IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,909
DCA NO. 94-617

THE STATE OF FLORIDA,

Petitioner,

-vs-

DARREL JENNINGS,

Respondent.

ON APPLICATION FOR DISCRETIONARY JURISDICTION

BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General

CONSUELO MAINGOT
Assistant Attorney General
Florida Bar No. 0897612
Office of the Attorney General
Department of Legal Affairs
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE**

OTHER AUTHORITIES

INTRODUCTION

The Petitioner, the **STATE OF FLORIDA**, was the prosecution in the trial court and the appellant in the District Court of Appeal of Florida, Third District. The Respondent, **DARREL JENNINGS**, was the defendant in the trial court and the appellee in the District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

On April 23, 1993, an Information was filed against the Respondent charging him with Tampering with Physical Evidence (Count I), Resisting an Officer Without Violence (Count II), and Unlawful Possession of Cannabis (Count III) in violation of §§ 918.13(1)(a), 843.02 and 893.13(1)(g), Fla. Stat. (1993). (R. 1-5).

On January 18, 1994, the Respondent filed a Sworn Motion to Dismiss. (R. 17). In the motion the Respondent represented the following undisputed facts: that he was observed holding what law enforcement officers believed was a marijuana cigarette; that as one of the officers approached him, the officer also saw what appeared to be loose cocaine rocks in his palm; that when the officer shouted "police," he put the alleged cocaine rocks into his mouth and swallowed; that he was then arrested but the objects he swallowed were never recovered. (R. 17-18).

On February 5, 1994, the Honorable W. Thomas Spencer granted the Respondent's sworn motion to dismiss. (T. 33, R. 24-25). Specifically, in its written findings of fact and order of law, the trial court substantially accepted the facts alleged in the sworn motion but found the facts were insufficient to establish that the defendant's conduct violated the section of the Florida Statutes proscribing tampering with evidence by altering,

destroying, concealing or removing any thing with the purpose of impairing its verity or availability for a criminal proceeding or investigation. (R. 25). The Respondent entered a plea of *nolo contendere* to Counts II and III. (R. 20). Petitioner filed a timely notice of appeal. (R. 26).

The Third District Court of Appeal affirmed the dismissal of the charge of tampering with physical evidence, but certified any conflict with Hayes v. State, 634 So. 2d 1153 (Fla. 4th DCA) *rev. denied*, No., 83-942 (Fla. Aug. 30 1994). Petitioner filed a notice to invoke discretionary jurisdiction on December 20, 1994. On January 6, 1995, this Court entered an order postponing its decision on jurisdiction, ordering the Petitioner to file a brief on the merits.

QUESTION PRESENTED

WHETHER THE DECISION IN STATE v. JENNINGS, 19 Fla. L. Weekly D2600 (Fla. 3d DCA December 14, 1994), CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN HAYES v. STATE, 634 So. 2d 1153 (Fla. 4th DCA 1994), WITH OTHER DISTRICT COURTS OF APPEAL AND THE FLORIDA SUPREME COURT ON THE ISSUE OF WHETHER SWALLOWING COCAINE ROCKS IN THE PRESENCE OF THE ARRESTING OFFICER CONSTITUTES TAMPERING WITH PHYSICAL EVIDENCE?

SUMMARY OF THE ARGUMENT

By affirming the trial court's dismissal of the charge of tampering with evidence on grounds that the act of swallowing cocaine rocks did not rise to the level contemplated in section 918.13 of the Florida Statutes, the Third District Court of Appeal is in direct conflict with this Court and other district courts of appeal. This Court and other district courts of appeal have determined that defendants who attempted to swallow alleged cocaine rocks after their arrest had committed the crime of tampering with evidence.

ARGUMENT

THE DECISION IN STATE v. JENNINGS, 19 Fla. L. Weekly D2600 (Fla. 3d DCA December 14, 1994), CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN HAYES v. STATE, 634 So. 2d 1153 (Fla. 4th DCA 1994), OTHER DISTRICT COURTS OF APPEAL AND THE FLORIDA SUPREME COURT ON THE ISSUE OF WHETHER SWALLOWING COCAINE ROCKS IN THE PRESENCE OF THE ARRESTING OFFICER CONSTITUTES TAMPERING WITH PHYSICAL EVIDENCE.

