IN THE SUPREME COURT OF FLORIDA

BILLY TURNER,

Petitioner,

v. CASE NO. 81,519

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON THE MERITS

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BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the lower tribunal. A one volume record on appeal, including transcripts, will be referred to as "R," followed by the appropriate page number in parentheses. Attached hereto as an appendix is the opinion of the lower tribunal, which has been reported as Turner v. State, 615 So. 2d 819 (Fla. 1st DCA 1993). The issue presented in this case is also pending review before this Court in Brown v. State, case no. 81,189, oral argument set for November 1, 1993; Bailey, et al. v. State, case no. 81,621; State v. Thomas, et al., case no. 81,724; and State v. Kirkland, case no. 81,725.

II STATEMENT OF THE CASE AND FACTS

By information filed October 4, 1991, petitioner was charged with sale of cocaine within 200 feet of a public housing facility and possession of cocaine with intent to sell (R 19).

Petitioner appeared with counsel on November 18, 1991, and entered a plea of no contest to both charges (R 4-5). The written plea form relates:

> Straight plea. Defendant falls within recommended range of community control/12 to 30 mos. DOC. Minimum & Maximum possible penalties have been explained to Defendant. Up to 15 yrs. probation each count; Community control followed by probation; Up to 1 yr. county jail followed by probation; Up to 3 1/2 yrs. DOC (prison) followed by probation; Court costs; Up to $10,000 fine each count; Restitution if warranted; Public service work hrs. plus fee; Adjudication of guilt within Court's discretion. (R 43; emphasis added).

Petitioner appeared for sentencing on January 14, 1992. The sentencing guidelines scoresheet contained a total of 181 points, which called for a recommended range of 5 1/2 to 7 years, and a permitted range of 4 1/2 to 9 years (R 58).

Petitioner was adjudicated guilty and sentenced to 9 years in prison on count I, followed by 15 years probation on count II (R 6-7; 54-57; 66-67).

On January 29, 1992, a timely notice of appeal was filed (R 64). On March 17, 1992, the Public Defender of the Second Judicial Circuit was designated to represent petitioner.

On appeal, petitioner challenged the statute under which he was convicted, §893.13(1)(i), Fla. Stat. (Supp. 1990),

because the failure of the legislature to define "public housing facility" rendered it unconstitutionally vague.

The First District disagreed and held the statute to be constitutional on authority of its prior opinion in Brown v. State, 610 So. 2d 1356 (Fla. 1st DCA 1992):

> With respect to appellant's challenge to the constitutionality of section 893.13(1)(i), we affirm. See Brown v. State, 610 So. 2d 1356 (Fla. 1st DCA 1992). Appendix at 1.

Petitioner also attacked conditions of his probation because the written order did not conform to the oral pronouncement and because the judge improperly delegated to the probation officer the duty to define a "high drug" area. The lower tribunal struck those conditions. Appendix at 1.

Petitioner also attacked his plea because the sentencing guidelines scoresheet came out to call for a much greater sentence than he believed he would receive when he entered his plea. The lower tribunal rejected this claim:

> [W]e dismiss the appeal as to this issue without prejudice to his filing in the trial court either a motion to withdraw his plea or a motion to vacate his sentence under Florida Rule of Criminal Procedure 3.850. Appendix at 2.

On March 31, 1993, a timely notice of discretionary review was filed, pursuant to Art. V, §3(3)(b)(3), Fla. Const., and Rule 9.030(a)(2)(A)(i), Fla.R.App.P. On May 28, 1993, this Court accepted review.

III SUMMARY OF THE ARGUMENT

The First District's opinion in this case expressly declares valid the state statute creating the crime of sale of a controlled substance within 200 feet of a public housing facility, making the crime a first degree felony, and prohibiting release through control release or the accumulation of gain time.

An opinion from this Court will notify citizens of this state what conduct is prohibited. The First District's opinion in Brown assumes the general public knows what a "public housing facility" is, although that term was never defined by the legislature and cannot be found in the dictionary. In fact, the dictionary definitions of these words would lead a person of common intelligence to believe that any place where people live is a protected area.

The due process vagueness doctrine requires a statute to both give notice to its citizens what conduct is prohibited and prevent discriminatory enforcement.

The Second District has criticized the lower tribunal's Brown opinion and declared the statute to be unconstitutionally vague. The Third District has agreed with the First. This Court should adopt the position of the Second District, quash the First and Third Districts, and declare the statute unconstitutionally vague on its face.

Petitioner also attacked his plea in the lower tribunal, but that court refused to reach the issue. When petitioner entered his plea, he believed his sentencing guidelines

scoresheet would call for community control or 30 months. When he went to be sentenced, his scoresheet called for a much greater sentence, a recommended range of 5 1/2 to 7 years an a permitted range up to nine years. He received the top of the permitted range. The judge should have offered him the opportunity to withdraw his plea.

