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SID J. WHITE
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CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 85,132

RONALD S. NATTRESS,

Respondent.

_____/

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

MERITS BRIEF OF RESPONDENT

JAMES DICKSON CROCK, P.A.

JAMES DICKSON CROCK, ESQ.
Florida Bar No. 307051
315 Silver Beach Avenue
Daytona Beach, Florida 32118
(904) 255-9202

COUNSEL FOR RESPONDENT

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POINT ON APPEAL

RESPONDENT DID NOT RECEIVE PROPER NOTICE OF INTENT TO SEEK HABITUAL OFFENDER TREATMENT BEFORE ENTERING HIS PLEA. HIS HABITUALIZATION AT SENTENCING SHOULD BE VACATED.

TABLE OF AUTHORITIES

CASES:

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

On or about February 1, 1993, the Respondent was charged in a one count information with carrying a concealed firearm, in violation of 790.01(2). (R-117, Vol. 2)

On or about February 26, 1993, the public defender was appointed to represent Mr. Nattress at arraignment. (R-3) Mr. Nattress entered a guilty plea at said arraignment and signed a written plea form that included a paragraph (4) stating that the Defendant could theoretically be sentenced as a habitual offender. (R-147)

The Respondent entered his plea simultaneously with the taking of pleas in three other entirely unrelated cases involving Defendants Walden, Rogers and Soros, and a presentence investigation was ordered. (R 1-10)

Neither the State of Florida nor the trial court made any oral or written statement of their intent to habitualize the Respondent either at the instant plea colloquy or prior thereto.

On or about April 17, 1993, the trial judge, John Watson, on his own motion, filed a "Notice and Order for Separate Proceeding to Determine if Defendant is Habitual Felony Offender." (R-118-119)

On or about April 29, 1993, the undersigned counsel entered his Notice of Appearance as counsel for the Respondent. (R-120-121) The trial judge signed an order substituting counsel for the public defender on or about May 4, 1993. (R-137-38)

On or about June 2, 1993, the Respondent filed a Motion to Withdraw his previously entered plea. (R-139-140)

Hearings were held on said Motion to Withdraw Plea on or about June 17, 1993; September 15, 1993; November 9, 1993; November 11, 1993; and January 31, 1994. (R-11-115)

In the initial June 17, 1993, hearing, the trial judge questioned the undersigned counsel as to the sufficiency of the aforementioned notice in paragraph four of the Written Plea Form as to later habitualization. (R-15) Counsel responded that "notice" was insufficient under the tenets of the Florida Supreme Court case of Ashely v. State, 614 So.2d 486 (Fla. 1993). (R-16-20)

At the continuation of the Respondent's Motion to Withdraw Plea on or about November 9, 1993, Mr. Nattress testified that he had "no idea" that he faced ultimate habitualization in the instant cause at the time of entering his plea in January of 1993. Nattress further noted that he believed he would "get probation" and "go to treatment." (R-38, LL18-23) Nattress added that he would not have entered his initial plea if he understood that either the Court or the State intended to habitualize him. (R-40 LL 20-24)

Mr. Nattress further explained that he only went through the ninth grade in school and later obtained a GED. Mr. Nattress previously did factory work. (R-47-48)

Former Assistant Public Defender Scott Decker also testified over the Respondent's objections. Mr. Decker represented the Respondent at the time of the plea entry in January of 1993. At

the time of taking testimony in November of 1993, Mr. Decker had become an Assistant State Attorney in the same office then prosecuting the Respondent. The Court ruled that the Respondent waived any attorney/client privilege or objection by previously testifying. (R-54)

The Respondent also objected that the State and Mr. Decker previously violated the attorney/client privilege by discussing privileged communications before Mr. Nattress had testified on or about November 9, 1993. (R-56)

On or about January 31, 1994, at the continuation of the Motion to Withdraw Plea hearing, the Respondent further objected that because of the violation of attorney/client privilege by the State and Mr. Decker prior to November 9, 1993, he had been forced into a decision to testify concerning communications with Mr. Decker as a direct result, and that, in turn, led directly to the trial court's ruling that such testimony thereby waived the attorney/client privilege. As part of all objections, the Respondent requested that Mr. Decker be prohibited from testifying pursuant to said attorney/client privilege. The trial court denied the Respondent's objections and ruled that confidentiality was waived. (R-80)

In said hearing, on or about January 31, 1994, Mr. Decker testified he normally went over paragraph four of the Plea Agreement with any defendants. (R-82) However, Mr. Decker could not recall exactly how he went over said paragraph with the

Respondent, or whether he specifically did go over said paragraph. (R-85)

Defense counsel once again argued at length that the Motion to Withdraw Plea should have been granted on the basis of Ashley. (R-92)

The trial court denied the Respondent's Motion to Withdraw Plea, explaining orally that the written plea agreement included paragraph four's explanation of the possibility of habitualization, and thereby attempted to distinguish the instant cause from Ashley. (R-1-1-104)

