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CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ROBERT F. WILKINS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

DCA CASE NO. 96-1622
SUPREME CT. CASE 90,864

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0845566
112 Orange Avenue, Suite A
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COUNSEL FOR APPELLANT

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TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

ROBERT F. WILKINS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 96-1622
SUP. CT. NO. _____

STATEMENT OF CASE AND FACTS

Petitioner was convicted of vehicular homicide, a third degree felony. Pursuant to the sentencing guidelines, Petitioner's recommended sentencing range was 55.65 months to 92.75 months in prison. Petitioner was adjudicated guilty and sentenced to 85 months in prison.

On appeal to the Fifth District Court of Appeal, Petitioner argued that the sentence was illegal inasmuch as it exceeded the statutory maximum. The issue on appeal was the interpretation of the 1994 amendment to the sentencing guidelines in rule 3.702(d)(19), Florida Rules of Criminal Procedure. Petitioner contended that, if the statutory maximum is within the recommended range, the amendment does not apply. The District Court disagreed and affirmed the Petitioner's sentence citing the Third District Court of Appeal in Martinez v. State, 22 Fla. L. Weekly D305 (Fla. 3d DCA January 29, 1997) opinion on rehearing 22 Fla. L. Weekly D1009 (Fla. 3d DCA April 23, 1997) and also the Fifth District Court of Appeal in Green v. St&, 22 Fla.L.Weekly D614 (Fla. 5th DCA March 7, 1997) See Appendices.

Petitioner timely sought rehearing which was denied on May 15, 1997. A timely notice to invoke this Court's discretionary jurisdiction was filed on June 13, 1997.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal sub judice expressly cited a decision of the Third District Court of Appeal, Martinez v. State, 22 Fla. L. Weekly D305 (Fla. 3d DCA January 29, 1997) opinion on rehearing, 22 Fla. L. Weekly D1009 (Fla. 3d DCA April 23, 1997) and a decision of the Fifth District Court of Appeal in Green v. State, 22 Fla. L. Weekly D614 (Fla. 5th DCA March 7, 1997), which are both currently pending review before this Court in Case Nos. 90,679 and 90,696. Pursuant to Jollie v. State, 405 So.2d 418 (Fla. 1981) and Savoie v. State, 422 So.2d 308 (Fla. 1982), this Court has the discretion to accept the instant case for review.

ARGUMENT

THE DISTRICT COURT OF APPEAL'S DECISION RELIES DIRECTLY ON TWO DECISIONS WHICH ARE CURRENTLY PENDING BEFORE THIS COURT, SPECIFICALLY, MARTINEZ V. STATE, 22 FLA. L. WEEKLY D305 (FLA. 3D DCA JANUARY 29, 1997) AND GREEN V. STATE, 22 FLA. L. WEEKLY D614 (FLA. 5TH DCA MARCH 7, 1997).

Petitioner was charged by information with vehicular homicide under Section 782.071, Florida Statutes. (R 50) After Petitioner entered a no contest plea to the charged offense, the trial court sentenced the Petitioner, over defense counsel's objection that the sentence exceeded the statutory maximum, to an 85 month incarceration term. (R 44-47) In its opinion affirming Petitioner's judgment and conviction, the Fifth District Court of Appeal cited the following authorities:

> AFFIRMED. See Green v. State, 22 Fla. L. Weekly D614 (Fla. 5th DCA March 7, 1997); Martinez v. State, 22 Fla. L. Weekly D305 (Fla. 3d DCA January 29, 1997).

Wilkins v. State, 22 Fla. L.Weekly D878 (Fla. 5th DCA April 4, 1997).

As this Honorable Court held in Jollie v. State, 405 So.2d 418 (Fla. 1981):

> We thus conclude that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this court to exercise its jurisdiction.

Id at 420. Consequently, this Court has jurisdiction to review the decision rendered by the Fifth District Court of Appeal in this cause due to the District Court's reliance as controlling authority on the decision in Green v. State, 22 Fla. L.Weekly D614 (Fla. 5th DCA March 7, 1997), and the decision in Martinez v. State, 22 Fla. L. Weekly D305 (Fla. 3d DCA January

29, 1997), opinion on rehearing, 22 Fla. L. Weekly D1009 (Fla. 3d DCA April 23, 1997), which are currently pending review before this Court in case numbers 90,696 and 90,679.

Further, in Martinez, supra, the Court also rejected an issue involving the scoring of victim injury points and certified direct conflict with a decision of the Second District Court of Appeal. Although Martinez did not invoke jurisdiction on the same issue as in the instant case, once this Court accepts jurisdiction over a cause to resolve a legal issue in conflict, in its discretion, the Court can consider other issues properly raised and argued. Savioe v. State, 422 So.2d 308 (Fla. 1982). Since the issue sub judice will be argued in Martinez and Green, this Court has discretionary review to accept this cause pursuant to Jollie, supra, to ensure uniformity of decisions.

CONCLUSION

For the reasons expressed herein, this Honorable Court should exercise its discretionary jurisdiction and grant review of the Fifth District Court of Appeal's decision sub judice based upon the reasoning of Jollie v. State, 405 So.2d 418 (Fla. 1981).

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Susan A. Fagan

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COUNSEL FOR APPELLANT

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 Boulevard, 5th Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to Robert F. Wilkins, DC#441285, Washington Correctional Institution, P.O. Box 510, Vernon, FL 32462, this 23rd day of June, 1997.

Susan A. Fagan

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

ROBERT F. WILKINS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

DCA CASE NO. 96-1622
SUPREME CT. CASE _____

APPENDICES

Appendix A -- Wilkins v. State, 22 Fla. L. Weekly D878 (Fla. 5th DCA April 4, 1997).

Appendix B -- Motion for Rehearing and Order Denying Rehearing

Appendix C -- Green v. State, 22 Fla. L. Weekly D614 (Fla. 5th DCA March 7, 1997)

Appendix D -- Martinez v. State, 22 Fla. L. Weekly D305 (Fla. 3d DCA January 29, 1997) opinion on rehearing 22 Fla. L. Weekly D1009 (Fla. 3d DCA April 23, 1997)

ject to a search warrant can be detained to prevent flight in the event that incriminating evidence is found and also in order to minimize the risk of harm to the officers and the occupants. See *also State v. Thomas. 603* So. 2d 1382 (Fla. 5th DCA 1992).

During the detention, the officer was advised by Ms. Freeman, one of the owners of the home subject to the search, that Boydell possessed cocaine. Since the affidavit supporting the search warrant indicated the presence of drugs on the premises owned by the informant, the officer's belief that the informant's statement gave him probable cause to search Boydell was, in our view, well-founded. The question is whether " 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States, 338* U.S. 160, 175-176, 69 S. Ct. 1302, 1310-11, 93 L. Ed. 1879 (1949), *citing Carroll v. United Stares. 267* U.S. 132.45 S.Ct. 280, 69 L.Ed. 543 (1925).

Even though Ms. Freeman's statement might have been hearsay had it been offered to prove the truth of the matter, the relevance for a probable cause analysis is that the statement was made to the police officer by a person he reasonably believed was in a position to know facts justifying the statement. Having heard the statement from one reasonably believed to be involved in the sale of cocaine (based on the affidavit and the search warrant) and finding Boydell on the premises where it was alleged that cocaine was being sold, a reasonable person would believe that Boydell was involved in criminal activity. Even though the court erred in excluding the statement based on a hearsay objection, it nevertheless made the correct ruling on the motion.

AFFIRMED. (PETERSON, C.J., and ANTOON, J., concur.)

* * *

Criminal law-Sentencing-Error to impose three-year mandatory minimum sentence for possession of firearm by convicted felon

DONNIE ANDERSON, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-1961. Opinion filed April 4, 1997. Appeal from the Circuit Court for Marion County, Jack Singbush. Judge. Counsel: James G. Gibson, Public Defender, and Susan A. Fagan, Assistant Public Defender, Daytona Beach, for Appellant. No Appearance for Appellee.

