IN THE SUPREME COURT OF FLORIDA

WADE E. CARTER,

Petitioner,

v.

CASE NO. 92,501
5TH DCA CASE NO. 97-2245

STATE OF FLORIDA

Respondent.
_____/

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

RESPONDENT'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERTA J. TYLKE
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0986909
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND FACTS

Petitioner was tried and convicted in 1986 of second degree murder with-a deadly weapon, attempted second degree murder with a deadly weapon and battery. Carter v. State, 704 So. 2d 1068, 1069 (Fla. 5th DCA 1997). (Appendix A) The trial court entered a written order of upward departure, and sentenced Petitioner as a habitual offender to forty years on count I, thirty years on count II, and one year on count II. Id. The judgment and sentences were affirmed on direct appeal, as were the denials of a Rule 3.800(a) and a Rule 3.850 motion. Id.

Petitioner then filed a second Rule 3.800(a) motion, claiming that because of his use of a deadly weapon, his second degree murder conviction was a life felony for which he could not receive a habitual offender sentence. The trial court denied the Petitioner's motion, and the Fifth District Court of Appeal affirmed the denial in Carter v. State, 704 So. 2d 1068, 1069 (Fla. 5th DCA 1997). In affirming the trial court, the District Court held that Petitioner's sentence was not illegal under this Court's decisions in King v. State, 681 So. 2d 1136 (Fla. 1996) and Davis v. State, 661 So. 2d 1193 (Fla. 1995), which hold that a sentence is not illegal unless it exceeds the statutory maximum for the particular offense at issue.

Petitioner now seeks discretionary review of this honorable Court, claiming that the opinion of the District Court conflicts with Nathan v. State, 689 So. 2d 1150 (Fla. 2d DCA 1997). (Appendix B).

SUMMARY OF ARGUMENT

The District Court's opinion in the instant case is not in conflict with Nathan v. State, 689 So. 2d 1150 (Fla. 2d DCA 1997). In the instant case the District Court held that Petitioner's sentence was not illegal under this Court's decisions in King v. State, 681 So. 2d 1136 (Fla. 1996) and Davis v. State, 661 So. 2d 1193 (Fla. 1995), which hold that a sentence is not illegal unless it exceeds the statutory maximum for the particular offense at issue. In Nathan the Second District Court of Appeal never addressed the effect of this Court's decisions in King and Davis. Accordingly, the opinion of the District Court in the instant case is not in express and direct conflict with the opinion of the Second District Court of Appeal in Nathan, and this Court should decline to accept jurisdiction of this case.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN THE CASE SUB JUDICE IS NOT IN EXPRESS AND DIRECT CONFLICT WITH A DECISION OF THE SUPREME COURT OR ANY OTHER DISTRICT COURT

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution where a decision of a district court "expressly and directly conflicts" with a decision of this Court or another district court. This Court has repeatedly held that such conflict may not be implied but must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Because the District Court's opinion in the instant case is not in express and direct conflict with a decision of this Court or another district court, this Court should decline jurisdiction in the instant case.

In the instant case, the Fifth District Court of Appeal held that Petitioner's sentence, although an improper habitual sentence[1], was not an illegal sentence which could be raised on a Rule 3.800(a) motion because it did not exceed the maximum allowed

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[1] This court held in Lamont v. State, 610 So. 2d 435 (Fla. 1992) that reclassification of a conviction to a life felony made a defendant ineligible for sentencing as a habitual offender. The Legislature subsequently overruled Lamont by providing that life felonies are subject to habitual offender sentencing. § 775.084(4)(a)(1) (Fla. Stat.) (1995).

by law for a life felony[2]. Carter v. State, 704 So. 2d 1068 (Fla. 5th DCA 1997). In reaching this ruling the District Court relied on this Court's opinions in King v. State, 681 So. 2d 1136 (Fla. 1996) and Davis v. State, 661 So. 2d 1193 (Fla. 1995), which hold that a sentence is not illegal unless it "exceeds the statutory maximum for the particular offense at issue." King, at 1140. The District court then held that Petitioner had the opportunity to raise his claim for relief for three years prior to this court's ruling in Davis, and thus the Petitioner was not entitled to relief.

