FILED
SID J. WHITE
MAY 22 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ROBERT DUNHAM,

Petitioner,

vs.

CASE NO. 87,269

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(407) 355-7600

TATJANA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS i

AUTHORITIES CITED ii

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 6

POINT I

MR. DUNHAM'S SENTENCE TO A PRISON TERM UNDER THE SENTENCING GUIDELINES FOLLOWED BY HABITUAL OFFENDER PROBATION WAS AN ILLEGAL HYBRID SENTENCE WHICH WAS WITHOUT STATUTORY AUTHORITY AND BARRED BY THE DOUBLE JEOPARDY CLAUSE. 6

POINT II

THE TRIAL COURT ERRED IN REVOKING MR. DUNHAM'S PROBATION BASED ON HEARSAY. 11

CONCLUSION 14

CERTIFICATE OF SERVICE 14

AUTHORITIES CITED

CASES — PAGE

Alloway v. State, 593 So. 2d 1193 (Fla. 1st DCA 1992) 7

Brown v. State, 521 So. 2d 110, 112 (Fla.), cert. denied 488 U. S. 912, 109 S. Ct. 270, 102 L. Ed. 2d 258 (1988) 9

Burdick v. State, 594 So. 2d 267 (Fla. 1992) 7

Burrell v. State, 610 So. 2d 504 (Fla. 2d DCA 1992) 8

Burrell v. State, 612 So. 2d 594 (Fla. 2d DCA 1992) 6, 8, 10

Chavous v. State, 597 So. 2d 943 (Fla. 2d DCA 1992) 11

Cohen v. State, 365 So. 2d 1052 (Fla. 4th DCA 1978) 11

Combs v. State, 351 So. 2d 1103 (Fla. 4th DCA 1977) 11

Davis v. State, 587 So. 2d 580 (Fla. 1st DCA 1991) 9

Davis v. State, 623 So. 2d 547 (Fla. 2d DCA 1993) 6

Disbrow v. State, 642 So. 2d 740 (Fla. 1994) 9

Donald v. State, 562 So. 2d 792, 795 (Fla. 1st DCA 1990), review denied, 576 So. 2d 291 (Fla. 1991) 9

Grimes v. State, 616 So. 2d 996 (Fla. 1st DCA 1993) 9

King v. State, 597 So. 2d 309 (Fla. 2d DCA), rev. denied, 602 So. 2d 942 (Fla. 1992) 7

Lambert v. State, 545 So. 2d 838 (Fla. 1989) 9

Lira v. State, 579 So. 2d 781
(Fla 3d DCA 1991) 11

North Carolina v. Pearce, 395 U. S. 711,
89 S. Ct. 2072,
23 L. Ed. 2d 656 (1969) 9

Pankhurst v. State, 632 So. 2d 142
(Fla. 2d DCA 1994) 6

Perkins v. State, 616 So. 2d 580
(Fla. 2d DCA 1993) 10

Poore v. State, 531 So. 2d 161
(Fla. 1988) 9

Ricardo v. State, 608 So. 2d 93
(Fla. 2d DCA 1992) 7

Rock v. State, 584 So. 2d 1110
(Fla. 1st DCA 1991) 11

Shaw v. State, 637 So. 2d 254
(Fla. 1994) 6

Watkins v. State, 622 So. 2d 1148
(Fla. 1st DCA 1993) 10

Wemmet v. State, 567 So. 2d 882
(Fla. 1990) 6

Whitehead v. State, 498 So. 2d 863
(Fla. 1986) 7

Wright v. State, 348 So. 2d 412
(Fla. 2d DCA 1977) 11

Wright v. State, 586 So. 2d 1024
(Fla. 1991) 10

Wyche v. State, 576 So. 2d 884
(Fla. 1st DCA 1991) 7

FLORIDA STATUTES

Section 775.084(4)(a) 7

Section 775.084(4)(c) 8

Section 775.084(4)(e) 7

FLORIDA RULES OF CRIMINAL PROCEDURE

3.701(b) 6

3.701(d)(14) 8

3.800(a) 10

PRELIMINARY STATEMENT

Petitioner, Robert Dunham, was the defendant in the trial court and the appellant before the Fourth District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and Appellee on appeal. The parties will be referred to by name.

