ORIGINAL

IN THE SUPREME COURT OF FLORIDA

JONATHAN T. FISHER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 92,502

PETITIONER'S BRIEF ON MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

M. A. LUCAS
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TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

JONATHAN T. FISHER,	)	
	)	
Petitioner/Petitioner,	)	
vs.	)	CASE NO.
	)	
STATE OF FLORIDA,	)	
	)	
Appellee/Respondent.	)	

STATEMENT OF THE CASE

A four-count second amended information was filed on January 4, 1996, charging Petitioner with the following offenses: Count I - attempted first degree murder with a firearm in violation of Sections 782.04(1)(a), 777.04 and 775.087, Florida Statutes; Count II - attempted first degree murder with a firearm in violation Sections 782.04(1)(a), 777.04 and 775.087, Florida Statutes; Count III - carrying a concealed firearm in violation of Section 790.01, Florida Statutes; Count IV possession of a firearm by a convicted felon in violation of Section 790.23, Florida Statutes. (R 37-40)

The case proceeded to trial on July 16-17, 1996, before the Honorable Theotis Bronson, Circuit Court Judge of the Ninth Judicial Circuit, in and for Orange County, Florida. (T 1-402) At the close of the State's case, defense counsel moved for judgement of acquittal on all counts. (T 234-35) The trial court

denied the motion. (T 238-240) At the conclusion of all the evidence, defense counsel renewed his motion for judgement of acquittal. The trial court denied the motion. (T 311-312) The jury found Petitioner not guilty in Counts I and II. The jury, however, found Petitioner guilty in Counts III and IV as charged. (T 397) Based on the jury verdicts, the trial court entered final judgements of acquittal on Counts I and II. (T 399)

A sentencing hearing was held on August 20, 1996, before Judge Bronson. (R 125-139) Petitioner's sentencing guidelines scoresheet resulted in a minimum state prison of 22.2 months and a maximum state prison of 34.04 months. (R 109-110) Defense counsel objected to the inclusion of eighteen additional points for use of a firearm. Defense counsel argued that the instant case could be easily distinguished from the Fifth District Court of Appeal's decision in Gardner v. State, 661 so. 2d 1274 (Fla. 5th DCA 1995) because in Gardner, the primary offense was possession of marijuana with intent to sell. Unlike, the instant case where Petitioner was found guilty of possession of a firearm by a convicted felon and carrying a concealed firearm. (R 127-131) The State admitted that Gardner was not exactly on point but urged the trial court to include the eighteen additional points for use of a firearm, (R 131) The trial court overruled defense counsel's objection stating that:

> ...based upon my review of the rule, which allows the points to be added

> in a situation where the defendant possessed a firearm during the commission of, or attempting to commit a felony. In this case, the defendant was charged with two counts of attempted first dearee murder. And he had the firearm durina the commission of those offenses. And of course, there were the two additional charges, carrying a concealed firearm, and possessing firearm by convicted felon. So I'll find that eighteen points are proper, and allow them to be included in the scoresheet.
> (R 136)(Emphasis supplied)

The trial court sentenced Petitioner in Counts III and IV to 34.4 months incarceration which was the maximum the trial court could sentence Petitioner to according to his scoresheet. Petitioner received credit for 328 days time served. (R 105-106, 137) Both counts were to run concurrently with each other. (R 105-106)

Petitioner appealed to the Fifth District Court of Appeal. On appeal to the Fifth District Court of Appeal, Petitioner argued that the trial court erred in assessing 18 points for possession of a firearm pursuant to Florida Rule of Criminal Procedure 3.702(d)(12). On January 23,1998, the Fifth District issued its opinion affirming Petitioner's sentence. See Fisher v. State, 23 Fla. L. Weekly D303 (Fla. 5th DCA January 23, 1997). (Appendix A) In rejecting Petitioner's argument that the assessment of the 18 points was improper, the District Court cited to two of its earlier decisions, one of which is currently

pending review in this Court. See State v. Scott, 692 So. 2d 234 (Fla. 5th DCA), rev. granted, 698 So. 2d 840 (Fla. 1997) The District Court also cited to the Second District Court of Appeal's case of White v. State, 689 So. 2d 371 (Fla. 2d DCA), rev. granted, 696 So. 2d 343 (Fla. 1997). In White, the Second District Court of appeal certified direct conflict with the Fourth District Court of Appeal's decision in Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996)and is currently pending review with this Court in Case Number 89,998.

