IN THE SUPREME COURT OF FLORIDA



JOHN D. FERRY,

Petitioner,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO.: 92,135

# AMENDED PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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## STATEMENT OF THE CASE AND FACTS

After having been observed with an open container containing alcohol on Christmas Day, 1996, the Petitioner, John D. Ferry, was arrested and charged with carrying a concealed firearm. (R II, 18) The unloaded .38 caliber firearm was in the Petitioner's right hand pants pocket, while the ammunition for the firearm was in Petitioner's left hand pants pocket. (R III, 22-23) On January 13, 1997, an information was filed charging the Petitioner with carrying a concealed weapon, in violation of Florida Statute §790.01(2), and possession of a firearm by a convicted felon, in violation of Florida Statute §790.23, based upon Ferry's felony conviction in December, 1991 for possession of cocaine. (R III, 26)

On March 27, 1997, Judge Reginald K. Whitehead heard Petitioner's motions to amend his scoresheet by removal of the eighteen enhancement points assessed for possession of a firearm, pursuant to Fla. R. Crim. P. 3.703(d)(19), and to withdraw and re-enter his plea,

prior to sentencing. (R I, 9-20; R II, 1-8; R III, 32-33) The Petitioner's motion to correct his scoresheet was denied, and his right to appeal that ruling was expressly reserved by his "no contest" plea to count two of the charges, possession of a firearm by a convicted felon. (R I, 6-7; R II, 14, 19-20) The state nolle prossed the first count, carrying a concealed weapon. (R II, 16; R III, 32, 44) The Petitioner was adjudicated guilty, and sentenced to twenty-four months in the Department of Corrections with credit for time served. (R II, 20; R III, 34, 39, 46-47) On appeal to the Fifth District Court of Appeal, the Petitioner argued that his status-based, firearm possession offense was not among the violent crimes contemplated by Florida Statute Section 775.087 (2) (1995)-- either expressly, or by omission. The State argued that the Fifth District Court of Appeal should continue to follow its earlier decisions on the issue. In a decision issued on November 21, 1997, the Fifth District certified its conflict with the Fourth District Court of Appeal on the issue of whether the trial court erred in assessing enhancement points for "possession of a firearm during the commission of a crime pursuant to Florida Rule of Criminal Procedure 3.703(d)(10) [sic][1] where firearm possession is the gravamen of the only charged offense." Ferry v. State, 701 So.2d 660 (Fla.5th DCA 1997) (Appendix A). See also, Smith v. State, 683 So.2d 577 (Fla. 5th DCA 1996), (Appendix B); and also Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996) (Appendix C). A timely notice to invoke this Court's discretionary jurisdiction was filed in the Fifth District Court of Appeal on December 19, 1997. On January 9, 1998 this Honorable Court issued its order postponing jurisdiction and scheduling briefing. This appeal follows.

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[1]The opinion mistakenly references paragraph (10) instead of paragraph (19) of Fla. R. Crim. P. 3.703 (d).

## SUMMARY OF ARGUMENT

The Fifth District Court of Appeal has now joined the Second and Fourth District Courts of Appeal in certifying conflict on the issue of firearm sentencing enhancement of possessory firearm offenses. A conflict between the Fourth District Court of Appeal and the Second and Fifth District Courts of Appeal regarding applicability of firearm enhancement points to cases where firearm possession is unrelated to the commission of any additional substantive offense, had recently been certified to the Florida Supreme Court by both the Second (accord) and Fourth (contra) District Courts of Appeal.

The Petitioner argues that the better view is that propounded in Galloway, where, in a case with facts similar to the instant case, firearm enhancement points were ruled as inapplicable when the sole charged crime was firearm possession. 680 So.2d 616 (Fla. 4th DCA 1996). Assessment of enhancement points for the possession of a firearm during commission, or the attempt to commit a crime presumes some other crime beyond the mere possessory act, itself. Otherwise, the rationale of the legislature per Davidson, is not satisfied, in that the thing being deterred, i.e., *the crime* being made more dangerous, is not present. 666 So. 2d 941 (Fla. 2d DCA 1995) The error of the contrary view is evident, where, as here, the addition of firearm enhancement points to points assessed for the firearm possession, a status offense, meant the difference between a 24 month prison sentence and a non-prison sentence.