The following symbol will be used:

"R"	Record on appeal
"SR"	Supplemental record on appeal

STATEMENT OF THE CASE AND FACTS

Mr. Dunham was informed against in Case No. 89-21360 for kidnapping with a firearm (Count I), burglary of a conveyance while armed (Count II), and robbery with a firearm (Count III) (R 147). Mr. Dunham was also charged, in Case No. 90-21805, with possession of a firearm by a convicted felon (Count I), carrying a concealed firearm (Count II), possession of cocaine (Count III), and resisting arrest without violence (Count IV) (R 200). A jury trial on these charges ended when the jury could not reach a verdict (R 212-215).

The State noticed its intent to seek Mr. Dunham's classification as a habitual felony offender in Case No. 89-21360 (R 153).

Mr. Dunham subsequently entered pleas of guilty to kidnapping, robbery and burglary, as included within the allegations of the information in Case No. 89-21360, and to each of the charges made in Case No. 90-21850, with the understanding that he would receive concurrent sentences in each case of five years in prison to be followed by five years probation on each count (R 175, 218). If he violated his probation, he would be sentenced as a habitual offender (R 175, 218, SR 6-7).

On March 19, 1992, Mr. Dunham was adjudged guilty of kidnapping, burglary and robbery in Case No. 89-29360 (R 177) and of possession of a firearm by a convicted felon, carrying a concealed firearm, possession of cocaine, and resisting arrest without violence in Case No. 90-21850 (R 236). He was sentenced to concurrent terms on each count of five years in prison to be followed by five years probation (R 164-172, 181-182, 223-224, 225-230), except that the sentences for Counts II and IV in Case No. 90-21850 were each to five years in prison only (R 228-235). Neither the oral sentencing (SR 10-11) nor the written sentences reflected that Mr. Dunham was being sentenced as a habitual offender.[1] This sentence was a

---

[1]In a separate order, the trial court classified Appellant as a habitual offender, and "reserve[d] the right to sentence him to a prison term as a habitual felony offender,... should he violate the terms and conditions of his probation." (R 173-174, 234-235).

downward departure from the guidelines-recommended sentence range of twenty-two to twenty-seven years incarceration (R 163, 219). The trial court noted, as its reasons for the departure, that the State had witness problems in the case, that there was a potential motion to suppress evidence, and that a jury deliberating in the case had hung (R 163).

On January 13,1993, an affidavit of probation violation was filed, alleging that Mr. Dunham had moved without consent (paragraph 1) and had failed to report as ordered in December, 1992 (Paragraph 2) (R 184, 238).

At the hearing on Mr. Dunham's violation of probation, a probation officer testified that she had advised Mr. Dunham of the conditions of his probation on December 3, 1992 (R 16), a day or two after his release from prison (R 25). Mr. Dunham's case was then assigned to a different probation officer (R 26, 33), who testified that she never saw him or received any written reports from him (R 33, 36). When she went to the address Mr. Dunham had given as his residence, she met someone named "Ike" who told her that he did not know Mr. Dunham (R 38-39). The probation officer said she telephoned Mr. Dunham's mother, who told her that Mr. Dunham did not live there but called often (R 37). Mr. Dunham's hearsay objection to this testimony was overruled (R 37-38, 39, 40), as was his motion to strike the hearsay testimony (R 57-58). The probation officer testified that she told someone who said she was Mr. Dunham's girlfriend that he needed to report to the officer (R 40-41). Mr. Dunham's sister was also given this message (R 41).

A clinical psychologist testified in Mr. Dunham's behalf that he was using drugs at the time of the alleged violations of probation, and "I don't feel he could in any way have been responsible for making decisions and for knowing the difference between right and wrong. I think his thinking was clouded, I think his judgment was nonexistent, and his behavior was generally bizarre." (R 69). Mr. Dunham did not, in the psychologist's opinion, know the difference between right and wrong (R 75). Mr. Dunham testified that he was living with his mother and father, but sometimes stayed with his sister (R 78-79). He had just gotten a roofing

job, which he would lose if he took time off to personally report to the probation office (R 81). When he called the probation office to report, he was told that his supervisor was not there (R 82). So, he planned to report personally the next month (R 82).

