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IN THE SUPREME COURT OF FLORIDA

THOMAS ASHLEY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 79,159

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY, FLORIDA

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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IN THE SUPREME COURT OF FLORIDA

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~~STATEMENT OF THE CASE AND FACTS~~

Petitioner **was** charged by Information with Battery on a Correctional Officer, a Third Degree Felony. (R 21)

On July 24, 1990, Petitioner entered a **plea** of no contest to the charge. **(R** 2-3) There **was** some discussion of where Petitioner would fall within the sentencing guidelines ranges. The Assistant State Attorney stated she would try to have a scoresheet prepared within a few days. **(R** *3-5)* The court accepted Appellant's plea as voluntary. **(R 9)**

Three days <u>after</u> Petitioner entered his plea the State filed a notice of its intention to seek enhanced punishment pursuant to the habitual felony offender statute. (R 41)

On October 31, 1990, Petitioner was sentenced to six years in prison as an habitual felony offender. **(R** 17-18,60-63) Petition filed a timely Notice of Appeal pro se. **(R 67)** Later the Public Defender's Office filed an amended notice. **(R 79)**

Petitioner was adjudged insolvent and the Office of the Public Defender was appointed for purposes of appeal. (R 78)

On appeal Petitioner argued that his habitual offender sentence was illegal because the enhancement statute requires that written notice be served before the entry of a plea. The District Court noted that Petitioner's position was supported by Inmon v. State, 383 So.2d 1103 (Fla. 2d DCA 1980), review denied, 389 So.2d 1111 (Fla. 1980). However the Fifth District Court disagreed, "based on a literal reading of the statute and on the basis of common sense." The District Court held that notice was timely if served a sufficient time prior to sentencing. The District Court certified conflict with Inmon v. State. This brief follows.

SUMMARY OF ARGUMENT

Petitioner argues herein that if the State intends to seek enhanced punishment against an accused it must file written notice of such intent. In a situation where an accused enters a plea of guilty to charges, such notice must be filed prior to the entry of the plea. Petitioner's position is supported both by the language of the statute and by policy considerations.

ARGUMENT

THE TRIAL COURT ERRED IN SENTENCING PETITIONER AS A HABITUAL OFFENDER WHERE THE STATE FAILED TO FILE ITS NOTICE OF INTENTION TO SEEK ENHANCEMENT PRIOR TO THE ENTRY OF PETITIONER'S NOLO CONTENDERE PLEA.

Petitioner entered his no contest plea on July 24, 1990. At the time he entered the plea there was absolutely no discussion of the habitual offender statute. To the contrary, there was much discussion of where Petitioner would fall within the sentencing guidelines system. The first mention of enhanced punishment came three days after the plea hearing when the State filed its written notice. (R 41) Petitioner was later sentenced as an habitual offender to six years in prison. (R 60-63)

Section 775.084, Florida Statutes (1989), is the habitual offender statute. Subsection (3)(b) provides:

> Written notice shall be served on the defendant and his attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence so as to allow the preparation of a submission on behalf of the defendant.

In the District court Petitioner argued that habitual offender notice was untimely in his case because the above quoted statute requires notice be given "prior to the entry of a plea." Petitioner pointed out that any other construction of the statute would render the phrase "prior to the entry of a plea" absolutely meaningless.

In its Answer Brief the State obviously chose to

emphasize a different portion of the statute -- that is that notice must be served "a sufficient time prior to the entry of a plea or prior to the imposition of a sentence so to allow the preparation of a submission on behalf of the defendant." The State points out that if the purpose of notice is to allow preparation of a submission for sentencing, than there is no need for notice prior to a plea.

The question to be decided is clearly one of statutory interpretation. Petitioner concedes that both parties can find support for their positions in the portions of the statutory language which they choose to emphasize. The language chosen by the Legislature is not clear enough to exclude either possibility. Nevertheless Petitioner contends that the Court should adopt his construction, for the following reasons:

First, because the law requires that courts resolve doubt or ambiguity regarding a criminal statute in favor of the accused. State v. Jackson, 526 So.2d 58 (Fla. 1988). Criminal statutes must be strictly construed. Perkins v. State, 576 So.2d 1310 (Fla. 1991).

