# ORIGINAL



IN THE SUPREME COURT OF FLORIDA

ANDREW J. MORRIS,

Petitioner,

vs.

.STATE OF FLORIDA,

Respondent.

Supreme Court Case No. 90, 427

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

M.A. LUCAS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0658286
112 Orange Ave., Ste. A
Daytona Beach, FL 32114
(904) 252-3367

ATTORNEY FOR PETITIONER

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INITIAL BRIEF OF Petitioner

STATEMENT OF THE CASE

Petitioner was charged by a two count information filed on October 25, 1994, charging Petitioner with committing the following offenses: Count I - unlawful possession of a controlled substance, to-wit: cocaine, in violation of Section 893.13(6)(a), Florida Statutes; Count II - resisting officer without violence to his person, in violation of Section 843.02 and 943.10, Florida Statutes. (R 1)

The case proceeded to trial on February 16, 1995 before the Honorable Charles J. Tinlin, acting Circuit Court Judge for the Seventh Judicial Circuit, in and for St. Johns County. (T 42-205) At the close of the State's case, defense counsel moved for a judgment of acquittal on Count I. (T 148) The trial court denied the motion. (T 149) Defense counsel failed to renew his motion for judgment of acquittal after Petitioner testified on his own behalf. After deliberations, the jury returned a verdict of guilty as charged in Count I and Count II. (T 198)

A sentencing hearing was held on May 3, 1995 before the Honorable Robert K. Mathis. (R 79-86) Petitioner's sentencing guidelines scoresheet total indicated that state prison time was not appropriate. (R 36-37) The trial court, however, imposed a departure sentence of five years incarceration in Count I because of Petitioner's extensive unscored juvenile record. (R 29, 37) In Count II, the trial court sentenced Petitioner to 364 days in the county jail to run concurrent to the sentence imposed in Count I. (R 30, 37, 84)

Petitioner appealed to the Fifth District Court of Appeal, arguing that the trial court erred in denying Petitioner's motion for judgment of acquittal made at the close of the State's case as to Count I and in sentencing Petitioner to a departure sentence which exceeded the term of incarceration if Petitioner's juvenile record had actually been scored. (R 46)

On March 21, 1997, the Fifth District Court of Appeal affirmed Petitioner's conviction but reversed for a new sentencing. The Fifth District Court of Appeal in affirming Petitioner's conviction held that Petitioner's claim that the trial court erred in denying his motion for judgment of acquittal was not preserved because Petitioner did not renew the motion at the close of all the evidence. See Morris v. State, 689 So. 2d 1275 (Fla. 5th DCA 1997) (Appendix A)

Notice to Invoke this Honorable Court's Discretionary Jurisdiction was filed in the Fifth District Court of Appeal on April 21, 1997. A Jurisdictional Brief was filed on April 29, 1997. This Honorable Court accepted jurisdiction on August 20, 1997. This appeal follows.

## STATEMENT OF THE FACTS

On October 4, 1994, at approximately 2:00 a.m., Officer Brannon of the St. Augustine Police Department was following another patrol vehicle south bound on San Marco Avenue when he observed 3 black males standing near the wall of the Raintree Restaurant which is located at the corner of San Marco and Bernard. (R 60) Office Brannon observed that as the patrol vehicle in front of him passed the individuals, it appeared as if they were trying to conceal themselves and that they may have placed an object over the wall. (R 61) Officer Brannon became suspicious and stopped his vehicle. Office Brannon exited his car and asked the three individuals to come over to his patrol car. Two of the three individuals walked over to his parked patrol car while the third individual who was later identified as Petitioner ran west bound down Bernard Street. (R 62)

