047

1-4-92

IN THE SUPREME COURT OF FLORIDA

RICHARD L. DUGGER, Secretary,
Department of Corrections,

Appellant,

v. Case No. 78-844

WILEY JEROME GRANT,

Appellee.

ANSWER BRIEF OF APPELLEE

ON A CERTIFIED QUESTION OF THE
FIRST DISTRICT COURT OF APPEAL, CASE NO. 91-483

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STATEMENT OF THE CASE AND THE FACTS

The appellee accepts the state's statement of the case and the facts as an accurate presentation of the history of the case.

SUMMARY OF THE ARGUMENT

The appellee does not dispute that the Department of Corrections (DOC) may use the contents of the presentence investigation report (PSI) when making determinations regarding inmate classification or program eligibility. Nor does the appellee argue that the police report can not be used in formulating the factual statement found in a PSI. What the appellee does dispute is the use of the police report, or any other factual source, which is contradicted by a jury verdict or finding of fact. The jury's verdict and the offenses of conviction differed from the factual statement. The factual statement was taken from the police report which was written before the trial; before the jury's determination that events did not occur as the victim testified.

The state interprets the holdings of the lower courts too broadly. Neither court determined that the use of a PSI was not the type of evidence upon which the DOC could make classification and sentencing decisions. But rather, only as to the Grant case was the PSI inadequate evidence. In the present case both the circuit court and district court made a determination of the quality of the "evidence" and found it lacking.

ARGUMENT

IN PERFORMANCE OF ITS STATUTORY DUTIES, THE DEPARTMENT OF CORRECTIONS MAY RELY ON INFORMATION TAKEN FROM *AN* ARREST REPORT WHICH IS INCLUDED IN THE PSI AS THE SOLE BASIS FOR DETERMINING AN INMATE'S ELIGIBILITY FOR PROVISIONAL CREDITS PURSUANT TO SECTION 944.277, FLORIDA STATUTES.

The appellant states that the issue before the court is "whether the Department of Corrections (DOC) may use the contents of the presentence investigation report (PSI) taken from an arrest report as an aid in determining whether a sex act was attempted or completed during commission of the battery and whether the burglary was committed with the intent to commit sexual battery." (Initial brief at 5). The appellee does not dispute that the Department of Corrections (DOC) may use the contents of the presentence investigation report (PSI) when making determinations regarding inmate classification or program eligibility. Nor does the appellee argue that the police report can not be used in formulating the factual statement found in a PSI. What the appellee does dispute is the use of the police report, or any other factual source, which is contradicted by a jury verdict or finding of fact. The PSI was internally incansistent. The jury's verdict and the offenses of conviction differed from the factual statement. The factual statement was taken from the police report which was written before the trial; before the jury's

determination that events did not occur as the victim testified.

The state interprets the holdings of the lower courts too broadly. Neither court determined that the use of a PSI was not the type of evidence upon which the **DOC** could make classification and sentencing decisions. But rather, only as to the Grant case was the PSI inadequate evidence. The PSI was internally inconsistent. The allegations of the police report, which were reiterated in the **PSI**, were not proven. The jury's verdict called into question whether the events happened as related by the victim. "The question before the court is whether the information contained in the **PSI** in the instant case is sufficiently competent to satisfy the evidentiary requirements of **Mayo**[1] and **Bishop**[2]." Dugger v. Grant, **16** FLW **D2668 (Fla.** 1st DCA Oct. 10, **1991).**

The point of contention between the parties actually appears to be a definition of sufficient "evidence" upon which to deny gaintime under section 944.276(1)(c). The state argues that any statement placed into the PSI can be sufficient "evidence". As the state admits the DOC makes no determination concerning the quality of information contained within the PSI, the department simply presumes it is correct. Even in the face of contrary indications the

[1] Mayo v. Dugger, 535 So.2d 300 (Fla. 1st **DCA 1988).**
[2] Bishop v. Dugger, 16 FLW D1573 (Fla. 1st DCA June **11, 1991).**

DOC presumes the statements are correct because it pleases them to do so. In the present case both the circuit court and district court made a determination of the quality of the "evidence" and found it lacking. In distinguishing Jones v. Florida Parole Commission, 413 So.2d 861 (Fla. 1st DCA 1983), the trial court found that it was the quality of the information which made its use improper.

