017

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

MERIT BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 0845566
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

ROLAND DOBSON, Petitioner,	)	
VS.	)	**CASE NO. 87,356**
STATE OF FLORIDA, Respondent.	)	

MERIT BRIEF OF PETITIONER

STATEMENT OF THE CASE

The State charged the Petitioner, Roland Dobson, in an information filed on June 28, 1993, with the offense of sale or delivery of cocaine. (R 37) On December 7, 1993, defense counsel filed a "notice of expiration of speedy trial time." **(R** 41) Petitioner proceeded to jury trial on December 22, 1993, before Circuit Judge John Watson which ended in a mistrial. (R 45; **SR 1-166)** A second jury trial began on January 18, 1994. (T 1-197; R 134-254) At the beginning of the second trial, the State made several motions in limine to exclude any evidence of the confidential informant's prior drug dealing activity and any evidence as to the Petitioner's prior lack of involvement in selling or possessing drugs. (T 4-7) Judge Watson granted both of the State's motions with the provision that defense counsel could proffer additional questions of the affected witnesses concerning the aforementioned excluded evidence. **(T** 7-10)

Defense counsel requested that the State be limited from eliciting testimony from each of the witnesses during the trial concerning any unrelated arrests and convictions of the Petitioner. (T 11) Judge Watson granted defense counsel's request provided the defense did not open the door to allowing such evidence to be presented by the State. (T 11-15)

At the close of the State's case, and again, at the close of all the evidence, defense counsel made a motion for judgment of acquittal. In support of the motion, defense counsel argued that the State failed to present sufficient evidence upon which a conviction for the charged offense could be supported. In particular, defense counsel cited to the lack of evidence by the State identifying the Petitioner as the individual who sold the cocaine to the confidential informant. (T 97, 146) Judge Watson denied the motion. (T 97, 146) Before the jury returned its verdict, the Petitioner notified the trial court that he was not satisfied with his trial counsel's presentation of his defense. Specifically, Petitioner alleged that defense counsel misled the court to think that he had changed his plea, that defense counsel did not "impress the jury" and that the Petitioner was not able to review any of the depositions of the State's witnesses prior to trial. (T 188-189) Judge Watson determined, after questioning defense counsel, that the Petitioner had been represented in a competent fashion by his public defender. (T 190-193) The jury returned a verdict of guilty as to the charged offense. (R 61; T 193-195)

On March 1, 1994, Judge Watson filed a written notice of the trial court's intention to determine whether the Petitioner qualified as a habitual felony offender. (R 62-63) On March 3, 1994, defense counsel filed a motion to strike the trial court's notice of habitual offender sentencing. (R 66-67) Petitioner filed, pro se, a motion to disqualify the trial court on March 2, 1994. (R 64-65) On May 4, 1994, the Petitioner filed, pro se, a notice of appeal, an affidavit of insolvency, a motion for statement of particulars, a motion of rejection of probation, and a motion to disqualify the trial court. Additionally, on March 9, 1994, the Petitioner filed, pro se, a motion to withdraw as counsel. A pro se motion for a new trial, signed by the Petitioner on April 15, 1994, was also filed by the Petitioner but there appears to be no filing date on the document. (R 64-65, 68-80) The trial court denied the Petitioner's March 2, 1994, motion to disqualify the trial court based on the motion being insufficient as a matter of law and that it was not filed in compliance with the requisites of "the Florida Rules of Criminal Procedure and other applicable law." (R 81) The trial court further denied defense counsel's motion to strike the trial court's notice of habitual offender sentencing. (R 82, 259-260, 263)

Over defense counsel's objection, the trial court continued the March 17, 1994, sentencing hearing when defense counsel challenged certain prior convictions listed on the Petitioner's guidelines scoresheet. (R 264-268) On May 12,

1994, the Petitioner's sentencing hearing was again postponed when the Petitioner submitted, through defense counsel, various "pro se" motions for the trial court's consideration. (R 4-5) At the subsequent sentencing hearing held on June 3, 1994, Judge Watson denied the Petitioner's pro se motions based on the fact that the Petitioner's defense counsel did not sign and adopt the motions as his own, that the Petitioner's request to discharge his public defender had been previously ruled on by the trial court, and that the Petitioner's notice of appeal (accompanied by an affidavit of insolvency) was premature. (R 17-18) Petitioner, having been previously found by the trial court to be a habitual felony offender, then received a sentence of twelve years incarceration, followed by five years of probation as a habitual felony offender on June 3, 1994. (R 26-29, 108-112, 120-123, 124-125)

