IN THE SUPREME COURT OF FLORIDA

ROBERT PEOPLES,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

CASE NO. 77,851
5DCA NO. 89-1074

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
Daytona Beach, Florida 32114-4310
904-252-3367

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by an information filed in the Circuit Court of Brevard County, Florida, with trafficking in 14 to 28 grams of Dilaudid and with conspiracy to traffic in 28 or more grams of Dilaudid. (R 593-594) He was tried by a jury on February 28 and March 1, 1989, and was found guilty of trafficking in four to 14 grams of Dilaudid and of conspiracy to traffic in four to 14 grams of Dilaudid. (R 588, 639-630) On April 27, 1989, he was sentenced to consecutive prison terms totalling 18 years, including consecutive minimum mandatory terms of three years and six years, and was fined $50,000.00 for each count. (R 659-660, 662, 637-639)

The Office of the Public Defender was appointed to represent Petitioner and he timely appealed to the Fifth District Court of Appeal. (R 643, 642) On February 28, 1991, his convictions were affirmed and his sentences were vacated in part. Peoples v. State, 16 F.L.W. D588 (Fla. 5th DCA February 28, 1991) (Appendix). His motion for rehearing was denied on April 4, 1991, and on April 29, 1991, he filed his notice to invoke this Honorable Court's discretionary jurisdiction.

SUMMARY OF ARGUMENT

As acknowledged by the District Court in its opinion herein, the District Court's decision is in direct and express conflict with State v. Douse, *448* So.2d 1184 (Fla. 4th DCA *1984).*

ARGUMENT

THE DISTRICT COURT OF APPEAL'S DECISION DIRECTLY AND EXPRESSLY CONFLICTS WITH THE DECISION IN STATE v. DOUSE, *448* So.2d 1184 (Fla. 4th DCA 1984).

Following his first appearance hearing and his invocation of his right to remain silent and have an attorney, Petitioner was contacted by a co-defendant who was still in custody and who had offered to cooperate with the police and allow detectives to record his telephone calls to Petitioner. (R 95-97, 214-216) On appeal to the Fifth District Court of Appeal, Petitioner argued that the trial court had erred by denying his motion to suppress tape recordings of the conversations between him and the co-defendant because his Sixth Amendment right to counsel had been violated by the police's action in obtaining them. Massiah v. United States, 377 U.S. 201, *84* S.Ct. 1199, 12 L.Ed.2d *246* (1964); Amends. VI and XIV, U. S. Const.; Art. I s. 16, Fla. Const.; Rule 3.130, Fla.R.Crim.P.

In State v. Douse, 448 So.2d *1184* (Fla. 4th DCA 1984), the District Court held that the defendant's rights under Article I, Section 16 of the Florida Constitution and under Florida Criminal Procedure Rule 3.130 were violated when a police detective posing as a friend obtained incriminating statements from him one day after Douse's first appearance hearing.

In this case, the Fifth District Court of Appeal found that Florida law provides no stronger rights than are found in the federal Constitution and stated:

> We are unable to avoid conflict with Douse. The Douse court stated that the Florida Constitution guarantees the right to assistance of counsel in all criminal prosecutions. The court stated further:
>
> > Rule 3.130, Fla.R.Crim.P., in turn, states that the right to assistance of counsel attaches at least as early as the defendant's first appearance which should occur within twenty-four hours of arrest. Thus, in this case the incriminating statements made one day after Douse's first appearance were elicited after his right to counsel attached under Florida law.

Peoples v. State, 16 F.L.W. D588, at 589 (Fla. 5th DCA February 28, 1991) (Appendix).

Because, as the District Court acknowledged, the decision herein is in direct and express conflict with another District Court's decision on the same question of law, this Honorable Court should exercise its discretionary jurisdiction and resolve the conflict.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and review the District Court's decision in this cause.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
Daytona Beach, Florida 32014-4310
904-252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, by delivery to his basket at the Fifth District: Court of Appeal; and by mail to Mr. Robert William Peoples, 1150 S. W. Allapattah Road, Indiantown, Florida 33456-4397, this 9th day of May, 1991.