Petitioner asserts that the District Court's decision is in conflict with Nathan v. State, 689 So. 2d 1150 (Fla. 2d DCA 1997), where a defendant who had been improperly sentenced as a habitual offender on a life sentence claimed his sentence was illegal under Rule 3.800(a)[3]. However, in Nathan the State conceded error and agreed that the defendant was entitled to relief, without raising the issue of whether the defendant's claim could be raised in a 3.800(a) motion under King and Davis. While the Nathan opinion appears to hold, in dicta, that the defendant's sentence was illegal as that term is defined in a Second DCA opinion which

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[2] The District Court also noted that Petitioner was not entitled to a guidelines sentence because the trial court's reasons for departure had already been considered and affirmed on direct appeal. Carter, at 1070.

[3] The order of this honorable Court dated June 24, 1998 also directed Respondent to address whether there is express and direct conflict between Carter v. State, 704 So. 2d 1068 (Fla. 5th DCA 1997) and Nathan v. State, 689 So. 2d 1150 (Fla. 2d DCA 1997).

predates King and Davis, the Nathan opinion never addressed the issue of the effect of Davis and King because the State conceded error. Nathan, at 1151. Accordingly, Nathan is not in express and direct conflict with the opinion of the Fifth District Court of Appeal in Carter, and this Court should decline to accept jurisdiction of this case.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable Court decline to accept jurisdiction of this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERTA J. TYLKE
ASSISTANT ATTORNEY GENERAL
Fla. Bar #986909
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished by delivery via U.S. Mail to Wade E. Carter, DC# 068325, Tomoka Correctional Institution, 3950 Tiger Bay Road, **AS-21T,** Daytona Beach, FL 32124 this 29th day of June, 1998.

Roberta J. Tylke
Counsel for Respondent

and that payment would have explained why he was in possession of so much cash upon his arrest for robbery two days later. U.S.C.A. Con&Amend. 6; West's F.S.A. RCrP Rule 3.850.

Danny Eugene Harris, pro se, Appellant.

No brief filed for Appellee.

MICKLE, Judge.

Appellant challenges the trial court's summary denial of his motion for post-conviction relief, filed pursuant to Florida Rule of Criminal Procedure 3.850. We affirm the order in all but one respect. Appellant claims he received ineffective assistance of counsel by virtue of his attorney's failure to investigate and interview as a witness his employer, Fred Daniels. Appellant, who was convicted of robbery, claims that he informed trial counsel that Daniels had paid him $1,000, on July 15, 1992, for services rendered, and that this would have explained why he was in possession of so much cash upon his arrest on the date of the robbery, July 17, 1992. We conclude that such allegations are sufficient to require the trial court either to attach to its order portions of the record conclusively showing that appellant is entitled to no relief, or to hold an evidentiary hearing. Accordingly, we reverse and remand solely as to this claim for relief. As to all of the other issues raised, the order is affirmed.

AFFIRMED IN PART; REVERSED IN PART, and REMANDED with directions.

WEBSTER and LAWRENCE, JJ., concur.

Appendix A

1

Gene Allen SALSER, Appellant,

v.

STATE of Florida, Appellee.

No. 97-3156.

District Court of Appeal of Florida, Fifth District.

Dec. 19, 1997.

Rehearing Denied Feb. 6, 1998.

3.800 Appeal from the Circuit Court for Orange County; Jay Paul Cohen, Judge.

Gene Allen Salser, Malone, pro se.

No Appearance for Appellee.

HARRIS, Judge.

See Bond v. State, 675 So.2d 184 (Fla. 5th DCA 1996).

AFFIRMED.

GRIFFIN, C.J., and W. SHARP, J., concur.

2

Wade CARTER, Appellant,

v.

STATE of Florida, Appellee.

No. 97-2235.

District Court of Appeal of Florida, Fifth District.

Dec. 19, 1997.

Rehearing Denied Feb. 6, 1998.

Defendant, whose convictions for second-degree murder with deadly weapon, attempted second-degree murder with deadly weapon and battery were affirmed on appeal, 510 So.2d 930, filed motion for correction of illegal sentence. The Circuit Court, Orange

County, Jay Paul Cohen, J., summarily denied motion, and defendant sought review. The District Court of Appeal, Griffin, C.J., held that improper habitualization on second-degree **murder** with **weapon** conviction was not remediable on motion for correction of illegal sentence.

Affirmed.

