IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

JAMES ROBINSON,

Respondent.

_____/

CASE NO. 77,196

APPEAL FROM THE CIRCUIT COURT
IN AND FOR LEE COUNTY
STATE OF FLORIDA

BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

Respondent was the defendant before the trial court and the Petitioner was the prosecution. The parties will be referred by their proper names or as they appeared before the trial court. The record on appeal consists of one (1) volume and will be referred to by the letter "R" followed by the appropriate page number.

NOTICE OF SIMILAR CASES

State v. V.A.A., Fla. S.Ct. #75,902 (lead case from the Second District Court presenting the instant certified question).

> WHEN A DOUBLE JEOPARDY VIOLATION IS ALLEGED BASED ON THE CRIMES OF SALE AND POSSESSION (OR POSSESSION WITH INTENT TO SELL) OF THE SAME QUANTUM OF CONTRABAND AND THE CRIMES OCCURRED AFTER THE EFFECTIVE DATE OF SECTION 775.021, FLORIDA STATUTES (SUPP. 1988), IS IT IMPROPER TO CONVICT AND SENTENCE FOR BOTH CRIMES.

State v. McCloud, Fla. S.Ct. #75,975

STATEMENT OF THE CASE AND FACTS

On August 4, 1989, the State Attorney for the Twentieth Judicial Circuit in and for Lee County, Florida, filed an information charging the Appellant, James Robinson, with sale or delivery of cocaine and possession of cocaine. The charges allegedly occurred on July 11, 1989 (R.2). On October 16, 1989, Mr. Robinson made an oral motion to dismiss one of the charges based on double jeopardy; and the State made its argument that the Gordon v. State, 528 So.2d 910 (Fla. 2d DCA 1988), decision did not apply after the July 1, 1988, amendment to the statute. The trial court denied Mr. Robinson's motion. Mr. Robinson then entered a plea of no contest, preserving this dispositive motion. He was then placed on 5 years probation concurrent on each charge in accordance with the guidelines (R. 5-18).

On December 21, 1990, the Second District Court in Robinson v. State, 571 So.2d 120 (Fla. 2d DCA 1990) affirmed Appellant's conviction and sentence for one count of sale of cocaine and vacated the conviction and sentence for possession of cocaine on the authority of V.A.A. v. State, 561 So.2d 314 (Fla. 2d DCA 1990). As in V.A.A. v. State, the Second District certified the following question of great public importance:

> WHEN A DOUBLE JEOPARDY VIOLATION IS ALLEGED BASED ON THE CRIMES OF SALE AND POSSESSION (OR POSSESSION WITH INTENT TO SELL) OF THE SAME QUANTUM OF CONTRABAND AND THE CRIMES OCCURRED AFTER THE EFFECTIVE DATE OF SECTION 775.021, FLORIDA STATUTES (SUPP. 1988), IS IT IMPROPER TO CONVICT AND SENTENCE FOR BOTH CRIMES.
>
> [Appendix, A]

SUMMARY OF THE ARGUMENT

Carawan v. State, 515 So.2d 161 (Fla. 1987), is applicable to crimes occurring before the effective date of chapter 88-131, section 7, Laws of Florida, but not to crimes occurring after that date. State v. Parker, 551 So.2d 1209 (Fla. 1989); State v. Smith, 547 So.2d 613 (Fla. 1989). The effective date of chapter 88-131, Laws of Florida, is July 1, 1988. Carawan has been overridden for offenses occurring after July 1, 1988, the effective date of Chapter 88-131, Section 7. As recognized by this Court in State v. Burton, 555 So.2d 1210 (Fla. 1989), the amended statute makes sale and possession of the same substance separate offenses subject to separate convictions and punishments.

