IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 78,948

MALCOLM XAVIER MALONE,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

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STATE OF FLORIDA,	:	
Petitioner,	:	
VS.	:	CASE NO. 78,948
MALCOLM XAVIER MALONE,	:	
Respondent.	:	
	:	

RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

The state seeks review from the decision of the First District Court of Appeal in Malone v. State, 16 FLW D2880 (Fla. 1st DCA Nov. 12, 1991) (copy attached as an appendix). The lead case on this issue is Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991) (en banc), review pending, case no. 77,751, in which the district court held that defendants could not be sentenced as habitual offenders if their two prior threshold convictions were entered on the same day, under the 1988 habitual offender statute. The oral argument in Barnes has recently been rescheduled for January 8, 1992.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's statement as reasonably accurate.

III SUMMARY OF ARGUMENT

Habitual offender statutes in Florida have been construed with a judicial gloss requiring that the prior convictions be sequential.

Even after the 1988 amendment of the habitual offender statute, all the district courts of appeal have have held that the sequentiality requirement remains. The state disagrees with those decisions, arguing that the changed statutory language does not require that prior convictions be in sequence.

The state's position is flawed for two related reasons. First, the legislature is presumed to know of existing laws and their judicial interpretation. Second, when the legislature intends to overturn long-standing precedent and the construction that the courts placed on the statute, it is obliged to use unmistakable language to achieve this objective. Since the 1988 version of the habitual offender statute was essentially silent on the sequentiality rule, the legislature did not abrogate it. Without unmistakable language overturning the rule, and there was none, it stands.

Since respondent was sentenced under the 1989 version, which is not materially different than the 1988 version, the Barnes rationale applies equally to respondent.

This court should approve the decision of the First District Court of Appeal below and answer the certified question in the affirmative.

IV ARGUMENT

CERTIFIED QUESTION/ISSUE PRESENTED

WHETHER SECTION 775.084(1)(a)1, FLORIDA STATUTES (1989), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF ANY COMBINATION OF TWO OR MORE FELONIES IN THE STATE OR OTHER QUALIFIED OFFENSES," REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PREVIOUS OFFENSES?

A. INTRODUCTION

Respondent urges the Court to decline to accept jurisdiction; or, in the alternative, answer the certified question in the affirmative.

While the purported basis for this Court's jurisdiction is a certified question and not conflict among the district courts of appeal, it is noteworthy that all the district courts have addressed the issue before the Court, and there is no conflict among them. Rather, all the district courts have agreed, either expressly or implicitly, that the Joyner-Shead rule -- that multiple contemporaneous convictions count as one conviction for purposes of sentence enhancement -- remains viable under the 1988 habitual offender statute. Joyner v. State, 30 So.2d 304 (Fla. 1947); and Shead v. State, 367 So.2d 264 (Fla. 3d DCA 1979); in the district courts, see Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991), review pending, case number 77,751; Collazo v. State, 573 So.2d 209 (Fla. 3d DCA 1991); Williams v. State, 573 So.2d 451 (Fla. 4th DCA 1991); Walker v. State, 567 So.2d 546 (Fla. 2d DCA 1990); and Taylor v. State,

558 So.2d 1092 (Fla. 5th DCA 1990), appeal after remand, 576 So.2d 968 (Fla. 5th DCA 1991).

In his concurring opinion in Barnes, Judge Zehmer considered whether, in light of the unanimity among the district courts, there even was a question of great public importance. The concurrence said:

> In view of the unanimity of rulings by all district courts of appeal on the question now before us, I am unable to agree that the court should revisit the statute and change these principles; there is simply no question of great public importance presented.

576 So.2d at 765 (Zehmer, J., concurring). Thus, this Court should not accept review.

B. THE 1988 STATUTE RETAINED THE REQUIREMENT THAT THE TWO PRIOR CONVICTIONS NOT BE ENTERED ON THE SAME DATE.

Assuming the Court will address the certified question, the debate boils down to this: Malone argues that, to qualify as an habitual offender, he must have two non-contemporaneous felony convictions, and he did not. The Joyner-Shead line of cases supports this view. The state, on the other hand, argues that the language of the habitual offender statute has changed substantially since Joyner was decided, and that the plain language of the 1988 habitual offender statute -- "previously convicted of two or more felonies" -- contains no sequentiality requirement. Thus, according to this view, Malone's two prior convictions on the same day qualify him as an habitual offender.

