IN THE SUPREME COURT OF FLORIDA

ISIAH N. FIELDS,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

DCA CASE No.: 89-1937
CASE NO.: 77,660

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner entered pleas of nolo contendere to two counts of perjury committed on the same day in the same legal proceeding. A legal guidelines scoresheet was computed on which Petitioner was scored twice for legal constraint points. Petitioner timely appealed this decision to the Fifth District Court of Appeal and argued that it was error to score multiple legal constraint points. The Fifth District Court of Appeal in an opinion rendered March 14, 1991, rejected Appellant's argument and reaffirmed its decision in Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990). In so doing, the court noted that the Flowers rationale has been rejected by the Second District Court of Appeal in Scott v. State, 16 FLW D356 (Fla. 2d DCA February 1, 1991) and Lewis v. State, 16 FLW D352 (Fla. 2d DCA February 1, 1991).

Petitioner timely filed his notice to invoke discretionary jurisdiction with this court on March 26, 1991. The decision of the Fifth District Court of Appeal in the case sub judice is in direct conflict with the decisions of the Second District Court of Appeal in Scott v. State, 16 FLW D 356 (Fla. 2d

DCA February 1, 1991) and Lewis v. State, 16 FLW D352 (Fla. 2d DCA February 1, 1991) on the identical issue. Thus, this court has discretionary jurisdiction to accept the instant case to resolve this conflict. Further, Petitioner notes that the decision also relies on a prior decision of the Fifth District Court of Appeal in Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990) which is currently pending review by this court in Supreme Court Case No. 76,854. Therefore, this court has jurisdiction to review the instant case where the issue is currently pending before this court.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal in the case sub judice is in direct conflict with a decision of the Second District Court of Appeal in Scott v. State, 16 FLW D 356 (Fla. 2d DCA February 1, 1991) and Lewis v. State, 16 FLW D352 (Fla. 2d DCA February 1, 1991) on the identical issue.

ARGUMENT

THIS COURT HAS JURISDICTION TO REVIEW THE INSTANT DECISION OF THE FIFTH DISTRICT COURT OF APPEAL WHERE SUCH DECISION IS IN DIRECT CONFLICT WITH A DECISION FROM THE SECOND DISTRICT COURT OF APPEAL ON THE SAME ISSUE AND WHICH ISSUE IS CURRENTLY PENDING BEFORE THIS COURT.

This Court has discretionary jurisdiction to review a case which is in direct conflict with the decision of another district court of appeal on the same rule of law. See, Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. On the face of the decision in the instant case, the Fifth District Court of Appeal has noted that the Second District Court of Appeal has specifically rejected the rationale of Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990) on which the Second District Court relies in Scott v. State, 16 FLW D356 (Fla. 2d DCA February 1, 1991) and Lewis v. State, 16 FLW D352 (Fla. 2d DCA February 1, 1991). In Flowers the Fifth District Court of Appeal ruled that applying a multiplier to legal constraint points where the accused is being sentenced for more than one offense committed while on legal constraint, was proper. In so doing, the Fifth District Court of Appeal certified to this court the question of applying a multiplier to the legal constraint points as a question of great public importance. In Lewis and Scott, the Second District Court of Appeal considered the same issue and specifically rejected the rationale of the Fifth District Court of Appeal in Flowers. Clear conflict exists.

Petitioner also draws this court's attention to the fact that the decision relied upon by the Fifth District Court of Appeal below, Flowers, supra is currently pending resolution by this Court in Case No. 76, 854. The ensure uniformity of decisions, this Court can accept the instant case for review pursuant to the dictates of Jollie v. State, 405 So.2d 418 (Fla. 1981).

CONCLUSION

Based on the foregoing reasons and authorities, Petitioner respectfully requests this Honorable Court to exercise its discretionary jurisdiction and accept the instant case for review on the basis of express conflict between the decision of the Fifth District Court of Appeal sub judice and the decision of the Second District Court of Appeal in Scott v. State, and Lewis v. State.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

for Barbara L. Conder
MICHAEL S. BECKER
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave, Suite 447, Daytona Beach, FL 32114 in his basket at the Fifth District Court of Appeal, this 28th day of March, 1991.

for Barbara L. Conder
MICHAEL S. BECKER
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

ISIAH N. FIELDS,	)	
	)	
Petitioner,	)	
	)	DCA CASE NO.: 89-1937
vs.	)	CASE NO.:
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

A P P E N D I X

Fields v. State, 16 FLW D718, (Fla. 5th DCA March 14, 1991).

Flowers v. State, 567 So.2d 1055, (Fla. 5th DCA October 11, 1990).

Lewis v. State, 16 FLW D352, (Fla. 2d DCA February 1, 1991).

Scott v. State, 16 FLW D356, (Fla. 2d DCA February 1, 1991).

less, after reviewing the entire record and also observing that the first, and some of the worst, of these questions were not objected to, it appears the errors in overruling appellant's objections were harmless.

* * *

Criminal law—Nolo contendere plea—Claims of prosecutorial misconduct and double jeopardy arising out of circumstances preceding plea agreement may not be raised on appeal in absence of express reservation of right to appeal—No entitlement to withdraw plea which was entered in exchange for sentence of six months less than the top of whatever cell resulted from defendant's guidelines scoresheet where points placed defendant in higher cell than he envisioned

ISIAH NAZARETH FIELDS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 89-1937. Opinion filed March 14, 1991. Appeal from the Circuit Court for Seminole County, C. Vernon Mize, Jr., Judge. James B. Gibson, Public Defender, and Michele A. Lucas, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Bonnie Jean Parrish, Assistant Attorney General, Daytona Beach, for Appellee.

(PETERSON, J.) Isiah Nazareth Fields appeals the judgment and sentence imposed following the denial of his motion to withdraw his plea of no contest.