CERTIFIED QUESTION

WHEN A DOUBLE JEOPARDY VIOLATION IS ALLEGED BASED ON THE CRIMES OF SALE AND POSSESSION (OR POSSESSION WITH INTENT TO SELL) OF THE SAME QUANTUM OF CONTRABAND AND THE CRIMES OCCURRED AFTER THE EFFECTIVE DATE OF SECTION 775.021, FLORIDA STATUTES (SUPP. 1988), IS IT IMPROPER TO CONVICT AND SENTENCE FOR BOTH CRIMES.

In State v. Smith, Gordon, et. al., 547 So.2d 613 (Fla. 1989) this Court held that the decision in Carawan v. State, 515 So.2d 161 (Fla. 1987) has been overridden for offenses that occurred after the effective date of Chapter 88-131, section 7, i.e., July 1, 1988. Section 775.021, Florida Statutes (1988). Accordingly, Carawan does not apply to the offenses which occurred on August 1, 1988, and separate convictions are appropriate for both sale and possession of cocaine. In amending section 775.021(4), the legislature declared the crimes of possession and sale of an illegal drug separate offenses. In fact, in State v. Burton, 555 So.2d 1210 (Fla. 1989) this Court noted that Smith (547 So.2d 613), held that the amended statute makes sale and possession of the same substance separate offenses subject to separate convictions and punishments.

The First District Court, the Fifth District Court, and Second District Judge Parker have authored opinions which have concluded that there is no double jeopardy bar to dual convictions for both sale and possession of the same contraband. In St. Fabre v. State, 548 So.2d 797 (Fla. 1st DCA 1989), the court found that possession of cocaine and sale of cocaine constitute separate offenses for double jeopardy purposes, even

when they are both predicated on the same act or transaction. Sub judice, as in St Fabre, the defendant was charged with violating two separate subsections of the statute and, since possession of cocaine is not a necessarily lesser included offense of sale of the same cocaine, his double jeopardy claim must fail. In Davis v. State, 560 So.2d 1231 (Fla. 5th DCA 1990) the Fifth District Court affirmed the defendant's conviction and sentence for two statutory offenses: possession of a controlled substance (a third degree felony under Section 893.13(1)(f)), and delivery of a controlled substance (a second degree felony under Section 893.13(1)(a)(1)). In Davis, the Appellant, pursuant to a negotiated drug deal, handed an undercover officer one piece of crack cocaine and in Davis, the court recognized that possession is not required for a sale and a sale is not required to possess contraband. In fact, in Carawan, this Court recognized that:

> ". . . Sale of drugs can constitute a separate crime from possession. . ."
>
> Id. at 176.

In Crisel v. State, 561 So.2d 453 (Fla. 2d DCA 1990), Judge Parker's concurring opinion sets forth a detailed analysis supporting his conclusion that there can be dual convictions for both the sale and possession of the same illegal drug under the amended statute, 775.021. In his concurring opinion, Judge Parker notes, in pertinent part:

> ". . . I perceive the court's rationale in V.A.A. to be that a possession charge is always subsumed into a charge of sale based

upon section 775.021(4)(b)(3), Florida Statutes (Supp. 1988). I disagree. As our supreme court unanimously recognized in State v. Burton, 555 So.2d 1210 (Fla. 1990):

> *We held, in State v. Smith, 547 So.2d 613 (Fla. 1989), which applied chapter 88-131, section 7, Laws of Florida, that the legislature intended the following to be separate offenses subject to separate convictions and separate punishments: the sale or delivery of a controlled substance; and possession of the substance with intent to sell. We also held that although chapter 88-131 overrode Carawan v. State, 515 So.2d 161 (Fla. 1987), nevertheless, it is not to be applied retroactively.*

Burton, 555 So.2d at 1211 (footnote omitted.) Therefore, I think the supreme court has recognized that the amended statute has overturned the Carawan court's analysis of double jeopardy and that pursuant to the amended statute, there now can be convictions for both the sale and possession of the same illegal drug.

The Florida Standard Jury Instruction strengthens my position.

* * *

Nowhere is the element of possession listed as an element in the crime of sale.

* * *

Likewise, nowhere is the element of sale listed as an element of the crime of possession.

