IN THE SUPREME COURT OF FLORIDA

THE STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,544

FELICE JOHN VEACH,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the prosecuting authority in the trial court and Appellee in the district court of appeal, shall be referred to herein as "the State." Respondent, FELICE JOHN VEACH, defendant in the trial court and Appellant in the district court of appeal, will be referred to herein as "Respondent." References to the record on appeal, including the transcripts of the proceedings below, will be by the use of the symbol "R" followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

On July 25, 1990, Respondent as to circuit court case no. 90-2027 entered into a plea agreement (R 9-10). Therein, Respondent agreed to plead nolo contendere to two counts of a lewd and lascivious act in the presence of a child, one count of lewd and lascivious sexual battery and one count of sexual battery, in exchange for a five-year term of probation (R 9-10). During the first two years of the probationary term, Respondent was to be placed on community control (R 9-10). Respondent's recommended sentencing guidelines range was twelve to seventeen years' incarceration (R 13-14). On August 8, 1990, the trial court sentenced Respondent in accordance with the plea agreement (R 11-12, 61-61). Respondent did not appeal from this sentence.

On February 15, 1991, Respondent's community control officer filed with the court an affidavit of violation of community control (R 17). On March 26, 1992, Respondent entered pleas of no contest to the violations of community control, and the trial court found that Respondent violated his community control (R 21-34). As a result, the trial court adjudicated Respondent guilty of the four offenses, and the court sentenced Respondent to twenty years' incarceration as to the offense of sexual battery and to concurrent fifteen-year sentences as to the remaining three offenses (R 35).

In a decision reported at Veach v. State, 18 Fla. L. Weekly D637 (Fla. 1st DCA Mar. 4, 1993), the First District Court of Appeal reversed the sentences of incarceration imposed after revocation of community control. On appeal, Veach argued that the sentences imposed after revocation must be reversed because the original sentences of probation were erroneous in that they were imposed without the trial court determining whether Respondent was suitable for adult sanctions, pursuant to Section 39.059(7)(c), Florida Statutes. Id. at D638. Citing Pendarvis v. State, 400 So. 2d 494 (Fla. 5th DCA 1981), the State responded that

> appellant was sentenced pursuant to a negotiated plea bargain, combining community control and probation (R-11-12), that was far below the recommended guidelines sentence of twelve to seventeen years (R-13-14). Appellant voluntarily waived the requirements of Section 39.059(7), when he requested this sentence and waived a presentence investigation (R-60). Having received the benefit of his bargain, appellant squandered the opportunity he was given, when at the age of nineteen, he violated community control (R-17-19).

Petitioner's answer brief at 4-5. The State also cited Goldsmith v. State, 613 So. 2d 1327 (Fla. 1st DCA 1992), Novaton v. State, 610 So. 2d 726 (Fla. 1st DCA 1992), and Preston v. State, 411 So. 2d 297 (Fla. 3d DCA 1982), as supplemental authority.

The First District agreed with Veach, stating:

> Failure to follow the provisions of section 39.059(7)(c) in sentencing a juvenile as an adult requires remand for resentencing, regardless of objection. State v. Rhoden, 448 So. 2d 1013, 1016 (Fla. 1984). While a juvenile can waive his right to findings under section 39.059(7)(c)(1-6) before being sentenced as an adult, Rhoden, that waiver must be knowing, intelligent and manifest on the record. Hill v. State, 596 So. 2d 1210, 1211 (Fla. 1st DCA 1992). Without such a waiver, it is reversible error for a trial court to impose adult sanctions upon a juvenile without making the required findings, even though sanctions were imposed pursuant to a negotiated plea agreement which omitted any reference to the statute. Walker at 1341-42.
>
> Here, there was no waiver by Veach, either at the original sentencing proceeding or in the written plea agreement, of his right to section 39.059(7)(c) findings prior to adult sentencing in Case No. 90-2027. [Footnote omitted].

On April 5, 1993, Petitioner timely filed its notice to invoke the discretionary jurisdiction of this Court. On April 15, 1993, the State filed its brief on jurisdiction, arguing that the Veach decision was in express and direct conflict with the Third District's decision in Preston, supra. On April 23, 1993, Respondent filed his brief on jurisdiction, arguing that the Veach decision was not in express and direct conflict with Preston because Preston was overruled by this Court's decision in State v. Rhoden, 448 So. 2d 1013 (Fla. 1984). On June 30, 1993, this Court accepted jurisdiction over the instant case.

