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FILED
SID J. WHITE
SEP 23 1991
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

JEAN MAX LIATAUD,

Petitioner,

vs.

CASE NO. 78,626

STATE OF FLORIDA,

Respondent.

_____)

PETITIONER'S BRIEF ON JURISDICTION

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
301 N. Olive Avenue/9th Floor
West Palm Beach, Florida 33401
(407) 355-2150

TANJA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634

Counsel for Petitioner

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, and the appellee in the Fourth District Court of Appeal. Respondent was the prosecution and the appellant below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of purchase of cocaine within one thousand feet of a school, in violation of Section 893.13(1)(e), Florida Statutes (1989). Despite the existence of a three year mandatory minimum sentence for that offense, the trial court found Petitioner to be drug dependent, and he was ordered to serve a term of five (5) years probation, on the authority of Section 397.12, Florida Statutes (1989).

On appeal, the Fourth District Court of Appeal reversed this disposition, citing its prior decision in State v. Baxter, 16 FLW 1561 (Fla. 4th DCA June 21, 1991), (Appendix, at pages 2-3), which held that the three year mandatory minimum set forth in Section 893.13(1)(e) supersedes and precludes the operation of Section 397.12, Florida Statutes (1989). State v. Liataud, Case No. 90-3221 (June 19, 1991) (Appendix, at page 1). Petitioner's motion for rehearing was denied on August 28, 1991 (Appendix, at pages 4-5).

On August 21, 1991, in State v. Scates, 16 FLW 2203 (Fla. 4th DCA August 21, 1991), the Fourth District Court of Appeal cited State v. Baxter, supra, and the instant case when it certified the identical issue raised in those cases as a question of great public importance to this Court. State v. Scates, supra, (Appendix, page 6). The certified question is:

> MAY A TRIAL COURT PROPERLY DEPART FROM THE MINIMUM MANDATORY PROVISIONS OF SECTION 893.-13(1)(E), FLORIDA STATUTES (1989), UNDER THE AUTHORITY OF THE DRUG REHABILITATION PROVISION OF SECTION 397.12, FLORIDA STATUTES (1989).

Scates is presently pending before this Court in Case No. 78,533.

Petitioner noticed his intent to invoke this Court's discretionary jurisdiction to review this cause on September 11, 1991. This jurisdictional brief follows.

SUMMARY OF ARGUMENT

The decision in the present case is cited as authority in another decision of the Fourth District Court of Appeal, State v. Scates, 16 FLW 2203 (Fla. 4th DCA August 21, 1991), Appendix at page 6, which certifies to this Court a question of great public importance. Since this Court has jurisdiction of Scates, it also has jurisdiction to review the decision in Petitioner's case which presents the identical issue. Article V, § 3(b)(4), Florida Constitution; Jollie **v.** State, 405 So.2d 418 **(Fla. 1981).**

ARGUMENT

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL BELOW WHICH HAS BEEN CITED AS CONTROLLING AUTHORITY IN A SUBSEQUENT CASE WHICH CERTIFIES THE IDENTICAL ISSUE TO THIS COURT AS A QUESTION OF GREAT PUBLIC IMPORTANCE.

Article V, Section 3(b)(4) of the Constitution of Florida empowers this Court to review any decision of a district court of appeal which certifies to this Court a question of great public importance. In State v. Scates, 16 FLW 2203 (Fla. 4th DCA August 21, 1991), the following question was certified to this Court as one of great public importance:[1]

> MAY A TRIAL COURT PROPERLY DEPART FROM THE MINIMUM MANDATORY PROVISIONS OF SECTION 893.13(1)(e), FLORIDA STATUTES (1989), UNDER THE AUTHORITY OF THE DRUG REHABILITATION PROVISION OF SECTION 397.12, FLORIDA STATUTES (1989)?

Appendix, at page 6. This Court therefare has jurisdiction to review Scates, which is presently pending in Case No. 78,533.

Scates held that the three year mandatory minimum term required under Section 893.13(1)(e), Florida Statutes (1989) upon conviction for purchasing cocaine within 1000 feet of a school could not be avoided by resort to Section 397.12, Florida Statutes (1989), which authorizes the trial court to require a defendant to undergo a program of drug rehabilitation rather than incarceration where he is convicted of a vialation of the drug abuse laws of this State.

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[1]Petitioner also sought certification by the District Court of the identical issue in his motion for rehearing, which was denied by the Fourth District Court of Appeal on August 28, 1991, a week after Scates was decided (Appendix, at pages 4-5).

In Scates, the Fourth District Court of Appeal cited the instant case, State v. Liataud, 16 FLW 1846 (Fla. 4th DCA July 17, 1991), reh. denied 16 FLW 2245 (Fla. 4th DCA August 28, 1991), as authority for its reversal of the sentence in that case, which, like Petitioner's, was less than the three year mandatory minimum term provided by Section 893.13(1)(e) upon the defendant's conviction for purchasing cocaine within 1000 feet of a school.[2]

Scates also cited State v. Baxter, 16 FLW 1561 (Fla. June 21, 1991), as requiring its disposition of the appeal. It was State v. Baxter which was the decision cited as controlling in the present case.

In Jollie v. State, 405 So.2d 418 (Fla. 1981), this Court held that, where a district court of appeal per curiam decision cites as controlling authority a decision which is either pending review in or has been reversed by this Court, prima facie express conflict jurisdiction has been demonstrated, allowing this Court to exercise its jurisdiction. This Court observed that

> no litigant can guide the district court's selection of the lead case, and that the randomness of the district court's processing would control the party's right of review unless the citation PCA is itself made eligible for review before this Court.

Thus, this Court recognized the inequity arising from "the luck of the draw" in a district court's determination of which among several similar cases it would decide with a written statement of reasoning, on the basis of which a litigant could obtain conflict

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[2]Also cited in Scates was State v. Lane, 16 FLW 1631 (Fla. 4th DCA June 28, 1991), which is presently pending before this Court for a determination of jurisdiction in Case No. 58,534.

jurisdiction, and which it would decide by way of a per curiam affirmance, ordinarily not reviewable in this Court. In order to avoid such unjust and arbitrary results, this Court determined that it could accept for review those cases citing to another case pending before it. In State v. Brown, 475 So.2d 1 (Fla. 1985), this Court extended that rule to a situation where the district court had relied far its disposition of a case an another case which certified a question to the Court of great public importance.

In the present case, the Fourth District Court of Appeal certified a question to this Court, citing as controlling authority the same case which was cited as controlling in the instant case,[3] as well as the decision against Petitioner below. This case therefore presents the same equitable concern as that which inspired this Court to accept jurisdiction in Jollie and Brown, supra. Consequently, this Court has jurisdiction to resolve the issue presented in Petitioner's case, which is exactly the same one presently before this Court in Scates, supra.

