IN THE SUPREME COURT OF FLORIDA

LOREN DANIELS,

Petitioner,

v.

FSC Case No. 92,899
2d DCA Case No. 96-03015

STATE OF FLORIDA,

Respondent.
_____/

DISCRETIONARY REVIEW OF A DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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SUMMARY OF THE ARGUMENT

The Second District Court of Appeal affirmed the assessment of eighteen points for possession of a firearm to the Petitioner's scoresheet. However, in light of this Court's recent opinion in Coleman v. State, No. 92, 134 (Fla. June 12, 1998), whereby this Court held that the assessment of additional sentencing points for possession of a firearm was error, the Respondent will offer no argument on the merits unless otherwise requested to do so by this Court.

ARGUMENT

ISSUE

WHETHER THE TRIAL COURT ERRED BY ASSESSING EIGHTEEN POINTS FOR POSSESSION OF A FIREARM WHERE PETITIONER WAS CONVICTED OF CARRYING A CONCEALED FIREARM.

In its opinion, the Second District Court of Appeal affirmed the trial court's assessment of eighteen points for possession of a firearm to the Petitioner's guideline scoresheet, but certified conflict with Galloway v. State, 680 So. 2d 616 (Fla. 4th DCA 1996). The Petitioner asserts that the addition of the eighteen points violates the Double Jeopardy Clause, in that a firearm is an essential element of the crime for which he was convicted, carrying a concealed firearm. In the alternative, the Petitioner argues that this Court should apply the reasoning of the Fourth District Court of Appeal because here, as in Galloway, no additional substantive crime was committed.

In light of this Court's recent opinion in Coleman v. State, No. 92, 134 (Fla. June 12, 1998), the Respondent will offer no argument on the merits unless otherwise requested to do so by this Court. In Coleman, this Court held that "it is error for the trial court to assess additional sentencing points for possession of a firearm where the sole underlying crime is carrying a concealed weapon or possession of a firearm by a convicted felon." (Emphasis in original). See also White v. State, No. 89,998 (Fla. June 12, 1998)("where the possession of a firearm itself is already

specifically targeted by the legislature for punishment as an offense, the firearm possession incidental to that offense would not constitute a separate and additional factor to the underlying offense, so as to trigger an additional enhancement for the firearm possession.")(Emphasis in original). This opinion directly addresses the issue advanced in the instant case and is controlling.

CONCLUSION

Based upon the foregoing facts and citations of authority, the Respondent respectfully requests that this Honorable Court rule accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Cynthia J. Dodge, Assistant Public Defender, P. O. Box 9000, Drawer PD, Bartow, Florida 33831 on this 17TH day of June, 1998.

COUNSEL FOR RESPONDENT

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1. Daniels v. State, 23 Fla. L. Weekly D980d (Fla. 2d DCA April 15, 1998).

temporary relief from the support obligation. 600 So. 2d at 1276. In *Manning*, the husband was discharged and he attempted to secure other employment offering comparable pay. However, the husband was only able to obtain employment paying one-half his previous wages. The *Manning* court held that the husband's changed circumstance was not permanent because of the possibility that the husband would soon receive higher wages. *Id.* Therefore, the court held that a temporary order reducing the husband's child support payments was proper. *Id.* In the temporary order, the court held that the husband's child support obligations could be reduced "during such time as it is reasonably necessary for him to reestablish himself." *Manning*, 600 So. 2d at 1276. *See Pitts*, 626 So. 2d at 285.

In the present case, the January 9, 1995 order reduced the husband's child support obligations because he was discharged from his job. There was no suggestion that his unemployment would be permanent, and indeed, he has since obtained other employment. Therefore, the order reducing his child support payments must be considered temporary. Because the order was temporary, the husband's child support obligations should have been reduced only during such time as it was reasonably necessary for him to reestablish himself. *See Manning*; *Pitts*. Therefore, in determining arrears, the trial court should have considered the husband's child support obligations for the time period following his reemployment. We reverse and remand this case for the trial court to consider evidence of child support, medical expenses, and health insurance premiums from the date that the husband obtained employment in determining the amount of any arrearage.

We affirm the trial court's order offsetting the husband's child support obligations for day care expenses without discussion.

Affirmed in part and reversed in part. (NORTHCUTT and GREEN, JJ., Concur.)

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[1]On our own motion, we consolidate these cases for the purpose of preparing one opinion.

