IN THE SUPREME COURT OF FLORIDA

DENNIS ARNOLD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 83,359

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Dennis Arnold, was the defendant in the trial court and the Appellant in the district court of appeal. He will be referred to by name or as Petitioner in this brief. Respondent was the prosecution in the trial court and the Appellee in the district court.

The following symbols will be used:

"R" = Record on Appeal.

"AR" = Additional Record on Appeal.

"SR" = Supplemental Record on Appeal (certified copies of judgments of conviction entered into evidence).

STATEMENT OF THE CASE AND FACTS

Petitioner, Dennis Arnold, was charged in three Informations filed in the Fifteenth Judicial Circuit as follows: Case No. 91-13730 CF, Count I, burglary of a conveyance, Count II, petit theft and Count III, burglary of a conveyance (R 174-175); Case No. 92-7417 CF, Count I, burglary of a dwelling with a battery, Count II, grand theft (R 103-104); and Case No. 92-1018 CF, sale of cocaine (R 81).

Petitioner moved to declare the habitual offender court unlawful (R 144, 148-168) and moved for random reassignment of the cases (R 145-147, 169-171, 186-188). The court denied the motions (AR).

On September 10, 1992, Petitioner entered a plea to the court on all charges (R 3-11). The court ascertained that Petitioner was not under the influence of any narcotics or alcoholic beverages, that he had never been adjudicated insane, incompetent or treated for any mental illness, and that he read and understood the English language (R 4). The court advised Petitioner of the maximum penalties for the offenses with which he was charged and what the penalties for each offense would be if he were to be habitualized. The court further advised Petitioner that he could be habitualized and sentenced consecutively to the maximum sentences on all counts (R 5-6). Petitioner indicated that he understood the maximum sentence (R 6). Defense counsel stipulated that there was a factual basis for the plea (R 9). The court showed Petitioner a waiver of rights form and asked if he had read the form and

understood the rights he was giving up. Petitioner indicated that he had and that he had signed the waiver form (R 9-10). The court found the plea to be a voluntary, knowing and intelligent waiver of his rights and accepted his plea. The court adjudicated Petitioner guilty of the offenses and ordered a pre-sentence investigation (R 10-11).

At sentencing on November 12, 1992, Petitioner presented an alternative sentencing plan and the state sought to habitualize him.

Jack McCall, a fingerprint expert, testified that he compared Petitioner's fingerprints which he rolled that date with the fingerprints in the state's composite exhibit (SR). He determined that the fingerprints matched (R 23-25).

At the hearing the court heard testimony from a victim, Marion Popovich; Sandy Williams, coordinator for the in-house drug abuse program with the Palm Beach County Sheriff's Office, who testified Petitioner attended drug meetings in the jail; Karen Roney, a Palm Beach County Sheriff's Office employee; Petitioner's sisters Bertha Ridgeway, Annie Arnold and Barbara Jenkins, and his mother Ernestine Arnold, all of whom testified that Petitioner has had a long-time drug problem; Mildred George, director of the Public Defender's Office Division of Comprehensive Alternatives, who proposed an alternative sentencing plan in Petitioner's case to include drug offender probation, with in-patient treatment through the Drug Abuse Foundation of Delray Beach; and Petitioner (R 16-69).

The state recommended that Petitioner be sentenced to ten (10) years in the Department of Corrections to be followed by probation for drug treatment (R 70). Defense counsel recommended the court follow the alternative sentencing plan presented by the Public Defender's Office (R 71-73).

Thereupon, the court stated, "[B]ased upon the evidence which I received this morning regarding your previous offenses, I do hereby adjudicate you to be a habitual offender." (R 74). The court then sentenced Petitioner as follows: Case No. 92-7417 CF Count I, ten (10) years in the Department of Corrections as an habitual offender; followed by a consecutive six (6) month term in the Palm Beach County Jail on Case No. 91-13730 CF Count II; followed by concurrent terms of ten (10) years probation on Case No. 92-7417 CF Count II, Case No. 92-1018 CF, and Case No. 91-13730 Counts I and III. The court imposed a special condition of probation that he successfully complete the Palm Beach County Sheriff's Drug Farm if he is eligible at the time the six (6) month sentence in the Palm Beach County Jail has been completed, or, if ineligible for the drug farm, that he complete drug offender probation (R 74-76, 93-96, 109-112, 114-115, 197, 199, 200-201).