ATTORNEY

the legal status factor.

* * *

Contracts—Red property—Quitclaim dced—No error in denying rescission of quit-claim deed—Error to deny partition sought by tenant in common

CHRISTINA M. CARUSO, Appellant, v. CARL N. PLUNK, Appellee. 5th District. Case No. 90-647. Opinion filed February 28, 1991. Appeal from the Circuit Court for Orange County, Frederick T. Pfeiffer, Yudgc. Edward R. Cay, Orlando, for Appellant, John F. Tannian of King & Blackwell, P.A., Orlando, for Appellee.

(COBS, J.) In this case the plaintiff below, Christina M. Caruso, brought an action against Carl Plunk, seeking rescission of a quit-claim deed she and her husband had executed involving two acres of land. Alternatively, she sought partition of the property.

We affirm the trial court's denial of rescission, but reverse its denial of partition. Partition is a matter of right for tenants in common. *Condrey v. Condrey*, 92 So.2d 423 (Fla. 1957). Exceptions to that right include waiver and estoppel, but neither was pled nor proven in the instant case. At trial, Plunk testified that the property, owned in common by Caruso and Plunk, was divisible. We therefore remand for appropriate proceedings pursuant to Chapter 64.

AFFIRMED in part; **REVERSED** in part; and REMANDED. (DAUKSCH and PETERSON, JJ., concur.)

* * *

DARNELL REED, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 90-1581. Opinion filed February 28, 1991. Appeal From the Circuit Court for Orange County, Joseph P. Baker, Judge. James B. Gibson, Public Defender, and Kenneth Wills, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Altorncy General, Tallahassee, and Nancy Ryan, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) AFFIRMED on the authority of *King* v. *State*, 557 So.2d 899 (5th DCA), *rev. den.*, 564 So.2d 1086 (Fla. 1990). (DAUKSCH, COBB and WART, JJ., concur.)

* * *

Criminal law—Right to counsel attaches only when formal proceedings are initiated by wny of indictment, information, arraignment, or preliminary hearing—Defendant's right to counsel does not attach even though he has been afforded a first appearance and a non-adversary preliminary hearing—Conflict acknowledged—No violation of right to counsel by admission into evidence of tape recordings of telephone conversations between defendant who had been released on bond and co-defendnt who was in jail—No error in refusal to admit evidence of prosecution witness' fifteen-year-old federal conviction where defense counsel did not produce a certified copy of the judgment—Error to impose consecutive minimum mandatory sentences for trafficking in drugs and conspiracy to traffic in drugs where offenses were part of a single continuous episode

ROBERT PEOPLES, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 89-1074. Opinion filed February 28, 1991. Appeal from the Circuit Court for Brevard County, Humes T. Lasher, Circuit Judge, Retired. James B. Gibson, Public Defender, and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Pamela D. Cichon, Assistant Attorney General, Daytona Beach, for Appellee.

(PETERSON, J.) Robert Peoples appeals his judgment and sentence imposed following a jury verdict. Peoples was convicted of trafficking in fourteen to eighteen grams of Dilaudid and conspiracy to traffic in four to fourteen grams of Dilaudid in violation of sections 893.135(1)(c)1 and 893.135(5), Florida Statutes (1987). On February 27, 1988, a Rockledge police detective responded to a telephone call from a pharmacist who suspected that a customer's prescription for a narcotic was forged. Without arousing the suspicion of the customer, the pharmacist delayed filling the prescription and gave the detective time to travel to the pharmacy. The detective parked near the pharmacy and observed the actions of Peoples and two co-conspirators, Virgilio and Sawyer. The surveillance culminated in the arrest of the three as they attempted to drive away after Virgilio had paid for and obtained the drugs from the pharmacist. The detective found several forged prescriptions and 19.8 grams of Dilaudid in the car occupied by the three. Peoples' fingerprint was found on one of the prescriptions.