SUMMARY OF ARGUMENT

The First District Court of Appeal erred in reversing Respondent's sentences of fifteen and twenty years' incarceration. First, Respondent's original sentences were not erroneous. As Respondent agreed to such sentences in his plea agreement, the trial court was not required to determine that Respondent was suited to adult sanctions under Section 39.059(7), Florida Statutes. Second, Respondent waived his right to contest the legality of his original sentences because he did not appeal from them; rather, he enjoyed the benefits of community control until he violated it. In the event that this Court finds that it must reverse Respondent's sentences, the remedy is to set aside the plea and to reinstate the original charges. The parties, then, may elect to plead anew or to go to trial.

ARGUMENT

ISSUE

THE FIRST DISTRICT COURT OF APPEAL ERRED IN REVERSING RESPONDENT'S SENTENCES OF INCARCERATION IMPOSED AFTER REVOCATION OF HIS ORIGINAL SENTENCES OF COMMUNITY CONTROL AND PROBATION ON THE GROUNDS THAT THE ORIGINAL SENTENCES WERE ERRONEOUS.

In circuit court case no. 90-2027, Respondent entered into a plea agreement wherein he agreed to an adult sentence of community control and probation (R 9-10). Respondent did not appeal from this sentence. Respondent subsequently violated his community control, and the trial court imposed concurrent fifteen and twenty-year terms of incarceration (R 35). For two reasons, the First District Court of Appeal erred in reversing the sentences of incarceration on the grounds that Respondent's original sentences were erroneous. Veach v. State, 18 Fla. L. Weekly D637 (Fla. 1st DCA Mar. 4, 1993).

First, Veach's original sentences of community control and probation were proper because Veach waived any entitlement to findings of suitability under Section 39.059(7), Florida Statutes, when he entered into a plea agreement for an adult sentence. In Pendarvis v. State, 400 So. 2d 494 (Fla. 5th DCA 1981), Pendarvis pled to an unspecified adult sentence, which the trial court imposed without determining whether he was suited to adult sanctions. On direct appeal, the Fifth District affirmed the sentence, stating:

> [H]ere it is clear from the record the sentence was the result of a plea bargaining process agreed to by the parties and the judge and clearly not an otherwise illegal sentence. Of course, appellant did not object below. We would be hard put to try to explain to the trial judge where he erred when he did everything everyone, except appellate counsel, agreed to.

Similarly, Veach agreed to his original sentence of five years' probation in a plea bargain. Thus, as in Pendarvis, the trial court in the instant case was not required to determine whether Respondent was suited to adult sanctions, under Section 39.059(7), Florida Statutes.

The instant plea bargain to an adult sentence is analogous to cases where a defendant plea bargained for a departure sentence, which the trial court imposed without enunciating departure reasons as required by Florida Rule of Criminal Procedure 3.701(d)(11). For example, in Smith v. State, 529 So. 2d 1106 (Fla. 1988), the defendant pled guilty to armed robbery in exchange for a maximum sentence of twenty years' incarceration. Smith's guidelines range called for a sentence between four and one-half and five and one-half years' incarceration. Id. at 1007. The trial court imposed a sentence of twelve years' incarceration without delineating written reasons for departure. Id. This Court upheld the departure sentence, stating:

> A negotiated plea agreement is a valid reason upon which to base a departure from the presumptive guidelines sentence. Quarterman v. State, 527 So.

> 2d 1380 (Fla. 1988). The state negotiated with Smith based on the strength of the case it has against him . . . Although only one charge was involved in Smith's plea agreement, the agreement still constitutes a clear and convincing reason for departure. It is clear from the record that Smith agreed to the plea to avoid the risk of a maximum sentence under the law. Obviously he and his attorney thought the chance of his conviction for this offense was great. Nothing in the record indicates the plea was coerced or that Smith did not enter the plea freely and voluntarily, and knowingly and intelligently upon counseling by a competent attorney.

See also White v. State, 531 So. 2d 711, 712 (Fla. 1988) (Departure sentence of thirty years' imprisonment resulting from a negotiated plea to second-degree murder upheld despite lack of written reasons for departure). Similarly, in the instant case, Respondent agreed to an adult sentence, i.e., a departure from juvenile sanctions. He does not contend that his plea was entered unknowingly and unintelligently. Thus, his original sentence of probation and community control was valid because the trial court was not required to make the statutory findings.

