ORIGINAL

IN THE SUPREME COURT OF FLORIDA

JAMES EDWARD SCOTT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 90,558

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

MICHELLE A. LUCAS
ASSISTANT PUBLIC DEFENDER
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Daytona Beach, Florida 32114
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COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner entered pleas of guilty to the following offenses: Count I, dealing in stolen property; Count II, dealing in stolen property; Count III, grand theft of a firearm; and Count IV, grand theft. (R 35-36) Defense counsel objected to the inclusion of points for possession of a firearm on the sentencing guidelines scoresheet for the conviction of grand theft of a firearm. (R 20) The trial court agreed with defense counsel and the State appealed to the Fifth District Court of Appeal. On appeal to the Fifth District Court of Appeal, the State argued that in calculating Petitioner's guidelines scoresheet, the trial court should have assessed 18 points for possession of a firearm pursuant to Florida Rule of Criminal Procedure 3.702(d)(12). On April 18,1997, the Fifth District issued its opinion reversing Petitioner's sentence. See State v. Scott, 22 Fla. L. Weekly D991 (Fla. 5th DCA April 18, 1997). (Appendix A) In rejecting Petitioner's argument that assessment of the 18 points would have

been improper, the court noted that the Fourth District Court of Appeal reached a contrary decision in Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996). (Appendix B)

A timely notice to invoke this Court's discretionary jurisdiction was filed on May 2, 1997.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal below is in direct and express conflict with the decision of the Fourth District Court of Appeal in Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996) on the same question of law. Furthermore, the Second District Court of Appeal in White v. State, 22 Fla. L. Weekly D485 (Fla. 2d DCA February 21, 1997) (Appendix C) certified a direct conflict with the Galloway decision and is currently pending review with this Court in Case Number 89,998. Thus, this Court has discretionary jurisdiction to accept the instant case for review and resolve the conflict.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL BELOW IS IN DIRECT CONFLICT WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN GALLOWAY V. STATE, 680 SO.2D 616 (FLA. 4TH DCA 1996).

Petitioner, Appellee below argued that it would have been improper to assess 18 points for possession of a firearm pursuant to Florida Rule of Criminal Procedure 3.702(d)(12) where his offense at sentencing was grand theft of a firearm. The Fifth District rejected this argument but noted that the Fourth District Court of Appeal in Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996) had reached the direct opposite conclusion wherein it held that Florida Rule of Criminal Procedure 3.702(d)(12) is inapplicable to convictions for possession of a firearm by a convicted felon when unrelated to the commission of any additional substantive offense. The Second District Court of Appeal has aligned itself with the Fifth District Court of Appeal on this same issue in White v. State, 22 Fla. L. Weekly D485 (Fla. 2d DCA February 21, 1997). In White, the Second District Court of Appeal, however, certified direct conflict with the Galloway decision and that decision is currently pending review before this Court in Case Number 89,998. Therefore, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(iv) and Jollie v. State, 405 So.2d 418 (Fla. 1981) this Court has discretionary jurisdiction to accept the instant case for review for the purpose of resolving the express and direct conflict between the District Courts of Appeal on this question of law.

CONCLUSION

Petitioner respectfully requests this Honorable Court to exercise its discretionary jurisdiction and accept the instant case for review.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

M.A. LUCAS
ASSISTANT PUBLIC DEFENDER
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112 Orange Avenue, Suite A
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(904) 252-3367

COUNSEL FOR PETITIONER

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, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal and mailed to: James Edward Scott, 89 Stephenson St., West Melbourne, FL 32904, this 9th day of May, 1997.

M. A. LUCAS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

JAMES EDWARD SCOTT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO.
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

APPENDICES

Appendix A -- State v. Scott, 22 Fla. L. Weekly D991 (Fla. 5th DCA April 18, 1997)

Appendix B -- Galloway v. State, 680 So.2d 616 (Fla. 4th DCA 1996)

Appendix C -- White v. State, 22 Fla. L. Weekly D485 (Fla. 2d DCA February 21, 1997)

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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Brooks, 602 So.2d 630, 631 (Fla. 2d DCA 1992). Stated differently, the court may impute income only if the party has the ability to remedy the situation. *Gildea*; *see also Cushman v. Cushman*, 585 So.2d 485, 486 (Fla. 2d DCA 1991) (court must consider recent work history, occupational qualifications, and prevailing wages when imputing income).

