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IN THE SUPREME COURT OF FLORIDA

THOMAS ASHLEY,

Petitioner,

v. CASE NO. 79,159

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Appellee accepts Appellant's Statement of the Case and Facts with the additions as noted in the argument portion of this brief.

SUMMARY OF ARGUMENT

The language of Section 775.084(3)(b), Florida Statutes (1989), is quite clear. The State shall serve its notice of intention to seek an enhanced sentence a sufficient time prior to the entry of the plea or the imposition of the sentence to allow the defendant to prepare submissions an his own behalf. In the instant case, Petitioner was given notice three months prior to sentencing and had more than ample opportunity to prepare any submissions on his own behalf as to why such enhancement would be inappropriate.

As noted in the Fifth District's opinion, Petitioner waived any defect in the notice by failing to make any objection to it at the trial court level.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN SENTENCING PETITIONER AS AN HABITUAL FELONY OFFENDER WHERE THE STATE GAVE HIM WRITTEN NOTICE OF ITS INTENTION TO SEEK ENHANCEMENT THREE MONTHS PRIOR TO THE IMPOSITION OF SENTENCE.

In the Fifth District's opinion in the case sub judice, the Court certified conflict with the decision of the Second District in Inmon v. State, 383 So.2d 1103 (Fla. 2d DCA 1980); review denied 389 So.2d 1111 (Fla. 1980). That case dealt with the number of peremptory challenges to which a defendant is entitled, when he receives notice prior to trial of the State's intention to seek an enhanced sentence pursuant to Section 775.084, Florida Statutes. The instant case has nothing to do with peremptory challenges, but did deal with the issue of whether written notice of the State's intention to seek an enhanced penalty under the Habitual Offender Statute, Section 775.084, Florida Statutes (1989), must be given prior to the entry of a nolo contendere plea.

By way of dicta, the Second District said:

> We interpret this provision (Section 775.084(3)(b)) to mean that the State shall serve notice on the defendant either before he enters a plea of guilty or nolo contendere, or, in the event he enters a plea of not guilty and submits to trial, prior to the imposition of sentence. Id. at 1104.

The Fifth District said:

> 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 the plea.

In the instant case, Petitioner entered his plea of nolo contendere to battery an a law enforcement officer without being given any guarantees regarding the sentence which would be imposed. At the plea hearing, the defense attorney said that there had been no negotiations and that Petitioner was pleading "straight up". (Appendix I p.2-3). Three days after his plea, he received the requisite notice. He was given over three months between the time he was served with the written notice and the sentencing date within which to prepare submissions on his behalf.

At sentencing, Petitioner agreed that he met the statutory definition of an habitual offender, but asked for leniency. At the sentencing, it was noted that Petitioner had eleven prior felony convictions from 1979, 1980, 1981, 1984, 1985, 1987, 1988 and 1989. Defense counsel simply asked the Court to sentence Petitioner to a guidelines sentence. (Appendix II p.16). Under the guidelines, Petitioner scored 202 points for a permitted sentencing range of up to seven years incarceration. (Appendix V.) Without finding Petitioner to be an habitual felony offender, the statutory maximum penalty for the offense charged would have been five years incarceration. The Court imposed what amounted to a guidelines sentence, six years incarceration with credit for 213 days time served, with the finding that Petitioner is an habitual felony offender. (Appendix IV). It could have imposed up to ten years incarceration under Section

775.084(4)( )3, Florida St tutes. The Court wished Petitioner luck and defense counsel thanked the judge. There was no objection based upon the timing of the notice or based on anything else for that matter. (Appendix II p.18). As the Fifth District Court of Appeal pointed out, this failure to object on an issue requiring a factual determination constitutes a waiver and would of itself form a valid basis for affirmance.

Petitioner's appellate counsel argued that the State should have given Petitioner notice of its intention to seek an enhanced penalty, even though the plea was made directly to the Court without any negotiations and prior to the calculation of any guidelines scoresheet. The prosecutor stated at the time of the plea that she had no idea where Petitioner would come out under the guidelines. When asked by the Court what sort of record Petitioner had, the defense counsel incorrectly advised the Court that Petitioner had four prior felony convictions. (Appendix I p.3). Three days after the plea, after having had an opportunity to review Petitioner's record and calculate his scoresheet, the State provided the written notice required under Section 775.084(3)(b), Florida Statutes (1989). (Appendix 111).

Had this plea been the product of negotiations between the State and the defense, Petitioner's argument that the written notice should have been given prior to the formal entry of that plea would have been more reasonable. However, where a defendant enters a plea "straight up" without prior notification to the State, the prosecutor is not in a position to even know whether enhancement is appropriate, never mind have the written notice already prepared.

In Inmon, the Second District said that if the defendant submits to a trial and is convicted, the State shall serve the notice prior to the imposition of sentence. In that situation, the prosecutor is in a better position to provide notice of his intention to seek enhancement than under the circumstances of the instant case. By the time a case has reached the trial phase, the prosecutor is normally aware of the defendant's record and should have a pretty good idea whether or not enhancement is appropriate.

In the instant case, the trial court accepted the plea and the matter of the appropriate sentence was left up in the air. The judge did not get into a discussion of the possibility of an habitual offender sentence. It seems clear that neither he nor the prosecutor knew at that point whether Petitioner warranted such an enhanced penalty. In Zambuto v. State, 413 So.2d 461, 462-463 (Fla. 4th DCA 1982), the Fourth District indicated that the judge is not under any obligation to advise the defendant of the possibility of enhancement, since that is a collateral consequence of his plea. In Brown v. State, 585 So.2d 350 (Fla. 4th DCA 1991), cited by Petitioner, the Fourth District distinguished the situation in that case from its decision in Zambuto. The Court said that a life sentence under the habitual offender statute means life without the possibility of parole. This fact has a definite, immediate and automatic effect on the range of the defendant's punishment and is therefore a direct consequence of the plea. The Court went on to state that:

> ...all the parties were apparently unaware at the time appellant changed his plea from not guilty to guilty that a life sentence under the habitual offender statute meant life imprisonment without the possibility of parole, or early release, as opposed to, for example, life imprisonment with a mandatory minimum of a term of years. Id. at 354.

In the instant case, the fact that Petitioner was found to be an habitual felony offender did not have the same direct and automatic effect as in Brown. The trial court used its sentencing discretion to impose on Petitioner what amounted to a guidelines sentence despite Petitioner's well-earned designation as an habitual felony offender.

The purpose for the written notice required under Section 775.084(3)(b), Florida Statutes (1989), is "...to allow the preparation of a submission on behalf of the defendant." Petitioner was given three months to prepare that submission. His explanation of the incident moved the Court to show leniency, despite Petitioner's lengthy criminal history. The notice was timely and adequate given the circumstances of this case and the submission on behalf of the Petitioner successfully resulted in what amounts to a guidelines sentence. The decision of the Fifth District Court of Appeal in the case sub judice should be approved based upon the practicalities of the case, a literal reading of the statute and on the basis of common sense.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this honorable court adopt the decision of the Fifth District Court in the case subjudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been sent to Daniel J. Schafer, Esquire, Office of the Public Defender, counsel for Petitioner, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32114, this 14th day of February, 1992.

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