IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 84,789

STATE OF FLORIDA,

Petitioner,

vs.

BOBBY WILSON,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

****

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Defendant and Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent was the Appellant and Petitioner was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Petitioner may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto, the decision hereunder review reported as Wilson v. State, 19 Fla. L. Weekly D2353 (Fla. 4th DCA Nov. 9, 1994).

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent was charged in the Nineteenth Judicial Circuit with robbery filed April 26, 1993 (R. 1). The State filed its Notice of Intent to seek enhanced penalties pursuant to Sec. 775.084, Florida Statutes, on April 28, 1993 (R. 7).

On July 2, 1993, Respondent signed a written petition to enter a plea of guilty or nolo contendere (R. 8-17). Pertinent paragraphs in the written petition provided as follows:

> 7. I understand that if I plead ... (Nolo Contendere) to these charges the mandatory minimum penalty provided by law is NA and the maximum possible penalty is 15 years + $10,000 fine.
>
> 8. The following are additional terms of this ... (Nolo Contendere) plea: plea to court.
>
> 9. I understand that the judge is not bound to follow this plea agreement or any recommendation made by the State Attorney or my attorney.
>
> * * *
>
> 11. I understand that by pleading ... (Nolo Contendere), I will be giving up the following constitutional rights:
>
> * * *
>
> (f) I will be giving up my right to appeal all matters connected with Judgment and Sentence, including the issue of guilt or innocence, except I may appeal a Sentence which is outside of the recommended Guideline range. I understand that I will not waive my right to appeal a void or voidable judgment and my right to appellate review by appropriate collateral attack.
>
> * * *
>
> 14. **I have discussed this case and all**

matters contained herein with my attorney, and I am satisfied with the representation I have received from my attorney. I have told my attorney all the facts and circumstances known to me about the charge(s). My attorney has counseled and advised me on the nature of each charge, on any and all lesser included charge(s), and on all possible defenses that I may have in this case.

* * *

16. **I offer my plea** of ... (Nolo Contendere) freely and voluntarily and of my own accord **with full understanding of all the matters set forth** in the Information and in this Petition and **in the Certificate of my attorney which is made part of this Petition.**

* * *

I, Barbara D. Stull, state that I am the attorney for the above-named Defendant. I have read and fully explained to the Defendant this Petition and the allegations contained in the Information in this case. **I have explained the maximum penalty as to each count to which the Defendant is pleading (Guilty) (Nolo Contendere) and consider him/her competent to understand the charges against him/her and the effect of his/her Petition to enter the plea.** I have explained to him/her the right of appeal and the difference between a direct appeal and a collateral attack.
[Emphasis added]

(R. 9-12).

On July 2, 1993, the petition for change of plea came for hearing before the Honorable Dwight Geiger (T. 3-7). When discussing the plea agreement, defense counsel informed the trial court that "this is a plea to the court and there has been no agreement reached [as to sentence]." (T. 4). The trial court ascertained a factual basis for the plea existed (R. 4), and conducted a plea colloquy with Appellant (T. 4-6). During the plea

colloquy it was ascertained that Respondent discussed the charges with his attorney and that he was satisfied with her services (T. 4). Respondent answered in the affirmative when asked whether he had read everything in the Plea Form (T. 5). Respondent stated he understood everything in the plea form (T. 5), and that everything is true to which he had signed his name (T. 5-6). At that point, the following appears of record:

> THE COURT: Anything further on the known and voluntary nature of the plea?
>
> MS. CRAFT [Assistant State Attorney]: Your Honor, just that Ms. Hill [prosecutor] did file a notice of intent to seek enhanced penalties on April t and I just want to make sure that Mr. Wilson is aware of that.
> I do not know what she is going to recommend for sentence.
>
> THE COURT: Mr. Wilson, do you understand that the State is seeking an enhanced penalty to have you classified as an habitual offender?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Anything further?
>
> MS. CRAFT: No, sir.
>
> MS. SCULL [defense attorney]: No, Your Honor.

(T. 6). The court at that point found that Respondent made the plea of nolo contendere freely, voluntarily and intelligently. That Respondent was satisfied with his attorney's services; that there was a factual basis for the plea; and accepted Respondent's plea of nolo contendere (T. 6). The court ordered a presentence investigation (T. 6), and deferred sentencing to July 26, 1993 (T. 7).

At the sentencing hearing of July 26, 1993, the State started

by informing the court that the state was seeking enhanced penalties under the habitual offender statute and that the notice was sent to Respondent April 28, 1993 (T. 9). There was no objection or motion to withdraw plea by the Respondent (T. 10-24). The testimony of Officer Heinmiller of the Fort Pierce Police Department, as a fingerprint identification expert, was introduced to establish that the fingerprints on the certified judgment of convictions presented by the State were the same as Appellants (T. 10-21). At that point, the State sought and received a continuance before sentencing so that the State could receive the certificate of non-restoration of civil rights, which had already been ordered (T. 10, 23).

On August 23, 1993, the parties appeared before the court for sentencing of Respondent (T. 26). Without any objection from Respondent (T. 27), the State introduced into evidence the certified copy of non-restoration of civil rights for Respondent (T. 26-27). The court then stated:

> THE COURT: Court does find that, based upon the four exhibits presented, the State does show factually that they are entitled to have Mr. Wilson classified as an habitual felony offender.
>
> I will determine whether to sentence him as a habitual felony offender based upon additional argument.
>
> Ms. Stull [defense counsel] anything further you wish to present then?

(T. 27). Defense counsel then conceded that Respondent qualified as an habitual felony offender (T. 27, 28), but urged the court that if the court were to "habitualize" him, that Respondent be given a sentence within the guidelines to be followed by a

probationary period so that he could be referred to a drug treatment program (T. 28-29).

The Sentencing Guidelines Scoresheet shows a recommended sentence range of 12 to 17 years, and a permitted sentence range of 9 to 22 years (R. 39). The trial court imposed a 22 year habitual offender sentence, to be followed by three years of probation (R. 43).

Respondent did not object to the sentence imposed, nor ever moved to withdraw his nolo contendere plea before the trial court.

On appeal to the District Court of Appeal, Fourth District, Respondent challenged the habitual offender sentence imposed alleging that the trial court violated the requirements set out by this Court in Ashley v. State, 614 So. 2d 486 (Fla. 1993), when the court failed to inform him that if sentenced as an habitual felony offender, he could be sentenced to more than fifteen years. Respondent asked the District Court to remand with directions that the habitual offender classification and sentence be vacated and a guideline sentence be imposed. The State responded that because Respondent was aware that the State was seeking habitual felony offender treatment, and confirmed that he had conferred with his attorney regarding the consequences of pleading nolo contendere, leaving the decision as to the extent of the sentence to the discretion of the trial court, the question was one of knowingly, freely and voluntarily entering the plea of nolo contendere, when Respondent knew the State was seeking an habitual offender sentence. Therefore, the State asserted the sentence was legal and

should be affirmed. Once the sentence was found to be legal and affirmed on appeal, if Respondent wanted to further challenge the sentence on the basis now contended, he must begin by filing a motion to withdraw plea with the trial court alleging he had entered his plea involuntarily, not knowing what the maximum sentence under the habitual felony offender statute was to be.