The trial court's finding that Larry is "voluntarily unemployed, but could earn $1,200.00 per month based on his skills, past work and investment talents," is unsupported by the evidence in the record. In fact, the record suggests otherwise. *See Fusco v. Fusco*, 616 So.2d 86 (Fla. 4th DCA 1993) (lack of competent substantial evidence in record to support imputing additional income requires deletion of permanent alimony based upon such imputed income). While it is true that Larry has been voluntarily unemployed since 1984, there is no evidence that he has any skills which will make him employable in today's market. One witness testified that tug masters still serving in Panama were older men in their fifties and late forties and that there had been no new hiring in Panama for some time due to a treaty signed with Panama. Regardless, it seems that Larry will no longer be able to work as a tug master due to his arthritis. In review, Larry has only a ninth grade education, the only trade he knows is that of tug boat mate or master, and he particularly testified he had no skills with which to compete in today's market. Jeanette failed to present any evidence to contradict Larry's assertion that he has limited skills. Rather, she admitted at trial that Larry's only skill is that of tug boat operator. As for the trial court's determination that income could be imputed to Larry based on his "investment talents," the mere fact that Larry took money he received and gave it to an investment counselor to invest does not mean he has "investment talents."

In sum, there is insufficient evidence to support the trial court's finding that Larry could earn $1,200 per month. There is no evidence as to the anticipated source of the imputed income. Moreover, as to Jeanette's needs, the record evidence does not indicate that she is in need of alimony. Jeanette was awarded 43% of the retirement pension, amounting to $1,077.58 per month. She was also awarded about $78,000 cash based on the sale of the parties' marital home and limited partnership. Such awards are sufficient to sustain Jeanette in the "modest standard of living" to which the parties are accustomed.

Finally, it appears that both of the parties desire to continue their retirement and custom of living that they have both enjoyed for the last ten years of their marriage. Their standard of living was primarily financed by Larry's pension benefits and both seemed content with that. The portion of those benefits that are considered marital assets are now being divided between them as are the proceeds from the sale of the home and other investments. If either party desires to supplement such income, they certainly may do so as they are good candidates for training in minimum wage type jobs. In fact, the minimum wage was seized upon by the trial court to impute income to Larry. But there is no reason to eliminate Jeanette as a candidate for a minimum wage employee.

There is concern, however, for the uncertain future medical requirements that Jeanette may encounter in view of her history of cancer. The record reflects that she is unable to obtain medical insurance to replace the health care previously available to her as a spouse of a military veteran. Due to that uncertainty, although Jeanette does not have current burdensome medical expenses, and because this is a marriage of long duration, we believe that it is appropriate that we remand to the trial court for consideration of a nominal award of permanent periodic alimony that is capable of being modified should Jeanette's medical expenses become burdensome through no fault of her own. While medical insurance would be the desirable method of funding such expenses, Jeanette's testimony that insurance is unavailable remains unrefuted.

The final judgment of dissolution is affirmed except for that portion requiring Larry to pay permanent periodic alimony based upon an imputation of income.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART. (SHARP, W. and GOSHORN, JJ., concur.)

* * *

Criminal law—Sentencing—Guidelines—Scoresheet—Error to fail to score points for conviction of grand theft of firearm—Resentencing required where error resulted in departure sentence

STATE OF FLORIDA, Appellant, v. JAMES E. SCOTT, Appellee. 5th District. Case No. 96-969. Opinion filed April 18, 1997. Appeal from the Circuit Court for Brevard County, Jere E. Lober, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, and Michael D. Crotty, Assistant Attorney General, Daytona Beach, for Appellant. James B. Gibson, Public Defender, and M. A. Lucas, Assistant Public Defender, Daytona Beach, for Appellee.

