IN THE SUPREME COURT OF FLORIDA

ARTHUR L. DISBROW, JR.,

Petitioner/Appellant,

versus

STATE OF FLORIDA,

Respondent/Appellee.

S.CT. CASE NO. 82,857

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

ANNE MOORMAN REEVES
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0934070
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904-252-3367

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The Petitioner, Arthur Lew Disbrow, Jr., entered a plea of guilty to violation of probation in two burglaries, and guilty to a new charge of loitering and prowling (R5, 19). Disbrow committed the burglaries because of a mental disorder involving women's underclothing and masturbation. His aim in the loitering and prowling was similar. His guideline scoresheet totalled 344 points, for a permitted sentencing range of from seventeen to forty years (Appendix to Initial Brief).

Disbrow received what is called a "back end split sentence" of two years of community control, followed by thirteen years and a consecutive five years in prison, the eighteen-year prison portion to be suspended upon successful completion of the community control (R45-49). The main feature of the community control is mentally disordered sex offender counseling.

The state appealed the sentence, on the grounds (1) that it is illegal as not authorized by Poore v. State, 531 So. 2d 161 (Fla. 1988), and (2) that it is a downward departure from the guidelines without written reasons. Initial Brief of Appellant, 5th DCA Case No. 92-2391. The district court remanded the case for resentencing, and certified to this court the question now before it:

> IS A REVERSE SPLIT SENTENCE A DOWNWARD DEPARTURE FROM THE GUIDELINES WHICH REQUIRES WRITTEN JUSTIFICATION?

State v. Disbrow, 18 Fla. L. Weekly D2540 (Fla. 5th DCA December 3, 1990).

Notice to invoke this court's discretionary jurisdiction was timely filed. This merit brief follows.

SUMMARY OF THE ARGUMENT

Section 948.01(11), Florida Statutes (1991), specifically authorizes the type of sentence imposed here, a reverse split sentence with a term of probation (community control in the instant case) to be followed by incarceration, which may be modified by the court upon successful completion of the initial period. A specific statute covering a particular subject matter controls over a broader statutory provision covering the same generalized subject matter. In addition, where two different statutory constructions are possible, the rule of lenity mandates that the courts must construe statutes in criminal cases in the light most favorable to the accused.

Moreover, in the event the guidelines remain applicable in this case, the sentence as imposed does fall within the guidelines range, because a guidelines term of imprisonment was imposed. Since the term of incarceration may or may not actually be served, depending on certain future actions of the defendant and on a future motion to the trial court, any downward departure would not occur until such time as the incarcerative portion of the sentence was vacated.

For these reasons the sentence imposed here is lawful. The certified question should be answered in the negative and the case remanded for imposition of the original "back end" split sentence.

ARGUMENT

SINCE FLORIDA STATUTES SPECIFICALLY AUTHORIZE A REVERSE SPLIT SENTENCE, IT IS NOT A DOWNWARD DEPARTURE TO IMPOSE A TERM OF PROBATION TO BE FOLLOWED BY A TERM OF INCARCERATION.

Section 948.01(11), Florida Statutes (1991), specifically authorizes the imposition of a reverse or "back end" split sentence, whereby a probationary term or term of community control is followed by a period of incarceration, which may or may not be vacated by the court at some future date, depending on the actions of the defendant. That section provides that

> [t]he court may also impose a split sentence whereby the defendant is sentenced to a term of probation which may be followed by a period of incarceration or, with respect to a felony, into community control, as follows:
>
> (a) If the offender meets the terms and conditions of probation or community control, any term of incarceration may be modified by court order to eliminate the term or incarceration.

The provisions of this specific statute authorizing probation or community control to be followed by incarceration should take precedence over the more general sentencing guidelines statute. The law provides that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. See, e.g., Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959). See also, Busic v. United States, 446 U. S. 398, 406 (1980).