Officer Brannon observed Officer Makowski driving north bound on San Marco and just gestured to Officer Makowski to go after Petitioner. (R 62) While Officer Makowski was pursuing Petitioner, Officer Brannon detained the two other individuals in the back of the patrol car. (R 63) Officer Brannon asked the two individuals what they were doing and they told him that they were going to the 7-11 to get something to eat and drink. (R 63) Officer Brannon testified that he later searched the area around the wall but found that there was nothing there. (R 81) Officer Makowski testified that he pursued Petitioner who was running down the sidewalk, west bound on Bernard. (R 9) Officer Makowski observed that Petitioner was wearing a light colored t-shirt that was tucked into a dark pair of pants. (R 91) Officer Makowski also observed that Petitioner's pants pockets were inside his pants and that Petitioner did not have anything in his hands. (R 91, 91)

Officer Makowski testified that he temporarily lost sight of Petitioner when Petitioner turned into the parking lot behind the Raintree Restaurant. (R 91) As Officer Makowski turned into the parking lot, he observed Petitioner stumbling around by a large wrought iron gate. (R 91) Officer Makowski believed that Petitioner may have ran into the gate. Officer Makowski observed that Petitioner's pants pockets were now inside out. (R 92) Officer Makowski stopped his vehicle and ordered Petitioner to stop but Petitioner hid behind a van parked in the lot. (R 93) Officer Makowski ordered Petitioner to come out, but Petitioner ran west bound through the lot and attempted to hide in a clump of bushes. (R 93) Petitioner then tried to run towards Bernard Street and Officer Makowski told Petitioner to get down on the ground. Petitioner complied with the officer's order. (R 94) Petitioner was handcuffed and searched. (R 95) Officer Makowski testified that he found nothing on Petitioner. Petitioner was then placed into the back seat of the officer's patrol car. (R 95)

Officer Makowski testified that he observed a distinct odor of Juicy Fruit gum on Petitioner's breath. Officer Makowski read Petitioner his rights and asked Petitioner for his name. (R 101) Officer Makowski testified that Petitioner gave him a false name at least two or three times. (R 101)

Officer Makowski transported back to where Officer Brannon was holding the two other subject. (R 101) Officer Makowski walked back along the same path that he believed that Petitioner had taken during the chase. Officer Makowski searched near where Petitioner had been stumbling around. Officer Makowski found, to the left of where Petitioner had been standing, a cassette tape. To the right of where Petitioner had been standing he found a package of Juicy Fruit gum and a plastic baggie containing what appeared to be crack cocaine.

(R 102) Officer Makowski testified that the cassette tape, along with the gum and the baggie appeared to be dry. He further testified that it had rained at least 30 minutes earlier and that there were puddles in the parking lot and everything else appeared to be wet. (R 106) Officer Makowski asked Petitioner what kind of gum he had been chewing and Petitioner told him he was chewing Spearmint gum. (R 101) Officer Makowski testified that he never drew his weapon on Petitioner. (R 126)

Denise Holmquist testified as an expert that the baggie contained cocaine. (R 144) Joseph Dorsey, testified as an expert in latent fingerprint examinations. Mr. Dorsey testified that he examined the baggie which contained the cocaine but found no finger prints of any value. (R 134)

Andrew Morris testified on his own behalf that he was staying with two other friends at the Scottish Inn. They had decided to go to the 7-11 to get something to eat and drink. (R 153, 154) Petitioner testified that he was walking down the street, a police officer stopped his car and jumped out of his patrol car yelling something. (R 155) Petitioner ran because he was scared. (R 155) He testified that he never ran into any gate. That a police officer followed him into the parking lot and shined a flashlight on him. The officer pointed his gun and told him to get down on the ground. (R 155-158) Petitioner testified that he never saw a van parked in the lot nor did he ever try to hide in any bushes. (R 159) Petitioner further testified that he was chewing Spearmint gum. Petitioner also testified that it is common for him to wear his pockets inside out when he has nothing in his pockets. (R 156)

## SUMMARY OF ARGUMENT

The trial court erred in denying Petitioner's motion for judgment of acquittal on Count I, possession of cocaine where the evidence was legally insufficient to support the finding of guilt. The State's evidence showed only that cocaine was found near the area where Petitioner was stopped by Officer Makowski. There were no fingerprints found on the bag of cocaine. Petitioner's conviction must be reversed. Furthermore, the Fifth District Court of Appeal erred in holding that Petitioner's motion for judgment of acquittal at close of the State's case did not properly preserve the issue of the trial court's error in denying Petitioner's motion for judgment of acquittal. This Honorable Court should reverse Petitioner's conviction because the State's evidence was legally insufficient to support a finding of guilt and the issue was properly preserved.

