IN THE SUPREME COURT OF FLORIDA

84,758

STATE OF FLORIDA,

Petitioner,

v.

CASE NO:
5th DCA No.: 93-2404

JOSEPH SANTORO,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent pled guilty to Burglary of a Structure. He signed a plea form that stated that a hearing may be set to determine if he qualified as an habitual offender and that he understood that he could be subject to a maximum sentence of 10 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. Respondent was sentenced as an habitual offender to two years community control followed by six months probation. The Fifth District Court of Appeal reversed and remanded relying on Thompson v. State, 638 So. 2d 116 (Fla. 5th DCA 1994) and Ashley v. State, 614 So. 2d 486 (Fla. 1993). Santoro v. State, 19 Fla. L. Weekly D2302 (October 28, 1994). 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, supra, 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, supra, 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.

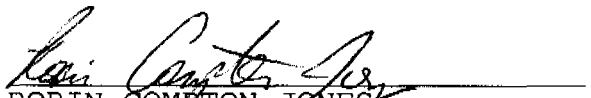
The Fifth District's decision in the instant case is in express and direct conflict with this Court's decision in Massey, infra. This honorable court should exercise its jurisdiction in this case and resolve the conflict between the two cases.

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



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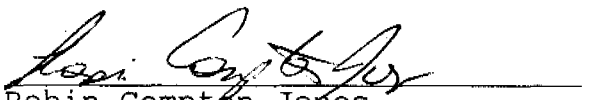
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief has been furnished by delivery to Susan A. Fagan, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, FL, 32114, this 15th day of November, 1994.



Robin Compton Jones
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO.

5th DCA Case No. 93-2404

JOSEPH SANTORO,

Respondent.

_____/

APPENDIX

ROBERT A. BUTTERWORTH
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the collective bargaining agreement. Article 20.14 of the BOR/UFF Collective Bargaining Agreement provides:

[redacted] Reprisal. No reprisal of any kind will be made by the Board, its representatives, or the UFF against any grievant, any witness, any UFF representative, or any other participant in the grievance procedure by reason of such participation.

* * *

Criminal law—Sentencing

ALEXANDER MOTEN, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-2756. Opinion filed October 28, 1994. Appeal from the Circuit Court for Orange County, John H. Adams, Sr., Judge. Counsel: James B. Gibson, Public Defender, and M. A. Lucas, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Kristen L. Davenport, Assistant Attorney General, Daytona Beach, for Appellee.

(PER CURIAM.) Appellant contends and appellee concedes that various sentencing errors occurred and that the sentences must be vacated.

SENTENCES VACATED, REMANDED FOR RESENTENCING. (DAUKSCH, GOSHORN and PETERSON, JJ., concur.)

* * *

Criminal law—Sentencing—Habitual offender—Provision in plea agreement referring to possible sentencing as habitual offender did not comply with requirement that defendant be made aware prior to pleading that habitualization would be sought

JOSEPH SANTORO, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-2404. Opinion filed October 28, 1994. Appeal from the Circuit Court for Volusia County, John W. Watson, III, Judge. Counsel: James B. Gibson, Public Defender, and Susan A. Fagan, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Myra J. Fried, Assistant Attorney General, Daytona Beach, for Appellee.

(H[redacted]RIS, C. J.) Once again we are faced with an alleged *Ashley*[1] violation. In this case, the State concedes that Joseph Santoro did not receive the requisite written notice of intent to habitualize *prior* to his plea as required by *Ashley*. Nor did he receive the actual (oral) notice during the sentencing proceeding that we held adequate in *Grasso v. State*, 639 So. 2d 152 (Fla. 5th DCA 1994) and *Voth v. State*, 638 So. 2d 121 (Fla. 5th DCA 1994).