In the instant case, the lower tribunal allowed petitioner the right to seek to withdraw his pleas or vacate his sentences in the trial court. But it would make more sense as a matter of judicial economy for the appellate court to go ahead and correct the obvious error, rather than to remand for the defendant to file a Rule 3.850 motion, which will surely be granted.

IV ARGUMENT

ISSUE I
SECTION 893.13(1)(i), FLORIDA STATUTES, IS UNCONSTITUTIONALLY VAGUE ON ITS FACE.

The First District's construction of §893.13(1)(i), Fla. Stat. (Supp. 1990), is incorrect because it expressly declares valid an unconstitutionally vague statute. Section 893.13(1)(i) states, in pertinent part:

> it is unlawful for any person to sell, ... a controlled substance in, on, or within 200 feet of the real property comprising a public housing facility, ... (emphasis added).

The statute makes the crime a first degree felony, and exempts the offender from consideration for control release and gain time.[1]

Petitioner contended below and argues here that this statute violates State and Federal due process guarantees, because it does not give notice of what is prohibited, in that "public housing facility" is not defined. The due process vagueness doctrine requires a statute to both give notice to its citizens what conduct is prohibited and prevent discriminatory enforcement.

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[1]The undersigned could not locate a parallel federal criminal statute on point. 21 U.S.C. §860 doubles the penalties for distribution of controlled substances within 1000 feet of a school, much like §893.13(1)(e), Fla. Stat., but does not speak to public housing facilities. The federal government encourages the eviction of residents of housing facilities owned by HUD, who are involved in drugs, 42 U.S.C. §1437d(1), but that policy has come under some criticism. Comment, 36 Loyola L. Rev. 137 (1990).

In Kolender v. Lawson, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983), the court ruled the California loitering statute unconstitutionally vague. The court set forth this test:

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with such sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

In Bertens v. Stewart, 453 So. 2d 92, 93 (Fla. 2d DCA 1984), the court said, citing State v. Wershow, 343 So. 2d 605 (Fla. 1977):

> It is constitutionally impermissible for a statute to contain such vague language that a person of common intelligence must speculate about its meaning and subject himself to punishment if his guess is wrong.

A statute is unconstitutionally vague if it:

> fails to give adequate notice of the conduct it prohibits and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement.

Id., citing Southeastern Fisheries Assoc. v. Department of Natural Resources, 453 So. 2d 1351 (Fla. 1984).

In Bertens, the court held a rule, which prohibited personal possession of "medicine" at school, was unconstitutional because it failed to give adequate notice what is required under due process.

In reaching its decision that the rule was impermissibly vague, the court noted that the school board's failure to

define medicine did not, in and of itself, render the rule unconstitutional. Rather, the court looked to the "ordinary" meaning of the term "medicine." The court concluded that the dictionary definition did not cure the infirmity and that the term "medicine" was impermissibly vague.

See also Linville v. State, 359 So. 2d 450 (Fla. 1978), in which this Court declared unconstitutional a statute which outlawed the sniffing of a "chemical substance," because it too broadly encompassed an unduly large number of materials and objects.

Penal statutes must be strictly construed, §775.021(1), Fla. Stat., and they require greater certainty than other statutes. State v. Winters, 346 So. 2d 991 (Fla. 1977).

The First District held in Brown that:

> Although the definition of "public housing facility" might not be included in a dictionary, a person of ordinary intelligence should know what was intended by the phrase. 610 So. 2d at 1358; emphasis added.

But this is not the test; it is not whether a person should know; rather, it is whether a person of common intelligence does know what the term means by reading the statute.

The Third District made the same mistake in Williams v. State, 18 Fla. L. Weekly D1220 (Fla. 3rd DCA May 11, 1993), when it ruled the same statute constitutional because its judges knew what the term meant:

> The term "public housing," in common parlance, is understood to to encompass affordable, government subsidized housing

> for individuals or families with varied needs.

Id. at 1221.

The Second District reached the proper result in State v. Thomas, et al., 18 Fla. L. Weekly D1067 (Fla. 2nd DCA April 21, 1993), review pending, case no. 81,724, when it ruled the statute unconstitutionally vague. First, it criticized the lower tribunal for its cursory examination of the statute:

> We find Brown, however, to be neither helpful nor persuasive as the discussion therein regarding the vagueness of the statute is limited to one paragraph ... .
>
> While the Brown court concludes that "a person of ordinary intelligence should know what was intended by the phrase public housing facility, we have not been able to decipher the intended meaning of the phrase with any degree of precision. The phrase is not defined in any dictionary, case law or sufficiently related statute that we can discover. While each of the three words of the phrase can be independently and easily defined, when used together in the statute, they present a veritable quagmire for any attempt at uniform enforcement.

Id; emphasis in original.

Next, the Second District struggled to find a way to place a judicial gloss on the statute which would make it constitutional.

