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 REPLY BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

GEORGINA JIMENEZ-OROSA
Senior Assistant Attorney General
Florida Bar No. 441510
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
Telephone: (407) 688-7759
FAX (407) 688-7771

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SUMMARY OF THE ARGUMENT

POINT I - The record is undisputed that Respondent received written notice of the State's intent to seek habitual offender treatment on April 28, 1993, or **prior** to acceptance of the plea of nolo on July 2, 1993. 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. The State submits that applying the harmless error rule to the facts of this case, the failure to confirm at the plea colloquy that he knew the maximum sentence he was facing under the habitual felony offender statute was harmless beyond a reasonable doubt; and therefore, the sentence imposed below can be affirmed.

The State, thus, urges this Court to clarify its holding in Ashley to provide that in cases as the one at bar, where the defendant is supplied with written notice [or actual notice as in Massey], the harmless error rule is applicable, and each case must be decided under its own particular facts.

POINT I

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?

In reply to Respondent's arguments, Petitioner hereby reasserts the arguments made in the initial brief.

As Respondent recognizes, "**notice** is the essence" of the Ashley[1] rule. See Respondent's brief at page 7. Petitioner maintains that since Respondent received the written notice of intent to habitualize on april 28, 1993 (R. 7), thus **well prior** to acceptance of the plea on July 2, 1993, the Ashley **notice** requirement was satisfied; and the habitual felony offender sentence should have been affirmed by the District Court.

The Notice served on Respondent provided:

> THE STATE OF FLORIDA, by and through the undersigned Assistant State Attorney, hereby notices the Defendant and his attorney of its intent to seek habitual penalties pursuant to **Florida Statute 775.084.**

(R. 7). Section 775.084(3)(b), Florida Statutes, provides:

> Written notice shall be served on the defendant and his attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence so as to allow the preparation of a submission on behalf of the defendant.

The purpose of the notice requirement is to prevent a defendant from being surprised at sentencing and to allow the defendant and/or the defendant's attorney the opportunity to prepare for the

---

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

hearing. Massey v. State, 609 so. 2d 598, 600 (Fla. 1992); see also Roberts v. State, 559 So. 2d 289, 291 (Fla. 5th DCA 1990).

In the case at bar, it is quite clear that Respondent and his attorney received written notice well in advance of the plea hearing (R. 7); Respondent acknowledged he had received and was aware the State was seeking habitual offender sentence in his case prior to the plea agreement being accepted by the trial court (R. (T. 6[2]); it is just as clear that the Respondent was not prejudiced in his preparation for sentencing which took place July 26, 1993, (T. 9-24) and August 3, 1993 (T. 26-36). In Massey, this Court 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**. (Emphasis added).

Massey, 609 So. 2d at 600.

The State maintains that if the harmless error rule applied

---

[2]

> 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 [prosecutor]: No, sir.
>
> MS. SCULL [defense attorney]: No, Your Honor.

under the facts in Massey, it must certainly must apply under the circumstances in the case at bar. Before the trial court, Respondent did not allege he was unaware of the possible sentence under the habitual offender statute. Rather he asserted he had received notice of the State's intent (T. 6). During the sentencing hearings, Respondent did not move to withdraw his plea on the basis that he had not been made aware of the possible sentence under the habitual felony offender statute (T. 9-36). The record is clear that Respondent and his attorney were prepared in anticipation of the sentencing hearing (T. 9-36). Respondent throughout acknowledged he qualified for sentencing as an habitual felony offender (T. 27, 28), and only asked the trial court **not to habitualize him**, rather to impose a sentence within the guidelines recommendations (T. 28-29). The allegations of an Ashley violation were raised for the **first time** on appeal before the District Court. In the words of Judge Harris, "the state of the law at this time will not permit such games to be played." Voth v. State, 638 So. 2d 121, 122 (Fla. 5th DCA 1994) (Harris, C.J., concurring specially).

Petitioner recognizes that in Ashley, at 490, this Court held that an objection to lack of notice was not required to preserve the issue for appellate review. Petitioner asserts, however, that under the facts of this particular case an objection **was necessary** as Respondent was given notice. Petitioner maintains that the only time an objection would **not** be required is in a "straight" Ashley-type situation, i.e., the defendant plead with absolutely no notice

or knowledge that he or she may be habitualized. Petitioner asserts that in cases such as the one at bar, were the defendant has both knowledge and notice that he may be habitualized, an objection asserting that he was not made aware of the maximum sentence either by the court or his counsel, must be required. Because, in the case at bar, Respondent never objected, or moved to withdraw his plea on these basis, the issue was waived for appellate review. See Heatley v. State, 636 So. 2d 153 (Fla. 1st DCA 1994), rev. denied, ___ So. 2d ___ (Fla. Sept. 7, 1994).

