IN THE SUPREME COURT OF FLORIDA

ROLAND DOBSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 87,356

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

SUSAN A. FAGAN
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ATTORNEY FOR PETITIONER

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STATE OF FLORIDA,	)	
	)	
Respondent.	)	

JURISDICTIONAL BRIEF OF PETITIONER

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by a information with sale of cocaine. (R 37) After a jury trial, the Petitioner was found guilty and the trial court filed, sua ssonte, written notice of its intention to seek habitual felony offender sentencing. (R 62-63) Appellant received a sentence of twelve years as a habitual felony offender, followed by five years of probation. (R 26-29, 108-112, 120-123, 124-125, 254-268)

Petitioner appealed and his judgment and habitual felony offender sentence were affirmed by the Fifth District Court of Appeal on January 5, 1995, based on the authority of its previously entered decision in Young v. State, 20 Fla. L. Weekly D2636 (Fla. 5th DCA, December 1, 1995). (Appendix 1) Young, supra, is currently pending review before this Court in case number 87,099. (Appendix 2) Petitioner's notice of seeking this Honorable Court's review was filed on February 5, 1996.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal's holding in this cause, affirming Petitioner's habitual felony offender judgment and sentence, is based upon the decision rendered in Youns v. State, 20 Fla. L. Weekly D2636 (Fla. 5th DCA December 1, 1995) which is currently pending review by this Court (S. Ct. No. 87,099). Under Jollie v. State, 405 So.2d 418 (Fla. 1981), this Court has jurisdiction to review a decision which relies on a separate decision currently pending before the Supreme Court of Florida.

ARGUMENT

THE DISTRICT COURT OF APPEAL'S DECISION RELIES DIRECTLY ON A DECISION WHICH IS CURRENTLY PENDING BEFORE THIS COURT, SPECIFICALLY, YOUNG V. STATE, 20 FLA. L. WEEKLY D2636 (FLA. 5TH DCA DECEMBER 1, 1995).

Petitioner was charged by information with sale of cocaine, under Section 893.13 (1)(a)(1), Florida Statutes (1991). (R 37) After proceeding to jury trial, Petitioner was found guilty of committing the offense and the trial court, sua sponte, filed written notice of its intention to seek habitual felony offender sentencing. (R 62-3) In its opinion affirming Petitioner's judgment and conviction, the Fifth District Court of Appeal's majority wrote:

> The habitual offender sentence is affirmed. Young v. State, 20 Fla. L. Weekly D2[6]36 (Fla. 5th DCA December 1, 1995)

Dobson v. State, 21 Fla. L. Weekly D96 (Fla. 5th DCA January 5, 1996).

As this Honorable Court held in Jollie v. State, 405 So.2d 418 (Fla. 1981):

> We thus conclude that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this court to exercise its jurisdiction.

Id at 420. Consequently, this Court has jurisdiction to review the decision rendered by the Fifth District court of Appeal in this cause due to the District Court's reliance as controlling

authority on its previously entered decision in Young v. State, 20 Fla. L. Weekly D2636 (Fla. 5th DCA December 1, 1995), which is currently pending review before this Court in case number 87,099.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and grant review of the Fifth District Court of Appeal's decision in this cause.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Susan A Fagan

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A, Butterworth, Attorney General, **210** N. Palmetto Avenue, Suite **447**, Daytona Beach, Florida 32114, by delivery to his basket at the Fifth District Court of Appeal; and by mail to the Roland Dobson, No. **586729**, Avon Park **C**. I., P. **O.** Box 1100, Avon Park, FL **33825-1100** on this 15th day of February, **1996.**

Susan A Fagan

SUSAN A. FAGAN
ATTORNEY FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

A.A., a child,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 83,125
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

JURISDICTIONAL BRIEF OF PETITIONER

A P P E N D I X

Appendix 1	Dobson v. State 21 Fla. L. Weekly D96 (Fla. 5th DCA January 5, 1996)
Appendix 2	Young v. State 20 Fla. L. Weekly D2636 (Fla. 5th DCA December 1, 1995)

law—Sentencing—No merit to argument that trial court erred in accepting pleas because defendant had been notified only that he might be considered for habitual offender sentencing—No merit to argument that trial court erred in initiating habitual offender sentencing procedure—Judgment to be corrected to reflect conviction of second degree rather than first degree grand theft—Probation—Conditions requiring defendant to pay for random drug testing and mental health counseling should have been orally pronounced—Where sentence is reversed because trial court failed to orally pronounce special conditions of probation which later appeared in the written sentence, trial court may reimpose the conditions at resentencing—Question certified—Conditionrequiring payment to First Step is stricken as unauthorized