At the conclusion of the hearing, the trial judge found that Mr. Dunham had violated his probation, and his probation was revoked (R 199, 98). Mr. Dunham was sentenced as a habitual felony offender, pursuant to a newly-scored[2] sentencing guidelines scoresheet which recommended a range of twenty-seven to forty years in prison and permitted a range of twenty-two to life in prison (R 187, 244), to life in prison on Count I in Case No. 89-21360, with concurrent terms of thirty years each in Counts II and III in that case (R 188-196) and on Count I in Case No. 90-21805 (R 245-247). The trial court recommended that he receive drug treatment at the Tier program while incarcerated (R 196). The Department of Corrections was directed to compute the credit Mr. Dunham was to receive for time spent in its custody. The credit for 630 days served ordered in Mr. Dunham's sentence included only credit for time served in the county jail (R 196, 247).

On direct appeal, the Fourth District Court of Appeal affirmed the orders revoking Mr. Dunham and sentencing him as a habitual offender. This Court accepted jurisdiction of this cause on April 24, 1996.

---

[2]Appellant's prior record score was increased from 145 to 221 points. See, Roberts v. State, 644 So. 2d 81 (Fla. 1994).

SUMMARY OF THE ARGUMENT

1. Mr. Dunham was originally sentenced to a prison term imposed under the sentencing guidelines, followed by probation which, if violated, would result in a habitual offender sentence. This combination of sentencing guidelines and habitual offender sanctions was illegal. It contravenes the statutory separation of the two types of sanctions, each of which is assigned different spheres of operation which the court below has improperly confused. It also results in a double jeopardy violation by sentencing the defendant twice, once under the sentencing guidelines and again under the habitual offender statute, for the same offense.

2. The hearsay evidence relied on by the State to establish its allegations that Mr. Dunham violated his probation was inadequate to the purpose and insufficient to support the order of revocation of probation.

ARGUMENT

POINT I

MR. DUNHAM'S SENTENCE TO A PRISON TERM UNDER THE SENTENCING GUIDELINES FOLLOWED BY HABITUAL OFFENDER PROBATION WAS AN ILLEGAL HYBRID SENTENCE WHICH WAS WITHOUT STATUTORY AUTHORITY AND BARRED BY THE DOUBLE JEOPARDY CLAUSE.

The Second District Court of Appeal has consistently held that a trial judge is without power to sentence a defendant to a hybrid split sentence, with eligibility for gain time on the incarceration portion but with the probation portion retaining habitual offender treatment. Shaw v. State, 637 So. 2d 254 (Fla. 2d DCA 1994). A defendant must be treated as a habitual offender for both portions of his split sentence, or for neither. Pankhurst v. State, 632 So. 2d 142 (Fla. 2d DCA 1994); Burrell v. State, 612 So. 2d 594 (Fla. 2d DCA 1992). Where the defendant was not habitualized on the incarceration portion of his split sentence, a trial court errs in treating him as a habitual offender upon revocation of his probation. Pankhurst v. State, 632 So. 2d 594; Davis v. State, 623 So. 2d 547 (Fla. 2d DCA 1993).

What is the legal basis for these holdings? By its adoption of the sentencing guidelines, Florida has expressed its determination that equally placed defendant will be treated equally. R. Crim. P. 3.701(b).[3] Departure from the guidelines recommendation is not favored, but only intended to apply when extraordinary circumstances exist to reasonably justify aggravating the sentence. Wemmet v. State, 567 So. 2d 882 (Fla. 1990).

The habitual offender statute arises from quite different concerns. In enacting this statute, the legislature has expressed its concern that qualified offenders be shut away for

---

[3] "The purpose of the sentencing guidelines is to establish a uniform set of standards to guide the sentencing judge in the sentence decision-making process. The guidelines represent a synthesis of current sentencing theory and historic sentencing practices throughout the state. Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense-related and offender-related criteria and in defining their relative importance in the sentencing decision...."

extended period of time. Thus, depending on the number and kind of the defendant's prior convictions, the maximum permissible term of his sentence is generally doubled, Section 775.084(4)(a), Fla. Stat. (1993) and he is not eligible to receive gain time. Section 775.084(4)(e), Fla. Stat. (1993).