The preamble to Chapter 91-225, Laws of Florida (1991), which enacted this subsection of 948.01, makes clear that the

legislative intent was to allow for this type of sentence outside of the stricter confines of the sentencing guidelines. That preamble states that

> WHEREAS, Florida is facing an ever-increasing prison and jail population and a severe budgetary shortfall, and
>
> WHEREAS, incarceration is an expensive method of dealing with offenders, and
>
> WHEREAS, offenders are currently serving, on the average, less than one-third of their sentences, and
>
> WHEREAS, judges sentencing offenders are faced with either placing an offender on probation or sending the offender to prison, resulting in an unacceptably short period of time being served due to overcrowded prisons, and
>
> WHEREAS, there is a lack of sufficient intermediate sanctions, punishments, and treatment programs, and . . .
>
> WHEREAS, both the inmate population within the Department of Corrections and the population under parole and probation supervision by the Department of Corrections had increased from 125,337 in November, 1989, to 134,116 in November, 1990, and
>
> WHEREAS, it is critical that state and local correctional authorities cooperate and combine forces to protect the public, reduce recidivism and effectively punish criminal behavior, . . .
>
> the state should reserve its prison system for the most serious and violent criminals and should begin, through this first phase of corrections partnership, to provide community-based correctional programs and treatment . . . .

Thus, it is clear that the legislature was providing an alternative "sufficient intermediate sanction" by the reverse split sentence. Such a sentence takes the specifically authorized punishment outside the restrictions of the sentencing guidelines.

In this way, it helps to avoid further overcrowding of the prison system. Moreover, it gives the sentencing judge the power to determine for whom the sentence is appropriate; to make the decision at this point, based on the facts surrounding the offense, is undoubtedly a more suitable and more effective method of reducing the prison population than allowing the Department of Corrections to release prisoners based on their good behavior.

It must be borne in mind that the rule of lenity provides for strict construction of statutes, and for construction favorable to the accused where statutes are susceptible of differing constructions. Section 775.021(1), Florida Statutes (1991). Thus, the two statutes--the one, the more general sentencing guidelines statute; and the other, the more specific reverse split sentence statute--should be construed in combination to permit imposition of the reverse split sentence regardless of guideline constraints.

In arguing that Disbrow's sentence is illegal, the state relies heavily upon Poore v. State, 531 So. 2d 161 (Fla. 1988), and the sentencing alternatives listed therein--which do not include the reverse split. A brief glance at the case law through which sentencing has developed is useful here. In the late fifties, it was held that to put a person on probation indefinitely before finally putting him in prison was illegal. See Shieder v. State, 430 So. 2d 537, 538 n. 1 (Fla. 5th DCA 1983). The direction was from the uncertain to the certain. Then Massey v. State, 389 So. 2d 712, 713 (Fla. 2d DCA 1980),

formulated as a rule what had often been observed before, namely "that a prisoner is entitled to pay his debt to society in one stretch rather than in bits and pieces." For this reason, "except where the defendant consents," an interrupted sentence was improper. Later, Lanier v. State, 504 So. 2d 501, 503 (Fla. 1st DCA 1987), made no mention of defendant consent, but merely offered the rule that "when a defendant is given a split sentence, the non-incarcerative portion must immediately follow the prison sanction." The direction remained as before, towards greater certainty.

The following year, Poore distinguished between a true split sentence and a probationary split sentence. The latter permits a greater sentence upon a finding of violation of probation than the former, based on the different legal principle that governs it. This court analyzed Florida law, and concluded that the five basic sentencing alternatives were (1) straight confinement, (2) a true split sentence, (3) a probationary split sentence, (4) confinement as a special condition of and preceding probation, and (5) straight probation. Since that time, courts have decided that a reverse split sentence is not legal as not authorized by Poore. See e.g., Gaskins v. State, 607 So. 2d 475 (Fla. 1st DCA 1992); Ferguson v. State, 594 So. 2d 864 (Fla. 5th DCA 1992); Bryant v. State, 591 So. 2d 1102 (Fla. 5th DCA 1992).

It is true that Poore does not specifically mention the reverse split, or "back end" split, or conditional suspension. But the purpose of Poore was not to eliminate proper sentencing

options; rather, it was to eliminate a constitutional transgression as set out in North Carolina v. Pearce, 395 U. S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) (defendant not subject to sentence increase based only on facts giving rise to original sentence, once jeopardy has attached). Hence the distinction between the true split and the probationary split sentence: An increase in sentence arising from a probationary split sentence rests on new facts, namely, those relevant to the probation violation. Thus the probationary split sentence avoids any Pearce noncompliance, and the same reasoning may be applied to the "back end" split sentence.