TAURANCE YOUNG, Appellant, v. STATE OF FLORIDA. Appellee. 5th District. Case No. 95-303. Opinion filed December 1, 1995. Appeal from the Circuit Court for Volusia County, John W. Watson, III, Judge. Counsel: James B. Gibson. Public Defender, and Dan D. Hallenberg, Assistant Public Defender, Daytona Beach. for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Timothy D. Wilson, Assistant Attorney General, Daytona Beach. for Appellee.

(SHARP, W., J.) Young appeals from the sentences he received in four different criminal cases after having entered guilty pleas in all, and after being sentenced as an habitual felony offender. On appeal, he argues the trial court erred in accepting his pleas because he was not notified he would be considered for a habitual offender sentencing, and because the trial judge erred in initiating the habitual offender sentencing procedure pursuant to section 775.08401, Florida Statutes (1993). We find no merit in either of these two arguments, but we agree with appellant that he is entitled to relief on three other points he raised: a discrepancy as to whether Young pled guilty to a first or a second degree grand theft charge in one case; imposing special conditions of probation which were not orally pronounced at sentencing; and imposing as a special condition ofprobation payment of money to First Step of Volusia County, Inc.

The record shows in this case that the trial court accepted Young's guilty pleas in four criminal cases involved in this proceeding. Case No. 94-31931, grand theft and conspiracy to commit grand theft (§ 812.014, Fla. Stat. (1993)); Case No. 94-31038, grand theft of the second degree (§ 812.014, Fla. Stat. (1993)); Case No. 94-32941, unlawful sale or delivery of a controlled substance (§ 817.563, Fla. Stat. (1993)); and Case No. 94-30589, battery (§ 784.045, Fla. Stat. (1993)). Young had signed written plea agreements in each case. All but the battery case contained statements that Young could be considered for habitual offender sentences if appropriate, and set out the potential maximum sentence for each crime, if he were to be sentenced in that manner.

At the plea hearing the trial judge asked Young if he understood the plea agreements. and if he had been advised by counsel as to their content. He responded affirmatively. The judge then asked Young:

> Do you understand that as a result of these pleas, that a proceeding can be set up by the Court or requestedby the state to determine whether or not you have two or more felony convictions, which would classify you as a habitual offender? And that if, in fact, it is shown that you do have the requisite felony convictions;" that you could be determined and would be determined to be a habitual felony offender, in which event, those sentencing exposures that 1have already explained to you would double ?

Young again responded in the affirmative. The judge went through each offense and possible sentence, asking Young if he understood his sentence could be doubled in each case, if he were habitualized. Young responded "Yes. Sir." The court also explained that if habitualized, Young would receive no basic gain time.

Further, at the sentencing hearing, when defense counsel raised an objection to the sentences, the court asked:

> Are you claiming that the defendant has not been advised of the habitualization offender sentencing exposure by you in connection with you explaining the possible consequences of his plea prior to the court accepting the plea?

Defense counsel said "No, Sir." In fact defense counsel agreed with the trial court that he had "explained to him (Young) thoroughly that the Court could find him to be a habitual offender and would set a hearing to make a determination in that regard and if he, in fact, had two or more prior felony convictions, that he would be found by the Court to be a habitual felony offender and may or may not receive sentence to an extended term.. .."

Young argues that a defendant must be notified that in fact the state or court intends to seek habitual offender sentencing for that defendant before a plea of guilty can be accepted. Notification that habitualization theoretically or possibly may be sought is not sufficient. However, the Florida Supreme Court has recently clarified that the kind of notice given in this case is legally sufficient. *State v. Blackwell,* 661 So. 2d 282 (Fla. 1995); *Gibson v. State, 660 So,* 2d 298 (Fla. 5th DCA 1995).

