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IN THE SUPREME COURT OF FLORIDA

HAMPTON ALONZO CORRY,

Petitioner,

v. CASE NO. 80,173

STATE OF FLORIDA,

Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL

FIFTH DISTRICT

RESPONDENT'S MERITS BRIEF

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STATEMENT F THE CASE AND FACTS

The respondent accepts the Statement of the Case and Facts set out in the petitioner's Merits Brief, with the following additions:

The petitioner, Hampton Alonzo Corry, was charged on December 30, 1988, in case no. CR88-9227 (Volusia County), with three counts of sale or delivery of cocaine and two counts of possession of cocaine. (R 15-6) On April 11, 1989, Mr. Corry entered pleas of nolo contendere to Counts I and 111, bath charging sale or delivery. (R 15, 21) The State filed a nolle prosequi as to the remaining three charges. (R 4, 26) The record does not include the April, 1989 plea colloquy or a written plea; the record does not disclose any details of the plea agreement.

Mr. Corry was originally sentenced in this case, on April 11, 1989, to a probationary split sentence of five and a half years' incarceration, to be followed by two years' probation, on each of Counts I and III of case no. CR88-9227 (Volusia County), to run concurrently. (R 21-5, 27-9)

Mr. Carry was found guilty on September 12, 1991 of violating his probation in case no. *88-9227.* (R 3)[1] At resentencing on December 12, 1991, the court and parties noted on the record that the State had filed a Notice of Intent to Seek Habitual Offender Sentencing in 88-9227 and in another of Mr.

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[1] Petitioner states in his merits brief that he was released from DOC on May 13, 1990. (Merits brief at 2) He was found guilty of failing ta report to his probation officer in July and August, 1990. (R 51)

Corry's cases, no. **91-1732**, on May **8, 1991. (R** 6)[2] **At** the resentencing hearing in this case, the State introduced certified copies of two of Mr. Corry's prior felony convictions, from 1987 and 1985 **respectively.** (R **5-6, 41-2, 46-7)** The sentencing guidelines scoresheet in the record on appeal shows a number of additional felony convictions. (R **60-1)** Defense counsel **conceded** at resentencing that Mr. Corry qualified as a habitual offender and that the scoresheet is correct. (R 6, 8, ***5)*** The defense did not object at resentencing to habitual offender treatment; the defense did file an Amended Motion to Correct Sentence on January 9, 1992 in the trial court arguing that the habitual **offender** sentence violated the rule of Lambert v. State, 545 So. 2d **838 (Fla. 1989). (R** 66-7)[3]

The trial judge, the Honorable Gayle **S.** Graziano, entered an order revoking Petitioner's probation in **88-9227** and resentencing him on Count I to fifteen years' incarceration as a habitual offender, with credit for all time previously served, and on Count III to ten years' incarceration as **a** habitual offender, with credit for all time previously served, to be served consecutively. (R 8-9, 51-9)

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[2] Case no. **91-1732** is **a** possession of cocaine charge which **arose** at the time Mr. Corry was arrested for violating his probation in **88-9227.** (Appellant's Initial Brief, attached to this brief as Appendix **A,** at **3-4;** R 32)

[3] The defense filed its notice of appeal from the resentencing order before the Motion to Correct Sentence was ruled on, and did not obtain an order from the trial court on **the** issue whether the habitual offender sentence was proper. (R **68,** Appendices **D** and E to this brief)

On appeal to the Fifth District Court of Appeal, the petitioner argued that his sentence was an illegal departure from the sentencing guidelines, citing Rule 3.701(d)(14), Florida Rules of Criminal Procedure, and Lambert v. State, 545 So. 2d 838 (Fla. 1989).[4] The District Court of Appeal affirmed the conviction, without opinion but with a citation to its earlier decision in Snead v. State, 598 So. 2d 316 (Fla. 5th DCA 1992), rev. granted no. 80,067 (Fla. 1992). Corry v. State, 599 So. 2d 290 (Fla. 5th DCA 1992).

[4] The briefs filed on direct appeal are attached to this brief as Appendices A-C.

SUMMARY OF ARGUMENT

The State submits that the district court's decision in this case, and in Snead v. State, 598 So. 2d 316 (Fla. 5th DCA 1992), rev. granted no. 80,067 (Fla. 1992), should be affirmed. This court's previous decisions construing the sentencing guidelines rules do not preclude habitual offender sentencing after a violation of probation. The habitual offender statute takes all habitual offender sentencing outside the operation of the guidelines altogether.