* * *

I would first note the legislature's following language in both acts:

For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the *proof adduced at trial*.

* * *

If a court cannot look to the proof to determine if the defendant can suffer

multiple punishments, it seems to me that any scenario in which a defendant can be found guilty of sale and not guilty of possession of the same drug defeats the rationale of V.A.A.

* * *

This court, in *Elias v. State*, 301 So.2d 111 (Fla. 2d DCA 1974), cert. denied, 312 So.2d 746 (Fla. 1975), without any *Blockburger* analysis, recognized that a defendant, after receiving a verdict of acquittal from the court on a possession of heroin charge, can still be found guilty of sale of heroin, without any proof that the defendant ever posses the heroin. This court found the evidence legally sufficient to convict the defendant as an aider and abetter of the sale. Such a holding appears inconsistent with this court's conclusion in V.A.A. that the elements of possession are subsumed by the elements of sale.

* * *

The Fifth District recently acknowledged conflict with V.A.A. in Davis v. State, No. 89-1064 (Fla. 5th DCA April 5, 1990) [15 F.L.W. D880], and adopts my position that a delivery or a sale of an illegal drug can be accomplished without a possession of that drug. In reaching that position, the fifth district looked to a decision from this court and stated:

> But consider an actual case, *Daudt v. State*, 368 So.2d 52 (Fla. 2nd DCA 1979) cert. denied, 376 So.2d 76 (Fla. 1979) in which the court found that a sale was accomplished without possession. In *Daudt* the defendant was convicted of sale and possession of marijuana. The defendant had, at the request of a prospective buyer (an undercover police officer), made a phone call to his "source' to obtain marijuana. Defendant and the undercover officer then drove to another location where they met "Mike". The defendant assured "Mike" that the money was right and, at Mike's insistence, remained as a lookout while Mike took the officer to the location of the marijuana. The sale went down and the arrest was made.

The *Daudt* court held:

> There is no evidence whatsoever that appellant ever had actual possession or control of the marijuana. Nor was constructive possession established. Although appellant knew of the presence of the marijuana, there is no evidence that it belonged to or was under the control of the appellant. At best, the evidence establishes that appellant brought the parties to the transaction together and expected to be paid for such service.
>
> . . .
>
> Appellant aided and abetted [Mike] in selling the marijuana, but not in possessing it. [Mike] already possessed the marijuana; there is no showing that appellant was of any help to [Mike] in either acquiring it or retaining possession of it. On the contrary, appellant aided [Mike] in divesting himself of it.

Daudt at 53-54.

Davis, 560 So.2d 1231.

The bottom line of my reasoning is that the legislature, in amending section 775.021(4), has declared the crimes of possession and sale of an illegal drug separate offenses, without regard to the indictment or information and without regard to the proof offered at trial. Therefore, all analyses of double jeopardy questions must be made by a side-by-side comparison of the elements of the two crimes in question. If this comparison of the two crimes reflects that each offense contains an element that the other does not, then there is no double jeopardy unless the exceptions apply which are listed in section 775.021(4)(b), Florida Statutes (Supp. 1988). If none of the three

> exceptions under that section apply, then there can be two convictions and two sentences for the two crimes. . . "
>
> * * *
>
> Crisel, concurring opinion, Parker, J.,

In Portee v. State, 392 So.2d 314 (Fla. 2d DCA 1981), approved, 447 So.2d 219 (Fla. 1984), the Court specifically stated that possession is not an essential aspect of sale, and in Daudt v. State, 368 So.2d 52 (Fla. 2d DCA 1979), cert. denied, 376 So.2d 76 (Fla. 1979), the Court reversed a conviction for possession of marijuana for insufficient evidence, but let stand a conviction for sale of the same drug. In addition, it is not a necessary element of delivery that the State prove possession, State v. Daophin, 533 So.2d 761, 762 (Fla. 1988). Separate evils have been addressed in the legislature's proscriptions in §893.13, Florida Statutes. The statutory provision prohibiting possession of a controlled substance is aimed at punishing the individual possessor for his criminal activity which does not directly or necessarily involve persons other than the perpetrator. Sale necessarily includes the involvement of the citizens and the legislature has a legitimate interest in punishing not only those who engage in private, personal illegal conduct, but who also seek to include the participation of others in the society in proscribed conduct. Section 775.021(4), Florida Statutes, provides that whoever commits several offenses shall be sentenced separately for each. Offenses are separate if