Young also argues that the trial court could not, on its own initiative, notify him that it would hold a hearing to determine if he was an habitual felony offender, pursuant to section 775,084. The 1993amendment to this statute requires the state attorney in each judicial circuit to adopt uniform criteria to be used in determining if an offender should be sentenced as an habitual offender, and that if the criteria are deviated from in any case, a written ,explanation must be filed in the case by the state attorney.' The appellant takes the position that under the amended statute, *only* the state attorney *can* initiate habitual offender proceedings.

We disagree. The amended statute does not preclude the trial judge from initiating a proceeding to sentence a person as an habitual felony offender. The requirements in the statute, which were added by the amendment, to adopt uniform criteria for eligibility for habitual offender sentencing, and to apply them uniformly were designed to ensure that the state attorney fairly and impartially applies the habitual offender statute. But it does not suggest that the trial judge may not initiate the proceeding. We held that a trial judge has this power under the earlier statute? The amendment appears to have left this power intact.

Both Young and the state agree that the record in this case shows that in Case 94-31038 Young pled guilty to a second degree grand theft charge, However, he was adjudicated guilty and sentenced to a first degree grand theft charge in that case. We agree that the judgment should be corrected on that point. However, the sentence need not be modified because Young was properly sentenced as an habitual offender for that offense to a term of fifteen years in the Department of Corrections, followed by five years on probation.

Young also argues that the trial court improperly imposed conditions of probation in Cases 94-31038 and 94-31931. In these cases *the* trial court imposed written conditions of probation requiring him to pay for random drug testing and mental health counseling, which it did not orally announce at sentencing. The requirement that a defendant pay for such testing *is* not authorized by section 948.03(1)(k), Florida Statutes (Supp. 1994), and as such constitutes a special condition of probation, which must be orally announced at sentencing. *See* Luby *v. State, 648 So.* 2d 308 (Fla. 2d DCA 1995). Under these circumstances, the practice of this district is to remand to the trial court, to permit it to resolve the discrepancy between the written record and the record of the oral pronouncement. If these conditions are to be imposed, the court must make its intention known to the appellant, and he must be afforded an opportunity to object. *Justice v. State, 658* So. 2d 1028(Fla. 5th DCA 1995).However, *we* certify the same question to the Florida Supreme Court, in this case as in *Justice:*

> WHERE A SENTENCE IS REVERSED BECAUSE THE TRIAL COURT FAILED TO ORALLY PRONOUNCE CERTAIN SPECIAL CONDITIONS OF PROBATION WHICH LATER APPEARED IN THE WRITTEN SENTENCE MUST

THE COURT SIMPLY STRIKE THE UNANNOUNCED CONDITIONS, OR MAY THE COURT ELECT[1] TO REIMPOSE THOSE CONDITIONS AT RESENTENCING?

We strike the special condition of probation in Case 94-31038 that requires Young to pay $60.00 to First Step of Volusia County, Inc., as unauthorized. *Tibero v. State; 646 So.* 2d 213 (Fla. 5th DCA 1994).

AFFIRMED in part; REMANDED for Resentencing in Cases 94-31038 and 94-31931; Special Condition of Probation in Case 94-31038 **STRICKEN. (PETERSON, C.J.,** concurs. HARRIS, J., concurs specially **with** opinion.)

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[1]Specifically, section 775.08401 provides;

The state attorney in each judicial circuit shall adopt uniform criteria to be used in determining if an offender is eligible to be sentenced as a habitual offender or a habitual violent felony offender. The criteria shall be designated to ensure fair and impartial application of the habitual offender statute. A deviation from this criteria must be explained in writing, signed by the state attorney, and placed in the case file maintained by the state attorney. A deviation from the adopted criteria is not subject to appellate review.

[2]*Turcotte v. State,* 617 So. 2d 1164 (Fla. 5th DCA 1993); *Toliver v. State,* 605 So. 2d 477 (Fla. 5th DCA 1992), *rev. denied,* 618 So. 2d 212 (Fla. 1993).

(HARRIS, J., concurring specially.) I concur with Judge Sharp's handling of the *Ashley* issue relating to pre-plea notice of intent to habitualize. Young contends that the notice that he might possibly be habitualized if he qualifies as an habitual offender which was contained in his plea form was insufficient Ashley notice. His position, of course, is based on the statement in Ashley:

> Consistent with this analysis under rule 3.172, the relevant portion of the habitual offender statute states unequivocally that before a defendant may enter a plea or be sentenced he or she must be given written ***notice of intent to habitualize . . .***

Ashley v. State, 614 *So.* 2d at **489-90** (emphasis added).

