

(941) 534-4200

ATTORNEYS FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner's brief is prepared in courier 12 point.

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STATEMENT OF THE CASE AND FACTS

On February 11, 1997, the State Attorney for the Sixth Judicial Circuit for Pasco County, Florida, filed an information charging the Appellant, Stevie L. McKnight, with carrying a concealed firearm, allegedly occurring on January 16, 1997, in violation of section 790.01(2), Florida Statutes (1995)(R5).

On April 24, 1997, Mr. McKnight entered a plea of guilty to the charge and was placed on one year of community control (R16-17,19-23). His guidelines reflected a total 53.2 total sentencing points, which included 25 points for the possession of a semi-automatic firearm or machine gun (R20).

On July 7, 1997, an affidavit alleging the violation of community control was filed (R39-41). On September 26, 1997, Mr. McKnight admitted the violation of his community control (R67-72). Prior to sentencing, defense counsel objected to the inclusion of the 25 points for the possession of a semi-automatic firearm, in the guidelines calculations. He noted that the scoring of the additional points was the factor that made the imposition of a prison sentence mandatory in the case (R74). The trial judge sentenced Mr. McKnight to a period of 23 months incarceration (R44-48,76).

An appeal followed and on February 24, 1999, the Second

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District Court of Appeal issued its Per Curiam Affirmed opinion referring to its prior decision in Thompson v. State, 725 So. 2d 1217 (Fla. 2d DCA 1999), accepted, ????. In Thompson, the district court found that the trial court had not erred in assessing 25 points for the possession of a semiautomatic firearm. The district court concluded 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.

Petitioner's notice to invoke this Court's discretionary Jurisdiction was filed on March 10, 1999. On June 30, 1999, this Court issued its Order Accepting Jurisdiction And Dispensing With Oral Argument directing Mr. McKnight to serve his brief on the merits on or before July 26, 1999.

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SUMMARY OF THE ARGUMENT

Petitioner, Stevie McKnight, was convicted in the trial court of the offense of carrying a concealed semiautomatic 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).

Possession of a firearm is an essential element of the offense of which Mr. McKnight 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. McKnight's calculated guidelines sentence. This error requires that Mr. McKnight be resentenced utilizing a guidelines scoresheet calculated without the inclusion of the twenty-five points for the possession of a semiautomatic firearm.

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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. Mcknight was sentenced under the 1995 guidelines. The twenty-five points for the carrying of a semiautomatic firearm included in the guidelines calculations increased his potential sentence by twenty-five months incarceration, requiring that a prison sentence be imposed. 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

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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)(a), Florida Statutes (1995), 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. Mcknight was convicted of only one offense, the carrying of a concealed firearm. The offense is not among the enumerated felonies in Section 775.087(2)(a), Florida Statutes (1993). Nevertheless, he believes that the twenty-five points should not be scored because a firearm is an essential element of crime for which he was convicted.

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.

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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

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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.

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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 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

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

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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.

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CONCLUSION

Petitioner respectfully requests that this Honorable Court reverse the trial court and the Second District Court of Appeal. Mr. McKnight'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 carrying a concealed firearm and sentence Mr. McKnight according to the sentencing guidelines.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Timothy A. Freeland, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of April, 2000.

Respectfully submitted,

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