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In The Supreme Court of Florida

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

CASE NO. 93,232

GARY LEE DOLES,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER

NANCY A. DANIELS
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Second Judicial Circuit

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COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,232

GARY LEE DOLES,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

PRELIMINARY STATEMENT

Citations in this brief to designate record references are as follows:

"R. ____" - Record on Direct Appeal.

"T. ____" - Transcript of proceedings.

"App. ____" - Appellant's Appendix

All cited references will be followed by the relevant page number(s). All other citations will be self-explanatory or will otherwise be explained. Respondent, State of Florida, was the appellee and plaintiff below, and will be referred to as "respondent" or the "state." Petitioner was the appellant and defendant below, and will be referred to as "Petitioner" or as the "defendant" or by name.

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STATEMENT OF THE CASE AND THE FACTS

On October 17, 1996, petitioner was charged with possession of a firearm (a shotgun) by a convicted felony in violation of § 790.23, Fla. Stat. [R. 13], and subsequently convicted of that offense following a jury trial [R. 32]. The offense was committed on July 31, 1996 [R. 1, 13; T. 25].

At sentencing, the Sentencing Guidelines Scoresheet prepared pursuant to Rule 3.703 scored 18 points under section VIII for "firearm/semi-automatic or machine gun" pursuant to Rule 3.703(d)(19) (1995). The total sentence points were 60, resulting in a presumptive sentence of 32 months, with a discretionary sentencing range of 24 to 40.6 months [R. 9-12]. The defendant objected to the inclusion of the 18 points for a firearm in the sentencing guidelines scoresheet [T. 127]. The objection was overruled [T. 129]. The court sentenced the defendant under the guidelines to 24 months imprisonment with credit for 147 days [R. 337-41; T. 143].

The Defendant appealed [R. 43] and argued solely on appeal that under *Galloway v. State*, 680 So. 2d 616 (Fla. 4th DCA 1996), it was error to assess 18 points for a firearm upon a sole conviction of possession of a firearm by a convicted felon. The district court affirmed the sentence on June 1, 1998, citing, inter

alia, *White v. State*, 689 So. 2d 371 (Fla. 2d DCA), review granted, 696 So. 2d 343 (Fla. 1997). The district court also certified that its decision was in direct conflict with *Galloway v. State*, 680 So. 2d 616 (Fla. 4th DCA 1996), on the same point of law. [App. 1-2].

Petitioner filed his Notice to Invoke Discretionary Jurisdiction on June 12, 1998. [App. 3-4].

SUMMARY OF ARGUMENT

Based upon this Court's recent decision in *White v. State*, Case No. 89,998, 23 Fla. L. Weekly S311 (Fla. June 12, 1998), quashing *White v. State*, 689 So. 2d 371 (Fla. 2d DCA 1997), and approving *Galloway v. State*, 680 So. 2d 616 (Fla. 4th DCA 1996), the trial court erred in scoring 18 points for a firearm upon conviction only of the offense of possession of a firearm by a convicted felon. The district court, which had relied on the Second District Court's decision in *White*, erred in rejecting appellant's argument of error based upon *Galloway* and in affirming the appellant's sentence

STATEMENT OF JURISDICTION

The district court certified that its decision, affirming the sentence, conflicts with decisions from the Fourth District Court of Appeal, *State v. Walton*, 693 So. 2d 135 (Fla. 4th DCA 1997), and *Galloway v. State*, 680 So. 2d 616 (Fla. 4th DCA 1996). This Court has jurisdiction under Article V, Section 3(b)(4), Florida Constitution, to review the district court's decision rendered June 1, 1998.

ARGUMENT

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT SCORED 18 POINTS FOR A FIREARM ON A CONVICTION OF POSSESSION OF A FIREARM BY A CONVICTED FELON OVER PETITIONER'S OBJECTION TO THE INCLUSION OF THE ERRONEOUS POINTS, AND THE DISTRICT COURT ERRED IN AFFIRMING THE SENTENCE

Possession of a firearm by a convicted felon is not an offense enumerated in § 775.087(2), Fla. Stat. Fla. R. Crim. P. 3.703(d)(19) (1995) provides, in pertinent part:

(19) Possession of a firearm, semiautomatic firearm, or a machine gun during the commission or attempt to commit a crime will result in additional sentence points. Eighteen sentence points are assessed if the offender is convicted of committing or attempting to commit any felony other than those enumerated in subsection 775.087(2) *while having in his or her possession a firearm as defined in subsection 790.001(6)*

