IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

RICHARD BLACKWELL,
JESSIE BROWN, II,
DARRYL HOLMES,
ROBERT JONES,
and WILLIE T. THOMPSON,

Respondents.

CASES NO. 84,071
84,176
84,148
84,150
83,951

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

RESPONDENTS' MERITS BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 765910
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

TABLE OF CITATIONS

SUMMARY OF ARGUMENT

Point I: The State argues that the written plea forms that were filed at the time the pleas were entered in these cases, read in combination with transcripts of the plea colloquies, reveal sufficient pre-plea notice of the trial court's intent to consider habitual offender treatment. The District Court correctly held that the notice given in these cases did not comply with this court's decision in Ashley v. State, 614 So. 2d 486 (Fla. 1993). This court's decision and opinion in Ashley are clear and reasonable, and this court has no need to revisit the issues decided in that case.

Even if the Fifth District court had incorrectly applied Ashley in the instant cases, its decisions vacating the sentences would be correct because the trial judge improperly issued his own notice of intent to consider habitual offender treatment. That notice should be given no legal effect, since the Legislature contemplates that the notice required by the habitual offender statute is to be issued only by State Attorney's offices. Also, as one judge has noted, the propriety of habitual offender notice issuing from the trial court is questionable.

Failure to give proper notice pursuant to the habitual offender statute in these cases was not harmless error, and the Fifth District's decisions vacating the respondents' sentences should be affirmed.

Point II: These cases should be remanded to the trial court for resentencing pursuant to the sentencing guidelines.

ARGUMENT

POINT I

THE RESPONDENTS DID NOT RECEIVE PROPER NOTICE OF INTENT TO SEEK HABITUAL OFFENDER TREATMENT BEFORE ENTERING THEIR PLEAS.

A. The trial court did not comply with Ashley v. State.

In each of these consolidated cases, the State neither filed nor announced any notice of intent to seek habitual offender treatment, either before or after the pleas were entered. In each case, the trial judge filed written notice sua sponte, after the pleas were entered, stating his own intent to consider habitual offender treatment. The State argues that the written plea forms that were filed at the time the pleas were entered, read in combination with transcripts of the plea colloquies, reveal sufficient pre-plea notice of the trial court's intent to consider habitual offender treatment. The District Court correctly held that the notice given in these cases did not comply with this court's decision in Ashley v. State, 614 So. 2d 486 (Fla. 1993).

In Ashley, this court held that

> before a court may accept a guilty or nolo plea from an eligible defendant it must ascertain that the defendant is aware of the possibility and reasonable consequences of habitualization. To state the obvious, for a plea to be "knowing," i.e., in order for the defendant to understand the reasonable consequences of his or her plea, the defendant must "know" beforehand that his or her potential sentence may be many times greater what it ordinarily would have been under the guidelines and that he or she will

> have to serve more of it.

614 So. 2d at 489.

> The defendant should be told of his or her eligibility for habitualization, the maximum habitual offender term for the charged offense, [and] the fact that habitualization may affect the possibility of early release through certain programs.

Id. at 490 n.8.

As the District Court correctly held in respondent Thompson's case, if Ashley is to have any meaning the defendant must know before his plea either that the State intends to seek habitual offender treatment *in his case*, or that the court intends on its own to consider habitual offender treatment *in his case*. Thompson v. State, 638 So. 2d 116, 117 (Fla. 5th DCA 1994) (en banc). The plea forms and colloquies in these cases told the respondents only that there exists a habitual offender statute which doubles statutory maximum sentences, and which reduces the amount of gain time available, in those cases where it is used. Id. Accord Holmes v. State, 639 So. 2d 151 (Fla. 5th DCA 1994) (plea form in these cases says only that "should" defendant be habitualized he "could" receive a longer sentence).

In Florida, this court's rules of procedure ensure that "no plea...shall be accepted...without the court first determining ...that the circumstances surrounding the plea reflect a full understanding of the significance of the plea." Rule 3.170(k), Florida Rules of Criminal Procedure. In cases where the State, or the trial court, believes habitual offender treatment is ap-

propriate, the defendant will very likely spend a substantially longer time in prison than he would if he were sentenced under the standard guidelines; accordingly, the significance of a guilty or nolo plea cannot be fully understood unless the defendant knows at the time he enters it whether the State, or the court, believes his record qualifies him for habitual offender treatment. Ashley; Thompson. Accord 3 ABA Standards for Criminal Justice 14-1.4(a)(ii) (2d ed. 1980) ("The court should not accept a plea...without first...determining that the defendant understands...any special circumstances affecting probation or release from incarceration.")