Timely Notice of Appeal was filed by Petitioner to the Fourth District Court of Appeal (R 202-203, 209-212).

The Fourth District in a written opinion, Arnold v. State, 19 Fla. L. Weekly D280 (Fla. 4th DCA Feb. 9, 1994)[see Appendix], affirmed Petitioner's sentence as an habitual felony offender in Case Nos. 92-1018 and 91-13730 "despite the trial court's failure

to make requisite statutory findings, pursuant to section 775.084(1)(a)1. and 2., Florida Statutes (1991." Id. The court held that the record reflected that this error was harmless, relying on its previous holdings in Herrington v. State, 622 So. 2d 1339 (Fla. 4th DCA 1993)(en banc), and DaCosta v. State, 625 So. 2d 1317 (Fla. 4th DCA 1993). The Fourth District certified the same question to this Court that it had certified in Herrington:

> WHETHER A TRIAL COURT'S FAILURE TO MAKE THE REQUISITE STATUTORY FINDINGS UNDER SECTION 775.084(1)(a) 1 AND 2 IS SUBJECT TO THE SAME HARMLESS ERROR ANALYSIS CONTAINED IN STATE V. RUCKER, 613 So. 2d 460 (Fla. 1993) WHERE THE EVIDENCE OF THE PRIOR CONVICTIONS WHICH QUALIFY A DEFENDANT AS A HABITUAL OFFENDER IS UNREBUTTED.

In addition, the Fourth District reversed Petitioner's sentence in Case No. 92-7417 for resentencing without habitual offender classification, pursuant to Ashley v. State, 614 So. 2d 486 (Fla. 1993), as he had not been furnished written notice of the state's intent to seek enhanced penalties prior to the entry of his guilty pleas. Id. The Fourth District also ordered that a ministerial error in Petitioner's written sentence be corrected to accurately reflect the trial court's oral pronouncement that Petitioner serve six (6) months in the county jail on Count II in Case No. 91-13730 consecutively to Count I in Case No. 92-7417.

On February 24, 1994, the Fourth District issued its mandate.

Timely Notice of Discretionary Review was filed by Petitioner on March 10, 1994. On March 16, 1994, this Court issued its Order postponing a decision on jurisdiction and setting a briefing schedule.

SUMMARY OF THE ARGUMENT

Petitioner was classified and sentenced as an habitual felony offender pursuant to Section 775.084, Florida Statutes (1991). Each of the findings required as a basis for sentencing a defendant as an habitual offender must be made by a preponderance of the evidence and must be made with specificity. The trial court failed to make any of the requisite statutory findings, including those required under Section 775.084(1)(a) 1. and 2., Florida Statutes, that:

> 1. The defendant has previously been convicted for any combination of two or more felonies in this state or other qualified offenses;
>
> 2. The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later.

The trial court's failure to make these crucial statutory findings resulted in reversible error. The "harmless error" analysis made by the Fourth District in the instant case should not be applied to the trial court's failure to make these two crucial statutory findings.

This Court should answer the certified question in the NEGATIVE. These findings should be made by the sentencing judge prior to classifying and sentencing a defendant as an habitual felony offender, not by an appellate court canvassing an appellate

record after the fact. This Honorable Court should reverse the decision of the Fourth District Court of Appeal in part, wherein it affirms Mr. Arnold's classification and sentence as an habitual felony offender as to Case Nos. 92-1018 and 91-13730. The order classifying and sentencing Petitioner as an habitual felony offender in Case Nos. 92-1018 and 91-13730 should be vacated and this cause remanded to the trial court for resentencing within Petitioner's sentencing guidelines range.