## ARGUMENT

THE FIFTH DISTRICT COURT APPEAL ERRED IN DENYING PETITIONER'S MOTION FOR A JUDGMENT OF ACQUITTAL WHERE THE CIRCUMSTANTIAL EVIDENCE WAS INSUFFICIENT TO SUPPORT A VERDICT OF GUILTY AND THE ISSUE WAS PROPERLY PRESERVED FOR APPELLATE REVIEW.

It has long been established in Florida that:

> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion the defendant committed the crime, it is not sufficient to sustain a conviction. It is the actual exclusion of the hypothesis if innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypothesis, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction of it if it is likewise consistent with a reasonable hypothesis of innocence.

Davis v. State, 90 So.2d 629, 631-632 (Fla. 1956); McArthur v. State, 351 So.2d 972 (Fla. 1977). Circumstances that create nothing more than a strong suspicion that the defendant committed the crimes, are not sufficient to support a conviction. Cox v. State, 555 So.2d 352 (Fla. 1989); Williams v. State, 143 So.2d 484 (Fla. 1962); Mayo v. State, 71 So.2d 899 (Fla. 1954)

The trial court erred in denying Petitioner's motion for judgment of acquittal to the charge of possession of cocaine because the State's evidence was legally insufficient to support a finding of guilt. The evidence was entirely circumstantial and failed to exclude, as required by law, every reasonable hypothesis of innocence. The State failed to prove Petitioner possessed the cocaine found in the parking lot.

In the instant case, the State's evidence rested exclusively upon Officer Makowski's testimony that during his initial pursuit of Petitioner at approximately 2:00 a.m., he was able to observe that Petitioner's pockets were inside of his pants. Officer Makowski lost sight of Petitioner. Officer Makowski testified that when he caught up with Petitioner later in the parking lot of the Raintree Restaurant, Petitioner's pockets were inside out. Officer Makowski further testified that he observed the smell of Juicy Fruit gum on Petitioner's breath. Officer Makowski found a package of Juicy Fruit gum near where Petitioner was standing along with a baggie containing crack cocaine. The package of gum and cocaine appeared to be dry, although everything else in the parking lot was still wet from the rain which had fallen approximately 30 minutes earlier. Officer Makowski further testified that he never saw Petitioner throw anything down nor did he observe anything in Petitioner's hands. The State submitted the baggie containing cocaine for fingerprints but there were no fingerprints of any value found on the package of cocaine. The State failed to prove the Petitioner had constructive possession of this cocaine.

Petitioner maintains that the trial court erred in denying his motion for judgment of acquittal because his conviction cannot stand as a matter of law based on what the officer thought Petitioner may have possessed. The evidence introduced by the State is entirely consistent with Petitioner's reasonable hypothesis of innocence. The State has failed to exclude a very reasonable hypothesis that the cocaine found in the restaurant parking lot was not Petitioner's.

In State v. Law, 559 So. 2d 187 (Fla. 1989), the Supreme Court of Florida reiterated the standard to be applied in reviewing circumstantial evidence cases as follows:

> It is the trial judge's proper task to review the evidence to determine the presence or absence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. That view of the evidence must be taken in the light most favorable to the State. Spinkellink v. State, 313 So. 2d 666, 670 (Fla. 1975), cert. Denied, 428 U.S. 911, 96 S. Ct. 3227, 49 L.ED. 2d 1221 (1976). The State is not required to "rebut conclusively every possible variation" of events which could be inferred from the evidence, but only to introduce competent evidence which is inconsistent with the defendant's theory of events. See, Toole v. State, 472 So 2d 1176 (Fla. 1985). Once that threshold burden has been met, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt. If the rule were not applied in this manner, a trial judge would be required to send a case to the jury even where no evidence contradicting the defendant's theory of innocence was present, only for the verdict of guilty to be reversed on direct appeal. (Emphasis added)

Id at 189

Accordingly, Petitioner requests this Court to reverse his conviction because there was no evidence presented at trial contradicting Petitioner's theory of innocence.

