IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DANIEL BOYNTON,

Respondent.

CASE NO.66,971

RESPONDENT'S

ANSWER BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street - 13th Floor
West Palm Beach, FL. 33401
(305) 837-2150

GARY CALDWELL
Assistant Public Defender

Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner,	)	
vs.	)	CASE NO.66,971
DANIEL BOYNTON, Respondent.	)	

RESPONDENT'S

ANSWER BRIEF ON THE MERITS

RICHARD L.JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street - 13th Floor
West Palm Beach, FL. 33401
(305) 837-2150

GARY CALDWELL
Assistant Public Defender

Counsel for Respondent

TABLE OF CONTENTS

AUTHORITIES CITED

PRELIMINARY STATEMENT

Respondent was the defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida, and the appellant in the District Court of Appeal, Fourth District. Petitioner was the prosecution and appellee in the lower courts. In the brief the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE

Respondent accepts petitioner's statement in its initial brief, but adds the following:

The state charged by information that appellant unlawfully entered the home of Steven Price with the intent to commit theft, and that while on the premises he made an assault on Mary Price. R302. Respondent entered a plea of not guilty and demanded a jury trial. R305. The jury found him guilty as charged, R312, and the trial court adjudged him guilty, R313, and sentenced him to twelve years in the department of corrections pursuant to the sentencing guidelines, to be served consecutively to his sentence in case 83-1547-CF of the same court. R316. Respondent timely filed his notice of appeal, R318, and his appeal followed.

STATEMENT OF THE FACTS

Respondent accepts petitioner's statement in its initial brief except to add the following:

The record shows that on the day that the case was set for trial, respondent told the court that he did not wish to proceed to trial that day because he was dissatisfied with his attorney, Assistant Public Defender Thomas Mahoney. R3-4.[1] After some discussion, the trial court threatened to have respondent tried in chains or in absentia, and then advised him of his right to represent himself. R7-8. After some discussion of extraneous matters, and a brief recess, respondent said he wished to represent himself. R13. The trial court then began a monologue about trial procedure, but did not complete it. R15. Respondent requested a continuance to read the depositions and police reports. R15. After further discussion, the trial court asked respondent a total of twelve questions (several of them repetitive), developing evidence that respondent dropped out of the eighth grade, once sought a GED, was 21 years of age at the time of trial, and wanted a continuance. R17-20. On the basis of this colloquy, the trial court concluded that respondent was competent to represent himself.

The next morning, respondent again said he needed more time to prepare his case, but the court refused to grant a continuance. R28. Respondent asserted that he wished to be

---

[1] It appears that respondent's cases (he had three separate charges pending) had been passed around from attorney to attorney in the public defender's office before landing in Mr. Mahoney's lap, R4, and that Mr. Mahoney had already tried and lost one of the cases. R3-4. Respondent complained that Mahoney had seen him only "about one time," R3, and Mahoney acknowledged that he had seen respondent only three times about all three cases. R6.

represented by new counsel, but the trial court refused the request. R28-29. As the discussion proceeded, the following occurred:

> THE COURT: Well, all right, let me finish telling you the two pitfalls you have by doing it yourself: One, as I have just explained to you, you're not schooled in the law. You have an eighth-grade education. You don't know the rules of evidence or the -- or the particular elements of the offense or the laws that apply to the particular offense, so you're at a tremendous disadvantage in that instance, and secondly, let's assume for the moment that you receive incompetent representation by counsel, let's just assume for the moment that your worst fears are --come to pass, you can challenge that representation within the courts of Florida. If you received incompetent representation, you are entitled to a new trial. If you represent yourself, you can't receive incompetent representation because you are doing it and any errors that may come to pass are on your own head and you can't go in to the Appellate Courts and say, Judge, I was incompetent in representing myself and, therefore, I should get a new trial.
>
> THE DEFENDANT: That's why I need more time.
>
> THE COURT: It's not a basis for the Court granting a continuance, Mr. Boynton. I am not going to grant a continuance. I have already told you that.