The trial judge relied upon section 948.01(13) as justification for Disbrow's "back end" split sentence. The state's initial brief suggests that this was an error, as that subsection refers to substance abusers. It is relevant to note that the section refers to a medical condition, and that the court found Disbrow suffering from a medical condition--mentally disordered sex offender. By analogy, subsection (13) applies to Disbrow, and gives additional authority for the reverse split sentence on facts of this kind.

With respect to the guidelines, Disbrow's sentence does fall within the permitted guidelines range as the prison term was imposed. While the district court was correct in stating that the prison term may be vacated at some time in the future, the fact remains that it was imposed and may in fact be served. The determining factors will be (1) the actions of the defendant

during the preliminary community control term, and (2) the court's decision whether or not to vacate the incarcerative term.

That is to say, if this type of sentence is to be considered in light of the proscription against departure without written reasons, no departure can have occurred until such time in the future, after the probationary period, as the trial court may decide to rule favorably on a defense motion to vacate the term of incarceration. At that time, the court could issue written reasons for its then downward departure, which the state could then appeal. But, by the terms of the sentence imposed here and the terms of section 948.01, the vacation of the term of imprisonment may never come to pass, and the defendant may indeed serve the period of incarceration. Thus, it is premature for the state to attack the sentence, imposed in conformity with both section 948.01(11) and the sentencing guidelines.

In conclusion, it is submitted that the sentence imposed here was authorized by statute and is a viable legal alternative sanction to be imposed by the trial court. The certified question should be answered in the negative and the case remanded for reimposition of the original "back end" split sentence.

CONCLUSION

Based on the argument and authorities presented herein, the Petitioner requests that this honorable court quash the decision of the District Court of Appeal Fifth District, answer the certified question in the negative, and remand for reimposition of the original sentence.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER

Anne Moorman Reeves
ANNE MOORMAN REEVES
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0934070
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal; and mailed to Arthur L. Disbrow, Jr., 2725 Middlehurst Road, Titusville, Florida 32796-3719, on this 9th day of February, 1994.

Anne Moorman Reeves
ANNE MOORMAN REEVES
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

ARTHUR L. DISBROW, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	S.Ct. CASE NO. 82,857
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

A P P E N D I X

Dissolution of marriage—Guardianships—Guardian of incapacitated person seeking divorce, on ward's behalf, from ward's competent spouse—Error to refuse to consider on the merits ward's application for attorney's fees *pendente lite*—Attorney's fees application was issue for court having jurisdiction over dissolution to determine, not for guardianship court—Order of guardianship court on which petition based facially insufficient to support guardian's petition for dissolution

NORMA VAUGHAN, Appellant, v. CLARENCE BUFORD VAUGHAN, Appellee. 5th District. Case No. 93-1377. Opinion filed December 3, 1993. Appeal from the Circuit Court for Orange County, Frederick Pfeiffer, Judge. Norma Vaughan, Winter Park, pro se. Gregory M. Wilson, Orlando, for Appellee.

(PER CURIAM.) The final judgment of dissolution is reversed on two grounds. First, the lower court erred in refusing to consider appellant's application for attorney's fees *pendente lite* on the merits. This was a matter for the court having jurisdiction over the dissolution to determine, not for the guardianship court to decide.[1] Additionally, the order of the guardianship court on which the petition was based is facially insufficient to support the guardian's petition for dissolution and will have to be refiled. Section 744.3725, Florida Statutes, on which petitioner relies, requires the court to authorize the guardian to act after specific steps have been taken and only on clear and convincing evidence.[2] Such an order must set forth the guardianship court's findings and conclusions, otherwise, meaningful appellate review of the final judgment of dissolution would be impossible. (COBB, and GRIFFIN, JJ., concur. SHARP, W. J., concurs and concurs specially, with opinion.)

[1]Based on this record, there is no basis for this court to determine whether appellant is entitled to fees *pendente lite* or, if so, in what amount or for what legal services.