After he was arrested and given his *Miranda* warning, Peoples invoked his right to be silent and to have an attorney. After making his first appearance pursuant to rule 3.130, Florida Rules of Criminal Procedure, Peoples posted bond and was released. Virgilio, who was the only one of the three unable to make bond, eventually advised police that he would cooperate and offered to allow them to record his calls to Peoples. Over a period of three days, two calls were made by Virgilio to Peoples. During the last phone conversation, Peoples told Virgilio he was sure the phone conversation was being taped since Virgilio was calling from the jail.

Sawyer testified at trial in exchange for a waiver of a minimum mandatory sentence. Sawyer testified that Peoples and one Michael Giadona were partners in the scheme and that Giadona supplied the false prescriptions. Sawyer testified that he was addicted to Dilaudid and that he had been purchasing it from the partners since 1985. The record does not reflect testimony by Virgilio other than proffered testimony to explain the manner in which the two phone conversations were recorded. Peoples' defense was that his only connection with the persons involved was that he was interested romantically in the "phone girl." Her role in the scam was to be available to respond when pharmacists called to verify prescriptions. Peoples testified that he merely accompanied Sawyer and Virgilio without knowing the purpose of the trip, that he opened the glove compartment of the car where the prescriptions were located to obtain a package of cigarettes and picked up a set of prescriptions only to take a quick look. He also testified that, nevertheless, he was not stupid and understood what the others were doing.

Peoples alleges that the trial court erred by:

I. Denying his motion to suppress the evidence presented to the jury of the two taped phone conversations between Virgilio and himself.

II. Granting the state's motion in limine to preclude cross-examination regarding Sawyer's prior conviction.

III. Imposing consecutive minimum mandatory sentences for trafficking and conspiracy to traffic.

IV. Imposing a six-year minimum mandatory sentence for the trafficking charge.

I. MOTION TO SUPPRESS

Peoples cites *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12L.Ed.2d 246 (1964), to support his argument that the trial court erred by not suppressing the recording of his telephone conversations with Virgilio. In *Massiah*, a co-defendant decided to cooperate with government agents by permitting the installation of a radio transmitter under the front seat of his car. Massiah, who had retained a lawyer, had been indicted, arraigned, and released on bail. Thereafter, he made several incriminating statements to his co-defendant in the bugged car. The Supreme Court held that evidence of the incriminating statements should be suppressed. The Court held that, since the statements were deliberately elicited from him after he had been indicted and in the absence of retained counsel, Massiah's Sixth Amendment rights were violated.

The *Massiah* principle was again applied in *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), in which post-indictment incriminating statements were made by the defendant to a cellmate who was also a paid informant. Evidence of the statements was suppressed. The statements had been

obtained in violation af Henry's Sixth Amendment right to assistance of counsel since they were made after indictment and while the defendant was in custody. In *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985), the defendant, following his indictment, made incriminating statements to a co-defendant who had consented to be equipped with a body bug and who had been instructed not to attempt to question the defendant regarding the charges. With respect to charges for which the defendant had been indicted, the Court found a violation of the Sixth Amendment. However, the Court held admissible evidence of statements made that pertained to crimes for which the defendant had not been indicted.

The Sixth Amendment right to counsel attaches only when formal judicial proceedings are initiated against an individual by way of indictment, information, arraignment, or preliminary hearing. *Kirby v. Illinois*, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). The Supreme Court recently reiterated the rule that "*[a]fter charges have been filed*, the Sixth Amendment prevents the government from interfering with the accused's right to counsel." *Illinois v. Perkins*, __ U.S. __, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990) (emphasis added). In *Moran v. Burbine*, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986), Justice O'Connor referred to the distinction between statements made before and after the filing of formal charges when she commented on the *Moulton* opinion:

> The Court made clear, however, that the evidence concerning the crime for which the defendant had not been indicted—evidence obtained in precisely the same manner from the identical suspect—would be admissible at a trial limited to those charges. . . . The clear implication of the holding, and one that confirms the teaching of [*United States v. Gouveia*, 467 U.S. 180, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984)], is that the Sixth Amendment right to counsel does not attach until after the initiation of formal charges. Moreover, because Moulton already had legal representation, the decision all but forecloses respondent's argument that the attorney-client relationship itself triggers the Sixth Amendment right.