## ARGUMENT

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE ENHANCEMENT OF PETITIONER'S SENTENCE BY THE ADDITION OF EIGHTEEN POINTS FOR FIREARM POSSESSION PURSUANT TO FLA. R. CRIM. P.3.703 (d) (19), WHERE THE SOLE CRIME WAS POSSESSION OF A FIREARM BY A CONVICTED FELON.

Acknowledging Florida appellate authority on both sides of the issue of sentencing enhancement of certain crimes under various circumstances based upon firearm possession, the Petitioner submits that where the possessory offense itself is the gravamen of the crime, statutory sentencing enhancement is contrary to the legislative intent of the sentencing provisions. Where, as here, a firearm possessory offense is already statutorily enhanced from a third to a second degree felony because of a defendant's previous convicted felon status, further enhancement of punishment by characterizing the possession as "the use of a firearm in the commission of" a felony, is arguably also an excessive punishment for a status-based possessory offense. Fla. Stat. §§ 790.01 (2), 790.23 (1)(a), (2)(1996).

Florida Rule of Criminal Procedure 3.703(d)(19)[2] provides for the enhancement of sentences for crimes committed or attempted while armed:

> 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 subsection 790.001(6)...

---

[2]The number of this rule was changed in the 1996 amendments to the criminal procedure rules, but language remains unchanged from the former rule 3.702(d)(12).

Id. The Petitioner submits that the possession of a firearm by a convicted felon, is not encompassed within the felonies *committed* or *attempted* while possessing a firearm, contemplated by the legislature in passage of the Rule.

At least two views of the legislature's intended application of this provision to cases where firearm possession is the gravamen of the charged offense, have evolved in the district courts of appeal. The facts of this case, wherein the Petitioner's sole crime consisted of the firearm possession, distinguish it from all but the two cases certified as being in conflict, Smith v. State, 683 So. 2d 577 (Fla. 5th DCA 1996), and Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996).

The Smith case represented a broadening of the rule in Gardner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995). Smith, supra at 579. In Gardner, the Fifth District Court found that, with the accompanying felonies of trafficking in cocaine and possession of marijuana with intent to sell, a simultaneous conviction of carrying a concealed firearm did not, of itself, prevent the scoring of the firearm enhancement points on the same scoresheet. Building upon that result, the Smith court found that possession of a firearm by a convicted felon, as the sole predicate offense, supported assessment of the additional points. The Smith Court reasoned that possession of a firearm by a convicted felon, itself a felony not enumerated within the crimes excepted by Fla. Stat. Section 775.087 (2), justified the enhancement contemplated by the legislature. Id. Here, the Petitioner respectfully submits that the resulting proposition of law, as amplified by the facts of his case makes no logical, or legal sense. That the possession of a firearm would enhance the punishment meted out for possession of a firearm, particularly where the previous felony status of a defendant has

already reaped the steeper felony conviction, is a non sequitur to the practice of sentencing enhancement.

The Petitioner argues that the better view is reflected by Galloway v. State, supra at 616. There, the Fourth District Court of Appeal, reversed the sentence of an Appellant charged similarly to Appellant in the instant case, stating that it "construe[d] rule 3.702(d)(12) as inapplicable to convictions [for carrying a concealed weapon and possession of a firearm by a convicted felon] when unrelated to the commission of any additional substantive offense." Galloway, supra at 617. In State v. Walton, the Fourth District Court of Appeal affirmed a lower court sentence, applying their Galloway holding to the case of an Appellee who had pled "no contest" to carrying a concealed weapon, had been placed upon eighteen months probation, but for whom the twenty-five additional points corresponding to the provision of the same rule concerning semiautomatic weapons, had not been added. 693 So. 2d 135 (Fla. 4th DCA 1997).