Thus, while it is true that during the plea colloquy the trial court did not confirm that Respondent knew the maximum penalty he could receive under the habitual offender statute, because he received and acknowledged (T. 6) he received written notice that referred him to Sec. 775.084 prior to the change of plea hearing (T. 7), and the record shows counsel discussed the maximum and minimum sentences with Respondent (R. 12)[3], the failure to so confirm on the record was harmless beyond a reasonable doubt. See Lewis v. State, 636 So. 2d 154, 156 (Fla. 1st DCA 1994); Mansfield v. State, 618 So. 2d 1385 (Fla. 2d DCA 1993); Hannah v. State, 623 So. 2d 855 (Fla. 3d DCA 1993). As mentioned above, Respondent received **written** notice that the state would seek habitual sentence under Sec. 775.084 (T. 7). Under the law Respondent is presumed to

---

[3]"That the consequences of a habitual offender sentence were explained in open court by counsel rather than by the court has no legal significance. The record shows a free and knowing plea." Lee v. State, 642 So. 2d 1190, 1191 (Fla. 1st DCA 1994) (Benton, J., concurring and dissenting.)

have knowledge of the maximum sentence he could receive as an habitual felony offender.[4] Accordingly, the sentence imposed by the trial court should have been affirmed.

The plea colloquy conclusively demonstrates that Respondent had notice of the State's intent to habitualize him, and that he knowingly and voluntarily entered his plea with a full understanding of the consequences of being sentenced as an habitual felony offender. In Massey, at 598-599, as in the case at bar, the defendant had actual knowledge that he may be sentenced as an habitual felony offender, although, unlike Respondent here, Massey was not served with written notice. This court nonetheless found any error to be harmless beyond a reasonable doubt. Id. at 600. In the instant case, Respondent **received** written notice well in advance of the change of plea hearing. Respondent went over the agreement with his attorney (T. 5-6), and the attorney discussed the maximum sentence Respondent would be facing (R. 12). Thus, under the harmless error rule, based on the particular circumstances of this case, the sentence imposed below should have been affirmed. Massey; Mansfield, supra; Lewis, supra.

The State once again 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

---

[4]Citizens are charged with notice of the consequences of legislation from the effective date of the statute. See Dewberry v. Auto-Owners Ins. Co., 363 So. 2d 1077, 1080 (Fla. 1978); Sarasota Commercial Refrigeration, etc., et al. v. Schooley, 381 So. 2d 1141, 1144 (Fla. 2d DCA 1980).

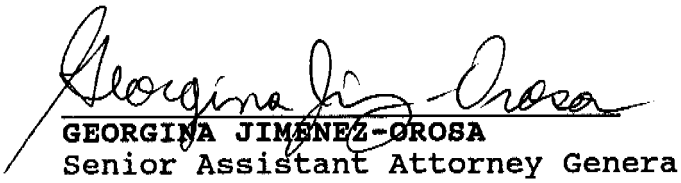
receive **any** notice whatsoever that he was going to be considered and treated as an habitual felony offender prior to him entering his plea of guilty. That is not the situation in the case at bar. In the instant case rather, the plea colloquy conclusively demonstrates that Respondent had notice of the State's intent to habitualize him, and that he voluntarily entered his plea with a full understanding of the consequences of being sentenced as an habitual felony offender. Therefore, that the trial court failed to comply with the "second" portion of the Ashley ruling, is clearly harmless beyond a reasonable doubt, Massey. The State would therefore urge this Court to clarify its holding in Ashley, and apply the Massey harmless error rule to situations as the instant case, where it is clear that written notice was supplied to the defendant prior to acceptance of the plea of guilty.

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,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

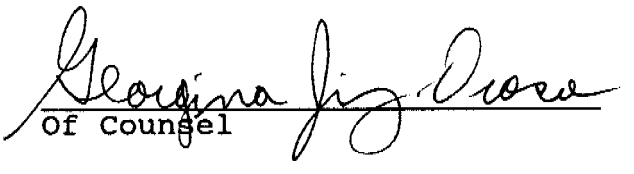


GEORGINA JIMENEZ-OROSA
Senior Assistant Attorney General
Florida Bar No. 441510
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759
FAX (407) 688-7771

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Reply Brief on the Merits" has been furnished by courier to: KAREN E. EHRLICH, Assistant Public Defender, Attorney for Respondent, The Criminal Justice Bldg./6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 9th day of March, 1995.



Of Counsel