IN THE SUPREME COURT OF FLORIDA

MARLENE SCOTT DAVIS,
Petitioner,

v.

Case no. 93,135
DCA Case no. 97-3557

STATE OF FLORIDA,
Respondent.
_____/

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

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NANCY RYAN
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COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

On July 16, 1997, the State Attorney for the Ninth Judicial Circuit (Orange County) filed an information in case no. CR97-8393 charging the petitioner, Marlene Davis, solely with one count of possession of a firearm by a convicted felon; the offense was alleged to have taken place on June 27, 1997. (R 21) On November 13, 1997 the petitioner entered a plea of no contest to the charged offense in a hearing held before the Honorable Charles N. Prather, Circuit Judge. (R 1-14, 29-30) The plea was based on the parties' agreement that Ms. Davis would receive a sentence of 27.3 months in prison, which represents the bottom of the guidelines scoring range. (R 2-3, 29, 37-39) It was also part of the plea agreement that the defense objected to 18 points being included on the sentencing guidelines scoresheet for possession of a firearm; the petitioner entered her plea reserving the right to appeal the issue whether those points should be scored in her case. (R 2-3, 10, 29) The judge accepted the plea on those terms, adjudicated Petitioner guilty as charged of the single offense of possession of a firearm by a convicted felon, and imposed a sentence of 27.3 months in prison on November 13, 1997. (R 10-11, 31-34)

Timely notice of appeal was filed from the sentencing order on December 5, 1997. (R 46; see R 56) The Fifth District Court of Appeal, in its case no. CR97-3557, affirmed the sentencing order in its decision and opinion issued May 29, 1998. The District Court,

reaffirming its own earlier decisions, held that 18 points may be assessed on a sentencing guidelines scoresheet when a defendant is convicted only of the offense of possession of a firearm by a convicted felon; the court certified conflict with decisions of other District Courts of Appeal. Davis v. State, 23 Fla. L. Weekly D1309 (Fla. 5th DCA May 29, 1998).

The petitioner filed timely notice of her intent to invoke the discretionary jurisdiction of this court on May 29, 1998.

SUMMARY OF ARGUMENT

Since the date of the District Court's decision in this case, this court decided the sole disputed issue in that appeal in the petitioner's favor. White v. State, 23 Fla. L. Weekly S311 (Fla. June 12, 1998). The District Court's decision should be quashed and the case remanded for resentencing pursuant to the guidelines without 18 points for possession of a firearm.

ARGUMENT

THIS CASE IS INDISTINGUISHABLE FROM WHITE V. STATE, 23 FLA. L. WEEKLY S311 (FLA. JUNE 12, 1998).

The District Court of Appeal held in this case that where, as here, a criminal defendant is convicted solely of possession of a firearm by a convicted felon, 18 points are properly scored on that defendant's sentencing guidelines scoresheet for possession of that firearm. The District Court relied on its own earlier decisions in Coleman v. State, 702 So. 2d 307 (Fla. 5th DCA 1997), Ferry v. State, 701 So. 2d 660 (Fla. 5th DCA 1997), Smith v. State, 683 So. 2d 577 (Fla. 5th DCA 1996), and Gardner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995) in reaching that decision. The court certified conflict with the decision of the Fourth District Court of Appeal in Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996).

Since the date of the District Court's decision in this case, this court approved Galloway in White v. State, 23 Fla. L. Weekly S311 (Fla. June 12, 1998). In White, this court held that Rule 3.702(d)(12), Florida Rules of Criminal Procedure, and Section 921.0014, Florida Statutes (1993), do not contemplate scoring 18 points for firearm possession where the gravamen of the sole offense at conviction is itself possession of a firearm. The analogous rule and statute that apply to this case are Rule 3.703(d)(19), Fla.R.Crim.P., and Section 921.0014, Florida Statutes (1995). That rule and that statute are indistinguishable on this

point from their predecessors. White, accordingly, is indistinguishable from this case. This court should quash the Fifth District's decision affirming Petitioner's sentence, and should remand this case to the trial court for resentencing pursuant to the guidelines without inclusion of points for possession of a firearm.