R31-32. (e.s.)

After further discussion, the following occurred:

> THE COURT: Okay, six hours. Well, okay, let me just cover some ground rules if you insist on representing yourself, Mr. Boynton, and that is -- that is you sat through a trial, your previous trial. The state will make an opening statement. If you wish to make an opening statement, you may do so.
>
> THE DEFENDANT: I ain't have time to write down none of my opening statements or nothing, prepare for this case or nothing.

> THE COURT: Well, you're making the choice, Mr. Boynton. Mr. Mahoney is prepared to go to trial. You have chosen to do it yourself. You may do so if you wish to.
>
> THE DEFENDANT: I need legal help but I don't feel -- he ain't trying to help me on my case or nothing. He already told me, man, he can't win the case or nothing. I'm going to get found guilty and all this here. I supposed to go back to trial with him? I just got found guilty.
>
> R33.

During further discussions, the trial court advised respondent of his right to make an opening statement, to which respondent replied, "I already -- I ain't prepared for opening statement or nothing." R35.

Respondent said he wished to subpoena a witness, to which request the trial court simply said the case had been set for three months "and that's plenty of time to subpoena a witness." R35. Mr. Mahoney interjected that he had decided not to subpoena the witness. R36. Respondent then asserted yet again, "I need some legal aid help," R36, and, when told of his right to testify, "I can tell them nothing, try to get some legal aid help...from an attorney." R37. Advised of his right to make closing argument, he said, "I told you before, I ain't prepared for nothing." R37. The trial court directed Mr. Mahoney to sit with respondent during the course of trial and answer any questions he might have. R27.

During all of the foregoing, there was discussion about respondent's clothes. Apparently, the public defender was unable to locate clothes that fit respondent, R20, and respondent was understandably upset about his sartorial disarray. One public

defender finally supplied him with a belt so that at least his pants wouldn't fall down, but respondent decided he looked better in jail clothes than in the ill-fitting garb supplied by the public defender. R38.

Thereafter, jury selection began. After the state's examination of the venire, the following occurred:

> THE COURT: Mr. Boynton, do you have any questions for the panel?
>
> MR. BOYNTON: No, sir.
>
> THE COURT: All right. If you will take a few moments, then, Miss Broome, Mr. Boynton, then we'll come up and select a jury.
>
> MS. BROOME: Your Honor, may we approach the bench?
>
> THE COURT: Yes.
>
> MR. MAHONEY: Your Honor, now Mr. Boynton has indicated to me he wants to go non-jury.
>
> THE DEFENDANT: I didn't say non-jury, man, I say I need some legal help. I'm not going to trial with no help on my case.
>
> MS. BROOME: Judge, I would ask that you instruct Mr. Boynton to carry on his conversations with Mr. Mahoney in a voice low enough so that the jury cannot hear it.
>
> THE COURT: Well, I am not, Mr. Boynton, I am not going to give you that instruction. I would suggest to you that it's probably in your best interest to carry on any conversation you have with Mr. Mahoney in a voice the jury does not hear.
>
> THE DEFENDANT: I told him, man, I ain't got no experience picking no jury, nothing, and I need some legal help. He ain't doing nothing to help me on this case and I just found guilty, like I said before, on another case and I like somebody else appoint me to help me out on my case.
>
> THE COURT: I've already gone through that, Mr. Boynton.

THE DEFENDANT: I know that. I'm saying I ain't got no experience as far as me, I don't even want to pick me jury.

THE COURT: Well, Mr. Mahoney is here and available to assist you if you wish to have him.

THE DEFENDANT: He assists me in my last trial I just came from. I asked him to dismiss the jury. He ain't dismissed. Now, him and the State one pick the jury. I ain't pick no jury.

THE COURT: Do you want him to proceed with representing you at this point?

THE DEFENDANT: No. He ain't no represent me. I just need somebody else to get on my case to help me out. He ain't doing his job to help me out. He ain't doing no help me out on my case.

