IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DEWAYNE SMITH,

Respondent.

84,427

CASE NO:
5th DCA No.: 93-2405

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBIN COMPTON JONES
ASSISTANT ATTORNEY GENERAL
Fla. Bar #846864
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Respondent pled guilty to two counts of unlawful sale of a counterfeit controlled substance and to attempted possession of a controlled substance. He signed a plea form that stated he understood that he could be subject to a maximum sentence of 20 years imprisonment with no eligibility for basic gain time if found by the judge to be a habitual offender. He affirmatively indicated at his plea hearing that he read the written agreement before he signed it, that he had an adequate opportunity to ask questions of his attorney about the agreement, and that he understood the agreement. Smith was personally, specifically informed at his plea hearing about the possibility of a habitual offender sentence and the consequences of such a sentence. Smith v. State, 19 Fla. L. Weekly D1818 (Fla. 5th DCA August 26, 1994). Respondent was sentenced as an habitual offender and the Fifth District Court of Appeal reversed and remanded relying on Thompson, infra. Smith, at D1818. The State then filed a Notice To Invoke Discretionary Jurisdiction of this Court based on express and direct conflict with a decision of this Court.

SUMMARY OF THE ARGUMENT

The opinion issued in the instant case by the Fifth District Court of Appeal cites Thompson, infra, as controlling authority which is currently pending jurisdiction in this Court. This constitutes prima facie express conflict, if accepted, thereby allowing this Court to exercise its jurisdiction.

As additional grounds for jurisdiction, the decision by the Fifth District Court of Appeal in this case is in express and direct conflict with this Court's decision in Massey, infra. Due to this conflict, this Court should exercise its discretionary jurisdiction.

ARGUMENT

THE DECISION IN THIS CASE IS IN EXPRESS AND DIRECT CONFLICT WITH A DECISION FROM THIS COURT.

A district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by the Supreme Court continues to constitute prima facie express conflict and allows the Supreme Court to exercise its jurisdiction. Jollie v. State, 405 So. 2d 418 (Fla. 1981). The opinion issued in the instant case by the Fifth District Court of Appeal cites Thompson v. State, 19 Fla. L. Weekly D1221 (Fla. 5th DCA June 3, 1994), as controlling authority. (Appendix) Thompson is currently pending jurisdiction in this Court, Florida Supreme Court Case Number 83,951, therefore, if accepted, this Court must exercise its jurisdiction in the instant case.

As additional grounds for jurisdiction, Petitioner asserts that the decision in the instant case is in express and direct conflict with this Court's decision in Massey v. State, 609 So. 2d 598 (Fla. 1992). In Massey, this Court held that the State's failure to strictly comply with the statute requiring that notice of the state's intention to have the defendant sentenced as an habitual offender be served upon the defendant, may be reviewed under the harmless error analysis. In that case, the State's error in failing to serve actual notice to the defendant was harmless where the defendant and his attorney had actual notice of the State's intention.

In the instant case, the Fifth District Court of Appeal reversed Respondent's sentence relying on Thompson, supra. The instant decision is in express and direct conflict with Massey, supra, because the Fifth District failed to apply a harmless error analysis. As in Massey, the Respondent had **actual** notice of the possible consideration of habitual offender sanctions.

At the time of entering his plea, Respondent signed a plea agreement which provided for the maximum sentence should he be determined by the Judge to be an habitual offender as well as the consequences of such a sentence. Respondent affirmatively indicated at his plea hearing that he read the agreement, had an adequate opportunity to ask questions of his attorney about the agreement, and that he understood the agreement. Because Respondent had actual notice of the possibility of a habitual offender sentence before he entered his plea, the protections afforded by Ashley v. State, 614 So. 2d 486 (Fla. 1993), were provided to him, and any error in failing to provide formal written notice of habitualization was harmless. The Fifth District erred in failing to apply a harmless error analysis as outlined in Massey, infra.