From the facts of this case it is apparent that the Third District Court of Appeal affirmed dismissal of the charge of tampering with evidence for two reasons. First, the District Court states that the Respondent was not under arrest because the officer had not even reached the Respondent before he put the alleged cocaine rocks in his mouth. Secondly, the Respondent did not know that a law enforcement officer was about to instigate an investigation, and was therefore not tampering with evidence when he swallowed the crack cocaine. The Third District Court distinguishes this case from other cases where the courts have determined that defendants who swallow alleged cocaine rocks after their arrest had committed the crime of tampering with evidence. Presumably, then, the Third District Court has determined that the proscriptions of the statute are not applicable except when a person is under arrest. This is clearly not the case.

Section 918.13, Florida Statutes, in pertinent part provides,

> (1) No person, knowing that . . . an investigation by a duly constituted . . . law enforcement agency . . . of this state is spending or about to be instituted, shall:
>
> (a) Alter, destroy, conceal, or remove any record, document or thing with the purpose to impair its verity or availability in such proceeding or investigation.

§918.13, Fla. Stat. (1993). If the circumstances which indicate an arrest include blocking of an individual's path or the impeding of his progress and are such that an encounter has become too intrusive to be classified as investigative detention, then shouting "police" at an individual is sufficient to put that person on notice that he is the subject and focus of an investigatory encounter with the authorities so announced. United States v. Hastamorir, 881 F.2d 1551 (11 Cir. 1993).

In the instant case, the Respondent represented in his sworn motion to dismiss and attested to the facts stated therein, that the officer approached him on the sidewalk and that the officer announced that he was the police before the Respondent tossed the alleged crack cocaine into his mouth and attempted to swallow it. He even began to choke but continued to swallow as he broke free of the police hold. The officer's announcement that he was the police clearly was an impediment to his progress and certainly was sufficient to put the Respondent on notice that he was the

focus of an investigatory stop. Therefore, the argument that shouting "police," without more, is insufficient to put the defendant on notice that an investigation was about to be instigated, is in conflict with the laws of Florida. Section 918.13, Fla. Stat. only requires that the person know that "an investigation by a duly constituted. . . law enforcement agency. . . of this state is pending" in order to punish alteration, destruction concealment, or removal of evidence.

Florida courts have interpreted the statute so as to not criminalize conduct which results in the suspect evidence being thrown away. *See*, Munroe v. State, 629 So. 2d 263 (Fla. 2d DCA 1993) (Defendant's act of stuffing small white tube containing cocaine away from his person at scene of arrest did not rise to level of conduct contemplated by section 918.13); Jones v. State, 590 So. 2d 982 (Fla. 1st DCA 1991) (Act of putting cocaine in pocket does not rise to level of conduct contemplated by section 918.13); Thomas v. State, 581 So. 2d 993 (Fla. 2d DCA 1991) (Defendant's act of throwing plastic bag filled with marijuana away from himself did not rise to level of conduct contemplated by section 918.13); Boice v. State, 560 So. 2d 1383 (Fla. 2d DCA 1990) (Defendant's act of tossing small bag of cocaine away from his person while in the presence of arresting officers at scene of purchase did not rise to level of conduct contemplated by section 918.13).

In such situations, the courts' focus has remained on the fact that the act of throwing something away does not manifest an intent to "impair its availability for trial." Jones v. State, 590 So. 2d 984. Regardless of whether the evidence is later recovered for trial, the defendants' conduct in these cases was not such that it would impair the evidence.

However, the courts have been clear that when defendants try to somehow alter or impair the objects, they are punishable under section 918.13 regardless of how analogous their actions may be to throwing the objects away. For example, in Hayes v. State, the Fourth District Court of Appeal held that throwing a 'baggie' into a drainage outlet was punishable under section 918.13. Hayes v. State, 634 So. 2d 1153, 1154 (Fla. 4th DCA 1994). The court relied on it's earlier holding in MacKenzie v. State, 632 So. 2d 276 (Fla. 4th DCA 1994). In MacKenzie, the defendant placed several (five or six) rocklike objects into his mouth, chewed and swallowed. The Fourth District upheld the conviction stating,

> Although neither side has cited any case in which the precise issue of whether swallowing and thus destroying a substance is tampering with evidence, we have no trouble concluding that it is.