A timely notice of appeal was filed on June 7, 1994. (R 126) The office of the Public Defender was appointed on June 8, 1994, to represent the Petitioner in this appeal. (R 132)

The Fifth District Court of Appeal issued an opinion on January 5, 1996, affirming the Petitioner's conviction and habitual offender sentence in Dobson v. State, 665 So.2d 386 (Fla. 5th DCA 1996) citing Young v. State, 663 So.2d 1376 (Fla. 5th DCA 1995). (Appendix A) Young is currently pending review before this Court in case number 87,099. Jurisdiction for discretionary review of the district court's decision in the intant case was accepted by an order dated April 11, 1996.

STATEMENT OF THE FACTS

On September 4, 1992, at approximately 10:47 p.m., Detectives Pat Myers and Robert Godfrey, both with the Daytona Beach Police Department, met with confidential informant, Lionell Curry, in order for Curry to assist the detectives in purchasing narcotics in the Daytona Beach area. (T 29-31, 33, 41) After a search of Curry's person and vehicle yielded no weapons, money or illegal contraband, Curry was equipped with an electronic listening device and given forty dollars to purchase narcotics. (T 33-34) Curry proceeded to a local tavern called "George's Place." (T 35-36) A short while later, Curry returned to a nearby location where Myers and Godfrey were waiting and gave them five baggies containing cocaine. (T 39-41) Curry testified that he had actually made the transaction with the Petitioner (who he knew as "Rollo") in a bathroom in George's place after Curry had spotted the Petitioner's vehicle in the parking lot. (T 50, 51, 54)

Gail Morgan, the Petitioner's girlfriend, testified, however, that she was with the Petitioner on the evening of the incident. According to Ms. Morgan, the Petitioner received a traffic ticket just after they had left a 7-11 at the same time that Myers had testified the drug transaction had taken place. (T 99-100, **109)**

SUMMARY OF ARGUMENTS

POINT ONE: The trial court committed reversible error by allowing the prosecutor, during her closing argument, to replay to the jury, peppered with her own personal observations, a tape recording after the audiotape had previously been entered into evidence and played to the jury as part of the State's case-in-chief. This error was further compounded by the trial court permitting, over defense counsel's objection, the same tape recording to be taken back to the jury room along with a tape player. Such actions by the trial court allowed the jury to review the tape recording, testimonial in nature, unsupervised out of the presence of the Petitioner, the State Attorney, and defense counsel. An additional harmful result from such misuse of the audio tape during the trial was to place undue prominence on the audio tape in comparison with other testimony presented by the parties during the trial. Therefore, due to such prejudicial errors, a new trial is required.

POINT TWO: The district court ruled that the trial court did not usurp the prosecution's discretion by unilaterally initiating habitual offender proceedings and determining the Petitioner to be a habitual felony offender. Petitioner argues that, especially since June 17, 1993, there exits no statutory authority for a trial court to unilaterally seek and impose habitual sentencing against a criminal defendant by the Florida legislature's enactment of Section 775.08401, Florida Statutes. That Statute specifically makes clear the legislature's intent

that only the state attorney's offices may initiate habitual felony offender proceedings upon adopting particularized uniformed "criteria" seeking habitual in the respective judicial circuits.

ARGUMENT

POINT ONE

THE DECISION OF THE DISTRICT COURT WAS INCORRECT BECAUSE THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO PERSONALLY COMMENT ON AND REPLAY A TAPE RECORDING TO THE JURY DURING THE STATE'S CLOSING ARGUMENT AND IN ALLOWING THE TAPE RECORDING TO BE TAKEN INTO THE JURY ROOM WITH A TAPE PLAYER DURING THE JURY'S DELIBERATION.

At the conclusion of all the evidence, the prosecutor requested from the trial court that the audiotape, which the State claimed was of the cocaine transaction charged in the instant information, be brought back to the jury room, along with a tape player, so it could be replayed by the jurors during their deliberation. (T 152-153) Defense counsel objected stating that such a practice would possibly subject the tape to being erased or to being played by the jurors in an altered fashion from the manner in which the tape had already been presented to the jury in open court. (T 153) Judge Watson overruled defense counsel's objection after being satisfied that the tape recorder had been disabled so that the tape could not be erased by a juror. (T 153-154)

Later, during the State's closing argument, the prosecutor was further permitted by the trial court, over defense counsel's objection, to replay for the jury the same audiotape. (T 165) The prosecutor then began playing the audiotape but not before she had told the jury that she had "figured out where a couple spots are." (T 165) The prosecutor's next comments to

the jury were as follows:

> MS. ZUST [Prosecutor]: ... This right in here is going to be the actual drug deal where he's saying he wants to get forty dollars.
>
> (Tape played.)
>
> MS. ZUST: It is kind of hard to hear. You're going to have to really listen to it. You can hear the CI real well, because he's wearing a wire. He says, Rollo, Rollo. He's talkins to somebody. You can hear the voice say, three and then he says, oh, five. Then they go to the bathroom. Let me so ahead and so real fast to the bathroom.
>
> (Taped played.)
>
> MS. ZUST: Okay. That's where he says that they passed the money and drugs and he's telling him, I'm going solo. I'm going solo, too, which means he's going to smoke the cocaine by himself. You have to really listen to it. It's really hard to hear when it's loud in the courtroom. If you'll listen to it, you'll hear when he says, Rollo, Rollo, there's somebody there talking to him. And he says, I want -- you know, what can I set for forty. And he says three and then he says five. If you listen real close, you'll hear it.
>
> In the bathroom you don't really hear too much. But he's having a conversation with somebody and he's talkins about after he gets the drugs he's going solo. He's going solo. ... (T 165-166) [emphasis added]

Clearly, the trial court abused its discretion in allowing the prosecutor to replay the audiotape to the jury as part of her closing argument, particularly while also interjecting her own personal observations, beliefs, and interpretation as to the evidentiary content of the tape. This resulted in the highlighted audio tape being given undue weight

in the minds of the jurors, relative to the other testimony produced at trial, as they began deliberating the Petitioner's guilt or innocence.

Further, the Fifth District Court of Appeal has definitively pointed out in Stone v. State, 626 So.2d 295 (Fla. 5th DCA 1993), that a prosecutor in Florida may not express his or her own personal beliefs concerning the evidence or testimony submitted a trial. See also, State v. Ramos, 579 So.2d 360 (Fla. 4th DCA 1991). Such commentary by the prosecutor was merely "an attempt by [her] to transform [her] own ... courtroom observations into evidentiary fact." Stone, supra at 297; Courson v. State, 414 So.2d 207, 208 (Fla. 3d DCA 1982) At the very least, the Petitioner was unduly prejudiced by the trial court allowing the prosecutor to showcase the audiotape to the jury in such a manner so that it would be given an unwarranted prominence in the eyes of the jury, vis-a-vis the other testimony and evidence offered at trial. The prejudicial harm is especially apparent since the confidential informant, Curry, had already testified concerning his own interpretation of what he and the Petitioner had said during the inaudible portions of the tape recording. (T 59-61)

The trial court's error was further compounded when it permitted, over defense objection, the audiotape and a tape recorder to be brought into the jury room during the jury's deliberations. (T 152-154) Consequently, the jury was able to review the audiotape totally unsupervised and out of the presence

of both counsel and the petitioner.

Rule 3.400(d), Florida Rules of Criminal Procedure permits all things received in evidence, other than depositions, to be taken into the jury room during the jury's deliberation. The audiotape at issue in the instant case, however, is actually testimonial in nature, and thus, is more akin to a deposition de bene esse in which testimony is preserved for later introduction at trial. Youns v. State, 645 So.2d 965 (Fla. 1994) Under the legal analysis set forth by this Court in Young, the videotape at issue in that case was employed primarily as a tool by the prosecutor to assert the truth of the statements made on the videotape. Id, 967. In the case at bar, the audiotape was also utilized in this manner, along with the CI's testimony, as well as being made part of the prosecutor's "testimony" during her closing argument. Therefore, the audiotape should not have been permitted to be the only testimony which was taken into the jury room for each of the juror's unlimited review.

A second component of the trial court's error, which this Court also addressed in Young, is that by permitting the jurors to review, unsupervised, the audiotape once again in the jury room, "... there is a real danger that the statements on the [audiotape] will be unfairly given more emphasis than other testimony." Id at 967. This Court further pointed out in Young, however, that even if a trial court limits such testimonial evidence from going into the jury room, it would not prevent the same trial court from allowing the jury to relisten to the same

testimonial evidence a second time in open court upon request pursuant to Rule 3.410, Florida Rules of Criminal Procedure.[1] Id, 968. Some of the other jurisdictions which have also prohibited similar types of evidence from being taken into the jury room upon the jury commencing deliberation are: Colorado, People v. Talley, 824 P.2d 65 (Col. App. 1991); Georgia, Watkins v. State, 229 S.Ed.2d 465 (Ga. 1976); Wyoming, Chambers v. State, 726 P.2d 1269 (Wyo. 1986); and Washington, State v. Ross, 42 Wash. App. 806, 714 P.2d 703 (1986).