[2]The order is titled "Amended Temporary Order Granting Supplemental Petition for Reduction of Child Support and Alimony." It specifically states that the husband's obligations are "temporarily reduced." Further, the only difference between the amended order and the original order granting the petition is the addition of the word "temporary."

* * *

Criminal law—Juveniles—Error to dispose of all offenses in one order upon revocation of community control—Trial court to resentence with separate disposition orders for each offense

A.V.B., a child, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 97-00093. Opinion filed April 17, 1998. Appeal from the Circuit Court for Polk County; Charles A. Davis, Jr., Judge. Counsel: James Marion Moorman, Public Defender, and John C. Fisher, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Tracy L. Martinell, Assistant Attorney General, Tampa, for Appellee.

(PATTERSON, Judge.) A.V.B. challenges his disposition upon revocation of community control for one count of battery, two counts of petit theft, and one count of indecent exposure. Upon revocation of community control, the court disposed of all offenses in one order. When multiple offenses constitute the basis for a delinquency adjudication, separate disposition orders for each offense must be used. *See R.L.B. v. State*, 703 So. 2d 1245 (Fla. 5th DCA 1998); *M.L.B. v. State*, 673 So. 2d 582 (Fla. 5th DCA 1996); *T.A.R. v. State*, 640 So. 2d 222 (Fla. 5th DCA 1994). Thus, we reverse A.V.B.'s disposition order entered upon revocation of community control and remand for resentencing with separate disposition orders for each offense.

Reversed and remanded. (THREADGILL, A.C.J., and CASANUEVA, J., Concur.)

* * *

Juveniles—Sentencing—Written order to be corrected to conform to oral pronouncement that sentences are to run concurrently

A.S., a child, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 96-03763. Opinion filed April 17, 1998. Appeal from the Circuit Court for Pinellas County; Frank Quesada, Judge. Counsel: James Marion Moorman, Public Defender, Bartow and Frank D.L. Winstead, Assistant Public Defender, Clearwater, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee and Michael J. Scionti, Assistant Attorney General, Tampa, for Appellee.

(FRANK, Acting Chief Judge.) We affirm A.S.'s adjudication of delinquency. We remand this case, however, for correction of the sentence. Although the trial court orally pronounced that A.S.'s sentences for Counts I and II would be served concurrently, the written commitment order provides that the sentences are to run consecutively. "When there is a difference between a court's oral pronouncement and a written order, the oral pronouncement controls." *D.F. v. State*, 650 So. 2d 1097, 1098 (Fla. 2d DCA 1995). Accordingly, we remand for correction of the written order to conform to the oral pronouncement that the sentences are to run concurrently.

Remanded with instructions. (ALTENBERND and FULMER, JJ., Concur.)

* * *

Criminal law—Issue concerning plea colloquy not preserved for appellate review and should properly be raised in post conviction motion—Attorney costs, restitution, and public defender's lien which were imposed without notice or opportunity to contest amount stricken without prejudice to reimpose them on remand after adequate notice and opportunity to be heard

DANNIE STEVEN JONES, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 96-02911. Opinion filed April 15, 1998. Appeal from the Circuit Court for Hillsborough County; Bob Anderson Mitcham, Judge. Counsel: James Marion Moorman, Public Defender, and Tosha Cohen, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Ronald Napolitano, Assistant Attorney General, Tampa, for Appellee.

(QUINCE, Judge.) Dannie Steven Jones appeals his convictions for burglary and grand theft of an automobile. He challenges the sufficiency of his plea colloquy, the propriety of his sentence, the imposition of restitution, and the imposition of various costs and fees. We strike these monetary items and remand for a hearing because they were improperly imposed. We do not address the issue concerning the plea colloquy since that issue has not been preserved for appellate review and should properly be raised in a postconviction motion. *See White v. State*, 682 So. 2d 671 (Fla. 4th DCA 1996).

At the conclusion of the sentencing hearing, the trial court imposed $500.00 in restitution, $500.00 as a public defender lien, and $100.00 as attorney costs. All of these sums were imposed without notice or an opportunity to contest the amount. Therefore, we strike the restitution, the lien and the costs without prejudice to reimpose them on remand after adequate notice and an opportunity to be heard. *See Washington v. State*, 685 So. 2d 858 (Fla. 2d DCA 1996); *Gant v. State*, 682 So. 2d 1137 (Fla. 2d DCA 1996). (FRANK, A.C.J., and DOYEL, ROBERT L., ASSOCIATE JUDGE, Concur.)

