IN **THE SUPREME** COURT **OF** FLORIDA

ROLAND DOBSON,

Petitioner,

v.

CASE NO. *87,356*

STATE OF **FLORIDA,**

Respondent.

ON **DISCRETIONARY REVIEW** FROM THE
FIFTH **DISTRICT COURT OF APPEAL**

RESPONDENT'S **BRIEF ON THE MERITS**

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TABLE OF AUTHORITIES

STATE CASES:

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

Respondent generally agrees with the statement of the case and facts as provided by Petitioner, but would supplement them with the following:

After the confidential informant made the cocaine purchase and returned to where the officers were waiting for him, he and his car were searched again. No drugs were found. (T Volume III, 91).

The audio tape of the controlled buy made by the confidential informant was admitted into evidence and initially played for the jury with no objection by defense counsel. (T Volume III, 38, 55-56, 58-61).

SUMMARY OF ARGUMENT

POINT I

It was not an abuse of the trial court's discretion to allow the prosecutor to play portions of the audio tape during her closing argument; the evidence had previously been presented to the jury without objection. Further, the audio tape, as a properly admitted piece of non-testimonial evidence, was properly allowed in the jury room during deliberations.

POINT II

The amendment to the habitual offender statute added a requirement for the state attorneys which was intended to encourage more consistent application of habitual offender proceedings. Nothing in the statute either explicitly or implicitly changed the acknowledged power of the trial court to independently initiate habitual offender proceedings. If any error occurred, it was harmless.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN ALLOWING THE AUDIO TAPE TO BE PLAYED DURING THE **STATE'S** CLOSING ARGUMENT OR IN **ALLOWING** THE TAPE TO BE TAKEN TO THE JURY ROOM DURING DELIBERATIONS. ERROR, IF *ANY,* **WAS** HARMLESS.

Dobson was charged by information with unlawful sale or delivery of a controlled substance, to wit: cocaine. (R 37). During Dobson's second trial for this offense, the state introduced an audio tape of Dobson's sale of cocaine to **a** confidential informant.[1] The sale on the tape is the one upon which the charge against Dobson was based. There was no objection by defense counsel to the introduction of this tape. (T Volume 111, 38).

During the direct examination of the confidential informant, the state played the audio tape for the jury, pausing it several times in order for the witness to explain what had happened during each portion of the tape. (T Volume 111, 55-56, *58-61).* *The* prosecutor, during her closing argument, selected two portions of the tape and replayed them for the jury, summing up the content of the sections she had replayed. The content **of** her closing argument

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[1]Dobson's first trial for this charge ended in **a** mistrial. (R **45,** T Volume 11, **1-168).**

regarding the tape was merely a summation of the evidence which the jury had already heard. The prosecutor was not expressing any personal opinion.

The trial court did not abuse its discretion in allowing the state to play the selected portions of the audio tape during the prosecutor's closing arguments, nor was it error to allow her to sum up the contents of the tape. The tape had been properly admitted into evidence during the trial: the comments were the summations of the criminal act with which Dobson was charged. **Also,** the transcript indicates that there were only two breaks to play the tape in the state's approximately seventeen page closing argument. (T Volume 111, 155-56, 173-38).

Furthermore, the trial court did not abuse its discretion in allowing the audio tape to be taken into the jury room during deliberations. Florida Rule of Criminal Procedure 3.400(d) permits all things received in evidence, other than depositions, to be taken to the jury room during their deliberation. It is the state's position that the audio tape in the instant'case is not in the nature of a deposition and, therefore, is not testimonial in nature. **As** a result, allowing the audio tape of the actual criminal act to be taken into the jury room during deliberations did not violate the rules of criminal procedure. Non-testimonial exhibits with verbal

content, such as recordings of criminal acts, are generally allowed to go into the jury room during their deliberations. Young v. State, 19 Fla. L. Weekly S531 (Fla. October 20, 1994). Cf. Crews v. State, 442 So. 2d 432, 434 (Fla. 5th DCA **1983)** (jury had right to review videotape of criminal act).