Here, the State claims that the *Ashley* requirement has been satisfied because the plea agreement contains the following provision:

> My attorney has explained to me the total maximum penalties for the charge(s) and as a result I understand the following:
>
> * * *
>
> c. That a hearing may hereafter be set and conducted in this case to determine if I qualify to be classified as a Habitual Felony Offender or a Violent Habitual Felony Offender, and:
>
> 1. That should I be determined by the Judge to be a Violent Habitual Felony Offender, and should the Judge sentence me as such, I could receive up to a maximum sentence of ____ years imprisonment and a mandatory minimum of ____ years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.
>
> 2. That should I be determined by the Judge to be a Non-Violent Habitual Felony Offender, and should the Judge sentence me as such, I could receive up to a maximum sentence of ____ years imprisonment and a mandatory minimum of ____ years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.
>
> d. That whether a guidelines sentence or departure sentence [redacted]abitual offender sentence, I will receive a mandatory minimum sentence of ____ years imprisonment.[2]

Although the form provision in this case is somewhat expanded from a similar provision in the plea agreement that we rejected in *Thompson v. State*, 638 So. 2d 116 (Fla. 5th DCA 1994), it still does not comply with what we considered to be the *Ashley* mandate: that the defendant be made aware *prior to pleading* that his habitualization *will be sought*. The only notice given in this new version of the plea agreement is that "a hearing *may* hereafter be set" to determine *if* the defendant qualifies as a habitual offender. As we stated in *Thompson*, the statute itself informs him of this possibility.[3] What the supreme court required in *Ashley*, and what we required in *Thompson*, was that the defendant be advised, prior to plea, that someone (the State or the judge)[4] *will* subject him to habitual consideration. This does not mean that the defendant must be advised that he will be habitualized. It only requires that the State advise the defendant prior to plea that *he will* be considered for habitualization. This requirement can easily be accomplished (though it may cut down on the number of pleas) by placing in the negotiated plea form a provision that states: "We *will* request that the court conduct a hearing to determine whether you should be sentenced as a habitual offender to an enhanced term as outlined below." This informs the defendant not that he *might* be considered for habitual treatment but that he *will* be so considered. It will take this or some similar notice, we think, to satisfy the requirements of *Ashley*.

REVERSED and REMANDED for resentencing. (DAUKSCH, J., concurs. GRIFFIN, J., dissents without opinion.)

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[1] *Ashley v. State*, 614 So. 2d 486 (Fla. 1993).

[2] The appropriate number of years were written into the blanks on the form.

[3] This is a *form* agreement. It is provided to both those who qualify as habitual offenders and those who do not. It is not intended to imply that all who sign the agreement are subject to habitual offender treatment. It does little more than provide the defendant with a summary of the habitual offender statute.

[4] The 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 in 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 a circuit-wide uniform criteria.

* * *

Receivership—Appeals—Defendants in foreclosure action in which receiver was appointed for defendants' assets did not have standing to appeal order regarding settlement between bank and other creditor as to priority of claims to certain portions of receivership funds—Defendants claimed no entitlement to funds held by receiver, and defendants' rights were not affected by the order—Defendants' contention that they are entitled to accounting of receiver's management of receivership is better addressed when receiver seeks order of discharge

JAMES O'NEAL, JR., SALLY O'NEAL, APAG HOLDINGS, INC., and APAG ORLANDO, INC., Appellants, v. SUN BANK, NATIONAL ASSOCIATION, and GENERAL MOTORS ACCEPTANCE CORPORATION, Appellees. 5th District. Case No. 93-1221. Opinion filed October 28, 1994. Non-Final Appeal from the Circuit Court for Orange County, Rom W. Powell, Judge. Counsel: W. Stewart Gilman, Apopka, for Appellants. Robert L. Mellen, III, of Akerman, Senterfitt, & Eidson, Orlando, and Eli H. Subin of Subin, Shams, Rosenbluth, Moran, Losey & Brennan, P.A., Orlando, for Appellees, Sun Bank, National Association. Michael C. Markham and Charles M. Tatelbaum of Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A., Clearwater, for Appellee, General Motors Acceptance Corp.

(HARRIS, C. J.) The first issue to be decided in this appeal is whether appellants, at this time, have standing to raise their present challenge. Because we find that they do not, we dismiss the appeal.

The basic facts are not disputed. In a foreclosure action by Sun Bank against appellants, Jeffrey A. Conley was appointed receiver of appellants' assets. During the course of the receivership, a dispute arose between Sun Bank and GMAC as to priority to certain portions of the receivership funds. Those two parties stipulated to an agreed settlement of their dispute which the receiver