> We used several approaches as we analyzed the alleged vagueness of this statute. We first considered whether we could articulate a precise jury instruction that would adequately advise a jury how to apply the statute in any particular set of circumstances. We were unable to do so. We also considered whether we could advise law enforcement officers in the field as to a precise standard to apply in enforcing the statute. We were unable to do so. We

> then considered at great length the myriad circumstances under which the statutory prohibition might be applicable. Although we could provide a long list of such circumstances, we set forth here only a few of the possibilities that raised sufficient doubt in our minds to require us to conclude the statute is unconstitutionally vague.

The Second District next looked at each individual term, beginning with the term "public:"

> In regard to the "public" aspect of the "public housing facility" provision, we have no way of definitively ascertaining whether the legislature intended the phrase to apply to publicly-owned housing to the exclusion of privately-owned housing; to housing available for occupancy by the "public" in general or for low income occupants only; to housing that is government financed or built; to housing that is privately owned but government financed or built; or to housing that is privately-owned but leased to a government agency for availability to public welfare recipients. We simply have no idea as to the limitations that might be or should be applied to the "public" aspect of a "public housing facility."

Id. The Second District then looked at the term "housing:"

> The same problem exists in trying to correctly determine the parameters of the term "housing." Does that term apply to rental units only? Does it refer to multifamily housing only or also to single family units? Does it apply to dormitory and congregate living facilities? Are military housing facilities included? Are religious or charitable owned and operated facilities available for occupancy or "shelter use" by the public included? The possibilities extend ad infinitum.

Id. The Second District finally examined the term "facility:"

> Finally, the term "facility" is open to so many possible interpretations as to be bewildering. Are the corporate offices

> of a "public housing facility" included? Are government offices that operate low income housing included? Are sewage, water and utility facilities included?

Id. The Second District then declared the statute to be unconstitutionally vague:

> In our opinion the possibilities for a misapplication of the term "public housing facility" are too numerous to allow that provision to section 893.13(1)(i) to withstand constitutional scrutiny.

Id.

The term "public housing facility" is not defined in the drug abuse statute. A search of the Florida Statutes related to housing does not reveal a definition for the term "public housing facility." The only passage of the statutes where the term "public housing" is used is in connection with the State Housing Incentive Partnership (SHIP) Act of 1988. Chap. 420, Fla. Stat., Part I. "Public housing" is mentioned in §420.00003(3)(d), Fla. Stat., but this is a legislative intent section and not a definitional section:

> Public Housing. -- The important contribution of public housing to the well-being of low-income citizens shall be acknowledged through state and local government efforts to provide services and assistance through existing programs to public housing facilities and tenants.

The definitional portion of the act, §420.00004, Fla. Stat., does not define the term. "Facility" is not defined anywhere in Chapter 420.

Chap. 421, Fla. Stat., governs public housing. The term "public housing facility" does not appear therein, but the term

"housing project" does. Section 421.03(9), Fla. Stat., defines "housing project" as:

> "Housing project" shall mean any work or undertaking:
>
> (a) To demolish, clear, or remove buildings from any slum area; such work or undertaking may embrace the adaptation of such area to public purposes, including parks or other recreational or community purposes; or
>
> (b) To provide decent, safe and sanitary urban or rural dwellings, apartments or other living accommodations for persons of low income; such work or undertaking may include buildings, land, equipment, facilities or other real or personal property for necessary, convenient or desirable appurtenances, streets, sewers, water service, parks, site preparation, gardening, administrative, community, health, recreational, educational, welfare or other purposes; or
>
> (c) To accomplish a combination of the foregoing. The term "housing project" also may be applied to the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, restoration, alteration and repair of the improvements and all other work in connection therewith.

These definitions are not particularly helpful to understand what a "public housing facility" is. Even if the legislature intended for the traditional low-income "housing project" to be targeted in §893.13(1)(i), the legislature did not use this statutory term; rather, it used "housing facility," a term with no definition. And even if the state uses this definition to attempt to save the statute, the statute is still vague.

A vacant lot could be a "housing project" within subsection (a) of the statutory definition, if it is some day envisioned as a dwelling place. A vegetable garden could be a

"housing project" within subsection (b) of the statutory definition, if it is in some way connected to a dwelling place. An abandoned building could be a "housing project" within subsection (c) of the statutory definition, if it is some day remodeled into a dwelling place. People of common intelligence must still guess as to the statute's meaning.

This Court has no power to rewrite the statute to make it constitutional. That is a job for the legislature. State v. Wershow, supra. In Brown v. State, 358 So. 2d 16 (Fla. 1978), this Court declared the open profanity statute unconstitutionally overbroad, and impossible to save by a limiting judicial construction:

> The Florida Constitution requires a certain provision defined by the legislature, not legislation articulated by the judiciary. ... This constitutional mandate obtains for two reasons. First, if legislative intent is not apparent from the statutory language, judicial reconstruction of vague or overbroad statutes could frustrate the true legislative intent. Second, in some circumstances, doubts about judicial competence to authoritatively construe legislation are warranted. Often a court has neither the legislative fact-finding machinery nor experience with the particular statutory subject matter to enable it to authoritatively construe a [statute].

