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SID J. WHITE

DEC 11 1997

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

GEORGE ANTHONY SCOTT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 91,738

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, George Anthony Scott, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State agrees with appellant's statement of the case and facts.

SUMMARY OF ARGUMENT

Issues relating to interpretation of the guidelines are exercised in the application of the rules of statutory construction. Applying the rules of construction to the statutory language in question requires this Court to affirm the lower tribunal. The language of the guidelines is clear and precise. The eighteen points are to be added to the score of any defendant who has in his possession a firearm unless the offense is enumerated in § 775.087 Fla. Stat. (1993). Petitioner's offense is not enumerated in that section and he possessed a firearm in committing his offense. Therefore, the points were required to be added to his guidelines score and this Court should affirm the ruling of the lower tribunal.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR BY INCLUDING IN THE
GUIDELINES SCORE FOR THE OFFENSE OF CARRYING A
CONCEALED FIREARM THE EIGHTEEN POINTS REQUIRED BY
§ 921.0014 FLA. STAT. AND FLA. R. CRIM. P. RULE
3.702(d)(12) FOR POSSESSION OF A FIREARM?
(Restated)

Appellant asserts that the trial court erred by adding the eighteen points mandated by Fla. R. Crim. P. rule 3.702(d)(12) to his guidelines score. He asserts that the points should not be added when the offense is possession of a concealed firearm. Appellant is wrong and this Court should affirm the lower tribunal.

Background

This issue presented by this case involves the application of Fla. R. Crim. P. rule 3.702(d)(12) which provides:

(12) 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 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).

RCRP Rule 3.702, Sentencing Guidelines (1994)

Three District Courts of Appeal have interpreted this rule exactly as it is written. They have held that the eighteen points are to be added to the guideline total for those defendant's convicted of any offense involving a firearm other than the offenses enumerated in § 775.087 Fla. Stat. (1993) Gardner v. State, 661 So.2d 1274 (Fla. 5th DCA 1995), State v. Davidson, 666 So.2d 941 (Fla. 2nd DCA 1995), Ramirez v. State, 677 So.2d 95 (Fla. 1st DCA 1996), White v. State, 689 So.2d 371 (Fla. 2nd DCA 1997) review granted, case no 89,998 (Fla. March 10, 1997)

Only one Court has held that the points are not to be added when the offense involves the possession of a weapon. See Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996) Galloway is a puzzling decision, for, it contains no analysis of the legal issue pertaining to the assessment of these points. The Galloway Court simply declares the points inapplicable.

In the instant case, the First District affirmed the assessment of the points in a citation PCA decision, in which the Court certified conflict with State v. Walton, 693 So.2d 135 (Fla. 4th DCA 1997) review granted case no 90,609 (Fla. August 20, 1997)

Argument

The analysis of the issue must start with an understanding of what the sentencing guidelines are. The guidelines are mandatory sentencing rules. They are primarily matters of substantive sentencing law and do not take effect until ratified by the

legislature. See Smith v. State, 537 So. 2d 982 (Fla. 1989) They are constitutional only because the legislature has adopted them. Smith. The issue here involving the point computation is undeniably substantive. These principles of guidelines sentencing are well settled and in accord with the principle that it is the legislature which defines crime and sets the punishment for criminal acts.

Thus, when analyzing guidelines issues the Courts of this state are engaging in routine statutory construction.

This is particularly true in instances such as presented by this case where the issue is not a matter of court procedure and the rule provisions mirror other statutory mandates. Here, the guidelines statutory section § 921.0014(1) Fla. Stat. (1993) includes the following language

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 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 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.

FSA § 921.0014, Sentencing guidelines;

This language is virtually identical to the language of the rule.

The operative language of the rule and statute is clear and specific. If the offense is not enumerated in § 775.087 Fla.

Stat. (1993) and the offender has in his possession a firearm points are assessed.

These provisions require no interpretation. This court has stated innumerable times that when the plain meaning of a statute is clear, there is no room for interpretation. In fact, the polestar of statutory construction is that the plain meaning of the statutory language controls. Capers v. State, 678 So. 2d 330 (Fla. 1996). Only when statute is of doubtful meaning are matters extrinsic to statute considered in construing language employed by the Legislature. Id. The plain meaning is clear and this Court should apply the statute as written.

The rule requiring courts to interpret statutes as written is strictly applied to statutes which define crimes and impose punishment, for, these tasks belong to the legislature. As long as the legislature acts within constitutional restraints, it has absolute authority to define crime and set the factors which will determine the amount of punishment to be imposed. This Court discussing a modification of the guidelines limiting the scope of review of departure sentences recognized this principle in Booker v. State, 514 So.2d 1079 (Fla. 1987), when it stated:

The rule in Florida historically has been that a reviewing court is powerless to interfere with the length of a sentence imposed by the trial court so long as the sentence is within the limits allowed by the relevant statute. As we stated in Brown v. State, 152 Fla. 853, 13 So.2d 458 (1943):

If the statute is not in violation of the Constitution, then any punishment assessed by a court or jury within the limits fixed thereby cannot be adjudged excessive, for the reason that the power to declare what punishment may be assessed against those convicted of

crime is not a judicial power, but a legislative power, controlled only by the provisions of the Constitution.

Id. at 858, 13 So.2d at 461 (quoting 15 Am.Jur. Criminal Law Sec. 526 (1938)). See also *Stanford v. State*, 110 So.2d 1 (Fla.1959); *Walker v. State*, 44 So.2d 814 (Fla.1950); *Infante v. State*, 197 So.2d 542 (Fla. 3d DCA 1967); *Rohdin v. State*, 105 So.2d 371 (Fla. 2d DCA 1958). This view is also consistent with the United States Supreme Court's treatment of this issue. In *Gore v. United States*, 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed.2d 1405 (1958), the Court was confronted with the claim that separate sentences for separate offenses was violative of the double jeopardy clause. In rejecting this claim, the Court stated:

In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility ... these are peculiarly questions of legislative policy. Equally so are the much mooted problems relating to the power of the judiciary to review sentences. First the English and then the Scottish Courts of Criminal Appeal were given power to revise sentences, the power to increase as well as the power to reduce them.... This Court has no such power.