In its opinion filed November 9, 1994, the Fourth District Court of Appeal framed the issue as "whether the defendant must be resentenced pursuant to the terms of his plea or whether the trial court may permit the defendant to withdraw his plea, thereby offering the trial court a second opportunity to properly habitualize." (Appendix) The District Court decided an Ashley violation created an "illegal sentence", and did not involve an involuntary plea issue; but certified conflict with the decision of the Second District Court of Appeal in Bell v. State, 624 So. 2d 821 (Fla. 2d DCA 1993), rev. denied, 634 So. 2d 622 (Fla. 1994). (Appendix).

Based on the certified conflict, the State invoke the discretionary review jurisdiction of this Court, and by order issued December 5, 1994, this Court postponed decision on jurisdiction, but set a briefing schedule.

Petitioner's Brief on the Merits follows.

SUMMARY OF THE ARGUMENT

The record is undisputed that Respondent received written notice of the State's intent to seek habitual offender treatment prior to acceptance of the plea of nolo on July 2, 1993 (R. 7, T. 6). The plea agreement form also contains a statement by defense counsel that she informed Respondent of the maximum penalty as to each count to which Respondent was pleading nolo prior to the acceptance of the plea (R. 12). The only problem arises from the fact that the trial court failed to confirm from Respondent that he was aware of the maximum sentence he could receive, or that he may not receive some gain time, if sentenced as an habitual offender statute.

The District Court below, certifying conflict with Bell, held that because this amounted to an Ashley violation, the sentence must be reversed and remand the cause to the trial court for resentencing under the guidelines recommended range, without giving the trial court the opportunity to allow Respondent to withdraw his plea. The State submits that because the harmless error rule has been applied by this Court in Massey where the defendant therein was not given prior written notice of the State's intent, the harmless error rule applies in the case at bar. Under the harmless error rule, it is clear that because Respondent did receive written notice, and was prepared for the hearing, he was not prejudiced by the trial court's failure to confirm Respondent was aware of the maximum penalty before accepting the plea. Therefore, the error was harmless beyond a reasonable doubt.

In the alternative, the State would submit that since Respondent did not move to withdraw the plea with the trial court, the issue is one that can only be decided after a hearing where the Respondent and his counsel can assert whether Respondent did or did not have actual knowledge of the maximum penalty under the habitual felony offender statute. Thus, the decision rendered below should be quashed, and the reasoning of Bell adopted, wherein the cause is remanded to the trial court to give Respondent an opportunity to withdraw the plea, and thereafter to enter a new plea to the charges or proceed to trial.

ARGUMENT

WHETHER THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, ERRED IN HOLDING THAT AN ASHLEY VIOLATION CREATED AN ILLEGAL HABITUAL FELONY OFFENDER SENTENCE, NOT A QUESTION OF VOLUNTARINESS OF THE PLEA.

Petitioner, the State of Florida, submits that the Fourth District Court of Appeal was incorrect when it held below that an Ashley[1] violation automatically created an illegal sentence, and did not involve a question of voluntariness of the plea. The opinion below is in conflict with Bell v. State, 624 So. 2d 821 (Fla. 2d DCA 1993), rev. denied, 634 So. 2d 622 (Fla. 1994). The State submits that the issue was properly decided in Bell, and therefore, the decision hereunder review should be quashed, and the reasoning of Bell adopted as the correct resolution of the issue.

The Bell Court's resolution of the issue can be said to be the correct one with more emphasis under the particular facts of this case. The record clearly shows that notice of intent to seek enhanced penalties pursuant to Sec. 775.084, Fla. Stat. was filed by the State on April 28, 1993 (R. 7). Respondent entered his plea of guilty on July 2, 1993 (T. 2-8). At the change of plea hearing, before accepting the plea of nolo contendere, the trial court made sure the record reflected that Respondent had read and understood the plea form (T. 5), that he had discussed the case, the plea agreement, and the consequences of pleading nolo contendere with his attorney (T. 5-6), and that Respondent was satisfied with

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

counsel's services (T. 4). Respondent then personally confirmed that he was aware that the State was seeking habitual offender classification and sentence (T. 6). The record also shows that the parties understood that the agreement did not encompass an agreed sentence. That the sentence was open to the discretion of the trial court (T. 4, R. 9); and that Respondent was only reserving his right to appeal a sentence outside the guidelines recommended range (R. 10).

In Ashley v. State, 614 So. 2d 486 (Fla. 1993), this Court held:

> [I]n order for a defendant to be habitualized following a guilty or nolo plea, the following must take place prior to acceptance of the plea: 1) The defendant must be given written notice of intent to habitualize, and 2) the court must confirm that the defendant is personally aware of the possibility and reasonable consequences of habitualization. (footnote 8 omitted)

Id. at 490. In the case at bar, the first requirement of Ashley was satisfied because it is clear that Respondent received the April 28, 1993, written notice of intent to habitualize well **prior** to acceptance of the plea on July 2, 1993; and Respondent so confirmed (T. 6). With reference to the second Ashley requirement, this Court explained

> The defendant should be told of his or her eligibility for habitualization, the maximum habitual offender term for the charged offense, the fact that habitualization may affect the possibility of early release through certain programs, and, where habitual violent felony offender provisions are implicated, the mandatory minimum term. As noted in the rule, "[c]ounsel for the prosecution and the defense shall assist the

> trial judge in this function." Fla.R.Crim.P. 3.172(a).

Ashley, n. 8 at 490. Under the facts and circumstances of the case at bar, the State would submit that the second requirement of Ashley was also met because it is undisputed Respondent had discussed the case with his attorney, was well aware the State was seeking habitualization (T. 6), and agreed he was eligible for habitualization (T. 27, 28). Further, the plea form Respondent executed July 2, 1993, provides that his attorney "explained the maximum penalty as to each count to which the Defendant is pleading ... ." (R. 12). Thus, it can be inferred that the attorney informed Respondent what the maximum habitual offender sentence would be for the charged offense, and that habitualization may affect the possibility of early release through certain programs (R. 10, 12). However, without taking into consideration the harmless error rule, because the trial court did not confirm from Respondent personally that he was aware what the maximum habitual offender term for the charged offense might be, the District Court held this case involved a straight Ashley violation.