Id. at 20; citations omitted.

Even if "low income" is judicially engrafted onto "housing facility," in an attempt to save the statute, the statute remains vague. Section 421.03(10), Fla. Stat., defines "low income" as:

> "Persons of low income" shall mean persons or families who lack the amount of income which is necessary, as determined by the authority undertaking the housing project, to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

Equating "low income" with "public" is internally inconsistent with other portions of the statute. The statute also enhances the penalties for drug transactions close to public schools and public parks. One does not have to be a low income person to attend public school or play basketball in a public park. Even rich people are allowed to use these places too.

Moreover, the concept of "low income" is not susceptible to quantification, but the statute leaves that determination to the local housing authority. A person of common intelligence must necessarily guess whether the housing authority will classify someone as "low income."

Moreover, some single parents employed as secretaries by the state, with several dependants, may believe they meet the definition, even if the housing authority does not. In short, restricting the statute's scope to low income housing does not alleviate any of its vagueness.

Because there is no statutory definition for "public housing facility," the words must be construed according to their plain meaning. State v. Hagen, 387 So. 2d 943 (Fla. 1980). In the absence of a statutory definition, case law, or related statutory provisions which define a statutory term, the

next step is to consult a dictionary to determine the meaning of the term. Bertens v. Stewart, supra, 453 So. 2d at 94.

Webster's New World Dictionary (2d college ed.) defines the adjective "public" as:

> 1. of, belonging to, or concerning the people as a whole; of or by the community at large
> 2. for the use or benefit of all; esp. supported by government funds
> 3. as regards community, rather than private, affairs
> 4. acting in an official capacity on behalf of the people as a whole
> 5. known by, or open to the knowledge of, all or most people

Id. at 1149.

The term "public" could be construed as "available to the public." This construction does little to save the statute. Such an interpretation would include within the statute virtually all housing developments, since in this country, those with sufficient funds may buy or rent any housing which they can afford.

The term "public" could be construed as "owned by the public." This construction does little to save the statute. Such an interpretation would include within the statute any place owned by the local, state, or federal governments. It would include college dormitories, military barracks, the Governor's mansion, juvenile detention homes, illegal alien detention camps, probation and restitution centers, migrant housing, homeless shelters, park ranger residences, prisons, jails, halfway houses, nursing or retirement homes, and

residential schools for the deaf, blind, or physically handicapped.

The confusion increases when one considers that many places traditionally owned by the public are now leased by the government from private owners, such as jails and prisons.

The term "public" could be construed as "financed by the public." This construction does little to save the statute. Such an interpretation would include within the statute any place where the resident receives government funds to assist in housing expenses. Such a construction would necessarily include private homes purchased with Farmer's Home, FHA or VA funds. It would include first-time home buyers who receive local bond money to assist in their payments. It would include apartments close to the FAMU campus, which the developer proposes to build with government funds. It would include off-base housing for military personnel.

The term "public" could be construed as "subsidized by the public." This construction does little to save the statute. Such an interpretation would include within the statute any place where the developer receives government funds to construct or maintain the project. It would include private not-for-profit groups, such as Habitat for Humanity, which depend on some government assistance in building affordable housing.

Scattered throughout Chap. 420, Fla. Stat., are programs for the state to subsidize private housing: the State Housing Trust Fund, §420.0005, Fla. Stat.; the Housing Development

Corporation of Florida, §420.101, Fla. Stat.; the Housing Predevelopment Trust Fund, §420.307, Fla. Stat.; the Elderly Homeowner Rehabilitation Program, §420.34, Fla. Stat.; the Florida Elderly Housing Trust Fund, §420.35, Fla. Stat.; the Neighborhood Housing Services Grant Fund, §420.4255, Fla. Stat.; the Florida Housing Finance Agency, §420.504, Fla. Stat.; the State Apartment Incentive Loan Program, §420.5087, Fla. Stat.; the Florida Homeownership Assistance Program, §420.5088, Fla. Stat., the Florida Affordable Housing Trust Fund, §420.603, Fla. Stat.; the Pocket of Poverty Trust Fund, §420.805, Fla. Stat.; and the Maintenance of Housing for the Elderly Trust Fund, §420.905, Fla. Stat.

Petitioner asks: which of these "public housing facilities" did the legislature intend to be included within the proscription of §893.13(1)(i)? All of these laudable programs are surely "public," but they are not included within the chapter dealing with "public housing."

