IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,220

THE STATE OF FLORIDA,

Petitioner,

-vs-

CALVIN LEE,

Respondent.

ON APPLICATION FOR DISCRETIONARY JURISDICTION

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2

QUESTIONS PRESENTED 4

SUMMARY OF ARGUMENT 5

ARGUMENT

I. ON THE FACTS OF THIS CASE, THE DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT RESPONDENT'S CONVICTION FOR TRAFFICKING IN COCAINE WAS A SECOND-DEGREE FELONY. 6

II. A NEW SENTENCING HEARING IS REQUIRED ON THE FACTS OF THIS CASE BECAUSE THE TRIAL COURT'S DETERMINATION OF THE LENGTH OF THE TERM OF RESPONDENT'S HABITUAL OFFENDER SENTENCE WAS PREDICATED UPON THE COURT'S AFFIRMATIVE RELIANCE ON AN ERRONEOUS GUIDELINES SCORESHEET. 9

CONCLUSION 14

CERTIFICATE OF SERVICE 15

APPENDIX . . . . . A

TABLE OF CITATIONS

CASES **PAGES**

Applegate v. Barnett Bank
377 So. 2d 1150 (Fla. 1979) 6

Bould v. Touchette
349 So. 2d 1181 (Fla. 1977) 4

Burdick v. State
594 So.2d 267 (Fla. 1992) 9,10

Echevarria v. State
492 So.2d 1146 (Fla. 3d DCA 1986) 12

Erickson v. State
565 So.2d 328 (Fla. 4th DCA 1990)
rev. denied
576 So.2d 286 (Fla. 1991) 12,13

Freund v. State
520 So. 2d 556 (Fla. 1988) 4

Jenkins v. State
533 So. 2d 297 (Fla. 1st DCA 1988)
rev. denied
542 So. 2d 1334 (Fla. 1989) 6

King v. State
597 So. 2d 309 (Fla. 2d DCA)(en banc)
rev. denied
602 So. 2d 942 (Fla. 1992)
adopted
McKnight v. State
616 So. 2d 31 (Fla. 1993) 9

McKnight v. State
616 So. 2d 31 (Fla. 1993) 9,10

Moore v. State
519 So.2d 22 (Fla. 3d DCA 1987) 12,13

Sellers v. State
578 So.2d 339 (Fla. 1st DCA)
approved
586 So.2d 340 (Fla. 1991) 12

Stidham v. State
579 So. 2d 319 (Fla. 5th DCA 1991) 6

Trushin v. State
425 So. 2d 1126 (Fla. 1982) 4

Tucker v. State
595 So. 2d 956 (1992) 9

Walsingham v. State
602 So. 2d 1297 (Fla. 1992) 9

OTHER AUTHORITIES

FLORIDA STATUTES (1991)

775.084 9
775.084(4)(a)1 10
775.084(4)(a)2 10
775.084(4)(e) 12
777.04 6,7,8
777.04(3) 7
893.135 6,7
893.135(5) . . . . .

FLORIDA RULES OF CRIMINAL PROCEDURE

3.988(g) 11

IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,220

THE STATE OF FLORIDA,

Petitioner,

-vs-

CALVIN LEE,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

INTRODUCTION

The petitioner, the State of Florida, was the plaintiff in the trial court and the appellee before the Third District Court of Appeal. The respondent, Calvin Lee, was the defendant in the trial court and the appellant before the Third District Court of Appeal. The parties are referred to throughout this brief as they stood in the trial court, as Petitioner and Respondent, or by proper name, as warranted. The symbol "A." will be used to refer to the appendix attached hereto. Record references are consistent with the record reference system adopted in the Petitioner's Brief.

STATEMENT OF THE CASE AND FACTS

In accordance with Florida Rule of Appellate Procedure 9.210(c) Respondent accepts the Petitioner's Statement of the Case and Facts as an accurate and nonargumentative representation, subject to the following additions or corrections:

As regards the conspiracy count (Count I), the only reference the State makes to section 893.135 in the information is in the caption portion of the information. That reference is only to section 893.135, the trafficking statute, generally; the State makes no reference to subsection 893.135(5), the conspiracy punishment provision. In the body of the information, where the substantive allegations reside, the only statute the State cites is the statute that makes criminal an act of conspiracy, section 777.04(3); no reference is made either to section 893.135 generally or to subsection 893.135(5). The judgment form, which categorizes the conviction as a first-degree felony, also cites only the general conspiracy statute and the trafficking statute generally; no reference is made to the conspiracy provision.