Once it decided this was an Ashley violation, the District Court went straight to decided what the proper remedy was, i.e., remand for resentencing under the guidelines or remand to give Respondent an opportunity to withdraw his plea. The District Court held that because this Court in Ashley referred to the issue as one of an "illegal sentence," then the only remedy when an "Ashley violation" has been establish is to reverse the habitual offender sentence, and remand for resentencing within the guidelines. That

is, the exact relief granted to Ashley by this Court; which the District Court held was necessary in every case, without taking into consideration the particular facts of the individual case. The State submits that the District Court's interpretation of Ashley was in error. It is clear that in Ashley, remand for resentencing under the guidelines was the only legal sentence available to the trial court at the time of sentencing. Because *sub judice* Respondent had notice of the State's intent to seek habitualization in his case (T. 6), and Respondent confirmed he discussed the consequences of pleading nolo with his attorney prior to the acceptance of the plea (R. 8-13, T. 5-6), the trial court below had the discretion to sentence Respondent either under the guidelines or as an habitual felony offender if the State established he qualified, in accord with the parties' understanding of the plea agreement at bar.

In Massey v. State, 609 So. 2d 598 (Fla. 1992), the defendant went to trial representing himself. During the trial, the state announced that it was filing a notice of intent to have Massey sentenced as a habitual felony offender. After the jury found Massey guilty as charged, the notice of intent was filed in open court. The sentencing hearing was held more than three months later. On appeal, Massey contended that although his attorney had received a copy of the notice, his sentence must be reversed because the notice had not been served upon him prior to sentencing as required by the statute. Massey, at 599. This Court approved the District Court's application of the harmless error rule to the

facts of the case, and held:

> The purpose of requiring a prior written notice is to advise of the state's intent and give the defendant and the defendant's attorney an opportunity to prepare for the hearing. This purpose was clearly accomplished because Massey and his attorney had actual notice in advance of the hearing. It is inconceivable that Massey was prejudiced by not having received written notice.

Id. at 600. The State submits that because in the case at bar it is uncontroverted that Respondent did receive the required written notice, the problem arises out of the fact that the trial court failed to confirm from Respondent whether he was aware of the maximum sentence and the consequences of being sentenced as an habitual felony offender. As can be seen from the Massey opinion, whether the defendant is aware of what sentence he might be sentenced when he goes to trial is not an issue. The issue only comes into play when the defendant enters a plea of guilty or nolo contendere due to the application of Florida Rule of Criminal Procedures 3.172. Therefore, it is clear that if it were not because Ashley plead, putting the requirements of Rule 3.172 into play, the second requirement of Ashley would not have become an issue. Thus, it is clear that Ashley deals strictly with a voluntariness of the plea issue, and not an "illegal sentence" issue as held by the District Court *sub judice*.

A review of Ashley demonstrates that this Court found that because the defendant therein did not have notice prior to the plea being accepted that he might be sentenced as an habitual felony offender, and what the maximum sentence thereunder might be, the

only legal sentence available to the trial court at the time of sentencing in that case was a guidelines sentence. The Ashley opinion clearly does not stand for the proposition that a guidelines sentence is the only remedy.

The State's position is supported by the interpretation given to Ashley by other District Courts of Appeal. See Heatley v. State, 636 So. 2d 153 (Fla. 1st DCA 1994), rev. denied, ___ So. 2d ___ (Fla. Sept. 7, 1994) (The relief granted in Ashley (a guidelines or departure sentence) was appropriate in that case because it would have been the only sentence available to the trial court at the time it accepted Ashley's plea.) In Horton v. State, 19 Fla. L. Weekly D2469 (Fla. 1st DCA Nov. 22, 1994), it was stated "*Ashley* [does not stand] for a mechanical reversal in cases where a plea was entered and accepted voluntarily, after the defendant had proper notice of intent to seek habitual offender sentencing." The Horton court observed that "*Ashley* turned primarily on the prosecution's failure to give notice of intent to habitualize before the plea." And concluded "that the primary consideration in *Ashley* was the state's complete failure to advise the defendant of its intent to seek habitual offender sentencing prior to the entry of the guilty plea." Therefore, the Horton court **affirmed** the trial court's denial of the defendant's motion to withdraw his plea under the facts of that particular case. In State v. Will, 19 Fla. L. Weekly D2334 (Fla. 3d DCA Nov. 9, 1994), the Third District **reversed** the trial court's granting of the defendant's motion to set aside his plea. The Third District also stated that "*Ashley*

... represents an evolutionary refinement in the law relating to **plea colloquies**, ..." The Fifth District Court of Appeal agrees with the First, Second and Third, that the Ashley opinion is dealing with the "law relating to **plea colloquies**" and was not strictly an "illegal sentence" issue as the Fourth District rule in the instant case below. See Thompson v. State, 638 So. 2d 116 (Fla. 5th DCA 1994), review pending, No. 83,951 (Fla. Nov. 23, 1994) (*Ashley* requires that the defendant be made aware that someone (the State of the Judge) will seek habitual offender treatment **prior to his plea so that he can take that into account in deciding whether or not to plea.**); Jones v. State, 639 So. 2d 147 (Fla. 5th DCA 1994), review pending, No. 84,150 (Fla. Nov. 23, 1994) (*Ashley* appears to require a pre-plea notice of intent to habitualize for an habitual offender sentence to stand as legally valid).

The State, therefore, submits that the District Court misinterpreted the holding of this Court in Ashley. The sentence in Ashley was illegal only because the defendant therein did not receive **any** notice whatsoever that he was going to be considered and treated as an habitual felony offender prior to him entering his plea of guilty. In other words, Ashley was not given the opportunity to take that into account in deciding whether or not to plead. That is not the situation *sub judice*. The case at bar is more similar to the circumstances in Bell v. State, 624 So. 2d 821 (Fla. 2d DCA 1993), rev. denied, 634 So. 2d 622 (Fla. 1994). The State submits that Bell was correctly decided. Therefore, the

Fourth District's opinion at bar which certified conflict with Bell needs to be quashed on the reasoning that Bell set out the proper remedy when the second prong of Ashley has not been complied with under the particular circumstances of the case under review.

Bell holds:

> The record in this case does not reveal that the trial court ever confirmed that Bell personally knew that he could receive up to thirty years in prison and that the would not be eligible for some gain time. Thus, there was no showing that Bell knowingly and intelligently entered the plea.
>
> * * *
>
> Bell's was an open plea, and he was not promised anything. He was misinformed about the possible maximum sentence and was uninformed as to how habitualization would affect his early release. Based on these circumstances, we vacate Bell's sentence and remand this case to the trial court to allow Bell to withdraw his plea and thereafter to enter a new plea to the charge or to proceed to trial.