A timely notice to invoke this Court's discretionary jurisdiction was filed-in the Fifth District Court of Appeal on February 20, 1998. A Jurisdictional Brief was filed with this Court on February 20, 1998. This Honorable Court accepted jurisdiction on March 26, 1998. This appeal follows.

STATEMENT OF THE FACTS

On Easter Sunday, April 16, 1995, Robert Cohn and several of his family members stopped at Lorna Dune Park. (T 24-27,29-30) Robert Cohn and his brother Wallace Cohn testified that they were aware of the fact that approximately a week earlier their other brothers had been involved in an argument/fight with Thaddeus Baxter and his mother Gwen Waites who are relatives of Petitioner. (T 44, 95, 186)

As Robert Cohn and his family were walking out of the park, Robert observed Petitioner standing by the entrance to the park. (T 31-32) Robert heard a lot of cussing but continued to walk by Petitioner when he was shot in his right arm. (T 33, 99) Robert turned and saw Petitioner with a gun. Robert tried to run away but was shot in the back and fell to the ground. (T 69, 100) Robert testified that he has never seen Petitioner before the shooting. (T 43) Robert further testified that he never threatened Petitioner or made any gestures towards him. (T 38)

Wallace testified that he observed Petitioner shoot his brother Robert. (98-100) Wallace also observed his brother Ed Earl Cohn jump over a vehicle and land on Petitioner. (T 100) Wallace saw Petitioner shoot Ed in the arm and legs. (T 102-103) Wallace testified that he did not have a gun, knife or any other weapon at the park. (T 95-96) Wallace testified that he made no threatening gestures toward Petitioner before Petitioner fired

the shots. (T 104) Wallace further testified that he observed Petitioner pull out the concealed gun from his waistband. (T 107-108)

Five casings from a .380 caliber weapon were found at the scene along with a steak knife. (T 140,155,229) Nanette Rudolph from the Orlando Regional Crime Lab testified that she examined the 5 casings and determined that they all appeared to have been fired from the same weapon. (T 212-216)

Detective Bergin of the Orlando Police Department testified that Robert and Wallace Cohn identified Petitioner from a photo line-up. (T 220) Detective Bergin further testified that Petitioner voluntarily came to the police station and after an initial interview gave a taped statement. (T 221) In his taped statement, Petitioner told the police that he had purchased a gun a week before the shooting because of the fight that had occurred between the Cohn brothers and his relatives. Petitioner brought the loaded gun with him to the park.

Petitioner believed that he was being surrounded by all of the Cohn brothers. Petitioner observed them walking towards him with their hands in their pants. This gesturing indicated to him that they had weapons. Petitioner observed one of the Cohn brothers pull a weapon out and Petitioner shot him because he was afraid for his life. Petitioner claimed he shot Ed Cohn in self-defense.

Terrie Evans and Cortez Edwards testified that the Cohn brothers had surrounded Petitioner. (T 244) Cortez testified that the Cohn brothers have a reputation for violent behavior. (T 281, 290) Cortez testified that one of the Cohn brothers had a knife and another one had a baseball bat. Cortez also testified that he believed one of the other brothers had some type of weopon they had their hands in their pockets. (T 285) Cortez tried to reason with the Cohn bropthers to leave Petitioner alone. (T 285) Cortez had originally told Petitioner that he would help him but when he saw how many members of the Cohn family were there and that they were armed, Cortez ran away. (T 287)

SUMMARY OF THE ARGUMENT

The Fifth District Court of Appeal erred by affirming the trial court's decision to include points for possession of a firearm during the commission of a crime on Petitioner's sentencing guidelines scoresheet. Possession of a firearm is an essential element of carrying a concealed a firearm and possession of a firearm by a convicted felon. Petitioner was not being sentenced for any other non-firearm offenses for which it might have been proper to score "firearm" points. Petitioner's convictions for possession of a firearm by a convicted felon and carrying a concealed firearm were not related to any additional substantive offenses.