> However, using hearsay information to determine an inmate's prior record for calculating parole eligibility is vastly different from using triple hearsay to establish crimes which the jury found not to be proven.

(R 53).

The appellee agrees with the state's conclusion that the exclusions in sections 944.276 and 944.277 are intended to protect the public from an especially dangerous type of criminal, the sex offender. The problem is that the appellee was not convicted of a sex offense or determined to be a sex offender.

When preparing a PSI, the probation officer is required to verify the facts presented. Section 921.231(3). Yet in the present case the probation officer did not verify[3] the factual statement, he ignored the verdict of the jury as well as the appellee's statements regarding the circumstances of the offense (R 20, 21). Both Mr. Grant and

[3]To prove to be true by evidence; to test the accuracy of -. *Webster's New World Compact School and Office* Dictionary 503 (1982).

his trial attorney raised objections about the PSI and objected that the probation officer focused exclusively on the initial charges and ignored the final verdict (Supplemental Record in Case No. 89-1305 at 12, 14). The contents were disputed at the sentencing hearing so the state's argument that the PSI should be presumed correct fails (Initial brief at 12).

The probation officer can hardly be termed an "impartial" fact-finder (Initial brief at 12). The probation officer's recommended disposition clearly establishes his dissatisfaction with the jury's verdict and his adoption of the unproven allegations found in the police report (R **25**).

By his ruling and reliance upon Mayo, the trial judge found that there is a lack of **record** support to establish that the appellee committed, attempted to commit, or intended to commit sexual acts in connection with the burglary and battery. This is a factual determination entitled to a presumption of correctness by this court. The court in **Mayo** found that the record contained no evidence that a sexual act was attempted or completed along with an assault and battery. The record obviously contained the information that Mayo had been arrested an a rape charge which was later reduced. The present case suffers from the same shortcomings as found in Mayo. The appellee was

charged with a sexual battery which was later reduced to battery through a jury verdict. The "evidence" which the state keeps emphasizing is only the unsworn statements in the police report which the state could not prove at trial.

The Mayo case is cited as authority in Tyson v. Dugger, 547 So.2d 240 (Fla. 1st DCA 1989). Again the first district points out that the record does not indicate that Tyson was *convicted* of a sexual battery or any other sexual offense. Therefore Tyson was eligible for gaintime under Section 944.276.[4] The present case also suffers from the same weakness as Tyson. The appellee was not convicted of a sexual battery or any other sexual offense. In fact the opposite is true, he was acquitted of the sexual offenses.

The "evidence" on which the state would deny the applicability of gaintime credits is simply the restatement of the offense report included in the PSI. Offense reports are generally not admitted into evidence at a trial. The state has not established that the offense report, on which the circumstances of the offense is wholly based, was entered into evidence at the trial. The statements in a police report are hearsay taken from an unsworn speaker. The statements in the PSI then are second generation hearsay because they are taken from the police report without any

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'Section 944.276, Florida Statutes (1987) has been repealed and replaced by Section 944.277, Florida Statutes (Supp. 1988).

guarantee of accuracy. If an offense report were considered competent evidence, a trial would consist wholly of submitting the report into evidence. A witness's credibility and accuracy would never be tested.

The appellee agrees that the PSI "is included within the range of information which the Department is charged to maintain in its permanent record, with regard to persons subject to parole."[5] The appellee further agrees that such information contained in a **PSI** is for the use of the DOC. **Adams v. State**, *560* So.2d 321, 323 (Fla. 1st DCA 1990). But, the information is not to be treated as gospel nor with the authority of sworn trial testimony. When the record does not support the **PSI**, then it cannot stand as a basis for denial of program eligibility.

The state argues that because charging documents frequently do not specify the sex acts performed in connection with a battery or burglary the **PSI** is necessary to distinguish between those who commit **sex** acts and those who do not. This might be true if the defendant were convicted as charged. If for some reason a PSI had not been prepared, the state would not be able to use the charging documents to meet the requirements of Section 947.277, particularly since the appellee was not convicted of sexual battery. Instead of relying on the **PSI** which repeats **a**

[5]The appellee was sentenced under the guidelines and is not subject to parole.

description of the offense contained only in the police report, the DOC should have to accept the findings of the jury.