In Walton, the Fourth District Court of Appeal certified its conflict both with the Second District Court of Appeal, based upon the ruling in State v. Davidson, and with the Fifth District Court based upon rulings in Gardner v. State, and Smith v. State. Supra. In White v. State, 689 So. 2d 371 (Fla. 2d DCA 1997), the Second District Court of Appeal certified its conflict with the Fourth District Court of Appeal in Galloway. Supra. Although factually distinguishable from the instant case in that other crimes were involved, another Fifth District Court of Appeal case, State v. Scott, 692 So.2d 234 (Fla. 5th DCA 1997) is presently pending Supreme Court review in Case No. 90,558.

Authority on both sides of this issue, across the district courts of appeal,

steadfastly maintains that whatever else it might be, sentencing enhancement for firearm possession, where the gravamen is firearm possession is not "double jeopardy." See Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996) (in holding that Fla. R. Crim. P. 3.702(d)(12), was inapplicable to convictions for carrying a concealed weapon and possession of a firearm by a convicted felon, the Fourth District Court of Appeal still "do[es] not disagree with the conclusion in Davidson and Gardner that assessing the additional scoresheet points does not offend principles of double jeopardy"). The Petitioner argues that, be that as it may, enhancement of the sentence for a firearm possession offense, by stacking extra points for firearm possession upon points for the already enhanced felony crime of firearm possession, offends all principles of fairness, toward no known public policy end. The result is a penalty disproportionate to the already enhanced felony offense of possession of a firearm by an individual, not otherwise engaged in criminal activity, based exclusively upon his prior felony offender status.

The meaning of Fla. R. Crim. Pro. 3.703(d)(19) seems plain enough, that the enhancement points will be added based upon the "possession of a firearm...during the commission or attempt to commit a crime." The "possession" is separable from the "commission" or "attempt." The term "enhancement" itself, is defined in *The American Heritage Dictionary of the English Language* as "to make greater, as in value, beauty, or reputation;...". (3d ed., 1992) The sense of this meaning depends upon the pre-existence of a separate value or property which is made greater, or **enhanced** by something else. Absent any other criminal offense or attempted criminal offense, the Petitioner maintains that the legislature never intended that firearm possession would enhance itself.

The Petitioner respectfully urges this Honorable Court to consider the arguments and rulings which support what appears to be the legislature's intended construction of the rule in question, as adopted by the Fourth District Court of Appeal in Galloway. Petitioner asks that the enhanced sentence which resulted in imposition of a prison sentence in his case, be reversed and remanded with instructions to delete the eighteen enhancement points.

## CONCLUSION

Based upon the arguments presented and the authorities cited, the undersigned Counsel requests that this Honorable Court quash the decision of the Fifth District Court of Appeals, and reverse and remand for re-sentencing under an amended scoresheet.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

ROSEMARIE FARRELL
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COUNSEL FOR APPELLANT

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Fl 32118, in his basket at the Fifth District Court of appeal, and mailed to Mr. John D. Ferry, Inmate #345980 Dorm B1-1107 Upper Hamilton Work Camp, POB 1088, Jasper, FL 32052, this 9th day of February, 1998.

ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER

JOHN D. FERRY, )
)
Petitioner, )
)
vs. ) CASE NO.: 92,135
)
STATE OF FLORIDA, )
)
Appellee. )
)

## APPENDICES

**Appendix A** -- Ferry v. State, 701 So.2d 660 (Fla.5th DCA 1997)

**Appendix B** -- Smith v. State, 683 So.2d 577 (Fla.5th DCA 1996)

**Appendix C** -- Galloway v. State, 680 So.2d 616 (Fla.4th DCA 1996)

Steven F. Lengauer and Ernest J. Myers of Meier, Lengauer, Bonner, Muszynski & Doyle, P.A., Orlando, for Petitioner, The City of Sanford.