Second, in construing a statute, a court is obliged to give meaning to **all** words chosen by the Legislature in enacting the statute. Atlantic C.L.R. Company v. **Boyd,** 102 So.2d 709 (Fla. 1958). The Court must presume that the Legislature intended every part of a statute for a purpose. Alexander v. Booth, 56 So.2d 716 (Fla. 1952). The construction urged by the State renders portions of the statute meaningless.

Next, requiring notice prior to entry of a plea is the better policy, because a plea should not be entered without a criminal defendant being aware of its true meaning and consequences. The Fifth District Court held that the trial court was under no obligation to advise Petitioner of the possibility of enhancement at the time of his plea because habitual offender treatment was a "collateral consequence of the plea." However the District Court overlooked the fact that the existing Rules of Criminal Procedure already require specific notice of the maximum possible penalty provided by law before a court may accept a plea of guilty or nolo contendere. Brown v. State, 585 So.2d 350 (Fla. 4th DCA 1991). Fla.R.Crim.P. 3.172(c)(i). In Petitioner's case at the time of his plea he was told the maximum possible term was five years when in fact he was sentenced to six years. (R 39,64) The Criminal Rules already require notice of the possibility of habitual offender sentencing prior to the entry of a plea. The statute requiring written notice should be interpreted consistently with the Rules.

Finally, the construction Petitioner advances should cause no hardship for the State. One would assume that before an Assistant State Attorney could be in a position to enter into a plea agreement he or she would have to know enough about the defendant and the case to know whether habitual offender sentencing is at least a possibility. There is simply no good reason to accept the State's position when Petitioner's argument is supported by one interpretation of the statutory language and

is clearly the better policy.

The decision of the Fifth District Court of Appeal should be reversed and Petitioner should be ordered resentenced within the guidelines.

CONCLUSION

BASED UPON the foregoing arguments and the authorities cited herein, Petitioner respectfully requests that the decision of the Fifth District Court of Appeal be reversed and that he be ordered resentenced within the guidelines.

Respectfully submitted,

JAMES B. GIBSON
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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, 210 N. Palmetto Ave., Suite 447, Daytona Beach, FL 32114 via his basket at the Fifth District Court of Appeal and mailed to: Mr. Thomas Ashley, #E-084214, P.O. Box 667, Bushnell, FL 33513, this 28th day of January, 1992.

DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

THOMAS ASHLEY, Petitioner,	)	
vs.	)	CASE NO. 79,159
STATE OF FLORIDA, Respondent.	)	

A P P E N D I X

Ashley v. State
16 FLW D2971 (Fla. 5th DCA November 29, 1991)

JAMES B. GIBSON
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wife or widow of Richard E. Cameron in and to real, personal and mixed property owned by Richard E. Cameron at the present time or to be acquired by him in the future. (emphasis supplied).

Paragraph 3 deals with the former wife's claims as a widow to dower, homestead and a share of Richard's estate, if he died before her. Paragraph 7 specifically covers termination of the marital relationship by a dissolution. It provides:

A. Each agrees that the other may keep and retain what was his or her own property before marriage, and each agrees to execute, in favor of the other, such quitclaim deeds or other release or conveyance as may be required to carry out the purposes hereof. (emphasis supplied)

B. Richard Cameron will absorb any expenses in relation to alterations to the residence incurred by the parties.

C. Each party hereto expressly relinquishes any claim for alimony or support, each against the other.

The record in this case discloses that at the time the parties entered into the prenuptial agreement, Richard had assets totalling $403,504.50 and Phyllis' assets totalled $40,750. Their marriage lasted approximately ten years. Each had been previously married and had children by prior marriages. At the time of the dissolution, Phyllis was sixty years old and Richard was forty-nine years old.

During the marriage, Phyllis left her former employment as a loan officer with a bank, primarily because Richard was a longtime customer of the bank and the bank management thought her continued employment after their marriage would be improper. She began her own real estate company, and enjoyed financial success while Richard's various businesses used her firm as a listing broker, However, in the final year of marriage, when their business as well as marital relationship was ending, her salary from her real estate business was minimal—$7,844 for the first five months of 1989, and its future financial success was uncertain.

