IN THE SUPREME COURT OF FLORIDA

STEVEN J. KLARICH, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

FSC CASE NO. 95 705

FIFTH DCA CASE NO. 98-172

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

SUSAN A. FAGAN
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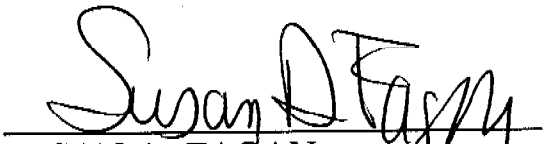
COUNSEL FOR PETITIONER

TABLE OF CONTENTS

CERTIFICATE OF FONT

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced CG Times.



SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

STEVEN J. KLARICH, JR., Petitioner,	)	
vs.	)	FSC CASE NO.
STATE OF FLORIDA, Respondent.	)	FIFTH DCA CASE NO. 98-172

STATEMENT OF THE CASE AND FACTS

Petitioner's Statement of the Case and Facts are as follows:

The State Charged the Petitioner, Stephen Klarich, in an amended information, filed on November 17, 1997, with resisting an officer with violence and battery. (R 36; Vol. 1) A pretrial hearing was held prior to jury voir dire on November 17, 1997, during which defense counsel requested a continuance so that she could depose a defense witness, Tim Williams. (SR 74)[1] Petitioner proceeded to jury trial on November 20, 1997, before Acting Circuit Judge, Stasia Warren. (T 1-202; Vol. 2) At the close of the State's case-in-chief,

[1] SR = Supplemental volume.

defense counsel made a motion for judgment of acquittal. (T 95-6; Vol. 2) The trial court denied the motion as to each of the offenses. (T 96; Vol. 2)

The Petitioner received a sentence of a year of community control, followed by three years of drug offender probation for the resisting arrest with violence. (R 14-27, 58-62; Vol. 1) As for the misdemeanor battery offense, the Petitioner received a sentence of time served. (R 25; Vol. 1)

Gerald Wilson testified that the Petitioner lived two trailers down from him. (T 35-36; Vol. 2) On the night of the incident, Gerald's brother came over to Gerald's trailer and stayed to drink beer with Gerald until approximately eleven o'clock. (T 37-8; Vol. 2) Gerald further testified that, sometime later, he heard a commotion outside and went to investigate. (T 36; Vol. 2)

Gerald additionally testified that the argument involved a friend's brother, Jethro, the Petitioner, and the Petitioner's father. (T 36, 39; Vol. 2) When Gerald walked outside, the Petitioner, according to Gerald, punched him under his right eye. (T 39-42; Vol. 2) Gerald was knocked out and told the police he had been struck five or six times, based on viewing his injuries, but he had actually only been struck once. (T 42-43; Vol. 2) Finally, Gerald testified that the Petitioner and Jethro returned to his trailer and knocked on the side of the trailer saying: "That's what [you] get, come on back outside[;]

I'll give you more." (T 48; Vol. 2)

Deputy Tara Savercoal testified that she first contacted Gerald subsequent to the incident and found him bleeding in the area of his right eye, along with having cuts and a swollen face on one side. (T 54; Vol. 2) After an initial search for the Petitioner was unsuccessful, a second search, according to Deputy Savercoal, was successful in locating the Petitioner who was pursued by Deputy Saverpool. (T 56-63; Vol. 2) As the Petitioner briefly stopped, Deputy Savercoal testified that she grabbed the Petitioner and held him in a headlock in an attempt to pull the Petitioner down. (T 63; Vol. 2) According to Deputy Savercool, this is when the Petitioner stood straight up and started to come off the ground causing her to feel pressure in the area of her waist. (T 64; Vol. 2) In addition, Deputy Savercool stated that as she continued to yell at the Petitioner to get down on the ground, the Petitioner did not comply as Deputy Dana White assisted her by striking the Petitioner with a flashlight in the area of the Petitioner's shoulder blade. (T 65-7; Vol. 2)