Fields was originally granted a mistrial following a jury verdict of guilty of one count of perjury perpetrated on April 19, 1988. The state then filed an amended information charging Fields not only with the original count of perjury, but with a second count of perjury allegedly also committed on April 19, 1988. In this appeal, Fields argues that adding the second count demonstrated prosecutorial misconduct and constituted a violation of double jeopardy principles. Because the allegations of prosecutorial misconduct and double jeopardy violation arose out of circumstances preceding the plea agreement and there was no express reservation of a right to appeal, no right of direct appeal exists on these issues. *Robinson v. State*, 373 So. 2d 898 (Fla. 1979); *see Skinner v. State*, 399 So. 2d 1064 (Fla. 5th DCA 1981); § 924.06(3), Fla. Stat. (1989); Fla. R. Crim. P. 3.170.

Fields also argues that, when he pled no contest to the two counts of perjury in exchange for "six months off the top of whatever the top range of the guidelines sentence is that he may score in this particular case," he did not have an intelligent understanding of the maximum penalty which could be imposed for the offenses. He asserts that this court's decision in *Walker v. State*, 546 So. 2d 764 (Fla. 5th DCA 1989), changed the law subsequent to the date of his plea agreement and that change placed him into a higher cell than he originally envisioned. *Walker* allows points to be assessed for legal constraint for each offense which occurred while a defendant was under legal constraint. *Walker* has since been followed in *Carter v. State*, 571 So. 2d 520 (Fla. 4th DCA 1990), and in *Flowers v. State*, 567 So. 2d 1055 (Fla. 5th DCA 1990), and rejected by *Scott v. State*, 16 F.L.W. D356 (Fla. 2d DCA February 1, 1991), and by *Lewis v. State*, 16 F.L.W. D352 (Fla. 2d DCA February 1, 1991).

We agree with the denial of Fields' motion to allow withdrawal of his plea of no contest. The basis for the motion was that the effect of the *Walker* decision was to place him in the fourth cell of his score sheet when he believed at the time he changed his plea to no contest that he would score in the third cell. Fields' plea agreement, however, did not specify any definite cell or term of sentence to be imposed. Fields simply agreed to be sentenced to six months less than the top of whatever cell resulted from his score sheet. In agreeing to whatever cell his score sheet put him in, Fields cannot now complain that, when he made that agreement, he was thinking he would fall in a particular guideline cell. In short, it appears from our review of the record that the appellant in his plea agreement knowingly and intelligently accepted the risk that his guideline score sheet might ultimately place him in the fourth rather than the third cell. *Compare Johnson v. State*, 547 So. 2d 238 (Fla. 1st DCA 1989), (denial of plea withdrawal reversed where written on the plea agreement form were the words "guideline sentence—community control" and the sentence given was incarceration).

The defendant responded affirmatively when the court asked him whether he was on probation at the time the plea was entered. The trial court also interrupted the sentencing hearing to allow Fields to verify that he was on probation for a prior felony on the date he committed the perjury. The trial court then recessed the hearing overnight to afford counsel the opportunity to research the *Walker* issue. Every consideration was given to Fields to support his motion for change of plea, and we agree with the trial court that inadequate support was presented to allow the change.

AFFIRMED. (SHARP, W., and GRIFFIN, JJ., concur.)

* * *

Criminal law—Sentencing—Restitution—Ability to pay—Where defendant does not object to proposed order of restitution and present evidence of inability to pay at time restitution is ordered, issue is waived—Failure of defendant to meet burden of showing inability to pay ordered restitution

THOMAS BUTTS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 90-1548. Opinion filed March 14, 1991. Appeal from the Circuit Court for Brevard County, Edward Richardson, Judge. James B. Gibson, Public Defender, and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Belle B. Turner, Assistant Attorney General, Daytona Beach, for Appellee.

(COBB, J.) The appellant, Thomas Butts, has alleged on appeal that the imposition of restitution, without a concomitant determination of ability to pay, was reversible error. In the past, this court has held that section 775.089(6), Florida Statutes (1989), requires a sentencing judge to determine a defendant's ability to pay prior to ordering a defendant to make restitution. *Leyba v. State*, 520 So.2d 705 (Fla. 5th DCA 1988). Section 775.089(6) reads:

> (6) The court, in determining whether to order restitution and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the present and potential future financial needs and earning ability of the defendant and his dependents and such other factors which it deems appropriate.

Section 775.089(7) reads in pertinent part:

> (7) . . . The burden of demonstrating the present financial resources and the absence of potential future financial resources of the defendant and the financial needs of the defendant and his dependents is on the defendant.

It is important to note that a defendant must object to the proposed order of restitution and present evidence of his or her inability to pay at the time the restitution is ordered; otherwise, a defendant will waive this argument. *See Spivey v. State*, 531 So.2d 965, 967, n. 2 (Fla. 1988); *Williams v. State*, 565 So.2d 849, 851 (Fla. 1st DCA 1990); *Dickens v. State*, 556 So.2d 782, 785 (Fla. 2d DCA 1990); *Abbott v. State*, 543 So.2d 411, 413 (Fla. 1st DCA 1989); *Hamrick v. State*, 532 So.2d 71, 72 (Fla. 1st DCA 1988); *Morgan v. State*, 491 So.2d 326, 327 (Fla. 1st DCA 1986). In short, a defendant must affirmatively assert his rights under section 775.089(6), when he is given the opportunity to do so.

In the instant case, the state correctly points out that the trial court did in fact consider the defendant's ability to pay and that the defendant clearly failed to meet the burden placed upon him. The evidence indicates that Butts will attempt to work in the service industry at $7.00 to $8.00 per hour (40-hour week). Notwithstanding the defendant's age, the elicited testimony

brought a fund successfully into court, we agree that the fees were improperly assessed against Community. The right of an attorney to receive fees under the common fund doctrine is based on the theory that the successful efforts of the attorney benefits the class entitled to receive the fund and equity requires that each class member bear his or her pro rata share of the cost of recovering the fund. Thus, we conclude that Rishoi's fees should be paid by the receivership and not Community. *Kittel, supra; Fidelity, supra. See also Estate of Hampton v. Fairchild-Florida Construction Company,* 341 So.2d 759 (Fla.1976).

AFFIRMED in part; REVERSED in part; REMANDED.

COBB and PETERSON, JJ., concur.

Willie Otis FLOWERS, Appellant,

v.

STATE of Florida, Appellee.

No. 89-2304.

District Court of Appeal of Florida, Fifth District.

Oct. 11, 1990.

