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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

MICHAEL EDENFIELD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 81,889

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

# INITIAL BRIEF OF PETITIONER ON THE MERITS

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## STATEMENT OF THE CASE AND FACTS

On October 30, 1991, Petitioner, MICHAEL EDENFIELD, plead guilty in Hillsborough County Circuit Court to violation of probation in two cases. (R68) He was sentenced to a total of 20 years in prison as a habitual offender, ten years consecutive for each case. (R26-29,46-49,70-71)

In Circuit Court Case No. 90-11055, Mr. Edenfield was charged with carrying a concealed firearm occurring July 16, 1990, in violation of section 790.01(2), Florida Statutes (1989). (R8) On August 2, 1990, the Honorable Harry Lee Coe III signed a "Subsequent Felony Notice." (R14) On the same day, Mr. Edenfield plead no contest to the charge (R11-13) and was placed on 2 years probation as a subsequent felony offender. (R15-16)

In Circuit Court Case No. 90-14078, Mr. Edenfield was charged with grand theft of a motor vehicle occurring August 6, 1990, in violation of section 812.014(2)(c)(4), Florida Statutes (1989). (R33-34) On October 3, 1990, Judge Coe signed a "Subsequent Felony Notice." (R36) One day later, on October 4, 1990, Mr. Edenfield plead guilty as charged to the grand theft. (R37-38) The probation in 90-11055 (carrying concealed firearm) was revoked. (R24). Mr. Edenfield was sentenced to 2 and 1/2 years in prison (non-habitual), followed by 3 years probation for the grand theft. (R40-43). For the concealed firearm charge he received 3 years probation, consecutive to the prison but concurrent with the 3-year probationary term for the grand theft. (R22-24)

On October 30, 1991, Mr. Edenfield plead guilty to violating probation. (R68) Judge Coe revoked the probation and sentenced Mr. Edenfield to 10 years in prison as a habitual offender for the concealed firearm charge (90-11055), and a consecutive 10 years in prison as a habitual offender for the grand theft charge (90-14078). (R26-29,48-49,70-71)

Judge Coe stated that Mr. Edenfield was to be given "credit for time actually served." (R71) The judgment forms indicate that Mr. Edenfield received time served credit of 53 days for the concealed firearm charge (R28,59) and 196 days for the grand theft charge. (R48,59)

Mr. Edenfield timely appealed his 20-year habitual offender sentence. (R60) On May 19, 1993, the Second District Court of Appeal issued an opinion affirming Mr. Edenfield's sentence. The court cited Bradley v. State, 616 So. 2d 1156 (Fla. 2d DCA 1993), which pertains to the forfeiture of gain time. Bradley is currently before this Court in Case No. 81,672.

## SUMMARY OF THE ARGUMENT

The trial court erred in sentencing Mr. Edenfield as a habitual offender. Mr. Edenfield received a non-habitual prison term for the same charges on October 4, 1990. Therefore, the trial court could not legally sentence Mr. Edenfield as a habitual offender on October 30, 1991, after the violation of probation.

The trial court also erred in failing to give Mr. Edenfield credit for the prior 2-and-1/2-year prison term imposed October 4, 1990. Section 848.06(6), Florida Statutes, which allows the denial of credit for gain time only applies to crimes committed after its effective date of September 1, 1990. Further, the statute authorizes the Department of Corrections, not the trial court, the authority to forfeit the gain time.

## ARGUMENT

### ISSUE I

WHETHER THE TRIAL COURT ERRED IN SENTENCING MR. EDENFIELD AS A HABITUAL OFFENDER.

Mr. Edenfield asked this Court to accept jurisdiction of this case due to a conflict of decisions regarding the effective date of the statute allowing forfeiture of gain time. This conflict is discussed in Issue II. Having accepted jurisdiction, this Court has the authority to fully review Mr. Edenfield's case. Bould v. Touchette, 349 So. 2d 1181 (Fla. 1977); see also Freund v. State, 520 So. 2d 556 n.2 (Fla. 1988).

Mr. Edenfield was sentenced to 20 years in prison as a habitual offender after violating his probation. This was an illegal sentence. One year prior to the sentencing hearing of October 30, 1991, Mr. Edenfield appeared in court on the same charges and received 2 and 1/2 years in prison, non-habitual, followed by probation. The Second District Court of Appeal recently held that after a non-habitual sentence is imposed, a defendant can not be resentenced as a habitual offender following a violation of probation. Burrell v. State, 610 So. 2d 594 (Fla. 2d DCA 1992), see also Moorer v. State, 614 So. 2d 643 (Fla. 2d DCA 1993).