During the marriage, Richard's plumbing business (Cameron Brothers Plumbing Co., Inc.) did well. Its value grew from $100,000 to $260,000. A nursery business, Cameron Creek Farms, grew to $65,000 in value. Other real property investments prospered. Richard's total worth at the time of dissolution was approximately 1.1 to 1.5 million dollars. Although his plumbing business income dropped in 1989, he still received $1,600 per week from salary, and rental and mortgage income from various real estate investments.

The parties kept their various business incomes separate, but they engaged in a series of successful real estate investments. The pattern was to acquire unimproved properties by refinancing and borrowing on others. Then, they improved the property and either rented or sold them. The newly acquired properties were sometimes put into the parties' joint names, and sometimes were left in Richard's or (in one instance) Phyllis' sole name. Both parties signed mortgage notes and deeds on all the properties being financed or leveraged. Richard testified this was required by the lenders.

The mortgage and other payments were primarily paid out of Richard's earnings, or other real estate sources (*i.e.*, rentals and additional loans). Phyllis testified she advised Richard concerning what property to acquire, and how to make the most out of their investments. She also worked in the plumbing business, and helped to manage and rent the rental properties. Many properties had been acquired, financed, sold, and the proceeds reinvested in other properties during the marriage. Neither party tried to trace the source of any except a few properties Richard had owned before marriage.

Essentially, the trial court first interpreted the prenuptial agreement and then applied it to these parties' ten years of complex dealings with a myriad of real estate investments and acquisitions. It concluded that the prenuptial agreement (based on the former wife's testimony and the ambiguity of the prenuptial agreement) did not encompass marital assets acquired *after* the parties' marriage. Paragraph 7 speaks only of shielding from the other party his or her assets owned *prior* to marriage.[1] Phyllis testified she understood the primary point of the agreement was to set aside and shield Richard's then successful plumbing company. She thought she would be entitled to share in the success of the real estate investments they engaged in after their marriage. This appears to be a plausible interpretation of this agreement, based on this record, and as an appellate court we should affirm. *Neale v. Neale*, 360 So.2d 440 (Fla. 3d DCA 1978), *cert. denied*, 368 So.2d 1371 (Fla. 1979).

Phyllis argues that the trial court erred by not equitably distributing all the parties' marital assets: specifically, the appreciation in value of Richard's businesses, in real estate owned prior to marriage, and in the Orange Blossom Trail property, which was owned by Richard's plumbing company prior to marriage, and upon which the parties constructed an office building. We cannot say the trial court erred in this regard. All of these properties were owned by Richard prior to marriage, or by his solely owned corporation. If paragraph 7A. is to effectively shield such properties from Phyllis' claims, it must also include any appreciation in value.

Richard argues none of the properties acquired after the parties' marriage either in joint names or in one party's sole name should be subject to equitable distribution, although they were admittedly acquired and improved with marital funds, and marital work efforts. In categorizing property as a marital asset, it really does not matter which spouse's income or work efforts were involved in its acquisition. *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980); *Webb v. Webb*, 498 So.2d 1059 (Fla. 5th DCA 1986).

As explained above, the trial court's interpretation of the prenuptial agreement appears to be a reasonable one. Applying that interpretation, the court distributed one-half of the properties acquired after marriage with marital income and work efforts, to Phyllis, and one-half to Richard. This appears to be an "equitable distribution" and neither party argues it was not, *Kittinger v. Kittinger*, 582 So.2d 139 (Fla. 5th DCA 1991); *Mahaffey v. Mahaffey*, 401 So.2d 1372 (Fla. 5th DCA 1981).

We find no error in the trial court's partial award of attorney's fees and costs and find that it was also within the trial court's discretion.

AFFIRMED. (HARRIS and PETERSON, JJ., concur,)

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[1] At the time the parties married, in April of 1979, the concept of equitable distribution was being developed, but had not yet been formally pronounced, in Florida case law. Since his dissolution proceeding was filed in February of 1988, the equitable distribution statute (effective October 1, 1988) would not be applicable, and the case is governed by Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980) and its progeny.