R80-81

....

THE COURT: I think we all understand how you feel about it. The question --

THE DEFENDANT: I know --

THE COURT: -- is to go ahead and select a jury.

THE DEFENDANT: I don't have any experience in selecting a jury. I don't know nothing about selecting a jury, plus I need some more time prepare my case.

THE COURT: When you're ready --

THE DEFENDANT: Subpoena my witness and everything and ain't have no times, just yesterday he drop off the paper. I just read the deposition. That was it. That's all.

R82.

After the state's opening statement, the following occurred:

THE COURT: Mr. Boynton, do you wish to make an opening statement to the jury?

THE DEFENDANT: No, sir. Like I told you, I ain't ready for trial or nothing. I don't know what's going on.

THE COURT: All right. I take that from your response you do not wish to make an opening statement.

R106.

After the judge sent the jury to lunch, the following occurred:

THE COURT: All right. Mr. Boynton, when I ask if you wish to proceed with a particular part of the trial, I appreciate it if you would just tell me whether you wish to proceed or not.

THE DEFENDANT: I ain't ready for trial or nothing. I just took over my case. You didn't give me time to prepare for my case.

THE COURT: Mr. Boynton, I'm not going to rehash that every time I ask you a question. If you want to appeal that decision that I made in that matter, you can do so and you can take it up.

THE DEFENDANT: How can I appeal it? I don't even want the -- don't even know what's going on.

THE COURT: If you are convicted and you want the Court to appoint a public defender for appellate purposes, I would be happy to do so. What we're dealing with at this point is the trial. If I ask you to proceed with a particular part of the trial, I would ask you please to just answer my question as to whether you wish to proceed. If you have any questions, Mr. Mahoney is with you. He will be happy to answer those questions. If you would like Mr. Mahoney to question at anytime --

THE DEFENDANT: I would like you to appoint me another legal aid to help me out on my case.

THE COURT: I appointed the Public Defender. Who the Public Defender appoints to handle your case is up to the Public Defender. I am not going to meddle with that. I have already told you that. I'm not going to appoint private counsel to represent you, so if you wish to have Mr. Mahoney conduct any cross examination of any witnesses, you tell him to do so. He will be prepared and he will be happy to do so. We'll be in recess then until 1:30.

R108-109.

Court then adjourned for lunch.

The state's first witness was Mary Price. When her alarm clock rang at 6:15 a.m. on March 9, 1983, she awoke to see someone leaving her bedroom. R116. Investigating, she found the kitchen door open, and a man between the door and the water heater. R117. She described him as a black man, six feet tall, with a thin mustache, wearing white pants. R118, R122. When she yelled at him to leave, he grabbed her by the neck and choked her until she passed out. R118-119. As he was choking her, she felt his watch rubbing on her face, and, as it turned out, the watchband left a mark on her neck. R120. When she recovered consciousness, she saw the man leaving through the door. Her thirteen-year-old son tried to pursue him, but she restrained the boy. R119. An examination of the house revealed that the bathroom window was open and its screen removed, that there was dirt and a shoeprint in the bathtub, R120, and that Ms. Price's daughter's purse was missing. R121. The police were called, and shortly thereafter they brought the man back to the Price home, where Ms. Price identified him, although his pants were light blue, and not white. R122. She identified respondent in court as being her assailant. R122.

Asked whether he wished to cross-examine Ms. Price, respondent said, "I told you, man, I'm not prepared for trial." R123.

The thirteen-year-old son, Liam, testified that he did not see the man's face, but described him as a black male of average height wearing a gray sweatshirt, sneakers, pants, and short hair. R126-128. He was unable to identify the man the police brought back as the intruder. R129.

Ms. Price's daughter, Kathleen, testified that her purse was missing and was never found. R132-133.

Steven Price, Ms. Price's older son, said he left the house around 5:30-5:45 a.m. on the day in question, and gave no one permission to come onto the premises. R134-135.