The Legislature, when it passed the current version of the habitual offender statute, required that defendants must receive written notice of intent to pursue habitual offender treatment "prior to the entry of a plea." Section 775.084(3)(b), Florida Statutes (1993). This court's decision in Ashley gives meaning to that language. Disapproving the Fifth District's decisions in these cases would empty Ashley, and that portion of the statute, of any meaning, and the decisions in these cases should accordingly be affirmed.

The State relies on Judge Goshorn's dissent in Thompson, arguing that it is both improper and impossible to decide at the time a plea is entered whether a particular defendant qualifies for habitual offender treatment, since the court must first consider the information in the presentence investigation report required by Section 775.084(3)(a). See Thompson, supra, 638 So. 2d at 118-19 and section 931.231, Florida Statutes. This concern is overstated;

the statutory notice requirement does not put the trial courts in an impossible position. The trial courts do not have to have *all* of the information that appears in a presentence investigation (PSI) before them when they take pleas; the statute does require the State, and the trial courts, to have enough information before entering into or accepting plea bargains to know whether the standard sentencing range, or the substantially more severe habitual-offender sentencing range, is appropriate. In doubtful cases, nothing in the Florida Statutes precludes the trial courts from ordering a PSI before accepting a plea.[1] The State's argument, in effect, is that pleas are routinely taken so early on in the process that neither the State nor the trial courts can be expected to know whether defendants have prior records or not at that point. The State and the courts *can* equip themselves with that much information before a plea is accepted, and the Legislature and this court have reasonably required them to do so. Section 775.084

---

[1]This court in Williams v. State, 316 So. 2d 267 (Fla. 1975), anticipated that PSI's would be available to the trial courts at the time pleas were entered, see 316 So. 2d at 273, and opinions from the district courts indicate that PSI's are, at least in some cases, ordered before pleas are taken. See Smith v. State, 559 So. 2d 1281, 1282 (Fla. 5th DCA 1990) and Shaw v. State, 546 So. 2d 796, 798 (Fla. 1st DCA 1989). The 1994 sentencing guidelines appear to *mandate* pre-plea PSI's, since sentences recommended under that scheme supersede statutory maximum sentences. Compare section 921.001(5), Florida Statutes (1993), with section 775.082(3), Florida Statutes. Without a pre-plea PSI, the trial courts in 1994 cases will be unable to advise defendants what the maximum possible sentence is for their offenses; the Florida Rules of Criminal Procedure, as well as the federal constitution, require that that advice be given in open court before any guilty or no contest plea is taken. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); Rule 3.172(c)(1), Fla.R.Crim.P.

(3)(b); Ashley.

The State also argues that the respondents did not preserve for appeal the point they argued in the district court, since they did not object at sentencing to the late habitual offender notice. The State acknowledges that in Ashley this court held that the timeliness of notice is a sentencing issue that can be determined by the appellate court from the record, and that accordingly no objection in the trial court is necessary to preserve the issue. Ashley, 614 So. 2d at 490; see Taylor v. State, 601 So. 2d 540, 541-2 (Fla. 1992). The State attempts to distinguish Ashley on the basis that the defendant in that case had no notice until sentencing that the State would seek habitual offender treatment, while in this case the defendant was notified between plea and sentencing that the court would consider habitual offender treatment. The distinction is one without a difference; Ashley, like the respondents in the instant cases, could have objected at sentencing but did not waive the issue for appellate consideration by failing to do so, since the issue is one that can be determined from the record. Taylor, supra, 601 So. 2d at 541-2.

The notice given in these cases did not comply with the habitual offender statute or with this court's decision in Ashley, supra. The respondents in this case were notified, before they entered their pleas, only that *one of* Florida's sentencing schemes would be applied in their cases. The District Court correctly vacated the respondents' sentences for that reason, and its decisions in these cases should be affirmed.

B. This court should disregard the State's challenge to Ashley v. State.

The State also argues, with some urgency, that this court should recede from Ashley both because that decision was "erroneous" and because it has confused the trial courts beyond hope of redemption. The burden of the former argument appears to be that federal constitutional caselaw does not mandate the result reached in Ashley. Nothing in Ashley suggests that this court believed it was compelled by federal authority to reach its decision; on the contrary, this court expressly stated that its holding was based on Rule 3.172, Florida Rules of Criminal Procedure, on its own prior caselaw, and on the notice provision in the habitual offender statute. Ashley, 614 So. 2d at 489-90. Boykin v. Alabama, supra, is cited in Ashley for the reasonable principle that a defendant should know the significance of his guilty plea before he enters it. 614 So. 2d at 488; accord Rule 3.170(k), Fla.R.Crim.P.

