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SID J. WHITE

MAR 18 1999

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT
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Chief Deputy Clerk

STEVIE L. MCKNIGHT, :

Petitioner, :

vs. :

Case No. 95,091

STATE OF FLORIDA, :

Respondent. :

_____ :

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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

MEGAN OLSON
Assistant Public Defender
FLORIDA BAR NUMBER 0656150

Public Defender's Office
Criminal Justice Center
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ATTORNEYS FOR PETITIONER

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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 the possession of a concealed weapon, allegedly occurring on January 16, 1997, in violation of section 790.01(2), Florida Statutes (1995).

Mr. McKnight entered a plea of guilty to the charge and was placed on one year of community control. 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.

Mr. Mcknight was charged with violating his community control. He admitted the violation, and 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. The trial judge permitted assessment of the points, and sentenced Mr. McKnight to a period of 23 months incarceration.

On appeal before the Second District, Mr. Mcknight relied on this Court's opinion in White v. State, 714 So. 2d 440 (Fla. 1998), in arguing that the 25 points for the possession of a semi-automatic weapon could not properly be assessed in his case, as he had been charged with carrying a concealed firearm. In rejecting this argument, in its per curiam affirmed opinion, the Second District Court of Appeal referred to Thompson v. State, 24 Fla. L. Weekly D209 (Fla. 2d DCA Jan.15, 1999). In Thompson, the court

distinguished the use of a semi-automatic firearm from the use of an ordinary firearm concluding that rule 3.702(d)(12) only created distinctions between the weapons, and that White, did not apply. Thompson, at 209. Discretionary review is also being requested in Thompson.

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction to review the present case, because the decision issued by the Second District Court of Appeal in Thompson v. State, 24 Fla. L. Weekly D209 (Fla. 2d DCA Jan. 15, 1999), and cited in the opinion in this case, expressly and directly conflicts with this Court's opinion in White v. State, 714 So. 2d 440 (Fla. 1998), and with the opinion issued by the Fifth District Court of Appeal in Williams v. State, 24 Fla. L. Weekly D215 (Fla. 5th DCA Jan. 15, 1999).

ARGUMENT

ISSUE I

THIS COURT HAS DISCRETIONARY JURISDICTION TO REVIEW THE PRESENT OPINION OF MCKNIGHT V. STATE, CASE NO. 97-0440 (Fla. 2d DCA FEBRUARY 24, 1999), AS THE SECOND DISTRICT COURT DECISION DIRECTLY CONFLICTS WITH THIS COURT'S OPINION IN WHITE V. STATE, 714 SO. 2D 440 (FLA. 1998) AND WITH THE FIFTH DISTRICT COURT'S OPINION IN WILLIAMS V. STATE, 24 FLA. L. WEEKLY D215 (FLA. 5TH DCA JAN. 15, 1999).

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 resolved the question of whether additional points could be assessed under 3.702 (d)(12), for offenses that had not been exempted under the rule.

Subsequently, the Second District Court of Appeal, issued its decision in Thompson v. State, 24 Fla. L. Weekly D209 (Fla. 2d DCA Jan.15,1999). In its opinion, the district court determined that this Court's opinion in White, did not prohibit the assessment under rule 3.702 (d)(12), of 25 points for the possession of semi-automatic firearm.

The Opinion issued by the Second District Court is in express and direct conflict with this Court's opinion in White. The opinion is also in direct conflict with the opinion issued by the

Fifth District Court of Appeal in Williams v. State, 24 Fla. L. Weekly D215 (Fla. 5th DCA Jan. 15, 1999). In Williams, the court specifically held that, the opinion in White, precluded the addition of 25 points for the possession of a semi-automatic firearm under 3.702 (d)(12), where the possession of a firearm is an essential element of the offense before the court.

This Court has discretionary jurisdiction to review district court decisions that "expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law." Fla. R. App. P. 9.030 (a)(2)(A(iv)). This Court has discretionary jurisdiction to review this case, as the Second District Court's opinion expressly and directly conflicts with this Court's opinion in White, and with the Fifth District Court's opinion in Williams.

CONCLUSION

In light of the foregoing facts, arguments, issues and authorities, Petitioner respectfully requests that this Honorable Court accept review of the present case.

