

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

DAVID BURKES,)	
)	
Appellant,)	
)	
v.)	Case Nos. 2D08-599
)	2D08-602
STATE OF FLORIDA,)	2D08-676
)	
Appellee.)	<u>CONSOLIDATED</u>
_____)	

Opinion filed June 12, 2009.

Appeal from the Circuit Court for Pinellas
County; Richard A. Luce, Judge.

James Marion Moorman, Public Defender,
and Megan Olson, Assistant Public
Defender, Bartow, for Appellant.

Bill McCollum, Attorney General,
Tallahassee, and Diana K. Bock, Assistant
Attorney General, Tampa, for Appellee.

LaROSE, Judge.

David Burkes appeals judgments and sentences imposed after the trial
court revoked his probation. We affirm all of the judgments. We also affirm the habitual
felony offender sentences imposed for four counts of sale of cocaine.

We reverse as to the guidelines sentence imposed on count two of case number CRC 06-26728 for cocaine possession; the scoresheet improperly included points for the offenses for which Mr. Burkes received habitual offender sentences.¹ See Teal v. State, 777 So. 2d 1105 (Fla. 2d DCA 2001). The State properly concedes error. " 'When a defendant is being sentenced as a habitual offender for some cases and under the guidelines for other cases at the same hearing, it is improper to score the crimes for which he receives habitual offender treatment as additional offenses in calculating the guidelines sentence.' " Olsen v. State, 791 So. 2d 558, 560 (Fla. 2d DCA 2001) (quoting Eblin v. State, 677 So. 2d 388, 389 (Fla. 2d DCA 1996)).

Affirmed in part, reversed in part, and remanded.

NORTHCUTT, C.J., and KHOUZAM, J., Concur.

¹Mr. Burkes preserved the error by filing a Florida Rule of Criminal Procedure 3.800(b)(2) motion. The motion is deemed denied because the trial court did not rule upon it within the required sixty days. See Watts v. State, 973 So. 2d 1271 (Fla. 2d DCA 2008).