The State raises the specter of a possible equal protection challenge to Ashley, suggesting that Ashley distinguishes one class of defendants from another unfairly in that only habitual offenders must be notified of the effect control release may have on their sentences. This court dealt with that potential objection in Ashley, noting that the habitual offender statute is used in a significant number of cases and crafting an appropriately general admonition, to the effect that "habitualization may affect the possibility of early release through certain programs." 614 So. 2d at 489, 490 n.8. As the State correctly notes in another context in its brief, it would be impossible to advise every defendant in

detail how each of the control release programs will affect his sentence. (Petitioner's merits brief at 36)

The State also suggests that Ashley should be abandoned or modified because it cannot be reconciled with State v. Ginebra, 511 So. 2d 960 (Fla. 1987). In Ginebra, this court applied the rule that the trial courts are, in general, obliged to notify defendants of only the direct consequences, and not the collateral consequences, of their pleas. The State insists that the total number of months or years pronounced by the trial court at sentencing is the *only* aspect of a prison term that can logically be considered the direct consequence of a plea, and that *all* other aspects of a sentence--no matter how foreseeably those aspects will affect the actual length of time the defendant serves--are and must be referred to as "collateral." Even if this made any sense, the direct/ collateral distinction should not operate as a limitation on what this court can require of the trial courts as a matter of fairness.

What Ashley requires of trial judges is simply that they notify eligible defendants that "habitualization may affect the possibility of early release through certain programs." 614 So. 2d at 490 n.8. This straightforward required statement will not, as the State suggests, lead to confusion every time the Legislature tinkers with the mechanism for releasing prisoners due to overcrowding. Since 1988, although that mechanism has been changed from "administrative gain time" to "provisional release credits" to

"control release,"[2] habitual offenders have occupied substantially the same position vis-a-vis the general prison population: habitual offenders are never awarded the ten days per month basic gain time the general population receives, and habitual offenders have always been either ineligible, or not fully eligible, for the current version of early release for overcrowding. Compare Section 775.084 (4)(e), Florida Statutes (1988 supp.) with Section 775.084 (4)(e), Florida Statutes (1993); see ch. 93-406, s.2, Laws of Florida. This general status is reasonably, and fairly, made known to defendants who are considering plea offers by the language approved in Ashley, and the opinion in Ashley needs no modification on this score.

The State also argues that the opinion in Ashley "has raised as many questions as it answered," suggesting that the opinion is so confusing it should be withdrawn. The State relies on the instant cases and on Horton v. State, 646 So.2d 253 (Fla. 1st DCA 1994), jurisdiction pending no. 84,994 (Fla. 1995); State v. Will, 645 So. 2d 91 (Fla. 3rd DCA 1994); Wilson v. State, 645 So.2d 1042 (Fla. 4th DCA 1994); and Heatley v. State, 636 So. 2d 153 (Fla. 1st DCA), rev. den. no. 83,723 (Fla. September 7, 1994), to make that point. In Will, the Third District held that Ashley should not be applied retroactively. In Horton and Heatley, the First District held--contrary to the instant cases and to the plain wording of Ashley--that as long as a defendant has notice that he may be habitualized he need *not* receive notice of the predictable

---

[2]See Sections 944.276, Florida Statutes (1987); 944.277, Florida Statutes (1988 supp.); 944.278, Florida Statutes (1993); 947.146, Florida Statutes (1993).

consequences of habitualization. In Wilson, the Fourth District held that the proper remedy, when a plea is taken in violation of Ashley, is a remand for a guidelines sentence; the instant cases from the Fifth District hold that the proper remedy is a remand for the defendant to be permitted to withdraw his plea. (See Point II of this brief) These cases do not reveal an inordinate degree of confusion among the trial courts. Horton and Heatley should be quashed, Wilson should be approved, and the instant cases should be approved as to the notice issue and disapproved as to the remedy issue. Ashley itself is abundantly clear, and the State has not shown that it should be withdrawn or amended.