The penalty should not increase after a violation of probation, except as authorized by statute. See Williams v. State, 594 So. 2d 273 (Fla. 1992). When sentencing after a violation of probation, a defendant can receive anything he could have received

originally. § 948.06, Fla. Stat. (1991). The trial court found it was not necessary to sentence Mr. Edenfield as a habitual originally as evidenced by the non-habitual prison term given on October 4, 1990. Therefore, the trial court could not sentence as a habitual on October 30, 1991, after the violation. The Burrell case was correctly decided. Applying the Burrell holding in the instant case, the habitual offender sentence must be reversed.

Mr. Edenfield further contends that the habitual offender sentence is unauthorized in accordance with this Court's decision in Snead v. State, 18 Fla. L. Weekly, S 220 (Fla. April 8, 1993).

The record in this case indicates that Mr. Edenfield was not given correct information of the maximum sentence he could receive as a habitual offender when he initially entered his pleas. In the original written plea of no contest to the concealed weapon charge, the plea form signed by Mr. Edenfield on August 2, 1990, indicates that the maximum sentence for the charge is 5 years in prison. (R11) Similarly, the plea form signed by Mr. Edenfield on October 4, 1990, indicates a maximum prison sentence of 5 years for the grand theft charge. (R37) A defendant must be informed of the ramifications of habitual offender sentencing prior to entry of a plea. Ashley v. State, 614 So. 2d 486 (Fla. 1993).

The record also supports the conclusion that Mr. Edenfield was not given proper notice that he would be treated as a habitual offender. The record indicates that when Mr. Edenfield was sentenced on August 2, 1990, in Case No. 90-11055, the trial judge signed a document the same day entitled "Subsequent Felony Notice"

purporting to comply with the notice requirement of section 775.084(3)(b), Florida Statutes (1989). (R14,15-16) In Case No. 90-14078, the trial judge signed the "Subsequent Felony Notice" one day before sentencing on October 4, 1990. (R36,40-43)

Section 775.084(3)(b), Florida Statutes (1989) requires written notice be served on a defendant and his attorney "a sufficient time prior to the entry of a plea or prior to the imposition of sentence so as to allow the preparation of a submission on behalf of the defendant." In Edwards v. State, 576 So. 2d 441 (Fla. 4th DCA 1991), written notice was provided the same day that the defendant was sentenced. There, the court held that the written notice provided on the day of sentencing was legally insufficient. In the instant case, both notices were legally insufficient. The notice in 90-11055 was signed the same day of sentencing as in Edwards, and the notice in 90-14078 was signed only one day before sentencing. The notice requirement is subject to a harmless error analysis. Massey v. State, 609 So. 2d 598 (Fla. 1992). However, in this case, the notice given in conjunction with the plea and sentencing cannot be harmless, because Mr. Edenfield was given erroneous information as to the maximum penalty at the time he signed the plea forms. The result in Edwards is consistent with the policy reasons expressed in this Court's decision in Ashley, wherein notice of intent to habitualize was required prior to entry of a plea in order to ensure voluntariness.

The defective notice renders the habitual offender status from August 2, 1990, and October 4, 1990, an illegal portion of those

sentences. A sentence which is illegal as a matter of law may be challenged at any time. Fla. R. Crim. P. 3.800(a). A defendant need not make a contemporaneous objection to later challenge an illegal sentence or condition of probation. Ashley v. State, 614 So. 2d 486, 490 (Fla. 1993); Larson v. State, 572 So. 2d 1368, 1370 (Fla. 1991). A defendant may not confer on a trial court the authority to impose an illegal sentence by agreement, waiver, or failure to object. Clark v. State, 579 So. 2d 109, 110-111 (Fla. 1991). See also, Forehand v. State, 537 So. 2d 103, 104 (Fla. 1989) (contemporaneous objection not necessary to preserve review of unauthorized sentencing guidelines departure where error is apparent on the face of the record); State v. Whitfield, 487 So. 2d 1045, 1047 (Fla. 1986) (contemporaneous objection rule not required to preserve review of trial court's failure to make mandatorily written, clear and convincing reasons for upward departure from sentencing guidelines); State v. Rhoden, 448 So. 2d 1013, 1016 (Fla. 1984) (where juvenile statute provides for findings of fact, in order to make effective right of sentence review, contemporaneous objection rule is not applicable).

The defective notice of intent to habitualize and the signed plea forms indicating the maximum sentence of five years for each case means that here, as in Snead, the trial judge could not have originally considered a habitual offender sentence. Therefore, the habitual offender sentence was not authorized after the violation of probation.