Bell, 624 So. 2d at 821-822. Accord Gonzalez v. State, 639 So. 2d 134 (Fla. 2d DCA 1994); Ciccarelli v. State, 635 So. 2d 149 (Fla. 2d DCA 1994); Syples v. State, 621 So. 2d 574 (Fla. 2d DCA 1993). The State would point out that the First District, Third District and Fifth District Courts of Appeal agree with the Second District's remedy set out in Bell, see, Hall v. State, 643 So. 2d 635 (Fla. 1st DCA 1994) (remanded for the trial court to determine whether the requirements of *Ashley* were complied with prior to entry of Hall's plea. If they were not, then Hall's habitual offender sentence is illegal and he must be permitted to withdraw his plea or be sentenced within the guidelines); Lee v. State, 642

So. 2d 1190 (Fla. 1st DCA 1994) (same); Cole v. State, 640 So. 2d 1194 (Fla. 1st DCA 1994) (The sentence is reversed and the case remanded to the trial court to allow appellant to withdraw her plea or be sentenced again after proper inquiry pursuant to *Ashley*); State v. Will, 19 Fla. L. Weekly D2334 (Fla. 3d DCA Nov. 9, 1994) (order granting motion to withdraw reversed, and remanded for specific finding on the defendant's claim that he did not agree to a habitual offender disposition); State v. Brown, 622 So. 2d 17 (Fla. 5th DCA 1993).

Thus, since in the case at bar, just as in Bell, the record does not reveal that the trial court ever confirmed that Respondent personally knew that he could receive up to thirty years in prison and that he would not be eligible for some gain time prior to acceptance of the plea, the question is one of whether Respondent **knowingly and intelligently** entered the plea. The State maintains that under the facts and circumstances of this case, Respondent should not have been allowed to challenge the sentence until he had moved to withdraw the plea with the trial court. Robinson v. State, 373 So. 2d 898 (Fla. 1979); Brown v. State, 616 So. 2d 1137 (Fla. 4th DCA 1993) (Since appellant did not present the contention that his plea of guilty was invalid because the trial court failed to advise him of the ten year mandatory minimum sentence as an habitual felony offender as required by Rule 3.172(c)(1) to the trial court in his motions to withdraw his plea, appellant cannot raise it for the first time on appeal.) Had this procedure been followed in the case at bar, the trial court could have held a

hearing to determine whether the defense attorney informed Respondent of the maximum sentence he would have been facing under the habitual offender statute, and that he would not be eligible for some gain time. The trial court could then have made findings to support its conclusion as to whether Respondent **knowingly and intelligently** entered the plea.

In the case at bar, it is uncontroverted that Respondent never moved to withdraw his plea in the trial court. As shown above, however, Respondent is now challenging the voluntary or intelligent character of his plea without having presented this issue to the trial court. In Robinson v. State, 373 So. 2d 898, 902 (Fla. 1979), this Court specifically held:

> The appellant contends that he has a right to a general review of the plea by an appellate court to be certain that he was made aware of all the consequences of his plea and apprised of all the attendant constitutional rights waived. In effect, he is asserting a right or review without a specific assertion of wrongdoing. We reject this theory of an automatic review from a guilty plea. The only type of appeal that requires this type of review is a death penalty case. See Sec. 921.141(4), Fla. Stat. (1977). Furthermore, we find that **an appeal from a guilty plea should never be a substitute for a motion to withdraw a plea.** If the record raises issues concerning the voluntary or intelligent character of the plea, that issue should first be presented to the trial court in accordance with the law and standards pertaining to a motion to withdraw a plea. If the action of the trial court on such motion were adverse to the defendant, it would be subject to review on direct appeal.

The State maintains that the record in the case at bar does not raise any issue concerning the voluntary or intelligent nature

of the plea. Thus in the action before the Fourth District Court below, Respondent was "asserting a right of review without a specific assertion of wrongdoing" which he did not have. Respondent not having filed a motion to withdraw the plea with the trial court, the District Court below should have affirmed the sentence. See Simmons v. State, 19 Fla. L. Weekly D2407 (Fla. 1st DCA Nov. 14, 1994); Heatley v. State, supra 636 So. 2d at 154; Brown v. State, supra, 616 So. 2d 1137. Thus, on these basis too the District Court's opinion here under review should be quashed.

Lastly, the State submits that the District Court's opinion below should be quashed, and the sentence imposed affirmed under the authority of Massey v. State, 609 So. 2d 598 (Fla. 1992), by applying the harmless error rule to the particular facts of this case. See Lewis v. State, 636 So. 2d 154 (Fla. 1st DCA 1994) (In Massey the supreme court has held that failure to satisfy the written notice requirements of the habitual offender statute is subject to a harmless error analysis.) In Massey, 609 So. 2d at 599, this court quoted with approval Roberts v. State, 559 So. 2d 289, 290-91 (Fla. 2d DCA), rev. dismissed, 564 So. 2d 488 (Fla. 1990), as follows:

> Defendant's attorney was served with ... notice, and there is no question that defendant had knowledge of the notice. While section 775.084(3) does ... state that such notice shall be served "on the defendant and his attorney," that section gives the purpose of that requirement as being "so as to allow the preparation of a submission on behalf of the defendant" in response to the notice. In this case there was such a response prepared and made on behalf of defendant, thus the purpose of the statute was fulfilled. We do

> not conclude that the legislature intended to permit a defendant to avoid the application of the statute on the technical grounds raised here.

This Court, in Massey, went on to hold that the district court was correct in affirming the sentence although the notice requirement had not been strictly complied with applying the harmless error rule because both Massey and his attorney had actual notice of the state's intention to seek habitual felony offender status, Id. at 599, and stated:

> The purpose of requiring a prior written notice is to advise of the state's intent and give the defendant and the defendant's attorney an opportunity to prepare for the hearing. This purpose was clearly accomplished because Massey and his attorney had actual notice in advance of the hearing. It is inconceivable that Massey was prejudiced by not having received the written notice.

Id. at 600.