475 U.S. 412, 431, 106 S.Ct. 1135, 1146, 89 L.Ed.2d 410, 427 (1986).

In the cases cited above, the defendants had been formally charged when the suppressed statements were elicited at the instigation of the prosecuting agency. The instant case is distinguished, however, in that Peoples had not been formally charged when his statements were made. Peoples had reached the point in Florida's procedure where he had been afforded his first appearance under rule 3.130, Florida Rules of Criminal Procedure, and a non-adversary preliminary hearing under rule 3.133(a). He had not been charged by indictment or information pursuant to rule 3.140. Since he had not reached the point under federal law where adversary judicial proceedings had been initiated against him, we hold that his right to counsel under the Sixth and Fourteenth Amendments was not violated.

Peoples also claims a violationof his right to counsel under the Florida Constitution. In *State v. Delgadillo*, 458 So. 2d 20 (Fla. 3d DCA 1984), *rev. denied*, 467 So. 2d 999 (Fla. 1985), the defendant, apprehended with an undercover police officer, was arrested and placed in a police cruiser with the undercover officer. During the trip in the car and later that same day in jail, the defendant made incriminating admissions in the presence of the officer. The Third District ruled that there was no violation of the defendant's right to counsel under either the Florida or the United States constitution because no such rights had attached when the statements were made. The opinion made it clear that a first appearance pursuant to rule 3.130, Florida Rules of Criminal Procedure, had not yet occurred and was no; yet required when the statements had been made.

In noting that the defendant's first appearance had not been made, the *Delgadillo* court avoided any conflict with *State v. Douse*, 448 So. 2d 1184 (Fla. 4th DCA 1984). In *Douse*, the trial court suppressed a taped telephone conversation between the defendant and a police detective who attempted to obtain information relating to the arrest by posing as a friend of a co-defendant. The call took place one day after defendant's first appearance at which he was represented by counsel. Citing rule 3.130, Florida Rules of Criminal Procedure, the Fourth District affirmed in a two-to-one decision. The court held that the taped telephone conversation should have been suppressed even though the defendant's Sixth Amendment right to counsel had not attached at the time the statements were elicited. The court relied upon article I, section 16, of the Florida Constitution and rule 3.130, Florida Rules of Criminal Procedure. The court indicated that Florida provides greater protection than federal law and concluded that the right to assistance of counsel attaches at least as early as a defendant's rule 3.130 first appearance.

We are unable to avoid conflict with *Douse*. The *Douse* court stated that the Florida Constitution guarantees the right to assistance of counsel in all criminal prosecutions. The court stated further:

> Rule 3.130, Fla.R.Crim.P., in turn, states that the right to assistance of counsel attaches at least as early as the defendant's first appearance which should occur within twenty-four hours of arrest. Thus, in this case the incriminating statements made one day after Douse's first appearance were elicited after his right to counsel attachedunder Florida law.

Id. at 1185. While the court cites article I, section 16, of the Florida Constitution in support of its conclusion, the words found there—"to be heard in person, by counsel or both"— provide no stronger rights than are found in the Sixth Amendment to the United States Constitution where an accused has the right "to have assistance of counsel for his defense." Furthermore, the word "attaches" does not appear in rule 3.130, Florida Rules of Criminal Procedure, notwithstanding the *Douse* court's insistence that the rule "states that the right to assistance of counsel *attaches* at least as early as the defendant's first appearance. . . ." *Id.* (emphasis added).

Whether Peoples was represented by private or public counsel is irrelevant to the determination of when Peoples' right to counsel attached under the Florida Constitution. Clearly, a suspect has the right *to* counsel in any criminal proceeding at any time and, if entitled to appointed counsel, "when he is formally charged with an offense, or as soon as feasible after custodial restraint or upon his first appearance before a committing magistrate, whichever occurs earliest." Fla. R. Crim. P. 3.111. Rule 3.130(c)(1), Florida Rules of Criminal Procedure, provides for the determination of entitlement to and appointment of counsel prior to first appearance. The above-cited rules do not accelerate the time when the right to assistance of counsel *attaches* so as to prohibit further police investigation utilizing surreptitious means to elicit information. These rules merely specify the point in time in the proceedings at which the state pays for counsel for those who are unable to afford private counsel.