Dobson cites Young, supra, as support for the argument that it **was** improper for the trial court to allow the audio tape into the jury room while they were deliberating. Young, however, is distinguishable from the instant case. Young deals with the jury taking back a videotaped interview of a child suspected of having been sexually abused. The Court stated:

> ... When introduced **to** prove sexual abuse, the videotaped interviews of children are self-serving in the sense that they are testimonial in nature and assert the truth of the child's statements. They are more akin to depositions de bene esse in which testimony is preserved for later introduction at the trial. We share the view of the district court of appeal that allowing a jury to have access to videotaped witness statements during deliberations has much the same prejudicial effect as submitting depositions to the jury during deliberations....

Id. at S532. The specific holding in Young is that "videotaped out-of-court interviews with child victims introduced into evidence

under section 90.803(23) shall not be allowed into the jury room during deliberations." Id.

Since the audio tape involved in the instant case is not testimonial in nature, it was not error for the trial court to allow the tape to be taken into the jury room during deliberations. Barr v. State, 659 So. 2d 370, 371 (Fla. 5th DCA 1995) (it was not error to allow the jury to listen to an audiotaped conversation between defendant and his daughter during deliberations). See Barr v. State, 375 So. 2d 16 (Fla. 2d DCA 1979), cert. denied, 383 So. 2d 1190 (Fla. 1980). The tape of the confidential informant's purchase of cocaine from Dobson is a recording of the criminal act with which Dobson is charged. This type of evidence is not the type which is excluded by Florida Rule of Criminal Procedure 3.400.

Finally, even if the trial judge erred in allowing the audio tape to be played during closing argument or in allowing the tape into the jury room, any error was harmless. Under State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986), where there is no reasonable possibility that the error contributed to the conviction, the error is harmless. Here, there is no reasonable possibility that either the playing of the tape during closing arguments or sending the tape to the jury room contributed to Dobson's conviction. As is apparent from the record, there was overwhelming

evidence of Dobson's guilt. In particular, Respondent's would draw this Court's attention to the testimony of the confidential informant who made the controlled purchase and the testimony of the police officer who supervised the controlled purchase. In light of all the other evidence against Dobson, the tape played only a supporting role in the state's case. Dudley v. State, 545 So. 2d 857 (Fla. 1989); Howard v. State, 471 So. 2d 208 (Fla. 5th DCA 1985). Additionally, substantially the same evidence that was contained on the tape was presented to the jury through the testimony of other witnesses, namely the confidential informant. Salter v. State, 500 So. 2d 184 (Fla. 1st DCA 1986); Putnal v. State, 468 So. 2d 444 (Fla. 1st DCA 1985). Furthermore, it is worthy to note that nothing in the record even suggests that the jury consulted the tape during their deliberations. Error, if any, was harmless.

POINT II

THE DISTRICT COURT CORRECTLY DETERMINED THAT THE TRIAL COURT MAY INTTIATE HABITUAL OFFENDER PROCEEDINGS AGAINST A DEFENDANT, ERROR, IF ANY, IS HARMLESS.

Dobson asserts that the district court erred in holding that the trial court may initiate habitual offender proceedings against a defendant. It is Dobson's position that only the prosecutor may initiate habitual offender proceedings based upon the legislature's amendment to the habitual offender statute in 1993. The State asserts that nothing in the legislature's addition of section 775.08401 to the Florida Statutes (1993) removes the court's power to initiate habitual offender qualifications proceedings sua sponte. The opinion of the district court should be affirmed.

In the instant case, the trial court, sua sponte, filed a notice and order for a separate proceeding to determine whether Dobson qualified as a habitual felony offender. (R 62-63). Dobson filed a motion to strike this notice, arguing that in filing the notice, the trial court was violating the principle of separation of powers. (R 66-67). The trial court denied the motion to strike and Dobson was eventually determined to be a habitual felony offender. (R 82, 261). Dobson was sentenced as a habitual offender to 12

years incarceration to be followed by five years probation. (R 26-30, 110-12, 120-22).