Matthew A. Leibert, Orlando, for Respondent.

PER CURIAM.

The moving party has filed a motion to disqualify pursuant to Florida Rule of Judicial Administration 2.160. The motion meets the requirements of the rule. We therefore grant the petition for writ of prohibition.

PETITION FOR WRIT OF PROHIBITION GRANTED.

DAUKSCH, PETERSON and ANTOON, JJ., concur.


1

**John D. FERRY, Appellant,**

**v.**

**STATE of Florida, Appellee.**

**No. 97–1136.**

District Court of Appeal of Florida, Fifth District.

Nov. 21, 1997.

Appeal from the Circuit Court for Orange County; Reginald K. Whitehead, Judge.

James B. Gibson, Public Defender, and Rosemarie Farrell, Assistant Public Defender, Daytona Beach, for Appellant.

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

COBB, Judge.

The issue on appeal is whether the trial court erred in assessing 18 additional scoresheet points for possession of a firearm during the commission of a crime pursuant to Florida Rule of Criminal Procedure 3.703(d)(10) [1] where firearm possession is the gravamen of the only charged offense. We have previously decided the above issue adversely to the argument now presented by the appellant. *Smith v. State*, 683 So.2d 577 (Fla. 5th DCA 1996), *review dismissed*, 691 So.2d 1081 (Fla.1997). *Smith* is in direct conflict with *Galloway v. State*, 680 So.2d 616 (Fla. 4th DCA 1996). We therefore affirm and certify our conflict with *Galloway*.

AFFIRMED; CONFLICT CERTIFIED.

W. SHARP and HARRIS, JJ., concur.


2

**Paul R. MARCUS, Appellant,**

**v.**

**Julia SULLIVAN a/k/a Julia Phipps, Appellee.**

**No. 96–1492.**

District Court of Appeal of Florida, Third District.

Nov. 26, 1997.

Attorney sued to recover on promissory note executed by his client's former girlfriend/current wife to secure legal fees incurred by client in connection with his divorce from his prior wife. The Circuit Court, Dade County, Celeste Hardee Muir, J., entered judgment in favor of defendant, on theory that she had been induced to execute note by duress, and attorney appealed. The District Court of Appeal, Barkdull, Senior Judge, held that joint request of boyfriend

1. The number of this rule was changed in the 1996 amendments to the criminal procedure rules, but the language remains unchanged from former Rule 3.702(d)(12).

*577 683 So.2d 577

21 Fla. L. Weekly D2395

**Gregory SMITH, Appellant,**
**v.**
**STATE of Florida, Appellee.**

No. 95-1375.
District Court of Appeal of Florida,
Fifth District.
Nov. 8, 1996.
Rehearing Denied Dec. 9, 1996.

Defendant was convicted in the Circuit Court, Brevard County, Edward J. Richardson, J., of possession of firearm by convicted felon, and he appealed. The District Court of Appeal, Thompson, J., held that: (1) testimony concerning burglary involving gold-plated handgun and defendant's statements concerning other guns were relevant to prove circumstances under which defendant acquired gun; (2) probative value of such testimony far outweighed prejudicial effect; (3) fact that jury heard defendant admit in taped interview that he had been in prison, if error, was harmless; and (4) defendant was properly assessed additional 18 points on his scoresheet for possession of firearm.

Affirmed.

1. CRIMINAL LAW ⚖369.2(3.1)
110 ----
110XVII Evidence
110XVII(F) Other Offenses
110k369 Other Offenses as Evidence of Offense Charged in General
110k369.2 Evidence Relevant to Offense, Also Relating to Other Offenses in General
110k369.2(3) Particular Offenses, Prosecutions for
110k369.2(3.1) In general.
Fla.App. 5 Dist. 1996.
Testimony concerning burglary involving gold-plated handgun and defendant's statements concerning other guns were relevant to prove circumstances under which defendant acquired gun, for purposes of prosecution for possession of firearm by convicted felon; defendant's testimony, along with that of burglary victim and person who gave defendant stolen gun, was necessary for jury to understand charge pending and aided jury in evaluating second element of crime, that defendant possessed firearm after conviction. West's F.S.A. § § 90.402, 790.23.

