

IN THE SUPREME COURT OF FLORIDA

JAMES R. THOMPSON, :
 Petitioner, :
vs. :
STATE OF FLORIDA, :
 Respondent. :
_____ :

Case No. 95,088

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner's brief is prepared in courier 12 pt.

STATEMENT OF THE CASE AND FACTS

On February 26, 1997, an information was filed charging Mr. Thompson with aggravated assault, allegedly occurring on February 15, 1997 in violation of section 784.021, Florida Statutes (1995) (R57). A second information was filed on May 6, 1997, charging Mr. Thompson with the felonious possession of a firearm allegedly occurring on February 15, 1997, in violation of section 790.23, Florida Statutes (1995) (R68).

On July 28, 1997, Mr. Thompson admitted the violation of his probation and entered pleas of no contest to the charges of aggravated assault, and the felonious possession of a firearm (R83-87). Prior to sentencing, defense counsel moved to strike from the guidelines scoresheet, the inclusion of 25 points for possession of a semiautomatic firearm, as violative of double jeopardy provisions (R99).

During the sentencing hearing, defense counsel renewed his objection to the assessment of the 25 points for possession of a semiautomatic firearm. The trial court felt that it was constrained by the Second District Court's ruling on the issue, and, over defense counsel's objection, permitted assessment of the points. Mr. Thompson was then sentenced to a term of 3.5 years incarceration to run concurrent in each case (R129-132).

An appeal followed and on January 15, 1999, the Second District Court of Appeal issued its opinion finding that the trial

court had not erred in assessing 25 points for the possession of a semiautomatic firearm. The district court found that the recent opinion issued in White v. State, 714 So. 2d 440 (Fla. 1998), precluding the assessment of additional points pursuant to Fla. R. Crim. P. 3.702(d)(12), for the possession of a firearm, where the firearm was an essential element of the charged offense, was inapplicable to the case. The Court determined that White, addressed only the assessment of 18 points under the rule, and the assessment of the twenty-five points was distinguishable and not affected by the decision.

A motion for rehearing was denied on February 16, 1999. Petitioner's notice to invoke this Court's discretionary Jurisdiction was filed on March 11, 1999. On June 21, 1999, this Court issued its Order Accepting Jurisdiction And Dispensing With Oral Argument directing Mr. Thompson to serve his brief on the merits on or before July 16, 1999.

SUMMARY OF THE ARGUMENT

Petitioner, James Thompson, was convicted in the trial court of the offenses of aggravated assault and the felonious possession of a firearm.

The trial court included twenty-five points on the guidelines scoresheet for possession of the semiautomatic firearm pursuant to Fla. R. Crim P. 3.702(d)(12). Under the rule, the twenty-five points could only be assessed against the felonious possession charge as the offense of aggravated assault is specifically exempted from application of the points.

Possession of a firearm is an essential element of the felonious possession offense for which Mr. Thompson was convicted. This Court has recently held in White v. State, 714 So. 2d 440 (Fla. 1998), and State v. Walton, 717 So. 2d 522 (Fla. 1998), that additional sentencing points should not be assessed under rule 3.702(d)(12) when the possession of a firearm is an essential element of the offense involved.

In the present case, the trial court erroneously applied the twenty-five points to Mr. Thompson's calculated guidelines sentence. This error requires that Mr. Thompson be resentenced utilizing a guidelines scoresheet calculated without the inclusion of the twenty-five points for the possession of a semiautomatic firearm. made in error

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY ASSESSING TWENTY-FIVE POINTS ON THE GUIDELINES SCORESHEET FOR POSSESSION OF A SEMI-AUTOMATIC FIREARM WHEN THE FIREARM WAS ONE OF THE ESSENTIAL ELEMENTS OF THE CRIME FOR WHICH PETITIONER WAS BEING SENTENCED?

Mr. Thompson was sentenced under the 1995 guidelines. The twenty-five points for the possession of a semiautomatic firearm included in the guidelines calculations increased his potential sentence by twenty-five months incarceration. Florida Rule of Criminal Procedure 3.702(d)(12), permits the addition of eighteen points for predicate felonies involving a firearm, and twenty-five points for predicate felonies involving semiautomatic firearms in the following language:

Possession of a firearm, destructive device, semiautomatic weapon, or a machine gun during the commission or attempt to commit a crime will result in additional sentence points. Eighteen sentence points shall be assessed where the defendant 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) or a destructive device as defined in subsection 790.001(4). Twenty-five sentence points shall be assessed where 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 semiautomatic weapon as defined in subsection 775.087(2) or a machine gun as defined in subsection 790.001(9).

The offenses enumerated in section 775.087(2), Florida Statutes (1993), are the following: murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, an attempt to commit any of the aforementioned crimes, or any battery upon a law enforcement officer or fire fighter.