This Honorable Court should adopt the holding of the Fourth District Court of Appeal in Gallowav v. State, 680 So.2d 616 (Fla. 4th DCA 1996) where the Fourth District Court of Appeal held that Florida Rule of Criminal Procedure 3.702 (d)(12) does not apply to convictions for possession of a firearm by a convicted felon and carrying a concealed firearm when unrelated to the commision of any additional substantive offenses.

ISSUE

THE FIFTH DISTRICT COURT OF APPEAL ERRED BY AFFIRMING PETITIONER'S SENTENCE WHERE PETITIONER'S SENTENCING GUIDELINES SCORESHEET INCLUDED POINTS FOR POSSESSION OF A FIREARM WHERE PETITIONER WAS BEING SENTENCED FOR POSSESSION OF A FIREARM BY A CONVICTED FELON AND CARRYING A CONCEALED FIREARM.

Petitioner was found guilty by a jury of Count III, carrying a concealed firearm and Count IV, possession of a firearm by a convicted felon. The jury found Petitioner not guilty in Counts I and II. Over Defense counsel's objection, the trial court scored an additional eighteen points for possession of a firearm pursuant to Rule 3.702(d)(12)on Petitioner's sentencing guidelines scoresheet. (R 127-131,136) Florida Rule of Criminal Procedure 3.702 (d)(12) provides that additional sentence points are to be included for possession of a firearm during the commission of any felony other than those enumerated in Section 775.08-7(2) .

In recognition of the fact that this issue is before this Court in several other cases,[1] Petitoner will not elaborate any further except to state that this Honorable Court should adopt the rational expounded by the Fourth District Court of Appeal in

[1] State v. Scott, 692 So. 2d 234 (Fla. 5th DCA), rev. granted, 698 So. 2d 840 (Fla. 1997);White v. State, 689 So. 2d 371 (Fla. 2d DCA), rev. granted, 696 So. 2d 343 (Fla. 1997);Ferry v. State, 701 So.2d 660 (Fla. 5th DCA 1997).

Gallowav v. State, 680 So.2d 616 (Fla. 4th DCA 1996). In Galloway, the Fourth District Court of Appeal held that Rule 3.702(d)(12) does not apply to convictions for possession of a firearm by a convicted felon and carrying a concealed firearm when unrelated to the commision of any additional substantive offense.

In the instant case, Petitioner was found not guilty of the additional offenses charged in Counts I and II. Petitioner maintains that these extra points should be removed from his scoresheet as the District Court correctly ruled in Gallowav.

CONCLUSION

Based upon the foregoing cases, reasons and authorities cited herein, Petitioner respectfully requests that this Honorable Court quash the decision of the Fifth District Court of Appeals and reverse and remand for resentencing pursuant to corrected scoresheet.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

M. A. LUCAS
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Jonathan T. Fisher, 931 Woodside Cir., #C, Kissimmee, FL 34744, on this 20th day of April, 1998.

M. A. LUCAS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

JAMES EDWARD SCOTT,

Petitioner,

vs. CASE NO. **92, 502**

STATE OF FLORIDA,

Respondent.

A P E N D I C E S

Appendix A --Fisher v. State, 23 Fla. L. Weekly D303 (Fla. 5th DCA January **23, 1997)**

JAMES B. GIBSON
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(DAUKSCH, J.) This is an appeal from a final judgment in an eminent domain case.

For two reasons we must reverse the judgment and remand the case for a new trial. The first reason is that the person the county called as a witness as to the value of the property was unable or unwilling to provide the court and jury with proper documentation and support for his opinion as to the value of the property being taken. Although he said that he "used market data, interviews with [persons] and other materials . , . to come up with these adjustments," on cross-examination he would not or could not produce any of the market data or names of persons to support his statements. His testimony was inherently incredible.