Respondent's sentences of incarceration should be reinstated for a second reason. Having fully accepted the terms of his plea bargain by not appealing from his original sentence, Respondent waived his right to question the legality of the original punishment. In Preston v. State, 411 So. 2d 297, 298 (Fla. 3d DCA 1982), Preston met the criteria of the Youthful Offender Act, which required that a

defendant be sentenced as a youthful offender once the statutory criteria were met. Id. Pursuant to a plea agreement, however, Preston pled guilty to robbery with a deadly weapon in exchange for adult probation. Id. Subsequently, the trial court revoked his probation, and imposed a new sentence. Id. On appeal from the new sentence, Preston contended that the sentence was erroneous because his original sentence had been erroneous. Id. Specifically, Preston argued that he was entitled to be sentenced as a youthful offender upon revocation of his probation because he should have been sentenced as a youthful offender in the first instance. Id. The Youthful Offender Act required that a youthful offender who violated probation be resentenced within the limitations of the act. Id. The Third District disagreed with Preston, holding:

> Where, however, a defendant never sought designation as a youthful offender and was not sentenced to a period of incarceration, but was placed on probation, the terms of which he fully accepted, we hold that the defendant has waived his right to question the legality of a probation which he has enjoyed and violated. King v. State, 373 So. 2d 78 (Fla. 3d DCA 1979), [cert. denied, 383 So. 2d 1197 (Fla. 1980)].

In the instant case, Respondent also never sought designation as a juvenile; rather, he fully accepted the agreed upon probation until he violated it. Thus, Respondent waived any objection to the terms of his original punishment.

Similarly, in King, supra, at 78, which the Preston Court cited as authority, the defendant pled guilty to armed robbery in exchange for an illegal sentence of three years' imprisonment with the last two years suspended while Preston was placed on probation. Preston did not appeal the sentence. Id. After Preston served his term of incarceration, he violated probation. Id. The trial court imposed a thirty-year term of imprisonment. Id. Preston contended that his new sentence was unlawful because the original sentence of probation had been illegal. Id. The Third District disagreed, stating "that the defendant has waived his right to appeal the unlawfully lenient sentence by his failure to appeal therefrom and his subsequent acceptance of probation based on the conditions imposed." Id. The court further stated that, "[h]aving fully accepted the improper sentence in the prior proceedings, the defendant may not subsequently come before the courts advocating a mutually inconsistent position." Id.

In a variety of contexts, the district courts of appeal have held

> that sentences and other judicial actions which deviate from statutory and even constitutional requirements to the potential benefit of the defendant and to which he agreed may not be the subject of a successful challenge brought only after he has failed to carry any burden imposed upon him.

Madrigal v. State, 545 So. 2d 392, 394 (Fla. 3d DCA 1989). See e.g., Gallagher v. State, 421 So. 2d 581 (Fla. 5th DCA 1982) (attack on conditions of probation which were imposed pursuant to a plea agreement came too late, where it came only after a violation was charged); Clem v. State, 462 So. 2d 1134, 1136 (Fla. 4th DCA 1984) (court may revoke probation even though appellants should have been sentenced to community control over which only Parole and Probation Commission had jurisdiction; court would not entertain complaint of error in being placed on probation rather than community control because defendant accepted benefits of that placement); Pollock v. Bryson, 450 So. 2d 1183 (Fla. 2d DCA 1984) (defendant who pled guilty in exchange for a three-year term of probation that included special condition of restitution was estopped from raising alleged legality of the condition); Bashlor v. State, 586 So. 2d 488 (Fla. 1st DCA 1991), rev. denied, 598 So. 2d 75 (Fla. 1992) (defendant who pled guilty to first-degree murder and received sentence of probation could not challenge legality of probation after he violated it; although original sentence violated statute prohibiting imposition of probation for first-degree murder, scuh violation benefitted defendant).

Contrary to the First District's interpretation of this Court's decision in State v. Rhoden, 448 So. 2d 1013, 1015 (Fla. 1984), Rhoden does not control the outcome of the instant case. In Rhoden, the defendant was tried as an adult for the offense of discharging a destructive device.

