95,866

IN THE SUPREME COURT OF FLORIDA

ANTHONY H. JERRY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

95866

S. CT. CASE NO. ~~95,861~~

CASE NO. 97-2638

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT AND THE FIFTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FLORIDA

PETITIONER'S INITIAL BRIEF ON THE MERITS

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS CONTINUED

IN THE SUPREME COURT OF FLORIDA

ANTHONY H. JERRY, Petitioner, vs. STATE OF FLORIDA, Respondent.	S. CT. CASE NO. 95,861 CASE NO. 97-2638

STATEMENT OF THE CASE

Petitioner's statement of the case are as follows:

The State charged the Petitioner, Anthony Jerry, in an information filed December 31, 1996, with delivery of cocaine and possession of cocaine. (R 15) Petitioner proceeded to jury trial on May 13, 1997, before Circuit Judge Michael Cycmanick. (T 1-170) At the close of the State's case-in-chief, which was the close of all the evidence, defense counsel made a motion for judgment of acquittal. (T 120-121)

The jury returned a guilty verdict as to each of the charged offenses. (T 165-166; R 28-29) The State filed a notice of its intention to seek habitual felony offender sentencing on May 15, 1997. (R 33) Defense counsel filed a motion for a new trial on May 23, 197, which was denied by the trial court. (R 34-36) The

Petitioner received a sentence of five (5) years imprisonment as a habitual felony offender for the delivery of cocaine offense. (R 54) As for the possession of cocaine offense, the Petitioner received a sentence of five years imprisonment as a habitual felony offender. (R 55)

The Petitioner timely filed a notice of appeal on September 19, 1997. (R 61) The Office of the Public Defender was appointed to represent the Petitioner in this appeal on September 19, 1997. (R 61) The Fifth District Court of Appeal affirmed both of the Petitioner's judgments and sentences in **Jerry v. State**, 24 Fla. L Weekly D 1290 (Fla. 5th DCA May 28, 1999) [See Appendix] Petitioner filed a notice to invoke this Court's discretionary jurisdiction on June 21, 1999.

STATEMENT OF THE FACTS

Agent David Phelan testified that on December 5, 1996, he was walking undercover in the area of Forest City Road and Kennedy Boulevard. (T 73-74) He further testified that he approached the Petitioner at an Exxon station and asked the Petitioner about buying a "twenty." (R 75) According to Agent Phelan, the Petitioner responded that he had no drugs at the time, but he was headed towards Eatonville, and if Phelan wanted to follow him, he could give Phelan a twenty there. (T 75) Phelan the told the Petitioner that he would meet him in Eatonville and proceeded to the area of Catherine Street and Hungerford Road. (T 75-76) Agent Phelan further testified that, approximately five minutes later, he next observed the Petitioner waiving him down. (T 76) When Phelan turned around and pulled back up to the sidewalk, the Petitioner, according to Phelan, parked a burgundy or maroon color vehicle in the back of a house. (T 76)

Agent Phelan further testified that when he pulled up next to the Petitioner's vehicle, the Petitioner got out of his vehicle, walked over to Phelan's vehicle, asked Phelan what he wanted. (T 77) Phelan additionally testified that when he told the Petitioner that he wanted a twenty, the Petitioner stated "O.K." and walked down toward a group of five of six individuals standing in a driveway. (T 77)

After the Petitioner spoke with the individuals briefly, he returned to Phelan and handed him a piece of a substance that subsequently tested positive for crack cocaine in exchange for twenty dollars from Phelan. (T 77-78, 80) The Petitioner then walked back to his vehicle and left. (T 78)

Agent Dewana Mullins testified that he was monitoring the drug purchase. (T 100-101) According to Agent Mullins, she overheard Agent Phelan ask to purchase a twenty and a response by a second voice stating: "meet me down on Catherine. I'll be down there in just a little bit." (T 101-102) The second voice was further overheard by Mullins directing Agent Phelan to the area of Catherine Street as well as Agent Phelan giving a description of the Petitioner. (T 102-103) The next thing Agent Mullins testified he overheard was the transaction being completed once the cocaine was purchased for twenty dollars. (T 103)

