

IN THE SUPREME COURT OF FLORIDA

FILED

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JOE L. MOBLEY,

Petitioner,

v.

Case No. 91,528

STATE OF FLORIDA,

Respondent.

ON PETITION FOR REVIEW FROM  
THE SECOND DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

**RESPONDENT'S BRIEF ON THE MERITS**

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**STATEMENT OF THE CASE AND FACTS**

Respondent accepts Petitioner's Statement of the Case and Facts.

## **SUMMARY OF THE ARGUMENT**

The trial court did not err in scoring eighteen points on the guidelines scoresheet for possession of a firearm even though possession of a firearm was an essential element of the felony for which the petitioner was convicted (possession of a firearm by a convicted felon). The offense in question was not one of the felonies specifically exempted from the assessment of the points as set forth in s. 921.0014(1)(b), Fla. Stat. (1995 & 1996) or under Fla. R. Crim. Pro 3.703(d)(19) (1996). Had the legislature desired to exempt felonies for which possession of a firearm was an essential element it could have done so.

The statute and the rule exempt only those felonies enumerated in s. 775.087(2). That statute, s. 775.087, also provides in subsection (1) for the exemption of felonies for which possession of a **firearm** is an essential element. By including only those felonies enumerated in s. 775.087(2), the general doctrine of statutory construction that the mention of one thing implies the exclusion of another, *expressio unius est exclusio alterius*, is applicable to the instant case. The Fourth District Court of Appeals statutory construction to the contrary in Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1994) was unwarranted and unnecessary because the language of the legislature was clear and unambiguous.

Petitioner's double jeopardy argument is also without merit. The fact that possession of a firearm is an essential element of the offense of possession of a firearm by a convicted felon, does not prevent the legislature from authorizing that additional points be added to the sentencing guidelines scoresheet which could result in the imposition of a prison sentence. There is no **reclassification** of the felony to a higher degree nor any enhancement of the maximum penalty for the offense.

## ARGUMENT

### ISSUE I

WHETHER THE TRIAL COURT ERRED BY ASSESSING EIGHTEEN POINTS ON THE GUIDELINES SCORESHEET FOR POSSESSION OF A FIREARM WHEN THE FIREARM IS ONE OF THE ESSENTIAL ELEMENTS OF THE CRIME FOR WHICH THE PETITIONER WAS BEING SENTENCED, IN THIS CASE POSSESSION OF A FIREARM BY A CONVICTED FELON? (RESTATED)

The trial court did not err in assessing eighteen points for possession of firearm based upon petitioner's conviction of the offense of felon in possession of a firearm. The eighteen points were assessed pursuant to Fla. R. Crim. Pro 3.703.09(d)(19) (1996) provides in pertinent part:

Possession of a firearm, semiautomatic firearm, or machine gun during the commission or attempt to commit a crime will result in additional sentence points. Eighteen sentence points are assessed if the offender is convicted of committing or attempting to commit **any felony other than those enumerated in subsection 770.82(2)** while having in his or her possession a firearm as defined in subsection 790.001(6). (emphasis added)

This rule tracks the language of s. 921.0014(1)(b), Fla. Stat. (1995 & 1996) which states in pertinent 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 possession: a firearm as defined in 790.001(6), an additional eighteen points are assessed,

Petitioner acknowledges in his brief that the felony for which he was convicted, possession of a firearm by a convicted felon, is not one of the felonies enumerated in s. 775.087(2). See petitioner's brief at page 4. Petitioner argues that

to assess the eighteen points is both a violation of double jeopardy and alternatively that the statute/rule relied upon to justify the additional points implicitly rejects the assessment where the firearm is an essential element of the crime.

Petitioner relies upon the case of Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996). However, even the Fourth District in Galloway, id., rejected the double jeopardy argument. The court in Galloway, id., was merely of the opinion that rule 3.702(d)(12) [now rule 3.703(d)(19)] is inapplicable to the offenses of carrying a concealed firearm or possession of a firearm by a convicted felon, when those offenses are unrelated to the commission of any additional substantive offense.

***Id.***

The Galloway court gives no legal analysis to support its conclusion. Respondent submits that there is no logical analysis to support this legal conclusion by the Galloway 3.703(d)(19) does not make any exception for any felonies except those provided for in s. 775.087(2). Possession of a firearm by a convicted felon is not one of the felonies excepted under s. 775.087(2).