MacKenzie v. State, 632 So. 2d 277.

In the case *sub judice*, the Respondent placed the suspect cocaine rocks into his mouth and swallowed. By placing the crack cocaine in his mouth and swallowing, the Respondent's intent was to "alter its availability for trial" in violation of section 918.13. It is beyond logic to think that putting a known soluble substance, such as crack cocaine, in contact with the natural enzymes of the saliva in the Respondent's mouth, would not irrevocably alter and impair the substance for use at trial. Even if it were retrieved, it would have been altered and impaired because it was not contained in a baggie, in contrast to Hayes, where the crack cocaine was thrown into the drainage outlet inside a baggie and was later recovered. Hayes v. State, 634 So. 2d 1154.

Moreover, prior physical custody of the evidence is unnecessary to punish under the statute. However, *compare*, Gilbert v. State, 19 Fla. L. Weekly D1138 (Fla. 2d DCA May 18, 1994) (Defendant who was in the rear seat of a vehicle searching for something, was properly chargeable under section 918.13 when a baggie with marijuana, which was originally on the rear seat and in the constructive possession of the police, was later recovered by the police across the road ten feet away with a hole in it). In Gilbert, the Second District focused on law enforcement's physical possession of the baggie in order to establish the defendant's possession of the contraband, not for the proposition that physical custody of the evidence by law

enforcement is a condition precedent to a tampering with evidence charge.

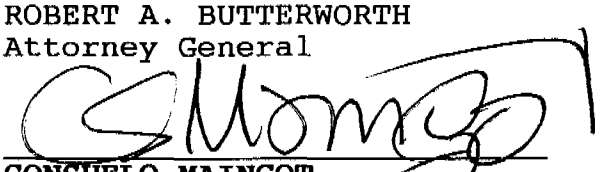
Therefore, the Respondent, having heard the officer shout "police" was on notice that he was about to be stopped and questioned, and his act of tossing the alleged crack cocaine into his mouth where it would dissolve and be swallowed so as to be beyond the reach of the authorities, was an act of intentional impairment of the evidence. The Third District Court of Appeal incorrectly affirmed the trial court's dismissal of the charge of tampering with evidence, and its decision conflicts with the Fourth District Court of Appeal on the same issue. Hayes v. State, 634 So. 2d 1154.

CONCLUSION

In light of the foregoing argument and citations of authority, the State respectfully requests this Court to quash the decision under review and remand the matter to the trial court with directions to reinstate the charge of tampering with evidence.

Respectfully submitted,

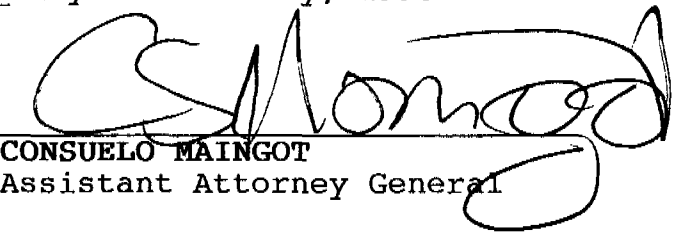
ROBERT A. BUTTERWORTH
Attorney General



CONSUELO MAINGOT
Assistant Attorney General
Florida Bar No. 0897612
Office of the Attorney General
Department of Legal Affairs
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF PETITIONER** was furnished by mail to **LOUIS CAMPBELL**, Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit Court, 1320 N.W. 14th Street, Miami, Florida 33125 on this 3 day of February, 1995.



CONSUELO MAINGOT
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

THE STATE OF FLORIDA,

Petitioner,

v. CASE NO. 84,909

DARREL JENNINGS,

Respondent.

_____/

APPENDIX TO BRIEF OF PETITIONER

Ex. A Decision of the Third District Court of Appeal in State v. Jennings, 19 Fla. L. Weekly D2600p (Fla. 3d DCA December 14, 1994).