The State acknowledges that Mr. Corry was not given written notice, prior to his original plea--which resulted in a probationary split sentence pursuant to the guidelines--that the State would seek habitual offender sentencing. The issue whether written notice must in all be cases be given before entry of a nolo contendere or guilty plea is pending in Ashley v. State, no. 79,159. If this court quashes the Fifth District's decision in Ashley, the State requests this court to remand this case so that it can show that failure to give the statutory notice before Mr. Corry entered his plea was harmless.

If this court approves the district court's decision in Ashley, the State submits that the petitioner has not shown that he is entitled to any relief from the resentencing order. Petitioner has never asserted that his original nolo contendere plea was induced by the promise of a guidelines sentence. In any event, the results of violating probation are collateral, rather than direct, consequences of entering a guilty or nolo contendere plea.

ARGUMENT

THE TRIAL COURT CORRECTLY SENTENCED THE PETITIONER AS A HABITUAL FELONY OFFENDER AFTER HE VIOLATED THE TERMS OF HIS PROBATION.

The petitioner argues that the decision of the Fifth District Court of Appeal in this case should be reversed. The State submits that the district court's decision in this case, and in Snead v. State, 598 So. 2d 316 (Fla. 5th DCA 1992), rev. granted no. 80,067 (Fla. 1992), should be affirmed.

In Snead, the Fifth District certified conflict with the Fourth District's decision in Scott v. State, 550 So. 2d 111 (Fla. 4th DCA 1989), rev. denied 560 So. 2d 235 (Fla. 1990). In Scott, the defendant pleaded guilty to a second-degree felony, and was specifically advised that if he violated his probation, he could be sentenced up to the fifteen-year statutary maximum. 550 So. 2d at 111. Neither the trial court nor the state referred to the habitual offender statute at Scott's original sentencing, Id. After he violated probation, Scott was sentenced a5 a habitual offender. On appeal, the Fourth District Court of Appeal held that it would have affirmed the sentence were it not for this court's recent decision in Lambert v. State, 545 So. 2d 838 (Fla. 1989). Scott at 112.

In Snead v. State, on facts very similar to those in Scott, the Fifth District held that this court's decision in Williams v. State, 581 So. 2d 144 (Fla. 1991) established that Lambert does not preclude a habitual offender sentence after a violation of probation. ("VOP") Snead, 598 So. 2d at 317. Lambert stands for

the rule that on resentencing after a VOP, the trial courts may not depart upward from the sentencing guidelines except to the extent of the one-cell "bump" permitted by Rule 3.701(d)(14), Florida Rules of Criminal Procedure.' In Williams, supra, 581 So. 2d 144, this court held that a departure sentence may be imposed after a VOP provided the reasons for departure predate the original grant of probation, for two reasons: first, because the "double dipping" problem noted in Lambert does not arise when the departure reason predates the probation, and second, to avoid a deterrent effect on probation. 581 So. 2d at 146.

The State submits that Snead is correct, and that the petitioner's habitual offender sentence should be affirmed. For the reasons set out above, Lambert does not control. The State acknowledges that Rule 3.701(d)(14), Florida Rules of Criminal Procedure, states without qualification that

> [s]entences imposed after revocation of probation or community control must be in accordance with the guidelines.

However, Section 775.084(4)(e), Florida Statutes (1988 supp.) provides, also without qualification, that sentences imposed pursuant to the habitual offender statute are not subject to the sentencing guidelines. The State submits that to the extent the statute conflicts with 3.701(d)(14), the statute controls.

Lambert has, of course, been modified in Williams v. State, 594 So. 2d 273 (Fla. 1992), to permit more than one "bump" to correspond with more than one sequential probation violation.

The portion of 3.701(d)(14) set out above was approved as an addition to that rule by this court, without comment, in 1984. The Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988--Sentencing Guidelines), 451 So. 2d 824 (Fla. 1984). The Legislature enacted this court's 1984 proposed change to 3.701(d)(14), also without comment, in Chapter 84-328, § 1, at 1772, Laws of Florida. The portion of Section 775.084(4)(e) described above was added to the statute by Chapter 88-131, § 6, at 709, Laws of Florida. When statutes conflict, the most recent expression of the Legislature's intent prevails. E.g., State v. Parsons, 569 So. 2d 437, 438 (Fla. 1990); State v. Dunmann, 427 So. 2d 166, 168 (Fla. 1983).

Moreover, as this court stated in Burdick v. State, 594 So. 2d 267 (Fla. 1992), by passing the 1988 amendment to Section 775.084 "the legislature was saying that the sentencing guidelines were no longer a limitation on habitual offender sentencing, regardless of the sentence imposed." 594 *So.* 2d at 270. It is highly improbable that the Legislature meant, by passing the 1988 amendment, to exempt all habitual offender sentences from the guidelines, *except* those imposed on defendants who are given a last chance on probation and who fail to comply with the conditions agreed to. See Dunmann, supra, 427 So. 2d at 168 (Legislature's apparent intentions are to guide courts in determining whether earlier statute repealed by implication).