Patrolman John Turner testified that he received a radio call to look out for a burglary suspect described in substantially the same way as by Mary and Liam Price above. R138. He saw a man matching the description run west in an alley. R141. Around 6:30 a.m., a canine officer found the man in a garage "roughly a couple hundred yards" from the Price home. R142-143. Identifying respondent as the man, Turner said:

> He's wearing, I believe it's prison clothes or jail clothes, with tennis shoes, T-shirt.
>
> R142.

Patrolman Palladino testified that he was present when respondent was found at the garage. R146.

Sergeant Leach testified that he spoke with Ms. Price around 11:00 a.m. on March 9. R149. He saw "an impression on her face that appeared to me to look like a flexible metal wristwatch band." R150. He testified that respondent's watchband matched the mark on Ms. Price's face. R152.

Canine Officer Fraser testified to finding respondent in the garage. R161.

The state ran out of witnesses, and the trial court granted the state a brief recess to find its next witness. R163-164. At this time, respondent repeated that there was a witness he wished to call. The court offered to recess a little early in the afternoon so that he could find and summon his witness. R166-167.

The State's final witness was Sergeant Parkinson. He testified that there was a faint "shoe impression" in the bathtub, R172, and shoeprints in the soft sugar sand under the bathroom window. R170. He compared respondent's shoe with a shoeprint in the sand, and testified:

> I found that the class characteristics were very similar, that is to say the size, the dimensions, the width of the ball of the foot and the general characteristics of the pattern of the shoe were very similar. However, insofar as microscopic analysis of the wear patterns, the accidental characteristics, any gouges that may appear in it, that was not possible due to the very fineness of the sand itself.
>
> R176.

The state rested, and respondent unsuccessfully moved for a judgment of acquittal. R186. Before recessing for the evening, the judge directed the jailers to let respondent make a "minimum of three calls...and a maximum of six" to try to locate his witness. R188. Court adjourned at 3:53 p.m. R188.

The next morning respondent said he was unable to call his witness, James Dozier:

> Our phone was on, but you can't get through on it. You have to keep pushing the four, take about hour, two hours to get through on it. They have phone lists, about 20 people in our cell. I was last on the list since I was in

> court and I told the sergeant. They left a note down there. I thought they'd take me downstairs somewhere so I could get and make my phone calls. They say they was going to talk to the sergeant. Sergeant came up, tried to call him through the speaker. He never come.
>
> R192.

The trial court recessed until 1:30 p.m. to give respondent more time to locate his witness. At 1:30, respondent reported that Dozier was at work, and could not be reached.[2] R202. Asked why he had not called Dozier's house from the courthouse holding cell when court recessed the day before,instead of waiting until he was returned to the jail that evening, respondent replied:

> THE DEFENDANT: I didn't know his number. I had it back in my cell.
>
> THE COURT: You didn't call directory assistance and try to obtain his number?
>
> THE DEFENDANT: They just ask me that I want to my calls now. I said, no. I thought they let me wait 'till I get back to the jail to make them.

The trial court then decided to proceed without Mr. Dozier's attendance, R205-206, and respondent proceeded to testify on his own behalf.

The upshot of respondent's testimony was that he spent the night in question drinking and riding around with Dozier and Dozier's friend, Benny. R208, R219, R223. Benny let Dozier off in Riviera Beach at 5:30 and let respondent off at the intersection of Second Street and Rosemary in West Palm Beach around 5:45. R208. Respondent went to a store, bought some orange

---

[2] This was confirmed by Assistant Public Defender Grant, who was trying to help respondent locate Dozier. R202-203.

juice, R229, and then walked toward the office of a temporary labor agency. R208. As he walked along, he saw a policeman, and then entered the garage where the police found him. R208. When respondent was brought to the Price home, Mrs. Price's son said respondent was not the intruder. R209. The trial court refused to let respondent read the depositions of the witnesses or the police reports into evidence in order to impeach the prior testimony of the eyewitnesses. R236-237.