C. The trial court's sua sponte notice of intent to impose habitual offender treatment should be given no legal effect.

Even if the Fifth District court had incorrectly applied Ashley in the instant cases, its decisions vacating the sentences would be correct because the trial judge improperly issued his own notice of intent to consider habitual offender treatment. That notice should be given no legal effect, since the Legislature contemplates that the notice required by Section 775.084(3)(b) is to be issued only by State Attorney's offices. The Fifth District Court of Appeal recently noted that

> [t]he judge's ability to initiate habitual offender treatment has been placed in doubt by the enactment of section 775.08401, Florida Statutes (1993), which requires the "state attorney within each judicial district" to adopt uniform criteria to determine the eligibility requirements in determining which multiple offenders should be pursued as habitual offenders in order to ensure

> "fair and impartial application of the habitual offender statute." It appears that this statute, effective June 17, 1993, may very well have "repealed" Toliver v. State, 605 So. 2d 477 (Fla. 5th DCA 1992), rev. denied 618 So. 2d 212 (Fla. 1993), which permitted the sentencing judge to initiate habitual offender consideration. It now appears that the legislature has determined that it is only the state attorney, in order to ensure "fair and impartial application," who can seek habitual offender treatment of a defendant--and then only if the defendant meets... circuit-wide uniform criteria.

Santoro v. State, 644 So. 2d 585, 586 n.4 (Fla. 5th DCA 1994), jurisdiction accepted no. 84,758 (Fla. February 22, 1995).

Legislative intent is the polestar by which the courts must be guided in construing statutes. State v. Webb, 398 So. 2d 820, 824 (Fla. 1981). The intent of a statute is the law, and that intent should be duly ascertained and effectuated. American Bakeries Company v. Haines City, 180 So. 524, 532 (Fla. 1938). The respondents submit that the Fifth District court has ascertained the Legislature's intention on this point, and that this court should effectuate that intent by affirming the Fifth District's decisions in these consolidated cases.

Also, as one judge has noted, "the wisdom and propriety of [habitual offender] notice issuing from the trial court is...questionable.... The appearance of impartiality of a sentencing judge may be compromised when he or she has already filed a notice to invoke a [discretionary] sentencing enhancement procedure." Steiner v. State, 591 So. 2d 1070, 1072 and n.2 (Fla. 2d DCA 1991) (Lehan,

J., concurring). The records of the respondents' cases illustrate the gravity of Judge Lehan's concerns. All of these cases emanate from the same court. In three of these cases, the judge accepted a plea without any particularized mention of the habitual offender statute, returned the defendant to jail, brought him back for sentencing, announced his intention of considering habitualization, returned the defendant to jail, brought him back for sentencing a second time, then imposed a habitual offender sentence.[3] Unsurprisingly, none of the defendants protested at that point that they would prefer to withdraw their pleas, return to jail, and wait for their attorneys to begin preparing for trial. This procedure ensures a large number of pleas, but does not adequately protect the right to due process of law and does not effectuate the Legislature's intentions for the notice provision in Section 775.084. See generally Boykin v. Alabama, supra; Santoro v. State, supra.

As Judge Lehan notes, and as trial counsel argued in three of these consolidated cases, the procedure used in these cases creates the appearance that the court has become an arm of the prosecution.[4] Proceedings involving criminal charges must both be and appear to be fundamentally fair. Steinhorst v. State, 636 So. 2d 498, 501 (Fla. 1994). The procedure used to obtain the pleas in these cases should be disapproved; the district court's decisions

---

[3]Blackwell record at 11-14, 32-35, 16-25; Holmes record at 11, 25-28, 35-37; Thompson record at 10, 54-56, 16, 19-21.

[4]Blackwell record at 34, Holmes record at 27, Thompson record at 54, 20.

vacating the respondents' sentences should be affirmed for that reason.

D. Failure to give proper notice was not harmless error.

The State argues that even if notice of intent to pursue habitual offender treatment was not properly given in these cases, the error was harmless. The State has not met its burden of showing beyond a reasonable doubt that the error was harmless in any of these cases, and the district court's decisions vacating the sentences should be affirmed.