1. Criminal Law ⇐998(21)

District Court of Appeal would consider whether petitioner was entitled to relief on postconviction motion for correction of illegal sentence, even though petitioner challenged habitual offender sentence on prior postconviction motions, where he had not done so on grounds raised in current motion. West's F.S.A. RCrP Rule 3.800(a).

2. Criminal Law ⇐998(11)

Improper habitualization on second-degree murder with weapon conviction was not remediable on motion for correction of illegal sentence, where 40-year sentence imposed for 'such conviction, a life felony, was within statutory maximum for offense. West's F.S.A. §§ 775.082(3)(a)2, 775.087, 782.04(2, 3); West's F.S.A. RCrP Rule 3.800(a).

3. Criminal Law ⇐1202.2

Reclassification of conviction to life felony makes defendant ineligible for sentencing as habitual **felony** offender.

Wade Carter, Daytona Beach, pro se.

Robert A. Butterworth, Attorney General, Tallahassee, and Roberta J. Tylke, Assistant Attorney General, Daytona Beach, for Appellee.

GRIFFIN, Chief Judge.

Appellant seeks review of the summary denial of his Rule 3.800(a) motion. In 1986, Appellant was tried and convicted of second degree murder with a deadly weapon, attempted second degree murder with a deadly weapon and battery. A written order of upward departure was entered, and he was sentenced as a habitual felony offender to forty years for count I, thirty years for count II and one year as to count III, all to be served concurrently. Defendant appealed the judgment and sentences, and this court affirmed. See *Carter* v. *State,* 510 So.2d 930 (Fla. 5th DCA), rev. *denied,* 519 So.2d 986 (Fla.1987). A Rule 3.800(a) motion was filed and denied and this court per curium affirmed the denial. See Curter v. *State,* 651 So.2d 475 (Fla. 5th DCA 1989). Defendant also filed a Rule 3.850 motion which was denied, and this court affirmed. See *Carter v. State,* 559 So.2d 1151 (Fla. 5th DCA 1990). A habeas corpus petition seeking a belated appeal was also denied. *See Carter v. State,* Case No. 90-608 (Fla. 5th DCA June 4, 1990).

In the present Rule 3.800(a) motion, defendant claims that because of the use of a deadly weapon, the second degree murder conviction constitutes a life felony which cannot be habitualized. Defendant requests that he be given a guidelines sentence.

The lower court denied defendant's **motion** without a hearing. The court attached a copy of this court's opinion in the direct appeal affirming defendant's sentence and noted that defendant had filed numerous motions for collateral relief, at least three of which claimed that the trial court erred in sentencing defendant as a habitual felany offender. The court concluded that defendant's claim that his habitual felony offender sentence is illegal had previously been heard and denied. In addition, the court found that defendant did not demonstrate that his sentence was illegal because it did not exceed the statutory maximum, citing to section 775.084(4), Florida Statutes (1985).

[1] **Upon our review** of **the prior proceedings**, it appears that, although defendant has challenged his habitual offender sentence in prior postconviction motions, he has not done so on the grounds raised in his current motion. This court has held that new grounds may be raised in successive Rule 3.800(a) motions so long as they qualify under the rule. *Raley v. State, 676* So.2d 170 (Fla. 5th DCA 1996). We, thus, consider whether he is entitled to relief under Rule 3.800(a).

[2] Second degree murder is, and was at the relevant time, a felony of the first degree punishable by imprisonment for a term of

years not exceeding life. § 782.04(2), (3), Fla. Stat, (1985). A first degree felony is reclassified to a life felony when a weapon is carried, displayed or used by the perpetrator. § 775.087(1)(a), Fla. Stat. (1985). The judgment in this case indicates that defendant was convicted of a first degree felony, yet the judgment also lists the crime as second degree murder with a weapon and identifies the offense statute as section 775.087. Therefore, it appears that defendant was convicted of second degree murder with a weapon, a life felony. The state concedes that this is the case.

[3] This court recently affirmed that reclassification of a conviction to a life felony makes a defendant ineligible for sentencing as an habitual felony offender. See *Moye v.* State, 633 So.2d 624 (Fla. 6th DCA 1996). *See also Mason v. State, 665* So.2d 328 (Fla. 5th DCA 1995); *Johnson v. State, 664* So.2d **36** (Fla. 5th DCA 1995). In *Lamont v. State,* 610 So.2d 435 (Fla.1992), the supreme court agreed with the majority of the district courts who had so held. The state again concedes this point, but nonetheless argues that defendant is not entitled to relief.