* * *

Criminal law—Sentencing—Habitual offender—No error in failing to serve defendant with written notice of intent to seek habitual offender sentence prior to entry of nolo contendere plea—Conflict certified—Notice issue waived for appeal by failure to object

THOMAS ASHLEY, Appellant, v. STATE OF **FLORIDA**, Appellee. 5th District. Case No. 90-2500. Opinion filed November 29, 1991. Appeal from the Circuit Court for Orange County, Jeffords D. Miller, Judge. James B. Gibson Public Defender, and Daniel J. Schafer, Assistant Public Defender, Dayton:, Bench, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellee.

(**COBB**, J.) Appellant, Thomas Ashley, was convicted of batter) on an officer and sentenced as a habitual felony offender to six years incarceration. On appeal, Ashley claims that the state untimely served its written notice of intent to seek a habitual offender sentence, contending that a notice to enhance punishment must be filed *prior* to the entry of a plea to ensure that a defendant knowingly and intelligently entered such plea. In the instant case.

Ashley pled nolo contendere to the battery charge, but was not given any guarantee regarding a possible sentence. Ashley did not receive written notice of the state's intent to "habitualize" prior to the entry of the nolo plea, but received the requisite notice three days after the nolo plea. Ashley was served with written notice on July 27, 1990, and sentenced on October 31, 1990, approximately three months later.

Section 775.084(3)(b), Florida Statutes (1989) reads as follows:

> Written notice shall be served on the defendant and his attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence so as to allow the preparation of a submission on behalf of the defendant.

The Second District Court of Appeal has interpreted the above provision to mean that written notice must be served before a defendant enters a plea of guilty or nolo contendere, or in the event of a not guilty plea, prior to the imposition of sentence. *See Inmon v. State, 383* So.2d 1103 (Fla. 2d DCA 1980), *review denied,* 389 So.2d 1111 (Fla. 1980).

We disagree, based on a literal reading of the statute and on the basis of common sense. The "submission on behalf of the defendant" is relevant to the sentence, but normally has no bearing on the entry of a plea. Here, the trial court was under no obligation to advise Ashley of the enhancement at the time of the plea (collateral consequence of the plea). *Scott v. State,* 550 So.2d 111 (Fla. 4th DCA 1989); *Blackshear v. State,* 455 So.2d *555,556* (Fla. 1st DCA 1984); *Zambuto v. State,* 413 So.2d 461, 462 (Fla. 4th DCA 1982). Hence, there was no concomitant duty to serve notice *prior* to entry of the plea. *Compare Brown v. State,* 585 So.2d 350 (Fla. 4th DCA 1991). We certify conflict with the second district opinion *Inmon, supra,* in regard to this issue.

[redacted] additional basis for affirmance of the instant appeal, we find there was a waiver of the notice issue by the defendant's failure to raise any objection in that regard at the trial level. Whether a defendant receives written notice a sufficient time prior to sentencing requires a factual resolution by the trial court. *See Dailey v. State,* 488 So.2d *532* (Fla. 1986) (where sentencing court fails to make affirmative findings required by law, error may be raised on appeal without contemporaneous objection, but sentencing issues which involve factual questions require a contemporaneous objection to be preserved); *State v. Rhoden,* 448 So.2d 1013 (Fla. 1984).

AFFIRMED. (GOSHORN, C.J., concurs. DIAMANTIS, J., concurs in result only with opinion.)

(DIAMANTIS, J., concurring in result only.) I concur in the result of the majority opinion. I would also certify conflict with *Inmon v. State,* 383 So.2d 1103 (Fla. 2d DCA), *rev. denied,* 389 So.2d 1111 (Fla. 1980).

* * *

Criminal law—Driving under influence—Sentencing—Sentence of one year in county jail exceeds statutory maximum of six months in jail for second degree misdemeanor of simple DUI—Where charging document fails to allege any property damage caused by the DUI, defendant may not be sentenced for first degree misdemeanor based on allegations contained in other counts that defendant's DUI caused damage to two vehicles

DONALD ANTHONY LEONE, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 91-289. Opinion filed November 29, 1991. Appeal from the Circuit Court for St. Johns County, Richard O. Watson, Judge. James B. Gibson, Public Defender, and Noel A. Pelella, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Bonnie Jean Parrish, Assistant Attorney General, Daytona Beach, for Appellee.