Based on the principles discussed in Burrell, Snead, and Ashley, the trial court was required to sentence Mr. Edenfield to a non-habitual guidelines sentence after revocation of probation.

## ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING MR. EDENFIELD CREDIT FOR 2 AND 1/2 YEARS TIME SERVED.

In sentencing Mr. Edenfield to 20 years in prison for the two third-degree felonies, the trial court ignored the fact that Mr. Edenfield had previously been sentenced to 2 and 1/2 years in prison for the same charges. Mr. Edenfield was in effect given 12 and 1/2 years in prison for each charge[1] which exceeds the maximum statutory penalty even as a habitual felony offender.[2]

In State v. Green, 547 So. 2d 925 (Fla. 1989), this Court held that at a resentencing, after violating probation, Green was entitled to credit for time served on the original sentence as well as credit for gain time accrued.

In affirming Mr. Edenfield's sentence, the Second District Court of Appeal upheld the trial court's award of time actually served, which denied Mr. Edenfield credit for gain time he accrued during service of his 2-and-1/2-year sentence. In allowing retroactive forfeiture of Mr. Edenfield's gain time, the district court relied on its opinion in Bradley v. State, 616 So. 2d 1156 (Fla. 2d DCA 1993). Bradley concludes that amendments to sections 944.28(1)

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[1] Although the 2-and-1/2-year sentence was imposed (pursuant to a split sentence) on the grand theft charge only, Mr. Edenfield must be given credit for the 2 and 1/2 years for both the grand theft and the carrying concealed firearm charge. Tripp v. State, 18 Fla. L. Weekly S 326 (Fla. June 10, 1993).

[2] A third-degree felony is punishable by up to 10 years in prison as a habitual offender. § 775.084(4)(a)(3), Fla. Stat. (1989).

and 948.06(6), Florida Statutes, gave the trial court the authority to forfeit gain time upon revocation of probation for crimes committed after October 1, 1989.

Mr. Edenfield urges this Court to adopt a different interpretation of the 1989 legislation governing gain time forfeiture after a violation of probation.

In Chapter 89-526, Section 8, Laws of Florida, and in Chapter 89-531, Section 13, Laws of Florida, the legislature enacted substantially similar measures relating to forfeiture of gain time. These laws were enacted on the same day, June 28, 1989. Chapter 89-531, which originated in Senate Bill No. 12-B, states in section 19, "[t]his act shall apply to offenses committed on or after October 1, 1989." Chapter 89-526, which originated in House Bill No. 9-A, states in section 52, "[s]ections 1 through 9 of this act shall take effect September 1, 1990." Both measures purport to add a new subsection (6) to section 948.06, Florida Statutes. The first line of Chapter 89-526, Section 8, and Chapter 89-531, Section 13, is the same: "Subsection (6) is added to section 948.06, Florida Statutes..."

Although both Chapter 89-526 and Chapter 89-531 purport to add a new subsection (6) to section 948.06, the two versions of the new subsection (6) differ slightly in wording. The version in 89-526 begins, "Any provision of law to the contrary notwithstanding..." The versions in 89-531 begins, "Not withstanding any provision of law to the contrary..." The versions differ substantially, as well, in that 89-526 includes violations of control release, where-

as 89-531 refers only to violations of probation and community control. Appellant asserts that Chapter 89-526, Section 8, being the more inclusive version of the law, was intended by legislature to be the operative version of the new subsection (6) of section 948.06, Florida Statutes.

An indication of this legislative intent is shown by an amendment to section 948.06(6), Florida Statutes, found in Chapter 90-287, Section 11. The amendment, which was approved by the governor July 3, 1990, amends the Chapter 89-526, Section 8, version which begins "any provision of law to the contrary notwithstanding..." By referring to the Chapter 89-526, Section 8, version in amending section 948.06(6), the legislature evinced its intent that Chapter 89-526, Section 8, created the operative new subsection.

Under section 775.021(1), Florida Statutes (1991), statutes pertaining to criminal defendants shall be strictly construed; and "when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." (Emphasis added.) In this case, the Senate has an earlier effective date than the House; but applying the rule of construction requires construing conflicting criminal statutes most favorably to the accused. Thus, the House's latter effective date of September 1, 1990, would be more favorable to the accused as opposed to the effective date of October 1, 1989. This reasoning would apply to both of the Senate's amendments to this idea of broadening forfeiture of gain time in Chapter 89-531 -- § 944.28(1) as well as § 948.06(6). The conclusion is that forfeiture of gain time for

probation, community control, and control release violations became effective on September 1, 1990.