Thus, the cumulative harmful effect of the aforementioned errors clearly adversely affected the outcome of the jury's verdict, particularly in light of the contradictory testimony provided by the State's main witness, Curry, and the defense's main witness, Gail Morgan. Accordingly, this Court should reverse the district court's affirmance of Petitioner's conviction as to the charged offense and grant Petitioner a new trial.

---

[1] Rule 3.410 provides:

> After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them such additional instructions or may order such testimony read to them. Such instructions shall be given and such testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

POINT TWO

THE DECISION OF THE DISTRICT COURT WAS INCORRECT BECAUSE THE HABITUAL OFFENDER PROCEEDINGS WERE INITIATED BY THE TRIAL COURT, ON ITS OWN MOTION, CONTRARY TO THE INTENT OF THE LEGISLATURE.

In this case, the prosecutor did not provide Petitioner with any notice of the State's intent to seek habitual offender sentencing as required by Section **775.084,** Florida Statutes. After the trial, on March 1, **1994,** however, Judge Watson filed written notice that he would conduct a hearing to determine whether to classify the Petitioner as a habitual offender. (R 62-63) On March 2, 1994, defense counsel filed a motion to strike the trial court's notice of habitual sentencing. (R **66-67)** The trial court denied the motion to strike on March **9, 1994.** (R **82)** The Petitioner was subsequently found by the trial court to be a habitual felony offender and sentenced to 12 years incarceration as a habitual felony offender, followed by 5 years of probation. (R 26-30, **110-112, 120-123)** Petitioner submits that the trial court was without authority to sua sponte seek habitualization proceedings against the him.

Article 11, Section **3,** of the Florida Constitution provides:

> SECTION 3. Branches of government. -- The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

In State v. Bloom, **497** So.2d **2** (Fla. 1986), this Court

held that under this provision,

> The decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to prosecute. Art. II s. 3, Fla. Const. ...

Id., 497 So.2d at 3.

In King v. State, 557 So.2d 899 (Fla. 5th DCA 1990), the Fifth District Court of Appeal stated that either the State or the trial court may suggest habitual offender classification. This statement was made, however, in the context of rebuffing a defendant's challenge that the habitual offender statute was void for vagueness. The First District Court of Appeal, on the other hand, in upholding the constitutionality of Section 775.084, reiterated that the executive branch is properly given the discretion to choose which available punishments to apply to convicted offenders, citing State v. Bloom, supra. Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990). Moreover, a trial court has no authority to reduce a mandatory minimum sentence for drug trafficking unless the State first files a motion to reduce the sentence based upon the defendant's providing substantial assistance to law enforcement. See e.g., State v. Cuesta, 490 So.2d 239 (Fla. 2d DCA 1986); State v. Bateman, 423 So.2d 577 (Fla. 2d DCA 1982), petition for review denied, 446 So.2d 97 (Fla. 1984). Similarly, Petitioner maintains that a trial court does not have the authority to sua sponte seek and impose an extraordinary penalty, i.e., a doubling of the statutory maximum and elimination of gain time, except upon the prosecution's

instigation.

Petitioner recognizes that the Fifth District Court of Appeal has adopted as its holding the dictum of King v. State, supra, that either the State or the trial court could suggest classification as an habitual offender in Toliver v. State, 605 So.2d 477 (Fla. 5th DCA 1992). Toliver, however, mentions the separation of powers argument but does not address it. See also Turcotte v. State, 617 So.2d 1164 (Fla. 5th DCA 1993).

The Fifth District Court of Appeal subsequently stated in Santoro v. State, 644 So.2d 585 (Fla. 5th DCA 1994), reversed on other grounds, State v. Santoro, 657 So.2d 1161 (Fla. 1995) the following:

> The judge's ability to initiate habitual offender treatment has been placed in doubt by the enactment of section 775.08401, Florida Statutes (1993), which requires the "state attorney in each judicial district" to adopt uniform criteria to determine the eligibility requirements in determining which multiple offenders should be pursued as habitual offenders in order to endure "fair and impartial application of the habitual offender statute." It appears that this statute, effective June 17, 1993, may very well have "repealed' Toliver v. State, 605 So.2d 477 (Fla. 5th DCA 1992), rev. denied, 618 So.2d 212 (Fla. 1993), which permitted the sentencing judge to initiate habitual offender consideration. It now appears that the legislature has determined that it is only the state attorney, in order to ensure "fair and impartial application," who can seek habitual offender treatment of a defendant -- and then only if the defendant meets a circuit-wide uniform criteria.