(Italics added). See also § 921.0014, (Fla. Stat. (1995). Rule 3.703(d)(19) reads exactly as its predecessor, Rule 3.702(d)(12),

which the Fourth District Court considered in *Galloway v. State*, 680 So. 2d 616 (Fla. 4th DCA 1996). In *Galloway*, the district court held:

We reverse Appellant's sentence and remand for resentencing due to scoresheet error in assessing 18 additional points for possession of a firearm. Florida Rule of Criminal Procedure 3.702(d)(12) permits assessment of these additional points where the defendant is convicted of committing a felony other than those enumerated in subsection 775.087(2), Florida Statutes, "while having in his or her possession a firearm." But we construe rule 3.702(d)(12) as inapplicable to conviction of these two offenses [possession of a concealed firearm or possession of a firearm by a convicted felon] when unrelated to the commission of any additional substantive offense.

(bracketed material added).

In this case, as in *Galloway*, possession of a firearm was an essential element of the offense and there were no additional substantive offenses committed.

Recently, reversing the decision of the district court upon which the First District relied in affirming petitioner's sentence, this Court held that under circumstances where the defendant is convicted of possession of a concealed firearm or possession of a firearm by a convicted felon based upon possession of a single firearm, but without a conviction of any other independent felony offense, it is error to assess 18 additional points on the

Sentencing Guidelines Scoresheet. *White v. State*, Case No. 89,998, 23 Fla. L. Weekly S311 (Fla. June 12, 1998). See also *Coleman v. State*, Case No. 92,134, 23 Fla. L. Weekly S313 (Fla. June 13, 1998) (on review of a decision by the Fifth District Court).

Like *White*, petitioner was convicted solely of possession of a firearm by a convicted felon based upon possession of a single firearm. *White v. State*, 689 So. 2d 371 (Fla. 2d DCA 1997), the case under review, was before this Court upon certified conflict with *Galloway v. State*, 680 So. 2d 616 (Fla. 4th DCA 1996). This Court quashed the decision of the district court in *White* and approved the holding in *Galloway*. The First District Court in the instant case affirmed the petitioner's sentence upon the district court's decision in *White*, rejecting the rationale in *Galloway* upon which petitioner had based his argument before the district court. The district court also certified conflict between its decision and *Galloway*.

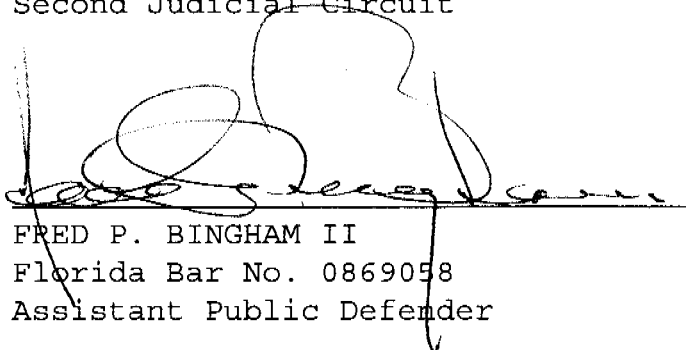
For the reasons set forth in this Court's decision in *White v. State*, this Court should quash the decision below.

CONCLUSION

Petitioner, GARY LEE DOLES, based on all of the foregoing, respectfully urges the Court to quash the decision of the First District Court of Appeal, to vacate his sentence, to remand the case for resentencing, and to grant all other relief which the Court deems just and equitable.

Respectfully submitted,

NANCY A. DANIELS
Public Defender
Second Judicial Circuit



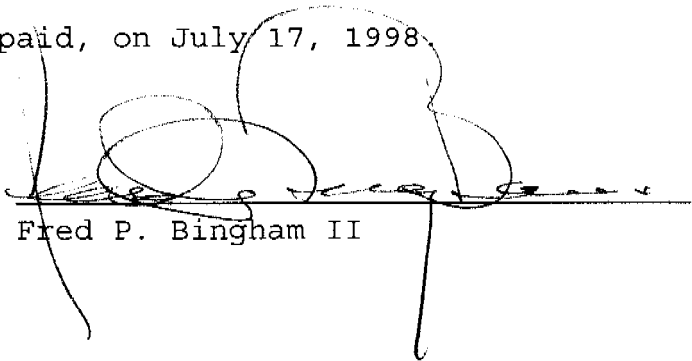
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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to: Giselle Lysten Rivera, Esq., Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the Appellant by U.S. Mail, first-class postage prepaid, on July 17, 1998.



