IN THE SUPREME COURT OF FLORIDA

DAVID L. TAYLOR,

Petitioner,

v. Case No. 90,439

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The State generally accepts Taylor's Statement of the Case and Facts, subject to the following additions:

1. The parties and the trial court regarded Taylor's original ten-year probationary sentence as a downward departure. (R. I 66-67,61). The sole reason for the departure was to allow Taylor to pay restitution, of which there was a substantial amount ($20,961). (R. I 66-67).

2. Although he acknowledges that he violated his probation as specified in the affidavit of probation violation, (Br.2), Taylor does not enumerate the violations. He violated his probation by 1) failing to pay toward the cost of his supervision, 2) committing the new law offense of possession of marijuana, 3) committing the new law offense of possession of drug paraphernalia, 4) smoking marijuana, 5) failing to maintain or actively seek gainful employment, 6) failing to pay a fine as ordered, 7) failing to pay the Crimes Compensation Trust Fund, 8) failing to pay court costs, 9) failing to pay his public defender fee, and 10) failing to pay restitution. (R. I 1-2).

SUMMARY OF ARGUMENT

The district court's opinion should be affirmed in all respects. Having accepted the benefits of his original probationary sentence without complaint, Taylor is estopped from challenging the sentence upon revocation of probation. Even though Taylor's original ten-year sentence was illegal in that it exceeded the statutory maximum for third degree felonies, that illegality was eradicated when the trial court revoked Taylor's probation within the legal portion of the sentence -- i.e., the first five years -- and sentenced him to prison. Now there is no possibility of Taylor serving any time beyond the statutory maximum. Accordingly, any error is harmless beyond a reasonable doubt.

This Court should not follow the Fourth District, as Taylor urges, in holding that Taylor's probation could not be revoked because his sentence was void *ab initio*. The Fifth District was correct in drawing a distinction between violations which occur during the legal portion of the sentence and violations which occur past the statutory maximum. When sentencing a defendant upon revocation of probation, the trial court is required to give credit for time served on probation if there is a danger of the sentence exceeding the statutory maximum. Thus, if the violation

occurs during the legal portion, this rule will prevent the sentence upon revocation from exceeding the statutory maximum.

This Court should therefore affirm the decision of the Fifth District Court of Appeal and disapprove any contrary case law.

ARGUMENT

THE TRIAL COURT PROPERLY REVOKED TAYLOR'S PROBATION WITHIN THE LEGAL PORTION OF THE SENTENCE.

Petitioner David L. Taylor challenges the decision of the Fifth District Court of Appeal to affirm the revocation of Taylor's probation. Taylor v. State, 690 So. 2d 686 (Fla. 5th DCA 1997).[1] Taylor contends that because his original ten-year probationary sentence exceeded the statutory maximum for third degree felonies, the sentence was illegal and his probation could not be revoked. For the reasons discussed below, the district court's opinion should be affirmed in all respects.

As acknowledged by the Fifth District Court of Appeal, Id., Taylor's original ten-year sentence was illegal in that it exceeded the statutory maximum of five years for third degree felonies. § 775.082(3)(d), Fla. Stat. (1993); see also, Davis v. State, 661 So. 2d 1193, 1196 (Fla. 1995)(illegal sentence is one which exceeds the maximum allowed by law). However, because the trial court revoked Taylor's probation and resentenced him, Taylor will never serve a day beyond the statutory maximum.

On June 30, 1995, the trial court sentenced Taylor to ten

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[1]Appendix A.

years on probation. (R. I 67). On December 22, 1995, an affidavit of probation violation was filed, charging Taylor with four violations, including the commission of the new law offenses of possessing marijuana and drug paraphernalia. (R. I 1). It appears that Taylor admitted the violations.[2] The trial court revoked Taylor's probation and sentenced him to thirty-eight months in prison. (R. I 19-24,61). No provision was made for further probation. Thus, Taylor's total sentence is well below the five-year statutory maximum.