ARGUMENT

THE TRIAL COURT REVERSIBLY ERRED IN FAILING TO MAKE THE REQUIRED STATUTORY FINDINGS PRIOR TO CLASSIFYING AND SENTENCING PETITIONER AS AN HABITUAL FELONY OFFENDER.

Petitioner was sentenced as an habitual felony offender pursuant to Section 775.084, Florida Statutes (1991). Sentencing under the Florida habitual felony offender statute is permissive, not mandatory. Tucker v. State, 595 So. 2d 956 (Fla. 1992); Burdick v. State, 594 So. 2d 267 (Fla. 1992).

Section 775.084(3)(d) expressly provides that each of the findings required as a basis for sentencing a defendant as an habitual felony offender must be made by a preponderance of the evidence. Section 775.084(1)(a) 1. and 2. clearly sets forth two of the findings that must be made by the trial court as a prerequisite for sentencing a defendant as an habitual felony offender:

> 1. The defendant has previously been convicted of any combination of two or more felonies in this state or other qualified offenses;
>
> 2. The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later;

The classification of a defendant as an habitual felony offender without making the statutorily required findings is reversible fundamental error. Parker v. State, 546 So. 2d 727

(Fla. 1989); Walker v. State, 462 So. 2d 452 (Fla. 1985); Eutsey v. State, 383 So. 2d 219 (Fla. 1980); Powell v. State, 596 So. 2d 770 (Fla. 5th DCA 1992). As stated by this Honorable Court in Walker v. State, 462 So. 2d at 454:

> We hold that the findings required by Section 775.084 are critical to the statutory scheme and enable meaningful appellate review of these types of sentencing decisions. Without these findings, the review of these types of sentencing decisions would be difficult, if not impossible. It is clear the legislature intended the trial court to make specific findings of fact when sentencing a defendant as a habitual offender. Given this mandatory statutory duty, the trial court's failure to make such findings is appealable regardless of whether such failure is objected to at trial.

(Emphasis supplied).

Turning to the instant case, the trial court at the conclusion of the habitual offender hearing merely stated, "[B]ased upon the evidence which I received this morning regarding your previous offenses, I do hereby adjudicate you to be a habitual offender." (R 74). This is insufficient under the applicable statutory provisions and this Honorable Court's decisions in both Powell and Walker. Hence, the order declaring Petitioner an habitual felony offender in Case Nos. 92-1018 and 91-13730 should be vacated.

The Fourth District in the instant case declined to vacate Petitioner's classification as an habitual felony offender in Case Nos. 92-1018 and 91-13730 by applying a "harmless error" analysis to the trial court's failure to make the critical statutory findings mandated by Section 775.084(1)(a)1. and 2., relying on its prior holdings in Herrington v. State, 622 So. 2d 1339 (Fla. 4th

DCA 1993)(en banc), and DaCosta v. State, 625 So. 2d 1317 (Fla. 4th DCA 1993).[1] Arnold v. State, 19 Fla. L. Weekly D280 (Fla. 4th DCA Feb. 9, 1994). In Herrington, the Fourth District suggested that this result was sanctioned by this Court's decision in State v. Rucker, 613 So. 2d 460 (Fla. 1993). The court certified the same question to this Court that it had certified in Herrington:

> WHETHER A TRIAL COURT'S FAILURE TO MAKE THE REQUISITE STATUTORY FINDINGS UNDER SECTION 775.084(1)(a) 1 AND 2 IS SUBJECT TO THE SAME HARMLESS ERROR ANALYSIS CONTAINED IN STATE V. RUCKER, 613 So. 2d 460 (Fla. 1993) WHERE THE EVIDENCE OF THE PRIOR CONVICTIONS WHICH QUALIFY A DEFENDANT AS A HABITUAL OFFENDER IS UNREBUTTED.

In State v. Rucker, the trial court sentenced the defendant as an habitual offender without specifically finding whether he had been pardoned for the qualifying offenses or whether any of the qualified offenses had been otherwise set aside. Although Section 775.084(1)(a) 3. and 4. requires such findings, this Court held that the trial court's failure to make these statutory findings was subject to harmless error analysis where there was unrefuted evidence of the prior convictions as required by Section 775.084(1)(a) 1. and 2.