Defendant was convicted in the Circuit Court, Brevard County, John Antoon, II, J., of offenses committed while on probation, and he appealed his sentence. The District Court of Appeal, Goshorn, J., held that points for "legal constraint" could be awarded for each offense committed while on probation.

Affirmed; question certified.

Cowart, J., filed dissenting opinion.

Criminal Law ⇐1245(2)

In imposing sentence under guidelines, points for "legal constraint" could be awarded for each offense committed while on probation. West's F.S.A. RCrP Rule 3.701.

James B. Gibson, Public Defender, and Michael S. Becker, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and David S. Morgan, Asst. Atty. Gen., Daytona Beach, for appellee.

GOSHORN, Judge.

Flowers appeals his sentence because points for "legal constraint" were awarded for each offense committed while on probation. We affirm. *Walker v. State,* 546 So.2d 764 (Fla. 5th DCA 1989).

Flowers urges that our decision in *Miles v. State,* 418 So.2d 1070 (Fla. 5th DCA 1982) dictates we reconsider our opinion in *Walker* and reverse. We reject this contention because *Miles* involved a single offense, while both Walker and Flowers committed multiple offenses for which they were being sentenced. In our view, *Walker*'s construction of Rule 3.701, Florida Rules of Criminal Procedure promotes the goal of fairness and uniformity envisioned by the enactment of the sentencing guidelines.

Because we are aware that numerous appeals involving this interpretation are pending, we certify to the supreme court the following question as being of great public importance:

DO FLORIDA'S UNIFORM SENTENCING GUIDELINES REQUIRE THAT LEGAL CONSTRAINT POINTS BE ASSESSED FOR EACH OFFENSE COMMITTED WHILE UNDER LEGAL CONSTRAINT?

AFFIRMED.

HARRIS, J., concur.

COWART, J., dissents with opinion.

COWART, Judge, dissenting.

This case involves the propriety of applying a multiplier to the "legal status" factor in computing a guidelines sentence under Florida Rule of Criminal Procedure 3.701 d.6.

While on probation on an initial drug offense, the defendant committed five additional substantive drug offenses. His probation was revoked and he was sentenced on the initial offense and the five additional offenses. The six offenses were duly scored (on scoresheet 3.988(g) Category 7: Drugs) as either the primary offense (3.701 d.3) or additional offenses at conviction (3.701 d.4). However, instead of scoring 14 points for "IV. Legal status at time of offense" (3.701 d.6), and perhaps increasing the sentence to the next higher cell (recommended or permitted guidelines range) for the revocation of probation as permitted by 3.701 d.14., the sentencing court did not use the bump-up provision in 3.701 d.14. but multiplied the 14 points permitted for legal status at time of offense (3.701 d.6.) by 5 (representing each of the 5 additional offenses) for a total of 70 points.

This case involves an old but illusive problem involving factoring. The ambiguity is in determining if the intent is to weigh one, but not the other, factor or to weigh both factors separately or to weigh both factors together in some variable measure of their relationship, as by addition, subtraction, multiplication or division. Under the sentencing guidelines, the offenses (primary or additional) at conviction are weighed on the scoresheet as factors I. and II. (of 5 factors explicitly weighed on the face of the scoresheet) and by matrix, two variable aspects of the offenses are measured (number and degree of seriousness). Time is not weighed. *See* separate opinion in *Lipscomb v. State,* 15 F.L.W. D2227 (Fla. 5th DCA Sept. 6, 1990).

The defendant's prior criminal record is scored as factor III. and again by matrix, the offenses are weighed by number and seriousness.

Victim injury is scored as factor V. and here two varying aspects of this factor are weighed—the degree of physical injury and the number of victims. Rule 3.701 d.7. expressly provides scoring for *each* victim physically injured.

However, under factor IV. "Legal status at time of offense," the scoring is strictly binary: (1) if the legal status of the defendant at the time of committing all offenses for which he is being sentenced was that he was under no restriction, he gets no points, but if, (2) at the time of committing any offense for which he is being sentenced, the defendant was under legal constraint, i.e., his legal status was within those defined in 3.701 d.6., he receives the number of points provided on the appropriate scoresheet. Scoresheet 3.988(g) for Category 7: Drugs provides for 14 points for legal constraint. The number of points depends on which scoresheet is used and the appropriate scoresheet depends not on which offense was committed while the defendant was under a status of legal constraint, but depends on the primary offense defined in 3.701 d.3. *See Gissinger v. State,* 481 So.2d 1269 (Fla. 5th DCA 1986).

When one factor to be considered in arriving at any conclusion is related by description or otherwise to some other factor, confusion can easily result from that relationship. When a circumstance involves two factors and one is mentioned incidentally as part of the description of the one factor to be weighed, the problem is somewhat like that of placing emphasis on the correct syllable of a word. Here the factor to be weighed is the defendant's legal status or legal constraint, and the phrase "at the time of offense" merely refers to the time of the relevant legal status or constraint. The emphasis is on the status, a continuing condition, and not on the offense which relates to a point of time with respect to the legal status. There are other illustrations of what is, in substance, the same problem. *See, e.g., Miles v. State,* 418 So.2d 1070 (Fla. 5th DCA 1982). In each of two separate criminal cases, Miles was released and ordered to appear before the trial court at one time and one place. When he failed to appear, Miles was convicted of two counts of wilfully failing to appear. On appeal this court reversed one

conviction. The State argued that the emphasis should be on each of the original criminal cases in which Miles failed to appear. This court disagreed. Recognizing that the essence of the charge was Miles' failure to appear which occurred but one time, although his appearance on that occasion related to two different matters, this court held that to be convicted twice under the same statutory offense as to the same factual event violated Miles' double jeopardy rights.

Similarly, in *Hoag v. State,* 511 So.2d 401 (Fla. 5th DCA 1987), *rev. denied,* 518 So.2d 1278 (Fla.1987), the defendant left the scene of an accident in which four persons were injured and one person was killed. The defendant was convicted of five counts of leaving the scene of an accident involving injuries or death. Again the court found that while victim injury or death was an essential element of the offenses and there were four injured victims and one dead victim, nevertheless, the focus was on the leaving of a scene of an accident and there was but one accident, one scene of an accident, and one leaving of that scene one time by the defendant. Therefore, this court vacated four of the convictions.[1] In this vein of reasoning, factor IV. relates to the defendant's status as being under, or not being under, legal constraint, a coin with but two sides, and not on the number offenses that he committed while on or in a condition of legal constraint.