Taylor's argument is riddled with logical inconsistencies. He complains that his original sentence was illegal. Therefore, he argues, the trial court did not have the authority to revoke his probation and resentence him. Yet it was the trial court's challenged actions of revoking Taylor's probation and resentencing him that corrected the illegality in Taylor's sentence and assured that he would not serve any time beyond the statutory maximum. Thus, the very ground he urges for reversal -- illegal sentence -- was rendered moot by the action he seeks to

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[2]Although the record-on-appeal does not contain a transcript of Taylor's VOP hearing, he acknowledges in his initial brief on the merits that he "violated his probation as indicated in the [affidavit of] Violation of Probation of December 22, 1995." (Br.2).

have reversed. This is logically untenable.

Ironically, Taylor did not complain that his original sentence was illegal until the illegality had been removed. A defendant who accepts the benefits of probation without complaint, is estopped from challenging the legality of the original sentence upon revocation of probation. Warrington v. State, 660 So. 2d 385 (Fla. 5th DCA 1995); Gaskins v. State, 607 So. 2d 475 (Fla. 1st DCA 1992).

It appears that Taylor did not appeal the original sentence because it was actually a good deal for him. Although illegal in the sense that it exceeded the statutory maximum, the parties regarded Taylor's original probationary sentence as a *downward* departure, apparently because Taylor scored out to state prison time. (R. I 66-67,61). Since Taylor did not challenge his original probationary sentence until the benefits of that sentence were no longer in effect, the principle enunciated in Warrington and Gaskins bars Taylor's current challenge to his original sentence.

Taylor points to certain dicta in Warrington in which the district court noted that Warrington's sentence did not exceed the statutory maximum. (Br.7); 660 So. 2d at 387. This would be a relevant distinction if Taylor were still serving an illegal

sentence.

The State's position is that the revocation of Taylor's probation was appropriate because it was done within the legal portion of Taylor's sentence, i.e. the first five years. This is the view that prevailed in the district court. 690 So. 2d 686. Admittedly, if the violation occurred past the statutory maximum, then the sentence could not stand and the defendant would have to be discharged.

However, where the violation occurs during the legal portion of the sentence, this Court's opinions in State v. Summers, 642 So. 2d 742 (Fla. 1994), State v. Roundtree, 644 So. 2d 1358 (Fla. 1994), and Waters v. State, 662 So. 2d 332 (Fla. 1995), will prevent the sentence upon revocation from exceeding the statutory maximum. These cases require the sentencing court, upon revocation of probation or community control, to give the defendant credit for time previously served on probation or community control, in order to insure that the sentence upon revocation does not exceed the statutory maximum.

This Court should disapprove Jackson v. State, 654 So. 2d 234, 236 (Fla. 4th DCA 1995)[3], which rejected the State's

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[3]Appendix B.

argument that probation may properly be revoked during the legal portion of an illegal probationary sentence. The Fourth District did not actually analyze this issue, but simply stated that the State's argument was "answered" by Cecil v. State, 614 So. 2d 603 (Fla. 1st DCA 1993).[4] 654 So. 2d at 236. This was erroneous. Cecil does not address this argument let alone reject it. It does not appear that the Cecil court even considered it.

In this case, the district court properly drew a distinction between a violation occurring during the legal portion of the sentence and one occurring during the illegal portion. 690 So. 2d 686. This Court should affirm the decision below and disapprove Jackson and Cecil to the extent that they conflict with the decision below.

The issue is one of prejudice. In asking this Court to declare his original sentence void *ab initio*, Taylor asks this Court to reverse his sentence despite the fact that he is no longer prejudiced by the alleged error. The Legislature has made it clear that a judgment or sentence should not be reversed in the absence of a prejudicial error. As part of the Criminal Appeal Reform Act of 1996, the Legislature passed Subsection

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[4]Appendix C.

924.051(7), Florida Statutes (Supp. 1996), which reads:

> In a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

A "prejudicial error" is one which "harmfully affected the judgment or sentence." § 924.051(1)(a), Fla. Stat. (Supp. 1996).