The legislature could easily have provided in s. 921.0014( 1) (b) that not only would those felonies enumerated in s. 775.07(2) be excepted from assessment of 18 additional points but also any felony “in which a firearm is an essential element” as provided for by s. 775.087( 1). The legislature was obviously aware of the existence of s. 775.087( 1) when it made the assessment of additional sentencing points exempt only from those felonies set forth in s. 775.087(2). If the legislature intended to exclude offenses where the possession of a firearm is an essential element it should have expressly done so as it did in s. 775.087( 1). “It is, of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio unius est exclusio alterius. ” Thayer v.

State, 335 So. 2d 815, 817 (Fla. 1976). *Cf. Capers v. State*, 678 So. 2d 330 (Fla. 1996).

Furthermore, the Fourth District's resort to statutory construction in Galloway, *supra*, its reasoning that, "[w]e construe rule 3.702(d)12 [now 3.703(d) 19] as inapplicable to convictions of these two offenses [ carrying a concealed firearm and possession of a firearm by a convicted felon] when unrelated to the commission of any other offense." was unnecessary and unwarranted when the rule is clear and unambiguous, As this court stated in Lamont v. State, 610 So.2d 435, at 437 (Fla. 1992):

Where, as here, the language of a statute is clear and unambiguous the language should be given effect without resort to extrinsic guides to construction, As we have repeatedly noted:

"[e]ven where a court is convinced that the legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." (Citations omitted)

Petitioner's attempt to construe the Fifth District's ruling in Gardner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995) as implying that the term "any felony" requires that the defendant must be up for sentencing for offenses other than those in which possession of a firearm is an essential element (in Gardner the defendant possessed a concealed firearm while committing offenses of possession of marijuana and trafficking in cocaine) is without merit. The Fifth District made it clear in Smith v. State, 683 So. 2d 577 (Fla. 5th DCA 1996) where the defendant was charged only with the offense of possession of a firearm by a convicted felon that it adopted the reasoning of the Second District Court of Appeals in that court's reasoning in State v. Davidson, 666 So.2d 941 (Fla. 2d DCA 1995) :

Florida Rule of Criminal Procedure 3.702(d)(12) provides for 18 additional points for possessing a **firearm** if the defendant is convicted of a felony not enumerated in section **775.087(2)**. Possession of a firearm by a convicted felon is not one of the enumerated felonies. In **Gardner v. State**, 661 So. 2d 1274 (Fla. 5th DCA 1996), we held that the meaning of rule **3.702(d)(12)** was clear and that any felony not enumerated was subject to having the additional 18 points assessed because a handgun was involved. Therefore, the assessment of 18 additional points was proper. **Accord State v. Davidson**, 666 So. 2d 941, 942 (Fla. 2d DCA 1995) (holding that the rule simply distinguishes between types of firearms, and manifests nothing more than legislative recognition of the need to deter through enhanced punishment the use of firearms and their potential for the infliction of severe injury during the commission of criminal acts).

**Id. at 579.**

Petitioner's **final** argument is that since a firearm is an essential element of the crime of possession of a firearm by a convicted felon, the assessment of 18 points is a double jeopardy violation. Appellant's double jeopardy argument lacks legal merit. His reliance upon **Gonzalez v. State**, 585 So.2d 932 (Fla. 1991) is misplaced as that case is factually distinguishable. In **Gonzalez, id.**, at 933, this court held that the use of a firearm could not be used to **reclassify** the defendant's conviction for aggravated battery with a firearm from a felony of the second degree to a felony of the first degree. In the instant case, petitioner's conviction for possession of a firearm by a convicted felon is not being reclassified from a felony of the second degree to a felony of the first degree. In the instant case his maximum punishment is not being enhanced; it remains at 15 years for a second degree felony. All that is being done is to add points to guidelines scoresheet to determine what, if any prison sentence, can be imposed.

A similar argument was made to this Court in the case of **Capers v. State, supra**. In that case the defendant argued that it was improper to depart from the

guidelines due to a legislatively authorized departure reason of vulnerability of the victim due to age, when vulnerability due to age is an essential element of the crime of capital sexual battery on child less than 12 and lewd and lascivious assault on a child under the age of 16. **Capers**, *id.* at 332. This Court rejected the argument that double counting of an element of the crime as an aggravating circumstance violated double jeopardy. As this Court reasoned:

Capers also argues that the double counting of an element of a crime as an aggravating circumstance violates constitutional principles. We find no merit to this claim. As we stated in *State v. Smith*, “the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” 547 So.2d 6 B, 614 (Fla. 1989) (quoting *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed2d 535 (1983)). Here, the legislature clearly gave the trial courts the discretion to consider the victim’s vulnerability due to age in the sentencing process as long as the sentence does not exceed the statutory maximum.