(THOMPSON, J.) The state appeals the trial court's failure to assess James E. Scott eighteen scoresheet points at sentencing. We reverse the sentence of probation and remand for resentencing.

Scott pleaded guilty to two counts of dealing in stolen property, grand theft of a firearm and grand theft. Eighteen points should have been added to the scoresheet for the conviction of grand theft of a firearm. *See e.g., Smith v. State*, 683 So. 2d 577 (Fla. 5th DCA 1996); *State v. Davidson*, 666 So. 2d 941 (Fla. 2d DCA 1995); *contra, Galloway v. State*, 680 So. 2d 616 (Fla. 4th DCA 1996). The failure to do so resulted in a departure sentence of probation instead of incarceration.

REVERSED AND REMANDED for resentencing consistent with this opinion. (SHARP, W. and GOSHORN, JJ., concur.)

* * *

Criminal law—Habeas corpus—Venue—Where petition was originally filed in county in which petitioner was incarcerated, petitioner's later transfer to another county provided grounds for transfer of venue, as requested by Parole and Probation Commission, rather than dismissal of petition

SAMUEL H. WIGFALS, Appellant, v. FLORIDA PAROLE COMMISSION, Appellee. 5th District. Case No. 96-842. Opinion filed April 18, 1997. Appeal from the Circuit Court for Orange County, Reginald K. Whitehead, Judge. Counsel: Samuel H. Wigfals, Sanderson, pro se. No appearance for Appellee.

(PER CURIAM.) Samuel H. Wigfals appeals the trial court's order dismissing his petition for habeas corpus while he was incarcerated in the Orange County Central Florida Reception Center. After the trial court ordered the Florida Probation and Parole Commission to respond to the petition, Wigfals was transferred to and incarcerated in the Baker Correctional Institution.

When the Florida Probation and Parole Commission (FPPC) responded to the trial court's order to show cause why Wigfals' petition should not be granted, FPPC filed its motion to transfer venue to Baker County. The motion to transfer venue followed Wigfals' notice of voluntary dismissal of his petition for habeas corpus, his notice of address change to Baker County and finally his request for reinstatement of his initial petition. Instead of transferring venue, the trial court in Orange County reasoned that it no longer had jurisdiction because section 79.09, Florida Statutes (1995) requires writs to be filed in the county where a prisoner is detained.

Wigfals' initial selection of venue in Orange County was appropriate since he was incarcerated there. His later transfer to Baker County provided grounds for the transfer of venue to Baker County as requested by FPPC rather than dismissal of the petition.

We therefore vacate the order of dismissal and remand for an order transferring the matter to the circuit court for Baker County.

ORDER VACATED; REMANDED. (PETERSON, C.J., SHARP, W., and GOSHORN, JJ., concur.)

* * *

Robert A. Butterworth, Attorney General and Cynthia A. Greenfield, Assistant Attorney General, for appellee.

Before LEVY, GODERICH and SHEVIN, JJ.

PER CURIAM.

Affirmed. *Cannady v. State*, 620 So.2d 165, 169 (Fla.1993); *Chestnut v. State*, 538 So.2d 820 (Fla.1989); *Zeigler v. State*, 402 So.2d 365, 373 (Fla.1981).

Debra GALLOWAY, Appellant,

v.

STATE of Florida, Appellee.

No. 95-3395.

District Court of Appeal of Florida, Fourth District.

Oct. 9, 1996.

Defendant was convicted in the Nineteenth Judicial Circuit Court, St. Lucie County, Joe Wild, J., of carrying concealed firearm and possession of firearm by convicted felon. Defendant appealed. The District Court of Appeal held that: (1) convictions did not violate double jeopardy principles, but (2) assessment of additional scoresheet points for possession of firearm was reversible error.

Conviction affirmed; sentence reversed and remanded.

1. Double Jeopardy ⇐140

Defendant's convictions for carrying concealed firearm and possession of firearm by convicted felon did not violate double jeopardy principles. U.S.C.A. Const.Amend. 5.

2. Double Jeopardy ⇐30

Rule permitting assessment of additional scoresheet points where defendant is convicted of committing felony other than enumerated felonies while possessing firearm does not offend double jeopardy principles. U.S.C.A. Const.Amend. 5; West's F.S.A. RCrP Rule 3.702(d)(12).