The state argued that the sequentiality requirement was based on an earlier, two-tiered statute, and that the demise of the two-tiered system eliminated the sequentiality requirement. The First District, however, ruled that the Joyner-Shead principle survived long after repeal of the two-tiered provision, and concluded that "[h]ad the legislature intended to overturn long-standing precedent and the construction that the courts had placed on the statute, then it was obliged to use unmistakable language to achieve its objective." Barnes, 576 So.2d at 761.

The state's argument bypasses the history of this statute. In 1988, the legislature did not create a new habitual offender statute. Rather, it amended an existing statute. The legislature's actions must be interpreted taking into account how this court and the district courts interpreted prior versions of the habitual offender statute. The cases cited by the state do not address this situation. Instead, the state's tunnel-visioned presentation looks only at the stark words of the law, without acknowledging historical precedent.

The background of the sequential conviction requirement is critical and revealing. Joyner v. State, supra, is the leading case. At the time Joyner was decided, the statute provided in part that "a person who, after having been three times convicted ... of felonies," shall be sentenced upon conviction for a fourth or subsequent felony as an habitual offender. § 775.10, Fla. Stat. (1941). This court held that

three prior convictions entered on the same day did not qualify as the three prior felonies required by the statute. The court said:

> To constitute ... a fourth conviction within the purview of ... Sec. 775.10, supra, the information or indictment must allege and the evidence must show that the offense charged in each information subsequent to the first was committed and the conviction therefor was had after the date of the then last preceding conviction. In other words, the second conviction must be alleged and proved to have been for a crime committed after the first conviction. The third conviction must be alleged and proved to have been for a crime committed after both the first and second convictions, and the fourth conviction must be alleged and proved to have been for a crime committed after each of the preceding three convictions. (emphasis added)

30 So.2d at 306.

The court's rationale in Joyner was:

> (1) because the purpose of the statute is to protect society from habitual criminals who persist in the commission of crime after having been theretofore convicted and punished for crimes previously committed. It is contemplated that an opportunity for reformation is to be given after each conviction. (2) This construction is implicit in the statutes. (emphasis added)

Id.

The court did not base its holding on the precise language of the statute, but instead canvassed decisions of other jurisdictions and decided "that a majority of the courts and the weight of authority supports this conclusion." Id.

An annotation entitled Habitual Criminal Statutes, 24 ALR 2d 1247 (1952), confirms the court's analysis:

> [R]egardless of the differences in phraseology, the preponderance of authority supports the view that the prior convictions, in order to be available for imposition of increased punishment of one as a habitual offender, must precede the commission of the principal offense, that is, the latest prosecution in point of time. In this connection it has been brought out in numerous cases that, although differing somewhat in language, the same principle is inherent in a habitual offender criminal statute, namely, that the legislature in enacting such a statute intended it to serve as a warning to first offenders and to afford them an opportunity to reform, and that the reason for the infliction of a severer punishment for a repetition of offenses is not so much that defendant has sinned more than once as that he is deemed incorrigible when he persists in violations of the law after conviction of previous infractions. (emphasis added)

Id. at 1248-49.

Since Joyner, this court consistently applied this rationale to habitual offender statutes. E.g., Lovett v. Cochran, 137 So.2d 572 (Fla. 1962) (when two of the four convictions were for offenses committed the same day they did not count as separate prior convictions); Scott v. Mayo, 32 So.2d 821 (Fla. 1947) (two convictions entered on same date, therefore "only one of these two convictions could be counted in arriving at the number of convictions ...").

This court later held that an information charging the defendant as a fourth offender was deficient "because we have repeatedly held that when two of the four convictions required to invoke the statute are shown to have been obtained the same day, the invalidity of the information to allege facts

justifying [an enhanced] sentence is obvious." Perry v. Mayo, 72 So. 2d 382, 383 (Fla. 1954).