The Fifth District's decision in the instant case is in express and direct conflict with this Court's decision in Massey, infra. This honorable court should exercise its jurisdiction in this case and resolve the conflict between the two cases.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully requests this honorable court exercise its jurisdiction in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBIN COMPTON JONES
ASSISTANT ATTORNEY GENERAL
Fla. Bar #846864
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief has been furnished by delivery to Lyle Hitchens, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, FL, 32114, this 26th day of September, 1994.

Robin Compton Jones
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

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v.

CASE NO.

5th DCA Case No. 93-2405

DEWAYNE SMITH,

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_____/

APPENDIX

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBIN COMPTON JONES
ASSISTANT ATTORNEY GENERAL
Fla. Bar #846864
444 Seabreeze Boulevard
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

August 26, 1994. Appeal from the Circuit Court for Marion County, Victor J. Musleh, Judge. Counsel: Lisa C. Cohen of Eric S. Ruff, P.A., Gainesville, for Appellant. David A. Glenny of Pattillo & McKeever, P.A., Ocala, for Appellee.

(PER CURIAM.) The final judgment piercing the corporate veil and finding Veritas Marketing and Research, Inc. (Veritas) responsible to pay a judgment Entertel, Inc. had obtained against Telemart Communication Company (Telemart) is reversed because there is no evidence or reasonable inferences arising therefrom to support the trial court's finding that Veritas was organized or used to mislead creditors of Telemart or to perpetrate a fraud upon them. *See Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114 (Fla. 1984); *USP Real Estate Inv. Trust v. Discount Auto Parts, Inc.*, 570 So. 2d 386 (Fla. 1st DCA 1990); and *Steinhardt v. Banks*, 511 So. 2d 336 (Fla. 4th DCA), *review denied*, 518 So. 2d 1273 (Fla. 1987).

REVERSED. (DAUKSCH, GOSHORN and GRIFFIN, JJ., concur.)

* * *

Criminal law—Plea—Sentencing—Habitual offender—Notice—Adequacy

DEWAYNE SMITH, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-2405. Opinion filed August 26, 1994. Appeal from the Circuit Court for Volusia County, John W. Watson, III, Judge. Counsel: James B. Gibson, Public Defender, and Lyle Hitchens, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Kristen L. Davenport, Assistant Attorney General, Daytona Beach, for Appellee.

(DAUKSCH, J.) The sentence in this case is violative of the dictates of *Thompson v. State*, 638 So. 2d 116 (Fla. 5th DCA 1994) and must be vacated.

SENTENCE VACATED; REMANDED. (HARRIS, C.J., concurs and concurs specially with opinion. GRIFFIN, J., dissents with opinion.)

(HARRIS, C. J., concurring and concurring specially.) Law, sometimes, is the science of fine lines. Perhaps this case is a good example of the application of this science. The judge came close in this case to complying with the notice requirements of *Ashley v. State*, 614 So. 2d 486 (Fla. 1993) and *Thompson v. State*, 638 So. 2d 116 (Fla. 5th DCA 1994). His efforts, however, fall short of the "line" of compliance. Consider the statements made by the judge when accepting the plea in this case:

> THE COURT: And do you understand that a notice for a hearing to be conducted to determine whether or not you're [a] habitual felony offender *can be issued prior to sentencing* (emphasis added). . . .

Not only is this a misstatement of the law since *Ashley* (now the notice must be given prior to the plea), but it also fails to clearly indicate that, in fact, a hearing *will be held* to determine the defendant's status as a habitual offender. Although the distinction between this statement and the same judge's statement in *Grasso v. State*, 19 Fla. L. Weekly D1430 (Fla. 5th DCA July 1, 1994), does not appear remarkable (truly a fine line), nevertheless their import is dramatically different. In *Grasso,* the court advised the defendant at sentencing:

> If you have two or more prior felony convictions on your record—and you already said you do—there would be a separate proceeding conducted. It would be set for the 24th, the same day the sentencing would be set. If you have those two prior felony convictions, then your sentence doubles. . . If, in fact, you are habitual qualified to be one, *I will classify you as a habitual.* (Emphasis in original).