CONCLUSION

The petitioner requests this court to quash the decision of the Fifth District Court of Appeal on the authority of White v. State, 23 Fla. L. Weekly S311 (Fla. June 12, 1998), and to remand for resentencing pursuant to the guidelines without the 18 points previously scored for possession of a firearm.

Respectfully submitted,

JAMES B. GIBSON
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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served on Assistant Attorney General Robin A. Compton, of 444 Seabreeze Blvd., 5th FL, Daytona Beach, FL 32118, by way of the Attorney General's in-basket at the Fifth District Court of Appeal, and mailed to Marlene Scott Davis, No. 333444, Florida C. I., P. O. Box 142, Lowell, FL 32966-0147 on this 6th day of July, 1998.

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ASSISTANT PUBLIC DEFENDER

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PETITIONER'S BRIEF ON THE MERITS

APPENDIX

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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immediately following such vacation period. Appellant was not entitled to benefits for the periods in question and must repay the overpayments. *See Unemployment Appeals Commission v. Comer*, 504 So. 2d 760 (Fla. 1987).

AFFIRMED. (DAUKSCH, PETERSON, JJ., concur.)

* * *

Criminal law—Sentencing—Guidelines—Scoresheet—Points may be assessed for possession of firearm when defendant is convicted only of possession of firearm by convicted felon—Conflict certified

MARLENE SCOTT DAVIS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 97-3557. Opinion filed May 29, 1998. Appeal from the Circuit Court for Orange County, Charles N. Prather, Judge. Counsel: James B. Gibson, Public Defender, and Nancy Ryan, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

(ORFINGER, M., Senior Judge.) Defendant appeals from a sentence which includes 18 points for possession of a firearm. This court has previously held that 18 points may be assessed on a guidelines scoresheet for possession of a firearm, when the defendant is convicted only of the offense of possession of a firearm by a convicted felon. *See Coleman v. State*, 702 So. 2d 307 (Fla. 5th DCA 1997); *Ferry v. State*, 701 So. 2d 660 (Fla. 5th DCA 1997); *Smith v. State*, 683 So. 2d 577 (Fla. 5th DCA 1996); *Gardner v. State*, 661 So. 2d 1274 (Fla. 5th DCA 1995). We have previously certified conflict with *Galloway v. State*, 680 So. 2d 616 (Fla. 4th DCA 1996) and we do so again.

AFFIRMED. (GRIFFIN, C.J., and HARRIS, J., concur.)

* * *

Dissolution of marriage—Final judgment lacks type of findings necessary for meaningful appellate review—Judgment is unclear and contradictory on its face—Remanded for further proceedings

WILLIAM McMULLAN, Appellant, v. DEBORAH McMULLAN, Appellee. 5th District. Case No. 98-231. Opinion filed May 29, 1998. Appeal from the Circuit Court for St. Johns County, Robert K. Mathis, Judge. Counsel: Lyman T. Fletcher and Jeffrey A. Conner, Jacksonville, for Appellant. No Appearance for Appellee.

ON MOTION FOR REVIEW OF DENIAL OF MOTION FOR STAY PENDING APPEAL

(SHARP, W., J.) This is an appeal of a final judgment of dissolution of marriage and the denial of a motion for a stay brought by the former husband. We reverse and remand, *sua sponte*.

The final judgment is unclear and contradictory on its face. There is a child support order for $3,000, but in a section entitled "Alimony," the judgment provides that "the Husband's share of child support [is] $108.00 per month." The wife is the primary custodial parent of the child, but the final judgment provides that the husband "has $1,903.48 for himself and the minor child." In addition to this finding that the husband's income is $1,903 per month, the judgment also finds that it is $2,778 per month. Further, the court ordered the husband to pay child support of $3,000 per month, primarily based on imputed income of an unspecified amount attributable to a trust, the terms of which the court found it had no real knowledge.

This judgment is not reviewable in its present form because it lacks the type of findings necessary for meaningful appellate review. *See Holmes v. Holmes*, Case No. 97-312 (Fla. 5th DCA March 27, 1998); *Romano v. Romano*, 690 So. 2d 751 (Fla. 5th DCA 1997); *Brooks v. Brooks*, 678 So. 2d 1368 (Fla. 1st DCA 1996); *Goosby v. Goosby*, 614 So. 2d 692 (Fla. 1st DCA 1993). We also note that an order which is not clear and definite is insufficient to support enforcement or contempt proceedings. *Escribano v. Coviello*, 698 So. 2d 934 (Fla. 4th DCA 1997); *Thompson v. Plowmaker*, 681 So. 2d 727 (Fla. 2d DCA 1996).