The Category 7 scoresheet prepared prior to sentencing counted the trafficking conviction as the primary offense at conviction, and the conspiracy conviction as an additional offense at conviction (RI. 61, 63, 66, 67; RII. 60). The scoresheet preparer assessed 65 points for the conspiracy under the category, "additional offense at conviction" (R. 60). This resulted in a point total that had a recommended range of nine to twelve years, and a permitted range of seven to seventeen years (R. 60).

At the sentencing hearing[1] the state advised the court that it was recommending twenty years in prison as an habitual felony offender (TIII. 7). The prosecutor then told the court, "the score sheet scores Mr. Lee at 17 years. So I am recommending three additional years, 20 years as a habitual felony offender." (TIII. 8). This was the sentence the court gave Lee (i.e., twenty years on each count, as an habitual felony offender, to be served concurrently) (RI. 65;

[1]At this hearing, the court also revoked appellant's probation (TIII. 3-4). In case number 88-1522, the court sentenced appellant to twenty years as an habitual offender to run concurrent with the sentence in the instant case; and in case number 88-1523, the court sentenced appellant to ten years, also to be served concurrently (TIII. 11).

RII. 62; TIII. 4; TIII. 10).

QUESTIONS PRESENTED

I. WHETHER, ON THE FACTS OF THIS CASE, THE DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT RESPONDENT'S CONVICTION FOR TRAFFICKING IN COCAINE WAS A SECOND-DEGREE FELONY?

II. WHETHER A NEW SENTENCING HEARING IS REQUIRED ON THE FACTS OF THIS CASE BECAUSE THE TRIAL COURT'S DETERMINATION OF THE LENGTH OF THE TERM OF RESPONDENT'S HABITUAL OFFENDER SENTENCE WAS PREDICATED UPON THE COURT'S AFFIRMATIVE RELIANCE ON AN ERRONEOUS GUIDELINES SCORESHEET?[2]

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[2]Respondent presented this issue to the district court of appeal as Issue V in his Initial Brief of Appellant. The district court rejected the point without discussion or citation of authority. *See* A. at 2. Although there would exist no independent basis for jurisdiction to review this question, because this Court possesses jurisdiction to review any and every issue in a case that is properly before the Court on some other ground, *Freund v. State*, 520 So. 2d 556, 557 n.2 (Fla. 1988)(citing *Trushin v. State*, 425 So. 2d 1126, 1130 (Fla. 1982); *Bould v. Touchette*, 349 So. 2d 1181, 1183 (Fla. 1977)), this Court has jurisdiction to review this issue because there exists jurisdiction as a result of this Court's review of Issue I. Respondent thus respectfully requests that this Court exercise its jurisdiction to review this question, as it did in the cases cited above as the argument presented herein identifies a prejudicial error that materially affects Respondent's sentence and for which he has no other available remedy.

SUMMARY OF ARGUMENT

The district court of appeal reached the correct result when it concluded that on the facts of this case, the trial court erred in adjudicating Respondent guilty of a felony of the first degree for trafficking in cocaine. While under subsection 893.135(5), conspiracy to traffick in a controlled substance is a felony of the first degree, the State did not charge Respondent with violation of this subsection; rather, the State proceeded only under subsection 777.04(3), the general conspiracy statute, which makes a conspiracy to commit a first-degree felony a felony of the second degree. Moreover, the information in no way put Respondent on notice that the crime with which he was charged was in fact a first-degree felony rather than a second-degree felony as the information claimed it was.

The record shows that the trial court sentenced Respondent as an habitual felony offender, but in exercising its discretion to determine what sentence to impose, based its sentencing decision on comparison with the maximum sentence provided by Respondent's permitted guidelines, as urged by the prosecutor. The guidelines maximum provided to the court, and upon which the State relied in making its recommendation of sentence, contained a computational error which resulted in an incorrect assessment of the guidelines maximum.

ARGUMENT

I. ON THE FACTS OF THIS CASE, THE DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THAT RESPONDENT'S CONVICTION FOR TRAFFICKING IN COCAINE WAS A SECOND-DEGREE FELONY.