each offense requires proof of an element that the other does not "without regard to the accusatory pleading or the prove adduced at trial." Since sale does not necessarily include the element of possession, separate convictions and sentences are appropriate. Pursuant to §775.021, in the absence of an applicable exception, a defendant who commits an act which constitutes more than one offense shall, where each offense requires prove of an element that the other does not, be convicted and sentenced for each offense. The legislature may permissibly decide to punish separately those who seek to involve other persons in illegal activity as well as those who individually engage in proscribed conduct. Accordingly, the Second District Court erred in concluding that the double jeopardy clause would be violated by virtue of dual convictions for both sale and possession of cocaine.

The principle of double jeopardy as espoused in the Fifth Amendment, made applicable to the States by the Fourteenth Amendment, is intended to protect individuals against a second prosecution after acquittal, a second prosecution after conviction and multiple punishments for the same offense. *See*, North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). The first two considerations are not applicable here. In the case *sub judice* we need only consider double jeopardy in the context of multiple punishments for the same offense. In this context the test outlined in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), requires only that each offense contain an element that the other does not.

The requirement of Blockburger v. United States, *supra*, is the same requirement outlined in Section 775.021(4). This Court and the courts of this State need look no further than the statutory elements when dealing with the issue of double jeopardy in a single prosecution and on the issue of multiple punishments. *See also* Porterfield v. State, 567 So.2d 429 (Fla. 1990) [Separate convictions and sentences for possession of cocaine and sale of cocaine were not authorized because the convictions were based on incidents which occurred prior to July 1, 1988, the effective date of Chapter 88-131.]

CONCLUSION

Based on the foregoing facts, arguments and authorities, this Honorable Court should reverse the decision of the Second District Court of Appeal, and authorize dual convictions for both the sale or delivery and possession of contraband.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to The Public Defender's Office, P. O. Box 9000 - Drawer PD, Bartow, Florida 33839 on February 5th, 1991.

OF COUNSEL FOR PETITIONER

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 77,196

JAMES ROBINSON,

Respondent.

_____/

APPENDIX

State v. James Robinson, 16 F.L.W. D91 (Fla. 2d DCA, Dec. 21, 1990)

Opinion filed December 28, 1990. Appeal from nonfinal order of the Circuit Court for Pinellas County; Gerard J. O'Brien, Judge. Thomas H. McGowan, St. Petersburg, for Appellant The Grove Restaurant & Bar, Inc., Marc Mazo, Appellant Pro Se. David T. Henninger of Green & Mastry, P.A., St. Petersburg, for Appellees.

(Frank, Judge.) Grove Restaurant and Bar, Inc., the lessee, and third party defendant Marc Mazo, a guarantor, the appellants, have sought review of a partial summary judgment rendered in favor of the lessor, Grove Partners, for accelerated rent following an alleged breach of the lease. Because genuine issues of material fact exist, we reverse.