Dobson now argues that the 1993 addition of section 775.08401 removed the power to suggest habitual offender status from the judge. The state disagrees and asserts that the trial court continues to retain the power to initiate the procedure to determine if a defendant meets the standards required to sentence him as a habitual offender despite the enactment of section 775.08401, Florida Statutes (1993). Prior to the enactment of this statute, it was recognized that both the trial court and the state attorney had the authority to initiate the procedure for classification of a defendant as a habitual offender without violating the separation of powers doctrine. Oglesby v. State, 627 So. 2d 585 (Fla. 5th DCA 1993), rev. denied, No. 82,987 (Fla. March 11, 1994), reversed on other grounds, Thompson v. State, 638 So. 2d 116 (Fla. 5th DCA 1994); 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).[2]

The section of the law allowing for habitual offender

[2]Review by this Court was sought in both Oglesby and Toliver. This Court denied review. Respondent asserts that by declining to accept jurisdiction this Court approved the decisions in those cases.

sentencing which is at issue in this argument was adopted in 1993 and codified as section 775.08401, Florida Statutes (1993). It reads:

> **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 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.

Respondent submits that the only purpose of section 775.08401 was to provide uniformity within each judicial circuit as to the manner in which each individual circuit determined a defendant's eligibility to be sentenced as a habitual offender. The state's position is based upon Respondent's reading of the legislature's policy statement pursuant to which the statute was enacted. In the statutory amendments, the legislature began the act:

> This revision of the sentencing guidelines may be cited as the "Safe

> Streets Initiative of 1994," and is designed to emphasize incarceration in the state prison system for violent offenders and nonviolent offenders who have repeatedly committed criminal offenses and have demonstrated an inability to comply with less restrictive penalties previously imposed.

Ch. 93-406, §1, at 2911-12, Laws of Fla. The goal of the legislature was clear. The changes in the law contained in that chapter were intended to make sure that habitual offenders were treated as such. The changes within the chapter were a codification of the legislature's intention to imprison career criminals for an extended period of time and should not be read in any way to amount to a reduction of the system's ability to punish the qualified criminals, Dobson's interpretation of the statutory amendment is inconsistent with the stated policy of the law and should be rejected.

Despite the numerous changes to the sentencing guidelines made in Chapter 93-406, the legislature chose <u>not</u> to amend section 775.084(3)(b), Florida Statutes, the section dealing with the provision of notice to a defendant and his attorney of intent to determine habitualization eligibility. This is the section which has been interpreted as allowing the court to suggest holding proceedings to determine a defendant's eligibility for habitual

offender sentencing. It seems logical that the legislature would have amended this section to affirmatively provide only the state attorney with the ability to initiate the proceedings for classification of a defendant as an habitual offender had such a result been their intention. As the Fifth District noted in Turcotte, supra,

> In fact, permitting trial courts to initiate the habitual offender classification when the state attorneys fail to do so accomplishes the legislative policy of incarcerating career criminals.

Turcotte, at **1165**. As noted above, the enactment of section 775.08401 did not alter the intent of the legislature, but instead was a re-enforcement of its stated policy.

As the Fifth District noted in another case concerning this exact issue:

> Section 775.08401 does not reject the established rule that a proceeding under the habitual offender statute can **be** initiated independently **by** the court. The statute **does** not refer to any of the rights or duties of the court....Had the legislature intended to remove judicial discretion to initiate a proceeding for an enhanced penalty, it would have done so expressly.
>
> * * * * *
>
> Section 775.08401 is a discrete provision of the habitual offender

> statute and it adds a regulation that pertains exclusively to the conduct of state attorneys. This section does not add any new requirement for trial judges much less remove any authority previously vested in trial judges. Judicial discretion in selecting cases for enhanced sentencing continues to be an important part of the statutory scheme. The trial judge's independent power to initiate habitual offender proceedings in a case similar to others in which the state attorney has routinely invoked the statute is a factor that operates as a further check on the potential for arbitrary enforcement.