The number of offenses involved are adequately scored as an aspect of factors I. and II. (Primary and additional offenses at conviction) and should not be used as a multiplier factor or aspect of the defendant's legal status at the time of the offenses. His "legal status" is a simple concept—he either was, or was not, under legal constraint when he committed any offense for which he is being sentenced. The guidelines neither expressly nor by implication contemplate nor provide for multiplying the defendant's legal status score for each offense involved in the manner that each victim's injury is scored.

To the contrary, there is persuasive evidence that the intent of the authority formulating the sentencing guidelines intended that the defendant's legal status be scored, if at all, but once. The Florida Supreme Court has recently amended the sentencing guidelines scoresheet and forms, including Form 3.988(g), Category 7: Drugs. *In re: Florida Rules of Criminal Procedure 3.701 and 3.988 (sentencing guidelines*), 15 F.L.W. S210 (Fla. Apr. 12, 1990), *revised on Motion for Clarification,* 566 So.2d 770 (Fla.1990). These amendments reflect that "legal status" is scored once while "victim injury" is scored by the number of victims injured as shown in the amended form:

Rule 3.988(g)
Category 7: Drugs

IV. Legal Status at Time of Offense

Status	Points
No restrictions	0
Legal constraint	14
Total	

V. Victim Injury (physical)

Degree of Injury		x Number =	Points
None	0		
Slight	5		
Moderate	10		
Death or severe	15		
		Total	

The court noted that the revised forms do not change the criteria used to calculate a guidelines sentence. Therefore, the amendments reflect the proper calculation of legal status then and now.

Common law criminal law concepts, incorporated into the criminal law of this country by the due process provisions of state and federal constitutions, dictate that all criminal law provisions relating to the determination of either guilt or penalty be

1. *See also Burke v. State,* 475 So.2d 252 (Fla. 5th DCA 1985), *rev. denied,* 484 So.2d 10 (Fla.1986), where this court held that giving three altered dollar bills to one person at one time constituted but one criminal act of uttering.

construed strictly in favor of the accused and that all ambiguities be resolved in his favor. This constitutionally based concept, sometimes called a rule of lenity, is merely codified into section 775.021(1), Florida Statutes, and cannot be abolished merely by statutory amendment or repeal.

The defendant's sentence should be vacated and the cause remanded for sentencing under a guidelines scoresheet scoring the defendant only 14 points under factor IV. "Legal status at the time of offense."

Johnny SWAIN, Appellant,

v.

Deborah SWAIN, Appellee.

No. 90–640.

District Court of Appeal of Florida, Fifth District.

Oct. 11, 1990.

In a dissolution proceeding, the Circuit Court, Orange County, Frank N. Kaney, J., ordered husband to support wife's child of whom he was neither the natural nor adoptive father, and husband appealed. The District Court of Appeal, Dauksch, J., held that the support order was error.

Affirmed in part, and reversed and remanded in part.

W. Sharp, J., issued a dissenting opinion.

1. Husband and Wife ⇐4

Husband could not be ordered to support wife's child of whom husband was not father on ground that husband had become "psychological father of child"; husband did not adopt child and did not stand in loco parentis.

2. Adoption ⇐20

Parent and Child ⇐3.3(1), 15

Basic rule is that only natural and adoptive parents have legal duty to support minor children; only small exception to this basic rule is duty of person to provide for children with whom he or she stands in loco parentis.

Evelyn Davis Golden of Perry, Lamb, Cato & Golden, Orlando, for appellant.

Ronald R. Findell, Orlando, for appellee.

DAUKSCH, Judge.

This is an appeal from a marriage dissolution judgment.

[1, 2] Both parties agree and the trial court found that appellant is not the father of the child the court ordered appellant to support. It is conceded by all that the child was born five years before the marriage of these parties and was fathered by another man. Yet the court ordered appellant to support the child because "he has become the 'psychological father of the child.'" There is no such thing recognized in law. Only natural and adoptive parents have a legal duty to support minor children. *See, e.g., Erwin v. Everard,* 561 So.2d 445 (Fla. 5th DCA 1990); *Albert v. Albert,* 415 So.2d 818 (Fla. 2d DCA 1982), *rev. den.,* 424 So.2d 760 (Fla.1983); *Kern v. Kern,* 360 So.2d 482 (Fla. 4th DCA 1978); *Bostwick v. Bostwick,* 346 So.2d 150 (Fla. 1st DCA 1977). The only small exception to this basic rule is the duty of a person to provide for children with whom he or she stands *in loco parentis.*

Those portions of the judgment requiring appellant to pay support and expenses for the child and giving appellant visitation and other rights regarding the child are reversed. Because appellant has not provided a transcript for our review we cannot find any other alleged error in the record.

AFFIRMED in part; REVERSED in part and REMANDED for entry of an amended judgment to conform hereto.

during which time the child who is the subject of Mr. Sides's petition was conceived. Since March, 1988, however, she has resided continuously in North Carolina. Mr. Sides's petition was not filed until 1989.

Mr. Sides's claim of jurisdiction is based on section 48.193(1)(h), Florida Statutes (1989), which extends Florida's long-arm jurisdiction, in paternity proceedings, to persons "engaging in the act of sexual intercourse within this state with respect to which a child may have been conceived." This subsection became effective October 1, 1988, after the date Ms. Oldt relocated to North Carolina but before the birth of the child. *See* Ch. 88-176, § 3, Laws of Fla.