First, the state points out that the departure from the guidelines has been considered and affirmed on appeal and is not subject to attack. Carter plainly is not entitled to a guidelines sentence. The only remaining issue is whether, on this one count only, he was not subject to habitualization. The Supreme Court of Florida has held that an illegal sentence which can be corrected by Rule 3.800(a) is a sentence which exceeds the maximum allowed by law. See King *v.* State, 681 So.2d 1136 (Fla.1996); *Davis v. State,* 661 So.2d 1193 (Fla.1995); *State v. Callaway,* 658 So.2d 983 (Fla.1995). Appellant's forty year sentence is legal because it does not exceed the statutory maximum term for a life felony. Section 775.082(3)(a)2, Fla. Stat. As defendant was sentenced to forty years, albeit as an habitual felony offender, it appears that under the supreme court's definition of an illegal sentence, the state is correct.

Defendant had ample opportunity to raise the habitualization issue but failed to do so before the supreme court's decisions explaining the scope of review under Rule 3.800(a). The earliest case holding that a sentence for a life felony could not be habitualized appears to be *Hall v.* State, 510 So.2d 979 (Fla. 1st DCA 1987), *rev. denied,* 619 So.2d 987 (Fla.1933). This court agreed in *Tucker v. State,* 576 So.2d 931 (Fla. 5th DCA 1991), approved, 595 So.2d 956 (Fla.1992). Davis and *Callaway* were not decided until 1995, so defendant had a minimum of three years in which he could arguably have raised this issue in a Rule 3.800(a) motion. Under the present case law, however, improper habitualization is not remediable under Rule 3.800(a) as long as the sentence imposed is within the statutory maximum for the offense.

AFFIRMED.

HARRIS and ANTOON, JJ., concur.

Victoria PATTERSON and Lawrence Patterson, Appellants/ Cross-Appellees,

v.

H. Brantley McNEEL, individually, and as Trustee of the assets of Downtown Medical and Diagnostic Center, P.A., a dissolved Florida corporation, d/b/a Downtown Medical & Diagnostic Center; David Allen Weiland, Jr., individually; and Downtown Medical and Diagnostic Center, P.A., a dissolved Florida corporation, d/b/a Downtown Medical & Diagnostic Center, Insurance Company, Appellees/ Cross-Appellants,

No, 97-00466.

District Court of Appeal of Florida, Second District.

Dec. 19, 1997.

Medical center's billing and collection supervisor and her husband sued medical

Armstrong & Mejer and Timothy Armstrong, Coral Gables, for appellees.

Before NESBITT, GODERICH and SORONDO, JJ.

PER CURIAM.

Affirmed. *Hyatt Corp. v. Howarth*, 678 So.2d 823, 824 n. 1 (Fla. 3d DCA 1996)("We may not, under the abuse of discretion standard, simply supplant [the trial court's decision to either grant or deny a motion to dismiss on forum non conveniens grounds] with this court's preference on a de novo review of the same venue factors.").

George GLISSON, Appellant,

v.

STATE of Florida, Appellee.

No. 96–1957.

District Court of Appeal of Florida.
Fifth District.

Feb. 28, 1997.

Appeal from the Circuit Court for St. Johns County; Robert K. Mathis, Judge.

James B. Gibson, Public Defender, and Stephanie H. Park, Assistant Public Defender, Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Lori E. Nelson, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

We affirm the judgments and sentences, but strike the imposition of the public defender's lien. *See Stover v. State*, 685 So.2d 1026 (Fla. 5th DCA 1997).

AFFIRMED, lien STRICKEN.

COBB, W. SHARP and ANTOON, JJ., concur.

2

Antonio NATHAN, Appellant,

v.

STATE of Florida, Appellee,

No. 96-05180.

District Court of Appeal of Florida,
Second District.

Feb. 28, 1997.

Petitioner filed motion to correct illegal sentence. The Circuit Court, Hillshorough County, Diana M. Allen, J., denied motion. Petitioner appealed. The District Court of Appeal, Parker, Acting C.J., held that: (1) motion was not time barred despite petitioner's failure to raise matter on direct appeal or on motion for postconviction relief, and (2) petitioner was not subject to sentencing under former version of habitual violent felony offender statute.