Kirk v. State, 663 So. 2d 1373, 1375 (Fla. 5th DCA 1995).

Further evidence that the legislature intended for section 775.08401 to merely provide uniformity among individual judicial circuits can be found in the final sentence of the statute itself: "A deviation from the adopted criteria is not subject to appellate review." It appears that this final sentence was intended to prevent any judicial interference with the internal operations of the offices of the state attorneys. The written criteria are intended to act as an internal guide to each circuit. In light of the new statute, each circuit can have its assistant state attorneys apply the statute in a similar fashion regardless of how many there are, or how much movement there is within each circuit's offices.

This statute takes into account the fluctuation in state attorney's offices and the fact that satellite offices away from the presence of the state attorney have become necessary.

Requiring an internal check system, not subject to interference by the courts, will assist each circuit in applying the habitual offender statute evenhandedly within its boundaries. Judges do not require such a guide since less turnover is involved in the judiciary and the judges are fewer in number. If the case ever occurs when the judge files a notice in a case in which the state would have declined to do so, nothing prevents the state from asserting its position. Certainly if a judge is presented with a signed document by the state attorney as to why the office feels habitual offender sentencing would be inappropriate in an individual case, the judge would give that opinion due weight when imposing sentence in that case.

The notice that a hearing will be held to determine a defendant's qualifications for habitualization in no way effects the propriety of actually imposing such a sentence. The notice is merely intended to put a defendant on notice that habitual offender sentencing is a possibility if he has the appropriate criminal history. This notice then allows him the opportunity to garner and present evidence that he does not qualify for habitual treatment if

indeed such evidence exists and to object to the evidence the state presents if it does not meet the necessary criteria. Roberts v. State, 559 So. 2d 289, 291 (Fla. 5th DCA 1990).

There is a substantial difference between providing notice *of* intent to determine if a defendant qualifies as a habitual offender and actually determining that the defendant is deserving of being sentenced as a habitual offender. A defendant's qualifications are objective in nature; either a defendant's criminal history qualifies him for potential treatment as a habitual offender or it does not. It is not the type of decision where a judge's impartiality can be questioned.

The actual determination as to whether a qualified defendant should be sentenced as a habitual offender is the time when a judge's impartiality is key. This, however, has nothing to do with the determination by the judge as to a defendant's qualifications. The determination of eligibility is based upon the pre-set factors of a defendant's prior criminal history.

For the above-stated reasons, Justice Overton's concerns expressed in his dissent in State v. Booth, 21 Fla. L. Weekly S166-67 (Fla. April 11, 1996) that the judge would take over the prosecutorial role if allowed to file the notice of intent to hold a habitual qualifications hearing are misplaced. In fact, the

trial court has a duty to make the determination as to whether a defendant qualifies as a habitual offender whenever it appears to the court that a defendant would be eligible for enhanced sentencing. §775.084(4)(c), Fla. Stat. (1993). Regardless of who files the notice for the hearing, it is a defendant's prior criminal history which establishes his eligibility or ineligibility for habitual sentencing. The judge's role is merely ministerial in this regard.

Furthermore, it should be pointed out that in Booth, the defendant had notice of intent to habitualize prior to the judge filing his notice, based upon Booth's plea. Booth v. State, 654 So. 2d 571, 572 (Fla. 5th DCA 1995), reversed, State v. Booth, supra. As Booth had already been given notice through the written plea agreement, any notice filed after the entry of the plea was a nullity whether it was filed by the trial judge or the state attorney.

Nothing in the amendment to the habitual offender statute changes the power of the court to initiate habitual offender proceedings. The statute limits the discretion of the state attorney to not bring habitual proceedings by requiring written criteria and an explanation when the state attorney does not habitualize. The thrust of the statute is toward more habitual

offenders, not less. The decision of the Fifth District is correct and **should** be approved.

