IN THE SUPREME COURT OF FLORIDA

ALICIA BAILEY, :

Petitioner, :

vs. : Case No. 81,483

STATE OF FLORIDA, :

Respondent. :

_____:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

# INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR PETITIONER

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## STATEMENT OF THE CASE AND FACTS

On April 27, 1989, the Hillsborough County state attorney charged the Petitioner, ALICIA BAILEY, with delivery and possession of cocaine. (R16) On May 4, 1989, after a guilty plea, she was placed on community control for two years for each count. (R22, 24) On September 12, 1989, she was charged with violating her community control by not staying at her approved residence and by using marijuana. (R28) On October 30, 1989, community control was revoked and she was sentenced to two-and-one-half years in prison followed by five years probation for the delivery count and five years concurrent probation for the possession count. (R38, 41) On May 14, 1991, she was charged with violating her probation by not paying costs of supervision and not providing proof of income. (R46) On August 16, 1991, probation was revoked and she was sentenced to two years community control for both counts. (R47-48)

On March 11, 1992, she was charged with violating her community control by not making enough visits to the community control officer during the week, not staying at home, and not submitting to urine tests. (R51-52) On June 5, 1992, she admitted violating her community control. (R3) Judge Evans revoked community control and sentenced her to three years in prison, concurrent on each count. (R5, 58-60) She appealed to the Second District Court of Appeal. (R62)

On March 10, 1993, the Second District rejected Bailey's argument that the trial court had improperly refused to grant credit for time served on one count to the second count. Bailey v.

State, 18 Fla. L. Weekly D720 (Fla. 2d DCA Mar. 10, 1993). The court, however, certified this question as one of great public importance. This Court accepted jurisdiction on March 30, 1993.

## SUMMARY OF THE ARGUMENT

This Court has ruled that credit for time served on one offense should be counted as time served for another offense if this is necessary to effectuate the intent of the sentencing guidelines.

## ARGUMENT

### ISSUE I

THE COURT VIOLATED THE SPIRIT OF THE GUIDELINES BY NOT GIVING THE DEFENDANT CREDIT FOR COUNT II FOR THE TIME SERVED ON COUNT I.

The October 30, 1989, sentence violated the spirit of the guidelines by imposing two-and-one-half years prison time only on Count I and probation for Count II. (R38, 41) This allowed the trial judge, when imposing the sentences presently under review, to sentence the defendant as if she had not served any time for Count II and to disallow any credit for time served in prison for that count. (R60) To give effect to the intent of the guidelines, the defendant should have received credit for this time served on Count II. The defense objected on this specific ground at the revocation hearing. (R6)

This Court has now agreed with Petitioner's argument. Tripp v. State, 18 Fla. L. Weekly S166 (Fla. Mar. 25, 1993). Accordingly, this Court should reverse and remand for resentencing.

## CONCLUSION

Bailey asks for resentencing.

# APPENDIX

**Dissolution of marriage—Error to fail to award fees and costs to wife where award of assets to husband and husband's income are greater than what wife will receive**

MELITTA A. HOENLE, Appellant/Cross-Appellee, v. W. PAUL HOENLE, Appellee/Cross-Appellant. 2nd District. Case No. 92-01838. Opinion filed March 12, 1993. Appeal from the Circuit Court for Manatee County; Scott M. Brownell, Judge. John M. Strickland of Livingston, Patterson & Strickland, P.A., Sarasota, for Appellant/Cross-Appellee. Arthur D. Ginsburg of Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., Sarasota, for Appellee/Cross-Appellant.

(PER CURIAM.) Melitta A. Hoenle has appealed the final judgment of dissolution of marriage, and W. Paul Hoenle has filed a cross-appeal. We affirm on all issues except the trial court's failure to award Mrs. Hoenle fees and costs. Otherwise, the judgment is affirmed.

Because the trial court's award of assets to Mr. Hoenle and the income Mr. Hoenle continues to enjoy are greater than those Mrs. Hoenle will receive, we reverse the trial court's order denying an award of fees and costs to Mrs. Hoenle. We direct the trial court, on remand, to award fees and costs to Mrs. Hoenle.

Affirmed in part; reversed in part; and remanded for further proceedings consistent with this opinion. (CAMPBELL, A.C.J., and SCHOONOVER and PARKER, JJ., Concur.)

* * *

**Criminal law—Probation—Condition which was not orally pronounced at sentencing and is not statutorily authorized stricken**

FREDDIE BRYANT, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 90-02748. Opinion filed March 10, 1993. Appeal from the Circuit Court for Hillsborough County; Richard A. Lazzara, Judge. James Marion Moorman, Public Defender, and Timothy A. Hickey, Assistant Public Defender, Bartow, for Appellant. Freddie Bryant, pro se. Robert A. Butterworth, Attorney General, Tallahassee, and Dale E. Tarpley, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm the appellant's judgments and sentences. We strike special condition of probation number six as it was not orally pronounced at sentencing and is not statutorily authorized. (CAMPBELL, A.C.J., PARKER and PATTERSON, JJ., Concur.)

