IN THE SUPREME COURT OF FLORIDA

JONATHAN T. FISHER,

Petitioner,

v.

CASE NO. 92,502
5DCA CASE NO. 96-2593

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF THE ARGUMENT

The State submits that the district court properly concluded that firearm points were 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 ONE

THE DISTRICT COURT PROPERLY CONCLUDED THAT FIREARM POINTS SHOULD HAVE BEEN SCORED.

Petitioner argues that the district court erred in concluding that firearm points were properly scored in the instant case. Fisher v. State, 23 Fla.L.Weekly D303 (Fla. 5th DCA January 23, 1998). As pointed out by Petitioner, this issue is currently pending before this Court in several cases.[1] It is the State's position that the district court's decision below should be approved.

Petitioner was found guilty of carrying a concealed firearm and possession of a firearm by a convicted felon. Under the sentencing guidelines, felony offenses are listed in an "Offense Severity Ranking Chart." 5921.0012, 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. 3.702(c). The new guidelines supersede prior case law conflicting with the principles and provisions of the new statute and rule. Fla.R.Crim.P. 3.702(b).

Under the sentencing guidelines, Petitioner's crimes are each categorized as level 5 offenses and assigned points according to

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[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) .

these categories. §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, 4 extra points are scored if the defendant has committed a "legal status violation"; 6 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 should have been scored in this case, and it is these points which are the subject of this appeal.

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. 3.702(d)(12). Fisher does not, and cannot, contend that he did not have a firearm in his possession at the time of his offense. Instead, he argues 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 commission of any additional substantive offense. This argument ignores the clear, unambiguous language of the statute.

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 and carrying a concealed weapon are not enumerated offenses in that statute. Accordingly, Fisher'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 mandgtory minimum offenses. The Legislature chose not to create a second scoring exception for crimes in which possession of a firearm is an essential element,[2] 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

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[2]In fact, the Legislature has 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). It was this express exception which formed the basis for the court's holding in McNeal v. State, 653 So.2d 1122 (Fla. 1st DCA 1995), cited by Petitioner.

Had the statute addressing the scoring of firearm points included similar language, Petitioner's argument would have merit. However, it is clear that the Legislature did not choose to exempt "essential element" crimes from the firearm points, as was its prerogative, and accordingly Petitioner's argument must fail.

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 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. 1977); State v. Davidson, 666 So.2d 941 (Fla. 2d DCA 1995); Gardner 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 holding in Smith, 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, as proposed by Petitioner.

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 this Court. See, Faker 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 statute 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,

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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 M.A. Lucas, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, FL, 32114-4310, this 7th day of May, 1998.

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