Santoro, at 586, f. 4.

Section 775.08401, Florida Statutes (1993) 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 designed 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.

Turning to the case at bar, Judge Watson first filed written notice of his intent to hold a hearing for the purpose of determining whether the Petitioner qualified as a habitual felony offender on March 1, 1994. This was well after the enactment of Section 775.08401 by the legislature. (R 62-63) The record, sub judice, is further silent as to the State Attorney filing any "uniform criteria" for determining whether the Petitioner qualified as a habitual felony offender within the Seventh Judicial Circuit. Moreover, the habitual offender statute's statement of "Legislative findings and intent"[2] clearly indicates that the habitual offender sentencing statute is to be implemented by prosecutors, not trial judges, who are not mentioned in the statement.

In Young v. State, 663 So.2d 1376 (Fla. 5th DCA 1995), and in the instant case, however, the Fifth District Court of Appeal recently chose not to adopt the position that habitual

---

[2] ... The Legislature intends to initiate and support increased efforts by state and local law enforcement agencies and state attorneys' offices to investigate, apprehend and prosecute career criminals and to incarcerate them for extended terms. § 775.0841, Fla. Stat. (1993).

offender proceedings may only be invoked by the State Attorney. See also Kirk v. State, 663 So.2d **1373** (Fla. 5th DCA 1995). Petitioner certainly recognizes that the legislative intent is the polestar by which the courts must be guided in construing statutes. State v. Webb, 398 So.2d 820, 824 (Fla. 1981). Thus, the intent of a statute is the law, and that intent should be duly ascertained and effectuated. American Bakeries Company v. Haines City, 180 So. 524, 532 (Fla. 1938). Petitioner, therefore, submits the legislature intended, by its enactment of Section **775.08401**, Florida Statutes, that habitual offender proceedings may only be invoked by the State Attorney.

Accordingly, based on the clear legislative intent expressed in Section **775.08401**, Petitioner urges this Court to adopt the reasoning of Judge Harris' concurring opinion in Young, supra, wherein Judge Harris wrote:

> By enactment of [section 775.084011, the legislature recognized that since every felon who has a record that would otherwise qualify for habitual offender 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. Did the legislature 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?

Young at 1379 (footnote omitted). Furthermore, as noted in Steiner v. State, 591 So.2d 1070, 1072 and n.2 (Fla. 2d DCA 1991) (Lehan, J., concurring), "the wisdom and propriety of the notice issuing from the trial court is...questionable....[T]he appearance of impartiality of a sentencing judge may be compromised when he or she has already filed a notice to invoke a sentencing enhancement procedure, the imposition of which is discretionary in the first place."

The procedure used in Petitioner's case creates the appearance that the court has become an arm of the prosecution. Proceedings involving criminal charges must both be fundamentally fair and appear to be fundamentally fair. Steinhorst v. State, 636 So.2d 498, 501 (Fla. 1994)(emph. added). Section 775.08401 clearly establishes the legislature's intent that invocation of habitual offender proceedings is solely a prosecutorial function.

Specifically, the legislature has given in Section 775.08401 the responsibility of initiating the habitual offender process only to the state attorney. The legislature has further attempted, through the statute's wording, to ensure the fair and impartial application of habitual offender sentencing by requiring the state attorney to establish circuit-wide criteria to determine defendants' habitual offender status, and then by having only the state attorney initiate the process based on the criteria. As such, in order to ensure and maintain that the required criteria are met and to ensure the fundamental fairness of habitual offender proceedings, the trial court cannot, on its

own, initiate the habitual offender treatment of a defendant. Therefore, the Fifth District Court of Appeal's affirmance of Petitioner's habitual felony offender sentence should be reversed by this Court.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse the decision of the District Court of Appeal, Fifth District, and remand this case for a new trial, or alternatively, vacate Petitioner's habitual felony offender judgment and sentence and remand for resentencing under the sentencing guidelines.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Susan A Fagan

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 0845566
112-A Orange Avenue
Daytona Beach, Florida **32114-4310**
904-252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to The Honorable Robert A. Butterworth, Attorney General, **444** Seabreeze Blvd., 5th FL, Daytona Beach, FL 32118 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 6th day of May, 1996.