Id. The jury found Rhoden guilty of the offense, and the trial court sentenced Rhoden to a mandatory ten-year term of incarceration. Id. Despite the fact that Rhoden was seventeen years old at the time he committed the offense, the trial court failed to determine whether Rhoden was suited to adult sanctions, pursuant to the predecessor to Section 39.059(7). Id.

Rhoden is distinguishable from the instant case and from Preston, supra. The only argument advanced by the State in Rhoden was that Rhoden's failure to object at the sentencing hearing to the trial court's failure to address the statutory criteria waived the issue for appellate review. Id. at 1015-1016. The State did not make the argument advanced here, i.e., that a plea agreement obviates the need for the findings of suitability or that Respondent's failure to appeal directly from the allegedly erroneous sentence waived any appeal of it now. Unlike Veach, Rhoden never agreed to serve an adult sentence in a plea bargain. Unlike Preston, Rhoden did not wait until after he took the benefit of his allegedly erroneous sentence before he contested its legality. Thus, the issue raised in the instant case and in Preston was not addressed by this Court in Rhoden, and Rhoden is inapplicable to both cases.

In Croskey v. State, 601 So. 2d 1326, 1327 (Fla. 2d DCA 1992) (en banc), Croskey entered a plea of nolo contendere

in exchange for a sentence of seven years' incarceration to be followed by five years' probation. The trial court did not determine whether Croskey was suited to adult sanctions prior to imposing the agreed upon sentence. Id. Croskey directly appealed the sentence, and the Second District reversed, stating:

> It is possible that a juvenile could enter a negotiated plea in exchange for an adult sentence without being aware that he has the right to have his suitability for such sanctions considered under chapter 39. We are not satisfied that a plea entered under such circumstances, as in this case, would constitute an intelligent and knowing waiver of that right.

Id. at 1327-1328. The Second District's decision is not applicable to the instant case because it involves a direct appeal from the allegedly erroneous sentence. Croskey also is inapplicable because Respondent did not contend below that his plea was made unknowingly or unintelligently.

In the event that this Court finds that it must reverse Respondent's sentences, the proper remedy is not to correct the sentence. Rather, it is to set aside the plea and to reinstate the charges pending against Respondent prior to the plea. In Jolly v. State, 392 So. 2d 54, 55-56 (Fla. 5th DCA 1981), the defendant pled guilty to shooting into an occupied vehicle in exchange for a three-year sentence and the State's decision to nol prosse a pending charge of shooting into a dwelling. The trial judge, prosecutor and

defense counsel erroneously believed that the judge had no discretion but to impose a three-year minimum mandatory under the statute. Id. at 56. Jolly subsequently filed a motion to correct his sentence, which the trial court denied. Id. Jolly appealed, and the Fifth District Court of Appeal affirmed the trial court's denial of the motion to correct illegal sentence, stating:

> As the negotiations were based on a material mistake of law, the plea was invalid and no legal sentence could be imposed. The remedy, in these circumstances, is not to correct the sentence but to set aside the plea (and the consequent judgment and sentence), and to reinstitute the two charges pending against the defendant prior to the invalid plea. [Citations omitted].

Id. The Fifth District further observed:

> If the foundation of the sentence is defective, a new sentence cannot correct it. Only a new plea negotiation or a trial can remedy the problem at this point. To let the plea and judgment stand would give the defendant the benefits of his bargain - i.e., a three-year sentence cap and dismissal of the other charge - and would deny the state what it bargained for: a mandatory three-year sentence.
>
> The State's negotiation was clearly based upon the premise that the defendant would receive a mandatory three-year sentence. If the plea negotiation is not binding upon the defendant, then it is not binding upon the state.

Id. The Fifth District remarked that Jolly's remedy was to file a motion to vacate judgment and sentence under Florida

Rule of Criminal Procedure 3.850. Id. See also Hayes v. State, 598 So. 2d 138 (Fla. 5th DCA 1992).

Similarly, in Forbert v. State, 437 So. 2d 1079, 1081 (Fla. 1983), this Court adopted the reasoning of Jolly and stated:

> It is a well-established principle of law that a defendant should be allowed to withdraw a plea of guilty where the plea was based upon a misunderstanding or misapprehension of facts considered by the defendant in making the plea . . . Hence when a defendant pleads guilty with the understanding that the sentence he or she receives in exchange is legal, when in fact the sentence is not legal, the defendant should be given the opportunity to withdraw the plea when later challenging the legality of the sentence. Cleveland v. State, 394 So. 2d 230 (Fla. 5th DCA 1981); Britt v. State, 352 So. 2d 148 (Fla. 2d DCA 1977). [Citations omitted].