Application of that rule did not depend on whether the simultaneously imposed sentences were for crimes committed on the same day or different days. In Perry, the court was unable to ascertain the date that any of the four offenses were committed. The pivotal fact, however, was that conviction for the last two offenses occurred on the same day. For that reason the allegation of four prior convictions was facially insufficient. The court said, "To end the confusion, once and for all, we adhere to the rule that in order to form a basis for sentence as a second or fourth offender, it must be established that offenses after the primary one were in each case committed subsequent to conviction for the preceding offense...." 72 So.2d at 384 (emphasis added).

The district courts applied the same principle to the revised habitual offender statutes. In Shead v. State, supra, the court ruled that simultaneous convictions of two misdemeanors committed on the same day did not meet the statutory requirement of "twice previously been convicted of a misdemeanor". Following this court's teaching in Joyner, the Third District Court said:

> Under this and similar habitual criminal statutes, it is the established law of this state, as well as the overwhelming weight of authority throughout the country, that, when the statute requires two or more convictions as a prerequisite to an enhanced sentence on a present case, the defendant must have committed the second offense subsequent to his conviction on the first

> offense. Two or more prior convictions rendered on the same day are, therefore, treated as one offense for purposes of such a provision in a habitual criminal statute.
>
> * * *
>
> It therefore follows that the requirement of two prior misdemeanor or qualified offense convictions under the habitual criminal statute means that the defendant must have committed the second offense subsequent to his conviction on the first offense and thus showed a persistence in a pattern of crime notwithstanding an opportunity to reform. (emphasis added)

367 So.2d at 266-267.

In Snowden v State, 449 So.2d 332, 338 (Fla. 5th DCA 1984), quashed on other grounds 476 So.2d 191 (Fla. 1985), the Fifth District said that, "although the current statute differs somewhat in its operative language from the earlier version, we see nothing in it that expresses a purpose other than was earlier noted by this court in Joyner, viz., to protect society from habitual criminals who persist in the commission of crime after having been theretofore convicted and to permit an opportunity for reform after each conviction" (emphasis added).

In Wilken v. State, 531 So.2d 1011 (Fla. 4th DCA 1988), an habitual misdemeanant sentence was reversed because, as here, both prior offenses occurred before the defendant was convicted of either crime. The court followed the rationale of Joyner and Shead, which had applied "the same gloss" on other versions of the habitual offender laws by finding that "the timing requirement is implicit in the statutes...." Id.

Despite those judicial decisions, the state argues that the present statutory language is clear and requires no interpretation. The Joyner decision is said to be inapplicable because it was based on a "two-tiered" statute. That assertion, however, is not completely accurate, because the original act expressly required sequential convictions for the second conviction,[1] but not the fourth conviction.[2] This court, however, extended the sequentiality requirement to the upper tier by interpretation. Joyner, 30 So.2d at 306.

Later, the Third District in Shead decided that the sequentiality requirement was also a part of the habitual felony offender statute, which by then was not a two-tiered system. A person qualified merely if he had "twice previously been convicted of a misdemeanor..." § 775.084(1)(a)1.b, Fla. Stat. (1975).

Presently, the statute applies when the defendant "has previously been convicted of two or more felonies." This language is remarkably similar to the fourth conviction requirement in old section 775.10, which read, "after having been three times convicted." This present language is not greatly different from the "twice previously convicted" language of the

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[1]Section 775.09, Florida Statutes (1947), applied to a second felony committed by a person, "after having been convicted...of a felony..."

[2]Section 775.10, Florida Statutes (1947), applied to a fourth felony committed by a person "after having been three times convicted...of felonies..."

former section 775.084. Such similarities in the statutory provisions belie the state's assertion that the present law is free of ambiguity, or that interpretations of the former law are irrelevant to interpretation of the present one.

On a larger scale, the state's position is at odds with fundamental principles of recidivism statutes. Joyner's rationale was not confined to the statute's words, but took account of the overall purpose of habitual offender acts: that "an opportunity for reformation is to be given after each conviction." 30 So.2d at 306. That same principle was carried forward in Shead, nine years before the 1988 amendment was enacted.