In the case at bar, the record demonstrates that Respondent was aware that the State was seeking to sentence him as an habitual felony offender (T. 6). The State filed its notice of intent to seek habitual sentence on April 28, 1993 (T. 6, R. 7). At the change of plea hearing of July 2, 1993, Respondent, personally, acknowledged that he knew the State was seeking to enhance the sentence as an habitual felony offender (T. 6). At the sentencing hearings of July 26 and August 23, 1993, the State introduced certified judgments and sentences of Respondent's prior convictions (R. 14-16, 17-25, 26-33). Douglass K. Heinmiller of the Fort Pierce Police, Identification Bureau, testified as a fingerprint expert (T. 12), and stated that the fingerprints on the judgments

matched the prints he had rolled of Appellant that morning (T. 13-14). Respondent conceded he qualified to be classified as an habitual felony offender (T. 27, 28). Respondent simply asked the trial court that if the court were to "habitualize" him, that he be given a sentence within the guidelines range to be followed by a probationary period so that he could be referred to a drug treatment program (T. 28-29). The Sentencing Guidelines Scoresheet shows a recommended sentence range of 12 to 17 years, and a permitted sentence range of 9 to 22 years (R. 39). Respondent received a 22 year habitual offender sentence, followed by three years probation (R. 43). It is clear, thus, that Respondent was not prejudiced by not being advised of the maximum sentence as an habitual felony offender prior to the plea of nolo being accepted. Appellant had notice, was prepared for the hearings, and received the sentence he asked for. Under these circumstances, applying the harmless error rule, the sentence imposed must be affirmed. Massey.

Because **notice** is the main concern, and Respondent received written notice well in advance of the change of plea hearing, no prejudice has been established *sub judice*. Massey; Voth v. State, 638 So. 2d 121 (Fla. 5th DCA 1994); Jenkins v. State, 634 So. 2d 1143 (Fla. 3d DCA 1994) (failure to give notice of habitualization harmless error). Here Respondent received written notice, and the plea negotiations were with the understanding that although he knew the State would seek a habitual offender sentence, Respondent was requesting a sentence within the guidelines. Respondent personally

confirmed he knew the State was seeking habitualization. This fact distinguishes this case from Ashley, where at the time the plea was accepted, the defendant had no personal understanding that he would be habitualized. Further, the record also shows that after receiving written notice on April 28, 1993, defense counsel asserted on July 2, 1993, in the written plea agreement form that she had explained to Respondent the maximum sentence as to each count to which Respondent was pleading nolo contendere (R. 12). Therefore, Respondent's sentence as an habitual offender should be affirmed. See Mansfield v. State, 618 So. 2d 1385 (Fla. 2d DCA 1993). Here the State presented uncontradicted evidence establishing that Respondent qualified as an habitual felony offender. Moreover, there is no suggestion in the transcript of the sentencing hearing that either Respondent or his attorney was surprised by or unprepared to deal with the state's request for imposition of habitual felony offender sentences. Accordingly, on the facts presented, the failure of the trial court to confirm from Respondent that he knew what the maximum sentence he could receive as an habitual offender prior to acceptance of the plea was harmless beyond any reasonable doubt. See Lewis v. State, 636 So. 2d 154 (Fla. 1st DCA 1994).

In the alternative, the State submits that the sentence should be affirmed, without prejudice for Respondent to file a motion to withdraw his plea. At the hearing on such motion, the trial court can hear testimony from defense counsel and Respondent on whether the maximum sentence as an habitual felony offender was discussed

by them prior to the change of plea hearing held July 2, 1993. See Anderson v. State, 637 So. 2d 971 (Fla. 5th DCA 1994); Hannah v. State, 623 So. 2d 855 (Fla. 3d DCA 1993).

CONCLUSION

WHEREFORE, based on the above and foregoing arguments and authorities cited therein, the State of Florida respectfully submits that the decision of the district court should be **QUASHED** and the judgment and sentence imposed by the trial court should be **AFFIRMED.**

Respectfully submitted,

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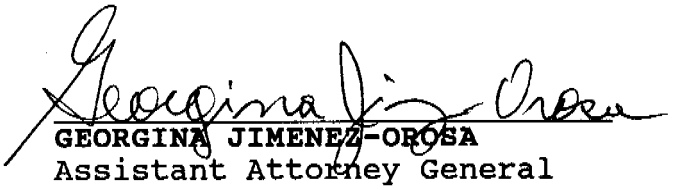

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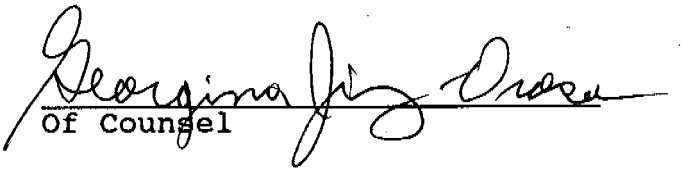
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief of Appellee" has been furnished by Courier to: KAREN E. EHRLICH, Assistant Public Defender, Attorney for Respondent, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 30th day of January, 1995.



Of Counsel

IN THE SUPREME COURT OF FLORIDA

CASE NO. 84,789

STATE OF FLORIDA,

Petitioner,

vs.

BOBBY WILSON,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

****

APPENDIX TO

PETITIONER'S BRIEF ON THE MERITS

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Verdult's argument that the trial court reversibly erred by not giving the requested "good faith defense" jury instruction, we do not need to address Verdult's other point on appeal.

REVERSED. (WARNER, POLEN and FARMER, JJ., concur.)

* * *

Criminal law—Juveniles—Sentencing—Error to impose adult sanctions without making specific written findings addressing juvenile's sophistication and maturity—Amended statute eliminating requirement that trial court make specific findings or enumerate statutory criteria in writing as prerequisite to adult sanctions does not apply to sentences in appeal "pipeline" rendered prior to statute's effective date—Speedy trial—Nearly two-year delay between issuance of capias and juvenile's arrest did not violate speedy trial rights where delay was inadvertently caused by unexplained failure of sheriff's office in neighboring county to detain juvenile on capias and defendant was not actually prejudiced by delay—Evidence that state may have been negligent in not taking further action upon learning of juvenile's release is not fatal

JAMAL SHAW, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 93-3290. L.T. Case No. 91-15708 CF10. Opinion filed November 9, 1994. Appeal from the Circuit Court for Broward County; Howard Zeidwig, Judge. Counsel: Richard L. Jorandby, Public Defender, and Louis G. Carres, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Georgina Jimenez-Orosa, Assistant Attorney General, West Palm Beach, for appellee.

(STONE, J.) Appellant's conviction is affirmed but we reverse Appellant's adult sentence and remand for the trial court to make specific written findings in accordance with section 39.059(7)(d), with respect to the Appellant juvenile's "sophistication and maturity." § 39.059(7)(c)4, Fla. Stat. (1993). On resentencing, the court may again determine whether to impose adult sanctions. *Troutman v. State*, 630 So. 2d 528 (Fla. 1993). We note that recent amendment to subsection 39.059(7) became effective October 1, 1994. Pursuant to the amendments, trial courts are no longer required to make specific findings or enumerate the statutory criteria in writing as a prerequisite to imposing valid adult sanctions. Ch. 94-209, § 51, at 834-35, Laws of Fla. However, the amended statute is inapplicable to sentences in the appeal "pipeline" rendered prior to its effective date.