(PER CURIAM.) In this *Anders* appeal[1] we strike the three year minimum mandatory provision in appellant's sentence for possession of a firearm by a convicted. felon. The convicted felon firearm offense is not one of the enumerated felonies in the statute which requires a minimum mandatory term for possession of a firearm. See § 775.087(2), Fla. Stat. (1995); *Simmons v. State,* 457 So. 2d 534 (Fla. 2d DCA 1984). In all other respects, the judgment and sentences in this appeal are affirmed.

MINIMUM MANDATORY TERM STRICKEN; AFFIRMED AS MODIFIED. (DAUKSCH, SHARP, W., and THOMPSON, JJ., concur.)

[1] *Anders v. California, 386* U.S. 738. 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

* * *

WILKINS v. STATE. 5th District. #96-1622. April 4, 1997. Appeal from the Circuit Court for Orange County. AFFIRMED. *See* Green *v. State,* 22 Fla. L. Weekly D614 (Fla. 5th DCA March 7. 1997); *Martinez* v. *Store,* 22 Fla. L. Weekly D305 (Fla. 3d DCA January 29, 1997).

* * *

Venue-Change-Convenience of parties or witnesses or in the interest of justice-Interlocutory appeal from trial court's denial of defendant's motion to change venue from Duval to Putnam County in action for negligence, strict liability, and civil conspiracy resulting from smoking tobacco products manufactured and retailed by defendants-Trial court did not abuse discretion in denying motion where venue would be proper in either county, and plaintiff asserted, without contradiction, that he intends to call corporate personnel located in Duval County, that many of the witnesses will be experts coming from various parts of United States and Canada, and that Duval County, with a major airport would be more convenient for these witness-Although defendants suggested that plaintiff's coworkers and friends in Putnam County will be witnesses, they failed to identify potential witnesses or set forth expected substance of testimony, record reflects that many tobacco products liability cases are now pending in Duval County and that Duval County Circuit Court has case management order in place dealing with tobacco litigation—Notice of supplemental authority-Abuse of rule to file, in the afternoon prior to oral argument, notice of supplemental authority attaching copies of opinions in five cases, the latest of which was decided in 1989

BROWN & WILLIAMSON TOBACCO CORPORATION, etc., et al., Appellants, v. DAVID YOUNG, Appellee. 1st District. Case No. 96-3566, Opinion tiled April 4. 1997. An anneal from the Circuit Court for Duval County. Alban E. Brooke, judge. Counsel: James F. Moseley, Robert B. Parrish and-Andrew J. Kninbt. JI of Moseley, Warren. Prichard & Parrish, Jacksonville, for Appellant Brown & Williamson Tobacco Corporation. Michael L. Coulson of Saalfield. Catlin & Coulson, Jacksonville, for Appellant Winn-Dixie Stores. Inc. Charles C. Howell. III of Howell.. O'Neal & Johnson. Jacksonville, for Appellant Liggea Group; Inc. Norwood S. Wilner, Gregory H. Maxwell, Stephanie J. Hartley and Kenneth C. Steel. III of Snohrer, Wilner, Maxwell, Maciejewski & Stanford, P.A., Jacksonville, for Appellee.

(VAN NORTWICK, J.) In this interlocutory appeal in a products liability action, Brown & Williamson Tobacco Corporation, Liggett Group, Inc., and Winn-Dixie Stores, Inc., appeal an order denying their motion for change of venue from Duval **County to Putnam County** pursuant to section 47.122, Florida Statutes (1995).[1] Because appellants have failed to meet their **burden** of showing that the trial court abused its discretion in refusing to transfer venue from Duval County, we affirm.

Factual and Procedural Background

David Young, appellee, is currently a resident of Putnam County, moving there in 1993. He brought this action against appellants in 1995, alleging that he developed chronic obstructive pulmonary disease and other diseases from smoking tobacco products manufactured by Brown & Williamson and Liggett, foreign corporations doing business in Florida, and sold at retail by Winn-Dixie, a Florida corporation with its corporate headquarters in Duval County. He seeks damages on the theories of negligence, strict liability, and civil conspiracy.

Young selected venue in Duval County pursuant to **section** 47,051, Florida Statutes (1995).[2] The parties agree, however, **that venue would be proper under section 47.051 in either Duval** County or Putnam County, presumably because Winn-Dixie owns and operates grocery stores in both those counties. Thus, as this suit could have been brought in Putnam County, **section** 47.122 would permit a change of venue to Putnam County for the **convenience of the parties or witnesses or in the interest of justice.**

After Young answered his first set of interrogatories, the appellants moved for a transfer of venue pursuant to section 47.122. They allege that the cause of action did not accrue in Duval County and that none of Young's family members or treating physicians reside in Duval County. Appellants contend that it would be more convenient for Young's witnesses to testify **in Putnam County rather than Duval County. Finally, they** argue that the Duval County citizens should not be burdened with the trial of this case which has little or no nexus to Duval County.

In his answer to interrogatories, Young had identified two treating physicians, one located in Putnam County and the other located in Alachua County. Although Young was asked to identify his living relatives, who are few in number, he was not asked, and therefore did not answer, whether any of these relatives had knowledge of his disease, its alleged cause, or any other circumstances pertinent to a resolution of this lawsuit. Young was not **asked,** and therefore did not answer, whether there were

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT
STATE OF FLORIDA

ROBERT FOY WILKINS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

DCA CASE NO. 96-1622

MOTION FOR REHEARING,
REHEARING EN BANC, AND/OR CERTIFICATION

Appellant, ROBERT WILKINS, by and through his undersigned attorney, moves for rehearing, rehearing en banc, and/or certification in the above-captioned matter and says:

1. On April 4, 1997, the panel rendered an opinion affirming Appellant's sentence and citing this Court's decision rendered in Green v. State, 22, Fla.L.Weekly D614 (Fla. 5th DCA March 7, 1997; and the decision of Martinez v. State, 22 Fla.L.Weekly D305 (Fla. 3d DCA January 29, 1997). In Green, supra, this court construed Section 921.001(5) as follows:

> If the recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082, a sentence under the guidelines must be imposed, absent a departure. [Emphasis the court.]

2, Rehearing is authorized by Rule 9.330, Florida Rules of Appellate Procedure, where the court has overlooked or misapprehended points of law. Appellant respectfully suggests that this Court overlooked the rules of statutory construction that require penal statutes to be strictly construed, and where susceptible to more than one meaning, construed in

favor of the accused. See, Cabal v. State, 678 So. 2d 315 (Fla. 1996) and cases cited therein.

3. By this Court's reliance on its statutory interpretation of Section 921.001(5), Florida Statutes, expressed in Green, Appellant respectfully submits that such a statutory interpretation construes Section 921.001(5) in the light most favorably to the state, rather than the accused. In fact, this court specifically rewrote section 921.001(5) in Green stating that "[t]he emphasized line from section 921.001(5)..., should read, for purposes of clarity, as follows:..." [emphasis added] Accordingly, because this Court did recognize in Green that section 921.001(5) requires clarification, Appellant would respectfully submit that this Court was constrained by section 775.021(1), Florida Statutes, to interpret Section 921.001(5) most favorably to the Appellant, i.e., that the entire recommended sentencing range must exceed that applicable statutory maximum before a guidelines sentence, beyond the statutory maximum, may be imposed.

4. In Martinez, supra, the Third District Court of Appeal, similarly utilized a statutory interpretation of section 921.001(5) that was more favorable to the state, instead of the accused. Specifically, the court in Martinez employed its own reading of the statutory language of section 921.001(5), based on its own interpretation of the statute's legislative intent, and determined that if only a portion of the guidelines sentencing range exceeds the statutory maximum for the applicable offense, a sentence within the recommended range may be imposed even if it exceeds the statutory maximum. Thus, both the Green and Martinez decisions, relied-on by this Court in the instant case, acknowledge that Section 921.001(5) is at least susceptible of conflicting interpretations, although the interpretation most favorable to the state was ultimately chosen in affirming the sentences in those cases.