Moreover, the instant case presents an issue which this Court should resolve. In Petitioner's case, as in Scates, the sentencer relied upon Section 397.12, Florida Statutes (1989) and State v. Herrin, 568 So.2d 920 (Fla. 1990) to depart downward from the three year mandatory minimum, noting that Petitioner had purchased a minimal amount of cocaine for personal use, that he was under the

[3]Petitioner notes that in that case, State v. Baxter, supra, which has in effect become one of the "lead" cases on the issue presented in the instant appeal, the defendant-appellee was unrepresented by counsel, making the likelihood of successfully obtaining further review in this Court in that appeal very slim indeed. See, Case No. 78, 294.

influence of alcohol, that he suffered from substance abuse, and that he was amenable to and capable of rehabilitation (Appendix, concurring opinion of Judge Anstead at page 1). As a result of the decisions in Liataud, Baxter, and Scates, these individuals will be forced to forego the opportunity of rehabilitation and instead be consigned to an already over-burdened prison system. Certainly, this is an issue which has great impact on the sentences of those individuals unfortunate enough to be affected by it. And the numbers of those individuals is far from insignificant. In the Seventeenth Judicial Circuit, a number of trial judges are applying sentencing alternatives, via Chapter 397, to defendants convicted under Section 893.13(1)(e). The issue raised herewith and in Scates is raised in at least ten cases currently pending before the Fourth District Court of Appeal and assigned to attorneys in the office of undersigned counsel.

By virtue of the Fourth District's citation to Petitioner's case -- and to the case cited as controlling authority in Petitioner's own appeal -- as controlling authority in Scates and by virtue of the Fourth District's certification of the issue as a question of great public importance in Scates, Petitioner's case presents the same issue for review as Scates. Since Scates is now before this Court, jurisdiction of the instant case should be accepted. State v. Brown, supra; Jollie v. State, supra.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to accept jurisdiction in his case.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

TANJA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Dawn S. Wynn, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 20th day of September, 1991.

Counsel for Petitioner

IN THE SUPREME COURT OF FLORIDA

JEAN MAX LIATAUD,

Petitioner,

vs. CASE NO.

STATE OF FLORIDA,

Respondent.

PETITIONER'S APPENDIX

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(407) 355-2150

TANJA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634

Counsel for Petitioner

which enact it," section 942.05, Florida Statutes, the uniform holdings of our sister states should be given great weight where they are well reasoned and legally sound.

REVERSED. (ANSTEAD and WARNER, JJ., concur.)

* * *

Criminal law—Sentencing—Purchase of cocaine within 1000 feet of school—Referral of defendant to drug treatment program in lieu of or in addition to other sentence

STATE OF FLORIDA, Appellant, v. JEAN MAX LIATAUD, Appellee. 4th District. Case No. 90-3221. Opinion filed July 17, 1991. Appeal from the Circuit Court for Broward County; J. Leonard Fleet, Judge. Robert A. Butterworth, Attorney General, Tallahassee, and Dawn S. Wynn, Assistant Attorney General, West Palm Beach, for appellant. Richard L. Jorandby, Public Defender, and Tanja Ostapoff, Assistant Public Defender, West Palm Beach, for appellee.

(PER CURIAM.) Reversed and remanded for further proceedings in accord with this court's opinion in *State v. Baxter*, Case No. 90-3175 (Fla. 4th DCA, June 12, 1991) [16 F.L.W. D1561]. (HERSEY and WARNER, JJ., concur. ANSTEAD, J., specially concurring.)

(ANSTEAD, J., specially concurring.) At issue is whether the sentencing provisions of section 893.13(1)(e), Florida Statutes (1989), should apply or whether the provisions of section 397.12 authorized the trial court to place appellee in a treatment program instead of prison. Except for the precedent of *Baxter*, I would affirm and approve the trial court's well-reasoned order.

Although it can be argued that this is another case of the left hand of the legislature not knowing what the right hand is doing, I believe the clear expression of section 397.12, Florida Statutes (1989) controls and grants the trial court the authority to act as it did:

> When any person, including any juvenile, has been charged with or convicted of a violation of *any provision of chapter 893,* or of a violation of any law committed under the influence of a controlled substance, the court, Department of Health and Rehabilitative Services, Department of Corrections, or Parole Commission, whichever has jurisdiction over that person, may in its discretion require the person charged or convicted to participate in a drug treatment program licensed by the department under the provisions of this chapter. *If referred by the court, the referral may be in lieu of or in addition to final adjudication, imposition of any penalty or sentence, or any other similar action.* If the accused desires final adjudication, his constitutional right to trial shall not be denied. The court may consult with or seek the assistance of any agency, public or private, or any person concerning such a referral. Assignment to a drug program may be contingent upon budgetary considerations and availability of space.

(Emphasis supplied).

Consistent with these provisions, the trial court's order provides:

> THIS CAUSE having come before this Court on Defendant's Motion to Depart Downward From Presumptive Guideline Sentence and to Avoid the Minimum Mandatory Sentence and Sentence Defendant Alternatively pursuant to *F.S.* 397.12, and the Court having heard testimony on the matter, reviewed the file, heard arguments of counsel, reviewed the law, and being otherwise duly advised in the premises, it is,
>
> ORDERED that said motion is hereby GRANTED. The reasons for granting such relief are as follows:
>
> (1) The record shows Defendant is a thirty-six (36) [year old] black male, with no prior arrest record, who purchased two *(2)* "rocks" of crack cocaine for personal use on April 12, 1990. This cocaine was purchased from Detention Aide Raymond Hicks, who is not a certified police officer. However, Mr. Hicks was posing as a street level drug dealer who purposely positioned himself within 1,000 feet of Dillard High School. Further, the Court notes that said Detention Aide was selling crack cocaine, which was manufactured from cocaine in the Broward Sheriffs Office Crime Laboratory. The location of this reverse sting has been the site of numerous reverse stings ever since the 1,000 foot school-yard statute, *F.S.* 893.12(1)(e), came into effect in 1987.
>
> (2) Evidence shows that Defendant did suffer from substance abuse addictions, and was under the influence of alcohol at the time of his arrest. The Court finds Defendant did not have full control over his faculties and was impaired to the extent his judgment was severely compromised. See *Barbera v. State*, 505 So.2d 413 (Fla. 1987), and *State v. Herrin*, 555 So.2d 1288 (Fla. 2d DCA 1990).
>
> (3) The evidence shows that Defendant is not a threat to society, but, in fact, desires treatment and rehabilitation for this addiction. See *State v. Sachs*, 526 So.2d 48 (Fla. 1988).
>
> (4) The record reflects that the Defendant has lived in Dade and Broward Co. for the past 6 years and is not familiar with Fort Lauderdale, Florida, and was in such an intoxicated state that he did not fully realize that he was near a school. Indeed, the arrest occurred at 7:10 p.m., after school hours. There was no evidence Defendant knew he was within 1,000 feet of a school, nor is there any evidence of school activities taking place, or any school children in the area. The Court feels that the particular circumstances of this case ameliorate the level of Defendant's guilt and indicate less moral culpability. *See State v. Regan*, 15 FLW 1928 (Fla. 2d DCA 1990).
>
> (5) The court further finds it is the policy of this State "to provide meaningful alternatives to criminal imprisonment for individuals capable of rehabilitation as useful citizens through techniques and programs" not available in the prison systems. *F.S.* 397.10 (West 1989). The legislature encourages trial judges to use their discretion in sentencing persons charged with a violation of Chapter 893, where there is evidence that the person charged is a drug abuser and is capable and desires rehabilitation. See *Stare v. Edwards*, 456 So.2d 575 (Fla. 2d DCA 1984) and *F.S.* 397.12 (Wests 1989). The evidence is (sic) this case indicates that the Defendant purchased two (2) "rocks" of cocaine which was for personal use and not intended for resale or distribution. It has also been shown that Defendant is amenable and capable of meaningful rehabilitation back to society.
>
> *(6)* This Court feels strongly that *F.S.* 397.12, provides a meaningful alternative to prison in this particular case. Defendant is a first offender who scores three and one-half (3½) to four and one-half (4½) years under the guidelines with a minimum period of incarceration of three (3) calendar years with no gain time. Oddly enough, it is a legal reality that Defendant would actually serve three (3) years behind prison bars while traffickers in cocaine do less time on a three (3) year minimum mandatory case (approximately ten months)
>
> (7) This Court's decision to depart will give the Defendant an opportunity to become a meaningful and productive member of society—drug free. *F.S.* 397.12 (West's 1989). In addition, the Court finds that the Defendant has no prior arrest history and has two (2) children, ages 18 months and four (4) months.
>
> IT IS, THEREFORE, ORDERED that Defendant he referred to a licensed Department of Health and Rehabilitative Services drug treatment program pursuant to Florida Statutes Section 397.12 (Wests 1989). The Defendant shall be placed on probation to supervise his compliance with his treatment plan.

* * *

Civil procedure—Dismissal—Failure to prosecute—Trial court's status order asking counsel to respond to questions designed to advance the case toward resolution and counsel's response to order constitutes record activity sufficient to prevent involuntary dismissal

NEBUCHADNEZZAR FREEMAN and HELEN FREEMAN, Appellants, v. KEITH LEROY TONEY and ORKIN EXTERMINATING COMPANY. INC., Appellees. 4th District. Case No. 90-2201. Opinion filed July 17, 1991. Appeal from the Circuit Court for Broward County; Barbara Bridge, Judge. Gary Marks of Law Offices of Gary Marks, Fort Lauderdale, for appellants. Robert H. Schwartz of Gunther & Whitaker, P.A., Fort Lauderdale, for appellees.

ON MOTION FOR REHEARING
[Original Opinion at 16 F.L.W. D765]

(PER CURIAM.) We deny appellee Orkin Exterminating Com-

somewhere and the passenger knows that if the airline loses or damages the valuables en route then there is a limitation on liability. The appellant argues that in this case the tariff places the limitations on liability at a point before the bags enter the aircraft, thereby absolving the airline's agents of any real responsibility for their own operations. It must be kept in mind that the passenger, in carrying the handbag, is acting in compliance with the provision of the tariff which states that valuables should be carried.

We hold that the tariff and its limitations on liability do not apply where the passenger is forced to relinquish possession of his or her valuables for the purpose of a security magnetometer check. The airline and the security companies must exercise reasonable care in handling the belongings of the passengers who are merely exercising their right to retain possession of such belongings.

In this case Wackenhut was established as the agent of Delta, which remained undisputed throughout the proceedings below. We realize that in other cases security companies may not stand in this relationship but may rather be independent contractors. If any liability is found it should be apportioned accordingly, depending on the facts of each case which will establish the relationships of the parties. In the case at bar the jury was able to apportion damages after finding that the appellants were both negligent in their handling of Mrs. Lippert's handbag, and but for the prejudicial error discussed below, there would be no reason for another trial on this matter.

It appears that the second trial judge vacated the partial summary judgment previously entered by another judge for no particular reason other than his opinion that the order would be appealed from anyway. The second judge misled the appellant throughout the pretrial proceedings and the trial itself by declaring that the judgment could be entered only in the amount of $1250 at most. This disturbs us, and we hold that the appellants were unduly prejudiced in the trial of their cause, by relying on the partial summary judgment (albeit an erroneous one), and the second judge's frequent pronouncements that the $1250 limitation would prevail.

Finally, we find that the trial court erred in failing to take into consideration the insurance recovery and the recovery of the earrings by the plaintiff. Appellees have conceded that appellants are entitled to *some* offset. The court should have ordered some offset of the final judgment for all or part of the amounts plaintiff recovered from collateral sources. The damages awarded to the plaintiff should be equal to and precisely commensurate with the loss sustained, *Hanna v. Martin*, 49 So.2d 585 (Fla. 1950). On remand, if appellee prevails on her primary claim, the trial court is instructed to then conduct an evidentiary hearing, and to grant an offset for whatever amount it determines is legally appropriate after considering the evidence and the legal positions of the parties.

The final judgment is reversed and the cause remanded for a new trial, with the proviso that the tariff limitation of liability to $1250 does not apply in this case.

We deem the issues presented in this case to be ones of great public importance, and we therefore certify the following question to the Florida Supreme Court:

> WHERE A POSTED TARIFF IN CONJUNCTION WITH THE TICKET FOR CARRIAGE ON A COMMON CARRIER LIMITS LIABILITY FOR CHECKED BAGGAGE OR BAGGAGE ULTIMATELY DELIVERED TO A FLIGHT ATTENDANT FOR STOWAGE IN THE CABIN, BUT THE PASSENGER CHOOSES INSTEAD TO RETAIN CUSTODY OF A PACKAGE, PURSE, HANDBAG, ETC., AND THE PASSENGER IS THEN REQUIRED TO RELINQUISH POSSESSION OF THE ITEM FOR THE PURPOSES OF X-RAY OR OTHER EXAMINATION OR INSPECTION, DOES THE CARRIER'S TARIFF LIMIT ITS LIABILITY, OR THAT OF ITS AGENTS, FOR ORDINARY NEGLIGENCE RESULTING IN LOSS TO THE PASSENGER DURING THE X-RAY OR INSPECTION PROCESS?

(ANSTEAD and GARRETT, JJ., concur.)