[2]Because of the defects we have identified in this opinion, we do not now decide the issue of the power of a guardian, on behalf of his ward, to obtain a divorce from a competent spouse.

(SHARP, W., J., concurring specially.) I concur with the majority opinion, but write to stress why I think it is particularly important that Norma Vaughan be provided funds for temporary attorney's fees. This case may well be one of first impression in this state on the question of whether a guardian of an incapacitated person can obtain a divorce for his ward from a competent spouse, solely because the ward has been incapacitated for a total of three years. *See* §§ 744.3215(4), 744.3725 and 61.052(1)(b). Section 61.052(1)(b) indicates mental incapacity of a spouse is a ground for the *competent* spouse to seek a divorce, provided the rights of the incapacitated spouse are duly protected. But its express terms do not foreclose the ability of a guardian of an incapacitated spouse to sue a competent spouse for a divorce *solely because the ward has been incapacitated for three years*. This interpretation would be a departure from precedent in this state[1] and other jurisdictions.[2] It has potentially far-reaching social implications and could raise constitutional issues, as well.

[1]*See Scott v. Scott*, 45 So. 2d 878 (Fla. 1950); *Wood v. Beard*, 107 So. 2d 198, 199 (Fla. 2d DCA 1958).

[2]*Annotation, Power of Incompetent Spouse's Guardian, Committee, or Next Friend to Sue for Granting or Vacation of Divorce or Annulment of Marriage or Make a Compromise or Settlement in such Suit*, 6 A.L.R. 3d 681 (1966).

* * *

Dissolution of marriage—Award of permanent alimony unsupported by findings of fact required by statute

[redacted] P. BROWN, Appellant, v. ROBERT W. BROWN, Appellee. 5th District. Case No. 93-789. Opinion filed December 3, 1993. Appeal from the Circuit Court for Brevard County, Lawrence V. Johnston, Judge. Joan H. Bickerstaff, Melbourne, for Appellant. Cris Bates Foster of Foster and Ridley, Melbourne, for Appellee.

(COBB, J.) The final judgment of dissolution of marriage is affirmed except to the extent of the award of permanent periodic alimony. The final judgment is vacated to the extent of the permanent periodic alimony award and the cause is remanded to the trial court for findings of fact as required by section 61.08(1), Florida Statutes (1991). *See Moreno v. Moreno*, 606 So. 2d 1280 (Fla. 5th DCA 1992).

AFFIRMED IN PART; VACATED IN PART; AND REMANDED. (DAUKSCH and SHARP, W., JJ., concur.)

* * *

Criminal law—Juveniles—Adjudication of delinquency for possession of drug paraphernalia reversed on ground that alleged paraphernalia tested negative for controlled substance, and record was devoid of evidence that juvenile possessed it with intent to use it for illegal purposes set forth in statute

T.E.D., III, a child, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 92-2200. Opinion filed December 3, 1993. Appeal from the Circuit Court for Orange County, Thomas S. Kirk, Judge. James B. Gibson, Public Defender, and James T. Cook, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellee.

(GRIFFIN, J.) Appellant's adjudication of delinquency for possession of drug paraphernalia is reversed. The alleged paraphernalia tested negative for any controlled substance and the record is devoid of any evidence that appellant possessed it with intent to use it for the illegal purposes set forth in section 893.147(1), Florida Statutes (1991).

REVERSED and REMANDED. (GOSHORN, and PETERSON, JJ., concur.)

* * *

Criminal law—Sentencing—Guidelines—Imposition of reverse split sentence of community control, followed by a period of incarceration which is to be modified and eliminated upon defendant's compliance with community control conditions, is downward departure from guidelines which requires written reasons—Question certified

STATE OF FLORIDA, Appellant, v. ARTHUR LEW DISBROW, JR., Appellee. 5th District. Case No. 92-2391. Opinion filed December 3, 1993. Appeal from the Circuit Court for Brevard County, John Dean Moxley, Jr., Judge. Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, Daytona Beach, for Appellant. James B. Gibson, Public Defender, and Anne Moorman Reeves, Assistant Public Defender, Daytona Beach, for Appellee.