Respondent then rested, and unsuccessfully renewed his motion for acquittal. R237. The state presented no rebuttal testimony.

At sentencing, respondent was represented by the public defender. He elected to be sentenced under the sentencing guidelines. R277, R280. The guidelines called for a sentence of from five and one-half years to seven and one-half years, with a recommendation for a six-year sentence. R280.

The trial court decided to double the recommended guideline sentence, and sentenced respondent to twelve years in prison, R295, for the following reasons: first, respondent had just been convicted in another burglary case before another judge, and that conviction was not figured into the guideline score, R291; second, respondent had a record of juvenile offenses, which were so old that the guidelines did not cover them, R229-294; and third, respondent had assaulted people in the past. R295.

SUMMARY OF ARGUMENT

The trial court erred by sentencing appellant to a term in excess of the recommended guideline sentence where it gave no clear and convincing written reasons for the departure.

Where respondent was dissatisfied with the work of the assistant public defender assigned to his case, but was not prepared to proceed to trial pro se, the trial court erred by refusing to order a continuance and compelling him to proceed to trial without counsel. The trial court also erred by compelling respondent to proceed to trial in his jail uniform.

Finally, where appellant was charged with burglary with intent to commit theft, and the evidence was that appellant committed an assault rather than a theft on the premises, the trial court erred by denying his motion for judgment of acquittal.

POINT I

THE TRIAL COURT ERRED BY EXCEEDING THE GUIDELINES IN SENTENCING RESPONDENT

A. Introduction.

The sentencing guidelines, set forth in Rule 3.701 Florida Rules of Criminal Procedure, and Florida Statute 921.001 (1983), are based on specific delineations of the sentence ranges to be imposed for various offense categories. In Re Rules of Criminal Procedure, 439 So.2d 848 (Fla. 1983); Section 921.001, Florida Statutes (1983). The intent of the guidelines is to ensure uniformity and to alleviate disparity in the sentencing process. Fla.R.Crim.P. 3.701(b); §921.001; Samuel S. Jacobson, Sentencing Guidelines, The Florida Bar Journal, Vol. LVII, No.4 (April 1983), pp. 235, 237.

The guidelines apply to felonies, other than capital and life felonies, committed before October 1, 1983 only when he defendant affirmatively selects to be sentenced under them. Section 921.001(4).

The instant cause comes within the guidelines, since the offense for which respondent was sentenced occurred prior to October 1, 1983 and the defense affirmatively requested and agreed to application of the guidelines at the December, 1983 sentencing. The sentencing scoresheet indicated that respondent fell within the category which required imprisonment for a period of five and one-half to seven and a half years. The trial court exceeded the guidelines by sentencing respondent to twelve years in prison.

The standard for departing from the guidelines is one of "clear and convincing reasons..." which "...should be articulated in writing..." Fla.R.Crim.P. 3.701(b)(6). Moreover, departures from the guideline sentence should be avoided in the absence of "clear and convincing" reasons. Fla.R.Crim.P. 3.701(d)(11).

As the accompanying Committee Note reflects, the written statement must be included in the record in order to inform the public and all parties of the specific reasons for the departure; the reasons cannot include offenses for which no convictions have been obtained.[3]

Thus, the guidelines must be adhered to in order to effectuate uniformity and fairness in sentencing patterns. Samuel Jacobson, supra. That is, in the absence of "clear and convincing" reasons, the guidelines should be followed.

As will be discussed in the following subsections, a review of the record sub judice demonstrates no legal basis for the lower court's departure from the guidelines. No "clear and convincing" reasons exist on the record to depart from the presumptive sentence. Certainly, the trial court's oral

---

[3] The Committee Note to Rule 3.701(d)(11) states, in pertinent part:

> (d)(11) The written statement shall be made a part of the record, with sufficient specificity to inform all parties as well as the public of the reasons for departure. The court is prohibited from considering offenses for which the offender has not been convicted...