The case at bar presents this Court with the question of whether it should extend State v. Rucker to cases in which the trial court failed to make any of the requisite findings under Section 775.084(1)(a). Mr. Arnold contends that it should not.

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[1] The certified question related only to this portion of the Fourth District's decision and this is the only issue challenged in this Petition for discretionary review. The remainder of the Fourth District's opinion should be affirmed.

In making its erroneous, albeit hesitant[2] leap, the Fourth District failed to give appropriate recognition to the significant distinctions between the requirements of 1. and 2. (qualifying offense, temporal element) and 3. and 4., which concern a pardon or post-conviction set aside. This Court in Eutsey made it clear that the defendant has the burden of asserting a pardon or post-conviction set aside (3. and 4.) at the proceeding, likening them to affirmative defenses. However, the defense has absolutely no burden to establish the prerequisite felonies and the required temporal element. This is a crucial factor which separates Rucker from the instant situation. The findings mandated by Section 775.084(1)(a) 1. and 2. are an absolute prerequisite to classification of a defendant as an habitual felony offender. It is clear that the legislature intended the trial judge to make the specific findings of fact when sentencing a defendant as an habitual offender. It is a fundamental rule of statutory construction that legislative intent is the polestar by which the courts must be guided. State v. Webb, 398 So. 2d 820, 824 (Fla. 1981). The legislature squarely placed the mandatory duty on the trial judge to make the findings that the defendant "has previously been convicted of any combination of two or more felonies," Section 775.084(1)(a) 1., and that the "felony for which the defendant is

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[2] In Herrington v. State, 622 So. 2d at 1341, the Fourth District, in extending the harmless error analysis to the first two requirements, wrote: "We come to our conclusion with some reluctance because it is arguable that we have eviscerated the fact finding requirements which the legislature mandated in the statute."

to be sentenced was committed within 5 years of the date of ...." Section 775.084(1)(a) 2. Further, the trial court is required to determine if a felony can nevertheless be a predicate conviction under the habitual offender statute if said offense is an otherwise "qualified offense" pursuant to Section 775.084(1)(c), Florida Statutes (1991).[3]

Under analogous circumstances, this Court and the district courts of appeal have mandated strict and complete compliance with Section 39.059(7), Florida Statutes (1991), and its predecessor statute, Section 39.111(7)(d), Florida Statutes (1989), prior to sentencing a juvenile as an adult. See Rhoden v. State, 448 So. 2d 1013 (Fla. 1984) (trial court must make required statutory findings before sentencing a juvenile as an adult); Trueblood v. State, 610 So. 2d 14 (Fla. 1st DCA 1992); Taylor v. State, 593 So. 2d 1147 (Fla. 1st DCA 1992) (the failure of the trial court to address even one of six statutory criteria in sentencing juvenile as an adult required reversal); Stanley v. State, 582 So. 2d 140 (Fla. 5th DCA 1991) (reversal was required of order imposing adult sanctions on juvenile who pled to felony, due to trial court's failure to make written findings as to whether adult sanctions were suitable, even though juvenile judge had previously considered

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[3] Section 775.084(1)(c) provides: (c) "Qualified offense" means any offense, substantially similar in elements and penalties to an offense in this state, which is in violation of law of any other jurisdiction, whether that of another state, the District of Columbia, the United States or any possession or territory thereof, or any foreign jurisdiction, that was punishable under the law of such jurisdiction at the time of its commission by the defendant by death or imprisonment exceeding 1 year.

similar criteria in transferring juvenile to adult court for prosecution). This strict compliance with the statutory criteria required for an order imposing adult sanctions on a juvenile should be equally applied to an habitual felony offender classification pursuant to Section 775.084.