* * *

**Criminal law—Sentence of twelve years imprisonment exceeds statutory maximum for possession of cocaine—Remand for correction of sentence**

GEORGE W. HENDERSON, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 92-00336. Opinion filed March 10, 1993. Appeal from the Circuit Court for Pinellas County; Anthony Rondolino, Judge. James Marion Moorman, Public Defender, and Tonja R. Vickers, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Donna Provonsha-Lentz, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) Appellant received concurrent twelve-year prison sentences for sale of cocaine, a second degree felony, and for possession of cocaine, a third degree felony. The state concedes that the sentence for possession exceeds the five-year statutory maximum. §§ 893.13(1)(f), 775.082(3)(d), Fla. Stat. (1991).

Accordingly, we vacate only the sentence for possession and remand for correction of that sentence. Appellant need not be present for the correction. The sentence for the sale is affirmed. (CAMPBELL, A.C.J., and PARKER and PATTERSON, JJ., Concur.)

* * *

FRANKIE LEE SMITH, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 92-01113. Opinion filed March 10, 1993. Appeal from the Circuit Court for Collier County; Eugene C. Turner, Acting Circuit Judge. James Marion Moorman, Public Defender, and A. Anne Owens, Assistant Public Defender, Bartow, for Appellant. Frankie Lee Smith, pro se. Robert A. Butterworth, Attorney General, Tallahassee, and Peggy A. Quince, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm without prejudice to appellant to file a timely motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. (CAMPBELL, A.C.J., PARKER and PATTERSON, JJ., Concur.)

* * *

**Criminal law—Sentencing—Credit for time served—Question certified whether, if a trial court imposes a term of probation on one offense consecutive to a sentence of incarceration on another offense, jail credit from the first offense can be denied on a sentence imposed after a revocation of probation on the second offense**

ALICIA BAILEY, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 92-02672. Opinion filed March 10, 1993. Appeal from the Circuit Court for Hillsborough County; Donald C. Evans, Judge. James Marion Moorman, Public Defender, and Stephen Krosschell, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Carol M. Dittmar, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) We affirm the appellant's judgments and sentences. As in *State v. Tripp*, 591 So. 2d 1055 (Fla. 2d DCA 1991), we certify to the Florida Supreme Court the following question of great public importance:

> IF A TRIAL COURT IMPOSES A TERM OF PROBATION ON ONE OFFENSE CONSECUTIVE TO A SENTENCE OF INCARCERATION ON ANOTHER OFFENSE, CAN JAIL CREDIT FROM THE FIRST OFFENSE BE DENIED ON A SENTENCE IMPOSED AFTER A REVOCATION OF PROBATION ON THE SECOND OFFENSE?

(CAMPBELL, A.C.J., PARKER and PATTERSON, JJ., Concur.)

* * *

**Criminal law—Search and seizure—Residence—To allow warrantless entry into person's home in emergency situation, emergency need not in fact exist so long as officer reasonably believes it to exist because of objectively reasonable facts—Where officer was dispatched to residence based on reports that man was in yard discharging firearm, officer found defendant angry and holding shotgun aimed in direction of residences yelling "I'll shoot," officer had to point his own firearm at defendant and twice order him to put down shotgun and threaten to shoot defendant before defendant put shotgun down, officer observed evidence that weapon had been fired and that another individual might be involved, and officer could not identify who resided in house or get any response from house, objectively reasonable circumstances existed to cause officer to believe that emergency may exist in regard to possibility of injured persons in defendant's residence—Officer's warrantless, nonconsensual entry into residence legal—State met burden of proving by preponderance of evidence that defendant voluntarily consented to search of premises a second time to seize any items determined to be contraband—Officer's presence when defendant was displaying firearm in angry manner and threatening to shoot sufficient to sustain charge of improper exhibition of firearm—Statute does not require presence of third parties—Error to dismiss charge**

STATE OF FLORIDA, Appellant, v. JAMES R. BOYD, Appellee. 2nd District. Case Nos. 91-03895 and 91-03985. Opinion filed March 10, 1993. Appeal from the Circuit Court for Polk County; Robert E. Pyle, Judge. Robert A. Butterworth, Attorney General, Tallahassee, Dell H. Edwards and Sue R. Henderson, Assistant Attorneys General, Tampa, for Appellant. James Marion Moorman, Public Defender, and Tonja R. Vickers, Assistant Public Defender, Bartow, for Appellee.

(CAMPBELL, Acting Chief Judge.) In these consolidated appeals, appellant, the state of Florida, seeks reversal of a pretrial order suppressing evidence and an order dismissing Count II of the information, which charged appellee, James R. Boyd, with the improper exhibition of a firearm in violation of section 790.10, Florida Statutes (1991). In addition to the charge of improper exhibition of a firearm, appellee was also charged with resisting an officer with violence, possession of a firearm with altered serial number, possession of cannabis with intent to sell or deliver, possession of drug paraphernalia, possession of cocaine and grand theft. We agree with the state and reverse both

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Carol M. Dittmar, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 10th day of April, 1993.

Respectfully submitted,

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