3. Weapons ⇐17(8)

Rule permitting assessment of additional scoresheet points where defendant is convicted of committing felony other than enumerated felonies while possessing firearm was inapplicable to convictions for carrying concealed firearm and possession of firearm by convicted felon when unrelated to commission of any additional substantive offense. West's F.S.A. RCrP Rule 3.702(d)(12).

Richard L. Jorandby, Public Defender, and Margaret Good-Earnest, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Joan Fowler, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

[1] We affirm Appellant's convictions for carrying a concealed firearm and for possession of a firearm by a convicted felon. *See Skeens v. State*, 556 So.2d 1113 (Fla.1990); *Washington v. State*, 661 So.2d 1294 (Fla. 4th DCA 1995), *cause dismissed*, 669 So.2d 252 (Fla.1996); *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). We have considered *State v. Stearns*, 645 So.2d 417 (Fla.1994), in which the supreme court reversed a dual conviction, on double jeopardy grounds, for armed burglary and carrying a concealed weapon, but do not deem it applicable here. We do not read *Stearns* as proclaiming a general exception to *Blockburger*, or to the application of section 775.021(4), Florida Statutes, in all circumstances in which a firearm is an element of companion offenses, each otherwise containing an element or elements not contained in the other. We note conflict on this point with *Bell v. State*, 673 So.2d 556 (Fla. 1st DCA 1996), and *Maxwell v. State*, 666 So.2d 951 (Fla. 1st DCA), *rev. granted*, No. 87,290, 673 So.2d 30 (Fla. Apr. 11, 1996).

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L. Jorandby, Public Defender, and
Good–Earnest, Assistant Public
West Palm Beach, for appellant.

A. Butterworth, Attorney General,
e, and Joan Fowler, Assistant At
neral, West Palm Beach, for appel

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6), and *Maxwell v. State*, 666 So.2d
1st DCA), *rev. granted*, No. 87,290,
30 (Fla. Apr. 11, 1996).

We also affirm as to an evidentiary issue raised, regarding whether certain testimony falls under the hearsay rule, without addressing it, as its admission, if error, in any event would be harmless. *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986).

[2, 3] We reverse Appellant's sentence and remand for resentencing due to scoresheet error in assessing 18 additional points for possession of a firearm. Florida Rule of Criminal Procedure 3.702(d)(12) permits assessment of these additional points where the defendant is convicted of committing a felony, other than those enumerated in subsection 775.087(2), Florida Statutes, "*while* having in his or her possession a firearm." (Emphasis added) We recognize that two districts appear to have decided this issue otherwise. *See State v. Davidson*, 666 So.2d 941 (Fla. 2d DCA 1995); *Gardner v. State*, 661 So.2d 1274, 1275 (Fla. 5th DCA 1995). We do not disagree with the conclusion in *Davidson* and *Gardner* that assessing the additional scoresheet points does not offend principles of double jeopardy. But we construe rule 3.702(d)(12) as inapplicable to convictions of these two offenses when unrelated to the commission of any additional substantive offense.

We remand for resentencing under an amended scoresheet.

GUNTHER, C.J., and STONE and PARIENTE, JJ., concur.

Edward PERIERA, Appellant,

v.

FLORIDA POWER & LIGHT COMPANY, Appellee.

No. 95–2390.

District Court of Appeal of Florida, Fourth District.

Oct. 9, 1996.

Motorcyclist who was injured when he struck guy wire to utility pole owned by power company while he was riding on bike path at night brought action against power company. Company moved for summary judgment, and the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, James R. Stewart, Jr., J., granted motion based on lack of duty. Motorcyclist appealed, and the District Court of Appeal, Klein, J., held that: (1) motorcyclist's request for continuance was properly denied; (2) motorcyclist's violation of statute prohibiting use of motor vehicle on bike path was only evidence of negligence and did not relieve power company of duty; and (3) whether duty existed was fact issue precluding summary judgment.

Reversed, and conflict certified.