Id. at 393 (citations omitted).

[4] We find from our prior holdings that there is no inherent judicial power of appellate review over sentencing which would render chapter 86-273 violative of the separation of powers provisions of article II, section 3. Indeed, it clearly appears that both this Court and the United States Supreme Court have embraced the notion that so long as the sentence imposed is within the maximum limit set by the legislature, an appellate court is without power to review the sentence. In effect, this rule recognizes that setting forth the range within which a defendant may be sentenced is a matter of substantive law, properly within the legislative domain.

Id. 1081-1082

Thus, the factors to be used in calculating appellant's sentence are within the purview of the legislature and may not be disregarded when sentence is imposed.

Interestingly, appellant does not even provide this Court with an analytical basis for a ruling in his favor. The only argument that can be gleaned from his brief and the opinion in Galloway is a feeling that the points should not be assessed because it is what the court referred to as a status offense. Apparently the Fourth District believes that the offender should not be punished unless he uses the weapon he is illegally or improperly possessing to injure a citizen.

This is not the position of the legislature. The rationale of the additional points is readily apparent to even a casual observer. The legislature in adding this section to the new guidelines created a comprehensive mechanism to ensure that all offenses involving the use of a firearm would be enhanced in some fashion. The legislature interrelated several statutes to achieve this goal. The first part of the mix involves § 775.087(1) Fla. Stat. (1993) which enhances all offenses when a weapon or firearm is used unless the use of the weapon is an element of the crime. The second part of the mix is § 775.087(2) Fla. Stat. (1993) which creates minimum mandatory sentences for the possession of a firearm while committing certain offenses. The final part of the penalty scheme is in the guidelines where eighteen points are added when a firearm is possessed and the offense is not enumerated in § 775.087 Fla. Stat. (1993). These statutes combine to ensure that defendants who improperly use a firearm receive greater punishment. See Palmer v. State, 667 So.2d 1018 (Fla. 5th DCA 1996)

Respondent notes that in the White case currently pending before this Court a double jeopardy argument was presented. While petitioner has not presented a double jeopardy argument in this case, he has asked this Court to reverse based on White. Therefore, Respondent will address the double jeopardy briefly.

There exists no legitimate double jeopardy claim that can be raised challenging the legislature's right to define the factors to be considered in imposing sentence. While double jeopardy protects an individual from being twice punished for the same offense, in the sentencing context it does no more than to prevent the sentencing court from imposing greater punishment than the legislature intended. As this Court stated in Boler v. State, 678 So.2d 319 (Fla. 1996):

[3] This Court has also explained that legislative intent is the dispositive question in determining whether double jeopardy bars separate convictions and sentences for offenses arising from a single episode. State v. Smith, 547 So.2d 613, 614 (Fla.1989). " '[T]he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.' " Id. (quoting Missouri v. Hunter, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983)).

Id. at 321-322

The rationale applies equally when the issue is the legislature's authority to create a punishment mechanism for a single crime. There can be no double jeopardy violation when the legislature enhances punishment based its determination that offenders who use firearms deserve greater punishment. In doing so, the legislature could classify all firearms offenses as level ten offenses and impose a severe penalty on all such offenders,

or, choose to classify the offense based on a scale of seriousness and then enhance by adding points for the possession of the firearm. In fact, there would be no double jeopardy problem if the legislature determined that eighteen points would be added for possession of a firearm and one hundred additional points would be added if the offender discharged the firearm. Here the legislature clearly intended for the eighteen points to be added for possession of the firearm. The fact that the legislature chose to do this does not create a double jeopardy violation for petitioner who was convicted of an offense during which he possessed a firearm.

Summary

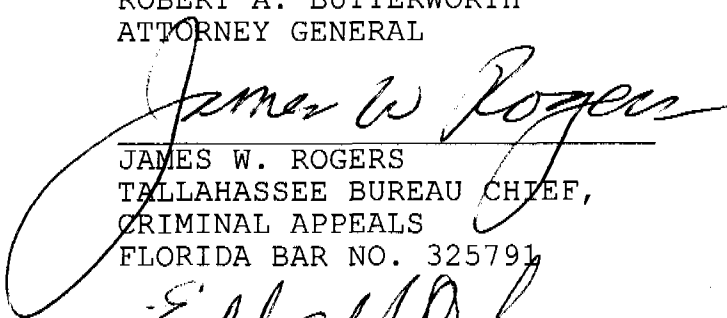
Issues relating to interpretation of the guidelines are exercises in the application of the rules of statutory construction. Applying the rules of construction to the statutory language in question requires this Court to affirm the lower tribunal. The language of the guidelines is clear and precise. The eighteen points are to be added to the score of any defendant who has in his possession a firearm unless the offense is enumerated in § 775.087 Fla. Stat. (1993). Petitioner's offense is not enumerated in that section and he possessed a firearm in committing the offense. Therefore, the points were required to be added to his guidelines score and this Court should affirm the ruling of the lower tribunal.

CONCLUSION

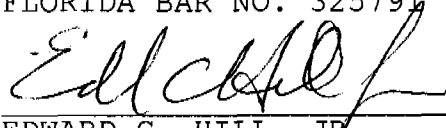
Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal should be approved, and the sentence entered in the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 11th day of December, 1997.



Edward C. Hill, Jr.
Attorney for the State of Florida

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