The due process clause protects the accused against conviction except upon proof beyond a reasonable doubt about every fact necessary to constitute the crime with which he is charged. In Re: Winship, 397 U.S. 358 (1970)

> Under Florida Law where there is no direct evidence of guilt and the State seeks a conviction based wholly upon circumstantial evidence, no matter how strongly the evidence may suggest guilt, a conviction can not be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. (citation omitted) The basic proposition of our law is that one accused of a crime is presumed innocent until proved guilty beyond and to the exclusion of every reasonable doubt, and it is the responsibility of the State to carry its burden. (citation omitted) It would be impermissible to allow the State to meet its burden through a succession of inferences that required a pyramiding of assumptions in order to arrive at the conclusion necessary for conviction. (citations omitted)

Torres v. State, 520 So.2d 78, 80 (Fla. 3d DCA 1988). See Posnell v. State, 393 So.2d 635, 636 (Fla. 4th DCA 1981) ("where the State fails to meet its burden of proving each and every necessary element of the offense charged, beyond a reasonable doubt the case should not be submitted to the jury and a judgment of acquittal should be granted."; Kickasola v. State, 405 So.2d 200, 201 (Fla. 3d DCA 1981)("evidence which furnished nothing stronger than a suspicion, even though it tends to justify the suspicion that the defendant committed the crime is insufficient to sustain a conviction.") (emphasis supplied)

In Williams v. State, 573 So. 2d 124 (Fla. 4th DCA 1991) two uniformed officers approached a group of men standing around a chair which Defendant was sitting in. As the officers approached the group moved to a picnic table. The officers searched the chair and found two cocaine rocks located between the seat cushion and the arm rest and another on the ground under the chair. Defendant was arrested and searched. The officers found $521.00 on Defendant. The Defendant went to trial and was convicted of possession of cocaine with intent to sell. The Fourth district Court of Appeal stated that:

> Because it is clear that appellant did not have actual or physical possession of the cocaine rocks, the state had to prove constructive possession. The elements of constructive possession can be proven by circumstantial evidence, Wale v. State, 397 So.2d 738 (Fla. 4th DCA 1991) and include: (1) The accused must have dominion and control over the contraband; (2) The accused must have knowledge that the contraband is in his presence; and, (3) The accused must have knowledge of the illicit nature of the contraband. Brooks v. State, 501 So.2d 176 (Fla. 4th DCA 1987); Wale, 397 So.2d at 739.

Williams at 125.

In Williams, the State did not dispute the proposition that mere proximity to the

contraband without more is legally insufficient to prove possession. Wallace v. State, 553 So.2d 777 (Fla. 4th DCA 1989); Agee v. State, 522 So.2d 1044 (Fla. 2nd DCA 1988) The Fourth District Court of Appeal reversed the Defendant's conviction because the evidence presented by the State only proved that the Defendant was in proximity to the cocaine. There was no evidence that the Defendant's fingerprints were on the cocaine and there was no evidence that Defendant was actually seen with the cocaine. Similarly, in the instant case the officer never observed Petitioner throw down anything and there were no fingerprints found on the cocaine.

Petitioner's conviction for possession of cocaine rests entirely on circumstantial evidence which fails to exclude every reasonable doubt violates the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 16, of the Florida Constitution. Accordingly, Petitioner's conviction should be reversed.

In the instant case, the Fifth District Court of Appeal held that Petitioner's argument that the trial court erred in denying his motion for judgment of acquittal was not preserved for appeal. Although, Petitioner properly made a motion for judgment of acquittal at the close of the State's case, he did not renew his motion for judgment of acquittal at the conclusion of all the evidence. In holding that the denial of Petitioner's motion for judgment of acquittal was not preserved for appeal, the Fifth District Court of Appeal improperly relied on this Court's decision in State v. Pennington, 534 So. 2d 393, (Fla. 1988) and Rule 3.380(b), Florida Rules of Criminal Procedure.