On the primary issue raised, we find no abuse of discretion in the trial court's denying Appellant's motion to dismiss on constitutional speedy trial grounds.

An information charging armed robbery incident to a car theft was filed and a capias issued in Broward County in August, 1991, but Appellant was not arrested until June, 1993. The warrant was forwarded by the Broward County Sheriff's Office via the NCIC/FCIC teletype computer. Appellant was located, by a then-existing "multi-jurisdiction task force," in Palm Beach County Sheriff's custody. The Broward authorities timely sent a "detainer" by teletype and mail to Palm Beach, where charges against Appellant were pending relating to the same vehicle. However, Appellant was released by Palm Beach prior to receipt of the mailed notice and the Broward County Sheriff's Office was advised accordingly. There is no explanation why the Palm Beach County Sheriff's Office did not honor the teletype detainer which it received before Appellant's release. The record does not reflect whether the B.S.O. then requested assistance from the P.B.S.O. in locating Appellant, who claims that he moved in with his mother in Palm Beach County, albeit at a different address from that on the capias. The multi-jurisdiction task force apparently ceased functioning during the interim one-year period and was reformed in the spring of 1993, at which time the capias was given to a U.S. Marshal for service and Appellant was arrested by the task force. Appellant knew that a warrant had been issued in Broward but claims that he did not know that it remained in effect after his Palm Beach release.

Appellant testified at the hearing that he was prejudiced by the delay because at the time of the robbery, he was "hanging out" with a number of friends in front of a store and several of those potential alibi witnesses were subsequently shot and killed. Others, however, are still available to testify.

Four factors are considered in determining whether an accused's constitutional speedy trial rights are violated: (1) the length of the delay; (2) the reason for the delay; (3) timely assertion of the right; and (4) actual prejudice resulting from the delay. *Kennedy v. Bonnano*, 571 So. 2d 14, 15 (Fla. 2d DCA 1990), which in turn cites the leading case of *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 182, 33 L. Ed. 2d 101 (1972).

Here, the trial court made findings that the cause of the delay was the unexplained failure of Palm Beach to detain Appellant on the capias. (We note that the record does indicate that he used more than one name.) The court further found that there was no deliberate attempt by the state to delay the proceedings; rather, the delay was inadvertent.

As to the claim of prejudice, the court found that "the presentation of the defense will not be impaired" by the lost witnesses, as "[m]ultiple other persons exist to establish the Defendant's alibi." The court also noted that it "finds it difficult to believe that coincidentally four (4) of the Defendant's alibi witnesses have been killed since the institution of this case."

The record reflects that the trial court, albeit imperfectly, did balance and weigh all four factors in arriving at its findings and decision. *See State v. Rounsaville*, 438 So. 2d 68 (Fla. 2d DCA 1983), *rev. denied*, 447 So. 2d 888 (Fla. 1984); *Howell v. State*, 418 So. 2d 1164 (Fla. 1st DCA 1982). We recognize that the trial court did make a finding that is patently not a valid factor: that Appellant did not assert his speedy trial right during the 18-month hiatus.[1] *Howell*, 418 So. 2d at 1173. However, it is clear that this was not the grounds for the court's conclusion.

Actual prejudice is the final and most important factor and the absence of prejudice was obviously the basis for the court's findings. *See King v. State*, 468 So. 2d 510 (Fla. 1st DCA 1985); *State v. Union*, 469 So. 2d 84 (Fla. 2d DCA 1985). *See also United States v. Brand*, 556 F.2d 1312 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063, 98 S. Ct. 237, 55 L. Ed. 2d 763 (1978); *Turner v. Estelle*, 515 F.2d 853 (5th Cir. 1975), *cert. denied*, 424 U.S. 955, 96 S. Ct. 1431, 47 L. Ed. 2d 361 (1976); *United States v. Smith*, 487 F.2d 175 (5th Cir. 1973), *cert. denied*, 419 U.S. 846, 95 S. Ct. 82, 42 L. Ed. 2d 75 (1974). Evidence that the state may have been negligent in not taking further action upon learning of Appellant's release is not fatal. *See Kennedy*, 571 So. 2d 14.

Therefore, we affirm except as to the sentencing issue and remand for resentencing. (GLICKSTEIN and GUNTHER, JJ., concur.)

---

[1]We do note that Appellant's motion was not made until over two months after his arrest on the Broward warrant.

* * *

Criminal law—Sentencing—Habitual offender—In order for defendant to be habitualized following guilty or nolo contendere plea, defendant must be given written notice of intent to habitualize, and court must confirm that defendant is personally aware of consequences of habitualization—Proper remedy where requirements for habitualization are not met is remand for sentencing in accord with terms of plea agreement—Conflict certified

BOBBY WILSON, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 93-2801. L.T. Case No. 93-783-CF. Opinion filed November 9, 1994. Appeal from the Circuit Court for St. Lucie County; Dwight L. Geiger, Judge. Counsel: Richard L. Jorandby, Public Defender, and Karen E. Ehrlich, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Georgina Jimenez-Orosa, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Appellant correctly argues that the trial court, prior to accepting his plea, failed to confirm that appellant was

personally aware of the reasonable consequences of habitualization. Accordingly, we reverse his sentence and remand with direction hereinafter discussed.

Where the habitualization requirements of *Ashley v. State*, 614 So. 2d 486 (Fla. 1993), are not met prior to habitualizing a defendant who has entered a plea of guilty or nolo contendere, an issue arises as to whether the defendant must be resentenced pursuant to the terms of his plea or whether the trial court may permit the defendant to withdraw his plea, thereby offering the trial court a second opportunity to properly habitualize.

The *Ashley* court held that "in order for a defendant to be habitualized following a guilty or nolo plea, the following must take place prior to acceptance of the plea: (1) The defendant must be given written notice of intent to habitualize, and (2) the court must confirm that the defendant is personally aware of the possibility and reasonable consequences of habitualization." 614 So. 2d at 490 (footnote omitted).[1] Neither prong was met in *Ashley*. The court vacated the habitualized sentence and remanded for "imposition of a sentence consistent with the terms under which Ashley's plea was proffered and accepted—a guidelines or departure sentence." *Id.* at 491.

Here, the first prong of *Ashley* was met, but the second prong was violated. Appellant entered an open plea to the court and the written plea agreement indicated a maximum sentence of fifteen years. Although the plea agreement did not promise a guidelines sentence, it did indicate that appellant reserved the right to appeal any sentence outside the recommended guidelines range. The sentencing guidelines scoresheet, which included points for appellant's prior record, showed a recommended sentencing range of twelve to seventeen years, and a permitted sentencing range of nine to twenty-two years. Without proper habitualization, the statutory maximum sentence for a second degree felony, with which appellant was convicted, is fifteen years. § 775.082(3)(c), Fla. Stat. (1993). The trial court classified appellant as a habitual felony offender and sentenced him to twenty-two years, to be followed by three years probation. On remand, we direct the trial court to resentence appellant to a maximum of fifteen years pursuant to the terms of his plea agreement.