In Forbert, the defendant pled guilty to robbery in exchange for a "split sentence" of five years' imprisonment and three years' probation. Id. at 1080. Forbert subsequently filed a motion to correct his illegal sentence, pursuant to Villery v. Florida Parole and Probation Commission, 396 So. 2d 1107 (Fla. 1981). The trial court imposed a sentence of eight years' incarceration with credit for time served, and Forbert moved to withdraw his plea. Id.

Forbert appealed, and this Court held that the trial court erred in denying Forbert's motion to withdraw his plea of guilty, stating:

> Since Forbert, by moving to withdraw his plea of guilty has indicated a desire to be no longer bound by the original plea agreement, if he renews his motion the state will also be released from its obligations under that agreement. Therefore, if the court allows the withdrawal of the plea the state can insist that the original charges be reinstated against Forbert. [Citation omitted].

Id. at 1081. See also Forshee v. State, 579 So. 2d 388, 389 (Fla. 2d DCA 1991) ("Just as a defendant is not bound by a misconceived bargain, the state likewise is not bound to accept a sentence it did not bargain for.").

In the instant case, the trial court, Respondent and the State erroneously believed that Section 39.059(7), Florida Statutes, was inapplicable to the instant sentence. However, the State's negotiation for a five-year term of probation and community control was premised upon the fact that Respondent would receive adult probation, which more strongly deters future criminal conduct than a juvenile sentence due to the nature of the consequences upon violation. If the plea negotiation in the instant case is not binding upon Respondent, it should not be binding upon the State. On remand, the State should be given the option of reinstating the original charges or of accepting the corrected sentence.

CONCLUSION

Based on the foregoing legal authorities and arguments, Respondent respectfully requests that this Honorable Court reverse the decision of the First District Court of Appeal and reinstate the sentences rendered by the trial court in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Second Judicial Circuit, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Fl 32301, this 9th day of August, 1993.

Wendy S. Morris
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,544

FELICE JOHN VEACH,

Respondent.

_____/

APPENDIX

Veach v. State, 18 Fla. L. Weekly D637 (Fla. 1st DCA Mar. 4, 1993).

appeal. This argument was rejected in *Claybourne v. State*, 600 So.2d 516 (Fla. 1st DCA 1992), *approved*, *State v. Claybourne*, 18 Fla. L. Weekly S79 (Fla. Jan. 21, 1993), and *Randall v. State*, 601 So.2d 644 (Fla. 1st DCA 1992).

Appellant's habitual violent felony offender sentence is vacated, and the case is remanded for resentencing. In all other respects, the judgment of the trial court is affirmed. (BOOTH, KAHN and MICKLE, JJ., CONCUR.)

* * *

Dissolution of marriage—Marital home—Partition—Husband's claims for contribution for mortgage payments, taxes, and insurance paid on marital residence properly offset by the reasonable rental value of the property during period in which husband had exclusive possession of home

GASPARE V. BRISCIANO, Appellant, v. JUNE BYARD, f/k/a JUNE BRISCIANO, Appellee. 1st District. Case No. 92-00691. Opinion filed March 4, 1993. An Appeal from the Circuit Court for Duval County. Charles Mitchell, Judge. Joseph S. Farley, Jr., of Mahon, Farley & McCaulie, P.A., Jacksonville, for Appellant. Edward P. Jackson, Jacksonville, for Appellee.

(PER CURIAM.) This cause is before us on appeal from a final order of partition. Appellant contends that the trial court erred in awarding an offset for the fair rental value to the cotenant not in possession.

On November 1, 1961, the parties, then married, purchased a home in Jacksonville Florida. In 1968, the parties separated, and appellee obtained a divorce, which was final in February of 1970. From the time of the separation, the former husband, Mr. Brisciano, resided in the home and made all payments thereon. There were no children, and the final judgment made no mention of the home.

On March 30, 1990, the former wife, Ms. Byard, filed a complaint for partition, asserting that she owned a one-half interest as tenant-in-common in the home. Mr. Brisciano counterpetitioned, seeking contribution for mortgage payments, upkeep, and taxes.