See also: Section 921.001(6) Florida Statutes (1983), referring to the writing requirement.

"findings," provided no clear and convincing justification to increase the sentence. Nor can the lower court's disregard for the procedures set forth in the rule and statute be condoned.

B. The Sentencing Judge's Oral Findings.

At the outset respondent notes that the lower court's oral pronouncements can in no way be construed as an adequate substitution for the specific written reasons for departure from the guidelines required by the rule. Additionally, the factors relied upon by the court below do not provide any "clear and convincing" reason for deviating from the guidelines.

The trial court's decision to consider respondent's decayed juvenile record was contrary to the drafter's manifest intent that a decayed juvenile record not be considered under the guidelines. See Fla.R.Crim.P. Rule 3.701 (1983), Committee Note (d)(5). Likewise, the trial court's consideration of respondent's prior history of assaults was improper where the guidelines already took into account his prior criminal record.

As to the fact that respondent had another pending case in which the jury had found him guilty, but in which he was not yet sentenced, the correct procedure would have been to have considered that case as an "additional offense at conviction," which would have added six points to his guideline score, 439 So.2d 848 at 849, increasing his sentence from 130 points, R280, to 136 points, leaving him within the same sentencing range. 439 So.2d at 860. Certainly that case formed no bases for doubling the recommended guideline sentence.

C. The Failure to Make Written Findings.

Assuming arguendo - and in no way conceding - that the above-mentioned reasons for departure from the guidelines could somehow be upheld, the present cause must be reversed due to the lower court's failure to make specific, written findings. Rule 3.701(b)(6), (d)(11), requires written findings delineating reasons for the deviation from the guidelines. See also section 921.001(7) Florida Statutes (1983).

The requirements of the rule are clear. The trial court's failure to follow the rule and statute in this regard cannot be condoned. Therefore, the instant sentence must be reversed where the court failed to comply with the statute and the rule.

Based upon the foregoing, the present sentence must be reversed for resentencing in accordance with the presumptive sentence pursuant to the guidelines.

POINT II

THE TRIAL COURT ERRED BY COMPELLING RESPONDENT TO PROCEED TO TRIAL PRO SE WHERE HE WISHED TO BE REPRESENTED BY COUNSEL, AND WAS NOT PREPARED TO PROCEED TO TRIAL

Two things are clear from the various colloquies between the trial court and respondent: first, respondent was not prepared to proceed to trial pro se; second, respondent's predominant wish was to be represented by counsel other than Mr. Mahoney. Under the circumstances, the trial court erred by compelling respondent to proceed to trial without delay.

A. In State v. Reed, 421 So.2d 754 (Fla. 4th DCA 119182), the state appeared at a hearing on a motion to suppress a confession without any witnesses or preparation, despite several weeks of advance notice. Finding that the state was unable to show that the confession was voluntary, the trial court granted the motion to suppress. The Court of Appeal reversed the trial court's ruling and wrote:

> It is always easier to assess a course of action in retrospect and at leisure rather than during the fray and we therefore do not fault the trial court for responding to the situation in a manner designed to remedy delay. A motion for the suppression of a confession, however, is an extremely important matter having severe repercussions to the losing party, whether the state or the accused. For that reason it is imperative that both sides be given fair opportunity to be heard. Only where prejudice will result to the accused should simple neglect or attorney error be sanctioned with the extreme remedy of granting a motion to suppress a confession. No such prejudice appears on this record; accordingly, we reverse and remand for further proceedings consistent with this opinion.
>
> 421 So.2d at 755

Respondent respectfully submits that a criminal trial is also an extremely important matter having severe repercussions for the losing party, so that it is imperative that both sides be given a fair opportunity to be heard.