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **APPENDIX TO BRIEF OF PETITIONER** was furnished by mail to **LOUIS CAMPBELL**, Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit Court, 1320 N.W. 14th Street, Miami, Florida 33125 on this 3 day of February 1995.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

CONSUELO MAINGOT
Assistant Attorney General
Florida Bar No. 0897612
Office of the Attorney General
Department of Legal Affairs
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441

complaint by certified mail on "each person having such security interest in the [illegible]rty."

For present purposes we do not address the interpretation of subsection 932.704(6), other than to hold that subsection 932.704(6) does not control the method of service of the forfeiture complaint and rule to show cause.

* * *

Civil procedure—Contracts—Character attacks, name-calling, and grossly inappropriate language used by plaintiff's counsel in final argument required new trial even though there was no timely objection

AL-SITE CORPORATION, a Delaware corporation, Appellant, vs. GIANBATTISTA ORIGONI DELLA CROCE and MARIA TONUCCI, as partners of GIANNI, ORIGONI, TONUCCI, a partnership, Appellees. 3rd District. Case No. 93-2433. Opinion filed December 14, 1994. An Appeal from the Circuit Court for Dade County, Herbert M. Klein, Judge. Counsel: Joseph C. Segor; Raab & Strader, for appellant. Carlson & Bales and Curtis Carlson and Hilary Goodman and Julie A. Moxley, for appellees.

(Before SCHWARTZ, C.J., and NESBITT and BASKIN, JJ.)

(SCHWARTZ, Chief Judge.) Ostensibly, this case involved a simple claim by the appellee, an Italian law firm, for legal services rendered to the appellant corporation. Unfortunately, but not unusually, the character attacks, name calling, and grossly inappropriate language which pervaded the final argument of the plaintiff's counsel[1] turned what occurred below into something less than a legitimate trial, and a great deal less than a fair one. As we have repeatedly said, we will not—even when, as here, there is no timely objection—permit the result of such a process to stand. *Kaas v. Atlas Chem. Co.*, 623 So. 2d 525 (Fla. 3d DCA 1993); *George v. Mann*, 622 So. 2d 151 (Fla. 3d DCA 1993); *Parkansky v. Old Key Largo, Inc.*, 546 So. 2d 1143 (Fla. 3d DCA 1989); *Borden, Inc. v. Young*, 479 So. 2d 850 (Fla. 3d DCA 1985); *Simmons v. Baptist Hosp. of Miami, Inc.*, 454 So. 2d [illegible]81 (Fla. 3d DCA 1984); *Schreier v. Parker*, 415 So. 2d 794 (Fla. 3d DCA 1982). Accordingly, the judgment under review is reversed for a new trial.[2]

Reversed.

---

[1]The following was said during the opening portion of the final argument:

[MR. CARLSON] Now you say to me, wait a minute. The bills are only $51,000 and I say to you, hey, look, these people could have paid these bills. These people could have acted in good faith. What really happened here is this man jerked these people around like you don't know. That is what happened here. (Tr.654-55).

* * *

They decided to put us up and to make us jump through the hoop, make us jump through those rings and *make us have to suffer*. Well, sometimes you have to pay the piper when you play games and that's what these folks did. They have played games and now they are going to pay the piper. (Tr.655).[e.s.]

* * *

Now, why should you do this? I mean, why did it get to the way it got? Let me explain what I believe the evidence has shown. Mr. Felkowitz here, *who is a small man*, not—I don't mean height-wise. *I mean character-wise. He is a small person*. And here he is working in a big family corporation with Al Nyman or Morton Nyman. You saw him. *He is a tough son of a gun. He is a bully. He has got his son Michael Nyman also working for the Company. It's a family-run company and Mr. Felkowitz wants to impress. He wanted to rise through the ranks. He wanted to become a big shot*, and so in 1989 he is given the responsibility for developing an international market.

Up to this point he has been in charge of the typical things such as the accounting and the computers and things like that. *But now it's sort of his big shot to break through*, to become in charge of the international development. And Italy is the first country he is going into. *If you read these letters you can see that this man was scared out of his mind that he was going to screw up*. He had these lawyers going all over the place. He had them doing all kinds of work. He was writing these partners. He was saying you've got to get back to me.(Tr.656-57).[e.s.]