Chap. 421, Fla. Stat., is entitled "Public Housing." It creates local housing authorities in §421.04, Fla. Stat., and regional housing authorities in §421.28, Fla. Stat., but it never defines "public housing facility."

The noun "housing" is defined as:

> 1. the act of providing shelter or lodging
> 2. shelter or lodging; accommodation in houses, apartments, etc. ...
> 3. houses collectively
> 4. a shelter; covering

Webster's New World Dictionary (2d college ed.) at 681. This definition is fairly straightforward, so petitioner will not

quarrel with it, except to note that it applies to all of the lodging mentioned above in connection with the term "public." Any apartment, single family home, condominium, hotel, motel, mobile home, duplex, cabin, or tent, if available for lodging the public, is a "public housing facility" within the dictionary definition.

The noun "facility" is defined as:

> 1. ease of doing or making; absence of difficulty
> 2. a ready ability; skill; dexterity; fluency
> 3. the means by which something can be done
> 4. a building, special room, etc. that facilitates or makes possible some activity

Id. at 501.

"Facility" may refer only to actual residences, or it could refer to anything associated with a dwelling place. These facilities may or may not include swimming pools, sheds, garages, garbage dumpsters, playgrounds, or parking lots across the street.

This definition is fairly straightforward, so petitioner will not quarrel with it, except to note that it applies to all of the lodgings mentioned above in connection with the term "public." Any apartment, single family home, condominium, hotel, motel, mobile home, duplex, cabin, or tent, if available for lodging the public, is a "public housing facility" within the dictionary definition.

Thus, the dictionary definition of each individual word does not provide a satisfactory definition. The dictionary meaning of the words together would lead a reasonable person to

conclude that any type of housing available to the public would be a public housing facility. The dictionary definition of the words together would cause a reasonable person to guess at the meaning of a "public housing facility." Surely, the legislature did not intend to elevate the penalty for drug offenses within 200 feet of any place where the public may reside.

Consequently, because the term "public housing facility" does not have a statutory definition, and there is no dictionary or plain and ordinary definition that provides a clear meaning, the statute is unconstitutionally vague in that it fails to provide adequate notice of the prohibited conduct.

The undersigned, in limited research of the law of other states, located only three states with statutes similar to ours. Code of Ala. §13A-12-270, provides for an additional five year prison term for a drug sale with three miles of a "public housing project owned by a housing authority." This language makes this statute a little less vague than ours.[2]

Illinois has a statutory scheme which reclassifies drug crimes which occurred within 1000 feet of "residential property owned, operated and managed by a public housing agency." Ill.

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[2]The statute has been upheld against a constitutional attack on separation of powers grounds, but no vagueness argument was made in Burks v. State, 611 So. 2d 487 (Ala. Ct. Crim. App. 1992).

Rev. Stat. ch. 56 1/2, para. 1407(b). Again, this language makes this statute a little less vague than ours.[3]

Georgia has the most explicit language. It penalizes drug crimes:

> in, on, or within 1,000 feet of any real property of any publicly owned or publicly operated housing project ... . For the purposes of this Code section, the term "housing project" means any facilities under the jurisdiction of a housing authority which constitute single or multifamily dwelling units occupied by low and moderate-income families ... .

Ga. Code §16-13-32.5(b). The statute further provides:

> The governing authority of a municipality or county may adopt regulations requiring the posting of signs ... designating the areas within 1,000 feet of the real property of any publicly owned or publicly operated housing project as "Drug-free Residential Zones."

Ga. Code §16-13-32.5(f).

The First District's conclusion that the statute was constitutional because a person of ordinary intelligence "should know what was intended by the phrase" is patently erroneous. A vague statute cannot be saved by what a person "should know;" it can only be saved by the terms the legislature used in the statute. A person cannot be required to guess what the words mean. This Court must quash the First and Third Districts, and adopt the position of the Second.

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[3]The statute has been upheld against an equal protection attack, but no vagueness argument was made in People v. Shephard, 605 N. E. 2d 518 (Ill. 1992).

ISSUE II

THE LOWER COURT ERRED IN FAILING TO OFFER PETITIONER THE OPTION TO WITHDRAW HIS PLEAS.

At the time petitioner entered his pleas to two crimes, in exchange for a guidelines sentence, he believed that his guidelines sentence would be community control or 12 to 30 months for both crimes, as evidenced by the written plea agreement in the record (R 43). He received the top of the permitted range, or 9 years. Nobody at the sentencing hearing offered petitioner the option of withdrawing his pleas.

It was well-settled prior to the guidelines that a defendant had the right to withdraw his plea if it was entered with the expectation of receiving a particular sentence, but then received a more harsh one, as the result of an honest misunderstanding or mutual mistake. See, e.g., Brown v. State, 245 So. 2d 41 (Fla. 1971). The same is true with regard to the guidelines.