The record shows that the trial court specifically found that respondent was unfamiliar with the rules of evidence and the law applicable to his case. R31-32. The record shows that the trial court was aware that a witness, whom respondent considered crucial to his case, was not under subpoena. R35-36. The record shows that respondent was not prepared to examine the venire, R80, and was not prepared to pick the jury. R80. The record shows that respondent was not prepared to make an opening statement. R35, R106. The record shows that respondent did not become aware of matters in the depositions that would impeach the eyewitnesses until after they left the stand, R23, and the trial court did not advise him of his right to recall the witnesses for the purposes of impeachment under Hahn v. State, 58 So.2d 188 (1952). Finally, the record shows that on the afternoon of October 18, 1983, when respondent yet again mentioned the witness he wanted to call, the trial court made no attempt to enforce respondent's right of compulsory process under the state and federal constitution, but instead directed that respondent be allowed to make phone calls, as though that were a substitute for compulsory process.

Had appellant had time to prepare for trial, or had he been represented by competent prepared counsel, he would have discovered a significant legal defense tothe offense charged. See Point IV, infra.

Under the circumstances, the trial court erred by compelling respondent to go to trial when he was unprepared to do so,in violation of his due process rights under the state and federal constitutions.

B. The record shows that respondent's main desire was to be represented by counsel other than Mr. Mahoney, whom he considered incompetent. Under the circumstances, the trial court could compel respondent to proceed pro se only after a full and complete inquiry as to his "education, legal experience, prior incarceration, history of mental illness, etc." Keene v. State, 420 So.2d 908 (Fla. 1st DCA 1982). The trial court's inquiry in this matter consisted of only twelve questions, several of them repetitive. R17-20. This was scarcely a sufficient inquiry to support compelling respondent to proceed pro se. The trial court erred by compelling respondent to proceed to trial in violation of his right to counsel under the state and federal constitutions.

POINT III

THE TRIAL COURT ERRED BY COMPELLING RESPONDENT TO PROCEED TO TRIAL IN JAIL CLOTHES

The record shows that respondent's mother was unable to supply him with clothes for trial, R38, and the best that can be said for the clothes supplied by the public defender is that if respondent wore a belt his pants would stay on. R38. The trial court did not advise respondent of any alternative sources of clothes. Understandably upset at the prospect of appearing before the jury dressed like a clown, respondent reluctantly accepted the only alternative of wearing his jail clothes. By compelling respondent to proceed to trial under such circumstances, the trial court violated respondent's rights under the due process clauses of the state and federal constitutions. See: Topley v. State, 416 So.2d 1158 (Fla. 4th DCA 1982), after remand, 424 So.2d 81 (Fla. 4th DCA 1982).

POINT IV

THE TRIAL COURT ERRED BY DENYING RESPONDENT'S MOTIONS FOR JUDGMENT OF ACQUITTAL

The state charged respondent with burglary with intent to commit theft. The evidence shows that respondent entered the Price home and assaulted an occupant, that another occupant's purse disappeared, and that no one saw respondent in possession of the purse either at the scene (when he was in the kitchen) or when arrested. Respondent entered through the bathroom window, yet the kitchen door was wide open.

Under the foregoing facts,the state clearly proved that respondent was guilty of burglary with intent to commit assault the best evidence of what respondent intended to do is what he did, namely assault Ms. Price. Cf. Jalbert v. State, 95 So.2d 589 (Fla. 1957), and State v. Waters, 436 So.2d 66 (Fla. 1983). The state failed to show, however, any intent to commit theft. Indeed, it appears quite possible that whoever entered through the kitchen door stole the purse, since respondent did not have it when he left the house, and it was never found on the premises. Accordingly, the state failed to prove beyond a reasonable doubt that respondent committed burglary with intent to commit theft. Accordingly, the trial court violated his due process rights under the state and federal constitutions by denying his motions for judgment of acquittal.

CONCLUSION

Based upon the foregoing arguments and the authorities cited therein, respondent respectfully requests this Honorable Court to reverse the judgment and sentence of the trial court, and remand this cause with such directives as may be deemed appropriate.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

GARY CALDWELL
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Lee Rosenthal, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, 33401 this 10th day of June, 1985.

Of Counsel