Fred P. Bingham II

The Supreme Court of Florida

CASE NO. 93,232

GARY LEE DOLES,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

A P P E N D I X

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

GARY L. DOLES,
Appellant,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

v.

CASE NO. 97-895

STATE OF FLORIDA,
Appellee.

Opinion filed June 1, 1998.

An appeal from the Circuit Court for Bay County.
Don Sirmons, Judge.

Nancy A. Daniels, Public Defender, and Fred Parker Bingham, II,
Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Giselle Lylen
Rivera, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED. See Scott v. State, 700 So. 2d 470 (Fla. 1st DCA
1997), review granted, (Fla. Feb. 5, 1998, No. 91,378); Ramirez v.
State, 677 So. 2d 95 (Fla. 1st DCA 1996); State v. Scott, 692 So.
2d 234 (Fla. 5th DCA (1997)); White v. State, 689 So.2d 371, 372
(Fla. 2d DCA), review granted, 696 So. 2d 343 (Fla. 1997).

JUN 1 1998

We certify that the decision in this case conflicts with the decisions in State v. Walton, 693 So. 2d 135 (Fla. 4th DCA 1997), review granted, 698 So. 2d 849 (Fla. 1997), and Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996), on the same point of law.

BARFIELD, C.J., JOANOS and WOLF, JJ., CONCUR.

**THE DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA**

CASE NO. 97-895

GARY LEE DOLES,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

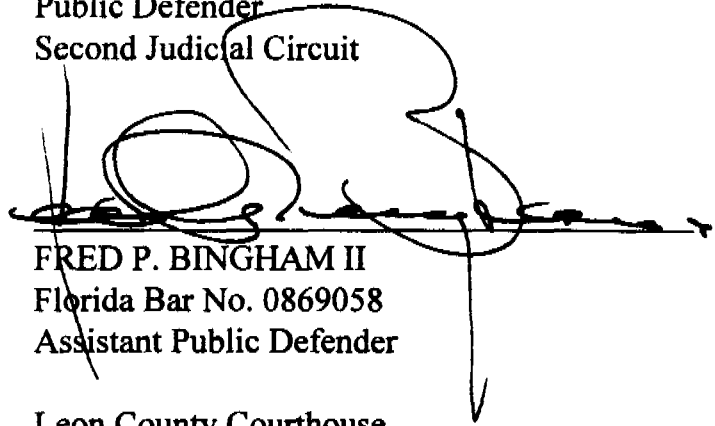
NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS HEREBY GIVEN that Appellant/Petitioner, GARY LEE DOLES, pursuant to Fla. R. App. P. 11 9.030(a)(2)(A)(vi), invokes the discretionary jurisdiction of the Supreme Court of Florida under 12 Article V, Section 3(b)(4), Florida Constitution, to review this Court's decision rendered June 1, 1998.

This Court certified that the decision in the above entitled case conflicts with decisions from the Fourth District Court of Appeal, *State v. Walton*, 693 So. 2d 135 (Fla. 4th DCA 1997), and *Galloway v. State*, 680 So. 2d 616 (Fla. 4th DCA 1996).

Respectfully submitted,

NANCY A. DANIELS
Public Defender
Second Judicial Circuit



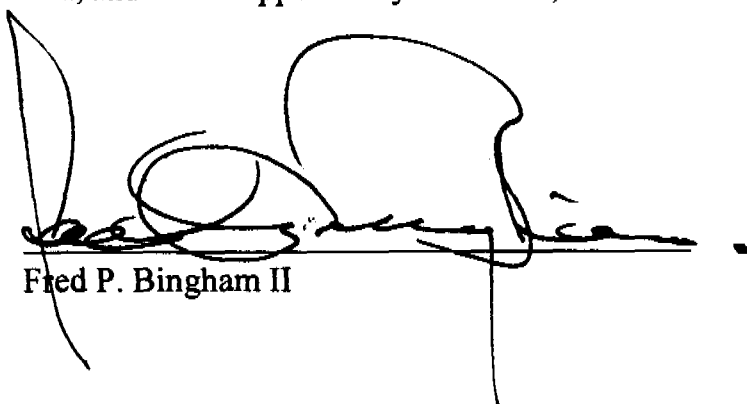
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Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by delivery to Giselle Lysten Rivera, Assistant Attorney General, Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to the Appellant by U.S. Mail, first-class postage prepaid, on June 12, 1998.



Fred P. Bingham II

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