In Bradley, the Second District Court of Appeal held that the two versions of the same amendment to section 948.06(6), Florida Statutes (1990) were not really the same. The Second District Court of Appeal found the Senate version (Chapter 89-531) gave the authority to forfeit gain time upon a revocation of probation or community control to the trial court and the House version merely added control release to the subsection. Mr. Edenfield disagrees with these conclusions. There is nothing in the Senate version that states the trial court has the authority to forfeit gain time. On the contrary, neither version of section 948.06(6) says who is to decide whether or not forfeiture is in order.

In State v. Green, 547 So. 2d 925, 927 (Fla. 1989), this Court stated that "[t]here is no statutory authority for the court to initiate the forfeiture of gain-time by denying credit for accrued gain-time at resentencing." In Green, awarding and forfeiting gain time was solely a function of the Department of Corrections. Mr. Edenfield contends that the 1989 statutory amendments do not change the department's authority to forfeit gain time and do not extend this authority to the trial court. Neither version of § 948.06(6) says who is to decide whether or not forfeiture is in order. Once the House version added revocations of control release to the list of instances that allow forfeiture, any assumption about this section pertaining to the trial court's authority became invalid. Under § 947.146, Fla. Stat. (1989), determining violations and

revoking control release is the sole authority of the Control Release Authority. The trial court never sees these defendants upon revocation of control release and would have no opportunity to consider a forfeiture of gain time in this circumstance. This duty, under Ch. 947 of the Florida Statutes, along with duties pertaining to violations of parole belong to separate authorities/commissions created for that purpose. In a broader scope this is under the auspices of the Department of Corrections, not the trial court, as was clarified in the amendment to Section 944.28-(1), Florida Statutes (1989) in Ch. 89-531.[3]

That amendment, according to section 20 of Ch. 89-513, was supposed to be effective October 1, 1989; but in the note in §944.28(1), Fla. Stat. (1989), the effective date is published as being September 1, 1990.

Case law on this issue is not very helpful. Although district courts have reached different conclusions on which amendment and which effective date is applicable to forfeiting gain time, none of the cases sets forth an analysis as to why their choice was made. Cases holding the September 1, 1990, date applicable are: Smith

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[3] (1) If a prisoner is convicted of escape, or if the clemency, conditional release as described in chapter 947, probation or community control as described in s. 948.-01, provisional release as described in s. 944.277, or parole granted to him is revoked, the department may, without notice or hearing, declare a forfeiture of all gain-time earned according to the provisions of law by such prisoner prior to such escape or his release under such clemency, conditional release, probation or community control, provisional release, or parole.

v. State, 613 So. 2d 603, 604 (Fla. 5th DCA 1993) ["Green applies, notwithstanding section 948.06(6), Florida Statutes, (Chapter 89-526, Section 8, Laws of Florida, effective September 1, 1990), because the original underlying offense occurred on February 6, 1989, prior to the effective date of the statutory change on September 1, 1990"]; Ferguson v. State, 594 So.2d 864, 866 n.6 (Fla. 5th DCA 1992) ["Neither party addresses the applicability of section 948.06(6).... This section was effective September 1, 1990. Laws 1989, Chapter 89-526, Section 8, 11, 52"]; Thomas v. State, 605 So.2d 1286 (Fla. 4th DCA 1992) ["...Green applies because appellant committed the original offense before September 1, 1990, the effective date of section 948.06(6)."]

As to cases holding the effective date to be October 1, 1989, not only is there the problem of no discussion but there is the additional problem of internal inconsistency. Although the Second District Court of Appeal denied any conflict with its decision in Bradley and its decision in Toschlog v. State, 604 So. 2d 22 (Fla. 2d DCA 1992); there is inconsistency with the decision it reached in another more recently issued opinion. In Bell v. State, 610 So. 2d 737 (Fla. 2d DCA 1993), the Second District Court of Appeal awarded earned gain time accrued during a prior imprisonment in accordance with State v. Green, 547 So. 2d 925 (Fla. 1989), where an offense was committed on June 20, 1990. The court stated:

> Section 948.06(6), Florida Statutes (Supp. 1990), has been enacted to counter State v. Green, 547 So. 2d 925 (Fla. 1989). The Appellant's offense was, however, committed before the effective date of the statute.