Even though Shead is now characterized by the state as wrongly decided, the present statute did not clearly depart from the language construed in Shead, or Joyner, or otherwise convey an intent to depart from an interpretation of law that had prevailed for the preceding 40 years.

With this background, there is no justification for a conclusion that the present habitual offender statute was intended to change the historical "gloss" which the courts have uniformly applied to enhancement statutes over the years. The general purpose of habitual offender statutes, rather than their individual wording, has been and should continue to be, the rationale of interpretation.

Further, the state's argument ignores two well-established rules of statutory construction. First, when enacting a statute, the legislature is presumed to know the existing law, and

also to "be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute." Ford v. Wainwright, 451 So.2d 471, 475 (Fla. 1984); Williams v. Jones 326 So.2d 425, 435 (Fla. 1975), appeal dism. 429 U.S. 803, 97 S.Ct. 34, 50 L.Ed.2d 63 (1976); Bermudez v. Florida Power and Light Co., 433 So.2d 565, 567 (Fla. 3d DCA 1983), review den. 444 So.2d 416 (Fla. 1984).

Second, when the legislature intends to overturn longstanding court interpretation of law, it must do so in unmistakable terms. State ex rel. Housing Authority of Plant City v. Kirk, 231 So.2d 522, 524 (Fla. 1970); American Motors Corp. v. Abrahantes, 474 So.2d 271, 274 (Fla. 3d DCA 1985).

Plant City involved a question whether an amended excise tax statute was intended to tax rental properties owned by public housing authorities. From 1949 to 1968, public housing authorities clearly were not subject to excise taxes. This was due to an interpretation of the Revenue Act by the Department of Revenue that applied from 1949 to 1959, and due to the decision of this court in Green v. Panama City Housing Authority, 115 So.2d 560, 562 (Fla. 1959), for the balance of the period. In 1968, the legislature amended the revenue statutes to expand the definition of businesses which were subject to the excise tax. On appeal, the Department of Revenue argued that public housing authorities came within the expanded definition of businesses and, thus, were subject to excise taxes.

This court said:

> Inherent in the argument of the Department of Revenue is that the exemption granted to the Housing Authority in Chapter 423 was repealed by implication by the 1968 amendment to the Revenue Act, thus rendering the Panama City cases and the exemption granted - now inoperable.

Plant City, 231 So.2d at 523. The court continued, thus:

> We cannot say that the Department's argument is not persuasive, but, in a situation such as this - with such long standing recognition of such exemption by both the Legislature, this Court, the district court and the circuit court - we are not persuaded that such a catyclysmic [sic] result could be brought about by the application of the principle of implied repeal.

Id.

This court further held that "[w]here an act purports to overturn long-standing legal precedent and completely change the construction placed on a statute by the courts, it is not too much to require that it be done in unmistakable language." Id.

American Motors, supra, concerned the retroactivity of a long-arm statute. The Third District noted a long line of cases which held that amendments to long-arm statutes were not to be applied retroactively. It then noted two rules of statutory construction, the second being that, as in Plant City,, when an act purports to overturn long-standing legal precedent and change the courts' construction placed on the statute, the legislature must do so in unmistakable language. The district court said that, while the language of the amended statute may reasonably be viewed to evince a legislative intent

that the 1984 amendment be applied retroactively, the act did not do so "clearly" and "unmistakably," and was therefore ineffective in doing so. 474 So.2d at 274.

Applying that rule of construction here, and considering the longstanding precedent of Joyner-Shead, if the legislature intended to eliminate the sequential conviction requirement, it was obliged to do so in unmistakable language. It did not. Therefore, Joyner-Shead should stand, until and unless the legislature makes a contrary intent unmistakably clear.