5. En banc review of a panel decision is further authorized by Rule 9.331, Florida

Rules of Appellate Procedure, where the issue is one of exceptional importance. A decision of exceptional importance is one that affects large numbers of persons or one that interprets a fundamental legal or constitutional right. In Interest of D.J.S., 563 So. 2d 655, n. 1 (Fla. 1st DCA 1990); Felts v. Stats;, 537 So. 2d 995 (Fla. 1st DCA 1988). Based upon a reasoned and studied professional judgment, counsel believes that the panel decision is of exceptional importance.

6. In the alternative, Appellant requests that this Court certify the following question as one of great public importance:

> Where the recommended guidelines range encompasses the statutory maximum permitted by section 775.082, does the statutory maximum constitute the maximum allowable sentence?

WHEREFORE, Appellant respectfully requests this Court to grant rehearing, rehearing en banc, or, in the alternative, to certify the above-styled question to the Supreme Court.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

Susan A. Fag

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ASSISTANT PUBLIC DEFENDER
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COUNSEL FOR APPELLANT

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, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to: Mr. Robert F. Wilkins, #441285, Washington Correctional Institution, DC# 441285, 1B2-09 Lower, P.O. Box 510, Vernon, FL 32462, this 21st day of April, 1997.

Susan A. Fagan

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

IN THE DISTRICT COURT OF-APPEAL OF THE STATE OF FLORIDA 96633 SF
FIFTH DISTRICT

ROBERT WILKINS,
Appellant,

v. CASE NO. 96-1622

STATE OF'FLORIDA,
Appellee.

DATE: May 15, 1997

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR REHEARING, REHEARING EN BANC, AND/OR CERTIFICATION, filed April 21, 1997, is denied.

I hereby certify that the foregoing is
(a true copy 0f) the original court order.

Frank J. Habershaw

FRANK J. HABERSHAW, CLERK

(COURT SEAL)

cc: Office of the Public Defender, 7th JC
Office of the Attorney General, Daytona Beach
Robert F. Wilkins

Attorney General. Tallahassee, and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellant. No Appearance for Appellee.

(ANTOON, J.) The state appeals the trial court's order granting the defendant's motion to suppress evidence. The defendant was charged with battery on a law enforcement officer,[1] resisting an officer with violence,[2] and possession of cannabis.[3] Following an evidentiary hearing, the trial court entered its oral ruling, suppressing "everything that occurred at and after [the] pretextual stop. . ."

The instant record contains no written motion to suppress and no written suppression order. The trial court orally announced its ruling at the conclusion of the hearing and then signed the court minutes which noted "defense motion granted" with no further explanation. Thus, the trial court's oral ruling is unclear with respect to what evidence the court intended to suppress, Therefore, we vacate the order and remand this matter to the trial court for a period of fifteen (15) days from the date of this opinion to enter a written order disposing of the motion. We also direct the state to supplement the record with the written suppression motion, if one exists.

We take this opportunity to remind the trial court and trial counsel of the importance of clearly stated motions and rulings. In this regard, counsel has an interest in ensuring that the record supports the argument raised on appeal. While not always required, written motions are preferable. This court has recognized that the signing of court minutes indicating that a motion to suppress is granted is sufficient to constitute "rendering" for jurisdictional purposes, ***Stare v. Brown, 629 So.*** 2d 980 (Fla. 5th DCA 1993). Nonetheless, trial courts have an obligation to clearly and fully set forth their rulings.

VACATED and REMANDED, (PETERSON, C.J., and THOMPSON, J., concur.)

[1] §§ 784.03, 784.045, 784.07, Fla. Stat. (1993).
[2] § 843.01, Fla. Sot. (1993).
[3] § 893.13. Fla. Stat. (1993).

* * *

Criminal law-Sentencing--Guidelines-Scvcnty-two months' incarceration for attempted voluntary manslaughter with a firearm, a third degree felony, was permissible even though it exceeded the five-year statutory maximum for a third degree felony-Sentence imposed did not cxcccd by 25% the recommended guideline prison sentence of 65.8 months and therefore there was no-departure

DENO S. GREEN. Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-394. Oainion filed March 7. 1997. Anneal from the Circuit Court for Orange County, Robert M. Evans, Jubge. Counsel: James B. Gibson, Public Defender, and Dee R. Ball, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General. Tallahassee. and Belle B. Turner, Assistant Attorney General, Daytona Beach, for Appellee.

(COBB, J.) Deno Green appeals the sentence imposed for one count of attempted voluntary manslaughter with a firearm, a third degree felony.' Green scored 93.8 total sentence points on the guidelines scoresheet, which resulted in a recommended state prison term of 65.8 months. Hc was sentenced to 72 months' incarceration with credit for time served. Green argues that the trial court erred by imposing a sentence in excess of the five year statutory maximum for a third degree felony. See § 775.082(3)(d), Fla. Stat. (1995). He acknowledges that subsection 921.001(5) authorizes a trial court to exceed the maximum sentence otherwise permitted by section 775.092; however, Green contends that where the recommended range encompasses the statutory maximum, the statutory maximum constitutes the maximum allowable sentence,

Section 921.001(5) of the Florida Statutes provides in pertinent part:

> Sentences imposed by trial court judges under the 1994 revised sentencing guidelines on or after January 1.1994, must be within the 1994 guidelines unless there is a departure sentence with written findings. *If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082, the sentence under the guidelines must be imposed, absent a departure.* If a departure, with written findings, is imposed, such sentence must bc within any relevant maximum sentence limitations provided in s. 775.082. (Emphasis added).

See also, Gardner v. State, 661 So. 2d 1274 (Fla. 5th DCA 1995) (rejecting the arguments that section 921.001(5) deprived a defendant of due process by failing to provide adequate notice and violates judicial rule-making authority).

Green's "total sentence points," as defined by Florida Rule of Criminal Procedure 3.702(d)(15), aggregated 93.8 points, which total represents, after deducting 28 points pursuant to Rule 3.702(d)(16), a recommended state prison term of 65.8 months. The sentence imposed on Green of 72 months did not deviate from the recommended sentence of 65.8 months by more than 25% (*i.e.*, 16.45 months); therefore, subsection (d)(18) of the rules did not require the trial court to accompany its sentence with a written statement delineating the reasons for departure. There was no departure.

There is no conflict between the 72-month sentence and the provisions of section 921.001(5), Florida Statutes, quoted above. The trial court ***did*** impose a "sentence under the guidelines" (see emphasized language of the statute quoted above) when it imposed 72 months. There was no departure sentence in this case, either under the rule or under the statute. A "departure" from a "recommended guidelines sentence" occurs when the sentence imposed varies by more than 25% from a calculated specific number of 12 or above arrived at by subtracting 28 points from the "total sentence points." §§ 921.0014(2), 921.0016(1), Fla, Stat.; Fla. R. Crim. P. 3.702(d)(15) & (16). A sentence which deviates from this specific number by less than 25 % is a permissible "variation," not a "departure." § 921.0016(1)(b), Fla. Stat. The word "departure" in Rule 3.702(18) and the term "departs from" in (18)(a) have the same meaning as the word "departure" has in section 921.0016 and these terms do not encompass those variations from the recommended guidelines sentence which are permitted without stated reasons. See, e.g., *Delancy v. State, 673 So.* 2d 541 (Fla. 3d DCA 1996).

The emphasized line from section 921.001(5) quoted above should read, for purposes of clarity, as follows: "If *the* recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082, a sentence under the guidelines must be imposed, absent a departure." It would appear, from a grammatical standpoint, that the articles in the foregoing sentence are misplaced in the printed statute.

AFFIRMED. (SHARP, W. and GOSHORN, JJ., concur.)