Although the opinion doesn't state on its face the date of the offense, undersigned counsel's office handled that appeal. The date of Bell's offense was June 20, 1990 (see Appendix B). Even this Court has issued conflicting statements on this matter. In State v. Carter, 553 So. 2d 169 at 170 n.2 (Fla. 1989), this Court, in a footnote, stated the effective date was September 1, 1990:

> 2. We note that the legislature recently amended sections 944.28 and 948.06, Florida Statutes, to add revocation of probation to the list of circumstances justifying forfeiture of gain-time. Ch. 89-526, §§ 6, 8, Laws of Fla. However, both of these amendments become effective September 1, 1990, id. section 52, and are not applicable to this case.

In another footnote in a revised opinion issued in Tripp v. State, 18 Fla. L. Weekly S 326 n.2 (Fla. June 10, 1993), this Court cites to the other amendment--Ch. 89-531--and states the effective date is October 1, 1989:

> 2. We note that prior to the enactment of chapter 89-531, Laws of Florida, "credit for time served" included jail time actually served and gain time granted pursuant to section 944.275, Florida Statutes (1991). State v. Green, 547 So. 2d 925, 927 (Fla. 1989). It did not include "provisional credits" or "administrative gain time" which is used to alleviate prison overcrowding and is not related to satisfactory behavior while in prison. See § 944.277, Fla. Stat. (1991). By virtue of chapter 89-531, the revocation of probation or community control now serves to forfeit any gain time previously earned. This change in the law is inapplicable to Tripp because his crimes were committed before October 1, 1989, the effective date of the act.

Because neither Carter nor Tripp involved crimes committed after October 1, 1989, but before September 1, 1990, both footnotes can be considered dicta.

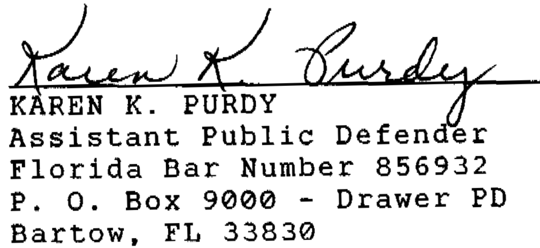
In conclusion Mr. Edenfield contends that the confusion with duplicate statutes with conflicting dates of when they are to become effective require that the most favorable version be the one utilized. The statutory amendment in Ch. 89-526 with an effective date of September 1, 1990, is the appropriate statutory amendment.

In the case sub judice, the underlying offenses were committed July 16, 1990 (carrying concealed firearm) and August 6, 1990 (grand theft). Green applies because the underlying offenses were committed before September 1, 1990 -- the effective date of Section 948.06(6), Florida Statutes (1990), as evidence by the legislative intent to make Chapter 89-256, Section 8, the operational version of the new law. Appellant should have been given credit for the 2 and 1/2 years previously served. However, should this Court disagree and hold the October 1, 1989, date applicable, there is still the problem of who has the authority to forfeit the gain time -- the Department of Corrections or the Department of Corrections and the trial court. Mr. Edenfield contends that a strict reading of the statute does not extend to the trial court the authority to forfeit gain time by refusing credit for time served. The only statutory authority for forfeiture is that pertaining to the Department of Corrections. Thus, only the Department of Corrections has the authority to forfeit gain time; and the trial court erred in this case by usurping this authority and refusing to give Mr. Edenfield his 2 and 1/2 years of credit.

## CONCLUSION

Based on the foregoing authorities and arguments, this Court should reverse the Second District Court of Appeal's decision and order this cause remanded to the trial court for resentencing within the sentencing guidelines allowing credit for the 2-and-1/2-year prison term imposed on October 4, 1990.

Respectfully submitted,



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# APPENDIX

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2. Initial Brief of Appellant filed in the Second District Court of Appeal in Bell v. State, 610 So. 2d 737 (Fla. 2d DCA 1993) — B1-14

aff'd

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

| | | |
|---|---|---|
| MICHAEL EDENFIELD, | ) | |
| Appellant, | ) | |
| v. | ) | Case No. 91-03720 |
| STATE OF FLORIDA, | ) | |
| Appellee. | ) | |

Opinion filed May 19, 1993.

Appeal from the Circuit Court for Hillsborough County; Harry Lee Coe, III, Judge.

Received By
MAY 19 1993
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Robert A. Butterworth, Attorney General, Tallahassee, and Peggy A. Quince, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed. Bradley v. State, 18 Fla. L. Weekly D1016 (Fla. 2d DCA Apr. 14, 1993).

THREADGILL, A.C.J., and ALTENBERND, J., and STOUTAMIRE, R. GRABLE, Associate Judge, Concur.

