

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. 96,095

TELF A DEAN HALL,

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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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.

Hall's argument that a special jury finding should be a prerequisite to the imposition of scoresheet points for possession of a semiautomatic firearm was not presented to the trial court. Even if it were properly before the Court, it would fail on the merits. Factual findings regarding scoresheet factors such as semiautomatic firearm points, prior record, and victim injury are properly made by the sentencing judge, not the jury.

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.

In his answer brief on the merits, Hall contends that this case is indistinguishable from White v. State, 714 So. 2d 440 (Fla. 1998). The State adheres to its argument that this case is distinguishable from White, in that it involves the assessment of points for possession of a semiautomatic firearm as opposed to a regular firearm. While possession of a firearm may be an element Hall's offense, possession of a semiautomatic firearm is not. See, § 790.23, Fla. Stat. (1997).

For the first time in the history of this case, Hall argues that the scoring of semiautomatic firearm points should be conditioned upon the State charging the use or possession of a firearm in the information and the jury returning a special verdict finding such use or possession. (AB 4-5). Alleged sentencing errors must be preserved in order to be cognizable on appeal. Fla. R. App. P. 9.140(d). Although Hall challenged the imposition of semiautomatic firearm points at his sentencing hearing, it was not on this ground. (R. Vol. I, 1-17). An argument is preserved for appeal only if it includes the specific legal ground to be argued on appeal. Archer v. State, 613 So. 2d 446, 448 (Fla. 1993). This Court should decline to consider this unpreserved challenge to the sentence.

Even if this matter were properly before the Court, it would

fail. A trial court may not apply an enhancement or impose a minimum mandatory absent a jury finding that the defendant used or possessed a firearm. State v. Overfelt, 457 So. 2d 1385 (Fla. 1984); State v. Hargrove, 694 So. 2d 729 (Fla. 1997). However, both the First and Fifth District Courts of Appeal have held that such a finding is not a prerequisite to the imposition of firearm points on the defendant's guidelines scoresheet. See, Bradford v. State, 722 So. 2d 858 (Fla. 1st DCA 1998); Crossley v. State, 24 Fla. L. Weekly D2225 (Fla. 5th DCA Sept. 24, 1999). Bradford and Crossley are based on an analogous line of cases holding that a special jury finding is not a prerequisite to the scoring of victim injury points on the guidelines scoresheet. See, Lowman v. State, 720 So. 2d 1105 (Fla. 2d DCA), rev. denied, 727 So. 2d 907 (Fla. 1998); McCloud v. State, 741 So. 2d 512 (Fla. 5th DCA 1999)(en banc).

The preparation of a sentencing guidelines scoresheet is "materially different" from the type of enhancement or mandatory minimum at issue in Overfelt and Hargrove. Bradford, 722 So. 2d at 860. The Lowman court explained this distinction in the context of victim injury points:

There are factual issues involved in the preparation of a sentencing scoresheet that must be determined by the trial judge. Thus, for example, issues concerning prior record are resolved by the judge and not by the jury. The nature and extent of victim injury are often irrelevant to the jury's decision to convict on a particular offense. We conclude that victim injury points are properly assessed based on a factual determination by the trial judge... The

trial judge cannot assess points on a scoresheet that conflict with the jury's factual findings concerning the offense. The trial judge, however, may weigh the evidence presented during the trial or consider additional evidence at the sentencing hearing in determining victim injury points.

Lowman, 720 So. 2d at 1107; Bradford, 722 So. 2d at 860. Like the nature and extent of the victim's injury, the scoring of semiautomatic firearm points under Section 921.0014, Florida Statutes (1997) is a scoresheet issue and does not involve an enhancement or minimum mandatory.

It would be unduly burdensome to require the jury to make factual determinations on every issue that may be a factor on the guidelines scoresheet. This is especially so with factors such as victim injury, prior record, and the use or possession of a semiautomatic firearm. These scoresheet factors are not elements of most offenses and are therefore irrelevant to the jury's decision of whether to convict in most cases. Moreover, evidence of these matters would likely be highly prejudicial if presented to a jury. Yet, if a special jury finding is required before such factors may be taken into account, then the State will be entitled -- indeed, required -- to present evidence on these matters to the jury. Every jury trial will be lengthened considerably by the presentation of this additional evidence, further taxing our already over-burdened trial courts. These matters are properly left to the sentencing judge. This Court should reject Hall's contention that a special jury finding is a prerequisite to the scoring of semiautomatic firearm points.

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 v. State, 724 So. 2d 652 (Fla. 5th DCA 1999) and Carder v. State, 731 So. 2d 784 (Fla. 5th DCA 1999); and 3) approve the Second District's opinion in Thompson v. State, 725 So. 2d 1217 (Fla. 2d DCA), rev. granted, 735 So. 2d 1289 (Fla. 1999).

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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 24th day of November, 1999.

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