It is noteworthy that all the district courts have addressed the issue before the court, and there is no conflict among them. All those courts have agreed, either expressly or implicitly, that the Joyner-Shead rule remains viable under the 1988 habitual offender statute. Barnes v. State, 576 So.2d 758 (Fla. 1st DCA 1991); Collazo v. State, 573 So.2d 209 (Fla. 3d DCA 1991); Williams v. State, 573 So.2d 451 (Fla. 4th DCA 1991); Walker v. State, 567 So.2d 546 (Fla. 2d DCA 1990); Taylor v. State, 558 So.2d 1092 (Fla. 5th DCA 1990), appeal after remand, 576 So.2d 968 (Fla. 5th DCA 1991).

C. THE 1989 STATUTE DID NOTHING TO REMOVE THE REQUIREMENT THAT THE PRIOR CONVICTIONS BE ENTERED ON DIFFERENT DAYS.

Since this case and some others, including Fuller v. State, 578 So.2d 887 (Fla. 1st DCA 1991), review pending, case no. 77,907, and Price v. State, 577 So.2d 682 (Fla. 1st DCA 1991), review pending, case no. 77,841, address the 1989

version of the habitual offender statute, respondent will address certain issues pertaining to the 1989 amendment.

The 1989 amendment changed the "previously been convicted of two or more felonies in this state" language to "previously has been convicted of any combination of two more more felonies in this state or other qualified offense." In Fuller, the state argued that the change to the "any combination" language meant the legislature had abolished any sequentiality requirement of prior convictions. Id.

The First District disagreed with this interpretation. The court said:

> We cannot agree with the state's position. The sequential conviction requirement is one of long standing. Nothing in the 1989 amendment addresses the timing of qualified offenses. If the legislature intended to overrule the sequential conviction requirement, it was obligated to do so in unmistakable language. (cites omitted)

Id. The court continued:

> Moreover, it appears that the sole intent of the 1989 amendment was to expand the definition of "qualified offenses" to include out-of-state offenses... (cites omitted)

Id.

Further, as a side note, and as noted by Judge Zehmer in his concurring opinion in Barnes, the state has taken inconsistent positions as to the 1988 and 1989 amendments. While the state has argued, in Barnes, for example, that the language of the 1988 statute is clear that there is no sequentiality requirement, it has also argued, in Fuller, for example, that

the 1989 amendment abolished the sequentiality requirement. Barnes, 576 So.2d at 762 (Zehmer, J., concurring). See also State v. Pitts, 249 So.2d 47 (Fla. 1st DCA 1971) ("The equal protection clause of the state and federal constitutions requires that every person's rights be determined by application of the same rule of law" (emphasis added)).

To summarize, the courts have consistently held that the habitual offender statute requires that each subsequent offense be committed after conviction of the prior offense. The legislature did not demonstrate an intent to abolish that rule when enacting the 1988 (or 1989) amendments to the statute. The prior interpretations should, therefore, still control.

Malone cannot be sentenced as an habitual offender because the statute requires two non-contemporaneous felony convictions. Malone's two prior convictions were imposed on the same date and, thus, do not qualify.[3]

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[3]In the district court, many habitual offender defendants have argued that the 1989 version of the habitual offender statute, section 775.084, Florida Statutes (1989), was unconstitutional because it was vague, arbitrary and standardless. The district courts have rejected the constitutionality argument in many other cases. E.g., Barber v. State, 564 So.2d 1169 (Fla. 1st DCA), review den. 576 So.2d 284 (Fla. 1990) (1987 version); Pittman v. State, 570 So.2d 1045 (Fla. 1st DCA 1990), review den. no. 77,121 (Fla. 1991) (1988 version); Love v. State, 569 So.2d 807 (Fla. 1st DCA 1990) (1988 version). This court has not passed on the constitutionality of either the 1988 nor the 1989 version of the statute.

The vagueness of the new habitual offender statute has a bearing on the argument presented here. Essentially, the point is that the new act is so broad that virtually any felon with

(Footnote Continued)

This court should approve the decision of the First District Court of Appeal below and answer the certified question in the affirmative.

(Footnote Continued)
two prior convictions qualifies for habitual offender sentencing. The statute no longer requires a finding that enhanced sentencing is "necessary for the protection of the public," as did section 775.084(3), Florida Statutes (1987).