A second strike by Deputy White to the Petitioner's lower back area was also witnessed by Deputy Savercool. (T 67; Vol. 2) The Petitioner, however, according to Deputy Savercool, then went down on his knees, falling forward on his hands in a push up position, but ultimately fell down with his chest on the

ground and continued to struggle with both deputies. (T 67-8; Vol. 2) Finally, Deputy Savercool testified that Deputy Edward Turk also assisted in attempting to handcuff the Petitioner after wrestling the Petitioner's arms behind his back. (T 68; Vol. 2)

Sergeant Dana White testified that when he arrived at the trailer park, an individual by the name of Jeffery Uptagraft was standing in the street, yelling obscenities at Gerald's trailer, and singing a song at thc top of his lungs. (T 77-8; Vol. 2) As Mr. Uptagraft began to walk away from Sergeant White, the Petitioner, according to Sergeant White, also ran from the area and was followed by Sergeant White. (T 78-80; Vol. 2) Sergeant White further testified that he could hear Deputy Savercoal telling him where she and the Petitioner were and that, upon his arrival at that location, he saw the Petitioner trying to break away from the headlock of Deputy Savercoal. (T 81-2; Vol. 2) Sergeant White next stated that he immediately grabbed the Petitioner by the shoulder or arm raising his left hand since his right hand held a flashlight. (T 82-3; Vol. 2)

Sergeant White also testified that the Petitioner did not respond to his verbal commands to get down as he pulled back on the Petitioner in an attempt to force the Petitioner off balance. (T 82-3; Vol. 2) At this point, Sergeant White stated that he struck the Petitioner with the flashlight between the Shoulder blades

in the center of the Petitioner's back having no effect on the Petitioner. (T 83; Vol. 2) A second blow with the flashlight was then made by White to the Petitioner's right hip area upon which the Petitioner went to the ground continuing to struggle. (T 83; Vol. 2) This is when, according to White, Deputy Turk arrived and the Petitioner was handcuffed. (T 84; Vol. 2)

Tim Williams testified that he lives in the Petitioner's trailer park and was standing outside when the incident occurred. (T 97-9; Vol. 2) Tim described the events as beginning with Gerald walking over to the Petitioner's trailer, at the Petitioner's request, and a fight developed between them. (T 99; Vol. 2) According to Tim, Gerald first swung at the Petitioner and then the Petitioner hit Gerald four or five times. (T 100, 104-105; Vol. 2)

Shana Ryan testified that the Petitioner has been her boyfriend for approximately twelve years and they have three children together. (T 108; Vol. 2) As for the incident, Shana testified that she witnessed a male deputy sheriff hit the Petitioner and put his feet on the Petitioner's back. (T 109; Vol. 2) Just prior to this, the Petitioner was standing by his mother's trailer with Jeff Uptagraft Jethro. (T 109; Vol. 2) Shana did not see what happened between the Petitioner and Gerald outside during the argument, but she did see that the Petitioner never picked up or made any contact with the female deputy. (T 109-111; Vol. 2) She

further testified that Gerald had once tried to get her to go out to some woods with him. (T 113-114; Vol. 2) Finally, Shana testified that Gerald had a reputation at the trailer park for drinking and starting fights. (T 114; Vol. 2)

Cythina Bell testified that she is the Petitioner's sister-in-law and that she witnessed the Petitioner being struck with a flashlight by the deputies and that the Petitioner's head was on the ground in the dirt. (T 125-6; Vol. 2) When she walked outside to see what was going on, she was told to get back inside by the deputies or she would go to jail. (T 126-7; Vol. 2) She also testified that she never saw the Petitioner picking up the female deputy. (T 127; Vol. 2)