The fact that Peoples was represented by counsel, as was his right, docs not m a n that his right to counsel *attached*, As stated by Justice O'Connor, the formation of the attorney-client relationship is not the point at which the right to counsel attaches:

> More importantly, the suggestion that the existence of an attorney-client relationship itself triggers the protections of the Sixth Amendment misconceives the underlying purpose of the right to counsel. The Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor. Its purpose, rather, is to assure

that in any "criminal prosecutio[n]," the accused shall not be left to his own devices in facing the " 'prosecutorial forces of organized society,' " By its very terms, it becomes applicable only when the government's role shifts from investigation to accusation. For it is only then that the assistance of one versed in the intricacies . . . of law" is needed to assure that the prosecution's case encounters "the crucible of meaningful adversarial testing."

Moran v. Burbine, 475 U.S. 412,430, 106S.Ct. 1135, 1145-46, 89 L.Ed.2d 410,427 (1986) (citations omitted).

Thus, although Peoples had appointed or retained counsel at the time his telephone conversation was recorded, his right to counsel had not attached. As indicated, the right to counsel attaches only when formal proceedings are initiated by way of indictment, information, arraignment, or preliminary hearing. Further, a defendant's right to counsel does not attach even though he has been afforded a first appearance pursuant to rule 3.130, Florida Rules of Criminal Procedure, and a non-adversary preliminary hearing pursuant to rule 3.133(a), Florida Rules of Criminal Procedure. Although these hearings are preliminary, neither type of hearing is adversarial for purposes of attachment of the right to counsel. In ***United States v. Gouvein,*** 467 **U.S.** 180, 104S.Ct. 2292, 81 L.Ed.2d 146 (1984), Justice Rehnquist reiterated that the right to counsel attaches when formal adversary proceedings are brought against an accused. He noted that "critical" pretrial proceedings are those "where the results of the confrontation 'might well settle the accused's fate and reduce the trial itself to a mere formality.' " 467 U.S. at 189, 104S.Ct. at **2298,** *quoting United States v. Wade*, 388 **U.S.** 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *compare Coleman v. Alabama*, 399 **U.S.** 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) (Preliminary hearings, that may be used to perpetuate evidence and keep necessary witnesses within the control of the state, are adversarial. We hold therefore that, in Florida, via the rule 3.130 first appearance or via the rule 3.133(a) non-adversarial hearing, the right to counsel does not attach. In so holding, we acknowledge conflict with ***Douse, supra,*** and, to the extent it relies on ***Douse,*** with *Sobczak v. State,* 462 So. 2d 1172 (Fla. 4th DCA 1984). ***rev. denied,*** 469 So. 2d 750 (Fla. 1985).

Since Peoples' right to counsel was not violated under either the state constitution or the federal Constitution, the trial court correctly denied his motion to suppress.

II. MOTION IN LIMINE

The defendant contends that the trial court should have allowed evidence of Sawyer's fifteen-year-old conviction. On cross-examination, the defense attempted to elicit from Sawyer, the state's principal witness, testimony that he had served twenty months in a federal penitentiary after his conviction for possession of heroin and marijuana in 1972, The state moved in limine to preclude examination regarding the conviction on the ground that the prior convictions were too remote in time to be admissible and that defense counsel did not have a certified copy of the Judgment. While section 90.610(1), Florida Statutes (1987), precludes evidence in a civil trial of a conviction so remote in time as to have no bearing on the present character of a witness, it does not prohibit such evidence in a criminal trial. § 90.610(1)(a); see *also* Sponsor's Note 1979, § 90.610(1)(a). The trial court was still correct, however, in disallowing the evidence. The attorney who seeks to introduce evidence of a prior conviction should have knowledge of the prior conviction and should possess a certified copy of the judgment of conviction. *King v. State,* 431 So. 2d 272 (Fla. 5th **DCA** 1983); *Cummings v. State,* 412 So. 2d 436 (Fla. 4th DCA 1982). While defense counsel argued that neither he nor the state attorney could obtain a copy of the federal conviction, we are unwilling to relax the *Cummings* rule and substitute for it a rule excusing certified copies of federal convictions because they may be difficult to obtain.

