IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

RICHARD BLACKWELL,

Respondent.
_____/

CASE NO. 84,071; 84,176; 84,148; 84,150; and 83,951

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

REPLY BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BONNIE JEAN PARRISH
ASSISTANT ATTORNEY GENERAL
Fla. Bar #768870
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

SUMMARY OF ARGUMENT

The Fifth District erred in determining that the plea agreements in these cases were insufficient to give the respondents notice that they may be sentenced as habitual offenders. Each of the five respondents read, understood, signed and discussed the plea agreement with their attorneys. The plea agreements set forth that the respondents could be habitualized, the maximum sentence each of them faced and that they would not be entitled to gain time. Petitioner asserts this was sufficient notice. It is both improper and impossible to inform a defendant that he or she "will" be habitualized; the most that may be said is a defendant may or possibly could be habitualized. If the plea agreements were insufficient notice, any error in failing to give the respondents separate written notice prior to entering their pleas was harmless, as each of the five respondents had actual notice that he may be habitualized. The decision in this case should be quashed, the convictions and sentences of the five respondents should be reinstated and the decision in Thompson v. State, 638 So. 2d 116 (Fla. 5th DCA 1994), juris. accepted, case no. 83,951, overruled.

Furthermore, this court should re-examine and clarify its decision in Ashley, infra. The decisions in these cases crystalize the problems inherent in the practical application of this court's decision in Ashley, infra. Thompson, supra, and the other cases cited herein indicate that Ashley, infra, raised more questions than it answered. Ashley, infra, should be clarified to reflect that notice which states only the possibility that a defendant may

be habitualized is sufficient. Also, the affect of gain time or early release on a defendant's sentence is a collateral consequence, not a direct consequence. Ashley, infra, should be clarified to reflect that a trial judge need only inform a defendant of the maximum possible sentence which may be imposed, not that he or she may serve more or less of that sentence depending upon which sentencing scheme the defendant is sentenced under. Ashley should be clarified as to whether or not an objection is required to preserve the issue for appellate review where some form of notice was given and the defendant later claims the notice was insufficient.

Furthermore, there is nothing in the habitual offender statute which precludes the trial judge from filing the notice. Such notice was not necessary in the instant cases as the respondents had notice from the plea agreements. There is nothing in the habitual offender statute which sets forth specifically what form the notice must take and who should file it. Finally, if remand is required in these cases, the cases should be remanded with directions that respondents either withdraw their pleas or accept habitual offender sentences.

ARGUMENT

POINT ON APPEAL

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN FINDING THAT THE RESPONDENTS HAD NOT BEEN GIVEN NOTICE OF THE INTENT TO HABITUALIZE PRIOR TO RESPONDENTS ENTERING THEIR PLEAS; THE PLEA FORM EACH OF THE RESPONDENTS SIGNED, READ AND UNDERSTOOD GAVE THE RESPONDENTS SUFFICIENT NOTICE, AS IT SET FORTH THE MAXIMUM SENTENCE THAT COULD BE IMPOSED IF THE RESPONDENTS WERE HABITUALIZED AND THAT THE RESPONDENTS WOULD NOT BE ENTITLED TO BASIC GAIN TIME; DUE TO THE CONFUSION CREATED BY THIS COURT'S DECISION IN ASHLEY, INFRA, THIS COURT SHOULD REVISIT AND CLARIFY ASHLEY.

Not surprisingly, respondents argue that Ashley v. State, 614 So. 2d 486 (Fla. 1993), was not complied with and this court should affirm the district court's decision. Petitioner relies on the arguments set forth in the initial brief. Ashley was complied with in the instant cases. Respondents had notice that they could be habitualized and that they would not be entitled to basic gain time. Section 775.084(3)(b) does not specify what form the notice must take. There is nothing in the habitual offender statute which precludes notice by way of a plea agreement. Respondents appear to ignore that such notice was provided. Notice was sufficient in these cases.[1]

---

[1]In its initial brief, petitioner requested this court reconsider not the holding in Ashley, but the dicta which accompanies that holding. The dicta has created many more problems than it resolved. Petitioner relies on the initial brief for those arguments rather than rearguing them in the reply brief. However, petitioner makes one point: contrary to respondents' claim on page 7 of the answer brief, petitioner does not argue that federal constitutional caselaw does not mandate the result reached in Ashley. Petitioner cited three federal cases as examples of what is and is not a collateral consequence of a plea. Respondents ignore the numerous state cases which are cited and on which

Respondents argue that they did not waive the issue for appellate review by failing to object to their habitual offender sentencing. This, however, was not what petitioner argued in its initial brief. Rather, petitioner argued that respondents should have objected to the form of the notice; specifically, the plea agreement. Respondents did not object to the form of the notice. The fact that respondents were given notice in the plea agreements does distinguish the instant cases from Ashley. Petitioner asserts that an objection to the notice which was contained in the plea agreement was necessary. The only time an objection is not necessary is where the defendant received no notice, as in Ashley. Notice was received in the instant cases.

Although not raised or addressed previously, respondents argue that the trial judge should not be permitted to file the notice of intent to habitualize. The trial judge did file a notice in the instant cases after the respondents entered their pleas. However, respondents again ignore the fact that they had previously been provided notice in the plea agreements. Respondents knew when they entered their pleas that they could be habitualized. The filing of the notice by the trial judge in no way affected or diminished the notice already received in the plea agreements.

