IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 84,879

CHARLES MAXWELL,

Respondent.
_____/

ON DISCRETIONARY REVIEW OF THE
DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

REPLY BRIEF OF PETITIONER

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SUMMARY OF ARGUMENT

The Fifth District erred in determining that the plea agreement in this case was insufficient to give the respondent notice that he may be sentenced as a habitual offender. Respondent read, understood, signed and discussed the plea agreement with his attorney. The plea agreement set forth that respondent could be habitualized, the maximum sentence he faced and that he would not be entitled to gain time. Petitioner asserts this was sufficient notice. It is both improper and impossible to inform a defendant that he or she "will" be habitualized; the most that may be said is a defendant may or possibly could be habitualized. If the plea agreement was insufficient notice, any error in failing to give the respondent separate written notice prior to entering his plea was harmless, as respondent had actual notice that he may be habitualized. The decision in this case should be quashed, the conviction and sentence of respondent should be reinstated and the decision in Thompson v. State, 638 So. 2d 116 (Fla. 5th DCA 1994), juris. accepted, case no. 83,951, overruled.

Furthermore, this court should re-examine and clarify its decision in Ashley, infra. The decisions in this cases crystalize the problems inherent in the practical application of this court's decision in Ashley, infra. Thompson, supra, and the other cases cited herein indicate that Ashley, infra, raised more questions than it answered. Ashley, infra, should be clarified to reflect that notice which states only the possibility that a defendant may be habitualized is sufficient. Also, the affect of gain time or

early release on a defendant's sentence is a collateral consequence, not a direct consequence. Ashley, infra, should be clarified to reflect that a trial judge need only inform a defendant of the maximum possible sentence which may be imposed, not that he or she may serve more or less of that sentence depending upon which sentencing scheme the defendant is sentenced under. Ashley should be clarified as to whether or not an objection is required to preserve the issue for appellate review where some form of notice was given and the defendant later claims the notice was insufficient.

Furthermore, there is nothing in the habitual offender statute which precludes the trial judge from filing the notice. Such notice was not necessary in the instant case as respondent had notice from the plea agreement. There is nothing in the habitual offender statute which sets forth specifically what form the notice must take and who should file it. Finally, if remand is required in this case, the case should be remanded with directions that respondent either withdraw his plea or accept habitual offender sentencing.

ARGUMENT

POINT ON APPEAL

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN FINDING THAT THE RESPONDENT HAD NOT BEEN GIVEN NOTICE OF THE INTENT TO HABITUALIZE PRIOR TO RESPONDENT ENTERING HIS PLEA; THE PLEA FORM THE RESPONDENT SIGNED, READ AND UNDERSTOOD GAVE THE RESPONDENT SUFFICIENT NOTICE, AS IT SET FORTH THE MAXIMUM SENTENCE THAT COULD BE IMPOSED IF THE RESPONDENT WAS HABITUALIZED AND THAT THE RESPONDENT WOULD NOT BE ENTITLED TO BASIC GAIN TIME; DUE TO THE CONFUSION CREATED BY THIS COURT'S DECISION IN ASHLEY, INFRA, THIS COURT SHOULD REVISIT AND CLARIFY ASHLEY.

Not surprisingly, respondent argues that Ashley v. State, 614 So. 2d 486 (Fla. 1993), was not complied with and this court should affirm the district court's decision. Petitioner relies on the arguments set forth in the initial brief. Ashley was complied with in the instant cases. Respondent had notice that he could be habitualized and that he would not be entitled to basic gain time. Section 775.084(3)(b) does not specify what form the notice must take. There is nothing in the habitual offender statute which precludes notice by way of a plea agreement. Respondent appears to ignore that such notice was provided. Notice was sufficient in this case.[1]

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[1]In its initial brief, petitioner requested this court reconsider not the holding in Ashley, but the dicta which accompanies that holding. The dicta has created many more problems than it resolved. Petitioner relies on the initial brief for those arguments rather than rearguing them in the reply brief. However, petitioner makes one point: contrary to respondent's claim on page 7 of the answer brief, petitioner does not argue that federal constitutional caselaw does not mandate the result reached in Ashley. Petitioner cited three federal cases as examples of what is and is not a collateral consequence of a plea. Respondent ignores the numerous state cases which are cited and on which petitioner relies. This appears to be an attempt to divert this

Respondent argues that he did not waive the issue for appellate review by failing to object to habitual offender sentencing. This, however, was not what petitioner argued in its initial brief. Rather, petitioner argued that respondent should have objected to the form of the notice; specifically, the plea agreement. Respondent did not object to the form of the notice. The fact that respondent was given notice in the plea agreement does distinguish the instant cases from Ashley. Petitioner asserts that an objection to the notice which was contained in the plea agreement was necessary. The only time an objection is not necessary is where the defendant received no notice, as in Ashley. Notice was received in the instant case.

Although not raised or addressed previously, respondent argues that the trial judge should not be permitted to file the notice of intent to habitualize. The trial judge did file a notice in the instant case after the respondent entered his plea. However, respondent again ignores the fact that he had previously been provided notice in the plea agreement. Respondent knew when he entered his plea that he could be habitualized. The filing of the notice by the trial judge in no way affected or diminished the notice already received in the plea agreement.