Further, the Due Process Clause applies to habitual offender proceedings. Specht v. Patterson, 386 U. S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967). In Specht the Court held that Colorado's Sex Offenders Act was unconstitutional. The Court wrote in pertinent part:

> The cause is not unlike those under recidivist statutes where an habitual criminal issue is "a distinct issue" on which a defendant "must receive reasonable notice and an opportunity to be heard." Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed.

386 U. S. at 610 (citations omitted; emphasis supplied).

Hence, there can be no meaningful appellate review (and thus no harmless error analysis) where the trial court makes no findings at all. Cf Sullivan v. Louisiana, 113 S. Ct. 2078 (1993) (harmless error analyses does not apply where, because of defective instruction on reasonable doubt, there has in effect been no jury determination that state proved elements of offense beyond reasonable doubt). The lack of findings gives the appellate court nothing to review, so that the court cannot make a determination of harmless error.

Policy considerations also support Mr. Arnold's argument. It is a fundamental tenant of statutory construction that penal statutes must be strictly construed. § 775.021(1), Fla. Stat. (1991)[4]; State ex rel Washington v. Rivkind, 350 So. 2d 575 (Fla. 1977). If there is any doubt as to a criminal statute's meaning it should be resolved in favor of the citizen. § 775.021(1); State ex rel Grady v. Coleman, 133 Fla. 400, 183 So. 25 (1938). Further, to the extent that any definiteness is lacking, a criminal statute must likewise be construed in the manner most favorable to the accused. Perkins v. State, 576 So. 2d 1310 (Fla. 1991).

This principle of strict construction is not merely a maxim of statutory interpretation: it is rooted in fundamental principles of due process. Dunn v. United States, 442 U. S. 100, 112, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979) (rule "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited. [Cit.] Thus, to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not '"plainly and unmistakably"' proscribed. [Cit.]"). This principle of strict construction of penal laws

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[4] Section 775.021(1), Florida Statutes (1991), sets forth the rule for construing provisions of the Florida Criminal Code as follows: "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused."

applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. Bifulco v. United States, 447 U. S. 381, 100 S. Ct. 2247, 65 L. Ed. 2d 205 (1980).[5]

The decision to sentence a defendant as an habitual felony offender has extreme consequences for the defendant. Under the plain and unambiguous language of the habitual felony offender statute, the trial court must find by a preponderance of the evidence that the defendant has been convicted of two or more felonies or other qualified offenses and that the temporal element requirement has been met. Strict construction of the statute requires that the trial court make the requisite findings, not that an appellate court substitute its judgment when the trial court has failed to do so. The enormous impact of this monumental decision requires that the statutory provisions necessary for its implementation be strictly enforced without any reference whatsoever to a "harmless error" analysis.

This Court should thus answer the certified question in the NEGATIVE. These findings should be made by the sentencing judge prior to classifying and sentencing a defendant as an habitual felony offender, not by an appellate court canvassing an appellate record after the fact. Since the statute plainly requires the findings, the failure to make them requires reversal.

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[5] This Court has held that this statutory rule applies to the sentencing guidelines. Flowers v. State, 586 So. 2d 1058 (Fla. 1991). Further, the rule of lenity applies to the sentencing guidelines rules. Lewis v. State, 574 So. 2d 245 (Fla. 2d DCA 1991), approved, 586 So. 2d 338 (Fla. 1992).

Therefore, this Honorable Court should reverse the decision of the Fourth District Court of Appeal in part, wherein it affirms Mr. Arnold's classification and sentence as an habitual felony offender as to Case Nos. 92-1018 and 91-13730. The order classifying and sentencing Petitioner as an habitual felony offender in Case Nos. 92-1018 and 91-13730 should be vacated and this cause remanded to the trial court for resentencing within Petitioner's sentencing guidelines range. See generally, Pope v. State, 561 So. 2d 554 (Fla. 1990).

CONCLUSION

Petitioner requests that this Honorable Court answer the certified question in the negative and reverse the decision of the Fourth District Court of Appeal in Arnold v. State, in part, wherein it affirms Mr. Arnold's classification and sentence as an habitual felony offender as to Case Nos. 92-1018 and 91-13730. The order classifying and sentencing Petitioner as an habitual felony offender in Case Nos. 92-1018 and 91-13730 should be vacated and this cause remanded to the trial court for resentencing within Petitioner's sentencing guidelines range.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Sarah B. Mayer, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida, 33401-2299 by courier this 11th day of April, 1994.

