IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

BOBBY WILSON,

Appellee.

Case No. 84,789

# RESPONDENT'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 Nineteenth Judicial Circuit, In and For St. Lucie County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The trial court transcripts and record are not numbered consecutively. References to the transcript will be preceded by the symbol "T" and references to the record will be preceded by the symbol "R".

## STATEMENT OF THE CASE AND FACTS

Petitioner states, "Respondent ... confirmed that he had conferred with his attorney regarding the consequences of pleading nolo contendere..." (Petitioner's brief at page 6, 13). Petitioner doesn't clarify "consequences", therefore Respondent must disagree with this broad statement and in response set forth the colloquy that was conducted before acceptance of his plea:

> THE COURT: Do you wish to plead no contest to robbery; is that right?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Ms. Stull is your lawyer.
> Did you discuss your case with her?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Are you satisfied with her services as your lawyer?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: How old are you?
>
> DEFENDANT: Twenty-nine.
>
> THE COURT: Twenty-nine?
> Are you taking drugs or medication today?
>
> DEFENDANT: No.
>
> THE COURT: Do you understand that you give up your right to a jury trial when you plead no contest?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Is that your signature there on the Plea Form?
> Do you see it right there?
> Yes?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: Okay.
> Did you read everything in the Plea Form or did somebody read it to you?
>
> DEFENDANT: Yes, sir.

THE COURT: Do you understand what is in the Plea Form?

THE DEFENDANT: Yes, sir.

THE COURT: Is everything true to which you signed your name here?

THE DEFENDANT: Exactly.

THE COURT: Anything further on the known and voluntary nature of the plea?

MS. CRAFT [the prosecutor]: Your Honor, just that Ms. Hill did file a notice of intent to seek enhanced penalties on April 28th 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.

(T 4-6).

At a subsequent hearing the court imposed the sentence recommended by the state, 22 years as a habitual felony offender followed by three years probation (T 34-35).

## SUMMARY OF ARGUMENT

Respondent was sentenced as a habitual felony offender following a plea of no contest. Prior to the plea Respondent had written notice of the state's intent to seek enhanced penalties. However, before the court accepted his plea the court did not confirm that Respondent was personally aware of the consequences of habitualization as required by Ashley v. State, 614 So. 2d 486 (Fla. 1993). Here, as in Ashley, the written plea did not mention habitualization and did not promise a particular sentence. Moreover, the maximum penalty contained in the written plea was the statutory (non-habitual) maximum penalty.

In vacating Respondent's habitual felony offender sentence the Fourth District Court of Appeal followed Ashley and remanded for resentencing to a maximum sentence as set forth in his plea. Respondent, like Ashley, does not challenge the voluntariness of his plea only the illegally imposed habitual felony offender sentence. In Ashley this Court concluded that the error created a legal sentencing issue. The Fourth District Court of Appeal noted this Court's conclusion and granted Respondent the same relief granted in Ashley. The cases in conflict with the remedy imposed in Ashley and Respondent's case failed to consider this Court's conclusion regarding the sentence.

## ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY VACATED RESPONDENT'S HABITUAL FELONY OFFENDER SENTENCE WHERE THE TRIAL COURT DID NOT COMPLY WITH ASHLEY AND THEREFORE COULD NOT LEGALLY IMPOSE A HABITUAL FELONY OFFENDER SENTENCE FOLLOWING RESPONDENT'S PLEA OF NO CONTEST.

The habitual felony offender statute roughly doubles the statutory maximum penalties applicable to some persons charged with having violated the law.[1] In Respondent's case the statutory maximum penalty doubled from fifteen to thirty years.

In Ashley v. State, 614 So. 2d 486 (Fla. 1993), this Court could not have been any clearer in setting forth the procedure that must be followed before a trial court has the judicial power to impose a habitual felony offender sentence following a plea. This Court stated:

> [W]e hold 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 [footnote omitted] of habitualization.

Id. at 490. This Court defined the reasonable consequences of habitualization as, "[t]he 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...." Id. at 490 n. 8.

This Court stated that the failure to follow this procedure created a "purely legal sentencing issue", and that, "[t]he requirement of rule 3.172 and section 775.084 concerning pre-plea notice of habitualization is clearly a legal matter, involving no factual determination." Ashley at 490.

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[1] Under the Habitual Felony Offender Statute a third degree felony is punishable by ten years; a second degree by thirty years and first degree for life. Section 775.084(4)(a), Florida Statutes (1993). Additionally gain time will not be applied to a habitual felony offender sentence. Section 775.084(4)(e).

In this case the trial court did not fulfill the second part of the procedure necessary for legal imposition of a habitual felony offender sentence. Therefore the Fourth District Court of Appeal followed this Court's mandate and reversed Respondent's illegal habitual sentence and remanded for resentencing to no more than the maximum sentence of fifteen years that was set out in his written plea.[2]

In conflict with the remedy in Ashley and Wilson, is Bell v. State, 624 So. 2d 821 (Fla. 2nd DCA 1993), wherein the court ordered that the defendant's plea be withdrawn. Bell, and the cases which follow it, completely ignored this Court's conclusion that the failure to comply with the notice requirements of 775.084 and Rule 3.172 created a sentencing issue and instead ordered that the defendant's plea be withdrawn.