[1] §§ 782.07, 777.04(4)(d), Fla. Stat. (1775).

* * *

Criminal law-Sentencing-Correction-Doctrine of law of the case bars reconsideration of 3.800(a) motion raising claim that was previously reviewed on the merits and rejected-Defendant estopped to assert the invalidity of original sentence where he accepted benefits of sentence without objection and complained only after violating terms of "illegal" community control

LEONARD STROBLE, Appellant. v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-3427. Opinion filed March 7, 1997. 3.800 Appeal from the Circuit Court for Orange County, Bob Wattles, Judge. Counsel: Leonard Stroble, Mayo, Pm se. No Appearance for Appellee.

ON MOTION FOR REHEARING

(HARRIS, J.) Leonard Stroble has asked for a rehearing on our previous Per Curiam Affirmance. He suggests that we ignored the fact that his original sentence was one not authorized by *Poore v. State,* 531 So. 2d 161 (Fla. 1988). We did not ignore this fact; we merely conclude that it makes no difference.

In 1990, Stroble was sentenced as an *habitual offender* but this sentence was suspended provided he successfully serve a term on

of or the terms of said Settlement Agreement, the settlement funds, or the cause of plaintiffs mental state, either directly or indirectly.

Consequently, nothing in the federal court proceeding prohibits Smith's answers to the questions ordered answered and does not violate the UPS confidentiality agreement. However, it would not affect our analysis even had the federal court held to the contrary.

Independently, reviewing the parties' claims and defenses, we conclude that the questions the trial court'allowed were both necessary and relevant. Furthermore, regardless of the federal court's determination of whether Smith's answers would put the UPS settlement at risk, or place Smith in a position of being held accountable for a violation of the terms of that agreement, it was Smith's responsibility to answer the questions as ordered, or risk dismissal of her suit against the Bank.

While confidentiality agreements are necessary in some instances, to facilitate settlement, they may not be subsequently employed by a litigant to obscure issues or otherwise thwart an opponent's discovery.' In addressing that concern, the Florida Supreme Court, in *Stockham v. Stockham, 168 So.* 2d 320,322 (Fla. 1964). approved *Independent Prods. Corp. v. Lowe's, Inc.,* 22 F.R.D. 266, 275-76 (S.D.N.Y. 1958), which, in part, held:

> It would be uneven justice to permit plaintiffs to invoke the powers of this court for the purpose of seeking redress and, at the same time, to permit plaintiffs to fend off questions, the answers to which may constitute a valid defense or materially aid the defense.
>
> Plain justice dictates the view that, regardless of plaintiffs' **intention, plaintiffs must be deemed to have waived their assumed** privilege by bringing this action. . . .
>
> Plaintiffs in this civil action have initiated the action and forced defendants into court. If plaintiffs had not brought the action, they would not have been called on to testify. Even now, plaintiffs need not testify if they discontinue the action. They have freedom and reasonable choice of action. They cannot use this asserted privilege as both a sword and a shield. Defendants ought not to be denied a possible defense because plaintiffs seek to invoke an alleged privilege.

As stated above, we reject Smith's argument that the bank has no real need for the information sought, or that the trial court improperly weighed the interests at stake. See *Pyszka, Kessler, Massey, Weldon, Catri, Holton & Douberley, P.A. v. Mullin,* 602 So. 2d 955 (Fla. 3d DCA 1991). As the bank points out, this is not only a boundary dispute, but also an action alleging fraud and breach of contract. The material sought to be discovered properly related to the issues involved in the litigation. *Everglades Protective Syndicate, Inc. v. Makinney,* 391 So. 2d 262, 263 (Fla. 4th DCA 1980). Smith placed at issue her justified reliance on the bank's assertions, the veracity of the financial documents she submitted to the bank, and the state of her mental health including memory problems she was experiencing at the time of the Bank's alleged tortious conduct. *See In re Vann,* 67 F. 3d 277, 283 (11 th Cir. 1995) (holding justifiable reliance as an element of **a fraud claim is gauged in** part **by the individual plaintiffs** own capacity and knowledge). In sum, the trial court here limited the questions to relevant subject areas.

Accordingly, the petition for certiorari is denied.

'In resolving the instant controversy, we do not construe in any way section 69.081, Florida Statutes (1995). the "Sunshine in Litigation Act" or other similar statutory provisions.

* * *

Criminal law—Vehicular homicide-Sufficiency of evidence—Evidence that defendant was driving 70 miles per hour in 30 mile-per-hour zone and passing another vehicle in a no-passing zone at time of accident sufficient to sustain conviction under vehicular **homicide statute-Opinion testimony-by witnesses--No abuse of discretion in admitting testimony of lay witnesses who estimated defendant's speed at about 70 miles per hour at time of accident-No error in admitting evidence of alcohol consumption in reckless driving prosecution-Blood alcohol level-Presumptions-Defendant will not be heard to complain about jury instruction on statutory presumptions for blood alcohol level where defense counsel wanted the jury to be so instructed and the jury was aware by virtue of the instruction that it was presumed defendant was not impaired-No abuse of discretion under section 90.403, Florida Statutes in admitting evidence of consumption of alcohol and prescribed medication—Sentencing—Guidelines—Sentence of six and one half years incarceration followed by one year probation legal for third degree felony where the applicable guidelines range was 4.6 to 7.7 years-Where the top end of the recommended range exceeds the ordinary legal maximum, the recommended sentence exceeds the ordinary legal maximum for purposes of section 921.001, Florida Statutes (1993)—Trial court had discretion to increase recommended sentence up to and including 25 percent where defendant scored 102 points and trial court could not avail itself of discretionary power to increase the total sentence points by 15 percent since initial total sentence points were not forty or less—Victim injury points-Death of victim properly scored under section 921.0011(7), Florida Statutes (1993), even where victim's death was element of offense-Conflict certified**

JAVIER E. MARTINEZ. Appellant, v. THE STATE OF FLORIDA. Appellee. 3rd District. Case No. 96-165. L.T. Case No. 94-32063. Opinion filed January 29, 1997. An appeal from the Circuit Court for Dade County, Leslie B. Rothenberg, Judge. Counsel: Linda L. Carroll and Gregory A. Wald, for appellant. Robert A. Butterworth, Attorney General, and Sylvie Perez Posner, Assistant Attorney General. for appellee.

(Before SCHWARTZ, C.J., COPE and FLETCHER, JJ.)

(COPE, J.) Javier E. Martinez appeals his conviction for vehicular homicide. We affirm.

Defendant-appellant Martinez contends that the evidence was legally insufficient to convict him of vehicular homicide. " 'Vehicular homicide' is the killing of a human being by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another." § 782.071(1), Fla. Stat. (1993). *See generally McCreary v. Stare,* 371 So. 2d 1024 (Fla. 1979). In determining whether the evidence is legally sufficient, the evidence must be viewed in the light most favorable to the state, *State v.* Law, 559 So, 2d 187, 189 (Fla. 1989).

On the night of the fatality, defendant drove northbound on Old Cutler Road in Coral Gables, Defendant was driving at an estimated 70 miles per hour in a 30 mile-per-hour zone, in a curving section of road. There was a continuous double yellow line, indicating that it was a no-passing zone, While passing another vehicle, defendant's car struck a median, proceeded across the southbound lane of traffic, and landed on top of a rock wall on the side of the road. A tree branch entered the car, impaling a passenger and causing his death. The facts just stated are legally sufficient for conviction under the vehicular homicide statute, and meet or exceed the level of recklessness involved in *McCreary v. State,* 371 So. 2d at 1026-27, and *Savoia v. Sate, 389 So.* 2d 294 (Fla. 3d DCA 1980).