'We considered many cases from other jurisdictions including the often citcd *Tremaroli v. Delta Airlines*, 117 Misc. 2d 484. 458 N.Y.S.2d 159 (N.Y. Civ. Ct. 1983). All of the foreign cases wcrc distinguishable, some involving the Warsaw Pact which is clearly inapplicable to the case at bar. As for *Tremaroli* we find it unnecessary to rely on the equivalent of a county court case from New York. We feel that the issues presented herein must be resolved in accordance with Florida law and the use of analogy, while not inappropriate, was lens effective in this case than in others due to the disparity between the authorities cited and the circumstances surrounding the instant appeal.

* * *

Criminal law—Sentencing—Guidelines—Departure—Error to impose departure sentence without providing written reasons—On remand, trial judge may impose departure sentence if deemed uppropriate with contemporaneous written reasons where trial judge did not realize imposing community control in addition to jail time would result in departure sentence—Restitution—Trial court properly reserved jurisdiction to determine amount of restitution at later date when victim's counseling is completed

RICHARD STANLEY, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 90-1438. Opinion filed June 12, 1991. Appeal from the Circuit Court for Palm Beach County; Walter N. Colbath, Jr., ludgc, Richard L. Jorandby, Public Dcfcndcr, and Anthony Calvello, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Douglas J. Glaid, Assistant Attorney General, West Palm Beach, for appcllec.

(PER CURIAM,) We affirm appellant's conviction. However, we reverse and remand for resentencing as the sentence imposed departed from the guidelines. The trial judge did not give any written reasons because he did not realize that imposing community control in addition to jail time would result in a departure sentence. *Betancourt v. Stare*, 550 So.2d 1121, 1122 (Fla. 3d DCA), *rev'd on other grounds*, 552 So.2d 1101 (Fla. 1989) (citing *State v. Mestas*, 507 So.2d 587 (Fla. 1987)). On remand the trial judge may impose a departure sentence if he deems it appropriate and gives contemporaneous written reasons. *Betancourt; Merritt v. State*, 567 So.2d 1031 (Fla. 4th DCA 1990).

We affirm as to all other issues. The trial court properly reserved jurisdiction to determine the amount of restitution at a later date when the victim's counseling in completed. *Weckerle v. State*, No. 89-3249 (Fla. 4th DCA Apr. 3, 1991) [16 F.L.W. D875] (citing *McCaskill v. State*, 520 So.2d 664 (Fla. 1st DCA 1988)). Appellant had constructive notice that restitution would be imposed, § 775.089, Fla. Stat. (1989), and will have the opportunity to be heard after notice of the future hearing. *State v. Beasley*, 16 F.L.W. S310 (Fla. May 9, 1991).

AFFIRMED IN PART; REVERSED IN PART AND REMANDED FOR RESENTENCING. (ANSTEAD, POLEN and GARRETT, JJ., concur.)

* * *

Criminal law—Sentencing—Trial court cannot depart downward from a mandatory sentence even with valid reasons for departure—Statute permitting referral to drug abuse program in lieu of or in addition to any other sentence does not apply to defendant convicted of purchasing cocaine within 1000 feet of school

STATE OF FLORIDA, Appellant, v. JOSEPH BAXTER, Appellee. 4th District. Case No. 90-3175. Opinion filed June 12, 1991. Appeal from the Circuit Court for Broward County; Robert W. Tyson, Jr., ludgc. Robert A. Butterworth, Attorney Gcncral, Tallahassee, and Sylvia H. Alonso, Assistant Attorncy Gcncral, West Palm Beach, for appellant. No appearance for appellee.

(PER CURIAM.) The state appeals appellee's sentence to probation. He plead guilty to *purchasing* cocaine within 1,000 feet of a school which called for a three year mandatory minimum sentence. § 893.13(1)(e)1., Fla. Stat. (1989). His recommended guidelines sentence was five and one half to seven years in jail.

The trial judge relied on section 397.12 of the Florida Statutes and appellee's drug and alcohol addiction as the reasons for the downward departure. We reverse and remand with directions to the trial judge to sentence appellee to the mandatory minimum sentence.

A defendant's drug and alcohol addiction can be valid reasons for a downward departure under the sentencing guidelines. *Barrera v. State, 505* So.2d 413 (Fla. 1987). However, a mandatory sentence takes precedence over a guideline sentence. Fla. R. Crim. P. 3.701d.9. Therefore, a trial judge cannot downward depart from a mandatory sentence even with valid reasons for departure.

Further, section 397.12 only relates to defendants who have been convicted of *possessing* illegal drugs. *State v. Edward,* 456 So.2d 575 (Fla. 2d DCA 1984); *see also State v. Ross,* 447 So.2d 380 (Fla. 4th DCA), *review denied,* 456 So.2d 1182 (Fla. 1984) section 397.12 not exception to mandatory minimum sentence or firearms violations). Thus, the trial judge had no authority to sentence appellant under that section.

REVERSED AND REMANDED WITH DIRECTIONS FOR RESENTENCING. (LETTS, GUNTHER and GARRETT, JJ., concur.)

* * *

Criminal law—Belated appeal of order denying post conviction relief granted on ground that order did not apprise defendant of thirty-day period in which appeal must be filed

SIMUEL HOWARD, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 90-2967. Opinion filed June 12, 1991. Appeal of order denying 3.850 motion from the Circuit Court for Martin County; John G. Ferris, Judge. Simuel Howard, Olustee, pro se appellant. No appearance required for appellee.

(PER CURIAM.) We grant the appellant belated appeal on the ground that the trial court's order denying his rule 3.850 motion did not apprise him of the thirty-day period in which appeal must be filed. The order is affirmed as to appellant's grounds three and four alleged in his motion for post-conviction relief, and reversed and remanded to the trial court for an evidentiary hearing on grounds one and *two,* or for attachment to the order of denial of portions of the record that conclusively show that appellant is entitled to no relief.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED. (LETTS, DELL and POLEN, JJ., concur.)

* * *

Venue—Improper to grant motion to transfer where motion was unsworn, affidavit in support of motion was based upon hearsay evidence which was itself stale and outdated, and no sworn testimony was taken nt hearing on motion

DANIEL J. STADLER and TRACEY WILLS STADLER, his wife, Appellants, v. FORD WERKE AG, a foreign corporation, HEISER LINCOLN-MERCURY, WC., a foreign corporation, FORD MOTOR CO., a foreign corporation, JEFFREY KIRSCH, as Personal Rcprcsentative of the Estate of BRIAN S. RICHARDS, deceased, THE RICHARDS AUTOMOBILE CO., INC., a domestic corporation, and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., a foreign corporation, Appellees. 4th District. Case No. 90-2955. Opinion filed June 12, 1991. Appeal of a non-final order from the Circuit Court for Palm Beach County: Edward Rogers, Judge. Lytal & Reiter, and Jane Kreusler-Walsh of Klein & Walsh, P.A., West Palm Beach, for appellants. L. Martin Flanagan of Jones, Foster, Johnston. Stubbs, P.A., West Palm Beach, and Mershon, Sawyer, Johnston, Dunwody & Cole, Miami, for Appellee-Ford Motor Company.