* * *

Well, it is not the law firm's fault *that he is a scared little bunny. It's not their fault that he made them do all of this work. It's not their fault that Morton Nyman is a bully*. He did this because he was scared and that—

MR. RAAB: Excuse me. Where is the testimony about Morton Nyman being a bully?

THE COURT: They will determine what was said in the testimony. (Tr.657-58).[e.s.]

* * *

On rebuttal, counsel continued:

[MR. CARLSON] Number two, why did they have to go to Legal Guards? Why did they have to find a guy at $275 an hour? The answer is because they couldn't find anybody in Miami who is a real lawyer that practices international law that would come in and substantiate this. They had to go to Tampa, Florida, to find some guy and the only guy they could find is one who expected $275 an hour from them to come up with the ridiculous figure like this. When he said that figure, I wanted to say, are you out of your mind? So it's off the wall, it's ridiculous. They are that kind of company. What they are hoping you will do is split the difference. That is what they are hoping. *They get some jerk to come in and give you a low ball hoping you people will try to split the difference in between*. Don't do it. (Tr.683-84).[e.s.]

* * *

Another letter mentioned that they billed $2,000. They are spending a lot of money. And what happens? Nothing happened. It got busted, if you will. The transaction never went forward. So why haven't they paid the legal fees? Because they already spent a ton a money. *They want to screw the lawyers. They are the easy ones to screw.*

One other point, I don't know if you picked this up. When I asked Mr. Felkowitz weren't you going to have to admit to being liable or accountable to a debt of $2 million to do the roll out for the advertising and things like that?

Hey, what he was saying was they were going to form a shell corporation that was going to take on this debt if the business folded and that is what his attitude has been. *You come over to the United States and sue me. Well, that is what we had to do. That is what we did and that is why I don't want there to be any reduction*. Yes, he charged one hour to prepare the bill. It was $200. Ordinarily we would say wipe it off, but I don't want you to wipe it off. (Tr.685-86).[e.s.]

[2]We find no other harmful error.

* * *

Criminal law—Tampering with evidence—No error to dismiss charge of tampering with physical evidence based on defendant swallowing what appeared to be loose cocaine rocks when officer shouted "police"—Defendant did not tamper with evidence because he was not under arrest and he did not know that a law enforcement officer was about to instigate an investigation

THE STATE OF FLORIDA, Appellant, vs. DARREL JENNINGS, Appellee.3rd District. Case No. 94-617. Opinion filed December 14, 1994. An Appeal from the Circuit Court for Dade County, W. Thomas Spencer, Judge. Counsel: Robert A. Butterworth, Attorney General, and Lucrecia R. Diaz, Assistant Attorney General, for appellant. Bennett H. Brummer, Public Defender, and Louis Campbell, Assistant Public Defender, for appellee.

(Before BASKIN, JORGENSON, and GERSTEN, JJ.)

(PER CURIAM.) The State appeals the dismissal of a charge of tampering with physical evidence in violation of section 918.13, Florida Statutes (1993). The charge was dismissed pursuant to Fla. R. Crim. P. 3.190(c)(4), and the State did not contest the underlying facts. We affirm.

According to the undisputed facts, the defendant was observed holding what law enforcement officers believed was a marijuana cigarette. As one of the officers approached the defendant, the officer also saw what appeared to be loose cocaine rocks in the defendant's palm. When the officer shouted "police," the defendant put the alleged cocaine rocks into his mouth and swallowed. The defendant was then arrested but the objects he swallowed were never recovered.

The trial court found the facts were insufficient to establish that the defendant's conduct violated section 918.13. That section provides:

> 918.13. Tampering with or fabricating physical evidence
>
> (1) No person, knowing that a criminal trial or proceeding or an investigation by a duly constituted prosecuting authority, law enforcement agency, grand jury or legislative committee of this state is pending or is about to be instituted, shall:
>
> (a) Alter, destroy, conceal, or remove any record, document, or thing with the purpose to impair its verity or availability in such proceeding or investigation.