Defendant relies on *R.* C. G. v. *Stare,* 362 So. 2d 166 (Fla. 2d DCA 1978), but the state correctly *points* out that *R.* C. G. applied a manslaughter standard to the vehicular homicide statute. In that respect, *R.* C. G. does not survive the Florida Supreme Court's later decision in *McCreary,* which rejected the application of the manslaughter standard in vehicular homicide cases. 371 So. 2d at 1025-27. The standard of proof in vehicular homicide cases is lower than the manslaughter standard. *Id.* Since the *R. C.* G. court applied the higher manslaughter standard, the *R.* C. *G.* decision sheds no light on whether the facts of that case would be legally sufficient to support a conviction for vehicular homicide. The *R.* C. G. case is also factually distinguishable; the *R. C. G.* court noted that the motorcycle accident may have been caused by a sudden shift of weight by the motorcycle passenger, which in

turn caused the. inexperienced driver to lose control. 362 So. 2d at 168.

Defendant *also* relies on *W.E.B.* v. *State*, *553* So. 2d 323 (Fla. 1st DCA 1989), but in that case the court concluded that the defendant was at most guilty of negligence in "overcorrecting from having driven off the shoulder of the road." *Id.* at 327 (emphasis omitted). The factual circumstances of the present case are of greater severity than those outlined in *W.E.B.*

Defendant next argues that the trial court erred by admitting the opinion testimony of lay witnesses about the speed of defendant's vehicle at the time of the accident. The state called as witnesses the driver and passenger in the motor vehicle which the defendant was passing at the time of the accident. Both individuals were licensed drivers with several years of driving experience and both estimated defendant's speed at about 70 miles per hour as he passed them.

"Testimony in the form of opinion by a nonexpert witness, qualified by opportunity for observation, is admissible to prove the speed of a vehicle, animal, or object." 1 Spencer A. Gard, *Florida Evidence* § 12.04, at 421 (1980). There was no abuse of discretion in admitting the testimony.

Defendant contends that the trial court erred by admitting the results of his blood alcohol test which indicated a .03 level, A toxicologist extrapolated that the level would have been .05 at the time of the accident. Defendant asserts that since this was a prosecution for reckless driving, and not a prosecution for driving under the influence (DUI) or DUI manslaughter', evidence of alcohol consumption was inadmissible. To the contrary, it has been held that evidence of alcohol consumption is a factor the trial court is entitled to consider in a reckless driving prosecution. *W.E.B. v. State,* 553 So. 2d at 326. Evidence of alcohol consumption was among the matters presented to the jury in such *cases as McCreary v. State,* 371. *So.* 2d at 1025, *Savoia v. State*, 389 So. 2d at 295, and *R.C.G. v. State, 362 So.* 2d at 166, although the question of admissibility was not discussed.

Defendant makes a related argument that the trial court erred by instructing the jury on the statutory presumptions for blood alcohol levels. See § 316.1934(2), Fla. Stat. (1993). By virtue of the instruction, the jury was aware that for the .03 and .05 levels, it was presumed that the defendant was not impaired. See *id.* § 316.1934(2)(a). Defendant contends that this instruction should not have been given, but as we view the record, trial counsel took the position that if the blood alcohol test results were going to bc admitted into evidence over defense objection, then defendant wanted the jury to be instructed regarding the statutory presumptions, Defendant will not now be heard to complain. Moreover, it would appear that the giving of this instruction was helpful, rather than harmful, to the defense,

Defendant argues alternatively that the evidence regarding consumption of alcohol and prescribed medicine should have been excluded under section 90.403, Florida Statutes, which provides that relevant evidence is inadmissible, inter alia, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, [or] misleading the jury . . . ." At trial the State adduced evidence that at the time of the accident defendant was taking a prescriptian drug which carries a warning not to operate a motor vehicle. Defendant's objection was addressed to the sound discretion of the trial court, and under the circumstances, we see no abuse of that discretion.

Defendant asserts that his sentence exceeds the legal maximum. Defendant was convicted of vehicular homicide under subsection 782.071(1), Florida Statutes, which is a third degree felony. While the maximum legal sentence for a third degree felony is five years, id. § 775.082(3)(d), the crime in this case was committed on July 23, 1994, and the 1994 sentencing guidelines are therefore applicable, Under the 1994 guidelines, "[i]f a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082, the sentence under the guidelines must be imposed, absent a departure." § 921.001(5), Fla. Stat. (1993). The recommended guidelines range in this case was 4.6 years to 7.7 years. The trial court imposed a sentence of six and one-half years incarceration followed by one year of probation. This is a legal sentence under the 1994 guidelines. *Delancy* v. *State,* 673 So. 2d 541 (Fla. 3d DCA 1996).

Defendant takes issue with *Delancy* and argues that the five-year statutory maximum applies in this case. He reasons that the recommended sentence does not exceed the five-year legal maximum because the bottom of the guidelines range is 4.6 years. He contends that so long as the bottom of the recommended range is below the ordinary legal maximum (in this case, five years), then the court cannot impose sentence above the ordinary legal maximum. We do not think that defendant's argument is consistent with the wording of the statute, or with its intent. The statute begins by stating, "If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775,082 . . . ." § 921.001(5), Fla. Stat. In this case the top end of the recommended range is 7.7 years, and thus the recommended sentence exceeds the ordinary legal maximum. Further, in our view the legislative intent is to allow the trial court the full use of the recommended range unencumbered by the ordinary legal maximum.

Defendant next claims that there is a scoring error in calculating the recommended sentence. Defendant argues that the recommended guidelines sentence of seventy-four months can only be increased by 15 percent in order to calculate the guidelines range. See § 921.0014(1), Fla. Stat, (1993). Defendant misreads the statute. The statute provides that "[t]he recommended sentence length in state prison months may be increased by up to, and including, 25 percent or decreased by up to, and including, 25 percent, at the discretion of the court." *Id.* The statute goes on to explain that the 25 percent range is not available if the trial court has already availed itself of its discretionary power to increase the total sentence points by up to 15 percent where the initial total sentence points are forty or less, See *id.* However, the defendant in this case scored 102 points, and the 15 percent discretion allowed by the statute was not available to, or invoked by, the trial court. The calculation of the guidelines range is correct.

Finally, the defendant argues that the trial court erred by scoring sixty points for victim injury, which is the score where death has resulted. Relying on *Thornton v. Stare. 683 So.* 2d 5 15 (Fla. 2d DCA 1996), defendant claims that the death of the victim cannot be scored because death or great bodily harm is an clement of the offense of vehicular homicide. We disagree.

Under the 1994 guidelines:

> "Victim injury" means the physical injury or death suffered by a person as a direct result of the primary offense, or any offense other than the primary offense, for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense.

§ 921.0011(7), Fla. Stat. (1993). Section 921.0014, Florida Statutes. creates the sentencing guidelines worksheet and calls for the scoring of the offense(s) plus victim injury. This is spelled out in Florida Rule of Criminal Procedure 3.702(d)(5) which states:

> "Victim injury" is scored for physical injury or death suffered by a person as a direct result of any offense pending before the court for sentencing. . . .
>
> Victim injury shall be scored for each victim physically injured and for each offense resulting in physical injury whether there are one or more victims. However, if the victim injury is the result of a crime of which the defendant has been acquitted, it shall not be scored.

Since the rule and the statute specifically call for the scoring of victim injury, the death of the victim was properly scored in this case.

We decline to follow the Second District decision in *Thornton v. State.* In *Thornton* the defendant moved for postconviction relief, claiming scoresheet error in sentences imposed in 1992.

Defendant relies on a portion of the *Thornton* opinion which states:

> In the order denying further relief upon rehearing, the trial court concedes that it was error to include forty-eight points on the scoresheet for victim injury; the primary offense had already been enhanced because injury or death is an element of the offense. *Byrd v. State*, 531 So. 2d 1004 (Fla. 5th DCA 1988); see *Hendsbee* v. *State*, 497 So. 2d 718 (Fla. 2dDCA 1986); *Benedict* v. *State*, 475 So. 2d 1000 (Fla. 5th DCA 1985).