2. CRIMINAL LAW ⚖338(7)
110 ----
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k338 Relevancy in General
110k338(7) Evidence calculated to create prejudice against or sympathy for accused.
Fla.App. 5 Dist. 1996.
Probative value of testimony concerning burglary involving gold-plated handgun and defendant's statements concerning other guns far outweighed prejudicial effect in prosecution for possession of firearm by convicted felon. West's F.S.A. §§ 90.403, 790.23.

3. CRIMINAL LAW ⚖1169.11
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.11 Evidence of other offenses.
Fla.App. 5 Dist. 1996.
Fact that jury heard defendant admit in taped interview that he had been in prison, if error, was harmless in light of stipulated evidence of defendant's prior convictions and fact that evidence of guilt was overwhelming.

4. CRIMINAL LAW ⚖1208.6(4)
110 ----
110XXVI Punishment of Crime
110k1208 Extent of Punishment in General
110k1208.6 Felony Punishments; Enhancement
110k1208.6(4) Dual use of enhancement factor.
Fla.App. 5 Dist. 1996.
Defendant was properly assessed additional 18 points on his scoresheet for possession of firearm when sentenced for possession of firearm by convicted felon. West's F.S.A. §§ 775.087(2), 790.23; West's F.S.A. RCrP Rule 3.702(d)(12).

James Gibson, Public Defender, and M.A. Lucas, Assistant Public Defender, Daytona Beach, for Appellant.

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

THOMPSON, Judge.

Gregory Smith appeals his conviction for possession of a firearm by a convicted felon. (FN1) Smith argues on appeal that the trial court erred when it allowed portions of his taped interview to be played to the jury and allowed testimony about a burglary and theft because the evidence tended to show Smith's involvement in criminal activity not related to the pending charge. Smith also argues that the trial court should not have assessed 18 additional points for possession of a firearm pursuant to Florida Rule of Criminal Procedure 3.702(d)(12) (FN2) since possessing a firearm *578 is an essential element of the offense. We affirm.

[1] The state was required to prove two elements before it could convict Smith of possession of a firearm by a convicted felon: first, Smith had been convicted of a felony and second, after the conviction he knowingly owned or possessed a firearm. The state called several witnesses to prove these elements. John Carter testified that he returned from vacation to find that his gold plated 9 millimeter semi-automatic handgun had been stolen during a burglary. Michael Aufiere testified he gave Smith a stolen 9 millimeter gold plated semi-automatic handgun. Aufiere testified that Smith knew the handgun was stolen, but Smith did not participate in the burglary or theft. Aufiere's wife testified that she saw Smith leave her home with the gun. Smith was arrested and read his rights. He waived his rights and gave the police a taped statement. In his statement, Smith admitted possessing the stolen handgun. He also said that the gun was stolen from him shortly after he acquired it from Aufiere. Smith talked about a large number of guns being available for sale from Aufiere and his associates. He also admitted involvement in cocaine transactions unrelated to the handgun.

Smith's attorney made an oral motion in limine to remove all statements from the tape about Smith's drug activities and any other crimes not charged in the information. Smith's attorney also sought to exclude testimony about the burglary and theft. The state responded that it had a copy of the tape with all references to the use and sale of cocaine redacted. However, the state argued that testimony about the burglary and theft was necessary to show the entire context in which Smith acquired the gun. The court allowed the redacted tape as presented by the state and found the testimony to be relevant and not overly prejudicial. When the tape was played to the jury, it included statements by Smith about other guns and the statement "I don't need to pay $1,500 for something that's going to send me back to prison." Smith's attorney objected and requested a mistrial because this was part of a discussion concerning drugs that should have been redacted. The trial court overruled the objection and denied the mistrial. Smith was found guilty.