Amendments or additions to the long-arm statute will not be applied retroactively unless the legislature specifically so provides. *AB CTC v. Morejon*, 324 So.2d 625 (Fla. 1975); *American Motors Corp. v. Abrahantes*, 474 So.2d 271 (Fla. 3d DCA 1985). No such provision surrounds the particular subsection relied upon by Mr. Sides.[1] Inherent in the concept of proper long-arm jurisdiction is that a person is thereby placed on notice that, by doing business or performing certain acts within a given jurisdiction, he or she might reasonably anticipate being subject to suit there. *See World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). At the time Ms. Oldt's child was conceived, there was no statutory or common law basis for her to have expected that conception might at a later date require her return to Florida to defend an action by the putative father.[2]

The principal authority cited to this court by Mr. Sides is *Keiser v. Love*, 98 So.2d 381 (Fla. 2d DCA 1957), wherein this court held that the statute of limitations in a "bastardy" proceeding ran from the date of the child's birth, not conception. By analogy, Mr. Sides reasons that his cause of action did not accrue until Ms. Oldt's child was born, by which time the 1988 amendment to section 48.193 had gone into effect. However, this case is not about whether Mr. Sides may have a cause of action against Ms. Oldt. While he may indeed have a basis to petition, such a cause of action must be pursued with regard for the due process rights of the respondent.

The order of the circuit court under review is reversed and this case is remanded with instructions to dismiss Mr. Sides's petition for determination of paternity. (CAMPBELL, A.C.J., and LEHAN and THREADGILL, JJ., Concur.)

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[1]Our research reveals only one published decision mentioning subsection (1)(h). Larson-Jackson v. Neal, 551 So.2d 567 (Fla. 4th DCA 1989), *rev. denied*, 563 So.2d 632 (Fla. 1990). While this very brief opinion *suggests* a retroactive application of the statute, we cannot determine whether this is in fact what occurred, and we note that Judge Anstead, dissenting, expressed his preference that the parties receive an opportunity to brief the issue of whether subsection (1)(h) was applicable.

[2]In Bell v. Tuffnell, 418 So.2d 422 (Fla. 1st DCA 1982), *rev. denied*, 427 So.2d 736 (Fla. 1983), jurisdiction was conferred over the nonresident father of a child conceived in Florida by virtue of § 48.193(1)(b), which covers "tortious acts" committed within this state. Though pausing to consider whether "the act of sexual intercourse between consenting adults" could in and of itself constitute a tort, 418 So.2d at 423, the court ultimately found tortious conduct in the failure to support a child the appellant had fathered. *See, e.g.*, Poindexter v. Willis, 87 Ill.App.2d 213, 231 N.E.2d 1 (1967); *contra*, State ex rel. Larimore v. Snyder, 206 Neb. 64, 291 N.W.2d 241 (1980). This court expressed disagreement with *Bell* in Department of Health and Rehabilitative Services v. Wright, 489 So.2d 1148 (Fla. 2d DCA 1986), thereby affording the supreme court a basis for accepting jurisdiction. The supreme court ultimately approved our conclusion that nonsupport is only a matter ancillary to and following from the main issue in a paternity action, *i.e.*, whether the respondent is the father of the child. 522 So.2d 838 (Fla. 1988). Even Justice Kogan, dissenting in *Wright* on the basis of his belief that § 409.2551, Fla. Stat. (1985), vested litigation rights in the child, conceded that there exists no *common law* tort of nonsupport. 522 So.2d at 841.

* * *

Criminal law—Sale of cocaine—Possession of cocaine—Separate convictions for sale and possession of same quantum of contraband—Question certified

ALVIN GEORGE STENSON, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 88-02497. Opinion filed February 1, 1991. Appeal from the Circuit Court for Hillsborough County; Richard A. Lazzara, Judge. James Marion Moorman, Public Defender, and Deborah K. Brueckheimer, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Elaine L. Thompson, 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?

(CAMPBELL, A.C.J., and LEHAN and THREADGILL, JJ., Concur.)

* * *

Criminal law—Sentencing—Error to impose sentence as habitual offender in absence of finding of necessity for protection of public

RANDY L. GRIMMAGE, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 89-02315. Opinion filed February 1, 1991. Appeal from the Circuit Court for Pinellas County; Susan F. Schaeffer, Judge. James Marion Moorman, Public Defender, Bartow, and Allyn Giambalvo, Assistant Public Defender, Clearwater, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Stephen A. Baker, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm the defendant's convictions. We also affirm his sentences in all cases except for circuit court case numbers 87-76 and 87-77. In those two cases, which occurred prior to the 1988 amendment to the habitual offender statute, the trial court erred in sentencing the defendant as an habitual offender without first finding that an enhanced sentence was necessary to protect the public. *See Smith v. State*, 561 So.2d 1281 (Fla. 2d DCA 1990). On remand, the trial court may again impose habitual offender sentences if the proper findings are made. (CAMPBELL, A.C.J., and LEHAN and THREADGILL, JJ., Concur.)

* * *

Criminal law—Sentencing—Guidelines—Scoresheet—Multiplier may not be used with legal constraint to arrive at recommended guidelines sentence—Amendment of guidelines to provide for permitted range does not render incorrect scoresheet computation harmless error

RICKY LEWIS, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-00369. Opinion filed February 1, 1991. Appeal from the Circuit Court for Manatee County; Thomas M. Gallen, Judge. James Marion Moorman, Public Defender, and Megan Olson, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Brenda S. Taylor, Assistant Attorney General, Tampa, for Appellee.

(THREADGILL, Judge.) Ricky Lewis appeals a guidelines sentence of seven years in prison. He challenges the computation of his guidelines scoresheet on two grounds, and we reverse on both.

The appellant first contends that Florida Rules of Criminal Procedure 3.701, and 3.988, do not authorize the use of a multiplier when calculating points for legal constraint. On the score-

sheet used to compute the appellant's recommended sentence, the state multiplied the points for legal constraint by four, the number of new offenses the appellant committed while on probation. The trial court felt bound by the authority of *Walker v. State*, 546 So.2d 764 (Fla. 5th DCA 1989), to use the multiplier. *See Chapman v. Pinellas County*, 423 So.2d 578, 580 (Fla. 2d DCA 1982) ("[A] trial court in this district is obliged to follow the precedents of other district courts of appeal absent a controlling precedent of this court or the supreme court."). Since *Walker*, the Fifth District has certified the use of the multiplier to the Florida Supreme Court, *Flowers v. State*, 567 So.2d 1055 (Fla. 5th DCA 1990), and the Fourth District has ruled in favor of a multiplier, *Carter v. State*, 15 F.L.W. D2911 (Fla. 4th DCA Dec. 5, 1990). We do not agree that the guidelines require the use of a multiplier with legal constraint.