(PER CURIAM.) This is an appeal from an order transferring the underlying action to Martin County, Florida. The motion to transfer filed by appellee, Ford, was unsworn. The affidavit filed in support of the motion was based upon hearsay which, itself, was stale and outdated. There was no sworn testimony taken at the hearing on the motion. Thus, there was not substantial, competent evidence to support the trial court's exercise of discretion in acting on the motion. This constitutes an inappropriate use of discretion. See *Hickman v. Sacino, 566* So.2d 903 (Fla. 4th DCA 1990).

We therefore reverse, and, as in *Gallagher v. Smirh,* 517 So.2d 744 (Fla. 4th DCA 1987), remand to permit the lower court to consider such proper evidence as may be presented by the parties as to the most convenient forum for the trial of this case. The convenience of the witnesses has been described as the single most important factor under section 47.122, Florida Statutes (1989). *Hu v. Crockett,* 426 So.2d 1275 (Fla. 1st DCA 1983).

REVERSED AND REMANDED. (HERSEY, C.J., LETTS and DELL, JJ., concur.)

* * *

Criminal law—Related appeal of order denying motion for post conviction relief

JOHN THOMAS WOODBURY, Petitioner, v. STATE OF FLORIDA, Respondent. 4th District. Case No. 91-0405. Opinion filed June 12, 1991. Petition for writ of habeas corpus granted belated full appellant review from the Circuit Court for Broward County; Patti Englander Henning, Judge. John Thomas Woodbury, Raiford, pro se, petitioner. Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for respondent.

(PER CURIAM.) We grant the petitioner's application for belated appellate review but affirm the order of the trial court denying appellant's motion for post-conviction relief, *See Brod v. State,* 418 So.2d *363* (Fla. 4th DCA 1982), *aff'd,* 437 So.2d 152 (Fla. 1983). (ANSTEAD, LE'ITS and GLICKSTEIN, JJ., concur.)

* * *

Dependent children—Child abuse—Mother striking child with belt when child allegedly tried to feed younger sibling mixture of bleach nnd baby oil—Evidence insufficient to support finding of abuse—No evidence of significant impairment to child where no treatment was necessary for injuries nnd no one testified that child was in any way emotionnlly impaired by incident—No evidence that other two children were at risk due to physicnl abuse of sibling

IN THE INTEREST OF: S.W., E.J. and L.M., Children. 4th District. Case No. 89-2962. Opinion filed June 12, 1991. Appeal from the Circuit Court for Broward County; Morton L. Abram, Judge. Kayo E. Morgan, Fort Lauderdale, for appellants. Patricia B. Wright, Fort Lauderdale, for appellee.

(PER CURIAM.) A mother appeals an order adjudicating her three children dependent, the dependency order having been based on a finding of abuse pursuant to section 39.01(2), Florida Statutes (1991). We reverse.

The dependency petition was based on one incident of alleged abuse. The evidence showed that on one day the mother repeatedly hit one of her children with a belt. Later that same day the child was taken to a Child Protection Team doctor under contract with H.R.S. The doctor found evidence of recent bruises, including some to the face. The injuries were consistent with belt marks. However, the marks on the face could also have been consistent with a fall which the mother said the child suffered while running away from the mother after the incident. No treatment was required of any of the injuries. The trial court's findings stated that the mother struck the child with a belt causing injury and that the two other children were at risk due to the physical abuse of their sibling. On that basis he adjudicated all three children dependent.

We reverse because the evidence is simply insufficient to support a finding of abuse. *See In the Interest of C.C.,* 556 So.2d 416 (Fla. 1st DCA 1989); *In the Interest of W.P., 534* So.2d 905 (Fla. 1st DCA 1988); *In the Interest of T.S.,* 511 So.2d 435 (Fla. 2d DCA 1984). Under the statute "abuse means any willful act that results in any physical, mental, or sexual injury that causes or is likely to cause the child's physical, mental, or emotional health to be *significantly impaired".* § 39.01(2), Fla, Stat. (1991) (emphasis added). There was no evidence of significant impairment to the child caused by the belt incident. No treatment

again denied appellee's renewed motion to file the second amended complaint hut stated that it would deem Count II of the 1981 amended complaint to be a count for conspiracy to defraud against all appellants, including the Magners. The case proceeded to trial on the 1981 amended complaint. At the close of the evidence, the trial court granted appellee's motion to amend the pleadings to conform to the evidence and permitted the issues of compensatory damages and punitive damages to go to the jury against appellants. The jury awarded appellee $31,500 in compensatory damages, prejudgment interest and punitive damages of $25,000 against the Magners. The jury also awarded appellee $31,500 in compensatory damages, prejudgment interest and punitive damages of $25,000 against the Coquises. The trial court entered final judgment on the jury verdict and awarded Merrill Lynch $28,866.43 in attorney's fees as against the Magners pursuant to a prevailing party provision in the exclusive listing agreement. The court also awarded costs to appellee as against all appellants, but denied appellee's claim to recover the attorney's fees it had paid as a result of the earlier appeal.

The Magners and the Coquises argue that Count II of the 1981 amended complaint failed to state a cause of action against either of them for conspiracy to defraud. We agree. Count II of appellee's 1981 amended complaint did not name the Magners as defendants nor did it seek affirmative relief against them. Further, it alleged general facts regarding the events surrounding the sale of the house, but failed to allege the existence of an agreement, understanding or conspiracy between the named defendants, an essential element of a cause of action for conspiracy. Therefore, we hold that the trial court erred when it denied the Coquises' motion for judgment on the pleadings as to Count II of appellee's 1981 amended cornplaint. See Fla.R.Civ.P. 1.140(h)(2); see *a h Menendez v. North Broward Hospital District*, 537 So.2d 89 (Fla. 1988); *Terry v. Johnson*, 513 So.2d 1315 (Fla. 1st DCA 1987).

The trial court compounded its error by later, just prior to trial, deeming Count II to be a count for conspiracy to defraud against appellants and by granting appellee's motion to amend the pleadings to conform to the evidence. The statute of limitations on conspiracy had expired before appellee attempted to join the Magners in the second amended complaint and before the trial court granted appellee's motion to amend the pleadings to conform to the evidence. See *School Board of Broward County v. Surette*, 394 So.2d 147 (Fla. 4th DCA 1981); see *also Daniels v. Weiss*, 385 So.2d 661 (Fla. 3d DCA 1980); *Cox v. Seaboard Coastline Railroad Company*, 360 So.2d 8 (Fla. 2d DCA 1978), *cert. denied*, 367 So.2d 1123 (Fla. 1979).