These statutes took effect July 1, 1996. Ch. 96-248, § 9, Laws of Fla. That is the same day Taylor commenced appellate proceedings in this case by filing notice of appeal in the circuit court. (R.51). The State would therefore submit that the provisions of Section 924.051 apply to this appeal and do not implicate the Ex Post Facto Clause. §§ 924.051(2), Fla. Stat. (Supp. 1996)("The right to direct appeal . . . may only be implemented in strict accordance with the terms and conditions of this section"); See also, California Dept. of Corrections v. Morales, ___ U.S. ___, 115 S.Ct. 1597, 1601 (1995)(the Ex Post Facto Clause "is aimed at laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts.'"), quoting Collins v. Youngblood, 497 U.S. 37, 43 (1990); Neal v. State, 688 So. 2d 392, 395 (Fla. 1st DCA 1997)(Even if

Subsection 924.051(3) "operates retrospectively," it is not an ex post facto law because it neither alters the definition of criminal conduct, nor increases the penalty by which a crime is punishable.)

The error Taylor complains of is no longer in effect and there is no longer a possibility that he will serve any time beyond the statutory maximum. Thus, there is no prejudice, as required by Subsection 924.051(7). The error is harmless beyond a reasonable doubt. See, State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Indeed, even if Taylor receives the relief he requests, reversal and remand for resentencing, there is nothing to stop the trial court from simply re-imposing the same 38-month sentence currently in effect.[5]

Sentencing is not a game in which one false move by the sentencing court results in immunity for the defendant. Harris v. State, 645 So. 2d 386 (Fla. 1994). The decision of the Fifth District Court of Appeal should be affirmed in all respects. Any conflicting case law should be disapproved.

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[5]Since Taylor evinced an inability to abide by the terms of his probation, there is no reasonable possibility of his again receiving a probationary sentence.

CONCLUSION

BASED ON THE foregoing argument and authority, the State respectfully requests that this Honorable Court affirm the decision of the Fifth District Court of Appeal in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing brief and attached appendix have been furnished by U.S. Mail to counsel for Petitioner, WM. J. SHEPPARD, ESQ. and RICHARD W. SMITH, ESQ., Sheppard and White, P.A., 215 Washington Street, Jacksonville, Florida 32202, this 11th day of August, 1997.

DAVID H. FOXMAN
ASSISTANT ATTORNEY GENERAL

IN THE SUPREME COURT OF FLORIDA

DAVID L. TAYLOR,

Petitioner,

v. Case No. 90,439

STATE OF FLORIDA,

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_____/

APPENDIX TO ANSWER BRIEF OF RESPONDENT ON THE MERITS

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Appendix A

David L. TAYLOR, Appellant,

v.

STATE of Florida, Appellee.

No. 96-1955.

District Court of Appeal of Florida, Fifth District.

March 27, 1997.

Defendant pled nolo to driving under the influence resulting in serious bodily injury and was sentenced to ten years probation. Defendant violated probation and was subsequently sentenced by the Circuit Court for St. Johns County, Robert K. Mathis, J. Defendant appealed, claiming original sentence was illegal. The District Court of Appeal, Harris, J., held that defendant was estopped from asserting illegality of sentence after he had knowingly taken advantage of its benefits and as probation violation occurred during term that sentence would have been legal.

Affirmed.

Estoppel ⇐92(1)

Defendant was estopped from asserting illegality of sentence to avoid revocation of probation and resentencing after he knowingly took advantage of sentence's benefits; even though original sentence was illegal as it exceeded maximum statutory authority, defendant violated probation during first five years when sentence would have been legal.

William J. Sheppard and Richard W. Smith of Sheppard and White, P.A., Jacksonville, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and David H. Foxman, Assistant Attorney General, Daytona Beach, for Appellee.

HARRIS, Judge.