We recognize the exceptional circumstances in *Alvarez v. State,* 467 ***So.*** 2d 455 (Fla. 3d **DCA** 1985), ***rev. denied,*** 476 ***So.*** 2d 675 **(Fla.** 1985), where it was held that evidence of a felony conviction in Cuba should have been admitted even though copies of the convictions were not available. *Alvarez* will not be applied in the instant case since, it is hoped, records of the United States have not reached the degree of inaccessibility as have Cuban records. Also, there was other incriminating evidence in the instant case. In *Alvarez,* the only evidence against the defendant was the testimony of the witness whom the defendant sought to impeach.

III. CONSECUTIVE MINIMUM MANDATORY SENTENCES

Peoples received two minimum mandatory terms pursuant to sections 893.135(1)(c)1, and 893.135(5), Florida Statutes (1987). for trafficking and conspiring to traffic in Dilaudid. Section 853.135(5), Florida Statutes (1987), provides for punishment for conspiring to commit an act proscribed by section 853.135(1) in the same manner as if he had actually committed the act.

Consecutive minimum mandatory sentences are not appropriate when the multiple offenses for which sentences are imposed are committed during a single continuous episode. *Palmer v. State,* 438 So. 2d 1 (Fla. 1983). This rationale is applicable to sentences imposed pursuant to section 893.135. *Vickery v. Stare,* 515 So. 2d 396 (Fla. 1st DCA 1987). In *Palmer,* the defendant was found guilty of traffickingin cocaine, conspiracy to traffic in cocaine, and conspiracy to traffic in cannabis. The court found that the conspiracy to traffic in cannabis was sufficiently separate and distinct from the other two offenses to permit a consecutive mandatory term of imprisonment, but the charges of trafficking and conspiracy to traffic in cocaine arose from a single transaction involving the *same* contraband. The offenses were not sufficiently distinct to permit consecutive mandatory sentences.

In the instant case, the testimony was in direct conflict as to Peoples' involvement in the alleged crimes. This conflict had to be resolved by the jury who found Peoples to be guilty of trafficking in four but less than fourteen grams and of conspiracy to traffic in exactly the same amount of drugs. The jury verdict does not distinguish the trafficking charge from the conspiracy charge; thus, we cannot conclude that the conspiracy was to traffic in any contraband other than that which was the basis for finding him guilty of trafficking. Since the offenses cannot be distinguished from one another, the sentences imposed appear to be for a single continuous episode, and *Palmer* requires that the sentences be served concurrently.

IV. IMPOSITION OF SIX-YEAR MINIMUMMANDATORY SENTENCE FOR COUNTII

The sentence for Count II, the trafficking charge, indicated the imposition of a six-year minimum mandatory imprisonment pursuant to section 893.135(1)(c)(3), Florida Statutes. That subsection clearly prescribes a mandatory term of three years. The six-year mandatory term is vacated, and we remand for imposition of the correct mandatory term of three years.

AFFIRMED in part; VACATED in part; and REMANDED for resentencing. **(COBB,** J., concurs. DAUKSCH, J., dissents without opinion.)

* * *

Criminal law—Sentencing—Error to impose consecutive mandatory minimum sentences for robbery with a firearm and aggravated assault with a firearm where offenses occurred in same criminal episode—Offenses occurred during same criminal episode where defendant robbed victim and then shot at robbery victim's husband while attempting to escape—Defendant entitled to serve sentence in onestretch rather than in bits and pieces

WILLIE PREYER, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. **90-496.** Opinion filed February 28, 1991. Appeal from the