Respondent does not disagree with Petitioner that, to the extent opinion of the district court below appears to set forth as a flat rule of law that conspiracy to traffick in cocaine is a felony of the second degree and does not state that Respondent was not charged under subsection 893.135(5) but rather was charged specifically under the general conspiracy statute, subsection 777.04, the opinion may be overly broad; however, Respondent posits that the district court nevertheless reached the correct result on the facts of this case and this Court ought to approve the result below. *Applegate v. Barnett Bank*, 377 So. 2d 1150 (Fla. 1979).

As the State acknowledges in note 3 of its brief, *Stidham v. State*, 579 So. 2d 319 (Fla. 5th DCA 1991), recognizes the possibility that the State may proceed under either section 777.04 or subsection 893.135(5) in charging conspiracy to traffick in controlled substances. *Stidham*'s recognition is express: "The defendant was not charged under the general conspiracy statute, section 777.04, and as such, section 895.135(5) would need to be included in the written judgment." 579 So. 2d at 319 n.2.[3]

Jenkins v. State, 533 So. 2d 297 (Fla. 1st DCA 1988), *rev. denied*, 542 So. 2d 1334 (Fla. 1989), upon which the State relies, concludes in dicta that subsection 893.135(5) controls over section 777.04, but then goes on to expressly state that, in any case, Jenkins was not prejudiced by any error in citing section 777.04 rather than subsection 893.135(5) because the record reflected that Jenkins affirmatively knew that he was facing punishment mandated by the latter.

Under either of these cases, either because *Stidham* correctly states the law or because the record does not show that Respondent, unlike Jenkins, was on actual notice and the

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[3]Under this view, the opinion below is in error only to the extent that it failed to state explicitly that conspiracy when charged under subsection 893.135(5) is a felony of the first degree, but that Respondent herein was charged under subsection 777.04(3).

information did not put him on notice, the district court reached the correct result.

As to the latter, it is an untenable position for the State to claim that Respondent was on notice and suffered no prejudice because the information contained, in the caption portion only, a citation to the trafficking statute generally. First, every indication in the record points to the conclusion that all concerned parties -- the Respondent, the court, and particularly, the State itself upon whose charge Respondent was called into court in the first instance -- labored under the belief that the State was pursuing a second-degree felony. Indeed, it was only at the point that the State filed its motion for rehearing of the district court's opinion that it first reached a belief, and alleged, that section 893.135(5) controls this case.

The State rests its claim that the information, which never cited subsection 893.135(5), put Respondent on notice that this was a subsection (5) case, entirely on two things: 1) the citation of section 893.135 generally, in, and *only* in the caption portion of the information; and, 2) the fact that section 777.04, which is cited in the caption, and cited with its subsection (3) in the body of the information as the sole offense-defining statute, contains a proviso that the penalty provisions of subsection 777.04 apply only where there is no other express provision of law assigning punishment to a specific crime. Respondent takes issue with the State's argument that this served to put Respondent on notice for the following reasons. The citation of subsection 777.04(3) alone simply cannot, and does not, itself meaningfully place a defendant on notice that there is in fact another applicable penalty-providing statute on which the State is relying. The State's citation of section 893.135 generally in the caption portion of the information here does not overcome this, because a conspiracy charge cannot exist in a vacuum but rather, always is tied to a plan to violate some express law, hence the need to cite section 893.135 generally. Moreover, it is plainly unjust for the State to disavow responsibility for its express statement in the caption that it regarded the charged crime as a second-degree felony and the implications that flow therefrom, while at the same time holding Respondent

liable for knowing that it meant to charge a first-degree felony.[4]

Second, the State, in alleging that no prejudice arose to Respondent from the fact that all concerned parties labored under the belief that the conspiracy count was a second-degree felony, focuses its analysis exclusively on the penalties provided by Respondent's sentence. In so doing, of course, the State overlooks the most fundamental of the possible implications: that the belief that one of the two substantive charges was a second-degree felony rather than a first-degree felony may have impacted upon Respondent's decision to proceed to trial on this case, or at least on that charge, in the first place.

Because the district court reached the right result, Respondent urges this Court to approve the result below, with directions to modify the opinion only to the extent that it is clear that on the facts of this case, the trial court erred in entering judgment of conviction for a felony of the first degree.

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[4]Additionally, Respondent strongly disagrees with the State's claim that the citation of subsection (3) of section 777.04 itself put the defendant on notice "since that is the operative provision which excludes conspiracies, for which there are specific provisions, from the general conspiracy statute." Brief of Petitioner at 9. In point of fact, the reason that subsection had to be cited was because it defines the crime of conspiracy as distinct from attempt, which is addressed by subsection (1), and solicitation, which is addressed by subsection (2), and not because subsection (3), as distinct from the others, is what contains that which the State has characterized as the exception provision.