It is Young's position that the supreme court's use of the term "intent to habitualize" implies that the defendant has been determined to possess the requisite record and that someone, the court or the State, actually has decided to pursue habitual sentencing. Since the statute does not contemplate that every felon who possesses a qualifying record will be sentenced as an habitual offender, Young urges that merely telling him that the court *might* conduct such a sentencing *if* he qualifies as an habitual offender did not meet the express requirement of Ashley that he be told, prior to plea, that he would be exposed to habitualization. This court was also confused by Ashley. See *Thompson v. State, 638 So.* 2d 116 (Fla. 5th DCA 1994), *quashed*, 20 Fla. L. Weekly S354 (Fla. July 20, 1995).

However, as indicated in the majority, the supreme court has now held in ***State v.*** Blackwell, *20* Fla. L. Weekly S354 (Fla. July 20. 1995), that notice to the defendant that he might possibly be habitualized is the legal equivalent of giving him notice of intent to habitualize.

But there remains a troubling aspect of habitualization. Who is to decide, the court or the State, which of the many eligible felons will be singled out for habitualization?

In ***King v. State, 557 So.*** 2d 899 (Fla. 5th DCA 1990), ***rev. denied,*** **564 *So.* 2d 1086** (Fla. 1990), we held in response to King's claim that section **775.084 was** unconstitutionally vague because it did not provide who should decide which, qualified candidates should be habitualized that either the State or the court could initiate such classification because "there is nothing in the statute to suggest that the legislature intended otherwise."

That was true in 1990. It was also true in 1992 when we decided Toliver ***v. State, 605*** So.2d **477** (Fla. 5th DCA 1992), rev. ***denied,*** **618** So.2d **212** (Fla. 1993), and in May, 1993 when we decided ***Turcotte v. State,*** 617 So.2d 1164 (Fla. 5th DCA 1993). However, effective June **17, 1993,** the legislature enacted section **775.08401**:

> ***Habitual offenders and habitual violent felony offenders: eligibility criteria.*** The state attorney in each judicial circuit shall adopt uniform criteria to be used in determining if an offender is eligible to be sentenced as a habitual offender or a habitual violent felony offender. The criteria shall be designed to insure fair and impartial application of the habitual offender statute. A deviation from this criteria must be explained in writing, signed by the state attorney, and placed in the case file maintained by the state attorney. A deviation from the adopted criteria is not subject to appellate review.

By the enactment of the statute, the legislature recognized that since every felon who has a record that would otherwise qualify for habitual treatment will not, and should not, be habitualized, there must be some standard (at least within any particular circuit) on which to base a sentencing decision. By placing the obligation on the state attorney to develop and maintain the appropriate criteria, in my view, the legislature has now expressed an intent that the separate proceedings required by section **775.084(3)** must be invoked by, and only by, the office of the state attorney. Otherwise the purpose of such section can be avoided by merely deferring to the sentencing philosophy of each individual judge. Bid &helegislature intend that a judge could sentence one as an habitual offender who would not be so qualified under the criteria established by the state attorney?'

This court raised this issue in ***Santoro v. State,*** **644 *So.*** 2d ***585,586*** n. **4** (Fla. **5th** DCA 1994). Our opinion in ***Santoro*** was quashed by the supreme court in ***State v. Santoro. 657 So.*** 2d 1161 (Fla. 1995), based on ***State v.*** Blackwell, **20** Fla. L. Weekly **S354** (Fla. July 20, 1995). However, this particular issue was not addressed in the ***Blackwell*** opinion. I suggest that the question of whether the trial court retains the authority to initiate habitual sentencing consideration be added to the certified question herein.

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[1]I recognize that another panel of this court in *Kirk v. Stare,* No. 94-2089 (Fla. 5th DCA Dec. 1, 1995) [20 Fla. L. Weekly D2621], released on the same date as this opinion, holds that the trial judge continues to have the authority to initiate habitual sentencing even if the state attorney, based on approved criteria, elects not to request such sentence.

* * *

Criminal law—Sentencing—Correction—Credit for time served—Incentive gain time

JOHN E. BAXN, Appellant. v. STATE OF FLORIDA. Appellee. 2nd District. Case No. 95-03600. Opinion filed December 1, 1995. Appeal pursuant to Fla. R. App. P. 9.140(g) from the Circuit Court for Pasco County; Craig C. Villandi, Judge.