*Id.* at 333.

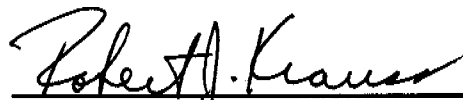
This reasoning is equally applicable to the instant case. The legislature clearly intended to have additional points added to a person convicted on any felony involving the use of a firearm unless it was a felony specifically enumerated in s. 775.087(2). Petitioner’s felony is not one of the enumerated felonies. The intent of the legislature is obvious here. It is to increase the possibility of a prison sentence in any offense in which there is a firearm. It is not increasing the statutory maximum sentence for the felony nor is it requiring a minimum mandatory sentence. The purpose of the rule is to deter through the possibility of prison sentence the potential for violence and injury whenever a firearm is possessed during the commission of a felony.

**CONCLUSION**

Based on the foregoing facts, argument, and citations of authority, respondent respectfully requests that this Court resolve the conflict between the Fourth District and the Second District Courts of Appeal by **affirming** the decision of the Second District Court of Appeal.

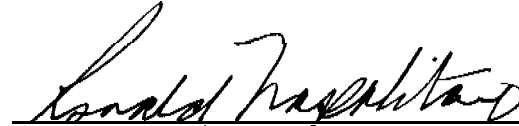
Respectfully submitted,

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COUNSEL FOR RESPONDENT

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Austin H. Maslanik, Assistant Public Defender, P.O. Box 9000-Drawer PD, **Bartow**, Florida 33830, this 7 day of November, 1997.



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COUNSEL FOR RESPONDENT

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

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

JOE L. MOBLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 96-01960

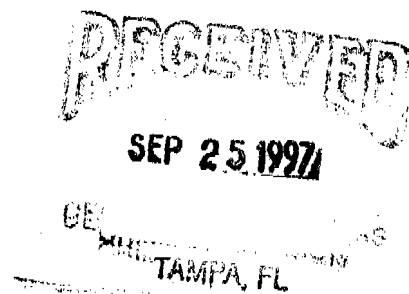
Opinion filed September 24, 1997.

Appeal from the Circuit  
Court for Charlotte County;  
Darryl C. Casanueva, Judge.

James Marion **Moorman**,  
Public Defender, and  
Austin H. Maslanik, Bar-tow,  
for Appellant.

Robert A. **Butterworth**,  
Attorney General,  
Tallahassee, and  
Ronald Napolitano,  
Assistant Attorney General,  
Tampa, for Appellee.

CAMPBELL, Acting Chief Judge.



Appellant challenges the addition of eighteen points to his scoresheet for possession of a firearm since possession of a firearm was an essential element of appellant's crime. We affirm.

Appellant entered a negotiated plea to, among other things, possession of a firearm by a convicted felon. When he entered his plea, appellant reserved the right to appeal the scoring of eighteen additional points on his scoresheet for possession of a firearm. On appeal, he maintains that eighteen months of his 37.5month term are the result of those eighteen points.

Under Florida Rule of Criminal Procedure **3.703(d)(19)**, eighteen points are to be assessed when the defendant is convicted of any felony other than those enumerated in subsection **775.087(2)** if the felony was committed while the defendant was in possession of a firearm. Since the offense to which appellant pled, possession of a firearm by a convicted felon, is not among the offenses enumerated, the court assessed the eighteen points, Appellant argues, however, that ~~even~~ though this offense was not among those enumerated, there is still another reason that the points should not be scored. It is his position that since possession of a firearm is an essential element of his offense, the addition of the eighteen points would be a violation of his right not to be subjected to double jeopardy.

Since this court rejected that argument and held in White v. State, 689 So. 2d 371 (Fla. 2d DCA **1997**), ~~rev. granted~~, 696 So. **2d** 343 (Fla. **1997**), that the scoring of the eighteen points is proper under Florida Rule of Criminal Procedure **3.703(d)(19)**, we **affirm** appellant's sentence here. We also certify conflict with

Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996), as was done in White.

FRANK and PATTERSON, JJ., Concur.