IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 85,167

STATE OF FLORIDA,

Petitioner,

vs.

LARRY WASHINGTON,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

****

PETITIONER'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 Seventeenth Judicial Circuit, in and for Broward County, Florida. Respondent was the Appellant and Petitioner was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court, except that Petitioner may also be referred to as the State.

In this brief, the symbol "A" will be used to denote the appendix attached hereto, the decision hereunder review reported as Washington v. State, 20 Fla. L. Weekly D252 (Fla. 4th DCA Jan. 25, 1995).

STATEMENT OF THE CASE AND FACTS

On September 4, 1992, Respondent was charged by information with burglary of a dwelling (R. 37-38). Respondent's attorney thereafter entered a plea of not guilty on behalf of Respondent (R. 38). On September 18, 1992, the State filed a notice of intent to have Respondent declared an habitual felony offender and/or an habitual violent felony offender (R. 42-43). On October 19, 1992, Respondent withdrew his previously entered plea of not guilty and entered an open plea of guilty (R. 2-13, 44-46).

Defense counsel stated during the plea hearing that he explained to Respondent the ramifications and consequences of pleading guilty. Defense counsel stated in relevant part as follows:

> I have gone over the case with [defendant] and there is really not much of a case and he wants to plead guilty, which I explained to him. John Countryman is the prosecutor. He is not here today. He is on vacation, but he submitted a note to [Assistant State Attorney] Ms. Brown and I told [defendant] that Mr. Countryman would be recommending 10 years as a habitual offender and for at the sentencing he possibly would have recommended it today.
>
> * * * * * * * * *
>
> I advised [defendant] he is basically pleading open to the mercy of the court. He may get what we recommend, what the defense recommends, he may get what the State recommends, he may get somewhere in the middle, he might get less than what I recommend or even more than what the State recommends.

> So do you understand that you're putting yourself completely at the mercy of the court? I can't predirect [sic] what the Judge is going to do after he receives the pre-sentence investigation.
>
> Do you understand you may get habitual offender, you may not get a straight prison sentence or you may get a Barbera, which we will be requesting? Do you understand that?

(R. 4-6). Respondent answered in the affirmative to defense counsel's questions (R. 6). The trial court then informed Respondent that it could sentence Respondent as an habitual offender, but also informed him that if it sentenced him as a non-habitual offender such sentence would have to be within the permitted range of the guidelines (R. 7). At the conclusion of the plea hearing, defense counsel informed the trial court as follows:

> I just want to place on the record I did see [defendant] twice at the jail since arraignment. One was on September 22nd, the day after I received discovery for about 45 minutes, and the other time was October 14th, which I guess was last Wednesday, if I'm getting my dates right, for about 25 minutes, and I explained to him in detail all the rights and what he is risking by this plea.

(emphasis added) (R. 12). Furthermore, the written plea agreement signed by respondent indicates an habitual offender sentence as a maximum penalty (R. 44). Moreover, the trial court found that

Respondent voluntarily, knowingly, and intelligently waived his constitutional rights, and that he freely entered into the plea agreement (R. 11).

At Respondent's sentencing hearing, Respondent's counsel stated in part as follows:

> And another positive was basically I went over the score sheet with him and running the local cases. All his cases are in Broward County. I advised in my estimate that his guidelines would be nine to twelve or twelve to seventeen. They are in that range right in the middle.
>
> I have advised him the permitted range is nine to twenty-two. I advised him even if I filed a Barbera motion the likelihood of him getting that is slim. He has a long history. He has prior similar offenses, and Larry might be looking at a habitual offender. I explained to him that he qualified. Legally that would be up to the court.
>
> I have no idea when he plead on October 9th what the court would do. I'm not a mind reader. I advised him that most clients think I am a mind reader, but I'm not. I have no idea what the court is going to do this morning. So all I can add is that Larry has plead open to the court guilty and knowing full well that he is running that risk.

(emphasis added) (R. 30). The trial court thereafter sentenced respondent to 12 years' imprisonment as an habitual offender, to be followed by five years' drug offender probation (R. 34, 57-60).

Respondent did not object to the sentence imposed, nor did he move to withdraw his plea before the trial court.

Respondent subsequently appealed his sentence to the Fourth District Court of Appeal. The Fourth District, in its opinion filed January 25, 1995, reversed Respondent's sentence, pursuant to Ashley v. State, 614 So. 2d 486, 490 (Fla. 1993), "[b]ecause the trial court did not confirm that [Respondent] was aware of the maximum habitualized penalty he could receive as a habitual offender..."; the court noted that its recent decision in Wilson v. State, 19 Fla. L. Weekly D2353 (Fla. 4th DCA Nov. 9, 1994), was directly on point and thus compelled reversal and remand for resentencing to a maximum fifteen-year sentence (See Ex. A). As in Wilson, the court certified conflict with Bell v. State, 624 So. 2d 821 (Fla. 2d DCA 1993), rev. denied, 634 So. 2d 622 (Fla. 1994).