The Petitioner testified that the incident began when he was on his patio driveway with his father moving a bed into his house and Gerald walked by and said nothing. (T 132; Vol. 2) Sometime later, when one of the Petitioner's children was present, Gerald came back to the Petitioner's yard, swung at him and missed. (T 132; Vol. 2) The Petitioner responded by hitting Gerald two of three times causing Gerald to hit a concrete slab on his face when he fell. (T 132; Vol. 2) As for Gerald's reputation for peacefulness or violence, the Petitioner stated that Gerald "...had a bunch of violent incidents in [the trailer park]." (T 132; Vol. 2) Two particular incidents described by the Petitioner pertained to Gerald punching a former girlfriend's new boyfriend in the face and pulling the

hair of the mother of another girlfriend, followed by throwing the mother to the ground and beating her while on top of her. (T 133; Vol. 2)

The Appellant filed a timely notice of appeal on January 14, 1998. (R 68; Vol. 1) The Office of the Public Defender was appointed to represent the Appellant in this appeal on January 14, 1998. (R 69; Vol. 1) The Fifth District Court of Appeals affirmed the Petitioner's judgements and sentences in Klarich v. State, 24 Fla.L.Weekly D1020 (Fla. 5th DCA April 23, 1999). [Appendix A] Petitioner filed a notice to invoke this Court's discretionary jurisdiction on May 21, 1999.

SUMMARY OF ARGUMENT

This Honorable Court has discretionary jurisdiction pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981) to review the instant case where the Fifth District Court of Appeal cited in its opinion to a case which is currently pending review with this Court.

ARGUMENT

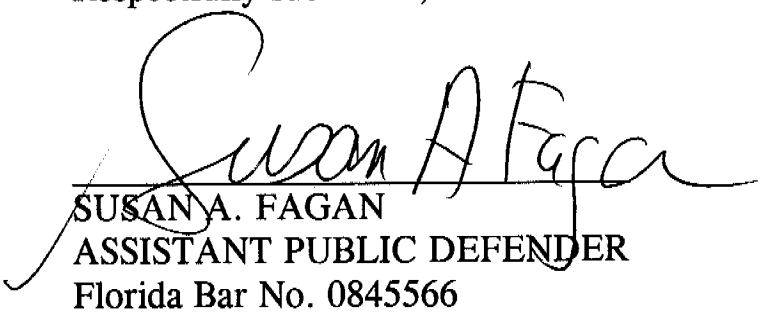
THIS COURT HAS JURISDICTION TO REVIEW THE INSTANT CASE PURSUANT TO JOLLIE V. STATE, 405 So. 2d 418 (Fla. 1981).

On appeal to the Fifth District Court of Appeal, Petitioner argued that the trial court erred by imposing certain special probation conditions which were not orally pronounced by the trial court and certain state attorney's fees and costs of investigation which were not statutorily authorized. On April 23, 1999, the Fifth District issued its opinion affirming Petitioner's sentences. See Klarich v. State, 24 Fla.L.Weekly D1020 (Fla. 5th DCA April 23, 1999) [See Appendix A] In rejecting Petitioner's argument, the District Court held that these sentencing errors were not addressable on appeal citing Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA 1998), which is currently pending for review with this Court in case number 92, 805, rev. granted, 718 So. 2d 169 (Fla. 1998). This Honorable Court has discretionary jurisdiction to accept the instant case pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981).

CONCLUSION

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

Respectfully submitted,



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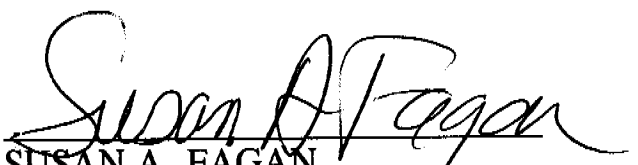
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal and mailed to: Mr. Steven J. Klarich, Jr., 602 6th Street, Holly Hill, Florida 32117, this 1st day of June 1999.



SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

STEVEN J. KLARICH, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	FSC CASE NO.
	)	
STATE OF FLORIDA,	)	FIFTH DCA CASE NO. 98-172
	)	
Respondent.	)	
	)	

JURISDICTIONAL BRIEF OF PETITIONER

APPENDIX

APPENDIX A -- Klarich v. State, 24 Fla.L.Weekly D1020 (Fla. 5th DCA April 23, 1999)

underlying *Mabie*. In *Lightsey v. Williams*, 526 So. 2d 764, 766 (Fla. 5th DCA 1988), this court explained that the rule set forth in *Mabie* is "intended to prohibit a race to judgment." Allowing the trial court's order in the instant case to stand will not further the policy considerations underlying *Mabie*.