The sentencing guidelines and the habitual offender statute operate in completely separate spheres. One is not to be confused with the other, nor do they act in combination with each other. Thus, it has been held that an offense for which a defendant has been classified and sentenced as a habitual offender may not be scored as the primary offense when arriving at a guidelines sentence on other charges, Ricardo v. State, 608 So. 2d 93 (Fla. 2d DCA 1992); Alloway v. State, 593 So. 2d 1193 (Fla. 1st DCA 1992); Wyche v. State, 576 So. 2d 884 (Fla. 1st DCA 1991), and that while a judge may sentence a defendant either under the sentencing guidelines or as a habitual offender, he may not depart from the guidelines on the grounds that the defendant is a habitual offender. Whitehead v. State, 498 So. 2d 863 (Fla. 1986). Indeed, since Whitehead was decided, the legislature has made it clear that a sentence as a habitual offender is taken totally out of the guidelines:

> A sentence imposed under this section is not subject to s. 921.001....

Section 775.084(4)(e), Fla. Stat. (1993).

On the other hand, the mere fact that a defendant, by virtue of his prior record, meets the criteria for habitualization does not automatically require that sentence be imposed pursuant to the habitual offender statute. In Burdick v. State, 594 So. 2d 267 (Fla. 1992), this Court held that, although a trial court's *finding* that a defendant meets the qualifications of a habitual offender is virtually ministerial, given the requisite proof, see, King v. State, 597 So. 2d 309 (Fla. 2d DCA). rev. denied, 602 So. 2d 942 (Fla. 1992), the trial court nevertheless has *discretion* as to whether to impose a habitual offender sentence. Thus, the trial judge, having found a defendant to meet the qualifications of a habitual offender, may decide 1) to sentence

him to an enhanced term as a habitual offender; 2) to sentence him pursuant to the sentencing guidelines, without regard to the habitual offender statute; or 3) to sentence him as a habitual offender, but to a term of years less than the maximum provided by the habitual offender statute. Burrell v. State, 610 So. 2d 504, 596 (Fla. 2d DCA 1992). Each of these options is statutorily authorized, and each of them is a permissible alternative sanction. The middle option represents a choice to utilize the sentencing guidelines. The other two involve the habitual offender statute. None involves both the guidelines and habitual offender sentencing.

The disposition in the instant case did not represent any of these permissible options. Instead, it constitutes a *combination* of them, encompassing a guidelines prison sentence of five years in prison, which was *not* imposed pursuant to the habitual offender statute and for which he was eligible to receive gain time, to be followed by a term of "habitual offender probation," for which the penalty, if he violated, was sentencing as a habitual offender (R 164-172, 181-182, 223-224, 225-230). Mr. Dunham's sentence thus represents an attempt to punish him *both* pursuant to the sentencing guidelines *and* as a habitual offender: it is just the sort of hybrid sentence disapproved in Burrell.

This hybrid sentencing scheme is in contradiction to the habitual offender statute, which expressly provides that where the trial court makes a determination that it is not necessary to sentence the defendant as a habitual offender even though he meets the statutory qualifications for such a sentence, "sentence shall be imposed without regard to this section." Section 775.084(4)(c), Fla. Stat. (1993). It also ignores Fla. R. Crim. P. 3.701(d)(14), which provides: "The sentence imposed after revocation of probation or community control may be included within the original cell [of the guidelines range] or may be increased to the next higher cell [of the guidelines range] without requiring a reason for departure," and "Sentences imposed after revocation of probation or community control must be in accordance with the guidelines." There is no provision in this framework for the imposition of a habitual offender sentence.

This Court has clearly warned "that sentencing alternatives should not be used to thwart

the guidelines. Poore v. State, 531 So. 2d 161, 165 (Fla. 1988)." Disbrow v. State, 642 So. 2d 740 (Fla. 1994) [no exemption from guidelines "mentioned ... any place ... in section 948.01"]; Lambert v. State, 545 So. 2d 838 (Fla. 1989); Poore, 531 So. 2d at 165 ["the cumulative incarceration imposed after violation of probation always will be subject to any limitations imposed by the sentencing guidelines recommendation"]. The sentencing scheme imposed in the present case represents just such an impermissible attempt to circumvent the constraints of the sentencing guidelines by confusing the very different and differently-focussed sanctions represented by the sentencing guidelines and the habitual offender statute.