683 So. 2d at 5 16.[2]

To begin with, the *Thornton* decision analyzes the pre-1994 version of the guidelines. The question of how to score victim injury depends on the wording of the guidelines.

However, the pre-1994 guidelines are similar to the 1994 guidelines in the scoring of victim injury. Under Florida Rule of Criminal Procedure 3.701, which governs the pre-1994 guidelines, "Victim injury shall be scored for each victim physically injured during a criminal episode or transaction, and for each count resulting in such injury whether there are one or more victims." Fla. R. Crim. P. 3.701(d)(7) (1992).[3] The 1988 committee notes state:

> (d)(7) This provision implements the intention of the commission that points for victim injury be added for each victim injured during a criminal transaction or episode. The injury need not be an element of the crime for which the defendant is convicted, but is limited to physical trauma. However, if the victim injury is the result of a crime for which the defendant has been acquitted, it shall not be scored.

The pre-1994 scoresheet forms call for assessment of victim injury points in addition to the points assigned to the primary and additional offenses at conviction. Fla. R. Crim. P. 3.988 (1992).

The Thornton decision does not discuss the language of Rule 3,701 or the committee notes. Instead, *Thornton* relies on *Byrd v. State*, 531 So, 2d 1004 (Fla. 5th DCA 1988), and *Hendsbee v. State*, 497 So. 2d 718 (Fla, 2d DCA 1986), both of which are sentencing guidelines departure cases. *In Byrd* there was a downward departure based, in part, on defendant's lack of prior record. The *Byrd* court said, "A defendant's record or lack of one is not a valid reason for departure because that factor is already taken into consideration in the guideline calculation." 531 So. 2d at 1007 (citation omitted), That is a correct statement of law, but it does not address whether victim injury is to be scored.

Similarly, the *Thornton* court cited *Hendsbee v. State, also* a departure case. There the court said:

> An clement of aggravated battery, victim injury, is scored on the scoresheet. Victim injury may not be figured into the scoresheet and also used to depart from the sentencing guidelines.

497 So. 2d at 718 (citations omitted). The point was that since victim injury had been scored, victim injury could not be used as a reason for departure from the guidelines, The *Hendsbee* decision does not support the proposition that victim injury is not to be scored. The court made the comment that victim injury is an element of aggravated battery because prior to July 1, 1987, the sentencing guidelines provided that, "[v]ictim injury shall be scored if it is an element of any offense at conviction." Fla. R. Crim. P. 3.701(d)(7) (1985).[4] *Hendsbee* was decided in 1986.

The final case relied on by *Thornton* is *Benedict v. State,* decided in 1985. The defendant in *Benedict* had been convicted of failing to stop and render aid and give information after an accident resulting in injury or death, in violation of sections 316.027 and 316.062. Florida Statutes. The question in *Benedict was* whether victim injury points had been properly scored. Since the guidelines at that time called for victim injury points to be scored only if it is an element of any offense at conviction, Fla. R. Crim. P. 3.701(d)(7) (1985), and since it was not an element of Benedict's crimes that the defendant have killed or injured someone else, the *Benedict* court ruled that victim injury points had been improperly scored. *475 So.* 2d at 100 1. *Benedict hinges,* in other words, on the wording of the pre-July 1, 1987, sentencing guidelines-a version of the guidelines which was not in force at the time of the *Thornton* decision, nor at the time the defendant committed his crime in the present *case. Benedict* does not support the proposition for which *Thornton* cites it.[5]

In sum, we conclude that *Thornton* is wrongly decided and certify direct conflict with it. Victim injury is to be scored in accordance with the text of the applicable sentencing guidelines. In the present case, victim injury has been properly scored under Rule3.702 and subsections 921.0011(7) and 921.0014(1), Florida Statutes (1993).

Affirmed; direct conflict certified.

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[1] § 316.193(3)(c)3, Fla. Stat. (1993).

[2] Operating on the premise that the defendant had been scored incorrectly, the court ordered that Thornton be resentenced. *Id.*

[3] Although immaterial in the present case, the phrase "and for each count resulting in injury whether there are one or more victims" was added in 1991. See *Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988). 576 So.* 2d 1307, 1308-09 & fn* (Fla. 1991).

[4] Effective July 1, 1987, Rule 3.701(d)(7) was amended to read, "Victim injury shall be scored for each victim physically injured during a criminal episode or transaction." *Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988),* 509 So. 2d 1088. 1089 (Fla. 1987); see *also Karchesky v. State, 591 So.* 2d 930.932 (Fla. 1992).

[5] Even if the pre-July 1, 1987 version of the sentencing guidelines were still in effect, victim injury points would be properly scored in the present case. The death of the victim is an element of the crime of vehicular homicide under section 782.071, Florida Statutes.

* * *

ARROCHA vs. STATE. 3rd District. #95-3055. January 29, 1997. Appeal from the Circuit Court for Dade County. Affirmed. See § 90.608, Fla. Stat. (1993); *Alexander v. State,* 627 So. 2d 35 (Fla. 1st DCA 1993). *review denied.* 637 So. 2d 236 (Fla. 1994).

GONZALEZ vs. STATE. 3rd District. #96-1168. January 29, 1997. Appeal from the Circuit Court for Dade County. Affirmed. *See Strickland v. Washington, 466* U.S. *668* (1984); *Mazard v. Stale. 649 So.* 2d *255* (Fla. 3d DCA 1994); *Gonzalez v. State, 579 So.* 2d 145 (Fla. 3d DCA 1991).

VALCIN vs. STATE. 3rd District. #96-14. January 29. 1997. Appeal from the Circuit Court for Dade County. Affirmed. Fla. R. Crim. P. 3.190(h)(4); *Jones* v. *State,* 580 So. 2d 143 (Fla.) (no appellate review unless attorney states grounds for motion for judgment of acquittal). *cert. denied, 502* U.S. 878 (1991); *Lackos* v. *State,* 339 So. 2d 217 (Fla. 1976) (can amend victim's name in information); *Cortes* v. *State, 670* So. 2d 119 (Fla. 3d DCA 1996) (motion to suppress untimely); *Johnson v. State, 478 So.* 2d 885 (Fla. 3d DCA 1985) (no error in restriction of victim's cross-examinations). *See Williams v. State, 591* So. 2d 319 (Fla. 3d DCA 1991) (requested instruction subsumed by standard instruction).

RAMOS vs. RODRIGUEZ-CESPEDES. 3rd District. #96-3229. January 29, 1997. On Petition for Writ of Certiorari to the Circuit Court for Dade County. Petition denied. *Brent* v. *Smathers. 529* So.2d 1267 (Fla. 3d DCA 1988).

WESTBURRY SHOPPES CORPORATION vs. SECURITY PACIFIC CREDIT CORPORATION. 3rd District, #96-128. January 29, 1997. Appeal from the Circuit Court for Dade County. Affirmed. *Visoly v. Bodek, 602* So. 2d 979 (Fla. 3d DCA 1992).

RUIZ vs. STATE. 3rd District. #96-3101. January 29, 1997. Appeal under Fla. R. App. P. 9.140(g) from the Circuit Court for Dade Countv. Affirmed. *Raley* v. *State,* 675 So, 2d 170 (Fla. 5th DCA 1996) (law of case doctrine precludes review of defendant's claim that sentence is unlawful where appellate court has previously reviewed and rejected same claim on same grounds alleged).

PORTO vs. CHURCH &TOWER OF FLORIDA. INC. 3rd District. #96-506. January 29. 1997. Appeal from the Circuit Court for Dade County. Affirmed. *Cones v. Delta Air* Lines, *Inc.,* 638 So. 2d 108. 110 (Fla. 3d DCA 1994) (where alleged negligence was not, as a matter of law, proximate or legal cause of plaintiffs injury, summary judgment for defendant proper).