(PER CURIAM.) John E. Bain appeals the denial of his motion to correct illegal sentence brought pursuant to Florida Rule of Criminal Procedure 3.800(a). One issue raised has merit; specifically, Bain claims he is entitled to credit for all time served, plus incentive gain time based upon Green ***v. State,*** **547 *So.*** 2d ***925*** (Fla. 1993). We agree.

The record demonstrates that Bain committed his original offenses prior to October 1, **1989, and** although the written sentence reflects the trial court's intention to credit Bain with "any applicable gain time," the order denying postconviction relief erroneously limits that credit to actual time served. Therefore, we reverse that portion of the order denying Bain incentive gain time credit and remand this cause to the trial court for action consistent with this opinion. In all other respects, the order denying relief is affirmed.

Affirmed in part, reversed in part and remanded. (THREADGILL, C.J., and DANAHY and LAZZARA, JJ., Concur.)

* * +

Criminal law—Probation revocation—Evidence supported finding that defendant violated probation by willfully failing to appear for urinalysis test—Written judgment and sentence to be corrected to delete statement that defendant "admitted guilt"

EDWIN LUPTON, Appellant. v. STATE OF FLORIDA. Appellee. 2nd

& Williams. Orlando, for Appellees.

(PER CURIAM.) Wanda Gryder appeals a final judgment rendered after a non-jury trial in favor of the appellee who acted as her broker in a transaction in which she sold a parcel of real property. Unfortunately, a substantial portion of the selling price was secured by a purchase money second mortgage that was foreclosed by a first mortgagee when the buyer defaulted. The first mortgage was quite large because it encumbered not only the property that Gryder sold, but also surrounding property that was acquired simultaneously with the closing of Gryder's property. The gravamen of Gryder's complaint on appeal is that the trial court erred when it found: (1) that her broker did not act as a dual agent for both the buyer and Gryder, (2) that the broker adequately advised her during changes to the three forms of contracts that were presented to her, and (3) that she was adequately advised of the risk attendant to taking a second mortgage.[1]

The record reflects many disputed factual contentions that were resolved against Gryder by the trial court and the judgment is supported by the evidence. We find no reason to disturb the decision of the trial court. Marshall *v. Johnson,* 392 *So.* 2d 249 (Fla. 1980).

AFFIRMED, **(PETERSON, C.J.,** SHARP, W., and HARRIS, JJ.. concur.)

[1]We note that Gryder did not seek the services of an attorney in this transaction in which $310,000 of her assets were at stake. All versions of the contracts were on the customary form approved by the Florida Bar and Florida Association of Realtors that provides in bold print. just above the signature lines: "THIS IS INTENDED TO BE A LEGALLY BINDING CONTRACT, IF NOT FULLY UNDERSTOOD. SEEK THE ADVICE OF AN ATTORNEY PRIOR TO SIGNING." The evidence doer not suggest that Gryder was ever discouraged from seeking advice. In fact, a version of the contract was left with Gtydcr for several days during which the broker testified that Grydcr informed him that she would be seeking advice.

* * *

Criminal law—Sentencing—Habitual offender scotcnce affirmed—Conditionof probation requiring payment to First Step stricken

ROLAND DOBSON, Appellant. v. STATE OF FLORIDA. Appellee. 5th District. Case Nos. 94-1063; 94-1334. Opinion fled January 5. 1996. Appeal from h e Circuit Court for Volusia County, John W. Watson. III, Judge. Counsel; James B. Gibson, Public Defender, and Susan A. Fagan, Assistant Public Defender. Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Ann M. Childs, Assistant Attorney General. Daytona Beach. for Appellee.

(PER CURIAM.) The habitual offender sentence is affirmed. *Young v. State,* 20 Fla. L. Weekly D2536 (Fla. 5th DCA Dec. 1, 1995). However, we strike the probation condition requiring payment to First Step. *Tibero v. State,* 646 *So.* 2d 213 (Fla. 5th DCA 1994).[1]

AFFIRMED AS MODIFIED. **(PETERSON,** C.J., COBB and **HARRIS,** JJ., concur.)