At final hearing, Byard testified that she never asked Brisciano to vacate the home. The parties had an understanding that Brisciano would live in the home and pay the mortgage and taxes on the residence. However, no formal agreement was entered between the parties.

Brisciano testified that the parties made an agreement that he would remain in the home and pay the mortgage, taxes, and insurance, and Byard would get an unimproved lot behind the house.

The trial court found that Brisciano was entitled to a credit of $21,075.54 for the payments made on the house. However, the court then gave Byard a credit for the fair rental value of the property, without expressing what that value was, but stating that the credit exceeded Brisciano's interest, thus eliminating any credit on either side. Thereafter, partition was ordered.

The general rule with regard to credits for rents is that the tenant-in-common who has exclusive possession of real property and uses it for his own benefit, but does not receive rents or profits therefrom, is not liable or accountable to a cotenant out of possession unless such possession is held adversely or as a result of ouster or the equivalent. However, if the cotenant in possession seeks contribution for amounts expended in improvement or preservation of property, including payments for mortgages, insurance, and taxes, that claim may be offset by the reasonable rental value of the property. *Adkins v. Adkins*, 595 So. 2d 1032, 1033-1034 (Fla. 1st DCA 1992), *citing*, *Barrow v. Barrow*, 527 So. 2d 1373 (Fla. 1988). In the instant case, since Mr. Brisciano sought contribution for mortgage payments, taxes, and insurance paid on the marital residence, the trial court did not err in offsetting these sums by the reasonable rental value of the property.

Accordingly, the final order of partition is affirmed. (ERVIN, BOOTH, AND WEBSTER, JJ., CONCUR.)

* * *

Mandamus—Habeas corpus—Prisoner alleging that Parole Commission unlawfully extended his control release date—Parole Commission's response that it had authority to change control release date based on presentence investigation report which was unavailable at time original control release date was determined was deficient where response did not contain copy of report—Record unclear whether prisoner received or considered Commission's response

DAVID GATES, Appellant, v. HARRY SINGLETARY, Secretary, Department of Corrections, and FLORIDA PAROLE COMMISSION, Appellees. 1st District. Case No. 92-24. Opinion filed March 4, 1993. An Appeal from the Circuit Court for Leon County. L. Ralph Smith, Jr., Judge. David Gates, pro se. James S. Byrd, Assistant General Counsel, Florida Parole Commission, for appellees.

(PER CURIAM.) David Gates appeals the denial of his petition for habeas corpus and mandamus. By petition filed only against Singletary as Secretary of the Department of Corrections (DOC), Gates alleged that his sentence expired on October 8, 1991 because of control release credits and the Florida Parole Commission (FPC) had unlawfully extended his control release date. After the lower court issued an order to show cause, the DOC filed a limited response advising the court that the proper party respondent was the FPC sitting as the Control Release Authority. The FPC, although not formally a party, filed a response and argued that it had the authority to change Gates' control release date based on a presentence investigation (PSI) report which was not available at the time the original control release date was determined. After considering the petition and responses, the lower court denied the petition.

It is not clear from our review of the record whether Gates received or considered the response filed by the FPC. In addition, the FPC's response did not contain a copy of the PSI upon which the FPC relied in changing Gates' control release date. In the absence of both the report and an opportunity by Gates to reply to the FPC's allegations, we must vacate the order denying the petition and remand for the FPC to file a response to the order to show cause which contains a copy of the PSI. We also direct the FPC to serve this response on Gates. (BOOTH, KAHN and MICKLE, JJ., CONCUR.)

* * *

Criminal law—Juveniles—Sentencing—Error to impose adult sanctions without making requisite statutory findings even though sanctions were imposed pursuant to negotiated plea omitting any reference to statutory factors—Defendant did not waive entitlement to statutory findings

FELICE JOHN VEACH, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 92-1506. Opinion filed March 4, 1993. An Appeal from the Circuit Court for Escambia County. T. Michael Jones, Judge. James C. Banks, Special Asst. Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and Gypsy Bailey and Michelle Konig, Asst. Attorneys General, Tallahassee, for Appellee.

(PER CURIAM.) Felice John Veach has appealed from the imposition of adult sanctions after his plea of nolo contendere to crimes committed when he was a juvenile. We reverse and remand for re-sentencing.