In Pennington, however, this Court rejected the State's argument to adopt the federal "waiver doctrine". Under the "waiver doctrine," if a defendant presents evidence following a

denial of his motion for judgment of acquittal, this operates as a waiver of his objection to the denial of his motion. Further, if the defendant fails to renew his motion for judgment of acquittal at the end of all the evidence, the "waiver doctrine" operates to foreclose the issue of sufficiency of the evidence on appeal. This Court stated that:

> The Florida Rule expressly states that a defendant's motion for judgment of acquittal at the close of the state's case is not waived by the defendant's subsequent introduction of evidence if properly preserved by a motion at the close of all the evidence. Further, the committee notes reflect that "a minority felt that the language should be changed so that a defendant would waive an erroneous denial of his motion for judgment of acquittal by introducing evidence. Florida Rule Criminal Procedure 3.660 Committee Notes (1967). It is clear that our rule is written to prevent application of the federal waiver rule. (Emphasis added) Id. at 395-396.

Furthermore, the Fifth District Court of Appeal reached a contrary result in Williams v. State, 511 So.2d 740 (Fla. 5th DCA 1987). In Williams, the defendant moved for a judgment of acquittal at the close of the State's case, but failed to renew the motion at the conclusion of all of the evidence or to file a motion for new trial. The Fifth District Court of Appeal held that the issue of the denial of defendant's motion for judgment of acquittal was preserved for appeal. The appellate court, however, was limited in their scope of review to only the evidence presented during the State's case in chief. See also, McGeorge v. State, 386 So.2d 29 (Fla. 5th DCA 1990)

The Fourth District Court of Appeal in T.M.M. v. State, 567 So.2d 805 (Fla. 4th DCA 1990), held that the failure of the defendant to renew his motion for judgment of acquittal at the close of the all the evidence does not prevent the court from reviewing the denial of the motion after the State's case. The Third and First District Courts of Appeal have reached the

same conclusion. See, e.g., Everett v. State, 339 So.2d 704 (Fla. 3rd DCA 1976); Vazquez v. State, 350 So.2d 1094 (Fla. 3rd DCA 1977); Castillo v. State, 308 So.2d 619 (Fla. 3rd DCA 1975); Wiggins v. State, 101 So. 2d 833 (Fla. 1st DCA 1958).

This Honorable Court should reaffirm it's holding in Pennington, reverse the decision of the Fifth District Court of Appeal and grant Petitioner's motion for judgment of acquittal on Count I.

## CONCLUSION

BASED UPON the foregoing cases, authorities and policies, Petitioner requests that this Honorable Court reverse Petitioner's conviction for possession of cocaine.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

M.A. LUCAS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0658286
112 Orange Ave., Ste. A
Daytona Beach, FL 32114
(904) 252-3367

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Ave., Ste 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal this 15th day of September, 1997.

M.A. LUCAS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

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| ANDREW J. MORRIS, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | Fifth District Court of Appeal No.: 95-1230 |
| | ) | |
| | ) | |
| .STATE OF FLORIDA, | ) | Supreme Court Case No. 90, 427 |
| | ) | |
| Respondent. | ) | |
| | ) | |

APPENDIX TO INITIAL BRIEF OF APPELLANT

Appendix

A. Morris v. State, 689 So.2d 1275 (Fla. 5th DCA 1997)

Robert A. Butterworth, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

HARRIS, Judge.

Clifton Denson was convicted of possession and delivery of a controlled substance. At sentencing, he complained that his attorney had been ineffective *during his trial.* The trial judge observed:

> I don't know what you expect your lawyer to do. He is not a magician. The officer testified that you walked up to his car, and you sold cocaine directly to an undercover police officer. I mean, the officer testified that not only did you sell the cocaine to him, but following the sale, that you were arrested at the scene. He came back and reconfirmed that you were the person that sold him the cocaine. I don't know what you expect your attorney to do with those facts.