Susan D. Cline

Attorney for Dennis Arnold

IN THE SUPREME COURT OF FLORIDA

DENNIS ARNOLD, Petitioner, vs. STATE OF FLORIDA, Respondent.	)	CASE NO. 83,359

APPENDIX

leting any provisions restricting appellant's entitlement to gain time. We reject appellant's claim that the trial court's order did not contemplate that appellant receive credit for his jail term against his community control sentence. (DELL, C.J., ANSTEAD and KLEIN, JJ., concur.)

* * *

Criminal law—Sentencing—Habitual offender—Sentence reversed where defendant was not furnished written notice of state's intent to seek enhanced penalties against him under habitual offender statute prior to his entry of guilty plea—Written sentence to be corrected to conform to oral pronouncement—Trial court's failure to make requisite statutory findings for habitual offender sentence in separate case was harmless error—Question certified

DENNIS ARNOLD, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 93-0015. L.T. Case No. 91-13730 CF A02. Opinion filed February 9, 1994. Appeal from the Circuit Court for Palm Beach County; Walter N. Colbath, Jr., Judge. Richard L. Jorandby, Public Defender, and Susan D. Cline, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Sarah B. Mayer, Assistant Attorney General, West Palm Beach, for appellee.

(STEVENSON, J.) We reverse appellant's sentence in case no. 92-7417 because he was not furnished written notice of the state's intent to seek enhanced penalties against him pursuant to the habitual offender statute prior to entry of his pleas of guilty. *Ashley v. State*, 614 So.2d 486 (Fla. 1993). The appellee relies on *Mansfield v. State*, 618 So.2d 1385 (Fla. 2d DCA 1993), as authority for its contention that the failure to provide written notice may be harmless error. *Mansfield* is distinguishable from this case, however, because there the defendant signed a written plea agreement in which he specifically stated that he understood that if the court accepted his plea that he would be habitualized. In the case at bar, the plea was not entered pursuant to an agreement and appellant did not sign any waivers. The appellant must be resentenced in case no. 92-7417 without habitual offender classification. *Ashley*.

The state concedes that a ministerial error appears in the written sentence as it does not correspond to the court's oral pronouncements at the hearing. The trial court orally sentenced appellant to six months in the county jail on Count II in case no. 91-13730 to run consecutively to Count I in case no. 92-7417. The written sentence reflects that the jail sentence is to run consecutively to case no. 92-7417, without specifying Count I. This correction is especially significant because appellant was sentenced to ten years in prison on count I and ten years probation on Count II in case no. 92-7417.

We affirm appellant's sentence as a habitual offender in case nos. 92-1018 and 91-13730 despite the trial court's failure to make requisite statutory findings, pursuant to sections 775.084(1)(a)1. and 2., Florida Statutes (1991). The record reflects that this error was harmless. *Herrington v. State*, 622 So.2d 1339 (Fla. 4th DCA 1993) (en banc); *Dacosta v. State*, 625 So.2d 1317 (Fla. 4th DCA 1993). We again certify to the Supreme Court the question certified in *Herrington*.

Accordingly, we affirm in part, reverse in part and remand for resentencing and correction of clerical errors. (HERSEY and POLEN, JJ. concur.)

* * *

Criminal law—Sentencing—Guidelines—Aggravated battery sentence to be reduced from three years to two years in order to comply with permitted sentencing range of guidelines

LIVINGSTON CUNNINGHAM, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 93-0094. L.T. Case No. 91-1478CFA02. Opinion filed February 9, 1994. Appeal from the Circuit Court for Palm Beach County; Marvin U. Mounts, Jr., Judge. Richard L. Jorandby, Public Defender, and Joseph R. Chloupek, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) We affirm appellant's convictions but remand with directions that appellant's sentence on aggravated battery be reduced from three (3) years to two (2) years in order to comply with the permitted sentencing range of the sentencing guidelines. *See Roberson v. State*, 596 So. 2d 1250 (Fla. 4th DCA 1992). (DELL, C.J., ANSTEAD and KLEIN, JJ., concur.)