Reversed and remanded.

1. Criminal Law ⇨996(2, 3)

Petitioner's motion to correct allegedly illegal sentence was not time barred or successive despite petitioner's failure to raise matter on direct appeal or on motion for postconviction relief; motion to correct illegal sentence could be raised at any time. West's F.S.A. RCrP Rule 3.800(a).

2. Criminal Law ⇨1203.22(4)

Habitual offender sentence is illegal for purposes of motion to correct illegal sentence if terms or conditions of sentence exceed those authorized by habitual offender statute. West's F.S.A. RCrP Rule 3.800(a).

3. Criminal Law ⇨1202.2

Defendant's conviction of burglary of dwelling with assault or battery while armed with firearm was a life felony, and thus defendant could not be sentenced under former version of habitual violent felony offender

statute. West's F.S.A. §§ 775.087(1)(a), 810.02(2)(a); F.S.1993, § 775.084(4)(a)1.

PARKER, Acting Chief Judge.

Antonio Nathan appeals the trial court's order denying his motion to correct illegal sentence filed pursuant to Florida Rule of Criminal Procedure 3.800(a). Nathan alleged in his motion that his sentence of forty years as a habitual felony offender for burglary of a dwelling with assault *or* battery with a firearm is illegal. The state concedes that Nathan is entitled to relief. We reverse.

In 1991 a jury convicted Nathan of burglary of dwelling with assault or battery with a deadly weapon, a firearm, and two other felonies.[1] In his rule 3.800 motion, Nathan attacks only the habitual offender sentence for the burglary charge. Nathan correctly points out that the punishment for that felony is provided by section 810.02(2)(a) and (b), Florida Statutes (1991),[2] and is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment. Nathan argues that because the jury convicted him of burglary of a dwelling with assault or battery while armed with a firearm, his sentence should have been enhanced to a life felony under section 775.087(1)(a), Florida Statutes (1991),[3] and, as a life felony, the trial court could not sentence him under the habitual offender statute.

[1,2] The trial court denied Nathan's motion finding that (1) the offense was, in fact, scored as a first-degree felony punishable by life and (2) if it were improper and should have been scored as a life felony, the matter should have been raised on direct appeal or raised pursuant to Florida Rule of Criminal Procedure 3.850 which is now time barred and successive. That finding was error. A motion to correct an illegal sentence can be raised at any time. Fla. R.Crim. P. 3.800(a). Furthermore, a habitual offender sentence is illegal for purposes of a motion to correct an illegal sentence if the terms or conditions of the sentence exceed those authorized by the habitual offender statute. *Judge v. State,* 596 So.2d 73 (Fla. 2d DCA 1991), review *denied,* 613 So.2d 5 (Fla.1992).

[3] In Grant v. State, 677 So.2d 45 (Fla. 3d DCA 1996), the defendant was charged with and convicted of a 1993 burglary with an assault or battery while using a weapon. The judgment listed the crime as a first-degree felony, and the trial court found the defendant to be a habitual violent felony offender. In reversing the sentence, the Third District Court stated:

> Defendant correctly argues that the judgment is in error in classifying the crime as a first degree felony. Here the state elected to charge defendant with burglary with an assault or battery. See § 810.02(2)(a), Fla. Stat. (1993). That offense is a first degree felony punishable by life imprisonment. Id. The effect of the weapon enhancement statute, § 775.087(1), Fla. Stat., is to enhance the offense from a

1. The other two felonies were aggravated assault with a deadly weapon, a firearm, and grand theft motor vchiclc. Al sentencing, Nathan also was sentenced on one other felony and two misdemeanors.

2. Section 8 10.02, Burglary, provides:

> (I) "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offcnsc thcroin, unless the premises are at the time open to the public or the dcfcndant is licensed or invited to enter or remain.
>
> (2) Burglary is a felony of the first dcgrcc, punishable by imprisonment for a term of years not cxcccding life imprisonment or as provided in s. 775.082, s. 775.083. *or* s. 775.084, if, in the course of committing the offense, the offcndcr:
>
> (a) Makes an assault or battery upon any person.
>
> (b) Is armed, or arms himself within such structure or conveyance, with explosives or a dangerous weapon.