[2] We hold that the testimony concerning the burglary involving the gold-plated handgun and Smith's recorded statements concerning the other guns were admissible under section 90.402, because the evidence was relevant to prove the circumstances under which Smith acquired the gun. Cases are not tried in a vacuum. The state was required to show that Smith possessed a firearm. Smith's testimony, along with the testimony of the burglary victim and Aufiere, was necessary for the jury to understand the charge pending against Smith. The evidence aided the jury in evaluating the second element of the crime the state had to prove: that Smith possessed a firearm after conviction. In this instance, the evidence about the acquisition of the gun was inseparable from or intertwined with the crime charged. *Griffin v. State,* 639 So.2d 966, 968 (Fla.1994), *cert. denied,* --- U.S. ----, 115 S.Ct. 1317, 131 L.Ed.2d 198 (1995). The state was entitled to use the evidence as long as it did not become a feature of the trial. *Id.* at 968, 970; *Denmark v. State,* 646 So.2d 754 (Fla. 2d DCA 1994). Here, the evidence did not become a feature of the trial, and its probative value outweighed the prejudicial effect. § 90.403, Fla. Stat. (1995).

[3] The defense also argues that the statement about not going back to jail was prejudicial. We fail to see how. The state and the defense stipulated that Smith was a convicted felon. Documents proving his prior convictions were admitted as evidence without objection. The fact that the jury heard Smith admit he had been in prison during the taped interview, if error, was harmless in light of the stipulated evidence of his prior convictions. *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986). Considering the testimony of Carter and Aufiere and Smith's taped statements, the evidence of Smith's guilt was overwhelming.

[4] Smith's second argument on appeal is that the trial court should not have assessed *579. an additional 18 points on his scoresheet for possession

of a firearm since possession of a firearm is an essential element of his offense. We disagree.

Florida Rule of Criminal Procedure 3.702(d)(12) provides for 18 additional points for possessing a firearm if the defendant is convicted of a felony not enumerated in section 775.087(2). Possession of a firearm by a convicted felon is not one of the enumerated felonies. In *Gardner v. State*, 661 So.2d 1274 (Fla. 5th DCA 1995), we held that the meaning of rule 3.702(d)(12) was clear and any felony not enumerated was subject to having the additional 18 points assessed because a handgun was involved. Therefore, the assessment of 18 additional points was proper. *Accord, State v. Davidson*, 666 So.2d 941, 942 (Fla. 2d DCA 1995) (holding 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 firearms and their potential for the infliction of severe injury during the commission of criminal acts); *contra Galloway v. State*, 680 So.2d 616 (Fla. 4th DCA 1996) (holding that rule 3.702(d)(12) is inapplicable to convictions for possession of a firearm by a convicted felon when unrelated to the commission of any additional substantive offense).

AFFIRMED.

SHARP, W. and GRIFFIN, JJ., concur.

FN1. § 790.23, Fla. Stat. (1993).

FN2. Florida Rule of Criminal Procedure 3.702(d)(12) reads 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 790.01(6) or a destructive device as defined in subsection 790.001(4).

*616 680 So.2d 616

21 Fla. L. Weekly D2167

**Debra GALLOWAY, Appellant,**
**v.**
**STATE of Florida, Appellee.**

No. 95-3395.
District Court of Appeal of Florida,
Fourth District.
Oct. 9, 1996.

Defendant was convicted in the Nineteenth Judicial Circuit Court, St. Lucie County, Joe Wild, J., of carrying concealed firearm and possession of firearm by convicted felon. Defendant appealed. The District Court of Appeal held that: (1) convictions did not violate double jeopardy principles, but (2) assessment of additional scoresheet points for possession of firearm was reversible error.

Conviction affirmed; sentence reversed and remanded.