We therefore reverse the final judgment and the order denying the husband's motion for a stay, and remand to the trial court for further proceedings consistent with this opinion.

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

* * *

Criminal law—Habeas corpus—Belated appeal—Allegation that defendant requested trial attorney to file appeal, but attorney failed to do so, is facially sufficient under appellate rules—Petition which was filed within two years of effective date of rule imposing two-year time limit was timely under rule—Petition which was filed slightly more than two years after sentence was imposed not barred under doctrine of laches

TERRANCE L. BROWN, Petitioner, v. STATE OF FLORIDA, Respondent. 5th District. Case No. 98-687. Opinion filed May 29, 1998. Petition for Writ of Habeas Corpus, A Case of Original Jurisdiction. Counsel: Terrance L. Brown, Raiford, Pro Se. Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Respondent.

(SHARP, W., J.) Brown petitions for a writ of habeas corpus, seeking a belated appeal of his 1995 conviction for aggravated battery with a firearm[1] and attempted first degree murder.[2] He alleges he requested his trial attorney to file an appeal, but the attorney failed to do so. This allegation is facially sufficient under Florida Rule of Appellate Procedure 9.141(j)(2)(F),[3] but the rule also requires a petition to be filed within two years. However, this rule became effective January 1, 1997, and the time limit created by it commenced with its effective date. Thus this petition is not time barred by this rule.

The state argues Brown's belated appeal is barred under the doctrine of laches. *McCray v. State*, 699 So. 2d 1366 (Fla. 1997). In this case, Brown was sentenced on January 19, 1996, and his petition was filed March 11, 1998. He alleges no reason for the delay in filing this petition—somewhat more than two years.

We have found no case in which the doctrine of laches was applied in a case involving such a short a period of time. *Compare Anderson v. Singletary*, 688 So. 2d 462 (Fla. 4th DCA 1997) (laches applied where petition was filed 15 years after appeal concluded); *Xiques v. Dugger*, 571 So. 2d 3 (Fla. 2d DCA 1990) (second motion properly denied as successive, but laches also may apply for failure to seek relief until 8 years after conviction); *Smith v. Wainwright*, 425 So. 2d 618 (Fla. 2d DCA 1982) (laches applied when defendant waited 13 years before filing petition); *Walker v. Wainwright*, 411 So. 2d 1038 (Fla. 1st DCA 1982) (laches applied where defendant filed petition 8 years after conviction); *Babson v. Wainwright*, 376 So. 2d 1187 (Fla. 5th DCA 1979), *cert. denied*, 388 So. 2d 1109 (Fla. 1980) (laches applied when defendant waited 14 years before seeking relief and court reporter's notes had been destroyed); *Remp v. State*, 248 So. 2d 677 (Fla. 1st DCA 1970) (laches applied when petition wasn't filed until 13 years after conviction, defense attorney who could refute claim was deceased, and claim counsel ignored request to appeal was not raised in prior post-conviction motions). *See also Tyler v. Beto*, 391 F. 2d 993 (5th Cir. 1968), *cert. denied*, 393 U.S. 1030 (1969) (laches applied where defendant waited 25 years before seeking appeal and judge, prosecutor and both defense attorneys were then dead).

Since the state concedes it cannot refute Brown's allegation that he requested his attorney to prosecute an appeal, an evidentiary hearing to establish that fact appears to be a waste of time. Accordingly, we grant Brown's petition for a belated appeal, and forward a copy of this order to the trial court to serve as the notice of appeal. Fla. R. App. P. 9.140(j)(5)(D).

Petition for Writ of Habeas Corpus GRANTED. (GOSHORN and PETERSON, JJ., concur.)

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[1]§ 784.045, Fla. Stat. (1995).

[2]§§ 782.04, 777.04, Fla. Stat. (1995).

[3]Rule 9.140(j) provides:

(2) *Contents*. The petition shall be in the form prescribed by rule 9.100, may include supporting documents, and shall recite in the statement of facts:

* * *