Even if this Court determines that it was error for the trial judge to file the notification of the intent to hold a habitual offender qualifications proceeding, any error here is harmless. Dobson and his attorney had actual notice in advance of appellant's sentencing hearing that habitual offender sentencing **was** a possibility. Since the purpose of notification is merely to allow a defendant and his attorney the opportunity to contest his classification, the fact that Dobson knew of the possibility and had the opportunity to prepare for the hearing, he suffered no prejudice. State v. Blackwell, **661** ***So.*** 2d 282 (Fla. 1995); Massev v. State, **609** ***So.*** 2d **598** (Fla. 1992); Lewis v. State, *636* ***So.*** 2d **154** (Fla. 1st DCA 1994). §924.33, Fla. Stat. **(1993)** (for reversible error to have occurred, the error complained of had **to** have injuriously affected the substantial rights of the defendant; such affect shall not be presumed); §59.041, Fla. Stat. **(1993)** (no judgment shall be set aside or reversed for error as to any matter of pleading or procedure unless after examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice).

Moreover, keeping in **mind** the purpose of providing a defendant

with notice regarding a qualifications hearing, having the state be the only entity permitted to file the notice would be to put form over substance and result in a waste of judicial economy. Since the purpose of the notice is to allow a defendant to prepare for the hearing, it is unimportant where this notification comes from.

> ... Technical noncompliance with a rule of procedure is permissible if there is not harm to the defendant. Hoffman v. State, 397 So. 2d 288, 290 (Fla. 1981) (the rules of criminal procedure are not intended to furnish a procedural device to escape justice)...

Tucker v. State, 559 So. 2d 218, 220 (Fla. 1990). The purpose of the hearing and a defendant's preparation for it will not change based upon the source of the notice. Therefore, the form the notice takes, i.e., from the judge or the state attorney, does not effect a defendant's preparation for the hearing. To prevent a judge from participating in this process will only inhibit the intention of the statute and place form over substance.

Judicial economy will also best be preserved by interpreting the statute as continuing to allow a judge to file the notice of intent to hold a qualifications hearing. If the statute were interpreted as Dobson suggest, then a case would have to be remanded for resentencing. The state would then be permitted to file its own

notice of intent to determine habitual qualifications. This is so since the filing of the judge's notice may have prevented the state from filing its own notice in an attempt to avoid duplicating paperwork. The qualifications process would start again resulting in a doubling of time and efforts on the part of all parties involved, while all the while the defendant's criminal history and qualifications remain unchanged.

Finally, if this Court determines it was error for the trial judge to file the notice of intent to hold an habitual offender eligibility hearing, upon remand, the state should be given the opportunity to file its own notice and seek habitual offender sentencing. The state should not **lose** its ability to seek enhanced sentencing based upon the trial court's actions which were proper at the time. Roberts, supra; Power v. State, 568 ***So.*** 2d 511 (Fla. 5th **DCA** 1990); Crews v. State, 567 So. 2d 552 (Fla. 5th DCA 1990); Capers v. **State**, 567 So. 2d 1079 (Fla. 4th DCA 1990).

In summation, the Fifth District properly determined that it **was** not error for the trial court to file the notice which initiated the proceedings to determine if Dobson qualified as a habitual offender. If this Court should determine that the trial court's filing of the notice was improper, Dobson still had actual notice that proceedings would be held **at** which it would be determined if he

qualified as a habitual offender, Based upon this notice, Dobson was able to adequately prepare to meet the state's evidence that was presented at the hearing. Therefore, any error was harmless. The Fifth District's decision in this case should be affirmed,

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this Honorable Court approve the decision of the district court.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Merits Brief has been furnished by delivery to Susan A. Fagan, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114-4310, this 28th day of May, 1996.

Ann M. Childs
Of Counsel

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 Sheriffs Office's revocation of his special process sewer appointment; because of alleged misconduct. The Sheriff moved to dismiss far 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 Sheriffs 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* 16 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..