

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. 96,095

TELFA DEAN HALL,

Respondent.

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ON DISCRETIONARY REVIEW FROM  
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent Telfa Dean Hall was convicted of possession of a firearm by a convicted felon.<sup>1</sup> Hall v. State, 24 Fla. L. Weekly D1683 (Fla. 5th DCA July 16, 1999). He appealed to the Fifth District Court of Appeal, which summarily affirmed his conviction but reversed his sentence because the trial court had assessed twenty-five points for possession of a semiautomatic firearm on Hall's sentencing guidelines scoresheet. Id. The district court determined that this Court's opinion in White v. State, 714 So. 2d 440 (Fla. 1998), precludes the additional sentencing points when the conviction is predicated upon possession of a firearm. Hall, 24 Fla. L. Weekly D1683.

However, the district court noted that the Second District Court of Appeal's decision in Thompson v. State, 725 So. 2d 1217 (Fla. 2d DCA), rev. granted, case no. 95,088 (Fla. June 21, 1999) approved the scoring of twenty-five points for possession of a semiautomatic firearm even where the possession of a firearm is an element of the offense. Hall, 24 Fla. L. Weekly D1683. Accordingly, the Fifth District certified direct conflict with Thompson. Hall, 24 Fla. L. Weekly D1683.

The State timely filed its notice to invoke this Court's discretionary jurisdiction on July 19, 1999. This proceeding follows.

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<sup>1</sup>§ 790.23, Fla. Stat. (1997).

### SUMMARY OF ARGUMENT

The trial court properly assessed twenty-five points for possession of a semiautomatic firearm on Hall's guidelines scoresheet. This case is distinguishable from White v. State, in that possession of a semiautomatic firearm is not an essential element of Hall's offense, possession of a firearm by a convicted felon. Thus, unlike White, this is not a situation in which a single factor is being taken into consideration twice. As a matter of public policy, this Court should give full effect to the legislature's effort to deter, through enhanced punishment, the use of semiautomatic firearms and their terrible potential for infliction of injury.

ARGUMENT

THE TRIAL COURT PROPERLY ASSESSED TWENTY-FIVE POINTS FOR POSSESSION OF A SEMIAUTOMATIC FIREARM ON HALL'S GUIDELINES SCORESHEET, EVEN THOUGH POSSESSION OF A FIREARM IS AN ELEMENT OF THE OFFENSE.

Following his conviction and sentence for possession of a firearm by a convicted felon, Hall appealed to the Fifth District Court of Appeal. The district court reversed Hall's sentence and remanded for resentencing, reasoning that White v. State, 714 So. 2d 440 (Fla. 1998) precludes the scoring of twenty-five points for possession of a semiautomatic firearm on Hall's sentencing guidelines scoresheet. Hall v. State, 24 Fla. L. Weekly D1683 (Fla. 5th DCA July 16, 1999). White is distinguishable and the points were properly scored. Accordingly, this Court should quash that portion of the district court's opinion which reversed Hall's sentence.

Section 921.0014(b), Florida Statutes (1997) reads in material part:

Possession of a firearm, semiautomatic firearm, or machine gun: If the offender is convicted of committing or attempting to commit any felony other than those enumerated in s. 775.087(2) while having in his or her possession: a firearm as defined in s. 790.001(6), an additional 18 sentence points are assessed; **or if the offender is convicted of committing or attempting to commit any felony other than those enumerated in s. 775.087(3) while having in his or her possession a semiautomatic firearm as defined in s. 775.087(3) or a machine gun as defined in s. 790.001(9), an additional 25 sentence points are assessed.**

(emphasis supplied); see also, Fla. R. Crim. P. 3.703(d)(19);

Fla. R. Crim. P. 3.702(d)(12). Hall's offense, possession of a firearm by a convicted felon, is not one of the felonies enumerated in Section 775.087(3)(a), Fla. Stat (1997). A semiautomatic firearm is defined as "a firearm which is capable of firing a series of rounds by separate successive depressions of the trigger and which uses the energy of discharge to perform a portion of the operating cycle." § 775.087(3)(b)(2), Fla. Stat. (1997).