1. Judgment ⇨186

Plaintiff's request for continuance in order to complete discovery was properly denied, and consideration of motion for summary judgment was proper, where outstanding discovery about which plaintiff complained was not initiated until three days before summary judgment hearing and over three years after filing of action. West's F.S.A. RCP Rule 1.150(f).

2. Judgment ⇨185.3(21)

Fact issue as to whether power company owed duty to motorcyclist who was injured when he struck guy wire of pole owned by company while he was riding at night on bike path precluded summary judgment; fact that operation of motorcycle on bike path violated statute was prima facie evidence of negligence, but did not relieve power company of duty as matter of law. West's F.S.A. § 316.1995.

3. Automobiles ⇨147

Violation of provision of traffic code which prohibits operation of motorized vehicles on bike paths or sidewalks is prima facie evidence of negligence, and not negligence per se. West's F.S.A. § 316.1995.

Scott A. Mager and Carl F. Schoeppl of Mager & Associates, P.A., Fort Lauderdale, for appellant.

with the discussion in *Smith v. State*, 598 So. 2d 1063 (Fla. 1992), but that opinion is not dispositive. In an analogous context, the supreme court chose the date its opinion in *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991), was "filed" as the date when a statute was voided by that opinion. As such, I conclude that the *Martinez* opinion was "filed" before the date that rehearing was denied. *See* § 25.041(2), Fla. Stat. (1995).

I believe that the new procedural rule in *Coney* was "announced" on Thursday, January 5, 1995, when the supreme court issued its opinion. The rule was available to lawyers, judges and the public under the well-established procedures of the supreme court on that date. The rule was not modified on rehearing. If rehearing delayed implementation of a rule in other lawsuits, there would be a great incentive for parties to file frivolous motions for rehearing in an effort to affect the outcome in other cases. As a practical matter, determining whether a motion for rehearing has been filed and remains pending in the supreme court or a district court typically requires a telephone call to the clerk of the court. While lawyers are free to debate whether the supreme court is infallible, the simple truth is that few rules of law are significantly modified on rehearing by that court or this court. Thus, both legal and practical reasons suggest that a rule is "announced" when the opinion is issued except in the rare situation where the rule is modified on rehearing.

Although I conclude that Mr. Hill has the right to raise the *Coney* issue, I do not believe he has the right to raise it on direct appeal. *But see Brower v. State*, 21 Fla. L. Weekly D2612 (Fla. 4th DCA Dec. 11, 1996) (stating that *Coney* violations are fundamental errors that may be raised on direct appeal); *Mejia*, 675 So. 2d at 999 (same). There is nothing in this record to suggest that Mr. Hill would have taken any action at the bench that would have affected the make-up of this jury.

I will not enter the debate concerning the supreme court's reason for removing the sentence in the initial release of *Coney* that suggested a defendant need not or cannot preserve this issue at trial. *See, e.g., Mejia*, 675 So. 2d at 998-99. *But see Gibson v. State*, 661 So. 2d 288 (Fla. 1995) (*Coney* argument waived where defendant did not object during jury selection). I assume a prisoner can raise this issue in a postconviction motion without the need to preserve it at trial. A prisoner may allege that his lawyer was ineffective by failing to read the advance sheets and advise the trial court of his client's newly announced right.

On the other hand, I cannot conclude that the *Coney* issue is a per se error. *See Scott v. State*, 618 So. 2d 1386 (Fla. 2d DCA 1993) (defendant's presence by video at arraignment is not per se error). Unlike a *Neil*[2] issue where a jury either includes someone who should have been dismissed or excludes someone who should not have been dismissed, the *Coney* issue does not automatically affect the make-up of the jury. *Cf. Ganyard v. State*, 22 Fla. L. Weekly D92 (Fla. 1st DCA Dec. 30, 1996) (rejecting defendant's argument that he might have exercised peremptory challenges if present at bench conference). Therefore, I conclude that Mr. Hill should be required to allege under oath and prove that he would have affected the make-up of his jury if he had been allowed to be physically present at the bench conference.