The trial court, after making this statement, permitted defense counsel to continue to represent Denson through the sentencing hearing. Denson appeals claiming that the court erred in not conducting a *Nelson* hearing. We affirm the trial court.

[1] In *Nelson v. State,* 274 So.2d 256 (Fla. 4th DCA 1973), the court announced the rule that "if a defendant, *before the commencement of trial,* makes it appear to the trial judge that he desires to discharge his court appointed counsel ... [and if] ... incompetency of counsel is assigned by the defendant as the reason, or a reason, the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court-appointed counsel *is not rendering effective assistance to the defendant.*" It is the purpose of the *Nelson* inquiry to determine if the appointed counsel *is* performing adequately and if not, to replace such counsel. The *Nelson* inquiry has no role in *past* ineffectiveness of counsel.

[2] Denson contends correctly that he is entitled to be represented by competent counsel at all critical stages of his trial. He is further correct in that sentencing is such a stage. But he did not complain to the court that his counsel was not doing something that he should or that he was doing anything that he should not in relation to the sentencing. Even on appeal, Denson does not contend that his counsel was ineffective *at sentencing.* Denson simply did not either timely or properly make an objection about his attorney that would warrant a *Nelson* inquiry.

[3] Further, even if his complaint had been timely, it was still inadequate to require a *Nelson* inquiry. Denson's only response to the judge's implied question: "What do you contend that your attorney did or did not do that was ineffective?" was that he had only seen his lawyer twice before trial and that he was brought to trial "with an orange suit on with a big jacket." The court obviously found in retrospect, proper because of the timing of the objection, that counsel's preparation was adequate under the circumstances and that the defendant's attire did not constitute ineffective representation. In short, the court could, and obviously did, find that the complaint did not present "reasonable cause" for a belief that counsel was acting in an ineffective manner.

**AFFIRMED.**

W. SHARP and GRIFFIN, JJ., concur.



**Andrew J. MORRIS, Appellant,**

**v.**

**STATE of Florida, Appellee.**

**No. 95–1230.**

District Court of Appeal of Florida, Fifth District.

March 21, 1997.

Defendant was convicted in the Circuit Court, St. Johns County, Robert K. Mathis,

J., of unlawful possession of a controlled substance and resisting arrest without violence, and he appealed. The District Court of Appeal, Harris, J., held that: (1) whether trial court erroneously denied motion for judgment of acquittal was not preserved for appeal, and (2) before considering defendant's nonscoreable juvenile record as reason for departure at sentencing, trial court was required to consider sentence which juvenile would have received had juvenile record been scored.

Affirmed in part, reversed in part, and remanded.

1. **Criminal Law ⇐1044.2(2)**

Whether trial court erroneously denied motion for judgment of acquittal was not preserved for appeal, where, although defendant properly made motion at conclusion of state's case, he did not renew motion at conclusion of his case. West's F.S.A. RCrP Rule 3.380(b) (1992).

2. **Criminal Law ⇐1044.2(2)**

Motion for judgment of acquittal must be repeated at close of all evidence in order to preserve denial of such motion for review on appeal. West's F.S.A. RCrP Rule 3.380(b) (1992).

3. **Criminal Law ⇐1287(8)**

Before considering defendant's nonscoreable juvenile record as reason for departure at sentencing, trial court was required to consider sentence which juvenile would have received had juvenile record been scored.

4. **Costs ⇐325**

Trial court erred at sentencing by setting public defender's lien without proper notice.

5. **Criminal Law ⇐1287(11)**

Although nonscoreable juvenile record may be considered as reason for departure, such departure may be no greater than sentence juvenile would have received had juvenile record been scored.

James B. Gibson, Public Defender, and M.A. Lucas, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Michael D. Crotty, Assistant Attorney General, Daytona Beach, for Appellee.

HARRIS, Judge.