Deputy Silas Appleby testified that he was provided with a clothing and vehicle description over the police radio. (T 109) When Deputy Silas arrived at Catherine Street and turned the corner, he spotted the burgundy Honda matching the description he had received earlier and the Petitioner standing next to or close to the vehicle. (T 110, 113) Once Deputy Silas spoke to the Petitioner, he permitted the Petitioner to leave after completing a field investigation card. (T 110-111)

SUMMARY OF THE ARGUMENT

POINT ONE: The Fifth District erroneously affirmed trial court's overruling defense counsel's hearsay objections when the prosecutor asked state witness, Deputy Dewana Mullins, what she overheard being said between Agent Phelan and an other individual, as well as that she overheard Agent Phelan give a description of the Petitioner over the police radio. The prosecutor incorrectly argued that this testimony was not being offered for the truth of the matter asserted, but instead, simply to establish that Agent Mullins was just listening to recognize the voice during the transaction. This error was further compounded by the prosecutor being permitted to improperly vouch for the credibility of a state witness by telling the jury during her closing argument that Deputy Silas Appleby "... was telling it just how it is" because he was a police officer. The prosecutor's improper submission of hearsay testimony and vouching for the credibility of a vital state witness, therefore, entitles Petitioner to a new trial.

POINT TWO: The Fifth District erroneously affirmed the Petitioner's sentencing as a habitual felony offender for the offense of possession of cocaine. Under Section 775.084 (1)(a)(3), Florida Statutes, the offense of possession of cocaine does not qualify for habitual felony offender sentencing when the offense is a violation of Section 893.13, Florida Statutes, for possession of cocaine. Accordingly, this Court should reverse the decision of the Fifth District and order

that the Petitioner be resentenced under the guidelines, as to the possession of cocaine offense since the sentencing error is fundamental in nature and, therefore, is correctable on direct appeal.

ARGUMENT

THE FIFTH DISTRICT COURT ERRONEOUSLY AFFIRMED THE TRIAL COURT OVERRULING DEFENSE COUNSEL'S HEARSAY AND CLOSING ARGUMENT OBJECTIONS.

On appeal, Petitioner challenged certain improper hearsay offered by the state and certain comments made by the prosecutor. Specifically during the testimony of state witness, Deputy Dewana Mullins, defense counsel's hearsay objection was overruled, by the trial court when Deputy Mullins was asked by the prosecutor what she heard Agent David Phelan say during a monitored conversation with another individual as part of an undercover sting operation. (T 101) Defense counsel again objected when the prosecutor further asked Agent Mullins what she overheard the second individual say to Agent Phelan in response. (T 102-103) The prosecutor argued that the testimony was not being offered as proof of the matter asserted, but rather, to establish that Agent Mullins was listening to the conversation to recognize the voice of the individual who was contacted by Agent Phelan. (T 101) The trial court overruled defense counsel's objection and Deputy Mullins was permitted to testify that she heard Agent Phelan request to purchase a twenty piece of cocaine. (T 101-102)

Defense counsel objected once again on the basis of hearsay when the prosecutor asked Deputy Mullins what she overheard the second individual say to

Agent Phelan. (T 102-103) The trial court overruled defense counsel's objection and Deputy Mullins was permitted to testify that the second individual directed Phelan to go to the area of Catherine Street and he would meet Phelan momentarily. (T 102-103) Deputy Mullins also testified to a description of the suspect as the Petitioner given over the radio by Agent Phelan. (T 103-106) Clearly, this improper hearsay testimony was being offered by the state into evidence as proof of the factual matters being asserted by the hearsay statements of Agent Phelan and by the second individual being monitored.

Defense counsel reasserted an additional hearsay objection when the prosecutor asked Deputy Silas Appleby if he too recalled the description of the Petitioner being given over the police radio. (T 109) The trial court denied defense counsel's hearsay objection and Deputy Appleby testified that he had been given a description of the Petitioner, including a clothing and vehicle description. (T 109) This hearsay testimony was similarly offered by the prosecutor for the truth of the matter asserted. (T 109) The prosecutor even made a point of questioning Appleby as to whether the vehicle description matched the Petitioner's vehicle tag number. (T 109-110) As a result of such hearsay improperly being admitted, the State was able to use the hearsay to further bolster the testimony of the State's other witness, Deputy Phelan, who directly participated in the charged undercover cocaine purchase.