Not only is there no statutory authorization for the sentencing scheme employed in the instant case, but constitutional concerns also prohibit its utilization. When a trial judge exercises his discretion to determine that, although the defendant meets the criteria for habitualization, an enhanced sentence is nevertheless not appropriate, he has effectively *acquitted* the defendant of a habitual offender sentence. Davis v. State, 587 So. 2d 580, 581 (Fla. 1st DCA 1991); see, Brown v. State, 521 So. 2d 110, 112 (Fla.), cert. denied 488 U. S. 912, 109 S. Ct. 270, 102 L. Ed. 2d 258 (1988); Donald v. State, 562 So. 2d 792, 795 (Fla. 1st DCA 1990), review denied, 576 So. 2d 291 (Fla. 1991). The Double Jeopardy Clause protects against "multiple punishments for the same offense." North Carolina v. Pearce, 395 U. S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). Once the defendant has been acquitted of an enhanced sentencing provision, the prohibition against double jeopardy contained in the Florida and United States Constitutions protects him against the subsequent imposition of that harsher sentencing alternative.

Thus, in Grimes v. State, 616 So. 2d 996, 998 (Fla. 1st DCA 1993) (corrected opinion), the appellate court held

> [W]e find that the trial court elected not to categorize Grimes as an habitual offender, and that such election constituted a determination that may not now be revisited without treading on appellant's constitutional right to be free of facing double jeopardy. Further, under these cases, it is immaterial whether the

> trial court erroneously concluded that he could not sentence Grimes as an habitual offender.

This Court has reached a similar conclusion in related circumstances, finding that where it determines that a trial judge should have accepted the jury's recommendation of life imprisonment in a capital prosecution, the defendant must be deemed acquitted of the death penalty for double jeopardy purposes and may not be subjected to death sentence again on retrial. Wright v. State, 586 So. 2d 1024, 1032 (Fla. 1991).

Consequently, once Mr. Dunham was sentenced pursuant to the sentencing guidelines, the trial court was prohibited by the bar of jeopardy and the lack of statutory authority from sentencing him as a habitual offender at the same time.

Nor could Mr. Dunham's agreement to such a sentence as part of the plea negotiations in this case legitimize the illegal disposition. A defendant cannot, by his agreement to such a sentence, confer authority on the court to circumvent the law. Burrell v. State, 612 So. 2d 594. An illegal sentence may be challenged at any time. Fla. R.Crim.P. 3.800(a). Thus, where the defendant pled guilty to a habitual offender sentence, the appellate court was not precluded from reviewing the propriety of the sentence, since if the sentence was illegal, then the trial court had no authority to impose it, regardless of the plea. Watkins v. State, 622 So. 2d 1148 (Fla. 1st DCA 1993). And a defendant may appeal an illegal habitual offender sentence when he violates probation, even if he did not challenge his habitual offender status at the time he was placed on probation. Perkins v. State, 616 So. 2d 580 (Fla. 2d DCA 1993).

Therefore, the illegal hybrid sentence imposed in the instant case must be corrected by reversing the habitual offender sentence imposed after the revocation of Mr. Dunham's probation and remanding this cause for the imposition of a sentence pursuant to the recommendations of the sentencing guidelines.

POINT II

THE TRIAL COURT ERRED IN REVOKING MR. DUNHAM'S PROBATION BASED ON HEARSAY.

Although the evidentiary rules applicable to trial proceedings are somewhat relaxed at a hearing for revocation of probation, hearsay alone will never support a finding of violation and subsequent revocation. Lira v. State, 579 So. 2d 781 (Fla 3d DCA 1991); Cohen v. State, 365 So. 2d 1052 (Fla. 4th DCA 1978). Combs v. State, 351 So. 2d 1103 (Fla. 4th DCA 1977). Thus, a probation officer's testimony that she received a booking report indicating that the defendant had been arrested was hearsay, and revocation of the defendant's probation could not be based on this ground. Rock v. State, 584 So. 2d 1110 (Fla. 1st DCA 1991). Similarly, a probation officer's testimony supporting the admission of a laboratory report relating to the analysis of the defendant's urine sample was not sufficient to establish a violation of probation. Chavous v. State, 597 So. 2d 943 (Fla. 2d DCA 1992).