* * *

Criminal law—Carrying concealed firearm—Sentencing—No error in adding points to guidelines scoresheet for use of firearm where sole conviction was firearm offense—Conflict certified—Error to impose public defender's lien without advising defendant of right to contest amount of lien—Defendant has 30 days to file objection and if filed, lien must be stricken and a new lien may be imposed after notice and hearing

LOREN DANIELS, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 96-03015. Opinion filed April 15, 1998. Appeal from the Circuit Court for Polk County; Randolph Bentley, Judge. Counsel: James Marion Moorman, Public Defender, and Cynthia J. Dodge, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Michael J. Scionti, Assistant Attorney General, Tampa, for Appellee.

(PER CURIAM.) Loren Daniels challenges his conviction and sentence for carrying a concealed firearm. He claims error in the trial court's denying his motion to suppress, adding eighteen points to his scoresheet for use of a firearm, and imposing a public defender lien. We affirm the conviction without discussion finding that the trial court's decision was based on a credibility

determination. We briefly address his remaining claims finding error in one of them.

Daniels contends that the addition of eighteen points on his scoresheet, pursuant to Florida Rule of Criminal Procedure 3.702(d)(12), was error because his sole conviction is a firearm offense. He relies on *Galloway v. State*, 680 So. 2d 616 (Fla. 4th DCA 1996). We have previously addressed this claim, holding that these additional points are proper in these circumstances and certifying conflict with *Galloway*. *See White v. State*, 689 So. 2d 371 (Fla. 2d DCA 1997), *review granted*, 696 So. 2d 343 (Fla. June 12, 1997); *see also State v. Davidson*, 666 So. 2d 941 (Fla. 2d DCA 1995). As in *White*, we also certify conflict in this case with *Galloway*.

Daniels' remaining claim relates to the imposition of a public defender lien. He correctly argues that he was not given notice of his right to a hearing to contest the amount of the public defender lien. *See Drinnon v. State*, 598 So. 2d 229 (Fla. 2d DCA 1992). The State concedes the error. On remand, Daniels shall have thirty days from the date of the mandate to file a written objection to the fee assessed. If an objection is filed, the assessment should be stricken, and a new assessment may be imposed in accordance with Florida Rule of Criminal Procedure 3.720(d)(1). *See Hinkle v. State*, 675 So. 2d 621 (Fla. 2d DCA 1996), *Bourque v. State*, 595 So. 2d 222 (Fla. 2d DCA 1992).

Accordingly, we affirm Daniels' conviction and sentence, but remand for him to have an opportunity to file a written objection to the public defender lien. (THREADGILL, A.C.J., and PATTERSON and CASANUEVA, JJ., Concur.)

* * *

Civil procedure—Complaint seeking declaratory relief based on "involuntary" contributions to court improvement fund improperly dismissed—While trial court's findings that plaintiffs paid costs without objection and without appealing judgments may ultimately prove true, facts supporting findings do not appear within four corners of complaint—Trial court may not transform motion to dismiss into motion for summary judgment

LEO WENDALL COWDER, III, LISA BORIC, and ROGER BREEDEN, Appellants, v. HILLSBOROUGH COUNTY, FLORIDA, Appellee. 2nd District. Case No. 97-02053. Opinion filed April 17, 1998. Appeal from the Circuit Court for Hillsborough County; James R. Case, Associate Judge. Counsel: John W. Hoft, Jr., Tampa, for Appellants. Christine M. Beck, Senior Assistant County Attorney, Tampa, for Appellee.

(PATTERSON, Judge.) The appellants, Leo Cowder, Lisa Boric, and Roger Breeden, challenge the dismissal, with prejudice, of their second-amended complaint seeking declaratory relief and class action damages. We reverse.

This dispute pertains to the Court Improvement Fund of Hillsborough County, which this court held to be unconstitutional in *Reyes v. State*, 655 So. 2d 111 (Fla. 2d DCA 1995). The appellants seek reaffirmation of this holding in their count for declaratory relief. Additionally, they each allege that they were required to contribute to this fund as a part of the disposition of their criminal charges in the Hillsborough County Courts and that such contribution was "involuntary." They seek refund of those amounts and the certification of a class action on behalf of all others who made like contributions.