An additional reversible error occurred when the trial court overruled defense counsel's objection when the prosecutor stated during her closing argument: "...Basically the defense is saying, Oh, [the Petitioner] didn't run. He should have run. Well, that's not so, and in order for you to believe that, you would have to completely disregard everything Silas Appleby told you. I suggest to that [Silas Appleby] was telling it to you just how it is." (T 144) In fact, just prior to this objection, defense counsel objected to a similar comment to the jury made by the prosecutor relating to one of the police officer witnesses, Deputy Appleby, who the prosecutor stated was "not lying to you." (T 143) That comment did cause the trial court to tell the jury at the time to "... disregard the last comment made by the prosecutor as to her personal opinion as to the truthfulness of the witnesses." (T 143) Such improper argument by the prosecutor to the jury is, in effect, asking the jurors to decide "who is the liar," when determining whether reasonable doubt exists. This is legally incorrect because it is the jury's responsibility to decide, taking all the evidence into consideration, whether guilt as to every essential element of the charged offense has been proven beyond a reasonable doubt. **Clewis v. State**, 605 So. 2d 974 (Fla. 3d DCA 1992). Consequently, this type of argument distorts the State's burden of proof by shifting that burden to the defense. **Id.**, 975

Moreover, the prosecutor's comments amounted to her not only expressing her own personal opinion as to the veracity of the State's witness, Deputy Appleby, but she also "testified" as to her opinion concerning what evidence was true and what was untrue. **Stone v. State**, 626 So. 2d 295 (Fla. 5th DCA 1993). The prosecutor further improperly implied, through the aforementioned comments, that each of the police officers, who testified on behalf of the State, wether or not they were eyewitnesses to the actual drug transaction, were telling the jury "just how it is."

As further pointed out by the Fifth District in **Stone**, a prosecutor must not express his or her own personal beliefs during the trial and may not "transform" his or her own court room observations into evidentiary fact. **Id**., 297. Such an attempt to vouch for the credibility of a police officer witness simply because the witness is a police officer is clearly improper and warrants a new trial standing alone. **Ryan v. State**, 457 So. 2d 1084 (Fla. 4th DCA 1984); **Cisneros v. State**, 678 So. 2d 888 (Fla. 4th DCA 1996). These types of comments similarly amount to the prosecutor improperly commenting on matters outside of the record. **Id**., 890. Nor can either the prosecutor's remarks or the impermissible hearsay testimony be deemed harmless since the State's case rested mainly on the credibility of Deputy Appleby, as well as on the other police officers' testimony concerning to what they saw and heard during the undercover drug transaction the Petitioner was charged

with participating in. **Kearney v. State**, 689 So. 2d 1310 (Fla. 5th DCA 1997). In sum, the cumulative effect of the objected to remarks in the prosecutor's closing argument and the improper hearsay testimony is such that neither rebuke or retraction could entirely remove the "sinister influence" of the comments or dissipate the prejudice of the hearsay testimony and warrants a new trial. **DeFreitus v. State**, 701 So. 2d 593 (Fla. 4th DCA 1997); **Henry\ v. State**, 24 Fla. L. Weekly D 1944 (Fla. 5th DCA August 20, 1999). **See also**, **Ruiz v. State**, 24 Fla. L. Weekly S157 (Fla. April 1, 1999). Accordingly, the Fifth District erred in denying the Petitioner a new trial as to both of his convictions based on the aforementioned improper hearsay and prosecutorial conduct.

POINT TWO

THE FIFTH DISTRICT ERRONEOUSLY AFFIRMED THE PETITIONER'S SENTENCE AS A HABITUAL FELONY OFFENDER FOR THE OFFENSE OF POSSESSION OF COCAINE.

During the sentencing hearing, the trial court found the Petitioner to be a habitual felony offender and sentenced the Petitioner for the possession of cocaine offense to five years imprisonment as a habitual felony offender. (R 7-8, 55) Under Section 775.084 (1)(a)(3), Florida Statutes, the offense of possession of cocaine does not qualify as an offense for which a defendant may receive a habitual felony offender sentence.