Two or more felony convictions are easily scorable under the sentencing guidelines, yet the present habitual offender statute nullifies the guidelines for a large number of offenders without specifying any other criteria by which to distinguish those sentenced under the guidelines from those sentenced as habitual offenders.

The existence of two distinct sentencing systems, with no objective criteria separating one from the other, is the essence of arbitrariness. Since the reach of the statute is constitutionally questionable, this court should not allow its further extension by abandoning the well-established sequentiality requirement when the legislature did not clearly abrogate it.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests that this Court decline to accept review; or, in the alternative, answer the certified question in the affirmative and approve the decision of the First District Court of Appeal below, that Malone cannot be sentenced as an habitual offender because he did not have the requisite two non-contemporaneous felony convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Bradley R. Bischoff, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to Mr. Malcolm Xavier Malone, this 18th day of December, 1991.

P. DOUGLAS BRINKMEYER

Criminal law—Sentencing—Habitual offender—Error to sentence defendant as habitual offender where prior convictions occurred on same date—Question certified whether Section 775.084(1)(a)(1), Florida Statutes (1989), which defines habitual felony offenders as those who have "previously been convicted of any combination of two or more felony offenses," requires that any of the felonies be committed after conviction for the immediately previous offenses

MALCOLM XAVIER MALONE, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 91-907. Opinion filed November 12, 1991. An Appeal from the Circuit Court for Okaloosa County, G. Robert Barron, Judge. Nancy A. Daniels, Public Defender, and Chrysa M. Iler, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General, and Bradley Bischoff, Assistant Attorney General, Tallahassee, for Appellee.

(JOANOS, Chief Judge.) Appellant contends he was sentenced improperly as an habitual felony offender, where the predicate convictions relied upon for habitual felony offender sentencing occurred on the same date. We agree, and reverse and remand appellant's enhanced sentence for resentencing. *See Fuller v. State*, 578 So.2d 887 (Fla. 1st DCA 1991); *Barnes v. State*, 576 So.2d 758 (Fla. 1st DCA 1991). In accordance with our decisions in *Fuller v. State*, and *Razz v. State*, 576 So.2d 901 (Fla. 1st DCA 1991), we certify the following question to the supreme court as a question of great public importance:

> WHETHER SECTION 775.084(1)(a)1, FLORIDA STATUTES (1989), WHICH DEFINES HABITUAL FELONY OFFENDERS AS THOSE WHO HAVE "PREVIOUSLY BEEN CONVICTED OF ANY COMBINATION OF TWO OR MORE FELONIES IN THIS STATE OR OTHER QUALIFIED OFFENSES," REQUIRES THAT EACH OF THE FELONIES BE COMMITTED AFTER CONVICTION FOR THE IMMEDIATELY PREVIOUS OFFENSES?

Accordingly, appellant's enhanced sentence imposed pursuant to the habitual felony offender statute is vacated, and the cause is remanded for resentencing. (ALLEN, J., and WENTWORTH, Senior Judge, CONCUR.)

* * *

Criminal law—Post conviction relief—Costs—Claim that trial court imposed costs without giving defendant notice and opportunity to object properly denied—Ineffective assistance of counsel in failing to inform defendant that because of nature of crimes he would not be eligible for provisional gain time—Claim facially insufficient where claim fails to allege that defendant would not have entered guilty plea had counsel told him about his inability to accumulate provisional gain-time—Claim properly denied even if attachment of written plea agreement indicating in general terms defendant's understanding of "possible consequences of his plea" failed to conclusively refute claim

JAMES DARREN DUGGAN, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 91-821. Opinion filed November 12, 1991. An Appeal from the Circuit Court for Duval County. David C. Wiggins, Judge. Appellant pro se. Robert A. Butterworth, Attorney General, and Gypsy Bailey, Asst. Attorney General, Tallahassee, for Appellee.

(JOANOS, Chief Judge.) James Darren Duggan has appealed an order of the trial court summarily denying his motion for post-conviction relief filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure. We affirm.