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IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

| | | |
|---|---|---|
| JACOB F. BELL, | : | |
| Appellant, | : | |
| vs. | : | Case No. 91-3001 |
| STATE OF FLORIDA, | : | |
| Appellee. | : | |

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

# INITIAL BRIEF OF APPELLANT


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ISSUE I

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO 10 YEARS IMPRISONMENT AS A HABITUAL OFFENDER FOR AGGRAVATED ASSAULT WITHOUT CREDIT FOR TIME SERVED PLUS GAIN TIME ACCRUED WHEN HE HAD ALREADY SERVED 3 1/2 YEARS IMPRISONMENT ON THE SAME CHARGE. 8

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STATEMENT OF THE CASE AND FACTS

On the State Attorney for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, filed an information in Case No. 90-2777 charging the Appellant, JACOB F. BELL, with burglary of a conveyance in violation of section 810.02(1)and (2), petit theft in violation of section 812.014(2)(d), and criminal mischief in violation of section 806.13(1)(b)1. The date of the alleged offenses was February 19, 1990. (R60-62)

On April 6, 1990, the Appellant pleaded guilty and on that date the Honorable Harry Lee Coe, III, sentenced the Appellant to two years community control on Count I, and to time served on Counts II and III. (R63-64, 67-71, 72-73) The guidelines recommended 2 1/2 to 3 1/2 years imprisonment, with a permitted range of community control to 4 1/2 years imprisonment. (R66) On that same date, Judge Coe filed a Subsequent Felony Notice. (R65)

On June 1, 1990, the Department of Corrections filed an amended affidavit of violation of community control alleging the Appellant committed the crime of aggravated assault, and that he failed to remain confined to his approved residence. (R79-80)

On July 20, 1990, in Case No. 90-10492, the state filed an information against the Appellant charging him with aggravated assault in violation of section 784.021, Florida Statutes (1989). The date of the alleged offense was June 20, 1990. (R97-98) On July 27, 1990, the Appellant pleaded guilty and was sentenced to 3 1/2 years imprisonment to be followed by 6 1/2 years probation. (R83, 100-101, 102-106, 115) The guidelines recommended 4 1/2 to

5 1/2 years with a permitted range of 3 1/2 to 7 years. (R114) Judge Coe filed a "subsequent felony notice" dated July 6, 1990, and the Appellant was sentenced as a habitual offender on only the probation. (R99, 106) At the same time, Judge Coe revoked the Appellant's community control in case no. 90-2777 and sentenced him to five years probation for burglary of a conveyance, to run concurrent with Case No. 90-10492. (R81-82, 83-84, 115)

On July 26, 1991, an affidavit of violation of probation was filed in both cases. (R132) On August 8, 1991, a hearing was held before Judge Coe and the following evidence was presented:

Tracey McClure testified that she had known the Appellant for several years, and that they dated. On May 23, 1991, just after midnight, she was on his street in a car with two other people. The Appellant was coming toward her car, so she stopped. The Appellant reached into the passenger side and hit her in the face. He said that Ms. McClure had called his mother and hung up on her. (R12-13) Ms. McClure stated that she had not seen the Appellant for four years before the incident. (R14) Someone called the police and they came to her house. An officer told her to go to the hospital. The Appellant went to the hospital with her. Ms. McClure made a police report a week after the incident. (R15) She later went to the prosecutor's office to drop the charges because the Appellant apologized. (R17) Ms. McClure had a fractured nose. (R19)

Officer Ronald Carpenter testified that he saw Ms. McClure about a week after the incident and her eyes were badly swollen and

black. (R20) He arrested the Appellant based on the interview of Ms. McClure a week later, although the officers who originally reported the incident did not. (R22)

The Appellant's probation officer, testified that the Appellant said someone who was in the car with Ms. McClure at the time she was driving up the street hit her. (R24)

Inez Michael, the Appellant's mother, testified that the Appellant was living with her. Ms. McClure was at the house even though they were not supposed to be together. (R26) After the incident, Mrs. Michael told Ms. McClure not to come to the house again, but she came back anyway. (R27)

The Appellant testified that he did not hit Ms. McClure. (R28) The Appellant had dated Ms. McClure off and on for the past seven years. They started dating when he got out of prison but she did not tell him she had other boyfriends, one of whom was Officer Carpenter's best friend. Ms. McClure was also dating a man named Rob. Ms. McClure called the Appellant from a couple of bars and wanted to go out with him, but he did not want to go out. Even though the court ordered that they were not to have any contact, Ms. McClure had spent the night with him eight times since the incident. (R28)

On the day of the incident, Ms. McClure was driving with Rob, who is a jealous person. The Appellant was waiting in the road dressed to see her. All of a sudden she hit the brakes. The Appellant went up to the car and saw Ms. McClure fighting with her boyfriend, Rob, because she was coming to pick up the Appellant.