Grove Restaurant & Bar, Inc. sued Fred Razook, David Brett, Mack McKee, and B/W General Contractors, Inc., a general partnership entitled Grove Partners, and alleged in its second amended complaint that Grove Partners frustrated its efforts to complete the restaurant that was the subject of the lease between the parties by failing to pay architectural fees and subcontractors, delaying payments to B/W General Contractors, failing to pay for items contemplated by their contract, failing to obtain a certificate of occupancy in a timely fashion, and ordering that work on the restaurant be stopped. Grove Restaurant alleged that Grove Partners also breached the contract by preventing it from opening the restaurant on the target date of February 15, 1988, as a result of which it was damaged by losing revenue from the winter tourist season. Grove Restaurant also alleged that Grove Partners failed to obtain additional parking for the restaurant, and further that it misrepresented that Grove Restaurant could have outside seating at the restaurant. Grove Partners counterclaimed that Grove Restaurant breached the lease in a number of ways, including failing to begin payments of base monthly lease amounts on February 15, 1988, failing to amortize monthly payments of additional improvements in a proper amount and on the date of the commencement of the lease, failing properly to employ, supervise and coordinate its subcontractors to complete the improvements in a timely fashion, failing to pay additional rent pursuant to paragraph 5 of the lease, and violating the operating rules and regulations for the project by improper outdoor seating, signage, and supplier/delivery. Grove Partners, as a result of Grove Restaurant's failure to pay the rent, elected to accelerate the entire sums due under the lease. Grove Partners also filed a third party complaint against Marc Mazo, the president and stockholder of Grove Restaurant & Bar, Inc., based upon his execution of a guaranty of payment and performance appended to the lease.

Grove Partners moved for partial summary judgment against Grove Restaurant and Marc Mazo for liability and damages for Grove Restaurant's and Mazo's alleged breach of the lease, through abandonment of the leased premises, and sought damages for accelerated rent.

Clause 19B(2) of the lease, entitled *Default; Remedies of Lessor*, provides that upon default Grove Partners may:

> Elect to declare the entire rent for the balance of the term, or any part thereof, due and payable forthwith, and may proceed to collect the same by distress or otherwise, and thereupon said term shall terminate at the option of the lessor except that, to the extent rents have been collected in such fashion, lessee shall be entitled to remain in possession to the exhaustion of the period covered by the rentals so collected.

This lease term indicates that acceleration is not proper unless the tenant remains in possession of the premises, either physically or by entitlement. "[T]he right to recover the full rental which might exist by reason of such an acceleration provision is lost upon re-entry by the lessor, or a surrender by the lessee." *Geiger Mutual Agency, Inc. v. Wright*, 233 So.2d 444, 447 (Fla. 4th DCA 1970). Further, as explained by this court in *Coast Federal Savings and Loan Ass'n v. DeLoach*, 362 So.2d 982, 984 (Fla. 2d DCA 1978), "[b]y retaking possession either for his own account or for the account of the lessee, a lessor loses the right to recover the full amount of remaining rental due on the basis of an acceleration clause. The two positions are inconsistent." However, in this case, as in *Coast Federal*, the crucial issue is whether the landlord did in fact retake possession of the premises.

Grove Partners moved on July 11, 1989 for an order directing Grove Restaurant either to pay the rent or to vacate the premises. Subsequent to the motion the court entered an injunction requiring Grove Restaurant and Mazo to return all equipment. In September of 1989 Grove Partners changed the locks on the premises. These actions were indicative of at least an intent to retake possession. From the record before us, however, it is unclear who was legally in possession of the premises at the time the summary judgment was entered. As stated above, under both the lease terms and the case law, acceleration is improper when the lessor has taken control of the premises.

Part of the reason for this lack of clarity is that factual issues surround the actual breach. Without making some factual determinations, the trial court could not have concluded as a matter of law that a constructive eviction had not occurred. Without eliminating the constructive eviction defense, the court could not have determined as a matter of law that Grove Restaurant had breached the lease and was in default. If there had been no default, of course, Grove Partners was not entitled to accelerate.

Before damages may be assessed against either party certain factual issues raised by Grove Restaurant's complaint must be resolved. That is to say, specifically, the extent to which outside seating and additional parking were integral parts of the lease agreement; whether Grove Partners failed to use its best efforts to insure their installation; whether Grove Partners' failure, if any, rendered the commercial premises uninhabitable; and whether Grove Restaurant complied with the constructive eviction term of the lease by giving advance notice before vacating.