II. A NEW SENTENCING HEARING IS REQUIRED ON THE FACTS OF THIS CASE BECAUSE THE TRIAL COURT'S DETERMINATION OF THE LENGTH OF THE TERM OF RESPONDENT'S HABITUAL OFFENDER SENTENCE WAS PREDICATED UPON THE COURT'S AFFIRMATIVE RELIANCE ON AN ERRONEOUS GUIDELINES SCORESHEET.

The trial court sentenced the Respondent as an habitual offender to twenty years on each count. On the face of the record in this case, it appears that in the course of determining what sentence to impose under section 775.084, the trial court was presented with an erroneous scoresheet that misstated Respondent's applicable guidelines range, and that the trial court affirmatively relied on this erroneous guidelines information in exercising its discretion to decide what sentence to impose under the habitual offender statute. Because on the unique facts of this case the exercise of the court's sentencing discretion was based upon this erroneous information, a new sentencing hearing is required.

After declaring Respondent to be an habitual felony offender, the trial court then set about to determine what sentence to impose upon Respondent. The determination of what sentence to impose was, of course, separate from the determination of whether to declare Respondent an habitual felony offender; while a trial court has a ministerial duty to declare to be an habitual offender any defendant presented to the court who so qualifies, *King v. State*, 597 So. 2d 309 (Fla. 2d DCA)(en banc), *rev. denied*, 602 So. 2d 942 (Fla. 1992), *adopted*, *McKnight v. State*, 616 So. 2d 31 (Fla. 1993), the imposition of an habitual offender sentence as prescribed under the statute is permissive rather than mandatory. *Tucker v. State*, 595 So. 2d 956 (1992); *Burdick v. State*, 594 So.2d 267, 271 (Fla. 1992); *Walsingham v. State*, 602 So. 2d 1297 (Fla. 1992). Thus, this court has held that a trial court has discretion even to place on probation one whom the court declares an habitual offender. *McKnight v. State*, 616 So. 2d 31 (Fla. 1993).

In the instant case, then, because the court declared Respondent to be an habitual offender on each count, on Respondent's first-degree felony conviction for trafficking, the trial

court had the discretion to impose any sentence ranging from a maximum of life imprisonment[5] under section 775.084(4)(a)1, Florida Statutes (1991), to as little as probation, *McKnight*, *Burdick*. On the second-degree felony conviction for conspiracy,[6] the court could have imposed any sentence ranging from a maximum of thirty years' imprisonment, section 775.084(4)(a)2 down to, again, probation.

The prosecutor offered the court a recommendation as to where within this vast range the court should sentence Respondent; the recommendation used the top of Respondent's permitted guidelines range as the reference point for determining the appropriate habitual offender sentence:

> the scoresheet scores Mr. Lee at 17 years. So I am recommending three additional years, 20 years as a habitual felony offender.

Without further argument of counsel,[7] the court imposed sentence. It appears from the record that the court followed the state's guidelines-premised recommendation, for the court imposed precisely the sentence as requested by the prosecutor.[8] However, because of a computational error, the scoresheet on which the prosecutor relied in making her recommendation, and upon which the court in turn relied in determining what sentence it wished to impose, erroneously

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[5]The prosecutor specifically advised the court of this (TIII. 7).

[6]Should this Court determine in point I, *supra*, that this conspiracy conviction properly is regarded as a first-degree felony, then the range on this Count properly would have been up to a maximum of life, as on Count I. This would not change the result or the import of Respondent's argument on this point because, in any event, the trial court elected not to exhaust its sentencing power to give Respondent even the maximum that was available if the conviction is viewed as a second-degree felony. That is, although the court could have given Respondent up to thirty years on this Count when viewed as a second-degree felony, the court actually imposed only twenty years; similarly, in imposing twenty years on Count I, the court again declined to exhaust its sentencing power.

[7]The defendant himself did make an intervening statement asking for mercy, but no further argument by counsel was had prior to the court's announcing sentence (TIII. 8-11).