Florida Rules of Criminal Procedure 3.701,[1] and 3.988, do not require the use of a multiplier. Nor do they contain language susceptible of a different construction. Even assuming ambiguity in the rules as to scoring legal constraint, the rule of lenity would bar the use of a multiplier. Section 775.021(1), Florida Statutes (1988) provides: "[t]he provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." We construe this statute as applying to the sentencing guidelines rules. *See Williams v. State*, 528 So.2d 453, 454 (Fla. 5th DCA 1988) (adopts the rule of lenity in resolving an ambiguity in the application of the guidelines to a true split sentence); §§ 921.0015 and .001, Fla. Stat. (Supp. 1988) (adopts rules 3.701 and 3.988, as substantive criminal penalties).

Strict construction requires that " 'nothing that is not clearly and intelligently described in [a penal statute's] very words, as well as manifestly intended by the Legislature, is to be considered included within its terms; and where there is such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of liberty is to be taken.' " *State v. Wershow*, 343 So.2d 605, 608 (Fla. 1977), *quoting Ex Parte Amos*, 93 Fla. 5, 112 So. 289 (1927). Therefore, applying the rule of lenity and strict construction to the sentencing guidelines rules and statutes, we conclude that a multiplier may not be used with legal constraint to arrive at a recommended guidelines sentence.

The appellant also argues that the scoresheet incorrectly scores the second and third-degree felony offenses in the primary offense category. In addition, the scoresheet incorrectly scores three third-degree offenses, whereas the appellant was convicted of only two. The state concedes error, but argues it is harmless because the revised score would place the appellant in a "permitted" sentencing range of three and one-half to seven years in prison, whereas he is currently sentenced in the "recommended" range of seven years. We disagree.

Rules 3.701d.8.[2] and 3.988(a)-(i) were amended to provide for a permitted range within which the trial court might increase a recommended guidelines sentence without written reasons for departure. As we have stated before, a trial court is without sufficient information to decide which sentence to impose without knowing the presumptive guideline sentence. *See Berrio v. State*, 518 So.2d 979 (Fla. 2d DCA 1988); *Parker v. State*, 478 So.2d 823, 824 (Fla. 2d DCA 1985). The presumptive guideline sentence as recomputed would be four and one-half to five and one-half years in prison.

We see no reason to modify our previous decisions because of the addition of a higher discretionary range. By creating two discretionary ranges, instead of merely increasing the presumptive range, we can only conclude that the legislature intended the trial courts to apply different criteria to each range. Without knowing both the presumptive and permitted ranges for a particular offense, courts cannot implement the intent of the sentencing guidelines rules and statutes. We therefore reverse the appellant's sentence and remand for correction of the scoresheet and resentencing.

Reversed and remanded. (SCHOONOVER, C.J., and RYDER, J., Concur.)

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[1]Florida Rule of Criminal Procedure 3.701d.6. (1989): Legal status at time of offense is defined as follows: Offenders on parole, probation, or community control; in custody serving a sentence; escapees; fugitives who have fled to avoid prosecution or who have failed to appear for a criminal judicial proceeding or who have violated conditions of a proceeding or who have violated conditions of a supersedeas bond; and offenders in pretrial intervention or diversion programs.

[2]Florida Rule of Criminal Procedure 3.701d.8. (1989): Guidelines Ranges: The recommended sentences provided in the guideline grids are assumed to be appropriate for the composite score of the offender. A range is provided in order to permit some discretion. The permitted ranges allow the sentencing judge additional discretion when the particular circumstances of a crime or defendant make it appropriate to increase or decrease the recommended sentence without the requirement of finding reasonable justification to do so and without the requirement of a written explanation.

* * *

Criminal law—Grand theft—Use of automobile in commission of offense—Forwarding of factual basis for revocation of driver's license, along with conviction, to Department of Highway Safety and Motor Vehicles—Failure to comply with appellate court mandate

STEPHEN VACHRIS, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-00744. Opinion filed February 1, 1991. Appeal from the Circuit Court for Charlotte County; Elmer O. Friday, Judge. James Marion Moorman, Public Defender, and Megan Olson, Assistant Public Defender Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee and Stephen A. Baker, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) The appellant challenges that portion of his sentence for grand theft in which the trial court ordered the clerk of the court to forward the record of his conviction to the Department of Highway Safety and Motor Vehicles for revocation of his driver's license. Because the trial court failed to comply with this court's prior mandate, we vacate this portion of appellant's sentence.

In *Vachris v. State*, 553 So.2d 375 (Fla. 2d DCA 1989) (*Vachris I*), this court reversed the trial court's suspension of appellant's license, because grand theft is not an offense for which the trial court could suspend the license. The panel further noted:

> [T]he state also points out that there was evidence that an automobile was used in the grand theft. In such a case, the trial court may forward the record of the conviction and the factual basis showing the use of the motor vehicle to the Department of Highway Safety and Motor Vehicles which must revoke the driving privileges pursuant to Florida Statutes 322.26(3) (1987).

Id. at 375-376.

We hold that the trial court erred in failing to follow our prior mandate to forward a factual basis for the revocation of appellant's license, along with his conviction, to the Department. Although the state again contends there is evidence that appellant used a motor vehicle in the commission of the grand theft, this evidence is not properly before us on appeal. Accordingly, we vacate this portion of appellant's sentence and remand the matter to the trial court. Upon remand, the trial court shall follow our decision in *Vachris I* if it determines that the Department should revoke appellant's license. (CAMPBELL, A.C.J., and LEHAN and THREADGILL, JJ., Concur.)

* * *

confinement, extended or otherwise." It is clear that the program is not a confinement and is more akin to community control. Since the appellant was not confined, he could not escape. We note that while prosecution for escape is not authorized, the Department of Corrections has the authority, and exercised it here, to terminate an inmate's participation in the release program and to return the inmate to a confinement facility.

Accordingly, the conviction is reversed and the judgment and sentence are vacated. (CAMPBELL, A.C.J., and LEHAN and THREADGILL, JJ., Concur.)