As to the propriety of the trial judge filing a notice, there is nothing in section 775.084 which precludes such action by the trial judge. In fact, the trial judge is obligated to declare a

---

petitioner relies. This appears to be an attempt to divert this court's attention from the Florida cases cited and relied on by petitioner.

defendant to be a habitual offender when he qualifies for such classification. Section 775.084(4)(c), Fla. Stat. (1991); Guy v. State, 632 So. 2d 1085 (Fla. 5th DCA 1994); Turcotte v. State, 617 So. 2d 1164 (Fla. 5th DCA 1993); Toliver v. State, 605 So. 2d 477 (Fla. 5th DCA 1992), rev. denied, 618 So. 2d 212 (Fla. 1993). Due to this obligation, a trial judge has a duty to identify habitual offenders regardless of whether the prosecutor has initiated habitual offender proceedings. This duty may necessitate the filing of the notice by the trial judge. Such action by the trial judge does not overcome the presumption that the trial judge is fair and impartial.

In a footnote in Santoro v. State, 644 So. 2d 585, 586 n.4 (Fla. 5th DCA 1994), juris. accepted, case no. 84,758, the Fifth District questioned whether a trial judge may file habitual offender notice after the enactment of section 775.08401, Fla. Stat. (1993). While section 775.08401 was not effective when the respondents committed their respective offenses, petitioner will address it briefly.

Section 775.08401 does not direct that only the prosecutors file notice of intent to habitualize. Rather, it directs the various state attorney's offices to adopt uniform criteria in determining whether an offender is eligible for habitual offender sentencing. Section 775.08401 is aimed at the wide-spread discrepancy, whether perceived or actual, in the seeking of habitual offender classification. Section 775.08401 does not prohibit trial judges from filing notices.

Furthermore, while the legislature wholly amended section 775.084, the legislature did not give prosecutors sole discretion in initiating habitual offender proceedings. This could easily have been done, but the legislature chose not to so change the statute. The language of section 775.084 does not specify who can or cannot initiate the habitual offender notice. As the Fifth District stated in Toliver, at 480:

> It achieves a logical and symmetrical result to read the habitual offender statute as giving the trial judge the power and discretion to *both impose* and *refrain from imposing* an habitual offender sentence. If the prosecutor were given the sole power to send the required notice to invoke a hearing on a defendant's habitual offender status, the trial judge could be deprived of the power to render an habitual offender sentence in a case he or she felt was appropriate, where the prosecutor (for various or whatever reason) took no action.

Id. (Emphasis in original). See also King v. State, 557 So. 2d 899, 903 (Fla. 5th DCA), rev. denied, 564 So. 2d 1086 (Fla. 1990) ("it is clear that either the state or the court may suggest the [habitual offender] classification. There is nothing in the statute to suggest that the legislature intended otherwise.").

Respondents argue that the state failed to show that the failure to file the notice prior to the entry of respondents' pleas was harmless error. In so arguing, respondents acknowledge that the harmless error analysis is applicable and has been previously applied to similar cases. However, respondents fail to acknowledge that they had notice prior to entering their pleas. The respondents were given notice that they could be habitualized in

each of their respective plea agreements. Furthermore, several of the respondents, in addition to the written plea agreements, were told by the trial judge prior to the acceptance of their pleas that they could be habitualized. The respondents understood this. Respondents ignore this actual notice. Even if a separate written notice should have been filed, the failure was harmless in this case due to the notice provided in the plea agreements. "It is inconceivable that [the respondents were] prejudiced by not having received the written notice [prior to the entry of their pleas]." Massey v. State, 609 So. 2d 598, 600 (Fla. 1992).

Finally, respondents argue, in furtherance of their claims that the opinion of the district court should be affirmed, that on remand the only option left to the trial judge is to sentence the respondents within the guidelines. Respondents argue that allowing the withdrawal their pleas would be "an inadequate remedy." Petitioner asserts that the only remedy should be either withdrawal of their pleas or acceptance of their habitual offender sentences.

As this court is aware, the guidelines are inapplicable to those found to be habitual offenders. Respondents' citation to Pope v. State, 561 So. 2d 554 (Fla. 1990), is inappropriate and misplaced. Rather, petitioner asserts that this court's decision in Troutman v. State, 630 So. 2d 528 (Fla. 1994), appears to be more closely related to habitual offender sentencing. In Troutman, at 533, this court determined that where a trial judge failed to follow the criteria for sentencing a juvenile as an adult resentencing as a juvenile was not required. This court

specifically found that because juvenile sentencing is specifically controlled by statute, the reasoning behind Pope, supra, was inapplicable. Troutman, at 533 n.6.

Petitioner asserts that the reasoning behind Troutman, supra, is equally applicable to habitual offender cases. Both habitual offender sentencing and juvenile sentencing are specifically controlled by statute. Also, as already stated, the guidelines are inapplicable.

While no notice was given in Ashley, supra, prior to the entry of Ashley's plea, in the instant case the respondents did have notice prior to entry of their pleas by way of the plea agreements. As argued in the initial brief and not addressed by respondents, there is nothing in the habitual statute as to what form the notice must take. Notice in the plea agreement is sufficient.

The respondents in these cases entered into the plea agreements knowing they could be sentenced as habitual offenders. The respondents knew what their prior records were and whether they could be habitualized. Furthermore, the trial judge was obligated to classify the respondents as habitual offenders if they qualified as such. Section 775.084(4)(c), Fla. Stat. (1991); Guy, supra; Turcotte, supra; Toliver, supra.

Should this court determine that remand is necessary, the instant cases should be remanded with directions to either allow the respondents to withdraw their pleas or accept sentencing as habitual offenders.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner requests this court quash the decisions in the instant case, overrule the decision in Thompson and clarify its decision in Ashley.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BONNIE JEAN PARRISH
ASSISTANT ATTORNEY GENERAL
Fla. Bar #768870
444 Seabreeze Boulevard
5th Floor
Daytona Beach, FL 32118

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Reply Brief of Petitioner has been furnished by delivery to Nancy Ryan, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 18th day of April, 1995.

Bonnie Jean Parrish
Of Counsel