In May 1990, Veach was charged in Case No. 90-1963 with grand theft, burglary and dealing in stolen property, all committed when he was 18. In June 1990, Veach was charged in Case No. 90-2027 with committing a lewd and lascivious act in the presence of, and on, a child, and sexual battery on a child less than 12 years of age, committed when he was 17. Veach pled nolo contendere to all charges, and received concurrent 5-year terms of probation, conditioned on 2 years of community control. The plea agreement did not mention Veach's juvenile status in 90-2027, nor did the trial court determine the suitability of adult sanctions as to that case with reference to the factors set forth at section 39.059(7)(c), Florida Statutes. Veach did not appeal.

In February 1991, an affidavit of violation of community

control was filed, to which Veach pled nolo contendere. The trial court revoked community control, and sentenced Veach to 20 years for the 1st-degree felony (90-2027), 15 years for each 2d-degree felony (two in 90-1963, two in 90-2027) and 5 years for each 3d-degree felony (90-1963), all concurrent. Veach argues that the sentences in 90-2027 must be reversed based on the trial court's initial imposition of sentence without making the findings required by section 39.059(7)(c).

The state does not dispute that the findings were initially required, or argue that Veach waived the issue by failing to appeal. Rather, the state maintains that Veach waived his entitlement to those findings, citing *Preston v. State*, 411 So.2d 297 (Fla. 3d DCA 1982) (where a defendant never sought designation as a youthful offender and was not sentenced to a period of incarceration, but was placed on probation, he waives the right to question the legality of a probation which he has enjoyed and violated). Veach responds that, absent a manifest knowing and intelligent waiver of the right to the findings, it is reversible error to sentence a juvenile as an adult, even in the absence of objection and even though sanctions were imposed pursuant to a negotiated plea omitting any reference to Chapter 39. *Walker v. State*, 605 So.2d 1341, 1341-42 (Fla. 1st DCA 1992).

Failure to follow the provisions of section 39.059(7)(c) in sentencing a juvenile as an adult requires remand for resentencing, regardless of objection. *State v. Rhoden*, 448 So.2d 1013, 1016 (Fla. 1984). While a juvenile can waive his right to findings under section 39.059(7)(c)(1-6) before being sentenced as an adult, *Rhoden*, that waiver must be knowing, intelligent and manifest on the record.[1] *Hill v. State*, 596 So.2d 1210, 1211 (Fla. 1st DCA 1992). Without such a waiver, it is reversible error for a trial court to impose adult sanctions upon a juvenile without making the required findings, even though sanctions were imposed pursuant to a negotiated plea agreement which omitted any reference to the statute. *Walker* at 1341-42.

Here, there was no waiver by Veach, either at the original sentencing proceeding or in the written plea agreement, of his right to section 39.059(7)(c) findings prior to adult sentencing in Case No. 90-2027. Therefore, as to that case only, we reverse the sentence imposed herein, and remand for resentencing. Reimposition of adult sanctions is permitted, upon compliance with the statute. *Walker* at 1342. (JOANOS, C.J., MINER and ALLEN, JJ., CONCUR.)

[1]In the *Preston* case cited by the state, the court effectively held that the defendant implicitly waived the right to sentencing as a youthful offender by not seeking that designation and accepting the benefits of probation. However, the courts have since held that such implicit waivers are insufficient, and must rather be "knowing, intelligent and *manifest on the record.*" Therefore, we do not follow *Preston*. As for *Goldsmith v. State*, 18 F.L.W. D268 (Fla. 1st DCA December 31, 1992), we note that the case did not involve a juvenile as to whom the trial court failed to make the findings required by section 39.059(7)(c) at the time of the initial imposition of community control.

* * *

Criminal law—Juveniles—Sentencing—Restitution—Error to impose restitution for losses which were not caused directly or indirectly by defendant's offense

IN THE INTEREST OF F.P., a child. 1st District. Case No. 92-1332. Opinion filed March 4, 1993. Appeal from the Circuit Court for Columbia County. Judge Julian Collins. Nancy A. Daniels, Public Defender, and Abel Gomez, Assistant Public Defender, Tallahassee, for appellant. Robert A. Butterworth, Attorney General, and Wendy S. Morris, Assistant Attorney General, Tallahassee, for appellee.