Susan A Fagan

SUSAN **a.** FAGAN
ATTORNEY FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

ROLAND DOBSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 87,356
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	

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

A P P E N D I X

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 0845566
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

ATTORNEY FOR PETITIONER

was lacking under the Administrative Procedure **Act** to review revocation.

Motion to dismiss granted;

Administrative **Law and Procedure** ⇐663
Process ⇐53

District Court of Appeal lacked jurisdiction under the Administrative Procedure Act over petition for judicial review of decision of sheriff's office to revoke petitioner's special process server appointment; appellate jurisdiction lay, if anywhere, in circuit court. West's F.S.A. §§ 120.52(1)(c), 120.68(2); West's F.S.A. R.App.P.Rule 9.030(b)(1)(C).

J.C. Murphy of Murphy & Murphy, **P.A.,** Melbourne, for Petitioner.

Bernadine Rice, Senior Staff Attorney, Legal Services Section, Orlando, for Respondent Kevin Beary, Sheriff of Orange County.

ON MOTION TO DISMISS

W. SHARP, Judge.

Bryant petitions for judicial review of the Sheriff's Office's revocation of his special process server appointment, because of alleged misconduct. The Sheriff moved to dismiss for lack of jurisdiction. We grant the motion.

The district courts of appeal have jurisdiction to review by way of plenary appeal, final "agency action". § 120.68(2), Fla.Stat. (1993); Fla.R.App.P. 9.030(b)(1)(C). The applicable definition of "agency" in this context is:

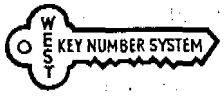
> Each other unit of government in the state, including counties and municipalities, to the extent they are expressly made subject to this act by general or special law or existing judicial decisions.

§ 120.52(1)(c), Fla.Stat. (1993).

There is to our knowledge no general or special law or judicial decision making the Orange County Sheriff's Office subject to the Administrative Procedure Act. Chapter **30,** which specifically pertains to sheriffs, does not place the sheriff and that office under the Administrative Procedure Act. Nor does the special law pertaining to the Orange County Sheriffs Office, Chapter 89–507 bring that office under the APA. Nor **have** any judicial opinions so held.' In fact, *Thomas v. Office of the Sheriff,* 507 So.2d **145** (Fla. 1st **DCA 1987)** indicates appellate jurisdiction lies, if anywhere, in the: circuit court. Thus, we grant the Sheriff's motion to dismiss this case for **lack** of jurisdiction. ***See Sweetwater Utility Corp. v. Hillsborough County,*** **314** So.2d 194 (Fla. 2d DCA 1975).

Motion to Dismiss GRANTED.

DAUKSCH and GOSHORN, JJ., concur.



Roland DOBSON, Appellant,

v.

STATE of Florida, Appellee.

Nos. 94-1063, 94-1334.

District Court of Appeal of Florida,
Fifth District.

Jan. 5, 1996.

Appeal from the Circuit Court for Volusia County; John W. Watson, III, Judge.

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.

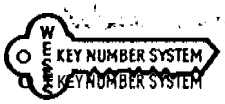
PER CURIAM.

The habitual offender sentence is affirmed. *Young* v. *State, 663* So.2d **1376** (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., and COBB and HARRIS, JJ., concur.



1

Hampesle L. JOHNSON, Appellant,

v.

STATE of Florida, Appellee.

No. 95–2586.

District Court of Appeal of Florida, Fifth District.

Jan. 5, 1996.

Appeal from the Circuit Court for Brevard County; Frank R. Pound, Jr., Judge.

Hampesle L. Johnson, Sharpes, pro se.

Robert A. Butterworth, Attorney General, Tallahassee, and Belle B. Turner, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED. See Fla.R.App.P. 9.315(a).

GRIFFIN, THOMPSON and ANTOON, 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.

2

Steve BROWN, Appellant,

v.

STATE of Florida, Appellee.

No. 95–2745.

District Court, of Appeal of Florida, Fifth District.

Jan. 5, 1996.

3.800 Appeal from the Circuit Court for Orange County; James C. Hauser, Judge.

Steve Brown, Cross City, pro se.

No Appearance for Appellee.

PETERSON, Chief Judge.

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.

3

Clara FENN, as Guardian of Arthur Charles KALHOEFER, Jr., Appellant,

v.

Susan BREWER and Janette Kirchgessner, Appellees.

No. 95–754.

District Court of Appeal of Florida, Fifth District.

Jan. 5, 1996.

Appeal from the Circuit Court for Osceola County; Frank N. Kaney, Judge..