In a similar situation in Tobey v. State, 458 So. 2d 90 (Fla. 2d DCA 1984), the appellant entered guilty pleas based upon the understanding that he would receive a guidelines sentence. The state attorney had previously represented to defense counsel that the appellant's presumptive sentence under the guidelines would be 36 months imprisonment, whereas the guidelines range actually called for 5 1/2 to 7 years. Defense counsel advised the appellant that his sentence would be 36 months and Tobey entered his plea on that basis. At the sentencing hearing, Tobey moved to withdraw his pleas, which

motion was denied, the trial court finding that the only agreement made with appellant was to sentence him pursuant to the guidelines.

The district court reversed, reasoning that the pleas were based on a failure of communication or misunderstanding between defense counsel and the state attorney, even though there was no suggestion that the court failed to honor the plea bargain. Accord, Deprycker v. State, 486 So. 2d 57 (Fla. 3d DCA 1986) (appellant should be allowed to withdraw his pleas which were based on a misapprehension of the possible sentence induced by the state's miscalculation of the appropriate scoring under the guidelines); Lamar v. State, 496 So. 2d 191 (Fla. 4th DCA 1986) (defendant plead on basis of prosecutor's representation as to the range); and Johnson v. State, 506 So. 2d 1086 (Fla. 1st DCA 1987) (defendant plead to erroneous scoresheet).

In State ex rel. Wilhoit v. Wells, 356 So. 2d 817, 824 (Fla. 1st DCA 1978), this Court stated:

> Until sentence is pronounced, the trial court maintains power to impose any sentence authorized by law; and, though the sentencing judge may be conscience-bound to perform his own prior agreements with counsel and the parties, the court is not in law bound to impose a sentence that once seemed, but no longer seems, just and appropriate. Whereas where a nolo contendere or guilty plea is tendered in reliance on the court's expression of sentencing intentions, and the pleas accepted, the sentencing judge must grant the defendant a clear opportunity to withdraw the plea if the judge cannot in conscience impose the sentence indicated; but that is the limit of the trial court's obligation. (emphasis added).

Rule 3.172(g), Fla.R.Crim.P. further provides that if the trial judge does not concur in a tendered plea of guilty or nolo contendere arising from plea negotiations, the plea may be withdrawn. The burden is on the court to grant the defendant the opportunity to withdraw his pleas; the rule does not require that the defendant must affirmatively request to withdraw his pleas. Perry v. State, 510 So. 2d 1083 (Fla. 2nd DCA 1987).

In Waldon v. State, 483 So. 2d 101 (Fla. 5th DCA 1986), the defendant entered into a plea agreement relying on the advice of his defense counsel as to the proper sentencing guideline scoring of his prior criminal record. Waldon was sentenced in accordance with the plea agreement but claimed on appeal that under a proper calculation, his recommended guideline sentence was less than that to which he agreed. The court held that rather than appealing, Waldon should have moved to withdraw his plea or to vacate his sentence under Rule 3.850, Fla.R.Crim.P. and accordingly, the court dismissed the appeal without prejudice to Waldon's right to seek the appropriate remedy.

That same result happened in the instant case. But it would make more sense as a matter of judicial economy for the appellate court to go ahead and correct the obvious error, rather than to remand for the defendant to file a 3.850 motion, which will surely be granted.

Here, once the scoresheet came out worse than expected, it was the judge's job to offer petitioner the option of withdrawing his pleas. Perry v. State, supra.

As noted in White v. State, 489 So. 2d 115, 118 (Fla. 1st DCA 1986), the holding in Waldon

> certainly permits a fair result to the state, since if the defendant withdraws his plea, arguing that he only agreed to be sentenced in accordance to the guidelines, the state would be released from its agreement to nolle prosequi other charges and to recommend the sentence imposed.

There is nothing in the record to show that the state would be prejudiced in any way by permitting petitioner to withdraw his pleas; and in the absence of a showing of prejudice, petitioner must be allowed the opportunity to withdraw the pleas. Williams v. State, 448 So. 2d 1236 (Fla. 1st DCA 1984).

In Wynn v. State, 557 So. 2d 188 (Fla. 1st DCA 1990), the defendant agreed to enter a plea in exchange for a guidelines sentence. He received a departure sentence, and the court reversed because it was in excess of the plea agreement.

In Smith v. State, 559 So. 2d 1281 (Fla. 5th DCA 1990), the defendant entered a plea in exchange for a three year prison sentence, followed by probation, upon a belief that his sentencing guidelines scoresheet would call for a 3 to 7 year range. He later received a 17 year sentence because the scoresheet had changed. The court held:

> Upon remand the trial court should determine the conditions of the original

> plea in regard to sentencing. If the original terms cannot be followed because it would constitute an improper sentence, then the trial court should offer the defendant the opportunity to withdraw his plea or be allowed to proceed with the plea without the trial court being bound by any agreement, or condition.

Id. at 1283.