(PER CURIAM.) Appellant challenges a restitution order, arguing that certain losses were not caused directly or indirectly by his offense of dealing in stolen property. The state concedes that the trial judge erred in ordering appellant to pay $730 in restitution. This amount represented losses caused by a burglary for which appellant was not charged. There is no evidence linking appellant to the actual burglary of the victim's vehicle. There is also no evidence linking appellant to any of the items stolen during the burglary that were never recovered. We accordingly reverse the restitution order. *Mansingh v. State*, 588 So. 2d 636 (Fla. 1st DCA 1991). On remand, the trial judge may order restitution for the 11 compact discs related to the charged offense.

REVERSED and REMANDED for further proceedings. (ERVIN, SMITH, and BARFIELD, JJ., CONCUR.)

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Criminal law—Sentencing—Restitution—Error to order restitution in amount exceeding that claimed by victim in sworn complaint and that defendant admitted taking where state failed to prove by preponderance of evidence that greater loss was caused directly or indirectly by defendant's offense of grand theft

JOHN T. HOUSE, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 91-2821. Opinion filed March 4, 1993. Appeal from the Circuit Court for Bay County. N. Russell Bower, Judge. Kimberly Fitzpatrick Pell, Panama City, for appellant. Robert A. Butterworth, Att'y Gen.; Carolyn J. Mosley, Ass't Att'y Gen., Tallahassee, for appellee.

(MICKLE, Judge.) Appellant challenges the order of restitution pursuant to which the trial court held him liable to pay $14,716.17 to Sunland Food Mart. We affirm the order of probation but are compelled to reverse the order of restitution because of the lack of any probative evidence demonstrating the amount ordered constituted "damage or loss caused directly or indirectly by the defendant's offense" of grand theft. *See* sections 775.089(1)(a) (restitution to victim shall be for damage or loss directly or indirectly caused by defendant's criminal conduct) and 948.03(1)(e) (restitution as condition of probation), Florida Statutes (1989); *State v. Williams*, 520 So. 2d 276 (Fla. 1988); *Mansingh v. State*, 588 So. 2d 636 (Fla. 1st DCA 1991).

The sworn complaint of Sunland Food Mart's general manager stated that Appellant had removed "approximately $2,500.00" from the store's cash receipts. That was the reported amount of loss at the time Appellant entered into a plea agreement to pay "full restitution," and $2,500.00 was the amount Appellant admitted having taken from the store. *See Martel v. State*, 596 So. 2d 100 (Fla. 2d DCA 1992). Sunland Food Mart's owner subsequently claimed in a victim impact statement that its "financial, economic or property loss" amounted to the substantially higher figure of $30,297.00. Much of the documentary evidence on which the state relied was subject to the hearsay rule and failed to meet the strict requirements for admissibility under the "business records" exception, on which the state relied. *See* section 90.801, 90.802 and 90.803(6), Florida Statutes (1989); *Beckerman v. Greenbaum*, 439 So. 2d 233 (Fla. 2d DCA 1983). Those who testified on the company's behalf could not determine precisely what portion of its losses above $2,500.00, if any, resulted from Appellant's offense. From our review of the record, we find the "waiver" decisions factually distinguishable. *See, e.g., Thomas v. State*, 581 So. 2d 992 (Fla. 2d DCA 1991); *Dickens v. State*, 556 So. 2d 782 (Fla. 2d DCA 1990). The state did not carry its statutory burden of establishing, by a preponderance of the evidence, that Appellant caused the victim damage or loss in the amount ordered. *See* section 775.089(7), Florida Statutes (1989); *Morel v. State*, 547 So. 2d 341 (Fla. 2d DCA 1989). The trial court is instructed on remand to issue an order requiring Appellant to pay $2,500.00 in restitution to Sunland Food Mart. *Thomas v. State*, 480 So. 2d 158 (Fla. 1st DCA 1985).

REVERSED and REMANDED. (BOOTH AND KAHN, JJ., CONCUR.)

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Criminal law—Separate convictions for aggravated assault and shooting into occupied vehicle not improper

ELTON RUMPH, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 92-408. Opinion filed March 4, 1993. Appeal from the Circuit Court for Okaloosa County. Judge G. Robert Barron. Nancy A. Daniels, Public Defender, and Jamie Spivey, Assistant Public Defender, Tallahassee, for appellant. Robert A. Butterworth, Attorney General, and Sara D. Baggett, Assistant