* * *

Criminal law--Defendant entitled to new trial where verdict was challenged under rule 3.600(a)(2) as contrary to manifest weight of evidence, presiding trial judge had recused himself, and credibility of witnesses for both sides played pivohl, if not critical, role, thereby preventing successor judge from ruling on motion based on reading of cold transcript

SAMUEL SANFORD, Appellant, v. THE STATE OF FLORIDA. Appellee. 3rd District. Case No. 95-451. L.T. Case No. 93-27417. Opinion filed Rodolfo 29, 1997. An appeal from the Circuit Court for Dade County.

set for December 15, 1994. In addition, the duties of the attorney for the guardian were taken over by Thomas J. Morgan, Esq. in December 1994, at the time of the first scheduled hearing for fees.

Levin's Estate failed to make any objections to the petitions for fees until the December 15, 1994 hearing, when the Estate made oral objections, resulting in the Court resetting the matter for hearing on January 30, 1995. The Estate alleged that Galbut was negligent and responsible for Levin's death. On January 8, 1995, the Estate filed a Motion to Strike the Petition for Fees filed by Galbut. The next day, January 9, 1995, the Estate filed Levin's death certificate. On January 10, 1995, the Estate filed formal objections and made a request for jury trial.

On January 20, 1995, Galbut filed his Response to the Motion to Strike his Fees, moved to strike the jury tnal demanded in the Motion to Strike his Fees, and responded to the separate motion for jury trial. Also on January 20, 1995, the Estate filed a Petition for Surcharge against Galbut, as guardian of the person, for his negligence. Galbut's attorney moved to dismiss, and on April 25, 1995, the trial court entered an Order on all pending motions. The Court dismissed the Amended Petition for Surcharge, with prejudice, finding that it failed to state a cause of action upon which relief could be granted because the Petition improperly sought relief for alleged torts. The Court also entered an order denying the Estate's Motion for Jury Trial and Motion to Strike the Petition for Fees for lack of jurisdiction.

In May of 1995, the Estate petitioned this Court for a Writ of Certiorari to review the Estate's right to trial by jury at a hearing awarding guardian fees and attorney's fees. The Estate also petitioned this Court for a Writ of Prohibition, contending that the probate court lacked jurisdiction to award either guardian or attorney's fees. This Court denied these petitions.

On June 2, 1995, Galbut's attorney filed a motion below for attorney's fees under § 744.108 and § 57.105, Fla. Stat., for services rendered in defending Galbut against the Estate's Petition for Surcharge and other motions, including the defense to the motion for jury trial and the motion to strike the petition for fees. Attorney's fees were also sought in this Court for the defense against the Estate's Petition for the Writs of Certiorari and Prohibition. This Court denied attorney's fees on November 16, 1995.

On June 12, 1995, the Estate appealed the Order Dismissing with Prejudice the Petition for Surcharge. In ***Estate of Levin v. Galbut***, *666* So. 2d 266 (Fla. 3d DCA 1996), this Court affirmed the lower court's dismissal of the Amended Petition for Surcharge because it failed to state a cause of action for surcharge as a matter of law. However, to ensure that the dismissal of the Petition would not have any preclusive effect on the pending tort action in the circuit court's general jurisdiction division, this Court held that the dismissal be "without prejudice." This Court denied Galbut's motion for attorney's fees on that appeal.

Finally, a hearing was set by the lower court on March 4, 1996, on Galbut's Petition for Fees as guardian of the person and Galbut's attorney's (Morgan) Petition for Fees and Costs in representing the guardian. At that hearing an attorney's fees expert testified regarding the reasonableness and necessity of the fees and services performed by both Galbut and Morgan.

The lower court awarded fees and costs and ordered that the award be paid from the assets of the Estate. The lower court awarded Galbut and his law firm, as attorneys for the guardian, $9,000.00 for fees for services rendered from April 15, 199 1 through July 20, 1994; awarded Galbut, as guardian of the person, $4,000.00 for fees for his services rendered from July 19, 1991 through April 25, 1994; and awarded Morgan, as attorney for the guardian, $35,000.00 for fees for his services rendered from July 25, 1994 through January 22, 1996. The Estate now appeals that Order to this Court.

We affirm the order of the trial court awarding fees and costs to the firm of Galbut, Galbut, Menin and Wasserman, P.R. We also affirm the award of fees to Abraham Galbut for services rendered as Guardian. [1]

We now address the issue of attorney's fees awarded by the trial court for services rendered by the attorney for the guardian, Morgan. First, we review the fees awarded for services rendered in the two appeals litigated here. In each of those appeals counsel for the guardian filed a motion for attorney's fees. These motions were considered and denied by this court. The trial court was therefore without authority to grant them.[2] ***Louth v. Williams, 643*** So. 2d 69 (Fla. 2d DCA 1994); ***Schere v. Z.F., Inc., 578 So.*** 2d 739 (Fla. 3d DCA 1991); ***Garcia v. Garcia, 570 So.*** 2d 357 (Fla. 3d DCA 1990); ***Scutti v. Daniel E. Adache & Assoc. Architects, P.A.,*** 515 So. 2d 1023 (Fla. 4th DCA 1987); ***Gieseke v. Gieseke,*** 499 So. 2d 839 (Fla. 4th DCA 1986); ***Elswick v. Martinez***, 394 So. 2d 529 (Fla. 3d DCA 1981); ***Travelers Indem. Co. of Am.*** v. ***Morris,*** 390 So. 2d 464 (Fla. 3d DCA 1980). As concerns the rest of the attorney's fees, we are unable to determine from the final order, the basis of the attorney's fee award.[3] For these reasons, the order of the trial court granting attorney's fees in the amount of thirty-five thousand ($35,000) dollars is reversed. We remand the case with instructions to conduct a new hearing to determine what attorney's fees the guardian's attorney (Morgan) may properly be entitled to receive for services rendered at the trial level. In so doing we note that we have thoroughly reviewed this record and fmd no legal basis for an award of attorney's fees under section 57,105, Florida Statutes. Accordingly, whatever award is ultimately made by the trial court must be based on section 744,108, Florida Statutes.

Affirmed in part; reversed in part, and remanded with instructions.

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[1]We stress that nothing in this opinion is intended to affect, in any way, the pending litigation between the Estate and the Guardian in the General Jurisdiction Division of the Circuit Court.

*Counsel for the Guardian suggests that the Probate Court has the authority to grant attorney's fees of any type at the conclusion of the proceeding. We agree that the Circuit Judge presiding in the Probate Division has the authority to award attorney's fees for services rendered to the estate in the appellate court. *Bissmeyer v. Southeast Bank, N.A., 596 So.* 2d 478 (Fla. 2d DCA 1991): *In re The Estate of Daniel A Udell,* 501 So. 2d 1286 (Fla. 4th DCA 1986); *Cari v. Erickson. 394* So. 2d 1022 (Fla. 4th DCA 1981). Counsel's services in this case, however. were not rendered to the estate but to the guardian.

[3]It is unclear to us whether the award of attorney's fees to Mr. Morgan was based on section 57.105 or section 744.108, Florida Statutes. The court's order does not refer to either statute and the motion refers to both.

* * *

Criminal law-Sentencing-Guidelines-Where recommended guidelines sentence exceeded statutory maximum, trial court properly imposed guidelines sentence-"Recommended sentence" under guidelines includes 25 percent discretionary increase or decrease

JAVIER E. MARTINEZ, Appellant, v. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 96-165. L.T. Case No. 94-32063. Opinion filed Aprill 23, 1997. An appeal from the Circuit Court for Dade County, Leslie B. Rothenberg, Judge. Counsel: Linda L. Carroll and Gregory A. Wald, for appellant. Robert A. Butterworth, Attorney General, and Sylvie Perez Posner, Assistant Attorney General, for appellee.

(Before SCHWARTZ, C.J., COPE and FLETCHER, JJ.)