The trial court then made findings that the Respondent was previously convicted of the third degree felony of possession of stolen property and adjudicated on May 21, 1990, and was also previously convicted of the third degree felony of accessory to burglary and adjudicated guilty on or about April 22, 1991. Based upon those two findings, the court found that the Respondent had two or more prior felony convictions which qualified him as a habitual felony offender, and would subsequently enter an order to that effect. (R-106-107)

The trial court then adjudicated Mr. Nattress guilty and placed him upon three years probation with special conditions. (R-111-114)

The Respondent was adjudicated guilty and sentenced in open court on or about January 31, 1994, to a term of three years probation. (R-111)

Orders denying the Motion to Withdraw Plea of Guilty were entered by the trial court on or about February 2 and 9, 1994. (R-162, 165) An order determining the Respondent to be a habitual felony offender was entered on or about January 31, 1994. (R-163-164)

A nunc pro tunc judgment determining the Respondent to be a habitual offender and placing him on probation was entered on or about March 2, 1994. (R-155-173)

An affidavit violating said probation was filed on or about June 22, 1994. Respondent entered a plea to violating said probation on or about November 16, 1994. Said probation was revoked and Respondent adjudicated and sentenced to 364 days incarceration with credit for 269 days time served. (See Appendix Exhibits A and B.)

SUMMARY OF ARGUMENT

The trial court erred in denying the Respondent's Motion to Withdraw Plea and by ultimately habitualizing him. Neither the State nor the trial court made any oral or written statement of their intent to habitualize the Respondent either at the instant plea colloquy or prior thereto. The Fifth District Court of Appeals ruled, en banc, in Thompson v. State, 638 So.2d 116 (Fla. 5th DCA 1994), that "notice" from a form plea agreement of the possibility of later habitualization under the habitual offender statute was insufficient to allow the Respondent to make a knowing and intelligent decision to enter a plea. As a result, the instant "Motion to Withdraw Plea" should have been granted. However, since the time of his original sentencing the Defendant's probation has been revoked and his sentence terminated. Therefore, he requests of this Honorable Court that his designation as an habitual offender be vacated.

ARGUMENT

POINT ON APPEAL

The Petitioner in its "Merits Brief" argued repeatedly that the Fifth District had elevated form to a new height over substance in both the instant cause and Thompson v. State, 638 So.2d 116 (Fla. 5th DCA 1994) review pending, (case no. 83,951).

In Ashley v. State, 614 So.2d 488 (Fla. 1993), this Honorable Court cited Boykin v. Alabama, 395 U.S. 238,242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) for the proposition that: "Before a trial judge can accept a plea of guilty or nolo contendere there must be 'an affirmative showing that it was intelligent and voluntary,' Id., at 242, for what is at stake for an accused facing death or possible imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences." Id., at 243-44 (Ashley, at 488 emphasis added.)

The instant Respondent completed nine years of formal schooling and later obtained a "GED" diploma of high school equivalence. Prior to his arrest, he was employed as a factory worker. (R 47-48)

On or about February 26, 1993, the public defender was appointed to represent Mr. Nattress at the time of his arraignment. (R 147) At said arraignment, the Respondent entered his plea to the charge of carrying a concealed firearm simultaneously with the

taking of pleas in three other entirely unrelated cases involving Defendants named Walden, Rogers, and Soros. (R 1-10)

Mr. Nattress was simply asked if he had read, signed, and understood the standardized written plea form by the court. The court further asked if the Respondent had an adequate opportunity to ask questions of his attorney about the agreement. No other specific colloquy with the Respondent was conducted by the court. There was no specific or even generalized reference made to paragraph four of the standard plea form during said colloquy. (R 1-10)

The "utmost solicitude" required by the Boykin court (see above) consisted of a quick plea at arraignment, with three other unrelated defendants, an attorney appointed at said proceeding, and an equally quick non-specific colloquy with the trial judge. Most importantly, a passing reference that habitual penalties "could" theoretically be applied were listed in a "standardized" form pleading whose Paragraph four (c) simply explains:

> That should I be determined by the Judge to be a non-violent habitual felony offender, and should the Judge sentence me as such, I could receive up to a maximum sentence of 10 years imprisonment and a mandatory minimum of _____ years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.
>
> (R-147) (emphasis added)

The requirements of Ashley requiring written notice and confirmation by the court that the Defendant is personally aware of the possibility and reasonable consequences of habitualization were met solely by said standardized paragraph.

Nearly two months after the Respondent's plea, the trial judge filed a "Notice and Order for Separate Proceeding to Determine if Defendant is a Habitual Felony Offender" on his own motion. (R 118-119) The State of Florida never joined in requesting that the Respondent be treated as a habitual offender.

Neither the trial court nor the State of Florida indicated any intention to treat the Respondent as a habitual offender either at the plea colloquy or prior thereto.