David L. Taylor pled nolo to the offense of driving under the influence resulting in serious bodily injury. Substantial restitution was required so, without objection from Taylor and with the approval of the State, Taylor was sentenced to ten years probation in lieu of prison. Within a few months of his sentence (which he did not appeal), Taylor violated the terms of his probation by, among other violations, possessing marijuana. He was found guilty of violating probation and sentenced to 38 months in prison. He now contends that it was improper to violate his probation because his original sentence was "illegal" where the initial conviction of a third degree felony did not authorize a term of ten years probation. He urges that since he cannot violate an illegal sentence, his latest conviction must be set aside. The trial court disagreed and we affirm.

We recognize that Taylor's original sentence was illegal in that it exceeded the maximum statutory authority. However, since he violated probation during the first five years, a sentence that would have been legal in any event, we find that he is now estopped to assert the illegality of the sentence after he has knowingly taken advantage of its benefits. *See Warrington v. State*, 660 So.2d 385 (Fla. 5th DCA 1995); *Smith v. State*, 630 So.2d 641 (Fla. 5th DCA 1994); *Gaskins v. State*, 607 So.2d 475 (Fla. 1st DCA 1992). We are not here facing a violation which is alleged to have occurred during that portion of the sentence which exceeded the statutory maximum.

We acknowledge conflict with *Jackson v. State*, 654 So.2d 234 (Fla. 4th DCA 1995).

AFFIRMED.

PETERSON, C.J., and GOSHORN, J., *concur.*

Appendix B

appealed. The District Court of Appeal held that property was to remain with church as representative of original church, given finding that church was hierarchical in structure.

Reversed and directed entry of judgment.

Religious Societies ⇐23(3)

Upon schism in local church, property remained with church as representative of original church given finding that church was hierarchical in structure.

Horace E. Hill, Sr., Daytona Beach, for appellants.

S. Scott Walker and Paul J. Consbruck of Watson, Folds, Steadham, Christmann, Brashear, Tovkach & Walker, Gainesville, for appellees.

PER CURIAM.

In this church schism case, the trial court erroneously entered summary judgment for appellees/defendants, the withdrawing members of Bethel AME Church of Newberry, concluding that they were the rightful owners of the church property. The principle of church structure which governs church property disputes, as articulated in the controlling case of *Mills v. Baldwin*, 362 So.2d 2 (Fla. 1978), *vacated on other grounds*, 443 U.S. 914, 99 S.Ct. 3105, 61 L.Ed.2d 878 (1979), *reinstated on remand*, 377 So.2d 971 (Fla. 1979), *cert. denied*, 446 U.S. 983, 100 S.Ct. 2964, 64 L.Ed.2d 839 (1980), requires that church property remain with the parent church where, as here, the church is hierarchical in structure. Given the trial court's finding that the AME Church is hierarchical, judgment should have been entered in favor of appellants/plaintiffs as representatives of the original church.

Accordingly, we reverse the appealed order and direct entry of judgment in favor of the appellants.

MINER, WEBSTER and BENTON, JJ., concur.

Solomon JACKSON, Appellant,

v.

STATE of Florida, Appellee.

No. 94-1602.

District Court of Appeal of Florida, Fourth District.

April 26, 1995.

Rehearing and Certification Denied May 25, 1995.

Defendant, who pleaded guilty to unemployment compensation fraud and later admitted to violation of probation and agreed to sentence of two years of community control with special condition of 90 days' jail time and three years' probation subject to same restrictions previously imposed, was charged with violation of community control. Defendant moved to correct allegedly illegal sentence for violation of probation and moved to strike special condition of probation and community control forbidding him from using intoxicants. The Circuit Court, Broward County, Barry E. Goldstein, J., accepted guilty plea to violation of community control and pronounced sentence, vacated sentence for violation of probation, and amended objectionable special condition to state that defendant could not use intoxicants to excess. The District Court of Appeal, Dell, C.J., held that: (1) trial court properly vacated sentence imposed following violation of probation, and (2) special condition prohibiting defendant from using any intoxicants or using intoxicants to excess was not reasonably related to underlying offense of unemployment compensation fraud and, therefore, should not have been imposed.

Reversed and remanded.