The state would deny the appellee his due process rights because the state has concluded that the appellee does not qualify for gaintime credits under **944.277**. This is **a** typical example of circular reasoning. The state has denied the appellee the possibility of receiving a more advantageous award. Gain-time, "is one determinant of [a] petitioner's prison term." Weaver v. Graham, **450 U.S. 24, 32, 101 S.Ct. 960, 966, 67** L.Ed.2d **17 (1981)**. The trial court and appellate court **have** decided that the appellee is eligible for the credits and to deny the credits on the basis of the PSI denies the appellee his due process rights. Section **944.277** grants provisional credits to any inmate who is earning incentive gaintime unless the inmate falls within one of nine exceptions. When the DOC decides if an inmate falls within one of the nine exceptions, the department must apply minimum standards of sufficiency and credibility to the information they use.

Overturning the lower court's ruling would let the DOC second guess the jury. The same evidence was presented at trial, under oath, and the jury was not convinced. Yet we are then to accept the hearsay statements in a **PSI** to establish facts which the state could not establish at

trial.

As seen often in arguments by the state, a "flood-gates" public policy argument is thrown in for good measure. The appellee is not arguing that the PSI does not have a place in the processing of inmates. The state would have this court give the present case too broad an application. No one has asked the department to reexamine every case similar to the appellant's or to find long lost victims. Each case must be judged independently. If other inmates pursue the same kind of action that Mr. Grant pursued, the department may be expected to support its actions with sufficient factual basis. That is no more than the department has always been expected to do, and no one has argued that the department may not use a PSI to support its decisions. But if one PSI in one specific case cannot withstand judicial scrutiny then decisions based on that PSI become suspect. In this specific case the evidence did not establish sex acts in connection with the battery and burglary. Based upon that finding the trial court granted the appellee's petition for writ of mandamus and the appellate court upheld the trial court's ruling.

The appellee does not argue that the standard of proof to revoke gaintime should be equal to that necessary to sustain a criminal conviction. Superintendent V. Hill, 472 U.S. 445, 105 S.Ct. 2768, 80 L.Ed.2d 356 (1988). Nor does

the appellee argue that the standard should be greater when deciding program eligibility. The appellee does argue that the evidence must possess some degree of credibility. The court in Hill determined that some evidence was necessary to support a gaintime revocation. The court used the word "evidence", "any evidence in the record that could support the conclusion reached ... ." Hill, 472 U.S. at 455-6. The use of such language suggests that the information attain a level of quality and veracity.[6]

> We hold that the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits. This standard is met if "there was some evidence from which the conclusion of the administrative tribunal could be deduced...."

Id.. *citing*, United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 106, 47 S.Ct. 302, 304, 71 L.Ed. 560 (1927).

In Hill the "evidence" which was used to revoke gaintime was the testimony and written statement of an eye

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[6] **Evidence.** All the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. Any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuation of the existence or nonexistence of some matter of fact. That which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other. That which tends to produce conviction in the mind as to existence of a fact. The means sanctioned by law of ascertaining in a judicial proceeding the truth respecting a question of fact. *Black's Law Dictionary, Abridged Fifth Edition 287* (1983).

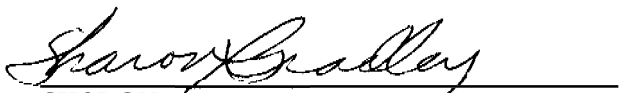
witness. An institution official testified at a hearing that he found an injured inmate and that he saw several inmates running from the area. The finder of fact determined that the evidence was sufficient to support the disciplinary charges and thereby revoke the gaintime. There were no contrary findings of fact.

A case cited by the state, State ex rel Seigendorf v. *Stone,* 266 So.2d 345 (Fla. 1972), held that the decisions of public administrators are presumed correct, "if factually accurate and absent ... clear error or overriding legal basis which would indicate overruling the administrator's decision." Id., at 346. The decisions of the lower courts found that the decision was not factually accurate and that the DOC's decision was in error.

CONCLUSION

The appellee does not argue that the certified question should be answered either negatively or affirmatively and asks only that the decision of the First District Court of Appeal, regarding the sufficiency of competent evidence be approved.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Elaine D. Hall, Assistant General Counsel, 2601 Blairstone Road, Tallahassee, FL 32399-2500 this 10th day of December, 1991.

SHARON BRADLEY