The second reason is that this same witness, a county employee, was permitted, over objection, to tell the jury that the notice of taking was not accurate; that the county was not really going to take all of the land it would be entitled to, under the ultimate judgment, so the appellant was not going to lose as much as had been originally proposed. Thus, he suggested that the jury award a lesser amount than what appellant would get under the entire taking. Although the appellant sought a mistrial for this behavior, the trial judge allowed the county to "amend" its notice of taking midtrial, Once that skunk was tossed into the jury box, the trial needed aborting.

REVERSED and REMANDED. (HARRIS and ANTOON. JJ . , concur.)

* * *

SALEM VILLAGES MRDD, INC. v. E.C. KENYON CONSTRUCTION COMPANY, INC. 5th District. #97-635. January 23. 1998. Appeal from the Circuit Court for Orange County. Affirmed. *See Prosperi v. Code. Inc., 626* So. 2d 1360 (Fla. 1993); *Moritz* v. ***Hoyt Enterprises, 604 So.*** 2d 807 (Fla. 1992).

BLOWE v. STATE. 5th District. #97-3309. January 23, 1998. 3.800 Appeal from the Circuit Court for Orange County. AFFIRMED. *See State v. Mattress,* 686 So. 2d 740 (Fla. 5th DCA 1997).

HUMBERT v. STATE. 5th District. #97-3469. January 23, 1998. 3.850 Appeal from the Circuit Court for Marion County. AFFIRMED. See *State v. McCloud,* ***577 So.*** 2d 939 (Fla. 1991); Taylor ***v. Louisiana, 419 U.S. 522*** (1975).

McGEE v. STATE. 5th District. #97-1960. January 23, 1998. Appeal from the Circuit Court for Osceola County. AFFIRMED. See Fla. R. App. P. 9.140(b)(2)(B); *Robinson* v. *State,* 373 So. 2d 898 (Fla. 1979).

FISHER v. STATE. 5th District. #96-2593. January 23.1998. Appeal from the Circuit Court for Orange County. AFFIRMED: See *Smith v. State, 683 So.* 2d 577 (Fla. 5th DCA 1996); *State v. Scott,* 692 So. 2d 234 (Fla. 5th DCA). *rev. granted, 698 So.* 2d 840 (Fla. 1997); ***White v. Store, 689 So.*** 2d 371 (Fla. 2d DCA), *rev. granred, 696 So.* 2d 343 (Fla. 1997).

* * *

Dissolution of marriage--Child custody--Visitation—Evidence-Hearsay-Establishment of visitation arrangements on basis of testimony of child's treating psychologist relating child's statements regarding mother's inappropriate conduct-Reversal required where trial court did not make necessary statutory findings relating to reliability of statements of child

ERIC A. COBERLY, Appellant, v. KAREN COBERLY, Appellee. 1st District. Case No. 97-493. Opinion filed January 21, 1998. An appeal and cross-appeal from the Circuit Court for Duval County. Frederick B. Tygart. Judge. Counsel: Ada A. Hammond and Glenn K. Allen of Johnston & Hammond, Jacksonville. for Appellant. Joy A. Lordahl, Jacksonville. for Appellee/Cross-Appellant. Michael M. Naughton. Jacksonville, for Maternal Grandparents.