1. Criminal Law ⇐982.9(7), 998(11)

Trial court properly vacated sentence imposed on defendant, who pleaded guilty to

unemployment compensation fraud and later admitted to violation of probation, of two years of community control with special condition of 90 days jail time and three years probation subject to same restrictions previously imposed; total sanctions of jail time, community control and probation, in addition to six months already served on probation prior to violation of probation, exceeded statutory five-year maximum sentence for unemployment compensation fraud, a third-degree felony.

2. **Criminal Law** ⇐982.5(2)

Special condition prohibiting defendant from using any intoxicants or using intoxicants to excess was not reasonably related to underlying offense of unemployment compensation fraud and, therefore, should not have been imposed.

Richard L. Jorandby, Public Defender, and Mallorye G. Cunningham, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Edward L. Giles, Asst. Atty. Gen., West Palm Beach, for appellee.

DELL, Chief Judge.

Solomon Jackson appeals an order of revocation of community control stemming from his conviction for unemployment compensation fraud. Appellant contends the trial court erred when it revoked his sentence of community control while he was serving an illegal sentence. He also contends the trial court erred when it included as a special condition of probation and community control a prohibition against use of any intoxicants. We agree and thus reverse.

Appellant pled guilty to one count of unemployment compensation fraud. On December 14, 1992, the trial court sentenced appellant to two years of probation with eighty hours of community service and ordered him to pay restitution. The terms of probation included a special condition directing appellant to refrain from use of any intoxicants. Thereafter, in May 1993, appellant admitted to a violation of probation and agreed to a sentence of two years of community control with a special condition of 90 days jail time and three years probation subject to the same restrictions previously imposed. One year later appellant's probation officer filed an affidavit of violation of community control against appellant. In response, appellant filed a motion to correct an illegal sentence, alleging that the trial court in fashioning its May 1993 sentence failed to give him credit for time served on probation from December 1992 through May 1993 and therefore the sentence exceeded the five-year permitted range for a third degree felony. Appellant also moved at that time to strike the special condition of probation and community control forbidding him from using any intoxicants, arguing that such condition was not reasonably related to the underlying offense.

In May 1994, the trial court conducted a hearing on appellant's motions and the violation of community control. The trial court judge stated that the sentence imposed in May 1993 was "a correctable sentence and I can vacate any portion of that sentence that exceeded the maximum sentence of five years in this case, and I'm basing this decision on [*Duchesne v. State*, 616 So.2d 172 (Fla. 2d DCA 1993)]." The trial court also stated that it would amend the objectionable special condition to state that appellant shall not use intoxicants "to excess." The trial court accepted appellant's plea of guilty to the violation of community control and pronounced sentence, including a new period of probation. The trial court also imposed as conditions of his new term of probation all other special conditions previously imposed on community control.

[1] We conclude that the trial court properly vacated the May 1993 sentence because the total sanction of jail time, community control and probation, in addition to the time served on probation, exceeded the statutory five-year maximum sentence for unemployment compensation fraud, a third degree felony. *Duchesne; Medina v. State*, 604 So.2d 30 (Fla. 2d DCA 1992); *Schertz v. State*, 387 So.2d 477 (Fla. 4th DCA 1980). "Upon revocation of probation, the time a probationer has already served on probation for a given offense must be credited toward any new

term of probation imposed for that offense, when necessary to ensure that the total term of probation does not exceed the statutory maximum for that offense." *State v. Summers*, 642 So.2d 742, 743 (Fla.1994); *accord Roundtree v. State*, 637 So.2d 325, 326 (Fla. 4th DCA), *approved*, 644 So.2d 1358 (Fla. 1994). By failing to credit appellant with time served on probation from December 1992 through May 1993, the trial court imposed an illegal sentence.[1] *Reed v. State*, 616 So.2d 592, 593 (Fla. 4th DCA 1993); *Cecil v. State*, 596 So.2d 461, 462 (Fla. 1st DCA 1992). We find no merit in state's argument that appellant acquiesced in the imposition of an illegal sentence by entering a plea of guilty to the revocation. *See Reed*, 616 So.2d at 593.

