it is perhaps true the judge would sentence heavily if he violates the terms of his probation, so the point is not moot.

The court has ruled on the point appealed in Gardner v. State, 661 So.2d 1274 (Fla. 5th DCA 1995) and State v. Scott, 692 So.2d 234 (Fla. 5th DCA 1997). The Second District Court of Appeal ruled similarly in White v. State, 689 So.2d 371 (Fla. 2d DCA 1997). The Fourth District Court of Appeal ruled differently in Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996) and the issue is now in our supreme court, so say the parties here, in Scott. We certify the conflict.

AFFIRMED.

HARRIS and ANTOON, JJ., concur.