On Motion for Rehearing

[Original Opinion at 22 Fla. L. Weekly D305a]

(COPE, J.) By motion for rehearing defendant argues that there has been a change in terminology under the 1994 sentencing guidelines. He points out that subsection 921.001(5), Florida Statutes (1993), refers to a "recommended sentence," ***id.,*** not a recommended range. Defendant's recommended sentence was 4.6 years. Since this is less than the 5-year legal maximum for a third degree felony, defendant again presses his argument that the trial court did not have the latitude under the 1994 guidelines to exceed the legal maximum.

In our view, the defendant argues a distinction without a legal difference. Under subsection 921.0014(1), Florida Statutes (1993), "The recommended sentence length in state prison months may be increased by up to, and including, 25 percent or decreased by up to, and including, 25 percent, at the discretion of the court." The recommended sentence is, therefore, the full range from minus 25 percent to plus 25 percent. It is accurate to describe this as a recommended range, and the term "range"

continues to be used elsewhere in the guidelines statute. See *id.* § 921.001(6) (referring to "the range recommended by the guidelines").

After defining the "recommended sentence," *id.* § 921.0014(1), to include the 25 percent increase and 25 percent decrease, the statute goes on to say, "If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082, the sentence recommended under the guidelines must be imposed absent a departure." *Id.* § 921.0014(1). When increased by 25 percent, the defendant's recommended sentence was 7.7 years, which exceeds the 5-year legal maximum. The trial court was entitled to impose the sentence that it did.

Rehearing denied.

* * *

Criminal law-Post conviction relief-Record does not conclusively refute allegations as to counsel's misadvice concerning defendant's eligibility for gain time—Remand for evidentiary hearing

MARCUS J. ROTH, Appellant, vs. THE STATE OF FLORIDA, Appellee. 3rd District. Case No. 96-2860. L.T. Case No. 9441013. Opinion filed April 23, 1997. An Appeal under Fla. R. App. P. 9.140(g) from the Circuit Court for Dade County, Maxine Cohen Lando, Judge. Counsel: Marcus J. Roth, in proper person. Robert A. Butterworth, Attorney General, for appellee.

(Before JORGENSON and SHEVIN, JJ., and BARKDULL, Senior Judge.)

ON MOTION FOR REHEARING

(PER CURIAM.) We grant rehearing and substitute the following opinion for the opinion filed February 5, 1997.

We reverse the order denying defendant's Florida Rule of Criminal Procedure 3.850 motion as to grounds one and two of defendant's motion and remand for an evidentiary hearing as the record does not conclusively refute defendant's allegations as to his attorney's misadvice concerning gain-time eligibility. *State v. Leroux*, 21 Fla. L. Weekly S557 (Fla. Dec. 19. 1996); *Booth v. State, 687* So. 2d 335 (Fla. 3d DCA 1997). On remand, the court must conduct a hearing "to determine the merits of. . . defendant's claim that he relied in good faith upon the erroneous advice of his attorney m entering a plea." *Leroux*, 21 Fla. L. Weekly at S559.

We affirm the remaining portions of the order.

Affirmed in part, reversed in part, and remanded.

* * *

Torts-Workers' compensation-No error in dismissing claim against employer for wrongful termination of workers' compensation benefits on ground that dispute was within exclusive jurisdiction of judge of compensation claims where basis for claim was ongoing dispute in which employer contended that plaintiff had unreasonably refused to return to work, and plaintiff contended that employer had not offered work within plaintiff's physical limitations, making refusal to return to work justifiable-supreme court ruling that employee has statutory cause of action for wrongful discharge in retaliation for pursuit of workers' compensation benefits, and that such action is cognizable before court of competent jurisdiction does not extend to instant dispute-Employee no longer has private cause of action against employer for knowingly making false, fraudulent, or misleading statement for purpose of denying workers' compensation benefits-Plaintiff cannot avoid exclusivity of Workers' Compensation Act by claiming that employer's conduct constituted intentional infliction of emotional distress

ARMANDO MONTES DE OCA, Appellant. vs. ORKIN EXTERMINATING COMPANY, a foreign corporation, and CRAWFORD & COMPANY, a foreign corporation, Appellees. 3rd District. Case No. 95-1229. L.T. Case No. 94-23827. Opinion filed April 23, 1997. An appeal from the Circuit Court for Dade County, David L. Tobin, Judge. Counsel: Manuel A. Femandez and Richard A. Bamctt, for appellant. Daniels, Kashtan & Fomaris and John E. Oramas, for appellees.

(Before SCHWARTZ, C.J., and COPE and GODERICH, JJ.)

On Motion for Rehearing and Certification

[Original Opinionat. Fla. L. Weekly D526a]

(COPE, J.) On consideration of appellant's motion for rehearing and certification, we withdraw the court's previous opinion and substitute the following opinion:

Plaintiff-appellant Armando Montes de Oca appeals an order dismissing his complaint for want of jurisdiction. We affirm.

According to the complaint, plaintiff was injured on July 9, 1993 in the course of his employment with defendant-appellee Orkin Exterminating Company as a crew chief. In February 1994 he reached maximum medical improvement and was authorized to return to work, restricted to light duty. Orkin advised that work was available but gave plaintiff an initial work assignment which exceeded plaintiffs physical restrictions. Plaintiff was unable to perform the duties.

Thereafter Orkin again advised that a job was available within plaintiffs physical restrictions. Orkin refused to make further payments of workers' compensation benefits on the ground that plaintiff was refusing light duty work offered by Orkm. Plaintiff reported to work. Plaintiff states that he was again offered work which was outside his physical limitations. He was also promised work as a route scheduler (which was within his physical restrictions), but on reporting to work, no route scheduler assignment was available.

Plaintiff filed suit in circuit court under several theories, alleging wrongful termination of his workers' compensation benefits, and seeking relief against Orkin. The circuit court dismissed the complaint for want of jurisdiction, and plaintiff has appealed.

We agree with the trial court that this dispute is within the jurisdiction of the judge of compensation claims. Subsection 440.15(6), Florida Statute (1993) provides:

> (6) EMPLOYEE REFUSES EMPLOYMENT.-If an injured employee refuses employment suitable to the capacity thereof, offered to or procured therefor, such employee shall not be entitled to any compensation at any time during the continuance of such refusal unless at any time in the opinion of the judge of compensation claims such refusal is justifiable.

The legislature has clearly stated that the judge of compensation claims is to decide whether the refusal of the employee to return to work is justifiable. Since that is the gist of the plaintiffs case, it follows that this dispute must be submitted to the judge of compensation claims within the workers' compensation system, See *Old Republic Ins.* Co. v. *Whitworth,* 442 So. 2d 1078, 1079 (Fla. 3d DCA 1983).

Plaintiff argues, however, that his claim falls within section 440,205, Florida Statutes (1993), which states: "Coercion of employees.-No employer shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensationunder the Workers' Compensation Law." Plaintiff asserts that Orkin is attempting to coerce him into settling his workers' compensation claim by not respecting his physical limitations and by claiming to have work which he can perform, when such work is not actually available. Plaintiff alleges that his claim under section 440.205 falls within the scope of *Smith v. Piezo Technology and Professional Administrators, 427 So.* 2d 182 (Fla. 1983). We disagree.

In Smith, the Florida Supreme Court held that "section 440.205, Florida Statutes (1979). creates a statutory cause of action for a wrongful discharge in retaliation for an employee's pursuit of a workers' compensation claim and such action is not cognizable before a deputy commissioner but rather is cognizable in a court of competent jurisdiction." *Id.* at 183-84 (footnote omitted). In *Smith,* the employee had actually been discharged for filing a workers' compensation claim. *Id.* at 183. The Florida Supreme Court held that section 440.205 creates a cause of action for retaliatory discharge. *Id.* at 183, 185.

In the present case, by contrast, plaintiff alleges an ongoing dispute with the employer wherein the employer contends that the plaintiff has unreasonably refused to return to work. The plaintiff claims that the employer has not offered work within the plaintiff s physical limitations, and that the plaintiffs refusal to return