Since appellant was serving an illegal sentence, the trial court could not charge appellant with a violation of the terms of his probation nor revoke his probation. In *Cecil v. State*, 614 So.2d 603 (Fla. 1st DCA 1993), the trial court originally sentenced the defendant to two five-year consecutive probationary periods for two separate offenses. The defendant's subsequent commission of another offense resulted in revocation of his probation and imposition of new sentences for the first two convictions: three and one-half years imprisonment with four years, seven months probation concurrent with a three and one-half year term of imprisonment followed by five years probation. The trial court sentenced the defendant to three and one-half years incarceration with eleven years probation for the new offense. On appeal, the defendant challenged his sentences for the first two convictions, and the appellate court determined that those sentences were illegal since the total sanction for each offense exceeded the term provided by general law for third degree felonies. The appellate court remanded to the trial court for resentencing. After remand but before resentencing, the defendant pled guilty to a fourth felony and admitted to a violation of probation. At the resentencing, the trial court sentenced the defendant on the fourth offense and revoked probation for the second and third convictions. The defendant again appealed. On appeal after remand, the district court upon its own motion concluded that the defendant could not be properly charged with violating his probation for the first, second and third convictions while serving illegal sentences nor have that probation revoked. 614 So.2d at 604.

We agree with *Cecil* and hold that a defendant may not be violated on a condition of probation or community control while serving an illegal sentence. *Cecil* also answers the state's argument that the revocation of probation should be affirmed because the violation occurred within the "legal" portion of the sentence. The subject violation in *Cecil* occurred on April 14, 1992, eighteen months after the imposition of the original sentences in October 1990 and thus would have occurred within the legal portion of the sentence.

[2] As to appellant's second point on appeal, the state concedes, and we agree, that the trial court should not have imposed the special condition related to appellant's use of intoxicants in the orders of probation and community control. The special condition prohibiting appellant from using any intoxicants or using intoxicants to excess was not reasonably related to the underlying offense of unemployment compensation fraud, the consumption of alcohol is not illegal and his use of alcohol is not reasonably related to his commission of future crimes. *See Biller v. State*, 618 So.2d 734, 734–35 (Fla.1993); *Zeigler v. State*, 647 So.2d 272, 274 (Fla. 4th DCA 1994).

Accordingly, we reverse the May 1994 order of revocation of community control as well as the resulting sentence. On remand, we direct the trial court to strike the May 1994 revocation from the judgment and sentence. We also strike the special condition prohibiting appellant's use of intoxicants from the orders of probation and community

1. Although the trial court did not have the benefit of *State v. Davis*, 630 So.2d 1059 (Fla.1994), at the May 1993 sentencing, we note that the combined sentence of jail time, community control and probation constitutes an illegal departure sentence for which written reasons were not provided. *See also Felty v. State*, 630 So.2d 1092 (Fla.1994); *Hause v. State*, 643 So.2d 679 (Fla. 4th DCA 1994).

control. We remand for resentencing and caution the trial court to consider any time served by appellant on community control during pendency of this appeal.

REVERSED and REMANDED.

WARNER and PARIENTE, JJ., concur.

Frank BIASETTI and Josephine Biasetti, Appellants,

v.

PALM BEACH BLOOD BANK, INC., Appellee.

No. 94-0590.

District Court of Appeal of Florida, Fourth District.

April 26, 1995.

Wife who, along with husband, filed suit against blood bank for allegedly supplying to husband blood tainted with human immunodeficiency virus (HIV) appealed from order entered in the Circuit Court for Palm Beach County, John J. Hoy, J., dismissing with prejudice her claim of negligence. The District Court of Appeal, Pariente, J., held that order was nonfinal, nonappealable order inasmuch as negligence claim arose from same transaction as pending claims and wife still remained plaintiff in case on her loss of consortium claim.

Appeal dismissed.