We recognize that this remedy conflicts with that fashioned by the second district in *Bell v. State*, 624 So. 2d 821 (Fla. 2d DCA 1993), *rev. denied*, 634 So. 2d 622 (Fla. 1994). In *Bell*, the defendant entered an open plea to the court and the plea agreement stated that the maximum penalty was fifteen years. The second prong of *Ashley* was not satisfied. The defendant argued that he could be resentenced to no more than fifteen years. The *Bell* court recognized that "*Ashley* could be read to require such a disposition because the *Ashley* court remanded the case 'for imposition of a sentence consistent with the terms under which Ashley's plea was proffered and accepted.' " 624 So. 2d at 821. However, the *Bell* court determined that such a conclusion was not mandated because, unlike in *Ashley*, Bell entered an open plea and was not promised anything. Under these facts, the court determined that *Ashley* did not mandate resentencing within the terms of the plea. Instead the court vacated the sentence and remanded the case to permit the defendant to withdraw his plea and enter a new plea or proceed to trial. In effect, this solution gave the trial court a second opportunity to habitualize correctly by complying with *Ashley*. *See also Syples v. State*, 621 So. 2d 574 (Fla. 2d DCA 1993) (where defendant was not informed that habitualized sentence could exceed maximum set out in plea form, reverse and remand with instructions to enter maximum sentence set out in plea form *or* allow defendant to withdraw guilty plea).

In an attempt to reconcile *Bell* with *Ashley*, one might argue that where the plea was conditioned on a determinate sentence, improper habitualization should be treated as an illegal sentence and the plea should be enforced, but where the plea was open to the court, improper habitualization mandates that the plea be vacated as involuntary because the defendant was not informed of the intent to habitualize or the consequences thereof. However, we do not find such a distinction convincing.

Although the facts of the instant case are similar to those of *Bell*, we find nothing in *Ashley* which suggests that a distinction between an open plea and a negotiated plea is significant or determinative of the *remedy*. Rather, the *Ashley* opinion's discussion concerning the promised guidelines sentence is presented within the context of supporting the court's determination that Ashley had not been informed of the intent to, or consequences of, habitualization. In this context, the court explained that at the plea colloquy and in the written plea, the sentencing discussion revolved around a guidelines sentence.

Furthermore, the *Ashley* court explained that notice of the intent to habitualize and awareness of the consequences thereof were required in order for the plea to be knowing and intelligent. Thus even though the defendant's plea could be characterized as involuntary because the notice and consequences elements were not satisfied, the court nonetheless appears to have treated the issue as an illegal sentencing issue. This is evidenced by the court's characterization of the issue as "a purely legal sentencing issue" and by the fact that the court ordered that the defendant be resentenced within the terms of his plea, not that he only be permitted to withdraw his plea. 614 So. 2d at 490. Thus it is apparent that the voluntariness of the plea and the illegality of the sentence are closely intertwined.[2]

The supreme court's treatment of this issue in *Snead v. State*, 616 So. 2d 964 (Fla. 1993), also suggests that the appropriate solution is to treat an *Ashley* violation as an illegal sentence rather than an involuntary plea which would require vacation of the plea. In *Snead*, the court determined that the defendant could not be habitualized upon revocation of his probation where the elements of *Ashley* had not been satisfied before he entered his plea. Instead, the trial court was limited to resentencing the defendant to the one cell increase permitted under the guidelines when probation is revoked. Although it is not clear in *Snead* whether the defendant's plea was open or whether the defendant was promised a guidelines sentence, one of the reasons cited by the court was that its result "provid[es] defendants who enter a plea agreement with the requisite notice of the most severe punishment that can be imposed." 616 So. 2d at 966. Such reasoning seems applicable whether the plea promises guidelines or whether the plea is open but sets out the maximum sentence possible.

Other decisions from this court support our conclusion. Unfortunately, the foundation for such statement lies within the court's records of the individual cases, not just in the issued opinions. For example, in *Harrelle v. State*, 632 So. 2d 280 (Fla. 4th DCA 1994), both prongs of *Ashley* were violated. Our records show that the defendant entered an unconditional plea straight to the court, the written plea indicated a maximum sentence of fifteen years, and a habitualized offender sentence of thirty years was imposed. We reversed the habitual offender sentence and instructed that on remand the defendant be sentenced in accordance with his plea.

Second, in *Arnold v. State*, 631 So. 2d 368 (Fla. 4th DCA 1994), our records reflect that the defendant had actual knowledge of intent to seek enhanced penalties, and his awareness of the consequences thereof was confirmed, but no written notice of intent was furnished. The defendant entered an open plea. Citing to *Ashley*, this court held that the defendant must be resentenced without habitual offender status.

Finally, in *Washington v. State*, 631 So. 2d 367 (Fla. 4th DCA 1994), our records show that the written plea stated that if the defendant was to be habitualized, the maximum sentences could be doubled. The defendant was not promised that he would receive a particular sentence or a guidelines sentence. In a very short opinion, this court noted that in addition to requiring notice of intent to habitualize, *Ashley* mandates that the defendant also be made personally aware of the possibility and consequences of

habitualization. Citing to *Ashley*, we "reverse[d] those portions of [the defendant's] sentencing orders adjudicating him to be an habitual offender." 631 So. 2d at 367.

These cases indicate that even where there has been an open plea, rather than a plea for a negotiated or guidelines sentence, this court has vacated the habitualized sentences, but has not presented the option of withdrawing the plea. This is consistent with interpreting *Ashley* to treat this issue as an illegal sentencing issue requiring resentencing within the terms of the plea regardless of whether the plea was open or negotiated, rather than treating it as an involuntary plea issue if the plea was open.[3]

Because we have invalidated appellant's habitualization, appellant must be resentenced to a maximum of fifteen years as set out in his plea.[4]

Pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), we hereby certify that our decision expressly and directly conflicts with that of the Second District Court of Appeal in *Bell v. State*, 624 So. 2d 821 (Fla. 2d DCA 1993), *rev. denied*, 634 So. 2d 622 (Fla. 1994). (GLICKSTEIN, WARNER and POLEN, JJ., concur.)

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[1]The consequences of which the defendant must be made aware include eligibility for habitualization, the maximum habitualized penalty, the possible effect of habitualization on early release, and mandatory minimum penalties. *Id.* at 490 n.8.