(SHARP, W., J.) The State timely appeals a back end split sentence imposed on Disbrow after he violated probation and was placed on community control. It argues the sentencing scheme is illegal,[1] and that it constitutes a downward departure without written reasons.[2] We agree.

On June 16, 1988, Disbrow was placed on probation in two cases: case no. 87-5227-CFA, burglary of a structure (violation of section 810.02(3)(d)(f)); and case no. 87-5228-CFA, burglary of a dwelling (violation of section 810.02(2)(d)(f)). The probationary periods were for five years and fifteen years respectively. Thereafter Disbrow violated his probation by committing the offense of loitering and prowling. He pled guilty, and the court revoked his probation in both cases.

On September 21, 1992, judgment and sentence were entered in the two cases. In case no. 87-5228 CFA, Disbrow was sentenced to two years community control coupled with numerous conditions, and then thirteen years in the DOC. If Disbrow complies with these conditions, the thirteen-year DOC portion will be modified and eliminated. In case no. 87-5227-CFA, Disbrow received five years in the DOC, consecutive to the DOC portion of case no. 87-5228-CFA. On that sentence, the court recommended a back end of a split sentence. Thus, Disbrow was released to community control.

We recently dealt with this issue in *State v. Carder*, 18 Fla. L. Weekly D2284 (Fla. 5th DCA October 22, 1993). There, Carder pled guilty to felony retail theft and received a back end split sentence. We held that a back end split sentence was nothing

more than a straight probationary sentence with the threat of incarceration included if there was a violation of probation (or as here, community control). As such, under Rule 3.701(d)(11), it is a downward departure sentence, requiring written reasons, which in this case are missing.

We again certify the following question to the Florida Supreme Court:

IS A REVERSE SPLIT SENTENCE A DOWNWARD DEPARTURE FROM THE GUIDELINES WHICH REQUIRES WRITTEN JUSTIFICATION?

SENTENCE VACATED; REMANDED for resentencing. (GOSHORN and THOMPSON, JJ., concur.)

---

[1]*Poore v. State*, 531 So. 2d 161 (Fla. 1988); *Ferguson v. State*, 594 So. 2d 864 (Fla. 5th DCA 1992).

[2]*Pope v. State*, 561 So. 2d 554 (Fla. 1990).

* * *

Civil procedure—Decision of lower court to set aside judgment affirmed—Proper remedy under circumstances is to set aside results of tainted trial proceedings and to order new trial

SHERIFF OF ORANGE COUNTY, FLORIDA, Appellant/Cross-Appellee, v. SHERRY BOULTBEE, etc., Appellee/Cross-Appellant. 5th District. Case No. 92-2512. Opinion filed December 3, 1993. Appeal from the Circuit Court for Orange County, Rom W. Powell, Judge. Robert E. Bonner, of Eubanks, Hilyard, Rumbley, Meier & Lengauer, P.A., Orlando, for Appellant/Cross-Appellee. R. David Ayers, Jr., Winter Park, for Appellee/Cross-Appellant.

(PER CURIAM.) The decision of the lower court to set aside the judgment is affirmed; however, the proper remedy under these circumstances is not to reinstate the verdict and judgment for the plaintiff below, but to set aside the results of the tainted trial proceedings and to order a new trial.

AFFIRMED in part; REVERSED in part, with instructions. (DAUKSCH, COBB and GRIFFIN, JJ., concur.)

* * *

Criminal law—Juveniles—Sentencing—Error to impose adult sanctions without making written findings required by statute

DAVID ROY GLIDEWELL, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 92-2700. Opinion filed December 3, 1993. Appeal from the Circuit Court for Orange County, Belvin Perry, Jr., Judge. James M. Russ, Orlando, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellee.

(GOSHORN, J.) David Glidewell appeals from the judgment withholding adjudication of guilt and the order imposing adult sanctions following a jury verdict finding Glidewell guilty of shooting at, within, or into a building. Because the trial court imposed adult sanctions without making *written* findings as required by section 39.059(7), Florida Statutes (1991), we must reverse. *See Troutman v. State*, 18 Fla. L. Weekly S580 (Fla. Nov. 4, 1993). Upon remand, the trial court may again sentence Glidewell as an adult as long as the trial court strictly adheres to the statutory criteria and timely reduces the findings to writing.