The fact that Grasso was going to be subjected to consideration as a habitual offender was clearly made known to him before his plea was accepted; in our case, such consideration, at the time of Smith's plea, remained a mere possibility. This does not meet the *Ashley* mandate.

(GRIFFIN, J., dissenting.) I respectfully dissent. This case is more like *Grasso v. State*, 19 Fla. L. Weekly D1430 (Fla. 5th DCA July 1, 1994) than like *Thompson v. State*. In *Thompson*, the court found there to be a defect in Judge Watson's plea agreement form in that it failed to adequately inform the defendant of the consequences of his plea as required by *Ashley v. State*.

> *Ashley* requires that the defendant must be made aware *prior to his plea* that either the State intends to seek habitual offender treatment *or that the court intends on its own to consider habitual offender treatment at sentencing*. The previously quoted provision in the form negotiated plea does not suggest that the defendant *will be* considered for habitual offender treatment; it merely informs him generally as to the maximum sentence *if he is* so considered. [Emphasis added.]

Thompson v. State, 19 Fla. L. Weekly D1221 (Fla. 5th DCA June 3, 1994).

Here, in addition to the defendant's execution of the plea form, the following transpired as the court was entertaining the plea of the defendant and two others:

> THE COURT: But is it your desire to plead guilty to two counts of sale of a counterfeit controlled substance, both third-degree felonies, and one count of attempted unlawful possession of a controlled substance, a first-degree misdemeanor?
>
> DEFENDANT SMITH: Yes, sir.
>
> THE COURT: And that is your signature on the plea agreement?
>
> DEFENDANT SMITH: Yes, sir.
>
> THE COURT: Before you signed the agreement, did you read it over thoroughly?
>
> * * *
>
> DEFENDANT SMITH: Yes, sir.
>
> THE COURT: Did you have an adequate opportunity to ask questions of your attorney about the agreement before you signed it?
>
> * * *
>
> THE COURT: Mr. Smith?
>
> DEFENDANT SMITH: Yes, sir.
>
> THE COURT: And did you understand the agreement before you signed it?
>
> * * *
>
> DEFENDANT SMITH: Yes, sir.
>
> * * *
>
> THE COURT: And do you have any questions about the agreement at this time?
>
> * * *
>
> DEFENDANT SMITH: No, sir.
>
> THE COURT: Are all of your representations in this agreement accurate as of this moment?
>
> * * *
>
> DEFENDANT SMITH: Yes, sir.
>
> THE COURT: And, Mr. Blackwell, do you understand that as a result of this plea, that your sentencing exposure under the statute is up to 15 years in the state prison?
>
> DEFENDANT BLACKWELL: Yes, sir.
>
> THE COURT: And do you understand that a notice for a hearing to be conducted to determine whether or not you're habitual felony offender can be issued prior to sentencing; and that if it were determined that you were found to be an habitual felon, that it means if it were determined that you had two or more prior felony convictions prior to today's date, that you could be found to be a habitual felony offender and your sentencing exposure would double up to 30 years?
>
> Do you understand that?
>
> DEFENDANT BLACKWELL: Yes, sir.
>
> THE COURT: And that if in fact that were done and you were sentenced, that you would then not receive any entitlement to any basic gain time? Do you understand that?
>
> DEFENDANT BLACKWELL: Yes, sir.
>
> THE COURT: Mr. Smith, do you understand that under the statute as a result of the entry of the pleas to the two third-degree

felonies and the first-degree misdemeanor, that your sentencing exposure is up to 11 years in the state prison?

DEFENDANT SMITH: Yes, sir.

THE COURT: And that likewise, a notice could be issued for the conducting of a separate hearing prior to the sentencing, and if a determine were made at that hearing that you had two or more prior felony convictions your sentencing exposure would double on the felonies and would mean sentencing exposure of up to 20 years on the felonies?

DEFENDANT SMITH: Yes, sir.

THE COURT: And that likewise, you wouldn't be entitled to any basic gain time or any such habitual sentence? Do you understand that?