* * *

Criminal law—Robbery—Slight force used in snatching ten-dollar bill from victim's hand insufficient to constitute crime of robbery

DARRELL LAVETTE GOLDSMITH, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-00299. Opinion filed February 1, 1991. Appeal from the Circuit Court for Highlands County; Richard G. Prince, Acting Circuit 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.

(PATTERSON, Judge.) Goldsmith challenges his conviction for unarmed robbery on the basis that the taking was accomplished without the required force or violence to constitute a robbery. We agree and reverse.

On August 15, 1989, James Ward, a part-time Highlands County deputy sheriff, was working undercover as a drug buyer in Lake Placid. While attempting to negotiate a purchase of crack cocaine from Goldsmith, Goldsmith snatched a ten-dollar bill from Ward's hand and ran. Goldsmith did not touch Ward in the process of the theft. The slight force used by Goldsmith to remove the bill from Ward's hand is insufficient to constitute the crime of robbery. *See S.W. v. State*, 513 So.2d 1088 (Fla. 3d DCA 1987).

Reversed and remanded with directions to adjudicate Goldsmith guilty of petit theft. (SCHOONOVER, C.J., and PARKER, J., Concur.)

* * *

Criminal law—Possession of cocaine—Correction of judgment to designate conviction as third-degree felony rather than second-degree felony

JERRY BATTLE, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-01555. Opinion filed February 1, 1991. Appeal from the Circuit Court for Lee County; Jay B. Rosman, Judge. James Marion Moorman, Public Defender, and Kevin Briggs, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Dell H. Edwards, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) Appellant was found guilty of possession of cocaine and resisting an officer with violence. We affirm the judgments and sentences but remand solely for correction of the judgment, changing the designation of the possession conviction as a second-degree felony to a third-degree felony. *See* § 893.13(1)(f), Fla. Stat. (1989). (CAMPBELL, A.C.J., and LEHAN and THREADGILL, JJ., Concur.)

* * *

Criminal law—Sentencing—Guidelines—Scoresheet—Error to multiply points awarded for legal status by all offenses sentenced under scoresheet

THOMAS M. SCOTT, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-00359. Opinion filed February 1, 1991. Appeal from the Circuit Court for Manatee County; Thomas M. Gallen, Judge. James Marion Moorman, Public Defender, and Megan Olson, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Elaine L. Thompson, Assistant Attorney General, Tampa, for Appellee.

(ALTENBERND, Judge.) The defendant appeals numerous sentences, all of which were based on a single scoresheet prepared on January 9, 1990. We reverse some of these sentences, as specified below, because the trial court applied a multiplier to the factor on the guidelines scoresheet regarding "legal status at time of offense." Our decision in this case conflicts with several decisions from other districts that have permitted the trial court to multiply the points awarded for legal status by all offenses sentenced under the scoresheet. *See Flowers v. State*, 567 So.2d 1055 (Fla. 5th DCA 1990); *Walker v. State*, 546 So.2d 764 (Fla. 5th DCA 1989); *Carter v. State*, 15 F.L.W. D2911 (Fla. 4th DCA Dec. 5, 1990). Our decision, however, follows this court's recent holding in *Lewis v. State*, No. 90-00369 (Fla. 2d DCA Feb. 1, 1991). The present case is an extreme example of the results obtained from the use of a legal status multiplier.

While on probation for forgery, grand theft and uttering a forged instrument, the defendant committed numerous robberies, as well as several other felonies, and four misdemeanors. Some of these offenses occurred on September 13, 1988, and the remainder of the offenses occurred on June 12 or June 13, 1989. The state filed seven separate informations charging Mr. Scott with these additional offenses, and also initiated a violation of probation proceeding. The defendant pleaded *nolo contendere* to these charges on January 9, 1990.

At the sentencing hearing, the parties agreed that the defendant should be sentenced for all of the offenses under a category 3 scoresheet for robbery. They disagreed on the method to calculate points for legal status at the time of the offense. The defendant maintained that legal status should receive a single entry of 17 points. Based on the calculations before the trial court, this would have resulted in a total score of 348 points, a recommended range of 17-22 years' imprisonment, and a permitted range of 12-27 years' imprisonment. The state argued that the legal status points should be multiplied for each offense sentenced under the scoresheet, and calculated 428 points for legal status.[1] This resulted in a total score of 759 points, a recommended range of life imprisonment and a permitted range of 27 years' to life imprisonment.

In the absence of conflicting precedent, the trial court correctly followed the Fifth District's decision in *Walker*. After the trial court ruled that it would use the scoresheet prepared by the state, the defendant acquiesced to a negotiated plea agreement under which he received sentences totalling 60 years' imprisonment and reserved the right to bring this appeal.

Because this issue is pending before the supreme court on a certified question in *Flowers*, and because Judge Threadgill has recently written a thorough analysis of this issue for this court in *Lewis*, we will not present an extensive explanation of our reasoning. We note, however, several reasons which have persuaded this court to adopt a position in conflict with that in *Walker*. First, we are influenced by Judge Cowart's dissent in *Flowers*. Second, unlike the other four factors on the scoresheet (i.e., primary offenses, additional offenses, prior record, and victim injury), there is no language in Florida Rule of Criminal Procedure 3.701 as adopted by the legislature in section 921.0015, Florida Statutes (Supp. 1988), which expressly authorizes a multiplier for legal status.

Finally, the points assessed for other factors strongly suggest that the creators of the scoresheet did not intend this factor to be multiplied. For example, in order to obtain the same number of points without the legal status multiplier, the state would have had to present 411 first-degree felony convictions as additional offenses at conviction, or 41 such felonies as primary offenses in this case. Under the rule announced in *Walker*, this defendant, on five of his offenses, is receiving one point for committing the additional felony and seventeen points for being on probation while committing it. Indeed, 56% of the points assessed against

Mr. Scott were based on his legal status. In the absence of express language in rule 3.701 requiring such a questionable approach to sentencing, we will not assume that the legislature intended this method when it adopted the guidelines. It may be that some reasonable multiplier would be appropriate for the factor of legal status, but the guidelines do not currently provide for such a multiplier.

