

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

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

SHATELL MACKEY,

Appellant,

v.

Case No. 5D21-4

STATE OF FLORIDA,

Appellee.

Decision filed May 14, 2021

Appeal from the Circuit
Court for Volusia County,
Dawn D. Nichols, Judge.

Matthew J. Metz, Public Defender,
and Susan A. Fagan, Assistant Public
Defender, Daytona Beach, for
Appellant.

Ashley Moody, Attorney General,
Tallahassee, and Roberts J.
Bradford, Jr., Assistant Attorney
General, Daytona Beach, for
Appellee.

PER CURIAM.

AFFIRMED.

HARRIS and NARDELLA, JJ., concur.

LAMBERT, J., concurs specially with opinion.

Shatell Mackey pleaded nolo contendere to charges of burglary of an occupied conveyance and battery. Consistently with Mackey's plea agreement with the State, the trial court placed her on a term of community control to be followed by probation for the burglary charge and sentenced Mackey to serve two days in jail, with an award of two days of jail credit, for the battery. The court withheld an adjudication of guilt on each count. I write briefly to comment on the jail sentence.

It is improper to withhold an adjudication of guilt when only a jail sentence is imposed. In *State v. Seward*, our sister court explained:

Under Florida Rule of Criminal Procedure 3.670 and *Thomas v. State*, 356 So. 2d 846 (Fla. 4th DCA 1978), adjudication cannot be withheld if a jail term is imposed. However, adjudication *can* be withheld if the defendant is put on probation rather than incarcerated. See *State v. Scarantino*, 543 So. 2d 399 (Fla. 4th DCA 1989).

Since both the defendant and the State were satisfied with the withholding of adjudication, we remand to the trial court with instructions to impose probation with a condition that the defendant serve two days in jail, with credit for the two days which she has already served.

543 So. 2d 398, 399 (Fla. 4th DCA 1989).

In the instant case, because the propriety of the trial court withholding an adjudication of guilt when it imposed a jail sentence on the battery charge

has not been challenged or otherwise preserved for review, I agree with the affirmance.