The Appellant jumped into the car to break up the fight. Rob ran through the Appellant's neighbor's yard and the Appellant had the neighbor call the police. Ms. McClure was afraid Rob would come back, so the Appellant drove her home. (R29)

The first police officers who arrived were two female officers. Ms. McClure's roommate was there when they arrived and said, "Jake, why did you do this to her." The Appellant told the roommate not to jump to conclusions because he saved her. (R29) The Appellant was going to take her to the hospital, but he knew that he had to wait for the police. He told the officers he was on probation and they separated them to take a statement. Ms. McClure was very drunk that night. (R30)

The Appellant took Ms. McClure to the emergency room. He also took her for the out-patient surgery. Since the incident, Ms. McClure has been coming to his house wanting him to sleep with her. (R30) The Saturday before the hearing, he and Ms. McClure went out and an old girlfriend walked up and was hugging him. Ms. McClure saw it and told the Appellant that she would see him in court and F--- him up. She said she could not believe he let that girl touch him in front of her. (R31)

On that date the court revoked the Appellant's probation in Case No. 90-2777, and sentenced him to 10 years imprisonment as a habitual offender. (R37, 141, 87-90) In Case No. 90-10492, the Appellant was sentenced to 10 years imprisonment as a habitual offender to run consecutive to Case No. 90-2777, and given credit for 334 days. (R37, 112-113) The guidelines recommended 4 1/2 to

5 1/2 years imprisonment. (R114) No certified copied of prior convictions were filed or presented to the court. (R36-37)

On August 21, 1991, the Appellant moved to re-open his probation violation hearing. (R134-135) On September 6, 1991, the court heard testimony regarding the motion to re-open the violation of probation. The following testimony was presented:

Victor Williams testified that he has known the Appellant for ten or fifteen years. He was present when the incident occurred. A man named Rod and Tracy (McClure) were involved. (R42-43) Rod was the person who struck Ms McClure. He struck her while they were in a car. The Appellant chased after the car and took her to the hospital because she was badly beaten. (R43)

Kenneth Kerby testified that the Appellant and Ms. McClure had a relationship. A week after the incident he asked Ms. McClure what happened and she said a guy named Rod hit her. (R44-45)

Steven Wovockel testified that was in Ms. McClure's car when the fight occurred. Vick and another man named Rob or Roger were also in the car. They were coming down the street where the Appellant lived. (R46) The car stopped half way down the street and Ms. McClure and Rob started fighting and he hit her a couple of times. Rob got out of the car and ran up the street. The Appellant did not hit Ms. McClure; he took her to the hospital. They were on the way to pick him up. (R47)

Christopher Singleton testified that one night Ms. McClure came to the place where Mr. Singleton works to look for the

Appellant. Both of her eyes were black and he asked her who hit her and she said a man named Rod hit her. (R48)

The court would not reverse its ruling and ordered that the sentence stay intact. On September 12, 1991, the Appellant timely filed his notice of appeal. (R136-137)

## SUMMARY OF THE ARGUMENT

The trial court erred in failing to give the Appellant credit for the time he served, plus gain time, against his ten-year habitual offender sentence for the same charge for which he originally received 3 1/2 years imprisonment, followed by 6 1/2 years probation.

Appellant requests that this Court certify the question of the legality of his sentence for "habitualized probation" to the Florida Supreme Court.

## ARGUMENT

### ISSUE I

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO 10 YEARS IMPRISONMENT AS A HABITUAL OFFENDER FOR AGGRAVATED ASSAULT WITHOUT CREDIT FOR TIME SERVED PLUS GAIN TIME ACCRUED WHEN HE HAD ALREADY SERVED 3 1/2 YEARS IMPRISONMENT ON THE SAME CHARGE.

In Case No. 90-10492, the charge of aggravated assault, the Appellant was originally sentenced to 3 1/2 years imprisonment to be followed by 6 1/2 years probation. He obviously had been released from prison and had begun serving the probation. Upon violation of that probation, the Appellant was given credit for 334 days time served. (R112-113) On the record Judge Coe ordered, "Give him credit for only that time served." (R37) Appellant argues he is entitled to receive credit for time served for the actual time on the original sentence, plus any gain time served, plus any jail time he accrued waiting for the hearing on the violation of probation. The record is unclear exactly for what the Appellant is being given credit, but it is obvious he did not get credit for 3 1/2 years imprisonment.