We find unpersuasive the argument that the subsequent proceedings cured the deficient complaint so as to validate the verdict as to the Coquises. A trial court may not construe a pleading to insert an essential element by inference and such an insufficient pleading may not be cured by a verdict. *See generally East Coast Shares v. Cuthbert*, 101 Fla. 25, 133 So. 863 (Fla. 1931); *Crawford v. Feder*, 34 Fla. 397, 16 So. 287 (Fla. 1894); *Walker v. Walker*, 254 So.2d 832 (Fla. 1st DCA 1971). While it has been held that a verdict may not be reversed on grounds of a defective pleading absent a miscarriage of justice, we find this inapplicable where the defect constitutes the failure to state a cause of action. *See generally Crawford*; *Walker*; *see also Spinner by and through Spinner v. Wainer*, 430 So.2d 595 (Fla. 4th DCA 1983).

Appellee argues on cross-appeal inter alia that the trial court erred in refusing to award costs equal to the amount of attorney's fees appellee had been required to pay to appellants as prevailing parties on the earlier appeal from summary judgment. Appellee's argument, in essence, challenges the premature execution of the fee award. It is clear that prevailing party fee awards may not be enforced prior to the conclusion of the suit, because only then may the ultimate "prevailing party" be determined. *See Cline v. Gouge*, 537 So.2d 625 (Fla. 4th DCA 1988); *General Accident Insurance Company v. Packal*, 512 So.2d 344, 346 (Fla. 4th DCA 1987). Challenges to the award and enforcement of such awards made pursuant to Fla.R.App.P. 9.400 must be brought under Fla.R.App.P. 9.400(c) which provides:

> Review of orders rendered pursuant to this rule shall be by motion filed in the court within 30 days after issuance of the mandate.

Appellee's failure to file a motion for review within thirty days of the trial court's order waived this point for appeal.

The limited exception to Fla.R.App.P. 9.400(c) recognized in *Starcher v. Starcher* 430 So.2d 991 (Fla. 4th DCA 1983), does not apply in this case. *Starcher* involved an appeal from an amended final judgment entered upon mandate from this court. On remand from a prior appeal, the trial court was to determine the value of the husband's special equity claim and the reasonable amount of attorney's fees pursuant to Fla.R.App.P. 9.400. In its amended final judgment, the trial court awarded a special equity to the former husband, but determined that an award of attorney's fees to the former wife was not warranted. The former wife challenged both rulings on plenary appeal. Noting that a single final judgment formed the basis for both a proper plenary appeal as well as review under subsection (c), this court recognized an exception to the requirements of Fla.R.App.P. 9.400(c) and stated:

> By way of careful limitation, we hold that if the only grievance is the assessment of attorney's fees and costs under Florida Rule of Appellate Procedure 9.400(a) and (b), it must be brought to this court by motion in strict accordance with the provisions of Florida Rule of Appellate Procedure 9.400(c). It is only where, as here, there are other points on appeal, points other than the assessment of attorney's fees and costs under Florida Rule of Appellate Procedure 9.400(a) and (b), that such review may also be obtained by raising same as an additional point on appeal.

Starcher, 430 So.2d at 993. Therefore, a timely challenge to an attorney's fee award can be consolidated with a simultaneous plenary appeal where strict compliance with Fla.R.App.P. 9.400(c) would unnecessarily result in multiple actions. Here, the trial court entered its judgment, awarding attorney's fees pursuant to Fla.R.App.P. 9.400, over three years before the final judgment now being challenged. We find no merit in appellee's other arguments on cross-appeal.

Accordingly, we affirm that part of the final judgment that awarded appellee compensatory damages and interest against the Magners, but reverse the award of punitive damages against them. We also affirm the trial court's award of attorney's fees and costs as against the Magners. We reverse that part of the final judgment that awarded appellee damages as against the Coquises as well as the judgment for costs against them.

AFFIRMED IN PART; REVERSED IN PART. (DOWNEY and GUNTHER, JJ., concur.)

[1]Appellee failed to effect service of process on the Seguras.

[2]This court dismissed appellee's late-filed cross-appeal on this point and therefore the propriety of the order denying appellee's motion for leave to file a second amended complaint is not before us.

* * *

Criminal law—Sentencing—Purchase of cocaine within 1000 feet of school—Referral of defendant to drug treatment program in lieu of or in addition to other sentence

STATE OF FLORIDA, Appellant, v. JEAN MAX LIATUAD, Appellee. 4th District. Case No. 90-3221. Opinion filed August 28, 1991. Appeal from the Circuit Court for Broward County; J. Leonard Fleet, Judge. Robert A. Butterworth, Attorney General, Tallahassee, and Dawn S. Wynn, Assistant Attorney General, West Palm Beach, for appellant. Richard L. Jorandby, Public Defender, and Tanja Ostapoff, Assistant Public Defender, West Palm Beach, for appellee.

ON REHEARING

[Original Opinion at 16 F.L.W. D1846]

(PER CURIAM.) Rehearing is denied. (HERSEY and WARNER, JJ., concur. ANSTEAD, J., concurring specially.)

(ANSTEAD, J., specially concurring.) I agree with appellee that we should certify this issue to the Supreme Court as one of great public importance. Because I also believe a number of appellee's contentions on rehearing are correct and also helpful in a resolution of the case, I set them out here:

> In reversing Appellee's sentence, this Court must have misconstrued the legislative will expressed in Chapter 953 and Section 397.12, *Fla. Stat.* (1989), which expressly provide alternatives to incarceration for substance abusers like Appellee. By its holding, this Court appears to have limited the circumstances in which a sentencercan exercise discretion under Chapter 9S3 and Section 397.12 to those cases where merely ***possessory*** offense are involved, based on one phrase contained in subsection *(2)* of Section 397.011(2), ***Fla. Stat., see, State v. Lane,*** 16 F.L.W. 1631(Fla 4th DCA June 15,1991):
>
> > For a violation of any provision of Chapter 893, Florida Comprehensive Drug Abuse Prevention and Control Act, ***relating to possession of any substance regulated thereby***, the trial judge may, in his discretion, require the defendant to participate in a drug treatment program licensed by the Department of Health and Rehabilitative Services pursuant to the provisions of this chapter. ..
>
> (Emphasis added.)
>
> However, this phrase must be considered in the context of the *entire* subsection (2), which defines the legislature's intent and has no limiting language at all:
>
> > (2) It *is* the intent of the Legislature to provide an alternative to criminal imprisonment for individuals capable of rehabilitation as useful citizens through techniques not generally available in state of local prison systems.... Such required participation may be imposed in addition to or in lieu of any penalty or probationotherwise prescribed by law....
>
> Likewise, subsection of of (sic) the same statute places no limitation on persons dependent on drugs controlled by chapter 893, as is Appellee:
>
> > (1) It is the purpose of the chapter to encourage the fullest possible exploration of ways by which the true facts concerning drug abuse and dependence may be made known generally and to provide a comprehensive and individualized program for drug dependents in treatment and aftercare programs. This program is designed to assist in the rehabilitation of persons dependent on the drugs controlled by chapter 893, as well as other substances with the potential for abuse except those covered by chapter 396. It is further designed to protect society against the social problem of drug abuse and to meet *the* need of drug dependents for medical psychological and vocational rehabilitation, while at the same time safeguarding their individual liberties.
>
> Furthermore, by focussing on only one portion of the preamble of Chapter 397, this Court must have overlooked the fact that Appellee was sentenced pursuant to specific provisions, Sections 397.10 and **397.12,** which do *not* circumscribe their application merely to possessory offenses. Thus:
>
> > 397.10 Legislative intent—It is the intent of the Legislature to provide a meaningful alternative to criminal imprisonment for individuals capable of rehabilitation as useful citizens through techniques and programs not generally available in state or federal prison systems or programs operated by the Department of Health and Rehabilitative Services. It is further the intent of the Legislature to encourage trial judges to use their discretion to refer persons charged with, or convicted of, ***vuiolation*** **(sic)** ***of laws relating to drug abuse*** or violation of any law committed under the influence of a narcotic drug or medicine to a state-licensed drug rehabilitation program in lieu of, or in addition to, imposition of criminal penalties.
>
> > **307.12** (sic 397.12) Reference to drug abuse program—When any person, including any juvenile, has been charged with or convicted of a violation of ***anyprovision of Chapter 893*** or of a violation of any law committed under the influence of a controlled substance, the court may ... in its discretion, require the person charged or convicted to participate in a drug treatment program.. ..
>
> (Emphasis added.)
>
> Consequently, this Court's limitation of the sentencer's discretion to merely possessory offenses overlooks two principles of statutory construction. First,
>
> > a specific statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subsections in general terms.. ..
>
> ***Adam v. Culver,*** 111 So.2d 665, 667 (Fla. 1959), and cases cited therein. Second, where a criminal statute is susceptible of different interpretations, it must be construed in favor of the accused. *E.g.*, *Lambert v. State,* 545 So.2d 838 (Fla. 1989). Application of these principles to the present case would result in affirmanceof the trial court's disposition.
>
> 3. Furthermore, this Court's decision in the present case fails to consider the legal effect of the *omission* from the mandatory minimum prison terms defined in Section 893.13(1)(e), *Fla. Stat.* (1989), of the prohibition, found in Sections 893.135 [drug trafficking], 784.08(3) [crimes committed against the elderly], 775.087 [crimes committed with firearm], and 775.0823 [violent crimes against law enforcement officer], ***Fla. Star.*** (1989), that the mandatory minimum sentence "shall not be suspended, deferred or withheld." In contrast with each of these statutes, Section 893.13(1)(e) is conspicuous by the fact that these words precluding the trial judge from staying, suspending, or withholding the mandatory sentence are absent.
>
> The restrictive language contained in the other mandatory minimum statutes cannot be implied against the instant statute which does not utilize it. As stated in ***St. George Island Ltd. v. Rudd,*** *547* So.2d 958,961 (Fla. 1st DCA 1989):
>
> > Where the legislature uses exact words in different statutory provisions, the court may assume they were intended to mean the same thing.... Moreover, the presence of a term in one portion of a statute and its absence from another argues against reading it as implied by the section from which it is omitted.
>
> Since it must be presumed that the legislative inclusion of the proscription against suspending, deferring or withholding sentence has meaning where it is added to a penal statute, the exclusion of that sentence from a similar penal stature likewise must have meaning, namely, that such suspension, deferral, or withholding of the sentence is ***not*** precluded. Thus, the trial judge sentencing a defendant for a drug transaction committing within 1000 feet of a school is still empowered to suspend, defer, or withhold the mandatory sentence which must otherwise be imposed.
>
> In the present case, the judgment specifically provides that, "The Court hereby stays and *withholds* the imposition *of* sentence as to count(s) 1 and places the Defendant on probation for a period of 5 years under the supervision of the Department of Corrections...." (R **34,** emphasis added). The trial court therefore exercised the discretion permitted to it by Section 893.13(1)(e), withheld the mandatory minimum sentence, and directed that Appellee serve a term of probation, as a special condition of which he is to complete a drug rehabilitation program, as well as comply with other mandates intended to insure his rehabilitation (r **36).** Since this procedure is not prohibited by Section 893.13(1)(e), the trial court committed no error in utilizing it, and its disposition of the instant case should be affirmed.

* * *

Criminal **law—Sentencing—Statute** permitting referral of defendant to drug **treatment** program in **lieu of or** in addition to **other sentence** is **not** valid **basis for reducing** minimum mandatory **sentence** applicable **to offense** of purchasing cocaine within 1000 **feet** of school

STATE OF **FLORIDA, Appellant, v. SALVATORE VOLA, Appellee.** 4th **District. Case** No. **91-0273. Opinion** filed **August 28, 1991. Appeal from** the **Circuit Court for Broward County; Robert W. Tyson, Judge. Robert A. Butterworth, Attorney General, Tallahassee, and Don M. Rogers, Assistant Attorney General, West Palm Beach, for appellant. Richard L. Jorandby, Public Defend-**

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appellant received the written order containing the additional special conditions.

We remand with directions that the additional special conditions be stricken. (GLICKSTEIN, C.J., ANSTEAD, J. and TEDAL, RICHARD L., Associate Judge, concur.)

* * *

iminal law—Purchase of cocaine within 1000 feet of ool—Sentencing—Error to depart downward from mandatominimum sentence—Question certified whether a trial court y properly depart from the minimum mandatory provisions Section 893.13(1)(e), Florida Statutes 1989, under the authorof the drug rehabilitation provision of Section 397.12, Florida tutes (1989)

TE OF FLORIDA. Appellnnt, v. CARRICK A. SCATES, Appcllcc. 4th trict. Case No. YO-3174. Opinion filed August 21, 1991. Appeal from the cuit Court for Broward County; Robert W. Tyson, Jr., Judgc. Robert A, terworth, Attorney General, Tallahassee, and Dawn Wynn, Assistant Attor- General, Wcst Palm Bcnch, for appcllnnt. Norliza Batts of Law Offices of liza Batts, P.A., For! Laudcrdalc, for appellee.