The habitual offender statute also provides that

> 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.

Section 775.084(3)(b), Florida Statutes (1991). The issue whether the statutory notice is untimely if given after the defendant enters his plea, but before sentencing, is pending in Ashley v State, no. 79,159. The State submits that the Fifth District Court's decision in Ashley v. State, 590 So. 2d 27 (Fla. 5th DCA 1991), is correct, and that the statute requires only sufficient notice for the defendant to prepare a submission to be made on his behalf at sentencing. Id. at 28.

In the event this court quashes the district court's decision in Ashley, the State requests this court to remand this case so that it can show that failure to give the statutory notice before Mr. Corry entered his plea was harmless. See Massey v. State, 17 Fla. L. Weekly 723 (Fla. December 3, 1992). The record of this case does not show whether the petitioner was on actual notice, at the time of the original plea, that he could be habitualized if he violated probation; in view of his extensive record, it is not unlikely that he was aware of the fact.

In the event this court approves the district court's decision in Ashley, the State submits that Mr. Cosry has not shown that he is entitled to any relief from the resentencing order. Mr. Corry did not assert or show, at resentencing or on appeal--and does not now assert--that his original nolo contendere plea was induced by the promise of a guidelines sentence.

In any event, the results of violating probation are collateral, rather than direct, consequences of entering a guilty or nolo contendere plea. Even if the petitioner had no actual notice, at the time he entered his plea, that he could be habitualized if he violated his probation, this court's decisions establish that he would be entitled to no relief, In Segarra v. State, 388 So. 2d 1017 (Fla. 1980), the defendant, charged with a second-degree felony, negotiated an agreement to plead guilty in exchange for a five-year cap on possible sentences. Id. at 1017. He received five years' probation, violated the probation, and received a fifteen-year prison sentence. This court quashed the district court's decision reversing the sentence, holding that

> so long as the probation imposed complies with the plea agreement, the court has fulfilled the plea bargain and the violation of probation opens a new chapter in which the court ought to be able to mete out any punishment within the limits prescribed for the crime.

Id. at 1018.

In Bilyou v. State, 404 So. 2d 744 (Fla. 1981), the defendant had negotiated a plea agreement calling for "a cap of ten years probation as a possible sentence." Id. at 744. After he violated probation, Bilyou was sentenced to fifteen years in prison; this court approved the district court's decision affirming the prison sentence, citing the language quoted above from Segarra. 404 So. 2d at 745. The Fourth District Court of Appeal relied on that language in Bilyou and Segarra to hold in

Zambuto v. State, 413 So. 2d 41 (Fla. 4th DCA 1982), that habitual offender sentencing after a VOP is a collateral consequence of entering the initial plea. 413 So. 2d at 463-4. The State submits that Zambuto is correct on this point, and that Mr. Corry's current prison term is the direct consequence of his own failure to comply with the terms of probation.

In his brief on the merits, Mr. Corry asserts that the trial court's resentencing order violated his double jeopardy rights. That contention is incorrect. State v. Payne, 404 So. 2d 1055 (Fla. 1981). Petitioner also argues in his merits brief that this case is distinguishable from Snead v. State, supra, because Snead involved a grant of straight probation and this case involves a probationary split sentence. Snead is not distinguishable on this point; while a true split sentence limits possible prison terms after revocation of probation, neither straight probation nor a probationary split sentence imposes such a limitation. Poore v. State, 531 So. 2d 161, 164 (Fla. 1988).

The position Mr. Corry advocates in this case, like the position advocated by the petitioner in Williams v. State, supra, would have a deterrent effect on probation. See Williams, 581 So. 2d at 146. It would be consistent neither with the Legislature's apparent intentions nor with sound public policy to reverse the Fifth District's decisions in Snead and in this case. The State requests this court to affirm the decision in this case and to approve the opinion issued by the district court in Snead.

CONCLUSION

The Respondent requests this court to approve the decision of the district court of appeal.

If this court quashes the district court's decision in Ashley v. State, 590 So. 2d 27 (Fla. 5th DCA 1991), review pending no. 79,159, and quashes the decision in this case based on Ashley, the State requests this court to remand this case so that it can show that failure to give the statutory notice before Mr. Corry entered his plea was harmless. See Massey v. State, 17 Fla. L. Weekly 723 (Fla. December 3, 1992).

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Merits Brief has been delivered by U.S. Mail to Hampton Alonzo Corry, DOC 8068209, at Sumter Correctional Institution, Dorm D-142B, P.O. Box 667, Bushnell, Florida 33513-0667, this 16th day of January, 1993.

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