1. DOUBLE JEOPARDY ⚿140
135H ----
135HV Offenses, Elements, and Issues Foreclosed
135HV(A) In General
135Hk139 Particular Offenses, Identity of
135Hk140 Weapons offenses.
Fla.App. 4 Dist. 1996.
Defendant's convictions for carrying concealed firearm and possession of firearm by convicted felon did not violate double jeopardy principles. U.S.C.A. Const.Amend. 5.

2. DOUBLE JEOPARDY ⚿30
135H ----
135HII Proceedings, Offenses, Punishments, and Persons Involved or Affected
135Hk29 Sentencing Proceedings; Cumulative Punishment
135Hk30 Enhanced offense or punishment.
Fla.App. 4 Dist. 1996.
Rule permitting assessment of additional scoresheet points where defendant is convicted of committing felony other than enumerated felonies while possessing firearm does not offend double jeopardy principles. U.S.C.A. Const.Amend. 5; West's F.S.A. RCrP Rule 3.702(d)(12).

3. WEAPONS ⚿17(8)
406 ----
406k17 Criminal Prosecutions
406k17(8) Sentence and punishment.
Fla.App. 4 Dist. 1996.
Rule permitting assessment of additional scoresheet points where defendant is convicted of committing felony other than enumerated felonies while possessing firearm was inapplicable to convictions for carrying concealed firearm and possession of firearm by convicted felon when unrelated to commission of any additional substantive offense. West's F.S.A. RCrP Rule 3.702(d)(12).

Richard L. Jorandby, Public Defender, and Margaret Good-Earnest, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Joan Fowler, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

[1] We affirm Appellant's convictions for carrying a concealed firearm and for possession of a firearm by a convicted felon. *See Skeens v. State,* 556 So.2d 1113 (Fla.1990); *Washington v. State,* 661 So.2d 1294 (Fla. 4th DCA 1995), *cause dismissed,* 669 So.2d 252 (Fla.1996); *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). We have considered *State v. Stearns,* 645 So.2d 417 (Fla.1994), in which the supreme court reversed a dual conviction, on double jeopardy grounds, for armed burglary and carrying a concealed weapon, but do not deem it applicable here. We do not read *Stearns* as proclaiming a general exception to *Blockburger,* or to the application of section 775.021(4), Florida Statutes, in all circumstances in which a firearm is an element of companion offenses, each otherwise containing an element or elements not contained in the other. We note conflict on this point with *Bell v. State,* 673 So.2d 556 (Fla. 1st DCA 1996), and *Maxwell v. State,* 666 So.2d 951 (Fla. 1st DCA), *rev. granted,* No. 87,290, 673 So.2d 30 (Fla. Apr. 11, 1996).

*617. We also affirm as to an evidentiary issue raised, regarding whether certain testimony falls under the hearsay rule, without addressing it, as its admission, if error, in any event would be harmless. *State v. DiGuilio,* 491 So.2d 1129 (Fla.1986).

[2] [3] We reverse Appellant's sentence and remand for resentencing due to scoresheet error in assessing 18 additional points for possession of a firearm. Florida Rule of Criminal Procedure 3.702(d)(12) permits assessment of these additional points where the defendant is convicted of committing a felony, other than those enumerated in subsection 775.087(2), Florida Statutes, "*while* having in his or her possession a firearm." (Emphasis added) We recognize that two districts appear to have decided this issue otherwise. *See State v. Davidson,* 666 So.2d 941 (Fla. 2d DCA 1995); *Gardner v. State,* 661 So.2d 1274, 1275 (Fla. 5th DCA 1995). We do not disagree with the conclusion in *Davidson* and *Gardner* that assessing the additional scoresheet points does not offend principles of double jeopardy. But we construe rule 3.702(d)(12) as inapplicable to convictions of these two offenses when unrelated to the commission of any additional substantive offense.

We remand for resentencing under an amended scoresheet.

GUNTHER, C.J., and STONE and PARIENTE, JJ., concur.