The State relies on Massey v. State, 609 So. 2d 598 (Fla. 1992), Lewis v. State, 636 So. 2d 154 (Fla. 1st DCA 1994), and Mansfield v. State, 618 So. 2d 1385 (Fla. 2d DCA 1993), in support of its argument on this point. None of those cases support its position. In Massey, the defendant went to trial; the record showed that he had actual notice, but not the requisite written notice, that the State would seek habitual offender treatment in his case. At sentencing, he argued that since the statutory notice was not complied with, he was entitled to a guidelines sentence. This court sensibly affirmed Massey's habitual offender sentence, since the State affirmatively proved that Massey suffered no conceivable prejudice from the State's failure to serve the written notice on substitute trial counsel. 609 So. 2d at 600. In Lewis and Mansfield, the defendants entered into plea bargains that expressly called for them to be sentenced as habitual offenders. Neither of those defendants was allowed to benefit from the fact the State did not file a written notice in addition to the plea forms. In all

three of those cases, the State plainly proved harmless error beyond a reasonable doubt; here the defendants entered into pleas without notice that they would be considered for habitual offender treatment, an error which this court has held is excessively prejudicial to a defendant's rights. Ashley. None of the defendants had actual notice he would be habitualized, and the district court's decisions vacating their sentences should be affirmed.

POINT II

THE RESPONDENTS' CASES SHOULD BE REMANDED FOR RESENTENCING PURSUANT TO THE SENTENCING GUIDELINES.

In Ashley, this court remanded the case to the trial court for entry of a guidelines sentence, noting that the defendant, on appeal, was not seeking to withdraw his plea. 614 So. 2d at 491 and n.10. The Fourth District Court of Appeal has correctly applied that portion of Ashley, remanding for entry of guidelines sentences in cases where late habitual offender notice was given. Wilson v. State, 645 So. 2d 1042 (Fla. 4th DCA 1994); Arnold v. State, 631 So. 2d 368 (Fla. 4th DCA 1994); Fountain v. State, 626 So. 2d 1119 (Fla. 4th DCA 1993). Accord Bogush v. State, 626 So. 2d 189 (Fla. 1993) (defendant pleaded guilty to violation of community control without habitual offender notice; remanding for guidelines sentence) and Snead v. State, 616 So. 2d 964 (Fla. 1993) (defendant violated probation; original plea entered without habitual offender notice; remanding for guidelines sentence with one-cell "bump"). The Fifth District court has correctly remanded some cases that involved late notice for guidelines sentences, see Armstrong v. State, 622 So. 2d 576, 578 (Fla. 5th DCA 1993), Avery v. State, 617 So. 2d 1171 (Fla. 5th DCA 1993), and Rolling v. State, 619 So. 2d 20 (Fla. 5th DCA 1993), but remanded the respondents' cases with directions to allow the defendants to either withdraw their pleas or accept resentencing as habitual offenders.

As the Fourth District Court noted in Wilson, supra, this court could have treated Ashley's case as one involving an

involuntary plea but instead treated it as one involving a "purely legal sentencing issue." 645 So. 2d at 1044. In the context of another legal sentencing issue, this court has held that the trial courts should not have a second opportunity to provide written reasons for guidelines departure sentences, since allowing that opportunity creates an entirely unnecessary risk of multiple appeals and multiple resentencings. Pope v. State, 561 So. 2d 554 (Fla. 1990). A similar rule should be enforced in this context, because as Justice Shaw has correctly pointed out, the notice provision of the habitual offender statute is clear and "its burden is not onerous." Massey v. State, 609 So. 2d 598, 600 (Fla. 1992) (Shaw, J., dissenting).

A remand to allow the respondents to withdraw their pleas would be an inadequate remedy in these cases, given the procedure used to elicit those pleas: the pleas were accepted, notice of intent to habitualize was given at the first announced sentencing date, and the respondents were finally sentenced at a later date, when they had served so much jail time they would be unlikely to choose to return to jail so their lawyers could begin to prepare for trial. Given this sequence of events, the choice of remedy on remand should be the defendant's, not the government's. See Williams v. State, 20 Fla. L. Weekly D373, D374 (Fla. 1st DCA February 9, 1995) (Benton, J., concurring and dissenting) (where defendant has kept his part of a plea bargain and begun to serve a sentence, State cannot unilaterally insist on return to status quo ante).

The decisions on review should be affirmed as to the notice issue, reversed as to the remedy issue, and remanded to the trial court for guidelines resentencing.

CONCLUSION

The respondents request this court to affirm the decisions of the district court, and to remand these cases to the trial court with directions to impose sentence in each pursuant to the sentencing guidelines.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER

NANCY RYAN
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 765910
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served on Robert A. Butterworth, Attorney General, of 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, Fla. 32118, by way of his basket at the Fifth District Court of Appeal this 13th day of March, 1995.

NANCY RYAN
ASSISTANT PUBLIC DEFENDER