(PER CURIAM.) In this appeal and cross-appeal, both Eric A. Coberly (the former husband) and Karen Coberly (the former wife) challenge the lower court's order which, among other things, grants primary residential custody to the former husband, supervised visitation to the former wife, and visitation to the maternal grandparents. The record is clear that the trial court established these visitation arrangements primarily to protect the parties' minor child in view of the court's finding that the former wife "more likely than not did act inappropriately in the presence of and with the minor child of the parties." This finding was based primarily upon testimony of the child's treating psychologist "that the minor child had expressed the fact that her mother [the former wife] . , , had engaged in certain conduct which is highly inappropriate [including] . . . inappropriate sexually related kissing, lifting up of dresses and looking **a [sic]** women's underwear, tying the child up, and improper touching of the child's genitalia." The former wife has consistently and vigorously denied engaging in any such inappropriate actions and objected to the introduction of this hearsay testimony of the child on the grounds that the requirements of section 90.803(23), Florida Statutes (1995). had not been met. Because the trial court failed to make the necessary findings under section 90.803(23) relating to the reliability of the statements of the child, we reverse. *See M.* W. ***v. Department of Health and Rehabilitative*** Serv., 651 So. 2d 754 (Fla. 1st DCA 1995); *Weatherford* **v.** State, 561 So. 2d 629, 633 (Fla. 1st DCA 1990); Salter v. *State,* 500 So. 2d 184,185 (Fla. 1st DCA 1986).

In view of our holding here, we find it unnecessary to address the other issues raised on appeal. On remand, the trial court, upon the appropriate motion, may again consider the findings and determinations required by section 90.803(23) and, in its discretion, may take additional testimony and hear additional argument concerning the visitation issues, including issues relating to grandparent visitation, See ***Beagle v. Beagle, 678 So.*** 2d 1271 (Fla. 1996); *Sketo* v. *Brown,* 559 So. 2d 381 (Fla. 1st DCA 1990); ***Von Eiff v, Von Eiff, 22*** Fla. L. Weekly D2176 (Fla. 3d DCA September 16, 1997); ***Firts*** v. ***Poe, 22*** Fla. L. Weekly D2265 (Fla. 5th DCA September 26, 1997).

REVERSED and REMANDED for proceedings consistent with this opinion. (BOOTH, JOANOS AND VAN NORTWICK, JJ., CONCUR.)

* * *

Criminal law—Manslaughter by culpable negligence--Proximate cause-Evidence that defendant consumed beer to the point of intoxication while driving vehicle, that defendant then insisted that minor passenger who had no driver's license drive vehicle, and that minor unlicensed driver fell asleep while driving vehicle, with result that vehicle crossed center lane and killed victim, sufficient to establish prima facie case of manslaughter by culpable negligence-The harm that occurred was foreseeable and within the scope of the danger created by defendant's negligent conduct-Error to dismiss information

STATE OF FLORIDA., Appellant, v. GREGORY ALAN MORRIS. Appellee. 1st District. Case No. 97-1108. Opinion filed January 21, 1998. An appeal from the Circuit Court for Santa Rosa County. Paul A. Rasmussen, Judge. Counsel: Robert A. Butterworth, Attorney General; L. Michael Billmeir, Assistant Attorney General. Tallahassee, for Appellant. Spiro T. Kypreos, Pensacola, for Appellee.

(LAWRENCE, J.) The State appeals the dismissal of an amended information charging Gregory Alan Morris (Morris) with manslaughter. The charge arose from an auto collision on Janu***ary 12,*** 1996, in Santa Rosa County. We reverse.

Morris filed a motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.190(c)(4). Morris, in order to prevail on such a motion, must allege undisputed material facts, and show that the undisputed facts do not establish a prima facie case. *State* ***v. Parrish,*** 567 So. 2d 461 (Fla. 1st DCA 1990). We are required to review the trial court's ruling resolving inferences from all facts in the light most favorable to the State. *Boler v. State, 678* ***So.*** 2d 319 (Fla. 1996); ***Parrish.*** We moreover must determine, not whether a jury ***would*** find a defendant guilty of the charged crime but, rather, whether the facts ***could*** be **sufficient** for a jury to convict adefendant. *State v. Knight, 622* So. 2d 189, 190 (Fla. 1st DCA **1993)** ("Whether or not a jury would ultimately find or would be justified in finding [the defendant] guilty is not now our concern.").

The facts of the instant case establish a prima facie case of manslaughter by culpable negligence. The trial court thus erred in ruling, as a matter of law, that the facts do not establish aprima facie case. The court reached this ruling by concluding that no