Based upon the certified conflict, Petitioner invoked the discretionary review jurisdiction of this Court, and by order issued February 17, 1995, this Court postponed decision on jurisdiction, but set a briefing schedule.

Petitioner's Initial Brief on the Merits follows.

SUMMARY OF THE ARGUMENT

The record is undisputed that Respondent received written notice of the State's intent to seek habitual offender status prior to the acceptance of his plea of guilty on October 19, 1992 (R. 2-13, 42-46). The only problem in the instant case arises from the fact that the trial court failed to confirm that Respondent was aware of the maximum sentence he could receive if sentenced as an habitual offender.

The Fourth District Court of Appeal, certifying conflict with Bell, held that because the trial court's failure amounted to an Ashley violation, the sentence must be reversed and remanded for resentencing to a maximum fifteen-year sentence, without giving the trial court the opportunity to allow Respondent to withdraw his plea. The State submits that because the harmless error rule has been applied by this Court in Massey v State, 609 So. 2d 598 (Fla 1992), a case where the defendant was not given prior written notice of the State's intent, the harmless error rule applies in the instant case. Under the harmless error rule, it is clear that because Respondent did receive written notice, and was prepared for the hearing, he was not prejudiced by the trial court's failure to confirm that Respondent was aware of the maximum penalty before

accepting the plea. Therefore, the error was harmless beyond a reasonable doubt.

In the alternative, the State would submit that since Respondent did not move to withdraw the plea with the trial court, the issue is one that can only be decided after a hearing, where the Respondent and his counsel can assert whether Respondent had, or did not have, actual knowledge of the maximum penalty under the habitual felony offender statute. Thus, the decision rendered below should be quashed, and the reasoning of Bell adopted, wherein the cause would be remanded to the trial court to give Respondent an opportunity to withdraw his plea and thereafter enter a new plea to the charges, or to proceed to trial.

ARGUMENT

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT AN ASHLEY VIOLATION CREATED AN ILLEGAL HABITUAL FELONY OFFENDER SENTENCE.

Petitioner, the State of Florida, submits that the Fourth District Court of Appeal was incorrect when it held in effect that, under Ashley,[1] Respondent's habitual offender sentence was an illegal sentence. The opinion below is in conflict with Bell v. State, 624 So. 2d 821 (Fla. 2d DCA 1993), rev. denied, 634 So. 2d 622 (Fla. 1994). The State submits that the issue was properly decided in Bell, and therefore, the decision hereunder review should be quashed, and the reasoning of Bell adopted as the correct resolution of the issue.

The Bell Court's resolution of the issue can be said to be the correct one with more emphasis under the particular facts of this case. The record clearly shows that notice of intent to seek enhanced penalties pursuant to Sec. 775.084, Fla. Stat. was filed by the State on September 18, 1992 (R. 42-43). Respondent entered his plea of guilty on October 19, 1992 (R. 2-13, 44-46). At the change of plea hearing, defense counsel stated that he had discussed the case with Respondent, had informed Respondent that

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

the State would be recommending an habitual offender sentence, that Respondent was basically pleading open to the mercy of the trial court, and that Respondent may get an habitual offender sentence; Respondent confirmed that he understood defense counsel's instructions (R. 4-6). Furthermore, at the conclusion of said hearing, defense counsel informed the trial court that he had explained to Respondent in detail all his rights and what he was risking by his plea (R. 12). Also, the written plea agreement signed by Respondent indicates an habitual offender sentence as a possible maximum penalty (R. 44). The trial court also informed Respondent that it could sentence him as an habitual offender, but also informed him that if it sentenced him as a non-habitual offender such sentence would have to be within the permitted range of the guidelines (R. 7). Furthermore, the trial court found that Respondent voluntarily, knowingly, and intelligently waived his constitutional rights, and that he freely entered into the plea agreement (R. 11).

In Ashley v. State, 614 So. 2d 486 (Fla. 1993), this Court held:

> [I]n 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 of habitualization. (footnote 8 omitted)

Id. at 490. In the instant case, the first requirement of Ashley was satisfied, as noted by the Fourth District Court of Appeal, because it is clear that Respondent received the September 18, 1992, written notice of intent to habitualize well **prior** to acceptance of the plea on October 19, 1992, and Respondent confirmed as such (R. 5). With reference to the second Ashley requirement, this Court explained as follows:

> The 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, and, where habitual violent felony offender provisions are implicated, the mandatory minimum term. As noted in the rule, "[c]ounsel for the prosecution and the defense shall assist the trial judge in this function." Fla.R.Crim.P. 3.172(a).