* * *

Jurisdiction—Circuit court—Amount in controversy—In controversy involving four separate promissory notes, each for $2500, the notes could not be aggregated to meet $5,000 jurisdictional requirement for circuit court—Final judgment to be vacated and cause transferred to county court

NORLIZA BATTS, Appellant, v. STATE OF FLORIDA, DEPARTMENT OF EDUCATION, Appellee. 4th District. Case No. 92-1476. L.T. Case No. 90-9673 (03). Opinion filed February 9, 1994. Appeal from the Circuit Court for Broward County; Patti Englander Henning, Judge. Stephen J. Finta, Fort Lauderdale, for appellant. Steven B. Sprechman, North Miami Beach, for appellee.

(PER CURIAM.) The sole issue raised on appeal is whether the circuit court lacked subject matter jurisdiction. Because this controversy involved four separate promissory notes, each for $2,500, the notes could not be aggregated to meet the then-existing $5,000 jurisdictional requirement and confer jurisdiction on the circuit court. Accordingly, we reverse. *See Burkhart v. Gowin*, 86 Fla. 376, 98 So. 140 (1923); *Canonico v. Devine*, 130 So. 2d 319 (Fla. 3d DCA 1961). This cause is remanded with directions to vacate the final judgment and to transfer this cause to the county court pursuant to rule 1.060(a), Florida Rules of Civil Procedure.

REVERSED and REMANDED with directions. (HERSEY, FARMER and PARIENTE, JJ., concur.)

* * *

Civil procedure—Discovery—In trial of damages issue in rear-end collision case, trial court had discretion to require that a witness be timely disclosed and be "listed" in a meaningful way in compliance with requirements of the pretrial order—Failure to properly list a witness in omitting witness's address or mischaracterizing subject matter of the testimony may properly be considered a violation of pretrial order—Where party without good cause improperly discloses witnesses, and by virtue of improper disclosure gains unfair advantage over opposing party who complied with pretrial order, trial court has discretion to strike those witnesses to prevent objecting party from being forced to choose between last-minute discovery and delay of trial—No error to strike witness who had been listed by defendant as independent medical examiner but who had refused to conduct an examination, so that plaintiff reasonably assumed that defendants would not call the witness—Trial court's granting of continuance does not necessarily cure prejudice resulting from untimely addition of witness

FLORIDA MARINE ENTERPRISES and ANGELIQUE MARIE MONDO, Appellants, v. DAWN ANNE BAILEY, Appellee. 4th District. Case No. 93-0103. L.T. Case No. 91-0364-CA-10. Opinion filed February 9, 1994. Appeal from the Circuit Court for Indian River County; Paul B. Kanarek, Judge. Geoffrey Marks and G. Bart Billbrough of Walton, Lantoff, Schroeder & Carson, Miami, for appellants. Stephanie S. Collison of William S. Frates, II, P.A., Vero Beach, for appellee.

(BROWN, LUCY, Associate Judge.) Whether the trial court abused its discretion in striking four improperly listed expert witnesses is the question presented by this appeal. At issue is the trial court's power to enforce its own pretrial order, and the meaning of:

(1) "listing" a witness;
(2) "prejudice;" and
(3) ability to "cure prejudice."

Dawn Bailey was injured in a rear-end collision in December 1990. Suit was filed in 1991. Defendant admitted liability; the trial court, by order issued in late August 1992, set the damages trial on a jury docket starting October 26, 1992, with a Pretrial Conference to be held on October 14.

At the October 14 conference, the defense made its second

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Sarah B. Mayer, Assistant Attorney General, Third Floor, 1655 Palm Beach Lakes Blvd., West Palm Beach, Florida, 33401-2299 by courier this 11th day of April, 1994.

Susan M Cline

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