The trial court must award a defendant credit for time served and gain time accrued during any earlier imprisonment for the offense underlying the violation of probation. State v. Green, 547 So.2d 925 (Fla. 1989); See also, State v. Perko, 588 So.2d 980, 981 (Fla. 1991). The trial court must also give the Appellant credit on each case for any time he spent in jail awaiting disposition of

the violation of probation. Daniels v. State, 491 So.2d 543 (Fla. 1986); Perko, at 982.

For these reasons, the case must be remanded to the trial court for the calculation of the proper amount of credit for time served. Parmley v. State, 590 So.2d 1016, 1017 (Fla. 2d DCA 1991).

## ISSUE II

WHETHER THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO "HABITUALIZED PROBATION."

In this case the Appellant was sentenced to "habitualized probation" in both cases. The only notice given to the Appellant was the "subsequent felony notice" filed by Judge Coe himself at the time the Appellant was originally sentenced. Upon violation of probation the trial court imposed a sentence of 10 years as a habitual offender on each case to run consecutively. Appellant argues that such a sentencing scheme is illegal and can be challenged at any time.

In Baxter v. State, 17 F.L.W. D1369 (Fla. 2d DCA May 27, 1992), Florida Supreme Court Case No. 79, 993, this court certified the conflict between King v. State, 17 F.L.W. D662 (Fla. 2d DCA March 27, 1992) and Kendrick v. State, 17 F.L.W. D812 (Fla. 5th DCA 1992), regarding the legality of a sentence of "habitual-ized probation."

The Appellant asks that this court certify the same conflict in this case.

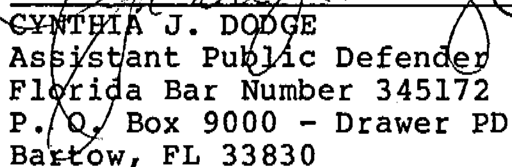
## CONCLUSION

In light of the above authorities and arguments, the Appellant respectfully requests that this Honorable Court remand his case for calculation of the appropriate amount of credit for time served. The Appellant also requests that this Court certify the conflict addressed above to the Florida Supreme Court.

## CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 30 day of July, 1992.

Respectfully submitted,



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CJD/mlm

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JACOB F. BELL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 91-03001

Opinion filed January 13, 1993.

Appeal from the Circuit Court
for Hillsborough County;
Harry Lee Coe, III, Judge.

James Marion Moorman, Public
Defender, Bartow, and Cynthia
J. Dodge, Assistant Public
Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney
General, Tallahassee, and Stephen
A. Baker, Assistant Attorney General,
Tampa, for Appellee.

Received
JAN 13 1993
Appellate
Public Defender

THREADGILL, Judge.

We affirm the appellant's sentences as a habitual felony offender following revocation of his probation pursuant to King v. State, 597 So. 2d 309 (Fla. 2d DCA), rev. den., 602 So. 2d 942 (Fla. 1992), but remand for recalculation of jail credits.

In circuit court case number 90-10492, the appellant is to be given credit for time served and earned gain time accrued during his prior imprisonment on this case in accordance with State v. Green, 547 So. 2d 925 (Fla. 1989).[1] The trial judge gave him credit only for the days actually served. He is also to be given credit for jail time served while awaiting his probation violation hearing, but only if he did not receive such credit in the companion circuit court case number 90-2777. See Daniels v. State, 491 So. 2d 543, 545 (Fla. 1986) (defendant sentenced to consecutive imprisonment not entitled to credit in each sentence for time spent in jail awaiting disposition).

Affirmed; remanded.

RYDER, A.C.J., and SCHOONOVER, J., Concur.

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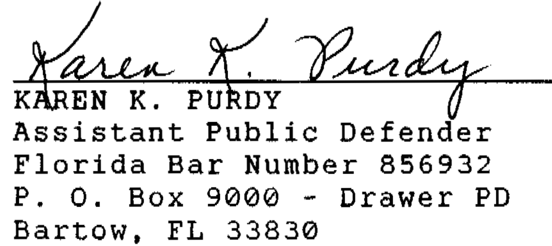
[1] Section 948.06(6), Florida Statutes (Supp. 1990), has been enacted to counter State v. Green, 547 So. 2d 925 (Fla. 1989). The appellant's offense was, however, committed before the effective date of the statute.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Christopher Sierra, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 11th day of October, 1993.

Respectfully submitted,

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