REVERSED and REMANDED for further proceedings. (SHARP, W. and PETERSON, JJ., concur.)

* * *

Criminal law—Juveniles—Record contains sufficient evidence to support adjudications for battery and battery on law enforcement officer—Juvenile's refusal to give name to police prior to being arrested insufficient to support adjudication for resisting officer without violence

J. R., a Child, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 92-2798. Opinion filed December 3, 1993. Appeal from the Circuit Court for Orange County, Thomas S. Kirk, Judge. James B. Gibson, Public Defender, and Anne Moorman Reeves, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, Daytona Beach, for Appellee.

(DIAMANTIS, J.) J.R., a juvenile, appeals the trial court's order of disposition which found that J.R. committed the offenses of battery,[1] resisting an officer without violence,[2] and battery on a law enforcement officer.[3] We affirm the trial court's order relative to the offenses of battery and battery on a law enforcement officer because the record contains sufficient evidence that J.R. battered the victim and later battered a law enforcement officer while she was in the process of arresting J.R.; however, we reverse the trial court's finding that J.R. committed the offense of resisting an officer without violence, which was based on J.R.'s refusal to give his name to the police prior to being arrested. In *Robinson v. State*, 550 So. 2d 1186, 1187 (Fla. 5th DCA 1989), we held that a defendant's failure to cooperate with the police by refusing to answer questions or identify himself by name cannot itself be criminal conduct consistent with fourth and fifth amendment protections.[4]

We note that the state could have charged J.R. with resisting an officer with violence based on J.R.'s conduct after he was arrested; however, this conduct cannot provide a basis for affirming the trial court's finding that J.R. committed the offense of resisting an officer without violence because resisting an officer without violence is not a necessarily lesser included offense of resisting an officer with violence. *See Benjamin v. State*, 462 So. 2d 110, 111 (Fla. 5th DCA 1985).

Accordingly, we affirm the order of disposition as to the offenses of battery and battery on a law enforcement officer but reverse as to the offense of resisting an officer without violence.

AFFIRMED in part; REVERSED in part. (HARRIS, C.J. and PETERSON, J., concur.)

---

[1]§ 784.03, Fla. Stat. (1991).

[2]§ 843.02, Fla. Stat. (1991).

[3]§§ 784.03, 784.07(2)(b), Fla. Stat. (1991).

[4]U.S. Const. amends. IV, V.

* * *

Criminal law—Sentencing—Sentence of life imprisonment with twenty-five-year mandatory minimum followed by twenty years' probation—Probationary portion of sentence erroneous

ERIC MALLON, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 92-2945. Opinion filed December 3, 1993. Appeal from the Circuit Court for Volusia County, Shawn L. Briese, Judge. James B. Gibson, Public Defender and Lyle Hitchens, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) Eric Mallon appeals his sentence of life imprisonment with a minimum mandatory 25 years followed by 20 years' probation. The State correctly concedes the probationary portion of Mallon's sentence is error. *Whitehead v. State*, 583 So. 2d 418 (Fla. 5th DCA 1991); *Kirk v. State*, 478 So. 2d 1190 (Fla. 5th DCA 1985). Accordingly, Mallon's sentence is corrected to delete the 20 year term of probation.

Conviction AFFIRMED, Sentence as amended AFFIRMED. (DAUKSCH, GOSHORN and PETERSON, JJ., concur.)

* * *

Criminal law—Sentencing form to be corrected to conform to jury verdict finding defendant guilty of burglary of dwelling with battery or assault

RICHARD LEE EDDY, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 92-3055. Opinion filed December 3, 1993. Appeal from the Circuit Court for Orange County, John H. Adams, Sr., Judge. James B. Gibson, Public Defender and Daniel J. Schafer, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Barbara Arlene Fink, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) The State concedes that appellant's sentencing form contains a scrivener's error. Accordingly, Eddy's sentence is corrected to conform to the jury verdict finding him guilty of burglary of a dwelling with a battery or assault. We find Eddy's remaining point on appeal to be without merit.

Sentence AFFIRMED as corrected. (DAUKSCH, GOSHORN and PETERSON, JJ., concur.)

* * *