Accordingly, we grant the petition for writ of certiorari, quash the order denying the motion to abate and remand to the trial court to grant the petitioners' motion to abate. *See Fasco Indus., Inc. v. Goble*, 678 So. 2d 916, 917 (Fla. 5th DCA 1996) ("[J]urisdiction lies in the court where service first is perfected against all defendants").

PETITION GRANTED; ORDER QUASHED; REMANDED with directions. (DAUKSCH and GOSHORN, JJ., concur.)

[1]According to the motion to abate, Andrews Automotive Corp. was served in the Duval County action at 12:50 p.m. on Friday, May 8, whereas the defendants in the Orange County action were served at 2:00 p.m. that same day.

* * *

Criminal law—Probation—Claim that special conditions of probation order are illegal and should be set aside not preserved for appeal where defendant neither objected at trial level nor filed motion to amend probation order—Errors do not appear to be fundamental

STEPHEN J. KLARICH, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 98-172. Opinion filed April 23, 1999. Appeal from the Circuit Court for Volusia County, Stasia Warren, Acting Judge. Counsel: James B. Gibson, Public Defender, and Susan A. Fagan, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Maximillian J. Changus, Assistant Attorney General, Daytona Beach, for Appellee.

ON MOTION FOR REHEARING

[Original Opinion at 24 Fla. L. Weekly D145b]

(PER CURIAM.) We grant rehearing, withdraw our original opinion and substitute the following in its place.

Appellant contends that certain special conditions of his probation order are illegal and thus should be set aside. However, appellant made no objection to these conditions at the trial level nor did he file a motion to amend the probation order. Thus, his contentions have not been preserved for appeal. *See* § 924.051(3), Fla. Stat. (1997); Fla. R. App. P. 9.140(d); *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA 1998), *rev. granted*, No. 92, 805 (Fla. July 7, 1998); *Mason v. State*, 698 So. 2d 914 (Fla. 4th DCA 1997). The errors complained of here do not appear to be fundamental in nature.

AFFIRMED. (GRIFFIN, C.J., SHARP, W. and ORFINGER, M., Senior Judge, concur.)

* * *

Criminal law—Juveniles—Battery—Aggravated battery—Error to enter single disposition order for two charges—Error to commit juvenile for indeterminate term on battery offense because commitment exceeded the one-year maximum sentence which adult could have received for same offense—Error not rendered moot by fact that juvenile was sentenced to concurrent commitment for two delinquent acts and remained lawfully in custody for third degree felony although he had served maximum time that could be imposed for battery misdemeanor—Commitment order providing for indeterminate period of commitment constitutes illegal disposition that requires reversal—No error in failing to state specific length of post-commitment aftercare where order committed juvenile to Department of Juvenile Justice until 19th birthday or until earlier released by court order—Trial court was not required to specify length of time in each component of commitment and, in fact, would have been unable to do so because length of juvenile's stay as resident was dependent upon the amount of time it took him to benefit from mental health counseling

D.P., A CHILD, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 97-3320. Opinion filed April 23, 1999. Appeal from the Circuit Court for Volusia County, Joseph G. Will, Judge. Counsel: James B. Gibson, Public Defender, and Anne Moorman Reeves, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Roberta J. Tylke, Assistant Attorney General, Daytona Beach, for Appellee.

(THOMPSON, J.) D.P., a child, was charged in separate delinquency petitions with battery against a fellow student and sexual battery against his stepmother. The latter charge was subsequently amended to aggravated battery. D.P. pled nolo contendere on separate dates to both charges. The court adjudicated D.P. delinquent on both charges and concurrently committed him to the Department of Juvenile Justice ("the Department"). The trial court entered one disposition order which committed D.P. to a residential high-risk facility for sex-offender treatment for a period not to extend beyond his 19th birthday, followed by community control and aftercare according to a plan to be developed by the Department and approved by the trial court before he was released from the residential program. The length of the aftercare program is not written on the commitment order, but the order noted that the maximum adult sentence for the aggravated battery charge would expire in October 2002. D.P. was 16 when he was committed to the Department.