The State argues that the defendant's actions were an attempt to alter or impair the availability of the evidence.

The defendant in this case did not tamper with evidence because he was neither under arrest nor did he know that a law enforcement officer was about to instigate an investigation. The defendant was not under arrest because the officer had not even reached the defendant before he put the alleged cocaine rocks in

his mouth. *Jones v. State*, 590 So. 2d 982 (Fla. 1st DCA 1991); *Thomas v. State*, 581 So. 2d 993 (Fla. 2d DCA 1991); *see also*, *Brown v. State*, 575 So. 2d 1360 (Fla. 3d DCA 1991) ("Once the officer had taken the evidence into his custody, the defendant was not entitled to remove it."). Additionally, shouting "police," without more, was insufficient to put the defendant on notice that an investigation was about to be instigated. *Cf. Hayes v. State*, 634 So. 2d 1153 (Fla. 4th DCA) (defendant convicted of tampering with evidence when he dropped baggie containing crack cocaine in a drainage outlet while being pursued by police), *rev. denied*, No. 83,942 (Fla. Aug. 30, 1994). To the extent our decision conflicts with *Hayes*, we certify conflict to the Florida Supreme Court.

The time of arrest distinguishes this case from two others where our sister courts have determined that defendants who attempted to swallow alleged cocaine rocks after their arrest had committed the crime of tampering with evidence. *McKenzie v. State*, 632 So. 2d 276, 277 (Fla. 4th DCA 1994); *McKinney v. State*, 640 So. 2d 1183 (Fla. 2d DCA 1994).

We affirm the dismissal of the tampering with evidence charge but certify any conflict with *Hayes* to the Florida Supreme Court.

AFFIRMED.

* * *

STATE vs. SORDO. 3rd District. #94-840. December 14, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *Genden v. Fuller*, ___ So. 2d ___ (Fla. Case no. 83,030, opinion filed, November 3, 1994) [19 FLW S559]; *State v. Agee*, 622 So. 2d 473 (Fla. 1993).

RODRIGUEZ vs. STATE. 3rd District. #94-579. December 14, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1987); *Sigaray v. State*, 549 So. 2d 1136 (Fla. 3d DCA 1989).

MOTYCZKA vs. ALLSTATE INSURANCE COMPANY. 3rd District. #93-703. December 14, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *Bould v. Touchette*, 349 So. 2d 1181, 1186 (Fla. 1977); *Walker v. Senn*, 376 So. 2d 410, 411-12 (Fla. 1st DCA 1979), *cert. denied*, 388 So. 2d 1119 (Fla. 1980).

LESSER vs. LESSER & SONS, INC. 3rd District. #94-657. Opinion filed December 14, 1994. Appeal from the Circuit Court for Dade County. Affirmed. § 733.601, Fla. Stat. (1991); *Griffin v. Workman*, 73 So. 2d 844, 846 (Fla. 1954); *Kelner v. Woody*, 399 So. 2d 35, 37 (Fla. 3d DCA 1981).

HARRIS vs. STATE. 3rd District. #93-1860. December 14, 1994. Appeal from the Circuit Court for Dade County. Affirmed. *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

* * *

Criminal law—Costs—Order awarding costs of prosecution to state reversed where record failed to show that state proved amount of prosecution costs

GEORGE STANSBURY, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 94-0861. L.T. Case No. 93-1207. Opinion filed December 14, 1994. Appeal from the Circuit Court for Indian River County; James B. Balsiger, Judge. Counsel: Richard L. Jorandby, Public Defender, and Karen E. Ehrlich, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee.

(GUNTHER, J.) Appellant, George Stansbury, defendant below (Defendant), appeals a final order awarding $200.00 in costs of prosecution to the state. We reverse.

The State concedes that it has the burden of demonstrating the amount of costs incurred in the prosecution of a defendant pursuant to section 939.01(6), Florida Statutes (1993). We have held that when the record reflects that no evidence was presented regarding the amount spent on prosecuting a defendant and no testimony was taken regarding the defendant's ability to pay, the trial court erred in assessing prosecution costs. *Wheeler v. State*, 635 So. 2d 140 (Fla. 4th DCA 1994). Moreover, if costs of prosecution are based on section 939.01, Florida Statutes (1993), then the state has the burden of proving the amount of these costs. *Sutton v. State*, 635 So. 2d 1032, 1033 (Fla. 2d DCA 1994).