The Fifth District held in the instant decision, that without an objection raised below at the trial level, under **Maddox v. State**, 708 So.2d 917 (Fla. 5th DCA 1998, rev. granted, 718 So.2d 169 (Fla. 1998), this type of sentencing error is not addressable on appeal. **Jerry v. State**, 24 Fla. L. Weekly D1290 (Fla. 5th DCA May 28, 1999). Specifically, the Fifth District held in **Maddox, supra**, that any sentencing errors, even those previously held by the district courts and this Court to be "fundamental" in nature, are waived on direct appeal under Section 924.051, Florida Statutes (Supp. 1996) if they are not objected to at sentencing or 30 days thereafter. Petitioner would submit that this analysis by the Fifth District is incorrect, particularly when dealing with fundamental sentencing errors.

As pointed out by the Second District in **Bain v. State**, 730 So. 2d 296 (Fla. 2d DCA 1999):

> "...appellate review of fundamental error is, by its nature, an exception to the requirement of preservation...no rule of preservation can impliedly abrogate the fundamental error doctrine because the doctrine is an exception to every such rule. It makes no difference this particular rule is codified." [Emphasis added] **Id.** at 302

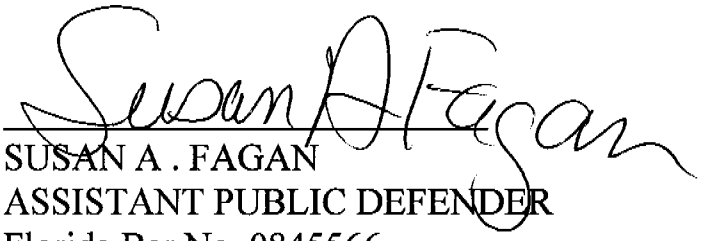
Petitioner would submit that this is the appropriate reasoning which this Court should adopt in lieu of that adopted by the Fifth District in **Maddox** and relied on by the Fifth District in resolving the instant case. See also, **Marrero V. State**, 24 Fla. L. Weekly D2242 (Fla. 3rd DCA September 29, 1999); **Nelson v. State**, 719 So.2d 1230 (Fla. 1st DCA 1998), **Sanders v. State**, 698 So.2d 377, 378 (Fla. 1st DCA 1997), and **Powell v. State**, 719 So.2d 963 (Fla. 4th DCA 1998). Accordingly, the Fifth District's holding in the case sub judice that, under **Maddox**, **supra**, Section 924.051, Florida Statutes (Supp. 1996), bars appellate review of the aforementioned sentencing error of an improper habitual felony offender sentence is erroneous. This cause should, therefore, be remanded for resentencing as to the instant possession of cocaine offense, for the imposition of a guidelines sentence.

CONCLUSION

Based on the authorities and argument cited herein, Petitioner respectfully requests that this Honorable Court reverse the decision of the Fifth District and, as to Point One, remand this cause for a new trial or, alternatively, as to Point Two, vacate the Petitioner's sentence for the possession of cocaine offense and remand this cause for resentencing for the possession of cocaine offenses according to the sentencing guidelines.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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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: Anthony H. Jerry, Inmate #334857, CFRC-East Unit, F-1106L, P. O. Box 628229, Orlando, FL 32862-8229, on this 5th day of November, 1999.

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in the brief is 14 point proportionally spaced Times New Roman.

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

LARRY CARL COOK,	)	
	)	
Petitioner,	)	
	)	S. CT. CASE NO. 96,399
vs.	)	CASE NO. 98-2726
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

APPENDIX

Jerry v. State, 24 Fla. L Weekly D 1290 (Fla. 5th DCA May 28, 1999)

JAMES B. GIBSON
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(CASANUEVA, Judge.) Cornell Horsley appeals the denial of his motion to suppress, alleging his warrantless arrest was without probable cause or a reasonable suspicion. We concur and reverse.