As to the propriety of the trial judge filing a notice, there is nothing in section 775.084 which precludes such action by the trial judge. In fact, the trial judge is obligated to declare a

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court's attention from the Florida cases cited and relied on by petitioner.

defendant to be a habitual offender when he qualifies for such classification. Section 775.084(4)(c), Fla. Stat. (1991); Guy v. State, 632 So. 2d 1085 (Fla. 5th DCA 1994); Turcotte v. State, 617 So. 2d 1164 (Fla. 5th DCA 1993); Toliver v. State, 605 So. 2d 477 (Fla. 5th DCA 1992), rev. denied, 618 So. 2d 212 (Fla. 1993). Due to this obligation, a trial judge has a duty to identify habitual offenders regardless of whether the prosecutor has initiated habitual offender proceedings. This duty may necessitate the filing of the notice by the trial judge. Such action by the trial judge does not overcome the presumption that the trial judge is fair and impartial.

In a footnote in Santoro v. State, 644 So. 2d 585, 586 n.4 (Fla. 5th DCA 1994), juris. accepted, case no. 84,758, the Fifth District questioned whether a trial judge may file habitual offender notice after the enactment of section 775.08401, Fla. Stat. (1993). While section 775.08401 was not effective when the respondent committed his offense, petitioner will address it briefly.

Section 775.08401 does not direct that only the prosecutors file notice of intent to habitualize. Rather, it directs the various state attorney's offices to adopt uniform criteria in determining whether an offender is eligible for habitual offender sentencing. Section 775.08401 is aimed at the wide-spread discrepancy, whether perceived or actual, in the seeking of habitual offender classification. Section 775.08401 does not prohibit trial judges from filing notices.

Furthermore, while the legislature wholly amended section 775.084, the legislature did not give prosecutors sole discretion in initiating habitual offender proceedings. This could easily have been done, but the legislature chose not to so change the statute. The language of section 775.084 does not specify who can or cannot initiate the habitual offender notice. As the Fifth District stated in Toliver, at 480:

> It achieves a logical and symmetrical result to read the habitual offender statute as giving the trial judge the power and discretion to *both impose* and *refrain from imposing* an habitual offender sentence. If the prosecutor were given the sole power to send the required notice to invoke a hearing on a defendant's habitual offender status, the trial judge could be deprived of the power to render an habitual offender sentence in a case he or she felt was appropriate, where the prosecutor (for various or whatever reason) took no action.

Id. (Emphasis in original). See also King v. State, 557 So. 2d 899, 903 (Fla. 5th DCA), rev. denied, 564 So. 2d 1086 (Fla. 1990) ("it is clear that either the state or the court may suggest the [habitual offender] classification. There is nothing in the statute to suggest that the legislature intended otherwise.").

Respondent argues that the state failed to show that the failure to file the notice prior to the entry of respondent's plea was harmless error. In so arguing, respondent acknowledges that the harmless error analysis is applicable and has been previously applied to similar cases. However, respondent fails to acknowledge that he had notice prior to entering his plea. The respondent was given notice that he could be habitualized in the plea agreement.

Respondent ignores this actual notice. Even if a separate written notice should have been filed, the failure was harmless in this case due to the notice provided in the plea agreement. "It is inconceivable that [the respondent was] prejudiced by not having received the written notice [prior to the entry of his plea]." Massey v. State, 609 So. 2d 598, 600 (Fla. 1992).

Finally, respondent argues, in furtherance of his claim that the opinion of the district court should be affirmed, that on remand the only option left to the trial judge is to sentence the respondent within the guidelines. Respondent argues that allowing the withdrawal of his plea would be "an inadequate remedy." Petitioner asserts that the only remedy should be either withdrawal of the plea or acceptance of the habitual offender sentence.

As this court is aware, the guidelines are inapplicable to those found to be habitual offenders. Respondent's citation to Pope v. State, 561 So. 2d 554 (Fla. 1990), is inappropriate and misplaced. Rather, petitioner asserts that this court's decision in Troutman v. State, 630 So. 2d 528 (Fla. 1994), appears to be more closely related to habitual offender sentencing. In Troutman, at 533, this court determined that where a trial judge failed to follow the criteria for sentencing a juvenile as an adult resentencing as a juvenile was not required. This court specifically found that because juvenile sentencing is specifically controlled by statute, the reasoning behind Pope, supra, was inapplicable. Troutman, at 533 n.6.

Petitioner asserts that the reasoning behind Troutman, supra,

is equally applicable to habitual offender cases. Both habitual offender sentencing and juvenile sentencing are specifically controlled by statute.

While no notice was given in Ashley, supra, prior to the entry of Ashley's plea, in the instant case the respondent did have notice prior to entry of his plea by way of the plea agreement. As argued in the initial brief and not addressed by respondent, there is nothing in the habitual statute as to what form the notice must take. Notice in the plea agreement is sufficient.

The respondent in this case entered into the plea agreement knowing he could be sentenced as a habitual offender. The respondent knew what his prior record was and whether he could be habitualized. Furthermore, the trial judge was obligated to classify the respondent as a habitual offender if he qualified as such. Section 775.084(4)(c), Fla. Stat. (1991); Guy, supra; Turcotte, supra; Toliver, supra.

Should this court determine that remand is necessary, the instant cases should be remanded with directions to either allow the respondent to withdraw his plea or accept sentencing as a habitual offender.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner requests this court quash the decisions in the instant case, overrule the decision in Thompson and clarify its decision in Ashley.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Reply Brief of Petitioner has been furnished by delivery to Nancy Ryan, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 5th day of May, 1995.

Bonnie Jean Parrish
Of Counsel