Mr. Thompson was convicted of aggravated assault and the felonious possession of a firearm. As the offense of aggravated assault is specifically excluded from assessment of the firearm points under 3.702(d)(12), the twenty-five points for the possession of a semiautomatic firearm could have only been assessed against the felonious possession of a firearm conviction.

In White v. State, 714 So. 2d 440 (Fla. 1998), this Court held that it is improper to assess additional sentencing points pursuant to 3.702 (d)(12) Fla. R. Crim. P., for a defendant's possession of a firearm during the commission of an offense, when the offense itself is predicated upon the possession of the firearm.

This holding was based upon the fact that the purpose of rule 3.702(d)(12) was to discourage the use of weapons during the commission of crimes by creating a penalty enhancement to be applied to crimes committed by a defendant while in possession of a firearm. This Court noted that this purpose was consistent with the exclusion under the rule of certain serious offenses, such as

aggravated assault, from the application of the enhancement, as those offenses have their own statutory enhancement when a firearm is employed.

Thus, this Court concluded:

... that the legislature would not ordinarily assess additional punishment for the same act of possession of a firearm, where concealment of a weapon and possession of a firearm by a felon are independently punishable crimes specifically predicated upon possession of a firearm. For those crimes a penalty has been specifically provided based upon the firearm possession.

Id. at 444.

The White opinion did not directly discuss the assessment of twenty-five points for the possession of a semiautomatic firearm under rule 3.702(d)(12). It was this fact that the Second District Court of appeal seized upon in the Petitioner's case, determining that the opinion in White, was limited to the application of eighteen points for the possession of a firearm, and that it did not address cases where the possessed firearm was a semiautomatic weapon. The court rested its holding on the premise that its previous decision in State v. Davidson, 666 So. 2d 914 (Fla. 2d DCA 1995), remained unaffected by the holding in White. In Davidson, the appellant had been convicted of carrying a concealed semiautomatic firearm. The trial judge refused to apply twenty-five points for the possession of the semiautomatic firearm pursuant to rule 3.702(d)(12). The Second District reversed holding that the points

were merely an enhancement that distinguished between types of firearms, assessing more points for the possession of a semiautomatic firearm because of the greater risk of harm associated with such a weapon.

The Second District is correct in its assessment that rule 3.702(d)(12) distinguished between type of firearms through the application of points, but the court is incorrect in its assessment that the White decision prohibited only the addition of eighteen points for the possession of a firearm and did not affect the twenty-five points which could be assessed for the possession of a semiautomatic firearm.

The reasoning and holding in White, is equally applicable to cases where the twenty-five points have been assessed, as evidenced by this Court's holding in State v. Walton, 717 So. 2d 522 (Fla. 1998). In Walton¹, the petitioner had been convicted of carrying a concealed semiautomatic firearm. At sentencing, the trial judge **refused** the state's request to assess twenty-five points pursuant to rule 3.702(d)(12), for the possession of the firearm. The District Court **affirmed** the trial judge's decision.

The District Court certified conflict, with Davidson, as well as other cases. This Court **affirmed** the District Court's decision reiterating:

...that rule 3.702(d)(12) of the Florida Rules

¹ State v. Walton, 693 So. 2d 135 (Fla. 4th DCA 1997).

of Criminal Procedure and section 921.0014, Florida Statutes (1993), do not contemplate the addition of sentencing points for carrying or possessing a firearm where the carrying or possession of a firearm is the essential element of the underlying offense.

Id. at 522.

Recently, in Williams v. State, 24 Fla. L. Weekly D215 (Fla. 5th DCA Jan. 15, 1999), the Fifth District Court of Appeal held that twenty-five points for the possession of a semiautomatic firearm could not be assessed under rule 3.702(d)(12). In reaching this decision the court determined that the holding in White, was controlling and prohibited the application of the points.

This opinion is particularly noteworthy as prior to the White decision, the Fifth District Court of Appeal had agreed with the Second District in the opinion that points for the possession of a firearm could be assessed pursuant to rule 3.702(d)(12). See, Gardner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995).

As this Court has recognized, the assessment of points under rule 3.702(d)(12), for the possession of a firearm or semiautomatic firearm, where the firearm is an essential element of the offense is improper. Consequently, the scoring of twenty-five points on the guidelines scoresheet in Mr. Thompson's case was error. Mr. Thompson should not have to serve an additional twenty-five months in prison where his possession of a firearm is an essential element of the crime for which he was convicted.

CONCLUSION

Petitioner respectfully requests that this Honorable Court reverse the trial court and the Second District Court of Appeal. Mr. Thompson's case should be remanded for a new sentencing hearing. This Court should instruct the trial court to prepare a new guidelines scoresheet without scoring twenty-five points for possession of a semiautomatic firearm and sentence Mr. Thompson according to the sentencing guidelines.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this _____ day of April, 2000.

Respectfully submitted,

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