In the present case, Mr. Dunham was charged with violating his probation by moving without consent (paragraph 1) and failing to report as ordered in December, 1992 (Paragraph 2) (R 184, 238). Mr. Dunham's probation officer testified that Mr. Dunham's mother told her that Mr. Dunham did not live at the address he had given her, and that a person called "Ike", whom she met while at Mr. Dunham's mother's house, told her that he did not know Mr. Dunham (R 37-40). The probation supervisor's testimony regarding the statements purportedly made to her by third parties was obviously hearsay, Wright v. State, 348 So. 2d 412 (Fla. 2d DCA 1977) [manager of drug rehabilitation house tells probation officer that defendant left], yet the trial court overruled Mr.Dunham's objections to this testimony (R 37-38, 39, 40) and denied his motion to strike it (R 57-58). This was error, and since the inadmissible hearsay formed the only basis for the conclusion that Mr. Dunham had moved without his probation officer's permission, the trial court erred in denying Mr. Dunham's probation on this ground.

The Fourth District Court of Appeal refused to reverse the revocation of probation in

the present case, relying on Mr. Dunham's testimony at the hearing, which the district court believed was sufficient to support a finding that he had changed his residence without permission. Specifically, the district court relied on testimony it characterized as an insistence by Mr. Dunham "that he did reside at his mother's house, but that he also lived 'in the streets' and stayed with his sister or other women who he used to support his drug habit." This summary of purported testimony by Mr. Dunham is inaccurate, however. Rather, Mr. Dunham stated:

> Q Now, was it true that you would occasionally spend days away from that house or sleep elsewhere occasionally; is that correct?
>
> A When I live here sometimes I would go down to my sister's. She stay a block up the street from me.
>
> Q So if there were occasions when people came by your house and knocked on the door at the address you had you might not be there, you weren't there all the time?
>
> A Right.
>
> Q But you never changed your address?
>
> A No, sir, never changed addresses.

(R 79). Mr. Dunham further explained his drug habit:

> Q Did [your abuse of drugs] continue to escalate until the time of your arrest?
>
> A It progressed, you know, and it got to the point where I stopped working and I was like in the streets, you know, juggling rocks you know what I'm saying, to do my thing and using some young lady, you know what I'm saying, getting money that way, my way of supporting it.

(R 84). Thus, while Mr. Dunham admitted staying at his sister's house occasionally and staying in the streets to "juggle rocks," (i.e., sell drugs), he never said that he *lived* at his sister's house or in the streets or that he *lived* with the woman who he was using to support his drug habit. This distinction is crucial, since Mr. Dunham's testimony was the only non-hearsay basis for the district court's finding that the evidence adduced below was sufficient to support

a conclusion that Mr. Dunham violated his probation by moving his residence without permission. Thus, the condition of probation allegedly violated did not require Mr. Dunham to spend every night at his parents' house or to obtain permission from his probation supervisor whenever he left that home for an evening or two. Rather, it required Mr. Dunham to seek permission from his supervisor only if his residence, that is, his permanent place of abode, changed. And there was simply nothing in Mr. Dunham's testimony which supported a finding that he had changed his *residence*.

Consequently, Mr. Dunham's testimony added nothing to the hearsay evidence relied on by the State to support the trial court's finding that Mr. Dunham violated his probation. The order of probation revocation should, therefore, be reversed and this cause remanded with directions to reinstate Mr.Dunham on probation.

CONCLUSION

Based on the foregoing argument and the authorities cited, Mr. Dunham requests that this Court reverse the judgment and sentence below and remand this cause with such directions as it deems appropriate.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
Criminal Justice Building
421 3rd Street/6th Floor
West Palm Beach, Florida 33401
(407) 355-7600

TATJANA OSTAPOFF
Assistant Public Defender
Florida Bar No. 224634

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to GEORGINA JIMENEZ-OROSA, Assistant Attorney General, Office of the Attorney General, Third Floor, 1655 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2299, by courier this 20th day of MAY, 1996.

Of Counsel