Cornell Horsley, standing near the walk-up window of a take-out restaurant in St. Petersburg, was arrested for violation of a municipal ordinance banning the possession of open containers of alcoholic beverages. A police officer found an open bottle of beer on the ground ten feet away from Mr. Horsley in this public area. We reverse on the ground that no police officer observed Mr. Horsley actually committing a misdemeanor in his presence. The fruit of the search incident to the arrest–two rocks of crack cocaine–should have been suppressed.

Two officers were instrumental in Mr. Horsley's arrest. The events began when Sergeant Lightfield, riding in an unmarked car, spotted Mr. Horsley carrying a bottle wrapped in a brown paper bag as he walked along the sidewalk. Sergeant Lightfield, from a distance of five or six feet, could see that the object was a bottle with a label, but he could not discern what was written on the label or whether the bottle contained any liquid. His experience led him to conclude that the bottle contained beer or malt liquor. Sergeant Lightfield then radioed all of this information, including a description of the "suspect," to a nearby uniformed officer.

Officer Herron, the recipient of the dispatch, discovered Mr. Horsley within a minute outside a business known as the Snow Peak. Mr. Horsley, who stated that he was ordering food from the window, was not carrying a bottle of any kind, but Officer Herron found an open container of Colt 45 malt liquor on the ground ten feet away. He then arrested Mr. Horsley for possessing an open container of alcohol, a violation of a municipal ordinance.[1]

According to section 901.15(1), Florida Statutes (1997), an officer may arrest a person without a warrant for violation of a municipal ordinance committed "in the presence of the officer. An arrest for the . . . violation of a municipal or county ordinance shall be made immediately or in fresh pursuit." The courts have strictly construed the "presence of the officer" language, requiring that the arresting officer actually see or otherwise detect by his senses that the person has violated the ordinance. *See Malone v. Howell*, 192 So. 224 (Fla. 1939); *Peterson v. State*, 578 So. 2d 749 (Fla. 2d DCA 1991); *Steiner v. State*, 690 So. 2d 706 (Fla. 4th DCA 1997).

In this case, however, the State has urged that the observations of Sergeant Lightfield may be imputed to Officer Herron under the "fellow officer" rule, which "allows an arresting officer to assume probable cause to arrest a suspect from information supplied by other officers." *Voorhees v. State*, 699 So. 2d 602 (Fla. 1997). The collective knowledge of the two officers, according to the State, provided probable cause for the arrest of Mr. Horsley.

Although the general proposition advanced by the State is true and operative in the context of arrests for misdemeanors, *see State v. Eldridge*, 565 So. 2d 787 (Fla. 2d DCA 1990), we must reject the State's argument because neither Officer Lightfield nor Officer Herron actually observed Mr. Horsley committing an open container violation. Sergeant Lightfield did not know what the label stated nor whether the bottle contained alcohol; Officer Herron did not see Mr. Horsley carrying the container. Furthermore, we decline to hold that Mr. Horsley constructively possessed the container, found ten feet away, because the area was open and accessible to the public. Although Officer Herron stated that no other person was nearby when he arrested the defendant, both officers described the area as normally busy, where people tended to congregate and where businesses sold food and beverages. All of the circumstances in the officers' collective knowledge provided only a mere suspicion that Mr. Horsley possessed an open container of alcohol. Accordingly, we reverse the court's denial of the motion to suppress and vacate the judgment and order of probation. (PARKER, C.J., and GREEN, J., Concur.)

[1]Although the parties have not provided this court with the ordinance that Mr. Horsley allegedly violated, the appellant's attorney verified that such an ordinance does exist. No challenge to this ordinance has been raised in this appeal.

* * *

STATE v. WRIGHT. 1st District. #98-4511. May 27, 1999. Appeal from the Circuit Court for Union County. AFFIRMED. *State v. Holland*, 689 So. 2d 1268 (Fla. 1st DCA 1997). We certify conflict with *State v. Hayes*, 720 So. 2d 1095 (Fla. 4th DCA 1998) and *State v. Baxley*, 684 So. 2d 831 (Fla. 5th DCA 1996).

WEEKS v. STATE. 1st District. #98-4078. May 27, 1999. Appeal from the Circuit Court for Walton County. AFFIRMED. *See Baker v. State*, 714 So. 2d 1167 (Fla. 1st DCA 1998).