1. Appeal and Error ⇐80(6)

Order dismissing with prejudice wife's claim of negligence against blood bank was nonfinal, nonappealable order inasmuch as negligence claim arose from same transaction as pending claims related to husband's alleged exposure to blood products tainted with human immunodeficiency virus (HIV) and wife still remained plaintiff in case on her loss of consortium claim.

2. Appeal and Error ⇐80(6)

Appeal from order dismissing count of complaint, where other counts against same parties remain, is authorized only when dismissed count arises from separate and distinct transaction independent of other pending, pleaded claims.

3. Appeal and Error ⇐80(6)

Analysis of "interdependence" for purposes of determining whether order dismissing single count of multicount complaint is appealable requires court to look primarily to facts upon which claims are based; if claims arise out of same incident, order dismissing some but not all counts will not constitute final appealable order, even if counts involve separate and severable legal theories.

Jacqueline Porth of Thomas D. Lardin, P.A., Fort Lauderdale, for appellants.

Heather McNamara Ruda of Gibson & Adams, P.A., West Palm Beach, for appellee.

Pamela K. Frazier and Thomas J. Guilday of Huey, Guilday & Tucker, P.A., Tallahassee, for amicus curiae Florida Ass'n of Blood Banks.

PARIENTE, Judge.

[1] Appellant, Josephine Biasetti, appeals an order dismissing with prejudice her claim of negligence against appellee, the Palm Beach Blood Bank. Because appellant's negligence claim arises from the same transaction as the remaining pending claims and because appellant still remains a plaintiff in the case on her loss of consortium claim, we find that the order of dismissal is a nonfinal, nonappealable order and accordingly dismiss the appeal.

Frank Biasetti and appellant, Josephine Biasetti, as husband and wife, filed a lawsuit against appellee alleging that while hospitalized for medical problems, Frank Biasetti received blood transfusions with blood products contaminated with HIV. Several years later, Frank Biasetti was diagnosed as being HIV positive and now has full-blown AIDS. Frank Biasetti sued in negligence and for breaches of implied warranties. Appellant's

Appendix C

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., and Marilyn McFadden, Asst. Atty. Gen., Tallahassee, for appellee.

JOANOS, Chief Judge.

Appellant, Darren Dwayne Smith, appeals the written judgment and sentence document, contending that he was adjudicated guilty of robbery, a second-degree felony, rather than "robbery with threat to uses [sic] a weapon," a first-degree felony punishable by life. The state agrees that the cause should be remanded for correction of the scrivener's error on the judgment form. We remand for correction of the written judgment.

The state concedes that the jury was instructed only on the offense of robbery, and that appellant was found guilty of robbery (without reference to a weapon). The guidelines scoresheet and the probation order list the convicted offense as robbery without a weapon. In view of the state's concession of error, the cause is remanded with directions to correct the judgment to reflect the convicted offense as robbery, a second-degree felony, with omission of the reference to a weapon. Appellant need not be present for correction of this scrivener's error.

BOOTH and WOLF, JJ., concur.

Glinder Lee CECIL, Appellant,

v.

STATE of Florida, Appellee.

No. 92–1766.

District Court of Appeal of Florida, First District.

Feb. 18, 1993.

After remand for resentencing, 596 So.2d 461, the Circuit Court, Bay County, Clinton Foster, J., again imposed sentence. Defendant appealed. The District Court of Appeal held that trial court was required to eliminate indication of habitual offender status as inconsistent with oral pronouncement of sentence.

Remanded with directions.

1. Criminal Law ⇐1203.26(7)

Remand for correction of written judgments and sentences to eliminate indication of habitual offender status was required, as such indication was inconsistent with oral pronouncement of sentence.

2. Criminal Law ⇐1192

Upon remand, trial court would be required to strike from judgments and sentences in two criminal cases any indication that probation was revoked in those cases, as such probation was part of illegal sentence stricken in earlier appeal.

Nancy A. Daniels, Public Defender, and P. Douglas Brinkmeyer, Asst. Public Defender, Tallahassee, for appellant.

Robert A. Butterworth, Atty. Gen., and Bradley R. Bischoff, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM.