[1]Sentencing in this case took place before the July 1. 1995 effective date of the amendment to section 948.03, Florida Statutes (Supp. 1994). *See Ch. 95-189. Laws of Florida.*

* * *

Criminal law—Appeals—Appellate court lacks jurisdiction where notice of appeal was filed over two years after rendition of order which was subject of appeal

STEVE BROWN, Appellant, v. STATE OF FLORIDA. Appellee. 5th District. Case No. 95-2745. Opinion filed January 5, 1996. 3.800 Appeal from the Circuit Court for Orange County, James C. Hauser, Judge. Counsel: Steve Brown, Cross City, pro se. No Appearance for Appellee.

(PETERSON, C.J.) This court does not have jurisdiction to dispose of this case in any manner other than to dismiss it. Appellant has attempted to appeal the trial court's order rendered January 6, 1993 by filing a notice of appeal two years and nine months later. *See Fla. R. App. P. 9.110(b).*

DISMISSED. (DAUKSCH and ANTOON, JJ., concur.)

* * *

Dissolution of marriage—Amount of monthly obligations imposed on husband for alimony, child support, and debt retirement did not leave husband reasonable amount for living expenses—Judgment left husband with large negative net worth, even without factoring award of attorney's fees to wife—Remanded for further proceedings

JAMES E. CHERESKIN, Appellant, v. MARY C. CHERESKIN, Appellee. 5th District. Case No. 95-685. Opinion Filed January 5, 1996. Appeal from the Circuit Court for Orange County, George A. Sprinkel, IV, Judge. Counsel: Sarah E. Arnold. Orlando. for Appellant. Garrick N. Fox, Orlando, for Appellee.

(PETERSON, C.J.) James E. Chereskin appeals the final judgment dissolving his marriage in which Mary C. Chereskin, his wife, was awarded permanent alimony. He also challenges the equitable distribution, the award of attorney's fees, and certain provisions regarding child support and visitation. We vacate the final judgment, except for the portions dissolving the marriage and establishing the terms of visitation, for the reasons stated in *Guzman v. Guzman, 653 So.* 2d 1118 (Fla. 5th DCA 1995):

> We disagree only with the unreasonable amount of monthly income that remains available to [the former husband] after the payments are made pursuant to the final judgment. If additional income is not imputed to him, it appears that either some adjustment to the equitable distribution will be necessary or alimony must be reduced, or a different method of equalizing the parties' equitable distributions must be fashioned. or some combination of the three must be considered.

See *also Marsh v. Marsh, 553 So.* 2d 366 (Fla. 5th DCA *1989)* (judgment reversed where trial court imposed monthly obligations on husband of $1523 while imputing a monthly income to him of $1387, and court directed on remand to make "due allowance for the husband to retain sufficient amount of his income in order that he may live and work."). See also *Canakaris v. Canakaris,* 382 So. 2d 1197, 1204 (Fla. 1980) ("trial judge must ensure that neither party passes automatically from misfortune to prosperity or from prosperity to misfortune, and in viewing the totality of the circumstances, one spouse should not be 'short-changed.' ").

In the instant case, the primary problem faced by the trial court and the parties is the large amount of marital and post-petition debt incurred by the parties. The payments required of the husband, however, for alimony, child support, and debt retirement, leave him with only $250 per month for his living expenses. Further, the judgment leaves the husband with a negative net worth of $66,000, even without factoring the award of attorney's fees to the wife. The husband's net monthly income is $2600 plus irregular stipends paid by the employer from time to time, while the wife's net monthly income from employment is $941.

In view of this financial situation, the trial court on remand should reconsider the distribution of the marital debts. The court may also reconsider the amount of the wife's attorney's fees the husband should be required to pay, and the monthly amount of child support he should be required to pay. We do not disagree with the award of permanent alimony to the wife, although, upon remand, the trial court may wish to consider a smaller monthly payment. The wife may seek a modification if and when the financial resources of the husband improve.

Unfortunately, the parties' financial situation is typical of dissolution cases that do not find resolution in a settlement. While it is to the parties' credit that they do not seek relief in bankruptcy and wish their creditors to be satisfied, the debt load apparently inhibited settlement and the trial judge was thus faced with the task of fashioning an almost impossible plan. The result, however, is a plan that places the husband in a position of predictable failure and despair.

JUDGMENT VACATED IN PART; REMANDED. (SHARP, W., and **THOMPSON,** JJ., concur.)

* * *