DEFENDANT SMITH: Yes, sir.

I think this explanation meets the requirements of *Ashley* and *Thompson*.

* * *

Eminent domain—Severance damages—Error to exclude expressway authority's expert testimony proffered to rebut claim for severance damages arising out of landowner's claimed vested right to an at-grade east-west arterial road to be built at some unspecified time in the future

ORLANDO/ORANGE COUNTY EXPRESSWAY AUTHORITY, Appellant, v. PETER G. LATHAM, etc., et al., Appellees. 5th District. Case No. 93-2750. Opinion filed August 26, 1994. Appeal from the Circuit Court for Orange County, Frederick Pfeiffer, Judge. Counsel: C. Ken Bishop, P.A., and Robert Alfert, Jr., of Broad and Cassel, Orlando, for Appellant. Jon M. Wilson and Mary A. Doty, of Foley & Lardner, Orlando, and David Lucey, of Counsel, of Foley & Lardner, Milwaukee, WI, for Appellee, Southchase Warehouse Joint Venture. No appearance for Appellee, Peter G. Latham.

(PER CURIAM.) The Orlando/Orange County Expressway Authority ["Authority"] appeals a jury verdict awarding the Southcase Warehouse Joint Venture ["SWJV"] $2,000,000 in severance damages in a condemnation proceeding. We reverse.

SWJV's claim for severance damages was based upon expert testimony concerning its claimed "vested right" to an at-grade east-west arterial road to be built at some unspecified time in the future[1]—one which would provide access to the Florida Turnpike via an interchange on adjacent land.

When the Authority sought to introduce expert testimony to rebut SWJV's case on severance damages, SWJV urged that the testimony should be excluded as irrelevant. After hearing the Authority's proffer, made by counsel, summarizing the testimony of their two experts, the lower court ruled they could not testify. This effectively left the Authority without a case in defense of SWJV's $4,000,000 severance damage claim. As the court expressed it: "[The Authority's counsel] is resting because I eliminated his rebuttal."[2] We reverse because, based on our review of the record, it appears that much of the proffered testimony *was* relevant to the severance damage claim put on by SWJV,[3] which depended on SWJV's claim of a right to an east-west arterial access.

The issue of whether SWJV has a claim for severance damages at all was not presented to the lower court, nor was the record well developed because of the severe limitations placed on the Authority's evidence. We conclude this issue is most appropriately considered on remand, taking into account recent developments in Florida case law, including *Department of Transportation v. Gefen*, 636 So. 2d 1345 (Fla. 1994) and *Broward County v. Patel*, 19 Fla. L. Weekly S269 (Fla. May 19, 1994).

Finally, even though the Authority has prevailed on appeal, Florida law requires that SWJV be awarded attorneys' fees. § 73.131, Fla. Stat. (1993). *Denmark v. Department of Transportation*, 389 So. 2d 201 (Fla. 1980).

REVERSED AND REMANDED. (DAUKSCH, GRIFFIN and DIAMANTIS, JJ., concur.)

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[1]As expressed in SWJV's brief, "SWJV's witnesses concluded not only that the construction of such a road was probable, but that it was specifically required by the applicable governmental agencies."

[2]The Authority's counsel then asked to be allowed not to rest until the following morning before the jury view of the property to see if he had any other appropriate rebuttal. The following day, possibly in recognition that the breadth of the lower court's order was error, SWJV's counsel attempted to "clarify" the scope of its objection, but the court did not modify its order.

[3]We are not persuaded by SWJV's contention on appeal that the Authority failed to preserve this error by making the proffer himself rather than by offering the witnesses' testimony. The colloquy between the Authority's counsel and the court, however, shows that the court was asked by counsel if the witnesses should testify and the court considered counsel's proffer adequate for the purpose of making his ruling. There was no objection from SWJV to the proffer by counsel. Furthermore, we find the proffer provides sufficient detail that the relevancy of the testimony and the lower court's error in excluding it are not in doubt. *See Reaves v. State*, 531 So. 2d 401 (Fla. 5th DCA 1988).