[8]Certainly, nothing in the record refutes Respondent's contention that the court's decision was based on the prosecutor's guidelines-based recommendation. Thus, the record is at least susceptible of the irrebuttable inference that the court so relied, if indeed, the record does not affirmatively establish that the court did so rely.

stated Respondent's applicable guidelines range as one cell higher than was correct.

Respondent was scored on a Category 7 scoresheet. The scoresheet preparer placed the conviction for trafficking in the category for "primary offense at conviction;" the conviction for conspiracy was placed in the category for "additional offense at conviction." Respondent received sixty-five (65) points on the scoresheet for the conspiracy count as an additional conviction. However, on a category 7 scoresheet, where a second-degree felony is scored as an additional offense at conviction rather than as the primary offense, the appropriate point assessment is only *thirteen* (13) points, not sixty-five.[9] Fla. R. Crim. P. 3.988(g). When calculated with the erroneous figure, Respondent had a total of 243 points, which placed him in the eighth cell on the scoresheet, with a permitted range of up to seventeen years, as the prosector urged. However, the correct point total, had the proper thirteen points been assessed for the additional offense, ought to have been only 191 points. This would have placed appellant in the seventh cell rather than the eighth, giving him a recommended range of seven to nine years, and a permitted range of only five and one-half to twelve years.[10] Fla. R. Crim. P. 3.988(g).

> In order to reach a fully informed sentencing decision, the trial court must have the benefit of an accurately prepared scoresheet. . . . This requirement applies even if the trial court expresses an intention to impose the maximum statutory sentence at the

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[9]One surmises that the preparer looked to the point totals under "primary offense at conviction" for this figure: one second-degree felony scored as a *primary* offense is, in fact, assessed sixty-five points. Fla. R. Crim. P. 3.988(g).

[10]For purposes of clarity and consistency, the analysis of this issue in the text regards the conspiracy conviction as a second-degree felony and the calculations in the analysis are based on the point totals as they would be assessed if the conspiracy is treated as a second-degree felony. However, it is critical to note that **the result in this case is the same** (i.e., there still is harmful error on this record) **even where the calculus regards the conspiracy conviction as a first-degree felony**: treating the conspiracy count as a first-degree felony under the "additional offense at conviction" column results in a final point total of 205 points, which places Respondent in the seventh cell of the category 7 scoresheet (which has a permitted range of five and one-half to twelve years), precisely the same cell where Respondent lands when the calculus treats the conviction as a second-degree felony. Fla. R. Crim. P. 3.988(g) (1991); RI. 61, 63, 66, 67; RII. 60. Thus, even were this Court to conclude in Point I *supra* that Respondent's conspiracy conviction was properly considered a first-degree felony, the prejudicial error identified herein still would require a new sentencing hearing.

> sentencing hearing. . . . ***The rationale for the rule is that the trial court might have imposed a different sentence had it had the benefit of a corrected scoresheet.***

Erickson v. State, 565 So.2d 328, 336 (Fla. 4th DCA 1990)(citations omitted), *rev. denied*, 576 So.2d 286 (Fla. 1991). *Accord Sellers v. State*, 578 So.2d 339 (Fla. 1st DCA), *approved*, 586 So.2d 340 (Fla. 1991), which holds:

> [C]orrect calculation of the scoresheet is essential to establish a valid base for the trial court's exercise of its discretion in determining an appropriate sentence under the guidelines. Thus, it has been held, "an incorrectly calculated minimum-maximum sentence range under the guidelines constitutes an erroneous base upon which the trial court exercises its discretion in aggravating the sentence, and requires reversal for resentencing, even in the absence of a contemporaneous objection."

Id. at 341 (quoting *Higgs v. State*, 470 So.2d 75, 76 (Fla. 3d DCA 1985)). *See also Moore v. State*, 519 So.2d 22 (Fla. 3d DCA 1987)(where incorrect scoresheet used, resentencing required "because the trial judge may not wish to depart, or to depart so extensively, from a guidelines sentence which is presumably substantially lower than the one which it previously considered when it imposed" sentence); *Echevarria v. State*, 492 So.2d 1146, 1147 (Fla. 3d DCA 1986)("Incorrect computations on a scoresheet necessitate vacating the sentence and remanding for resentencing.").

The point made by these decisions is no more saliently illustrated than by the instant case, where the prosecutor plainly urged the trial court to impose a sentence of twenty years *expressly because* it was only three years more than what Respondent could have gotten under the guidelines as (mis)calculated. Had the court had the benefit of a correct scoresheet and known that Respondent's permitted guidelines range went from as low as five and one-half years to a maximum of twelve years, the court may not have been willing to, or found it appropriate to, sentence Respondent to twenty years.