On March 8, 1990, Duggan pled guilty to two counts of lewd and lascivious act, and was sentenced to 9 years incarceration followed by 5 years probation. He filed the instant motion on January 24, 1991, alleging 1) that the trial court imposed costs without giving him notice and opportunity to object, and 2) that his counsel was ineffective for failing to tell him that, because of the nature of his crimes, he would not be eligible to receive provisional gain-time while incarcerated. The trial court summarily denied the motion, attaching Duggan's written plea agreement indicating in general terms his understanding of the "possible consequences of his plea."

Upon review of this motion and order, this court requested a response from the Attorney General's office pursuant to *Toler v. State*, 493 So.2d 489 (Fla. 1st DCA 1986). The state responds first that the motion was correctly denied as to the allegation of improper imposition of costs. We agree. *See State v. Beasley*, 580 So.2d 139 (Fla. 1991).

As to the allegation of ineffective assistance, the state responds that, if the attachment provided by the trial court does not conclusively refute the allegation, we should nevertheless affirm under *Shaffner v. State*, 562 So.2d 430 (Fla. 1st DCA 1990). In *Shaffner*, the prisoner alleged that his attorney had erroneously informed him, prior to his plea, that his escape offense would not result in loss of gain-time. The trial judge denied the motion, attaching to his order supporting documents which were not part of the record. The court nevertheless affirmed, finding Shaffner's motion facially insufficient in that it did not allege that, absent the misstatement, he would not have entered the plea. *Shaffner* at 431.

Similarly, the motion herein fails to allege that, had Duggan's attorney told him about his inability to accumulate provisional gain-time, he would not have entered his plea. Therefore, under authority of *Shaffner*, we find Duggan's allegations of ineffective assistance facially insufficient, and affirm. *See Robinson v. State*, 393 So.2d 33, 35 (Fla. 1st DCA 1981) (if a trial court's order is sustainable under any theory revealed by the record on appeal, notwithstanding that it may have been entered for erroneous reasons, the order will be affirmed).

Affirmed. (BOOTH and WOLF, JJ., CONCUR.)

* * *

Criminal law—Sentencing—Correction of sentence—Motion alleging that habitual offender sentence was illegal where predicate convictions were entered on same date—Error to find motion without merit—Defendant can challenge illegal sentence even if sentence was agreed upon in plea bargain

SYLVESTER SIMS, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 91-896. Opinion filed November 12, 1991. An Appeal from the Circuit Court for Escambia County. Joseph Q. Tarbuck, Judge. Appellant pro se. No appearance for Appellee.

(JOANOS, Chief Judge.) Sylvester Sims has appealed from an order of the trial court denying his motion to correct illegal sentence, filed pursuant to Rule 3.800(a), Florida Rules of Criminal Procedure. We reverse and remand for further proceedings consistent with this opinion.

Sims alleged below that, on April 28, 1986, he was convicted of four third-degree felonies. He commenced serving his sentence, and in the course thereof was permitted to participate in a work-release program. In December 1989, he escaped from his work-release assignment, and was charged with voluntary escape, a second-degree felony. Sims agreed to plead nolo contendere to that charge in exchange for the state's recommendation that he be sentenced as an habitual offender to a term of years not to exceed five. The trial court accepted the plea. As predicate convictions for the habitual offender classification, the state offered the four April 28, 1986 convictions. The court accepted them, and sentenced Sims to five years as an habitual offender.

Sims thereafter alleged in the instant motion that his classification as an habitual offender was error, in that the predicate convictions were entered on the same date. The trial court denied the motion, on the ground that the foregoing allegations "show unequivocally that said motion is without merit." On appeal, Sims argues that *Barnes v. State*, 576 So.2d 758 (Fla. 1st DCA 1991) (habitualization must be supported by sequential convictions) requires vacation of his classification as an habitual offender. The state does not respond.

The trial court erred in finding Sims' motion without merit. Sims' allegations, if true, show that he agreed to an illegal sentence as part of a plea bargain, i.e., he agreed to be classified as an habitual offender despite the absence of qualifying predicate convictions. *See Williams v. State*, 16 F.L.W. D2711 (Fla. 1st DCA October 21, 1991), in which the court held that, even if a