OLEN, J.) This appeal presents a factual scenario identical to se presented in *State v. Lane*, 16 FLW 1631 (Fla. 4th DCA ne 28, 1991), and *State v. Baxter*, 16 FLW 1561 (Fla. 4th DCA ne 21, 1991). On the authority of both *Lane* and *Baxter*, we erse appellee's sentence and remand to the trial court with ections that appellee be sentenced to the minimum mandatory ntence. We also certify a question of great public importance.

Appellee pled guilty to purchasing cocaine within 1,000 feet a school, in violation of section 893.13(1)(e), Florida Statutes 89). Although the statute provides for a three-year minimum ndatory sentence, the trial court relied on section 397.12, rida Statutes (1989), and *State v. Herrin*, 568 So.2d 920 (Fla. 90), to depart downward from appellee's sentencing guide- s score of three and one-half to four and one-half years, sen- cing appellee to two years probation. Among the various reans given for its downward departure, the court found that apellee had purchased one "rock" of cocaine intended for his sonal use; the purchase of this rock took place while appellee s under the influence of alcohol; appellee suffered from subnce abuse addictions; and appellee was both amenable to and able of meaningful rehabilitation back into society.

This court has previously held that section 397.12 does not wide an exception to the minimum mandatory sentencing reirement of section 893.13(1)(e). *Lane*, 16 FLW at 1632. See *o Stnte v. Ross*, 447 So.2d 1380 (Fla. 4th DCA), *rev. denied*, 5 So.2d 1182 (1984). Further, we recognize that *Herrin* conned the 1987 version of section 893.13(1)(e), before the 1989 endment which added the three year minimum mandatory use to that section. However, we note Judge Anstead's special ncurrence in *State v. Liataud*, No. 90-3221 (Fla. 4th DCA July , 1991) [16 F.L.W. D1846], and we are not unsympathetic to premise that, but for this court's opinions in *Lane*, *Baxter*, d now *Liataud*, there would be sound reasoning to support the l judge's actions concerning this appellee. Accordingly, we w certify to the Florida Supreme Court the following question:

MAY A TRIAL COURT PROPERLY DEPART FROM THE MINIMUM MANDATORY PROVISIONS OF SECTION 893.13(1)(e), FLORIDA STATUTES (1989), UNDER THE AUTHORITY OF THE DRUG REHABILITATION PROVISION OF SECTION 397.12, FLORIDA STATUTES (1989)?

REVERSED and REMANDED and QUESTION CERTIED. (DELL and GUNTHER, JJ., concur.)

* * *

iminal law—Abuse of discretion to sua sponte dismiss charges ainst defendant without considering options available to the te or prejudice to defendant if trial were continued

ATE OF FLORIDA, Appellant, v. SABRINA MACON, Appcllcc. 4th trict. Case No. 90-3147. Opinion filed August 21, 1991. Appeal from the cuit Court for Broward County; M. Daniel Futch, Jr., Judgc. Robert A, Butterworth, Altorncy General, Tallahassee, and Mclvina Raccy Flaherty, Assistant Attorney Gcncral, Wcst Palm Bench, for appellant. No appearance for appellee.

(PER CURIAM.) The state timely appeals the dismissal of three counts against appellee. We reverse.

Appellee was charged by information with grand theft and theft. She moved the trial court for a continuance of the trial date. On the date for which trial had been set, appellee indicated to the trial court that she was prepared to enter a plea. The trial court inquired whether it was left open. The state informed the court that the case had not been up for status conference in the past few days but had one earlier. After more discussion and the conduct of a plea inquiry, the trial court refused the plea and asked the state if it were ready for trial, which it was not, leading to the order of dismissal being appealed.

As the state points out, both parties anticipated the court accepting the plea; appellee did not request a dismissal; and the trial court dismissed sua sponte without considering options available to the state or prejudice to the defendant if trial were continued. The state did not have a chance to move for a continuance. As it notes, it barely had time to enter its objection to the dismissal. The record reveals no prejudice to appellee if continuance were allowed. The trial court did not inquire of appellee if she were ready to proceed.

Dismissal of criminal charges is only an action of last resort where *no* viable alternative exists. *State v. Ottrock*, 573 So.2d 169 (Fla. 4th DCA 1991).

Dismissal here constituted an abuse of discretion. See *State v. Briggs*, 578 So.2d 901 (Fla. 4th DCA 1991); *State v. Wilson*, 498 So.2d 1053 (Fla. 4th DCA 1986); *State v. Evans*, 418 So.2d 459 (Fla. 4th DCA 1982). (GLTCKSTEIN, C.J., ANSTEAD, J., and OFTEDAL, RICHARD L., Associate Judge, concur.)

* * *

Criminal law—Robbery—Trial court properly denied defendant's motion to dismiss where state's traverse specifically denied defendant's allegation that in the course of taking he did not use force, violence, assault or put in fear—Sentencing—Correction of written sentence to conform to oral pronouncement

JONATHAN WADE WHATLEY, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 90-3315. Opinion filed August 21, 1991. Appeal from the Circuit Court for Broward County; M. Daniel Futch, Jr., Judge. Richard L. Jorandby, Public Dcfcndcr, and Cherry Grant, Assistant Public Defender, Wcst Palm Beach, for appcllnnt. Robert A. Butterworth, Attorney Gcncral, Tallahassee, and Douglas J. Glaid, Assistant Attorney Gcncral, Wcst Palm Beach, for appellee.

(POLEN, J.) Appellant was charged with burglary, robbery, and resisting an officer without violence. He pled guilty to the burglary and resisting an officer charges, and no contest to the robbery charge, expressly reserving the right to appeal the trial court's denial of his motion to dismiss that charge. We affirm appellant's judgment, but remand for correction of a sentencing error.

In his motion to dismiss, appellant argued that the elements of robbery were not present because in the course of the taking he did not use "force, violence, assault or putting in fear." §812.13(1), Fla. Stat. (1989). The state filed a traverse to appellant's motion, specifically denying appellant's allegations and further alleging that during the course of the taking appellant placed both the victim and her brother in fear for their lives, by entering their home in the early morning hours, referring to the victim as a "bitch" and other vulgarities, and using a cloth to conceal his identity.

The trial court properly denied appellant's motion to dismiss. Florida Rule of Criminal Procedure 3.190(d) mandates such denial when "the State files a traverse which with specificity denies under oath the material fact or facts alleged in the motion to dismiss." Therefore we affirm appellant's judgment as to count 11, as well as his sentence as to count I and II only.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Petitioner's Appendix has been furnished to DAWN S. WYNN, Assistant Attorney General, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, Florida, by courier, this 20th day of SEPTEMBER, 1991.

Tanja Ostapoff

TANJA OSTAPOFF
Assistaht Public Defender
Florida Bar No. 224634