IN THE SUPREME COURT OF FLORIDA

DAVID L. TAYLOR,

Petitioner,

v. Case No. 90,439

STATE OF FLORIDA,

Respondent.
_____/

ON NOTICE TO INVOKE DISCRETIONARY REVIEW
OF A DECISION OF THE
FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

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TABLE OF AUTHORITIES

CASES CITED:

OTHER AUTHORITIES CITED:

SUMMARY OF ARGUMENT

This Honorable Court should decline to exercise its discretionary jurisdiction over this case. The Fifth District's opinion does not conflict with Cecil v. State, 614 So. 2d 603 (Fla. 1st DCA 1993). Even though the Fifth District acknowledged conflict with Jackson v. State, 654 So. 2d 234 (Fla. 4th DCA 1995), it did not certify direct conflict, suggesting that the court found further review inappropriate or unnecessary. This Court does not need to exercise its discretionary review because the Fifth District reached the correct and logical result.

ARGUMENT

THIS HONORABLE COURT SHOULD DECLINE TO INVOKE ITS DISCRETIONARY JURISDICTION TO HEAR THIS CASE.

Petitioner David L. Taylor asks this Court to exercise its discretionary jurisdiction to review the decision of the Fifth District Court of Appeal, on the ground that it expressly and directly conflicts with Jackson v. State, 654 So. 2d 234 (Fla. 4th DCA 1995), and Cecil v. State, 614 So. 2d 603 (Fla. 1st DCA 1993).[1] See, Fla.R.App.P. 9.030(a)(2)(A)(iv). The State's position is that the Court should decline to exercise its discretionary jurisdiction in this case.

The Fifth District's opinion does not conflict with Cecil. The Fifth held that a defendant who violates his probation during the legal portion of an illegal sentence is estopped to challenge the legality of the sentence after he has knowingly taken advantage of its benefits. Taylor v. State, 22 Fla. L. Weekly D815 (Fla. 5th DCA Mar. 27, 1997). The Cecil court does not appear to have even considered, much less ruled upon, this issue.

Despite "acknowledg[ing]" conflict with Jackson, the Fifth District did not certify direct conflict. See, Art. V, §

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[1]Copies of Jackson, Cecil, and the Fifth District's opinion in this case are included in the attached appendix.

3(b)(4), Fla. Const.; Fla.R.App.P. 9.030(a)(2)(A)(vi). Thus, it is reasonable to infer that the Fifth determined further review to be inappropriate or unnecessary in this case.

Additionally, discretionary review is inappropriate here since the Fifth reached the only reasonable result possible. Taylor was originally sentenced to ten years probation on a third degree felony on June 30, 1995. (R.67-68). His probation was revoked less than a year into the sentence and he was sentenced to thirty-eight months incarceration. (R.61).

Hence, the combined terms of probation served and incarceration do not exceed the five-year statutory maximum sentence for third degree felonies. §775.082(3)(d), Fla. Stat. (1993). Yet Taylor maintains that his probation could not be revoked because his original sentence was illegal. This position is contrary to the principle that sentencing is not a game in which one wrong move by the trial court results in immunity for the defendant. Harris v. State, 645 So. 2d 386 (Fla. 1994), citing U.S. v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), and Bozza v. U.S., 330 U.S. 160, 67 S.Ct. 645, 91 L.Ed.818 (1947).

CONCLUSION

BASED ON THE foregoing argument and authority, the State respectfully requests that this Honorable Court decline to exercise its discretionary jurisdiction in this case.

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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 Appellant, WM. J. SHEPPARD, ESQ. and RICHARD W. SMITH, ESQ., Sheppard and White, P.A., 215 Washington Street, Jacksonville, Florida 32202, this 20th day of May, 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 JURISDICTIONAL BRIEF OF RESPONDENT

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APPENDIX A

struck down as violative of due process an Alabama statute prohibiting a judge in a capital case from instructing the jury on lesser included offenses. Citing the "significant constitutional differences between the death penalty and lesser punishments," 447 U.S. at 637, 100 S. Ct. at 2389, the Court reasoned that the failure to give the jury the "third option"—of convicting on an appropriate lesser included offense, as opposed to either conviction or acquittal, impermissibly enhanced the risk of an unwarranted conviction.