In the instant case, the record fails to show any evidence suggesting that the state carried and met its burden of proving the amount of prosecution costs. Furthermore, the state concedes this lack of demonstrating the amount of costs.

Accordingly, we reverse the trial's order and remand this case for determination of costs pursuant to section 939.01, Florida Statutes (1993). (HERSEY, and POLEN, JJ., concur.)

* * *

Criminal law—Restitution order entered without support in oral record and without notice of hearing quashed

EARSLEY WILCHER, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 93-3478. L.T. Case No. 92-22498CF10B. Opinion filed December 14, 1994. Appeal from the Circuit Court for Broward County; Jeffrey E. Streitfeld, Judge. Counsel: 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.

(PER CURIAM.) We quash the restitution order entered incident to Appellant's sentence. The restitution was ordered without support in the oral record and without notice of hearing. *E.g. Denmark v. State*, 588 So. 2d 324 (Fla. 4th DCA 1991).

In all other respects, the final judgment and sentence imposed are affirmed. (STONE, FARMER and STEVENSON, JJ., concur.)

* * *

Dissolution of marriage—No error to deny motion to enforce final judgment regarding insurance company's post-judgment delivery of medical expenses reimbursement check to husband instead of wife

MARY LOU JACOBSON, Appellant, v. BENJAMIN JACOBSON, JR., Appellee. 4th District. Case No. 93-1725. L.T. Case No. 89-23344 35. Opinion filed December 14, 1994. Appeal from the Circuit Court for Broward County; Larry Seidlin, Judge. Counsel: Robert L. Bogen of Law Offices of Alan Jay Braverman, P.A., Boynton Beach, for appellant. S. Robert Zimmerman, Pompano Beach, Edna L. Caruso and Barbara J. Compiani of Caruso, Burlington, Bohn & Compiani, P.A., West Palm Beach, for appellee.

(PER CURIAM.) This is an appeal from an order denying appellant-former wife's motion to enforce final judgment.

After final judgment was entered in the dissolution action appellant filed a claim against an insurance company for reimbursement of medical expenses. The company sent the reimbursement check to appellee and the funds were placed (and remain) in the trust account of appellee's attorney. This gave rise to the motion to enforce. There is not one scintilla of evidence to support appellee's claim to these funds. Therefore, to the extent the trial court indicated at the hearing that his ruling was to be on the merits and in favor of appellee, it was in error. However, the order on appeal simply denies the motion. Because this is not a situation encompassed either by the rule in such cases as *Covin v. Covin*, 403 So. 2d 490 (Fla. 3d DCA 1981), or that expressed in our case of *Brandt v. Brandt*, 525 So. 2d 1017 (Fla. 4th DCA 1988), the fund having come into legal existence post-final judgment, the trial court had no jurisdiction to rule on the merits of the issue presented by the movant (appellee). Accordingly, we affirm. *See Applegate v. Barnett Bank*, 377 So. 2d 1150 (Fla. 1979).

AFFIRMED. (HERSEY, STONE and POLEN, JJ., concur.)

* * *

Criminal law—Sentencing—Sentencing of defendant upon revocation of probation and for offense of false imprisonment which served as basis for revocation—Error to increase guidelines sentence for false imprisonment by one cell based on revocation of probation—Rules do not allow subsequent offense to be bumped up because of previous violation of probation—Sentence for false imprisonment was departure sentence unaccompanied by written reasons—Written order of probation revocation reversed and remanded for conformance to oral pronouncement regarding offense which constituted violation of probation

WILBERTO Q. GALLETTI, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 94-0156. L.T. Case Nos. 93-35CFC and 93-590CFA. Opinion filed December 14, 1994. Appeal from the Circuit Court for Martin County; Larry Schack, Judge. Counsel: Richard L. Jorandby, Public Defender, and Marcy K. Allen, 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.