APPENDIX

1. Copy of opinion issued in Mcknight v. State,
Case No. 97-0440 (Fla. 2d DCA Feb. 24, 1999).
2. Copy of opinion issued in Thompson v. State,
24 Fla. L. Weekly D209 (Fla. 2d DCA Jan. 15, 1999).

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STEVIE LAVAN MCKNIGHT,)

Appellant,)

v.)

STATE OF FLORIDA,)

Appellee.)

CASE NO. 97-04404

Opinion filed February 24, 1999.

Appeal from the Circuit Court for
Pasco County; Lynn Tepper, Judge.

James Marion Moorman, Public
Defender, Bartow, and Megan Olson,
Assistant Public Defender,
Clearwater, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and Timothy
A. Freeland, Assistant Attorney
General, Tampa, for Appellee.

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PER CURIAM.

Affirmed. See Thompson v. State, 24 Fla. L. Weekly D209 (Fla. 2d DCA
Jan. 15, 1999).

THREADGILL, A.C.J., and ALTENBERND and CASANUEVA, JJ., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JAMES RENORRIS THOMPSON,)
)
 Appellant,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Appellee.)
)
)
)
)
)

CASE NO. 97-04138

Opinion filed January 15, 1999.

Appeal from the Circuit Court for Pasco
County; Lynn Tepper, Judge.

James Marion Moorman, Public Defender,
Bartow, and Megan Olson, Assistant
Public Defender, Clearwater, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Timothy A. Freeland,
Assistant Attorney General, Tampa, for
Appellee.

PER CURIAM.

The appellant, James Renorris Thompson, challenges his judgments and sentences for delivery of cocaine, possession of cocaine, aggravated assault, and felonious possession of a firearm. He contends that, pursuant to White v. State, 714

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So. 2d 440 (Fla. 1998), twenty-five points for possession of a semiautomatic firearm were erroneously added to his guidelines score. Though the State concedes error, White merely addresses the inappropriate assessment of eighteen points for possession of a firearm during the commission of a crime, where the possession or use of such is already an element of the crime. In State v. Davidson, 666 So. 2d 941, 942 (Fla. 2d DCA 1995), however, this court determined that the twenty-five points for use of a semiautomatic firearm could be assessed for the crime of carrying a concealed weapon, because the additional points were intended to distinguish "between types of firearms." Davidson explains that the rule calling for the twenty-five-point assessment-- Florida Rule of Criminal Procedure 3.702(d)(12)--"manifests nothing more than legislative recognition of the need to deter through enhanced punishment the use of semiautomatic firearms and their potential for the infliction of severe injury during the commission of criminal acts." Id., 666 So. 2d at 942. We again reach that conclusion. The twenty-five points at issue were therefore properly added to Thompson's guidelines score for his possession of a semiautomatic firearm with respect to his conviction for felonious possession of a firearm.

Affirmed.

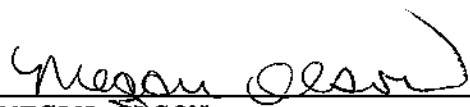
CAMPBELL, A.C.J., THREADGILL and GREEN, JJ., Concur.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 15 day of March, 1999.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(727) 464-6595



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JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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EXECUTIVE DIRECTOR

SID J. WHITE

MAR 18 1999

CLERK, SUPREME COURT
By _____ PLEASE REPLY TO
Chief Deputy Clerk

14250 49th Street North
Clearwater, FL 33762

March 15, 1999

Honorable Sid J. White, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304

RE: Stevie L. Mcknight vs. State of Florida
Appeal No. 97-04404 Case No. _____

Dear Mr. White:

Enclosed for filing in the above-styled cause are the original and five (5) copies of the Brief of the Petitioner on Jurisdiction.

Sincerely,

A handwritten signature in cursive script that reads "Megan Olson".

Megan Olson
Assistant Public Defender

/mo

Enclosures: noted above

xc: Robert Butterworth, Attorney General's Office

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MAR 29 1999

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____

Chief Deputy Clerk

STEVIE MCKNIGHT,

Petitioner,

v.

Case No. 95,091

STATE OF FLORIDA,

Respondent.

_____ /

CERTIFICATE OF FONT SERVICE

This brief is typed in Courier 12pt.

Allyn Gambale (for)

MEGAN OLSON, Attorney at Law
Florida Bar Number 0656150, For
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