(COWART, J.) This is another case that results from an accusatorial pleading of a DUI charge under section 316.193, Florida Statutes, so vague, indistinct and indefinite as to leave, after conviction, a substantial question as to the level or degree of the offense for which the defendant can be sentenced. Section 316.193(1), Florida Statutes, makes it a criminal offense for a person to drive or be in actual physical control of a vehicle while under the effect of alcohol or certain other chemicals to the extent that his normal faculties are impaired. Section 316.193(2), Florida Statutes, provides for three levels of punishment as a misdemeanor and one level as a felony depending upon the number of prior convictions for the same offense; while section 316.193(3) also provides for three levels of punishment (one for misdemeanor and two for felony) depending on whether the DUI caused (c)1. damage to property or injury to a person, (c)2. serious bodily injury to another, or (c)3. death of a human being.

The relevant count in the information in this case is as follows:

> *CHARGE:* DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOLIC BEVERAGES OR CONTROLLED SUBSTANCE, in Violation of F. S. 316.193
>
> *SPECIFICATIONS OF CHARGE* In that DONALD ANTHONY LEONE, on or about July 29, 1990, in St. Johns County, Florida, did then and there drive or be in actual physical control of a motor vehicle while under the influence of an alcoholic beverage, or any chemical substance set forth in F.S. 877.111, or any substance controlled under Chapter 893, and was affected to the extent that his normal faculties were impaired or while he had a blood alcohol level of 0.10 percent or higher.

The defendant pled nolo contendere to this charge. Based on a guidelines scoresheet the defendant was sentenced to confinement for one year in county jail on the DUI charge. The defendant appeals and argues that he was only charged with, and pleaded to, simple DUI and that there is no pleading, evidence or assertion that he had prior DUI convictions' and therefore the statutory maximum sentence for the offense under section 316.193(2)(a)2.a., Florida Statutes, is imprisonment for not more than six months, and therefore, his sentence of one year in county jail is unlawful as exceeding the statutory maximum. The State argues that the defendant's DUI caused damage to two vehicles and therefore, under section 316.193(3)(c)1., Florida Statutes, he was guilty of a first degree misdemeanor, punishable under section 775.082(4)(a) by imprisonment not exceeding one year.[3]

Count II of the charging document alleging this DUI offense contains no factual allegation of damage to property as is necessary (1) to allege an offense punishable as a first degree misdemeanor under section 316.193(3)(c)1., Florida Statutes, (2) to invoke the subject matter jurisdiction of the court as to that offense, (3) as to comply with due process (Art. 1 § 9, Fla. Const.), (4) as to inform the accused of the nature and cause of the accusation against him as required under Article 1, Section 16, Florida Constitution, or (5) to comply with Florida Rule of Criminal Procedure 3.140(d)(1), which provides that:

> Each count of an indictment or information upon which the defendant is to be tried shall allege the essential facts constituting the offense charged.

The statutory offense of DUI causing property damage (§ 316.193(3)(c)1., Fla. Stat.), involves a substantive offense separate from a simple DUI punishable under sections 316.193(2)(a)1.a. and 2.a. *See generally State v. Rodriguez,* 575 So.2d 1262 (Fla. 1991). It is only the allegation that the DUI caused property damage which makes this offense a first degree misdemeanor. The failure of the charging document to allege property damage caused by the DUI means that the defendant was charged with, and pleaded to, only a simple DUI, a second degree misdemeanor, punishable by a maximum of six months in jail. The State's argument that the other counts of the information can be used to supply the allegations omitted from the DUI count is incorrect, *Colwell v. State,* 448 So.2d 540 (Fla. 5th DCA 1984).

The defendant's sentence of one year imprisonment under Count 2 of Case Number CF90-1632 in the circuit court in St. Johns County, Florida, is vacated, and the cause remanded for