Respondent acknowledges that in the normal habitual offender circumstance, an error in the guidelines calculation would nave no relevance, for under section 775.084(4)(e), Florida Statutes (1991), no scoresheet is required as habitual offender sentences are outside the

guidelines. However, this general principle is of no moment here because the trial court actually predicated its decision in this case on the (mis)calculated guidelines. Stated somewhat differently, although a scoresheet normally is irrelevant when an habitual offender sentence is imposed and an error in the scoresheet thus would have no import, the scoresheet became highly relevant and material *in this case* when the State relied on it in making its recommendation to the trial court as to the actual number of years' imprisonment the court should impose, and every indication from the face of the record is that the court imposed sentence in accordance with the recommendation -- that is, as predicated upon the erroneous information. Thus, the error in the scoresheet was material and relevant and Respondent must be resentenced with the trial court having before it the correct information -- that the top of Respondent's permitted guidelines range was not the seventeen years upon which the State and court relied, but rather was actually only twelve years.[11] Respondent respectfully requests that this Court hold that he is entitled to a new sentencing hearing.

[11]Of course, the trial court would be free to again sentence Respondent to twenty years upon resentencing, but this fact is outcome-neutral -- that is, it does not dispel or diminish the need for resentencing in this case. As explained in *Erickson* and *Moore*, the relevant point is that one cannot be certain that the trial court might not have elected to impose a different sentence had it had before it the correct information, and while the sentencing decision is discretionary, the basis for the exercise of that discretion must be a valid one.

CONCLUSION

As to Point I, Respondent respectfully requests that this Court approve the result reached by the district court of appeal that Respondent's conspiracy conviction is to be treated as a second-degree felony. As to Point II, Respondent respectfully requests that this Court order that a new sentencing hearing be held, at which the trial court shall be presented with an accurate scoresheet and thus have the opportunity to formulate a sentence that the court finds appropriate to Respondent's circumstance.

Respectfully submitted,

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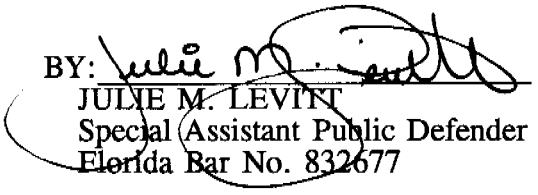
BY: 
JULIE M. LEVITT
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to Assistant Attorney General Mark Rosenblatt, Office of the Attorney General, Criminal Division, Post Office Box 013241, Miami, Florida 33101, this 30th day of December, 1993.

JULIE M. LEVITT
Special Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,220

THE STATE OF FLORIDA,

Petitioner,

-vs-

CALVIN LEE,

Respondent.

APPENDIX

INDEX

DOCUMENTS **PAGES**

OPINION OF THE THIRD DISTRICT COURT OF APPEAL 1-2

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 1993

CALVIN LEE,	**	
Appellant,	**	
vs.	**	CASE NO. 92-1242
THE STATE OF FLORIDA,	**	
Appellee.	**	

Opinion filed May 25, 1993.

An Appeal from the Circuit Court of Monroe County, Richard Payne, Judge.

Bennett H. Brummer, Public Defender and Julie M. Levitt, Special Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General and Mark Rosenblatt, Assistant Attorney General, for appellee.

Before BARKDULL, NESBITT and GODERICH, JJ.

PER CURIAM.

The defendant, Calvin Lee, appeals his conviction and sentence for conspiracy to traffic in cocaine and trafficking in cocaine. We affirm, in part, and reverse and remand, in part.

We must agree with the defendant and the state that the judgment incorrectly reflects the conviction for conspiracy to traffic as a first degree felony. A conspiracy to traffic in cocaine is a second degree felony because the underlying offense, trafficking in cocaine in an amount between 28 and 200 grams, is a first degree felony. §§777.04(4)(b), 893.135(1)(b)1a, Fla. Stats. (1991). Accordingly, we reverse the conviction and remand the judgment to the trial court, to be corrected to reflect the conviction for conspiracy to traffic as a second degree felony. See Watson v. State, 426 So. 2d 1300 (Fla. 2d DCA 1983).

As for the remaining points raised by the defendant in this appeal, we find that they lack merit.