* * *

We find no personal waiver is required in order to guarantee fundamental fairness in the non-capital context. Further, we find the facts of this case poor ones on which to carve out an exception to the general principle that a client is bound by the acts of his attorney performed within the scope of the latter's authority. (Citation omitted.)

Recognizing that the role of the defense counsel necessarily involves a number of tactical decisions and procedural determinations inevitably impacting on a defendant's constitutional rights, we find that no useful purpose would here be served by requiring the court to ensure that in this instance, counsel's conduct truly represented the informed and voluntary decision of the client. (Citation omitted.)

The next question is whether a "capital" sexual battery is a capital case in which the *Harris* rule requiring the client's informed and voluntary consent applies. I think not. In *Ulloa v. State,* 486 So. 2d 1373, 1375 (Fla. 3d DCA 1986), the court, in footnote four discussed this issue:

> The cases involving crimes labeled "capital" but not punishable by death are in two categories. In cases where death as a punishment was unavailable at the time the defendant was charged [as opposed to cases in which the death penalty could have been imposed but was not], the courts have held that procedural requirements accorded capital crime defendants are not applicable. See *Cooper v. State,* 453 So. 2d 6[illegible] (Fla. 1st DCA 1984) (no indictment required where defendant accused of sexual battery of child eleven years or under since crime not punishable by death at time of charge); *Hogan v. State,* 42[illegible] So. 2d 202 (Fla. 4th DCA (1983)), *approved,* 451 So. 2d 8[illegible] (Fla. 1984) (defendant charged with sexual battery of a child eleven years or under not entitled to twelve-member jury).

I believe that the charge in this case, capital in title only, is controlled by *Jones* and that Ferguson should be bound by the decision of his attorney and is not entitled to have the trial court inquire as to whether he voluntarily and intelligently joins in counsel's decision.

* * *

Criminal law—Probation revocation—Defendant contending that it was improper to find him in violation of probation because original sentence was illegal—Although sentence to ten years' probation in lieu of prison following plea of nolo contendere to offense of driving under the influence resulting in serious bodily injury was illegal because it exceeded statutory maximum, defendant estopped to assert illegality of original sentence where he knowingly took advantage of benefits of illegal sentence and where probation violation occurred during portion of sentence which would have been legal in any event—Conflict acknowledged

DAVID L. TAYLOR, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-1955. Opinion filed March 27, 1997. Appeal from the Circuit Court for St. Johns County, Robert K. Mathis, Judge. Counsel: 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, J.) 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.)

* * *

Dissolution of marriage—Alimony—Trial court's failure to make specific findings of fact mandated by statute requires reversal of judgment, except for portion dissolving marriage—Provision for "nonmodifiable permanent alimony" stricken

STEVEN DANIEL SMITH, Appellant, v. REBECCA JANE SMITH, Appellee. 5th District. Case No. 96-2416. Opinion filed March 27, 1997. Appeal from the Circuit Court for Orange County, Lawrence R. Kirkwood, Judge. Counsel: Peter Cushing, Orlando, for Appellant. Henry L. Perla, Orlando, for Appellee.

(PER CURIAM.) The judgment of dissolution of marriage is reversed, except for that portion dissolving the marriage, based on the trial court's failure to make the specific findings of fact mandated by subsection 61.08([illegible] Florida Statutes (1995). *See Risk v. Rausch*, 680 So. 2d 624 (Fla. 5th DCA 1996). We note that there is no provision in the law for "nonmodifiable permanent alimony" and order that provision stricken upon remand.

REVERSED and REMANDED with instructions. (SHARP, W., GOSHORN and ANTOON, J., concur.)

