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SID J. WHITE
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

MARLENE SCOTT DAVIS,

Petitioner,

v.

CASE NO. 93,135
5DCA CASE NO. 97-3557

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used in this brief is 12 point Courier New, a font that is not proportionately spaced.

SUMMARY OF THE ARGUMENT

This Court recently decided the issue on appeal in the case of White v. State, 23 Fla. L. Weekly S311 (Fla. June 12, 1998).

ARGUMENT

POINT ON APPEAL

(Restated)

WHETHER THE TRIAL COURT CORRECTLY INCLUDED 18 POINTS ON PETITIONER'S SCORESHEET FOR POSSESSION OF A FIREARM WHEN SENTENCING HER FOR POSSESSION OF A FIREARM BY A CONVICTED FELON.

Petitioner was sentenced pursuant to a plea agreement to 27.3 months imprisonment for possession of a firearm by a convicted felon. The defense objected to the assessment of the 18 points on Petitioner's scoresheet and specifically reserved the right to appeal that issue. (R 2-3, 10, 29) The Fifth District Court of Appeal upheld the assessment of the 18 points, while certifying conflict in Davis v. State, 23 Fla. L. Weekly D1309 (Fla. 5th DCA May 29, 1998).

This Court recently found that it is error to assess additional points for possession of a firearm where possession is one of the essential elements of the crime for which the defendant is being sentenced. White v. State, 23 Fla. L. Weekly S311 (Fla. June 12, 1998). It appears that the instant case is indistinguishable from White.

CONCLUSION

Based on the arguments and authorities presented herein, Respondents have no objection to this Court remanding the case for further proceedings.

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 Nancy Ryan, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL, 32114, this 27th day of July, 1998.

Robin A. Compton
Assistant Attorney General

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MARLENE SCOTT DAVIS,

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APPENDIX

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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:

* * *