IN THE SUPREME COURT OF FLORIDA

85,132

STATE OF FLORIDA,

Petitioner,

v.

CASE NO:
5th DCA No.: 94-477

RONALD S. NATTRESS,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent pled guilty to carrying a concealed firearm. He signed a plea form that provided for the maximum sentences should he be determined by the judge to be an habitual offender and that he understood that he could be subject to a maximum sentence of ten years with no eligibility for basic gain time if found by the judge to be an habitual offender. He affirmatively indicated at his plea hearing that he read the written agreement before he signed it, that he had an adequate opportunity to ask questions of his attorney about the agreement, and that he understood the agreement. Respondent was sentenced as an habitual offender to three years probation. The Fifth District Court of Appeal vacated the habitual offender sentences and remanded for resentencing citing Thompson v. State, 638 So. 2d 116 (Fla. 5th DCA 1994). The State then filed a Notice To Invoke Discretionary Jurisdiction of this Court based on express and direct conflict with a decision of this Court.

SUMMARY OF THE ARGUMENT

The opinion issued in the instant case by the Fifth District Court of Appeal cites Thompson, infra as controlling authority. Thompson is currently pending review in this court. This constitutes prima facie express conflict, if accepted, thereby allowing this Court to exercise its jurisdiction.

As additional grounds for jurisdiction, the decision by the Fifth District Court of Appeal in this case is in express and direct conflict with this Court's decision in Massey, infra. Due to this conflict, this Court should exercise its discretionary jurisdiction.

ARGUMENT

THE DECISION IN THIS CASE IS IN EXPRESS AND DIRECT CONFLICT WITH A DECISION FROM THIS COURT.

A district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by the Supreme Court continues to constitute prima facie express conflict and allows the Supreme Court to exercise its jurisdiction. Jollie v. State, 405 So. 2d 418 (Fla. 1981). The opinion issued in the instant case by the Fifth District Court of Appeal cites Thompson v. State, as controlling authority. (Appendix) Thompson is currently pending review in this Court, Florida Supreme Court Case Number 83, 951, therefore, if accepted, this Court must exercise its jurisdiction in the instant case.

As additional grounds for jurisdiction, Petitioner asserts that the decision in the instant case is in express and direct conflict with this Court's decision in Massey v. State, 609 So. 2d 598 (Fla. 1992). In Massey, this Court held that the State's failure to strictly comply with the statute requiring that notice of the state's intention to have the defendant sentenced as an habitual offender be served upon the defendant, may be reviewed under the harmless error analysis. In that case, the State's error in failing to serve actual notice to the defendant was harmless where the defendant and his attorney had actual notice of the State's intention.

In the instant case, the Fifth District Court of Appeal reversed Respondent's sentence relying on Thompson, supra. The

instant decision is in express and direct conflict with Massey, supra, because the Fifth District failed to apply a harmless error analysis. As in Massey, the Respondent had actual notice of the possible consideration of habitual offender sanctions.

At the time of entering his plea, Respondent signed a plea agreement which provided for the maximum sentence should he be determined by the Judge to be an habitual offender as well as the consequences of such a sentence. Respondent affirmatively indicated at his plea hearing that he read the agreement, had an adequate opportunity to ask questions of his attorney about the agreement, and that he understood the agreement. Because Respondent had actual notice of the possibility of a habitual offender sentence before he entered his plea, the protections afforded by Ashley v. State, 614 So. 2d 486 (Fla. 1993), were provided to him, and any error in failing to provide formal written notice of habitualization was harmless. The Fifth District erred in failing to apply a harmless error analysis as outlined in Massey, infra.

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

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully requests this honorable court exercise its jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief has been furnished by U.S. Mail to James Dickson Crock, 315 Silver Beach Avenue, Daytona Beach, FL, 32118, this 6th day of February, 1995.

Robin Compton Jones
Assistant Attorney General

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STATE OF FLORIDA,

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APPENDIX

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94-532

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1995

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

RONALD S. NATTRESS,

Appellant,

v. CASE NO. 94-477

STATE OF FLORIDA,

Appellee.
_____/

Opinion filed January 27, 1995

Appeal from the Circuit Court
for Volusia County,
John W. Watson, III, Judge.

James Dickson Crock, P.A.,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Robin Compton Jones,
Assistant Attorney General,
Daytona Beach, for Appellee.

PER CURIAM.

Appellant's habitual offender sentence violates the dictates of *Thompson v.State*, 638 So. 2d 116 (Fla. 5th DCA 1994) and must be vacated.

SENTENCE VACATED; REMANDED.

DAUKSCH, PETERSON and THOMPSON, JJ., concur.