* *

Criminal law—Juveniles—Trespass on grounds or facilities of public school—Claim that juvenile, who was arrested when he returned to school before suspension expired, was denied equal protection because another suspended student returned to school same day but was not arrested and charged not preserved for appeal by contemporaneous objection—Claimed error was not fundamental

M.L.D., A CHILD, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-2376. Opinion filed March 27, 1997. Appeal from the Circuit Court for Orange County, Walter Komanski, Judge. Counsel: James B. Gibson, Public Defender, and Lyle Hitchens, 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.) M.L.D. appeals his adjudication and disposition for the misdemeanor offense of trespass on grounds or facilities of a public school.[1] M.L.D. was suspended from school and was arrested when he returned to school before his suspension expired. On appeal, M.L.D. argues for the first time that he was denied equal protection because another suspended student returned to school the same day he did, but was not arrested and charged. The general rule is that an appellate court will not consider an issue unless a contemporaneous objection to an alleged error was raised below or unless the error was fundamental. *Wykle v. State*, 659 So. 2d 1[illegible]7, 1289 (Fla. 5th DCA 1995). M.L.D. did not raise this issue at the adjudicatory hearing and

APPENDIX B

appealed. The Distri Court of Appeal held that property was to main with church as representative of orig l church, given finding that church was h archical in structure.

Reversed and d cted entry of judgment.

Religious Societies 23(3)

Upon schism in cal church, property remained with churc as representative of original church given ding that church was hierarchical in structu .

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

S. Scott Walker and aul J. Consbruck of Watson, Folds, Ste ham, Christmann, Brashear, Tovkach & W ker, Gainesville, for appellees.

PER CURIAM.

In this church schism ase, the trial court erroneously entered su mary judgment for appellees/defendants, th withdrawing members of Bethel AME C rch of Newberry, concluding that they w the rightful owners of the church prope . The principle of church structure which erns church property disputes, as articula in the controlling case of *Mills v. Baldw* 362 So.2d 2 (Fla. 1978), *vacated on othe rounds*, 443 U.S. 914, 99 S.Ct. 3105, 61 Ed.2d 878 (1979), *reinstated on remand*, 7 So.2d 971 (Fla. 1979), *cert. denied*, 446 .S. 983, 100 S.Ct. 2964, 64 L.Ed.2d 839 (80), requires that church property remai with the parent church where, as here, e church is hierarchical in structure. G en the trial court's finding that the AME C urch is hierarchical, judgment should have en entered in favor of appellants/plaintiffs s representatives of the original church.

Accordingly, we reve se the appealed order and direct entry o udgment in favor of the appellants.

MINER, WEBSTE 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,

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. Foley, 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 claim.

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 accident, order dismissing some but not all counts will not constitute final appealable order, even if counts involve separate and severable legal theories.

Jacqueline Powell 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. Fraser 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, Dawayne 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 conviction 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.

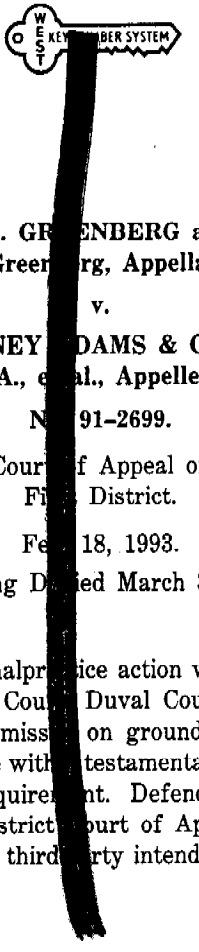
On January 2, 1992, an affidavit of violation of probation was filed based on a new offense of possession of cocaine (Case No. 92–3). Cecil pled guilty to the new charge, and admitted the violation of probation. On April 14, 1992, she came on for resentencing pursuant to *Cecil,* and for sentencing in 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. GR ENBERG and Arnold C. Greer rg, Appellants,

v.

MAHONEY DAMS & CRISER, P.A., al., Appellees.

N 91–2699.

District Cour f Appeal of Florida, Fi District.

Fe 18, 1993.

Rehearing D ied March 30, 1993.

Legal malpr ice action was brought. The Circuit Cou Duval County, Mattox Hair, J., dismiss on ground that action did not come with testamentary exception to privity require nt. Defendants appealed. The District ourt of Appeal, Smith, J., held that third rty intended beneficia-