Accordingly, we reverse the partial summary judgment and remand for further proceedings consistent with this opinion. (SCHEB, A.C.J., and PATTERSON, J., Concur.)

* * *

Criminal law—Sentencing—Guidelines—Departure—Question certified whether second violation of probation constitutes valid basis for departure sentence beyond the one-cell departure provided in sentencing guidelines

JAMES MICHAEL WILLIAMS, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-01254. Opinion filed December 28, 1990. Appeal from the Circuit Court for Lee County; William J. Nelson, Judge. James Marion Moorman, Public Defender, and Megan Olson, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Wendy Buffington, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm the judgment and guideline departure sentence in this case on the authority of *Williams v. State*, No. 87-02878 (Fla. 2d DCA April 27, 1990) [15 F.L.W. D1147]. As in *Williams*, we certify to the Florida Supreme Court the following question of great public importance:

> DOES A SECOND VIOLATION OF PROBATION CONSTITUTE A VALID BASIS FOR A DEPARTURE SENTENCE BEYOND THE ONE-CELL DEPARTURE PROVIDED IN THE SENTENCING GUIDELINES?

(SCHOONOVER, C.J., and CAMPBELL and FRANK, JJ., Concur.)

* * *

Criminal law—Double jeopardy—Sale and possession of contraband—Separate convictions—Question certified

JAMES ROBINSON, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 89-03047. Opinion filed December 21, 1990. Appeal from

the Circuit Court for Lee County; William J. Nelson, Judge. James Marion Moorman, Public Defender, and Deborah K. Brueckheimer, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Katherine V. Blanco, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm appellant's conviction and sentence for one count of sale of cocaine. We vacate the conviction and sentence for possession of cocaine on the authority of *V.A.A. v. State*, 561 So.2d 314 (Fla. 2d DCA 1990). As in *V.A.A. v. State*, we certify to the Florida Supreme Court the following question of great public importance:

WHEN A DOUBLE JEOPARDY VIOLATION IS ALLEGED BASED ON THE CRIMES OF SALE AND POSSESSION (OR POSSESSION WITH INTENT TO SELL) OF THE SAME QUANTUM OF CONTRABAND AND THE CRIMES OCCURRED AFTER THE EFFECTIVE DATE OF SECTION 775.021, FLORIDA STATUTES (SUPP. 1988), IS IT IMPROPER TO CONVICT AND SENTENCE FOR BOTH CRIMES?

(SCHEB, A.C.J., and RYDER and THREADGILL, JJ., Concur.)

* * *

Criminal law—Double jeopardy—Sale and possession of contraband—Separate convictions—Question certified

JAMES D. HAYNES, JR., Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-01663. Opinion filed December 21, 1990. Appeal from the Circuit Court for Pinellas County; R. Grable Stoutamire, Judge. Dwight M. Wells, Tampa, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Dell H. Edwards, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm appellant's conviction and sentence for one count of sale of cocaine. We vacate the conviction and sentence for possession of cocaine on the authority of *V.A.A. v. State*, 561 So.2d 314 (Fla. 2d DCA 1990). As in *V.A.A. v. State*, we certify to the Florida Supreme Court the following question of great public importance:

WHEN A DOUBLE JEOPARDY VIOLATION IS ALLEGED BASED ON THE CRIMES OF SALE AND POSSESSION (OR POSSESSION WITH INTENT TO SELL) OF THE SAME QUANTUM OF CONTRABAND AND THE CRIMES OCCURRED AFTER THE EFFECTIVE DATE OF SECTION 775.021, FLORIDA STATUTES (SUPP. 1988), IS IT IMPROPER TO CONVICT AND SENTENCE FOR BOTH CRIMES?

(SCHEB, A.C.J., and RYDER and THREADGILL, JJ., Concur.)