[2]In *Ashley*, a footnote attached to the court's remand instruction states that "Ashley does not seek to withdraw his plea, but rather asks for imposition of a guidelines sentence." *Id.* at 491 n.10. This note suggests that the court may have placed some significance on the defendant's request on appeal. As in *Ashley*, appellant also does not seek to withdraw his plea.

[3]Whether the issue is viewed as an illegal sentencing issue or an involuntary plea issue, appellant is not precluded from challenging his sentence in this appeal even though he did not seek to withdraw his plea below. If this issue is viewed as an illegal sentencing issue, then it falls within the class of issues which warrant a direct appeal from his plea. *Robinson v. State*, 373 So. 2d 898, 902 (Fla. 1979). Furthermore, unlike one who pleads guilty, one who pleads nolo contendere has a right to a direct appeal where he expressly reserved the right to appeal an issue. *Id.* at 901-03. Appellant pled nolo contendere and expressly reserved his right to appeal any sentence outside the recommended guidelines range. *Cf. Heatley v. State*, 636 So. 2d 153 (Fla. 1st DCA), *rev. denied*, __ So. 2d __ (Fla. Sept. 7, 1994) (Table, No. 83,723) (because appeal from *guilty* plea is not substitute for motion to withdraw plea, court declined to decide merits of *Ashley* issue on direct appeal from guilty plea).

Furthermore, we disagree with the *Heatley* court's discussion of *Ashley*. In *Heatley*, the notice prong of *Ashley* was met but the consequences prong was not. The court concluded "*Ashley* turned primarily on the prosecution's failure to give notice of intent to habitualize before the plea. It therefore remains for the supreme court to clarify the application of that case in other factual contexts [i.e., where notice is given, but the consequences are not adequately explained]." 636 So. 2d at 154. Although in *Ashley* the defendant neither received notice of intent to habitualize, nor was he informed of the consequences of habitualization, *Ashley* clearly requires that *both* of these elements be satisfied prior to accepting the plea. *See also, e.g., Washington v. State*, 631 So. 2d 367 (Fla. 4th DCA 1994); *Fountain v. State*, 626 So. 2d 1119 (Fla. 4th DCA 1993). We believe that *Ashley* turned on *both* notice of intent to habitualize *and* the consequences thereof. We disagree that *Ashley* turned *primarily* on the failure to give notice of intent to habitualize. The court's extensive discussion about the requirement that the defendant understand the reasonable consequences of the plea focused on the need to understand the maximum penalty that may be imposed. In fact, this discussion encompasses at least half of the court's opinion.

[4]Furthermore, absent proper habitualization, the trial court was prohibited from sentencing appellant beyond fifteen years because the statutory maximum penalty for a second degree felony, with which appellant was convicted, is fifteen years. § 775.082, Fla. Stat. (1993); Fla. R. Crim. P. 3.701(d)(10).

* * *

Criminal law—Juveniles—Jurors—Peremptory challenges—No abuse of discretion in trial court's determination that state offered race-neutral reason to support challenge of one of three African-American venire members—Sentencing—Adult sanctions—Trial court failed to adequately address in written order statutory criteria relating to protection of public and likelihood of reasonable rehabilitation—On remand, trial court may again impose adult sanctions after making necessary findings

DELVIN WOODS, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 93-2345. L.T. Case No. 92-015158CF10B. Opinion filed November 9, 1994. Appeal from the Circuit Court for Broward County; Sheldon M. Schapiro, Judge. Counsel: Richard L. Jorandby, Public Defender, and Joseph R. Chloupek, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Patricia Ann Ash, Assistant Attorney General, West Palm Beach, for appellee.

(DELL, C.J.) Delvin Woods, a juvenile, appeals his conviction for aggravated battery against Alex Hernandez and battery against Brian Whiting. Appellant has failed to demonstrate that the trial court abused its discretion when it determined that the state offered a race neutral reason to support its exercise of a peremptory challenge of one of three African-American venire members. Accordingly, we affirm appellant's conviction. *See Fotopoulos v. State*, 608 So. 2d 784, 788 (Fla. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 2377, 124 L. Ed. 2d 311 (1993).

We find merit in appellant's contention that the trial court erred when it sentenced him as an adult because the sentencing order failed to set forth all of the requisite findings as specified in section 39.059(7)(c), Florida Statutes (1991). In its written order, the trial court found:

> A. That the offenses for which the Defendant was found guilty were very serious to the community, and that the protection of the community requires adult disposition. The crimes of which the Defendant was convicted were racially motivated, and involved the Defendant leading a gang of teenagers armed with rocks and bottles, in an un-provoked and merciless attack upon unarmed victims. No multi-racial and multi-ethnic community such as ours, can long endure if the Courts do not impose the most severe of sanctions for such behavior.
>
> B. That the offenses were committed in an aggressive, violent, premeditated, and willful manner. The Defendant appeared to be engaging in an unprovoked attack on the victims for mere fun or sport. The Defendant was extremely aggressive, and after his arrest showed no remorse for what he had done. After he was apprehended, the Defendant boasted that he was going home and was going to get his gun, in order to inflict further carnage.
>
> C. That the offenses were against persons, and personal injury resulted.
>
> D. That the Defendant showed sophistication and maturity by bragging to the police and the victims that he could not be punished for his crimes, because he was a juvenile. He stated that "it was just another day at the office."
>
> E. That the Defendant's previous juvenile record dates back to 1989, when the Defendant was involved in a sexually related battery for which he was placed on community control.
>
> 4. That the Defendant's pre-sentence investigation reflects that he has had numerous disciplinary problems related to school.

The order does not recite factual findings addressing those criteria stated in section 39.059(7)(c)6, which provides:

> The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child if he is assigned to services and facilities for delinquent children.

We reject the state's argument that the trial court's order adequately covered this sixth factor in paragraph A. of its findings. In *Troutman v. State*, 630 So. 2d 528 (Fla. 1993), the supreme court stated:

> The Legislature has made clear in the statute itself that adherence to the requirements of section 39.059 is not optional: "It is the intent of the Legislature that the foregoing criteria and guidelines shall be deemed mandatory . . . ." § 39.059(7), Fla.Stat. (1991). We therefore hold that a trial court *must* consider each of the criteria of section 39.059(7)(c) before determining the suitability of adult sanctions. In so doing, the trial court must give an individualized evaluation of how a particular juvenile fits within the criteria. Mere conclusory language that tracks the statutory criteria is insufficient.

Id. at 531 (certain citations omitted).

The unequivocal holding of *Troutman* requires us to reverse and remand this case to the trial court for resentencing. On remand, the trial court may again impose adult sanctions against appellant after making the necessary findings in conformity with