IN THE SUPREME COURT OF FLORIDA

JOHN D. FERRY,

Petitioner,

v.

CASE NO. 92,135
5DCA CASE NO. 97-1136

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBIN A. COMPTON
ASSISTANT ATTORNEY GENERAL
Fla. Bar #846864
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

SUMMARY OF THE ARGUMENT

The district court properly concluded that firearm points were correctly scored. Under the clear, unambiguous language of the guidelines statute, firearm points must be assessed where the defendant possessed a firearm during the commission of his offense. There is no statutory exception to this rule for offenses in which the possession of a firearm is an inherent component, and this Court should not create such an exception in the face of the clear language of the statute.

ARGUMENT

POINT ON APPEAL

THE DISTRICT COURT PROPERLY CONCLUDED THAT FIREARM POINTS WERE PROPERLY SCORED.

Petitioner argues that the district court erred in concluding that firearm points were properly scored in the instant case. Ferry v. State, 701 So.2d 660 (Fla. 5th DCA 1997). It is the State's position that the district court's decision should be approved.

Petitioner entered into a negotiated plea agreement pleading nolo contendere to possession of a firearm by a convicted felon. Petitioner specifically reserved the right to appeal the assessment of the 18 points for possession of the firearm which is the sole issue before this Court. Petitioner maintains that there is no reasonable basis for enhancement where his only crime was possession of a firearm by a convicted felon because no crime that he committed was made more dangerous by the use of a gun.

Under the sentencing guidelines, felony offenses are listed in an "Offense Severity Ranking Chart." §921.0012, Fla. Stat. (1995). Offenses range from level 1 (the least severe) to level 10 (the most severe), according to the Legislature's determination of the severity of the offense and the harm or potential harm to the public. See, Fla.R.Crim.P. 3.703(c). The new guidelines supersede prior case law conflicting with the principles and provisions of the new statute and rule. Fla.R.Crim.P. 3.703(b).

Under the sentencing guidelines, Petitioner's crime is

categorized as a level 5 offense, and assigned points according to the category. §921.0014(1), Fla. Stat. (1995). In addition to points for the offense level, the guidelines call for extra points to be scored if certain circumstances apply to the crime. For example, four extra points are scored if the defendant has committed a "legal status violation"; six extra points are scored for each violation of a release program; and most relevant to the case at bar, 18 extra points are scored if the defendant had a firearm in his possession at the time of the offense. Id. The district court held that the 18 firearm points were properly scored in this case, and it is these points which are the subject of this appeal.

Petitioner's argument that the scoring is improper where the possession of a firearm charge is the only crime charged ignores the clear, unambiguous language of the statute. Scoring for firearms is explained in the statute as follows:

> Possession of a firearm or destructive device: If the offender is convicted of committing or attempting to commit any felony other than those enumerated in s. 775.087(2) while having in his possession a firearm as defined in s. 790.001(6), an additional 18 sentence points are added to the offender's subtotal sentence points.

§921.0014(1), Fla. Stat. See also, Fla.R.Crim.P. 3.703(d)(19).

Thus, under the clear language of the statute, firearm points must be added to the scoresheet of any offender who possesses a firearm during the commission of his offense, unless that offense already carries a three-year mandatory minimum term for the

firearm, as provided in section 775.087(2). Possession of a firearm by a convicted felon is not an enumerated offense in that statute. Accordingly, Ferry's offense does not fall under the statutory exception, and firearm points were properly scored under the plain language of the statute.

Clearly, the Legislature had the knowledge and ability to create an exception to the firearm points requirement, as it did in the case of the mandatory minimum offenses. The Legislature chose not to create a second scoring exception for crimes in which possession of a firearm is an essential element,[1] and this Court should not second-guess this legislative determination or attempt to create such an exception through case law.

The creation of an inherent element exception to the scoring of firearm points is not required by the Double Jeopardy Clause. Admittedly, the end result of the Legislature's chosen scoring structure is that offenses with possession of a firearm as an essential element will always end up scoring more than just their "level" points. That points are scored on more than one line of the scoresheet, however, does not demonstrate a double jeopardy violation.

Petitioner is not being punished twice for his offense simply because it results in two numbers on his scoresheet -- any more

---

[1]In fact, the Legislature had created just such an exception for firearms in another context. The statute requiring the reclassification of offenses involving a firearm specifically excludes offenses in which the use of a firearm is an essential element. §775.087(1), Fla. Stat. (1995).

than a person who commits an offense inherently involving victim injury (such as manslaughter) is punished twice because that crime results in "level" points plus "extra" victim injury points.

The opinion of the district court follows the clear dictates of the statute. See also, e.g., Smith v. State, 683 So.2d 577 (Fla. 5th DCA 1996), rev. dismissed, 691 So.2d 1081 (Fla. 1997); State v. Davidson, 666 So.2d 941 (Fla. 2d DCA 1995); Gardner v. State, 661 So.2d 1274, 1275 (Fla. 5th DCA 1995).

While the Fourth District Court of Appeal has reached a decision contrary to the Fifth District's decision below, that court's opinion contains no reasoning and ignores the clear, unambiguous language of the statute and rule delineating the firearm points requirement. See, Galloway v. State, 680 So.2d 616, 617 (Fla. 4th DCA 1996). The rule does not contain a requirement that the firearm offense be related to the commission of an additional substantive offense, as Galloway seems to require, nor is there an exception for crimes in which possession of a firearm is an essential element.

It is a "fundamental principle of statutory construction that where the language of a statute is plain and unambiguous there is no occasion for judicial interpretation." Pardo v. State, 596 So.2d 665, 667 (Fla. 1992). The statute in the present case is clear and unambiguous, and the Legislature should be held to have meant that which it has clearly expressed.

While Petitioner may question the wisdom of the scoring for his offense, that opinion should be expressed to the Legislature,

not to this Court. See, Baker v. State, 636 So.2d 1342, 1343 (Fla. 1994)("The proper remedy for a harsh law will not be found through construction or interpretation; it rests only in amendment or repeal."); Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 454 (Fla. 1992)(Where a statue is unambiguous, courts have no power to "evade its operation by forced and unreasonable construction").

The clear and unambiguous statutory language was properly applied by the district court and the court's decision should be approved.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent requests this honorable Court affirm the decision of the district court in all respects.

Respectfully submitted,

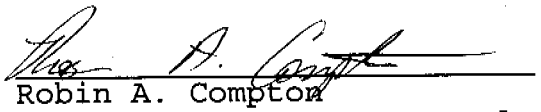
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBIN A. COMPTON
ASSISTANT ATTORNEY GENERAL
Fla. Bar #846864
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(904)238-4990

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief of Respondent has been furnished by interoffice mail/delivery to Rosemarie Farrell, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, FL, 32114-4310, this 24th day of February, 1998.



Robin A. Compton
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

JOHN D. FERRY,

Petitioner,

v.

CASE NO. 92,135
5DCA CASE NO. 97-1136

STATE OF FLORIDA,

Respondent.
_____/

APPENDIX

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBIN A. COMPTON
ASSISTANT ATTORNEY GENERAL
Fla. Bar #846864
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

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).