The appellee, Hillsborough County, moved to dismiss the complaint. The trial court granted the motion, finding in its order "that the Plaintiffs paid the costs to the clerk of court, without objection or question in the court that addressed the cost, and did not appeal from the judgments imposed on them." Although these facts may ultimately prove to be true, they do not appear within the four corners of the complaint. The court may not transform a motion to dismiss into a motion for summary judgment. *See Thompson v. Martin*, 530 So. 2d 495 (Fla. 2d DCA 1988). That is what occurred here. The complaint facially states a cause of action.[1] *See City of Miami v. Keton*, 115 So. 2d 547 (Fla. 1959). We therefore reverse and remand for further proceedings.

Reversed and remanded. (PARKER, C.J., and FULMER, J., Concur.)

[1]In making this determination, we do not reach the question of whether this case may be properly prosecuted as a class action.

* * *

Criminal law—Jurors—Peremptory challenges—Absence of defendant—*Coney v. State* applies where trial occurred after decision became final but before effective date of rule change—Failure to obtain *Coney* waiver cannot be raised on direct appeal where there was no contemporaneous objection at trial—Probation—Special conditions which were imposed without oral pronouncement stricken

WAYNE STEINARD, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 96-03071. Opinion filed April 17, 1998. Appeal from the Circuit Court for Lee County; Jay B. Rosman, Judge. Counsel: James Marion Moorman, Public Defender, and A. Victoria Wiggins, Assistant Public Defender, Bartow, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Wendy Buffington, Assistant Attorney General, Tampa, for Appellee.

(BLUE, Judge.) Wayne Steinard challenges his conviction for aggravated assault with a deadly weapon, contending the trial court erred in allowing improper character evidence and in failing to assure his presence or his waiver of presence during the exercise of peremptory challenges. We affirm Steinard's conviction based on our determination that neither of these issues constitute error, although the peremptory challenge issue merits discussion. We agree with Steinard that two conditions should be stricken from the probation order because the conditions were not orally pronounced at sentencing.

Steinard asserts the trial court erred by failing to demonstrate on the record that he was physically present for the exercise of peremptory challenges. *See Coney v. State*, 653 So. 2d 1009, 1013 (Fla. 1995) (holding a defendant must be "physically present at the immediate site where pretrial juror challenges are exercised," unless the defendant waives this right). After the *Coney* decision, the supreme court amended Florida Rule of Criminal Procedure 3.180(b) to provide that "[a] defendant is present for purposes of this rule if the defendant is physically in attendance for the courtroom proceeding, and has a meaningful opportunity to be heard through counsel on the issues being discussed." The State concedes, and we agree, that *Coney* applies in Steinard's case because his trial occurred after *Coney* became final but before the effective date of the change to rule 3.180(b). Nevertheless, this court has consistently held that the failure to obtain a *Coney* waiver cannot be raised on direct appeal without a contemporaneous objection made at trial. *See Neal v. State*, 697 So. 2d 941 (Fla. 2d DCA), *review granted*, 701 So. 2d 868 (Fla. 1997); *Lee v. State*, 695 So. 2d 1314 (Fla. 2d DCA), *review granted*, 700 So. 2d 686 (Fla. 1997). Because the record reveals no contemporaneous objection by Steinard on this issue, we affirm.

Steinard also asserts the trial court erred by imposing two special conditions of probation without oral pronouncement. He is correct. Condition twelve, requiring Steinard to pay for drug and alcohol testing and treatment, is a special condition not orally pronounced at sentencing; therefore, it must be stricken. *See Smith v. State*, 702 So. 2d 1305 (Fla. 2d DCA 1997). Condition thirteen, requiring Steinard to "waive extradition should a violation of supervision occur," is also a special condition not orally pronounced at sentencing that must be stricken. *See Smith*, 702 So. 2d at 1306; *McDaniels v. State*, 679 So. 2d 840 (Fla. 2d DCA 1996).

Steinard's conviction is affirmed; probation conditions twelve and thirteen are stricken. (ALTENBERND, A.C.J., and GREEN, J., Concur.)

* * *

GEORGE M. JIROTKA, as Mayor of Belleair Shore, Florida, Appellant/Petitioner, v. WILLIAM KROHN, as Commissioner of Belleair Shore Florida; GERALD PRESCOTT, as Commissioner of Belleair Shore, Florida ROBERT SCHMIDT, as Commissioner of Belleair Shore, Florida; and EARL M. SLOSBERG, as Commissioner of Belleair Shore, Florida, Appellees/Respondents. 2nd District. Case Nos. 97-04933, 97-05095 (Consolidated). Opinion filed April 17, 1998. Appeal from nonfinal order of the Circuit Court for Pinellas County; Richard A. Luce, Judge for case number 97-05095. Petitio