3. Section 775.087, Possession or use of weapon: aggravated battery; felony reclassification; minimum scntcnce, provides, in relevant part:

> (1) Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the USC of a weapon or firearm is an essential element, and during the commission of such felony the dcfcndant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the dcfcndant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:
>
> (a) In the case of a felony of the first degree, to a life felony.

first degree felony to a life felony. Id § 775.087(1)(a). Consequently, the judgment should have reflected that the burglary offense in this case is a life felony. *See id; Lamont v. State,* 610 So.2d 435, 438-39 (Fla.1992); *Lareau v. State, 573* So.2d 813, 814-15 (Fla.1991); *Lafleur v. State,* 661 So.2d 346, 349 (Fla. 3d DCA 1995).

It follows . that defendant's adjudication as a habitual violent felony offender on this count must be reversed . . . Under the version of the habitual offender statute in existence at that time, the statute did not provide an enhanced habitual offender penalty for a defendant who committed a life felony. *Lamont v. State,* 610 So.2d at 438; *Lafleur v. State,* 661 So.2d at 349.

Grant, 677 So.2d at 46 (footnote omitted).

The state concedes that Nathan is entitled to relief based upon the reasoning set forth in *Lamont* [4] and *Lareau.* Accordingly, we reverse the order denying Nathan's rule 3.800 motion and remand for resentencing on the crime of burglary of a dwelling with assault or battery with a deadly weapon.[5]

PATTERSON and WHATLEY, JJ., concur.

4. Effective October 1, 1995, the legislature has overruled *Lamont* by providing that life felonies are subject to habitual offender sentencing. 1995 Fla. Sess. Law. Serv. ch 95-182, § 2 (West) (amending § 775.084(4)(a)1). *Lafleur, 661* So.2d at 349, n. 1.

5. In its concession of error, the state has suggested that the trial court follow certain procedural requirements in resentencing Nathan "to avoid further sentencing errors on remand." This court includes those suggestions in this opinion in order that the trial court may review the state's position concerning preparation of a sentencing guidelines scoreshect and resentencing options. Those suggestions ***are*** as follows:

(1) On remand the trial court must prepare a sentencing guidelines scoresheet for the offense of "Burglary of a Dwelling with Assault or Battery with a deadly weapon; to wit, a firearm," which should be scored as a life felony. Furthermore, the offenses for which the Appellant was properly habitualized (Aggravatcd Assault. Grand Theft Auto, and Sale of a Counterfeit controlled substance), listed as "Additional offenses" on the original scorcsheet must not bc scored on the revised scorcsheet. ***Ricardo v. State. 608*** So.2d 93 (Fla. 2d DCA 1992).

(2) The trial court should be permitted to consider departing from the guidelines as to that offense so long as legal wriaen reasons are then assigned. *Madraso* ***v. State. 634*** So.2d ***749*** (Fla. 3d DCA ***1994)*** [*review* ***denied, 645*** So.2d 453 (Fla.1994)].

(3) The new sentence imposed under the guidelines for the burglary offense may run consecutive to the habitualized offenses so long as the total sentence (guidelines and habitualized sentences) does not exceed the original sentence of forty years contemplated by the trial court and appellant is given credit for the prison time already served on the burglary charge. ***See Gipson v. State,*** 616 So.2d 992 (Fla.1993) and ***Blackshear v. State, 531*** So.2d **956** (Fla.1988).

Debra L. PORTER, individually. and as guardian of Nnnsi M. Kelly, and Jnhn D. Porter as husband of Debra L. Porter; Tami L. Kichtcr; Mary J. Starkic; Karen A. Brown as guardian of Jennifer Baisden; Kathryn M. Bishop: and Stephanie Jo Wheeler, Appellants,

v.

The STATE of Florida, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, Appellee.

Debra L. PORTER, individually, and as guardian of Nansi M. Kelly, and John D. Porter as husband of Debra L. Porter; Tami L. Richter; Mary J. Starkie; Karen A. Brown as guardian of Jennifer Baisden; Kathryn M. Bishop; and Stephanie Jo Wheeler, Appellants,

v.

The TOWN OF CROSS CITY, Appellee.

Nos. 95–4664, 96–1132.

District Court of Appeal of Florida, First District,

March 5, 1997.

Motorists who were injured in collision with suspects during high speed police chase