* * *

VALMOND v. STATE. 3rd District. #98-3060. May 26, 1999. Appeal under Fla. R. App. P. 9.140(i) from the Circuit Court for Dade County. Affirmed. *Strickland v. Washington*, 466 U.S. 668 (1984); *Maharaj v. State*, 684 So. 2d 736 (Fla. 1996); *Kennedy v. State*, 547 So. 2d 912 (Fla. 1989).

WRIGHT v. STATE. 3rd District. #96-3070. May 26, 1999. Appeal from the Circuit Court of Dade County. Affirmed. *See Robinson v. State*, 692 So. 2d 883, 886 (Fla. 1997); *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Hooper v. State*, 476 So. 2d 1253, 1256 (Fla. 1985); *Smellie v. State*, 720 So. 2d 1131, 1132 (Fla. 4th DCA 1998); *State v. Meyers*, 708 So. 2d 661, 663 (Fla. 3d DCA 1998).

* * *

BAKER v. STATE. 4th District. #98-2766. May 26, 1999. Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County. We affirm defendant's conviction without prejudice to raise the gain time issue in a 3.850 motion.

DOSS v. LAMBDIN. 4th District. #98-2392. May 26, 1999. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County. Affirmed. The appellant has failed to exhaust his administrative remedies.

FERGUSON v. JENSEN. 4th District. #98-1951. May 26, 1999. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County. Affirmed. *See Siegel v. Deerwood Place Corp.*, 701 So. 2d 1190 (Fla. 3d DCA 1997), *review denied*, 717 So. 2d 537 (Fla. 1998).

MALMQUIST v. STATE. 4th District. #98-1413. May 26, 1999. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County. Affirmed. *See State v. Rodriguez*, 575 So. 2d 1262 (Fla. 1991).

T.H. v. FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES. 4th District. #98-2387. May 26, 1999. Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County. We affirm the trial court's detailed order terminating parental rights. Termination was justified under section 39.464(1)(c), Florida Statutes (1997).

ZAMBUTO v. STATE. 4th District. #s 98-0436 and 98-0492. May 26, 1999. Consolidated appeals from the Circuit Court for the Seventeenth Judicial Circuit, Broward County. We affirm without prejudice for the appellant to file a motion pursuant to Florida Rule of Criminal Procedure 3.800.

AFFIRMED

* * *

JERRY v. STATE. 5th District. #97-2638. May 28, 1999. Appeal from the Circuit Court for Orange County. AFFIRMED. *Maddox v. State*, 708 So. 2d 617 (Fla. 5th DCA), *review granted*, 718 So. 2d 169 (Fla. 1998).

CARMONA v. STATE. 5th District. #98-1873. May 28, 1999. Appeal from the Circuit Court for Lake County. AFFIRMED. *See State v. Brown*, 725 So. 2d 441 (Fla. 5th DCA 1999); *State v. Johnson*, 695 So. 2d 771 (Fla. 5th DCA), *rev. denied*, 705 So. 2d 9 (Fla. 1997).

ROBINSON v. ROBINSON. 5th District. #98-3185. May 28, 1999. Appeal from the Circuit Court for Brevard County. AFFIRMED. *Doerflein v. Doerflein*, 724 So. 2d 153 (Fla. 5th DCA 1998).

CRAWFORD v. STATE. 5th District. #99-1100. May 28, 1999. 3.850 Appeal from the Circuit Court for Seminole County. AFFIRMED on the authority of *Dixon v. State*, 1999 WL 46629 (Fla. Feb. 4, 1999).

CLARK v. STATE. 5th District. #99-174. May 28, 1999. Appeal from the Circuit Court for Orange County. AFFIRMED on the authority of *McKnight v. State*, 727 So. 2d 314 (Fla. 3d DCA 1999).

FLORENCE v. STATE. 5th District. #99-356. May 28, 1999. Appeal from the Circuit Court for Sumter County. AFFIRMED on the authority of *Alachua Regional Juvenile Detention Center v. T. O.*, 684 So. 2d 814 (Fla. 1996).

* * *