D.P. raises three issues on appeal. First, he contends that the use of one disposition order for the misdemeanor and the felony charge was error. Second, he argues that the commitment for battery, a misdemeanor of the first degree, is erroneous because it exceeds the maximum penalty for an adult charged with the same crime. Finally, he contends that the disposition order is defective because it does not state the length of the post-commitment community control or other aftercare.

In *R.L.B. v. State*, 703 So. 2d 1245 (Fla. 5th DCA 1998), this court held that a separate disposition order must be used for each delinquent act adjudicated. *See also J.K.H. v. State*, 694 So. 2d 130 (Fla. 5th DCA 1997); *G.R.A. v. State*, 688 So. 2d 1027 (Fla. 5th DCA 1997); and, *M.L.B. v. State*, 673 So. 2d 582 (Fla. 5th DCA 1996). Because the trial court used one order instead of two as required by statute, the case must be remanded for the entry of two disposition orders. *R.L.B.* Further, it was improper to commit D.P. for an indeterminate term on the battery offense. The commitment exceeded the statutory one year maximum sentence for adults, and a child cannot be committed longer than the maximum sentence an adult would serve for the same offense. §§ 775.082(4)(a), 985.231(1)(d), Fla. Stat. (1997).

The state argues that the error is moot because the commitment was concurrent for both delinquent acts and D.P. has served the maximum time that could be imposed for a misdemeanor of the first degree, yet he is still properly in the custody of the Department for aggravated battery, a third degree felony. We disagree. The case law is clear that disposition orders which provide for indeterminate periods of commitment "constitute illegal dispositions that require reversal." *T.C. v. State*, 23 Fla. L. Weekly D2343 (Fla. 1st DCA 1998); *T.D.J. v. State*, 725 So. 2d 466 (Fla. 1st DCA 1999); *C.D.N v. State*, 720 So. 2d 601 (Fla. 1st DCA 1998); *T.R.G. v. State*, 697 So. 2d 940 (Fla. 2d DCA 1997). The fact that D.P. may have served the maximum time provided by statute does not make the disposition order any less illegal. We therefore vacate the dispositions and remand for entry of separate disposition orders.

The trial court did not err when it failed to specify the length of the aftercare. The purpose of specifying a term of community control or aftercare is to ensure that the delinquent child will not be in the custody of the Department beyond his 19th birthday or longer than the maximum term for which the child could have been committed. *See E.J. v. State*, 595 So. 2d 282 (Fla. 1st DCA 1992); § 985.23(1)(a)1.a. Citing *A.L.W. v. State*, 22 Fla. l. Weekly D2227 (Fla. 1st DCA September 16, 1997), D.P. argues that the disposition order is defective because it must state the length of the post-commitment community control or other aftercare. More precisely, D.P.'s argument is that the commitment order must state the exact length of commitment to the high risk program and the exact length of the post-commitment community control or aftercare. We disagree with this conclusion because *A.L.W.* is not applicable to the facts of this case. In *A.L.W.*, the trial court failed to state the duration of the commitment and the post commitment community control. *Id.* The trial court failed to state *any* length of time the child

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MARLEAH K. HILBRANT
Administrative Assistant

June 1, 1999

The Honorable Debbie Causseaux
Clerk of the Supreme Court of Florida
Supreme Court Building
Tallahassee, FL 32301

Re: STATE v. KLARICH, Case no.

Dear Mr. White:

Enclosed please find the original and five copies of the Petitioner's Jurisdictional Brief. If you have any questions, please do not hesitate to call.

Sincerely,

Susan A Fagan

Susan A. Fagan
Assistant Public Defender

SAF/mll

Enclosure