In White, the defendant was convicted of carrying a concealed firearm and possession of a firearm by a convicted felon. 714 So. 2d at 440-441. He was assessed eighteen points on his guidelines scoresheet for possession of a firearm. Id. at 441. This Court held that the eighteen points for possession of a firearm are not properly scored where possession of a firearm is an essential element of the offense. Id. at 444-445. The Court noted that possession of the firearm is already factored into the guidelines analysis, since the offender receives certain points for the primary offense. Id. at 444. To allow the additional points to be scored for possession of a firearm would allow the presence of the firearm to be considered yet again. Id. The Court refused to infer that the legislature intended that result, "absent a more specific expression" of legislative intent. Id.

White did not address the propriety of scoring twenty-five points for possession of a semiautomatic firearm where possession of a firearm is an essential element of the offense. The

district courts have reached different conclusions on this issue. In Thompson v. State, 725 So. 2d 1217 (Fla. 2d DCA), rev. granted, case no. 95,088 (Fla. June 21, 1999), the court approved the scoring of semiautomatic firearm points where the defendant was convicted of, *inter alia*, possession of a firearm.

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.

Id. at 1218.

On the same day as Thompson, the Fifth District reached the opposite conclusion in Williams v. State, 724 So. 2d 652 (Fla. 5th DCA 1999). The court concluded that White controls the assessment of semiautomatic firearm points, since the same rule authorizes both firearm and semiautomatic firearm points. Id. at 653.<sup>2</sup> Consistent with its holding in Williams, the court

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<sup>2</sup>The Fifth reached a similar conclusion in Carder v. State, 731 So. 2d 784 (Fla. 5th DCA 1999).



reversed Hall's sentence and remanded for resentencing. 24 Fla. L. Weekly D1683. However, it found that its holding in both Williams and Hall conflicted with Thompson, and accordingly certified direct conflict. 24 Fla. L. Weekly D1683.

White is distinguishable, since it addressed only the assessment of firearm points, not semiautomatic firearm points. While possession of a firearm may be an element Hall's offense, possession of a semiautomatic firearm is not. In White the court expressed concern about taking the same factor into consideration twice. 714 So. 2d at 444. That is not a problem here because possession of a semiautomatic firearm has not been taken into consideration in determining the proper number of points for the primary offense.

The legislature has distinguished between regular and semiautomatic firearms. Thompson, 725 So. 2d at 1218 (quoting State v. Davidson, 666 So. 2d 941, 942 (Fla. 2d DCA 1995); see also, § 775.087(3)(a), Fla. Stat. (1997) (providing for an eight-year minimum mandatory sentence where the offender commits certain enumerated offenses while in possession of a semiautomatic firearm and its high-capacity detachable box magazine). The legislature has recognized the need to deter, through enhanced punishment, the use of semiautomatic firearms and their potential for the infliction of severe injury. Thompson, 725 So. 2d at 1218 (quoting Davidson, 666 So. 2d at 942). The wisdom of this legislative policy has been demonstrated by the recent wave of gun violence which has swept

across the country. It seems as though every week brings news of yet another tragic mass shooting. Most of these shootings have involved semiautomatics. In the Line of Fire, NEWSWEEK, Aug. 23, 1999, at 20.

Where possession of a firearm has already been taken into account in awarding points for the primary or secondary offense, it may seem harsh to assess still more points because the firearm is a semiautomatic. However, given the terrible threat these weapons pose, there is nothing unjust in awarding harsh sentences to those criminals who choose to arm themselves with semiautomatic firearms. The legislature is rightfully trying to protect the citizens of this state from gun violence. This Court should give full effect to that effort by quashing Hall, disapproving Williams and Carder, and approving Thompson.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Honorable Court 1) quash that portion of the Fifth District's opinion which reversed Hall's sentence; 2) disapprove Williams and Carder; and 3) approve the Second District's opinion in Thompson.

Respectfully submitted,

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this document is 12-point Courier New, a font that is not proportionally spaced.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished by inter-office delivery to Janet Brook Goodrich, Esq., Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 21st day of September, 1999.

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