Glinder Lee Cecil has appealed from sentence imposed after remand by this court in *Cecil v. State*, 596 So.2d 461 (Fla. 1st DCA 1992). We remand for correction of Cecil's sentence as outlined below.

In October 1990, Cecil pled guilty to two 3d-degree felonies (Case Nos. 89–2561 and 89–2883), and received consecutive 5–year probationary terms. An affidavit of violation of probation was filed based on a new offense, the 3d–degree felony of purchasing cocaine (Case No. 91–418). The trial court revoked probation and, in March 1991, sentenced Cecil as follows: *89–2561*—3½ years incarceration plus 4 years, 7

months probation concurrent with *89–2883*—3½ years plus 5 years probation, and *91–418*—3½ years plus 11 years probation, consecutive to the first two. Cecil appealed and this court reversed, finding that the total of each sentence exceeded the 5–year statutory maximum for 3d–degree felonies. *Cecil.* The court remanded for resentencing, and the mandate issued on February 19, 1992.

On January 2, 1992, an affidavit of violation of probation was filed based on a new offense of possession of cocaine (Case No. 92–3). Cecil pled guilty to the new charge, and admitted the violation of probation. On April 14, 1992, she came on for resentencing pursuant to *Cecil,* and for sentencing in 92–3. The trial court revoked probation in 89–2883 and 91–418, and orally resentenced Cecil to 3½ year terms; no habitualization was orally pronounced. However, the written judgments and sentences reflect a sentence of *2½ years* in each case and that, as to each, Cecil was a habitual offender. The trial court relied on the convictions in 89–2883 and 91–418 to habitualize Cecil in 92–3, and she was sentenced in that case to 10 years. The disposition in 92–3 is not at issue herein.

[1, 2] Cecil argues only that the written judgments and sentences in 89–2883 and 91–418 must be corrected to eliminate the indication of habitual offender status as inconsistent with the oral pronouncement of sentence. The state concedes this error, and urges remand for correction. On our own motion, we also note that: 1) Cecil could not properly be charged with violating the probation imposed in 89–2561, 89–2883 and 91–418 as part of illegal sentences, *Cecil,* nor have that probation revoked; 2) the trial court failed to comply with the *Cecil* mandate to re-sentence Cecil in 89–2561; and 3) the 2½ year terms reflected in the written judgments and sentences in 89–2883 and 91–418 are inconsistent with the 3½ year terms orally pronounced at sentencing.

Based on the error raised by the parties, and on the errors noted in the court's own review of the case, we remand with the following directions: 1) re-sentence Cecil in 89–2561, in compliance with the *Cecil* mandate, *see Stuart v. Hertz Corp.,* 381 So.2d 1161, 1163 (Fla. 4th DCA 1980) (district courts of appeal have inherent power to enforce their mandates); 2) strike from the judgments and sentences in 89–2883 and 91–418 any indication that probation was revoked in those cases, in that such probation was part of an illegal sentence stricken in *Cecil;* and 3) conform the written judgments and sentences in 89–2883 and 91–418 to the oral pronouncement of sentence by: a) striking any indication that Cecil was classified as an habitual offender in those cases and b) correcting the terms of incarceration to 3½ years, *see Bennett v. State,* 588 So.2d 672 (Fla. 1st DCA 1991) (written sentence must conform with the oral pronouncement at the sentencing hearing).

Remanded with directions.

JOANOS, C.J., and ERVIN and WEBSTER, JJ., concur.

Leonard E. GREENBERG and Arnold C. Greenberg, Appellants,

v.

MAHONEY ADAMS & CRISER, P.A., et al., Appellees.

No. 91–2699.

District Court of Appeal of Florida, First District.

Feb. 18, 1993.

Rehearing Denied March 30, 1993.

Legal malpractice action was brought. The Circuit Court, Duval County, Mattox Hair, J., dismissed on ground that action did not come within testamentary exception to privity requirement. Defendants appealed. The District Court of Appeal, Smith, J., held that third-party intended beneficia-