As a result of this holding, we reverse and remand for resentencing in *State v. Scott*, No. 89-2587F, Circuit Court of the Twelfth Judicial Circuit, Manatee County, Florida, and *State v. Scott*, Nos. 89-1812CFAN1 and 89-1908CFAN1, Circuit Court of the Twelfth Judicial Circuit, Sarasota County, Florida. From our review of the record, this error does not appear to affect the sentences in *State v. Scott*, Nos. 89-1404F, 89-1964F, and 891980F, Circuit Court of the Twelfth Judicial Circuit, Manatee County, Florida, and *State v. Scott*, Nos. 88-3318CFAN1 and 89-3561CFAN1, Circuit Court of the Twelfth Judicial Circuit, Sarasota County, Florida. Accordingly, we affirm the sentences in those cases.

Affirmed in part, reversed in part, and remanded for resentencing. (CAMPBELL, A.C.J., and LEHAN, J., Concur.)

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[1]This calculation appears to be incorrect. Assuming 17 points were assessed for 24 offenses, the total would have been 408. Based upon the record before this court, we are unable to confirm the accuracy of the number of relevant offenses applied to the calculation.

* * *

Criminal law—Sentencing—Split sentences in excess of statutory maximum

KERRIE MARLENE MITCHELL, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-01191. Opinion filed February 1, 1991. Appeal from the Circuit Court for Collier County; Charles T. Carlton, Judge. James Marion Moorman, Public Defender, and Andrea Norgard, 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 convictions for uttering a forged instrument, burglary of a dwelling, grand theft, and petit theft. However, we are required to remand this case for correction of sentence.

Appellant was convicted following her entry of no contest pleas in several separate circuit court cases, including charges of violating probation. The only negotiation was for a sentence at the midpoint of the range recommended by sentencing guidelines. The *total* sanction imposed, fifteen years in prison followed by five years probation, is consistent with that recommendation. The split sentence does not represent a departure, because only the incarcerative portion must conform to the guideline range. *Tyner v. State*, 545 So.2d 961 (Fla. 2d DCA 1989). However, the method by which sentence was imposed results in an unlawful sentence for each of the several crimes involved. The trial court imposed the same split sentence for each felony charge, thereby exceeding the statutory maximum in each case. §§ 775.082(3)(c), (d), Fla. Stat. (1989). *Cf. Speller v. State*, 545 So.2d 968 (Fla. 2d DCA 1989).

After remand the trial court may impose any combination of concurrent or consecutive sentences that would result in the same total sanction, so long as the statutory maximum is not exceeded for any offense. *Branam v. State*, 554 So.2d 512 (Fla. 1989). Appellant need not be present for resentencing.

Affirmed in part, reversed in part, and remanded with instructions. (CAMPBELL, A.C.J., and LEHAN and THREADGILL, JJ., Concur.)

* * *

Criminal law—Error to assess costs in absence of notice or opportunity to be heard

CHARLES FLEMING, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-02434. Opinion filed February 1, 1991. Appeal from the Circuit Court for Lee County; James R. Thompson, Judge. James Marion Moorman, Public Defender, and Robert D. Rosen, Assistant Public Defender, Bartow, for Appellant. No appearance for Appellee.

(PER CURIAM.) We affirm the judgment and sentence in this case. However, we strike the provision in the judgment which assesses court costs against appellant, because the record indicates these costs were imposed without prior notice or the opportunity to be heard. Our decision is without prejudice to the state to seek reimposition of costs after adequate notice to appellant. (CAMPBELL, A.C.J., and LEHAN and THREADGILL, JJ., Concur.)

* * *

Dependent children—Error to adjudicate child dependent and to award custody without advising mother of her right to counsel

IN THE INTEREST OF G.L.O., JR. C.R.O., Appellant, v. STATE OF FLORIDA, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, Appellee. 2nd District. Case No. 89-01851. Opinion filed February 1 1991. Appeal from the Circuit Court for Lee County; Hugh E. Starnes, Judge C.R.O., pro se. Anthony N. DeLuccia, Jr., District Legal Counsel, Department of Health and Rehabilitative Services, Fort Myers, for Appellee.

(PER CURIAM.) The appellant, the mother of G.L.O., Jr. challenges the trial court's order adjudicating her son dependent She raises six issues, one of which requires reversal at this time This issue involves the trial court's failure to advise the mother o her right to counsel at any point during the dependency proceeding. Since she was not apprised of her right to counsel, the orde adjudicating the child dependent and awarding custody must b reversed and remanded. *In Interest of D.M.S.*, 528 So.2d 50 (Fla. 2d DCA 1988).

Reversed and remanded for proceedings consistent with th opinion. (CAMPBELL, A.C.J., and LEHAN and ALTEN BERND, JJ., Concur.)

* * *

Declaratory judgment—Standing—Validity of easement—Part who has conveyed real property to county under agreeme whereby county has placed in escrow a portion of the purcha price to offset losses county may suffer as result of dispute co cerning easement has standing to bring declaratory judgme action to have easement determined invalid

NORDVIND TWO, INC., Appellant, v. TREASURE SHORES BEAC CLUB CONDOMINIUM ASSOCIATION, INC., Appellee. 2nd District. Ca No. 90-02221. Opinion filed February 1, 1991. Appeal from the Circuit Co for Pinellas County; Philip A. Federico, Judge. Robert L. McDonald, Jr. Cramer, Haber & McDonald, P.A., Tampa, for Appellant. Seymour Gordon of Gay and Gordon Attorneys, P.A., St. Petersburg, for Appellee.

(LEHAN, Judge.) This is an appeal from the trial court's ord dismissing appellant's declaratory judgment suit for lack standing. Appellant, who had conveyed certain real property Pinellas County, brought this suit, together with Pinellas Coun to have determined invalid a recorded easement held by appell on the property. Appellant in one count sought a declarato judgment, and the county in the other count sought to quiet tit Notwithstanding the well presented argument on behalf of app lee, we reverse.

Under the terms of the contract of sale between appellant seller and the county as buyer, $200,000 of the purchase pri was withheld from appellant and placed in escrow by the cou "to offset any losses the County may suffer or for any litigati costs the County may incur as a result of dispute concerning . . . easement[ ] . . . ." The contract further provides that app lant "shall have the right to co-counsel and participation in a litigation resulting from the [county's] use and occupancy of