In Edwards v. State, 575 So. 2d 297, 298 (Fla. 4th DCA 1991), apparently the defendant did not move to withdraw his plea. The court properly placed the burden on the judge to offer the opportunity to withdraw the plea, and held:

> The defendant/appellant, Ricky Earl Edwards, entered into a plea agreement with the state with the understanding that the state would recommend that his sentence be 12 years, the bottom of the recommended guidelines range. Subsequently it was discovered that an error had been made in the calculation of Edwards' scoresheet. Without advising Edwards that he could withdraw his plea, the trial court sentenced him to 22 years in the Department of Corrections -- 10 years greater than the amount agreed upon in plea negotiations. We reverse the conviction and sentence based upon Johnson v. State, 547 So.2d 238 (Fla. 1st DCA 1989) and direct the trial court to afford Edwards an opportunity to withdraw his plea of nolo contendere. (emphasis added).

Finally, in McCollun v. State, 586 So. 2d 490 (Fla. 1st DCA 1991), the defendant plea to the nonstate prison range of the scoresheet in front of Judge Foster. When his scoresheet turned out to call for state prison time, Judge Foster sentenced him to 3 years. The court held:

> When the trial court determines that it cannot honor a plea agreement, the defendant must be afforded an opportunity to withdraw his plea. ... [T]he written

> plea agreement expressly contemplated a nonstate prison sentence.

Id. at 491.

The same is true in the instant case. The plea agreement contemplated community control or 12-30 months. It certainly did not contemplate a 9 year prison sentence. When the scoresheet turned out worse than expected, the burden was on Judge Foster to offer petitioner the option of withdrawing his pleas. This cause must be remanded to give petitioner that opportunity.

V CONCLUSION

Based upon the arguments presented here, the petitioner respectfully asks this Court declare the statute unconstitutional, because it significantly affects the rights of citizens of the state to know what criminal conduct is prohibited. In addition, petitioner asks that his pleas be vacated.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Brief has been furnished to Gypsy Bailey, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to petitioner, on this 22nd day of June, 1993.

P. DOUGLAS BRINKMEYER

ERIES

EES' MOTION TO DISMISS

AM.

appeals from an order which
ighter to be dependent pursu-
er 39, Florida Statutes. The
ndparents were given custody
The trial court ordered the
ave an evaluation, attend all
l therapy and to have super-
on with her daughter. In addi-
her was ordered to obtain and
able employment and suitable
a reasonable length of time.

lparents now move to dismiss
asserting that the mother has
nply with the terms of the trial
er. Appellees assert that the
left the State of Florida and
o effort to reunite herself with
Appellees attach an affidavit
RS case worker attesting to the
e r[illegible]er has not complied with
urt [illegible]rder. The grandparents
r own affidavits to support their
hat the mother has had no visi-
her daughter.

for appellant moves to strike the
dismiss. This motion shall be
a response. Appellant argues
as not intentionally abandoned
l and asserts that she has main-
tact with her child. Appellant
t the motion to dismiss is untime-
e the order of the trial court con-
time restraint or restriction for
e. Appellant asserts that if she
ie jurisdiction, that does not sug-
she is in deliberate noncompliance
trial court's order. She asserts
missal at this stage will interfere
fundamental rights as a parent.

e determined that the request for
to this court is premature. There
no evidentiary ruling made to
ppellees' argument that the moth-
failed to comply with the trial
rder. Accordingly, jurisdiction is
he[illegible] the trial court for 30 days
nine if appellant has deliberately

disobeyed the order of the trial court. Following the trial court's ruling, appellees may then return to this court and seek dismissal based on that adjudication.

IT IS SO ORDERED.

JOANOS, C.J., and ERVIN and ZEHMER, JJ., concur.

Billy TURNER, Appellant,

v.

STATE of Florida, Appellee.

No. 92-406.

District Court of Appeal of Florida, First District.

March 16, 1993.

Defendant was convicted in the Circuit Court, Bay County, Clinton E. Foster, J., of selling cocaine within 200 feet of public housing project. Defendant appealed. The District Court of Appeal held that: (1) statute under which defendant was convicted was not unconstitutional; (2) portions of probation order imposing conditions which were not orally pronounced would be stricken; and (3) defendant's challenge to voluntary and intelligent nature of his plea was not cognizable on direct appeal, as he never raised issue in trial court by moving to withdraw plea.

Affirmed as modified.

1. **Constitutional Law** ⇐81, 250.1(2), 258(3.1)
Drugs and Narcotics ⇐43.1

Statute prohibiting sale of controlled substances within 200 feet of public housing project was not unconstitutional, despite claim that it was vague, violated defendant's rights to due process and equal protection, and amounted to invalid exercise of police power. West's F.S.A. § 893.13(1)(i); U.S.C.A. Const.Amends. 5, 14.