* * *

Criminal law—Double jeopardy—Sale and possession of contraband—Separate convictions—Question certified

ROBERT ROBINSON, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 89-03045. Opinion filed December 21, 1990. Appeal from the Circuit Court for Lee County; William J. Nelson, Judge. James Marion Moorman, Public Defender, and Deborah K. Brueckheimer, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Katherine V. Blanco, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm appellant's conviction and sentence for one count of sale of cocaine. We vacate the conviction and sentence for possession of cocaine on the authority of *V.A.A. v. State*, 561 So.2d 314 (Fla. 2d DCA 1990). As in *V.A.A. v. State*, we certify to the Florida Supreme Court the following question of great public importance:

WHEN A DOUBLE JEOPARDY VIOLATION IS ALLEGED BASED ON THE CRIMES OF SALE AND POSSESSION (OR POSSESSION WITH INTENT TO SELL) OF THE SAME QUANTUM OF CONTRABAND AND THE CRIMES OCCURRED AFTER THE EFFECTIVE DATE OF SECTION 775.021, FLORIDA STATUTES (SUPP. 1988), IS IT IMPROPER TO CONVICT AND SENTENCE FOR BOTH CRIMES?

(SCHEB, A.C.J., and RYDER and THREADGILL, JJ., Concur.)

* * *

Criminal law—Probation—Conditions—Correction of written order to conform to oral pronouncement—Costs and attorney's fees—Notice and opportunity to be heard

CLARENCE SEAWRIGHT, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 89-02960. Opinion filed December 21, 1990. Appeal from the Circuit Court for Polk County; Charles A. Davis, Jr., Judge. James Marion Moorman, Public Defender, and Stephen Krosschell, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Wendy Buffington, Assistant Attorney General, Tampa, for Appellee.

(THREADGILL, Judge.) The written order of probation in this case includes a special condition that Appellant submit to random drug tests. This condition was not orally announced by the judge at the sentencing hearing. We therefore reverse the written order of probation and remand for correction so that the written order conforms to the oral pronouncement. *Williams v. State*, 542 So.2d 479 (Fla. 2d DCA 1989).

We also strike court costs and attorney's fees without prejudice to the state to seek reimposition after proper notice and opportunity is afforded Appellant to be heard.

Appellant's sentence is otherwise affirmed. (RYDER, A.C.J., and DANAHY, J., Concur.)

* * *

Criminal law—Costs and attorney's fees—Notice and opportunity to be heard

TYRONE TAYLOR, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 89-02443. Opinion filed December 21, 1990. Appeal from the Circuit Court for Polk County; Charles A. Davis, Jr., Judge. James Marion Moorman, Public Defender, and Andrea Norgard, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, Erica M. Raffel, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm the defendant's judgment and sentence but order stricken the imposition of court costs and attorney's fees without prejudice to the state to seek reimposition after proper notice and opportunity to be heard. (SCHOONOVER, C.J., and SCHEB and DANAHY, JJ., Concur.)

* * *

Criminal law—Post conviction relief—Ineffectiveness of counsel—Failure to invoke jurisdiction of appellate court by filing timely notice of appeal—Belated appeal

WILLIE NICHOLS, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-03241. Opinion filed December 21, 1990. Appeal pursuant to Fla. R. App. P. 9.140(g) from the Circuit Court for Hillsborough County; Richard A. Lazzara, Judge.

(PER CURIAM.) Willie Nichols appeals the summary denial of his motion for postconviction relief.* We reverse and remand for further consideration of one issue raised in the motion.

The motion sets forth numerous grounds for relief. With one exception, all are facially insufficient or involve matters which should have been raised, if at all, on pretrial motion and direct appeal. Accordingly, the trial court was correct in denying relief as to those grounds and need not reexamine them after remand.

The one viable issue is captioned "denial of right of appeal" but, as recognized by the supreme court in *State v. Meyer*, 430 So.2d 440 (Fla. 1983), is more appropriately deemed a claim of ineffective assistance of counsel. Traditionally, such a claim has been reviewed by habeas corpus petition in the appellate court, not by rule 3.850. However, the supreme court recently determined that the latter represents the preferred method of present-