The Respondent himself testified that he had "no idea" that he faced ultimate habitualization at the time of entering his plea. Nattress further noted that he believed he would "get probation" and "go to treatment.:" (R-38) Nattress added that he would not have entered his initial plea if he understood that either the court or the State intended to habitualize him. (R 40)

The State argues that the aforementioned "standardized paragraph" satisfied the notice requirement's purpose of preventing surprise. The instant Defendant, upon receiving the trial Judge's notice of intent to habitualize on April 17, 1994 was so surprised and dismayed that he hastily fired the Public Defender, hired private counsel 12 days later, filed a motion to withdraw his plea, and diligently pursued it through numerous hearings over a seven and one half month period from June 1994 to January 1995.

In Thompson, the Fifth District Court of Appeal ruled on rehearing, en banc, in favor of the Respondent/Appellant on an identical issue.

In Thompson, the Respondent acknowledged:

> That should I be determined by the Judge to be a violent habitual felony offender, and should the Judge sentence me as such, I could receive up to a maximum sentence of 50 years imprisonment and a mandatory minimum of 20 years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.
>
> (At 1222) (emphasis added)

In Thompson, the court accepted the plea on October 12, 1993, and the trial judge filed a Notice and Order for Separate Proceeding to Determine if Defendant is Habitual Felony Offender or Habitual Violent Felony Offender on November 12, one month after the instant plea.

Interestingly, the instant causes's trial judge, the Honorable John W. Watson, III, was also the trial judge in Thompson.

The Thompson Court found that the requirements of Ashley v. State, 614 So.2d 486 (Fla. 1993) were not met. The court noted that:

> Ashley requires that the defendant must be made aware prior to his plea that either the State intends to seek habitual offender treatment or that the court intends on its own to consider habitual offender treatment at sentencing. The previously quoted provision in the form negotiated plea does not suggest that the defendant will be considered for habitual offender treatment; it merely informs him generally as to the maximum sentence if he is so considered.

The Thompson court further noted that:

> Ashley requires that the defendant be made aware that someone (the State or 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 plead. Merely

> advising him that the law may possibly be applicable to him (the statute itself gives him that notice) is not the same as advising him that someone will actively seek to apply it against him.
>
> (At 1222)

Thus, not only did the Respondent have little education in the instant cause, and the "benefit" of counsel appointed at the time of arraignment and entry of the plea, but Mr. Nattress also did not have access to any written or oral confirmation that the State or the Judge would pursue habitualization against him. He therefore did not have the ability to make a voluntary and intelligent decision to enter the instant plea. To rule otherwise would be to exalt the standardized plea form over substance in the instant cause, and to make a mockery of the law laid out in Boykin and Ashley. The State argues that a practical application of Ashley, as now construed is impossible. What is apparent from the instant circumstances is that the practical or typical taking of pleas is so haphazard and fraught with constitutional pitfalls that the specific application of the Ashley requirements is not only practical but fundamentally necessary, and the lack thereof is certainly not harmless error.

The Respondent also maintains that the notice required by Florida Statute 775.084(3)(b) is to be issued only by the State Attorney's Office. In the instant cause only the trial judge issued a notice of intent to habitualize.

The Fifth District Court of Appeal recently noted that:

> the judge's ability to initiate habitual offender treatment has been placed in doubt by the enactment of Section 775.08401, Florida Statutes (1993). . . {and} may very well have "repealed."
>
> Tolliver v. State, 605 So.2d 477 (Fla. 5th DCA 1992), rev. denied 618 So.2d 212 (Fla. 1993).
>
> Santoro v. State, 644 So.2d 585, 586 n.4 (Fla. 5th DCA 1994), jurisdiction accepted no.84,758 (Fla. February 22,1995).

On the basis of the legislative intent in said statute and the clear appearance of impropriety and partiality of having notice issued by the trial judge, rather than the trial prosecutor, it is the Respondent's contention that the instant notice is deficient on these grounds as well.

As a result of the foregoing, Respondent's Motion to Withdraw the Plea, made on a timely basis before sentencing, should have been originally granted. However, since the time of sentencing Respondent has completed his term of imprisonment. As a result, it is no longer in his best interests to seek withdrawal of his plea. Nonetheless, the imposition of habitualization was in error and must now be vacated.

CONCLUSION

Based upon the foregoing authorities and arguments of counsel, it is respectfully requested that this Honorable Court vacate the instant judgement and sentence's imposition of habitual offender status upon the Respondent.

Respectfully submitted,

JAMES DICKSON CROCK, P.A.

JAMES DICKSON CROCK, ESQ.
Florida Bar No. 307051
315 Silver Beach Avenue
Daytona Beach, Florida 32118

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Merits Brief of Respondent has been furnished by Federal Express to the Clerk, Sid J. White, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1925 and a copy furnished by hand delivery to Bonnie Jean Parrish, Assistant Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118 on this 22nd day of June, 1995.

James Dickson Crock
Of Counsel

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner

v. CASE NO.: 85,132

RONALD S. NATTRESS,

Respondent

_____/

APPENDIX

JAMES DICKSON CROCK, P.A.

JAMES DICKSON CROCK, ESQ.
Florida Bar No. 307051
315 Silver Beach Avenue
Daytona Beach, Florida 32118
(905) 255-9202

COUNSEL FOR RESPONDENT

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INSTRUMENTS