2. **Criminal Law** ⇐995(8), 1184(4.1)

Portions of probation order imposing conditions which were not orally pronounced, including prohibition against defendant's presence in specified areas and $1 monthly payment to organization, would be stricken.

3. **Criminal Law** ⇐1044.1(2)

Defendant's challenge to voluntary and intelligent nature of his plea was not cognizable on direct appeal, as he never raised issue in trial court by moving to withdraw plea.

Nancy A. Daniels, Public Defender, P. Douglas Brinkmeyer, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., Marilyn McFadden, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

Appellant challenges his conviction for selling cocaine within 200 feet of a public housing project. He argues: (1) that section 893.13(1)(i) is unconstitutional because it is vague, it violates his rights to due process and equal protection, and amounts to an invalid exercise of the police power; (2) that the trial court erred in failing to offer him the opportunity to withdraw his plea where the written plea, waiver and consent form indicated an incorrect guidelines sentence, and (3) that the trial court imposed an illegal probation order.

[1-3] With respect to appellant's challenge to the constitutionality of section 893.13(1)(i), we affirm. *See Brown v. State*, 610 So.2d 1356 (1992). We strike those portions of the probation order requiring a $1.00 monthly payment to First Step and prohibiting appellant's presence in specified areas, which conditions were not orally pronounced. *See Coupe v. State*, 591 So.2d 304 (Fla. 1st DCA 1991); *Tillman v. State*, 592 So.2d 767 (Fla. 2d DCA 1992). Appellant's challenge to the volun-

tary and intelligent nature of his plea is not cognizable on direct appeal because he never raised this issue in the trial court by moving to withdraw his plea. Accordingly, we dismiss the appeal as to this issue without prejudice to his filing in the trial court either a motion to withdraw his plea or a motion to vacate his sentence under Florida Rule of Criminal Procedure 3.850.

AFFIRMED as modified.

WIGGINTON, MINER and WOLF, JJ., concur.

1

Larry BARBER, Appellant,

v.

David FARCAS, Superintendent, Disciplinary Hearing Chairman and Team Members, Harry K. Singletary, Secretary of Department of Corrections, et al., Appellees.

No. 92-1048.

District Court of Appeal of Florida, First District.

March 16, 1993.

Petitioner appealed from an order of the Circuit Court, Leon County, L. Ralph Smith, Jr., J., summarily denying his petition for writ of habeas corpus. On appellees' motion for relinquishment of jurisdiction, the District Court of Appeal held that because appellees conceded that record was insufficient to support trial court's disposition, it was appropriate to treat motion as confessing error, and to reverse and remand order for further proceedings.

Reversed and remanded.

Habeas Corpus ⇐863

Where habeas petitioner appealed summary denial of his petition and appellees moved for relinquishment of jurisdiction, conceding that record was insufficient to support trial court's disposition, motion would be treated as confessing error, thus warranting reversal and remand with an order to show cause and conduct appropriate proceedings.

Larry Barber, pro se.

Susan A. Maher, Deputy Gen. Counsel for the Dept. of Corrections, for appellees.

PER CURIAM.

Larry Barber appeals summary denial of his petition for writ of habeas corpus. Appellees move for a relinquishment of jurisdiction, conceding that the record is insufficient to support the trial court's disposition. We believe the appropriate course is to treat this motion as confessing error. Accordingly, we reverse and remand the order appealed with directions to issue an order to show cause and to conduct such other proceedings as may be appropriate and necessary.

REVERSED AND REMANDED.

BOOTH, SMITH and WOLF, JJ., concur.

2

Sandra MILLER, Appellant,

v.

Betty CASTOR, as Commissioner of Education, Appellee.

No. 92-1736.

District Court of Appeal of Florida, Third District.

March 16, 1993.

Panel of Education Practices Commission revoked teacher's license for five years and imposed three years probation as result of misconduct. The District Court of ... held that: (1) commiss... proceed with panel ma... bers when two memb... attend hearing, and (2) t... material dispute at he... have justified terminat... ing.

Affirmed.

1. Administrative Law ⇐479

Schools ⇐132

Teacher was properl... member panel as require... utes for informal hearing ... of misconduct; Educatio... mission panel was entitle... panel majority of five m... members were unable t...

2. Schools ⇐132

Teacher did not raise ... at informal hearing rega... misconduct which would h... minating informal hearing...

3. Schools ⇐132

Teacher's claim that sh... ly advised by friends that ... to lose by electing infor... misconduct charges was ... reversal of revocation of ... cation Practices Commissio... teacher was fully informe... and implications of choosing ... ing.

Michael Greenwald, North... pellant.

Sydney H. McKenzie, III ... E. O'Sullivan, Tallahassee, ...

Before BARKDULL, FER... COPE, JJ.

1. Fla.Admin.Code Rule 6B-11.... An educator may elect an i... before the Commission if he ... the material facts of the co... sires to argue in mitigation o... in opposition to the legal c...