As in Ashley, the plea entered by Respondent was voluntary but the sentence illegal. Under the facts of both cases the pleas of no contest were voluntary as to the charge and as to the sentence contained in the written plea. Both Respondent and Ashley pled pursuant to a written plea that did not promise a particular sentence. In Respondent's case the written plea contained a cap of the maximum penalty and fine for a second degree felony, 15 years and $10,000 (R 9). §775.082(3)(c) and 775.083(1)(b) Fla. Stat. (1991). Under the sentencing guidelines Respondent's recommended range was twelve to seventeen and the permitted range nine to twenty-two (R 39). The recommended sentence was fifteen years (R 39). Fla. R. Crim. P. 3.988(c). The written plea did not include any reference to habitualization and provided the right to appeal a sentence outside the recommended guideline range (R 10). Ashley's plea stated he would receive a guideline sentence or a departure sentence capped by the five year statutory maximum. Ashley, 614 So. 2d 486, 490. Each of their pleas were voluntarily entered into and accepted by the court; however, the procedure to impose a habitual

[2] Wilson v. State, 645 So. 2d 1042 (Fla. 4th DCA 1994).

felony offender sentence was not followed. Therefore the sentence is illegal.[3] Respondent, like Ashley, does not wish to vacate his plea but seeks to be sentenced in accordance with the written plea.

Petitioner's reliance on Massey v. State, 609 So. 2d 598 (Fla. 1992), for use of the harmless error analysis is misplaced. Massey involved a habitual sentence imposed after a trial not a plea. The only notice requirement for habitualization was pursuant to Section 775.084(3)(b), Florida Statutes (1989). While Massey did not receive written notice, both he and his attorney had actual notice before the sentencing hearing. Id. at 600.

Petitioner concedes that the second requirement was not fulfilled and states, "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" (Petitioner's brief at 14). Nonetheless, Petitioner asserts it can be "inferred" that the second requirement of Ashley had been fulfilled (Petitioner's brief at page 12). Respondent disagrees with this argument. The second requirement must be accomplished by a pre-plea personal interview with the defendant, it cannot be fulfilled by exchanges between counsel and the court. See Ashley, 614 at 491, n. 9.

Compliance with Ashley must be apparent on the face of the record. This Court concluded that whether there was compliance with Section 775.084 and Rule 3.172 involves no factual determination. Id. at 490. Therefore compliance with the procedure in Ashley must be evident on the face of the record in order to have a legal habitual felony offender sentence. Clearly the extraordinary step of doubling the statutory maximums requires that due process be evident on the face of the record. Cf. Alexander v. State, 575 So. 2d 1371 (Fla. 4th DCA 1991) (it is the burden of the court, or the state, to make the record show that all the requirements of due process have been met).

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[3] Likewise, the failure to follow the required procedure necessary to impose a departure sentence results in an illegal sentence. See Pope v. State, 561 So. 2d 554 (Fla. 1990).

Even assuming the second requirement could be fulfilled by resorting to inferences, the record does not support such an inference. The trial court asked Respondent only if he had discussed "the case" with his lawyer (T 4). The attorney only signed a paragraph on the written plea that stated she had explained the written plea and the maximum penalty (R 12). Significantly the written plea stated the maximum possible penalty was 15 years and $10,000, the maximum penalty for a non-habitual second degree felony (R 9), §775.082 and 775.083.

Respondent disagrees with the Petitioner's notion that Ashley was decided on basis of the failure to give written notice (Petitioner's brief at 16).[4] The decision in Ashley explicitly holds that a habitual sentence cannot be imposed following a plea of guilty or nolo unless **both** requirements are fulfilled. Id. at 490. In Wilson the Fourth District Court of Appeal rejected the argument that the significance of Ashley was the failure to give written notice. The Fourth District specifically considered and followed this Court's extensive treatment of the second requirement. Wilson, 645 at 1045-1046 n. 3.

The notion that Ashley was decided on the written notice requirement completely fails to recognize that notice is the essence of both requirements. Discussing written notice this Court wrote, "[i]n this way, the legislature has extended the general pre-plea notice requirement of rule 3.172 to include specific written notice of intent to habitualize. Ashley, at 490. This Court understood the significance of both and clearly stated that for legal habitualization both requirements must be fulfilled. Clearly, written notice without confirmation that the defendant understands the significance of the notice is as good as no notice at all. Alternatively, if an accused understands the consequences of habitualization but has no notice that habitualization will be applied to him or her, that too is equally useless knowledge.

The remedy in Ashley was correctly followed by the Fourth District in Respondent's case. In both cases the plea which each defendant entered into was voluntary however the

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[4] The notion that Ashley was based on the failure to give written notice before the plea stems from Heatley v. State, 636 So. 2d 153 (Fla. 1st DCA 1994). However, unlike Wilson, Heatley does not explain its reasoning.

habitual sentence subsequently imposed was illegal. The appropriate remedy is to vacate the sentence, not the plea.

## CONCLUSION

Based on the foregoing arguments and the authorities relied on therein, Respondent respectfully requests this Honorable Court to affirm the decision of the Fourth District Court of Appeal, vacate Respondent's habitualization and remand for resentencing to a maximum of fifteen years as set out in his plea.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Georgina Jimenez-Orosa, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 3RD day of March, 1995.

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