Accordingly, I concur in the affirmance, but conclude that Mr. Hill is entitled to raise this issue in a properly filed postconviction motion pursuant to rule 3.850.

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[1]As discussed in *Boyett v. State*, 21 Fla. L. Weekly S535 (Fla. Dec. 5, 1996), this procedure has been modified by a change in Florida Rule of Criminal Procedure 3.180(b). Thus, actual physical presence at the bench is not a constitutional requirement, but simply a procedure created by a rule of court to assure total compliance with due process.

[2]*State v. Neil*, 457 So. 2d 481 (Fla. 1984).

* * *

Criminal law—Sentencing—Guidelines—Scoresheet—Assessment of additional points for possession of firearm—Conflict certified

ANTHONY D. WHITE, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 95-03598. Opinion filed February 21, 1997. Appeal from the Circuit Court for Collier County; Franklin G. Baker, Judge. Counsel: James Marion Moorman, Public Defender, and Austin H. Maslanik, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Tonja R. Vickers, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) Anthony D. White appeals an order denying his dispositive motion to suppress and an order denying his motion to amend the scoresheet. We affirm both orders, but certify conflict in regard to the latter.

White specifically challenges the addition of eighteen points to his scoresheet calculation. These points were applied pursuant to Florida Rule of Criminal Procedure 3.702(d)(12). In affirming the trial court on this point, we certify that our decision in this case is in direct conflict with the decision of the Fourth District Court of Appeal in *Galloway v. State*, 680 So. 2d 616 (Fla. 4th DCA 1996). (THREADGILL, C.J., and FULMER and WHATLEY, JJ., Concur.)

* * *

Criminal law—Negligent treatment of child—Statute is unconstitutionally vague

VINCENT JOSEPH RIGSBY, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 95-02104. Opinion filed February 21, 1997. Appeal from the Circuit Court for Hillsborough County; M. William Graybill, Judge. Counsel: James Marion Moorman, Public Defender, and John C. Fisher, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Susan D. Dunlevy, Assistant Attorney General, Tampa, for Appellee.

(PATTERSON, Acting Chief Judge.) Vincent Rigsby appeals from convictions of aggravated child abuse, child abuse, negligent treatment of a child, and aggravated battery with a weapon. We determine that none of his issues have merit except that pertaining to the conviction for negligent treatment of a child. *See* § 827.05, Fla. Stat. (1991). That section has been declared unconstitutionally vague by our supreme court. *State v. Mincey*, 672 So. 2d 524 (Fla. 1996). Therefore, we vacate that conviction and affirm in all other respects. (ALTENBERND and LAZZARA, JJ., Concur.)

* * *

Criminal law—Defendant erroneously convicted of misdemeanor battery where information charged aggravated assault but did not charge the elements of battery—Battery is not a category two lesser included offense of aggravated assault—In order to properly charge battery, state must allege that defendant intentionally committed an unwanted touching

GRANT MAULDIN, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 95-03127. Opinion filed February 21, 1997. Appeal from the Circuit Court for Hillsborough County; Bob Anderson Mitcham, Judge. Counsel: James Marion Moorman, Public Defender, and John C. Fisher, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Robert L. Martin, Assistant Attorney General, Tampa, for Appellee.

(CAMPBELL, Acting Chief Judge.) Appellant argues, and the state concedes, that appellant was improperly convicted of misdemeanor battery (§ 784.03, Fla. Stat. (1995)). The information only charged appellant with aggravated assault (§ 784.021, Fla. Stat. (1995)). Battery is neither a category two lesser included offense of aggravated assault, nor were the elements of battery charged in the information. Appellant, therefore, was not properly apprised of the charges he would have to meet. Accordingly, we reverse and remand for further proceedings.

At trial, the state conceded that though aggravated assault was not proved, battery had been proved. The court agreed and found appellant guilty of misdemeanor battery. This was error.

The information alleged that appellant intentionally and unlawfully threatened to do violence to Becky Mauldin, had an apparent ability to do so and did an act creating a well-founded fear in Becky that such violence was imminent and, in so doing, used a deadly weapon, a firearm, without intent to kill Becky. However, in order to properly charge a battery, the state would have