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FILED

SID J. WHITE

AUG 31 1998

IN THE SUPREME COURT OF FLORIDA

ANTHONY SCHMIEL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CLERK, SUPREME COURT

By

Chief Deputy Clerk

CASE NO.

93,428

5DCA CASE NO. 97-3317

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF AUTHORITIES

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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 HIM FOR CARRYING A CONCEALED FIREARM.

After entering no contest pleas, Petitioner was sentenced to 40 months imprisonment followed by 10 years probation for robbery, five years probation for carrying a concealed weapon and credit for time served for resisting without violence. The defense objected to the assessment of 18 points on Petitioner's scoresheet. (R 74) The Fifth District Court of Appeal upheld the assessment of the 18 points, while certifying conflict in Schmiel v. State, Fla. 5th DCA Case Number 97-3317, June 19, 1998. (See appendix)


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,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

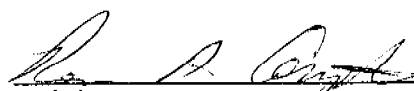


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CERTIFICATE OF SERVICE

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 Thomas J. Lukashow, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL, 32114, this 28th day of August, 1998.



Robin A. Compton
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

ANTHONY SCHMIEL,

Petitioner,

v.

CASE NO.

5DCA CASE NO. 97-3317

STATE OF FLORIDA,

Respondent.
_____ /

APPENDIX

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT
JANUARY TERM 1998

ANTHONY SCHMIEL,
Appellant,

NOT FINAL. THE TIME EXPIRES
TO FILE REHEARING MOTION, AND,
IF FILED, DISPOSED OF.

v.

CASE NO. 97-3317

STATE OF FLORIDA,
Appellee.

Opinion filed June 19, 1998

Appeal from the Circuit Court
for Brevard County,
Tonya Rainwater, Judge.

James B. Gibson, Public Defender, and
Thomas J. Lukashow, Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Simone P. Firley, Assistant
Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED on the authority of Ferry v. State, 701 So. 2d 660 (Fla. 5th DCA 1997); Smith v. State, 683 So. 2d 577 (Fla. 5th DCA 1996). We again certify conflict with Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996).

COBB, GOSHORN, J.J., and ORFINGER, M., Senior Judge, concur.

FILED IN OFFICE
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SHERY L. W. H. GARD
CLERK OF CIR. CT.
BREVARD CO. FLA.