Andrew J. Morris was convicted of the unlawful possession of a controlled substance and resisting arrest without violence. Although his scoresheet reflected a sentence of any non-state incarceration, the judge departed and sentenced Morris to five years incarceration based on his unscored juvenile record. Morris appeals his conviction and his sentence. We affirm the conviction but reverse for a new sentencing.

[1] Morris' claim that the court erred in not granting his motion for judgment of acquittal was not preserved for appeal. Although he properly made the motion at the conclusion of the State's case, he did not renew the motion at the conclusion of his case. Rule 3.380(b), Florida Rules of Criminal Procedure provides:

> A motion for judgment of acquittal is not waived by subsequent introduction of evidence on behalf of the defendant, but after introduction of evidence by the defendant, the motion for judgment of acquittal must be renewed at the close of all the evidence. Such motion must fully set forth the grounds upon which it is based.

[2] In *State v. Pennington*, 534 So.2d 393 (Fla.1988), the supreme court noted that the above cited rule expressly states that a defendant's motion for judgment of acquittal at the close of the State's case is not waived by the defendant's subsequent introduction of evidence *if properly preserved by a motion at the close of all the evidence.* Therefore, both the rule and *Pennington* (at least by implication) require that a motion for judgment of acquittal must be repeated at the close of all the evidence in order to preserve the denial of such motion for review on appeal.

[3–5] We agree with Morris, however, that the trial court erred in sentencing both

by not having or providing us with sufficient information and also by setting a Public Defender's lien without proper notice. Although the nonscoreable juvenile record may be considered as a reason for departure, such departure may be no greater than the sentence which the juvenile would have received had the juvenile record been scored. *See Puffinberger v. State*, 581 So.2d 897 (Fla. 1991). This record does not reflect that the trial court considered what that limitation might be.

We, therefore, affirm the conviction but reverse and remand for a new sentencing in conformity with *Pennington* and for a new determination of the Public Defender's lien after proper notice.

**AFFIRMED in part; REVERSED in part and REMANDED.**

COBB and W. SHARP, JJ., concur.

**Kimberly C. KRUEGER, n/k/a Kimberly Weiny, Appellant,**

**v.**

**Charles Piper KRUEGER, III, Appellee.**

**No. 96–00824.**

District Court of Appeal of Florida, Second District.

March 21, 1997.

Following marriage dissolution, father filed for downward modification of his child support. The Circuit Court, Collier County, Jay B. Rosman, J., granted modification, and mother appealed. The District Court of Appeal, Campbell, J., held that: (1) father's decision to attend law school could not be considered voluntary reduction in income supporting imputation of income to him; (2) trial court was not required to consider father's non-liquid assets; and (3) settlement agreement allegedly barring either party's collection of attorney fees did not address issue of attorney fees in modification proceeding, and (4) trial court should have reserved jurisdiction to consider fees.

Affirmed and remanded; conflict certified.

**1. Divorce ⇐309.2(3)**

Father's decision to attend law school could not be considered voluntary reduction in income supporting imputation of income to him for purpose of his motion for downward modification of his child support obligation; oldest child was only 12, and thus, would be able to benefit from father's reinstated child support and increased income after law school, and father had medical reason to change careers.

**2. Divorce ⇐309.2(3)**

Trial court was not required to consider father's assets in modifying his child support obligation downward, in light of father's testimony that his assets were not liquid, but were in form of real estate that he had been unable to sell.

**3. Parent and Child ⇐3.3(8)**

While it is permissible for court to consider assets in determining whether to modify child support, court may also consider whether any particular asset is fixed asset or liquid asset.

**4. Husband and Wife ⇐279(1)**

Settlement agreement which father claimed barred either party from collecting attorney fees did not address issue of attorney fees in support modification proceeding; three relevant provisions did not address attorney fees in modification proceeding, despite parties' specific mention of possibility of subsequent modification.

**5. Divorce ⇐312.8**

Trial court should have reserved jurisdiction to consider attorney fees, given that parties stipulated to reservation of attorney fees, and court stated that it intended to reserve issue for later hearing.