* * *

WOOD v. STATE. 5th District. #94-1699. August 26, 1994. 3.800 Appeal from the Circuit Court for Orange County. AFFIRMED. *Moses v. State*, 538 So. 2d 473 (Fla. 5th DCA), *rev. denied*, 545 So. 2d 1368 (Fla. 1989); *Dunn v. State*, 522 So. 2d 41 (Fla. 5th DCA 1988).

TINSLEY v. STATE. 5th District. #94-1560. August 26, 1994. 3.850 Appeal from the Circuit Court for Putnam County. AFFIRMED. *See Foster v. State*, 614 So. 2d 455, 458 (Fla. 1992), *cert. denied*, __ U.S. __, 114 S. Ct. 398, 126 L. Ed. 2d 346 (1993); *Christopher v. State*, 489 So. 2d 22, 24 (Fla. 1986).

RUGGIERO v. STATE. 5th District. #94-1453. August 26, 1994. 3.850 Appeal from the Circuit Court for Brevard County. AFFIRMED. *State v. McCloud*, 577 So. 2d 939 (Fla. 1991); *Thomas v. State*, 633 So. 2d 1122 (Fla. 5th DCA 1994).

M. J. v. STATE. 5th District. #94-408. August 26, 1994. Appeal from the Circuit Court for Marion County. AFFIRMED. *See Jones v. State*, 19 Fla. L. Weekly S280 (Fla. May 26, 1994).

* * *

Criminal law—Sentencing—Correction—Sentence which is otherwise legal is not rendered illegal merely because it exceeds an agreed sentence under a plea agreement—Order denying rule 3.800(a) motion affirmed without prejudice to filing rule 3.850 motion

RODNEY GRAHAM, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 94-1576. Opinion filed August 26, 1994. 3.800 Appeal from the Circuit Court for Volusia County, Edwin P. B. Sanders, Judge. Counsel: Rodney Graham, Brooksville, Pro se. No Appearance for Appellee.

(DIAMANTIS, J.) Rodney Graham appeals the summary denial of his rule 3.800(a)[1] motion to correct an illegal sentence, contending that his sentence is illegal because it exceeds the agreed sentence under his plea agreement. The record reflects that Graham pled *nolo contendere* to two second-degree felonies, which are each punishable by a prison sentence not to exceed 15 years,[2] in return for a prison sentence of 5½ years; however, the trial court sentenced Graham to a split sentence of 5½ years incarceration followed by 5 years probation. We affirm because a sentence which is otherwise legal is not rendered illegal merely because it exceeds an agreed sentence under a plea agreement. As the court in *Judge v. State*, 596 So. 2d 73 (Fla. 2d DCA 1991), *rev. denied*, 613 So. 2d 5 (Fla. 1992), explained:

> Rule 3.800(a) is intended to provide relief for a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law. It is concerned primarily with whether the terms and conditions of the punishment for a particular offense are permissible as a matter of law. It is not a vehicle designed to re-examine whether the procedure employed to impose the punishment comported with statutory law and due process.

Id. at 77. *See also Nowlin v. State*, 19 Fla. L. Weekly D1518 (Fla. 1st DCA July 12, 1994); *Young v. State*, 616 So. 2d 1133 (Fla. 3d DCA 1993); *Kelly v. State*, 599 So. 2d 727 (Fla. 1st DCA 1992).

We note that Graham's proper remedy in this case is to file a 3.850 motion[3] asserting that the plea should be set aside because, although a sentencing court is not required to impose a sentence in conformity with a plea agreement, if the court cannot abide by the terms of the agreement, the defendant must be given the opportunity to withdraw his plea. *See Jenkins v. State*, 549 So. 2d 247 (Fla. 5th DCA 1989).

Accordingly, we affirm the trial court's order denying Graham's rule 3.800(a) motion without prejudice to Graham filing a rule 3.850 motion in which he may seek to be sentenced