Ashley, n. 8 at 490. Under the facts and circumstances of the instant case, the State submits that the second requirement of Ashley was also met because it is undisputed that Respondent had discussed the case with his attorney, was well aware that the State was seeking habitualization, and agreed and understood that he was eligible for habitualization. Further, the plea form Respondent

executed October 19, 1992, provides an habitual offender sentence as the maximum penalty and states that Respondent discussed the legal consequences of his plea with defense counsel (R. 44-45). Thus, it can be inferred that defense counsel informed Respondent what the maximum habitual offender sentence would be for the charged offense. However, because the trial court did not confirm from Respondent personally that he was aware what the maximum habitual offender term for the charged offense might be, and without taking into consideration the harmless error rule, the Fourth District held that this case involved a straight Ashley violation. The Fourth District then proceeded to explain that Wilson v. State, 19 Fla. L. Weekly D2353 (Fla. 4th DCA Nov. 9, 1994), was directly on point and thus compelled reversal and remand for resentencing to a maximum fifteen-year sentence (Ex. A).

The State submits that the Fourth District's interpretation of Ashley was erroneous. It is clear that in Ashley remand for resentencing under the guidelines was the only legal sentence available to the trial court at the time of sentencing. The State submits, however, that in the instant case, where Respondent had notice of the State's intent to seek habitualization in his case, and where Respondent confirmed that he had discussed the consequences of pleading guilty with his attorney prior to the

acceptance of the plea, the trial court below had the discretion to sentence Respondent either under the guidelines or as an habitual felony offender if the State established that he qualified as such, in accord with the parties' understanding of the plea agreement.

In Massey v. State, 609 So. 2d 598 (Fla. 1992), the defendant went to trial representing himself. During the trial, the state announced that it was filing a notice of intent to have Massey sentenced as an habitual felony offender. After the jury found Massey guilty as charged, the notice of intent was filed in open court. The sentencing hearing was held more than three months later. On appeal, Massey contended that although his attorney had received a copy of the notice, his sentence must be reversed because the notice had not been served upon him prior to sentencing as required by the statute. Massey, at 599. This Court approved the District Court's application of the harmless error rule to the facts of the case, and held as follows:

> 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.

Id. at 600. In the instant case, it is uncontroverted that

Respondent received the required written notice; the problem, as noted in the Fourth District's opinion, 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. As can be seen from the Massey opinion, whether the defendant is aware of what sentence he might be sentenced when he goes to trial is not an issue. The issue only comes into play when the defendant enters a plea of guilty or nolo contendere due to the application of Florida Rule of Criminal Procedure 3.172. Therefore, it is clear that, but for the defendant in Ashley pleading, thus putting the requirements of Rule 3.172 into play, the second requirement of Ashley would not have become an issue. Thus, it is clear that Ashley deals strictly with a voluntariness of the plea issue, and not an "illegal sentence" issue as held by the Fourth District *sub judice*.

A review of Ashley demonstrates that this Court found that because the defendant therein did not have notice prior to the plea being accepted that he might be sentenced as an habitual felony offender, and what the maximum sentence thereunder might be, the only legal sentence available to the trial court at the time of sentencing in that case was a guidelines sentence. The Ashley opinion clearly does not stand for the proposition that a

guidelines sentence is the only remedy.

The State's position is supported by the interpretation given to Ashley by other District Courts of Appeal. See Heatley v. State, 636 So. 2d 153 (Fla. 1st DCA 1994), rev. denied, ___ So. 2d ___ (Fla. Sept. 7, 1994) (The relief granted in Ashley (a guidelines or departure sentence) was appropriate in that case because it would have been the only sentence available to the trial court at the time it accepted Ashley's plea.) In Horton v. State, 19 Fla. L. Weekly D2469 (Fla. 1st DCA Nov. 22, 1994), it was stated "*Ashley* [does not stand] for a mechanical reversal in cases where a plea was entered and accepted voluntarily, after the defendant had proper notice of intent to seek habitual offender sentencing." The Horton court observed that "*Ashley* turned primarily on the prosecution's failure to give notice of intent to habitualize before the plea," and concluded "that the primary consideration in *Ashley* was the state's complete failure to advise the defendant of its intent to seek habitual offender sentencing prior to the entry of the guilty plea." Therefore, the Horton court **affirmed** the trial court's denial of the defendant's motion to withdraw his plea under the facts of that particular case. In State v. Will, 19 Fla. L. Weekly D2334 (Fla. 3d DCA Nov. 9, 1994), the Third District **reversed** the trial court's granting of the defendant's motion to

set aside his plea. The Third District also stated that "*Ashley* ... represents an evolutionary refinement in the law relating to **plea colloquies**, ..." The Fifth District Court of Appeal agrees with the First, Second and Third, that the Ashley opinion is dealing with the "law relating to **plea colloquies**" and was not strictly an "illegal sentence" issue as the Fourth District ruled in the instant case below. See Thompson v. State, 638 So. 2d 116 (Fla. 5th DCA 1994), review pending, No. 83,951 (Fla. Nov. 23, 1994) (*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 plea**.); Jones v. State, 639 So. 2d 147 (Fla. 5th DCA 1994), review pending, No. 84,150 (Fla. Nov. 23, 1994) (*Ashley* appears to require a pre-plea notice of intent to habitualize for an habitual offender sentence to stand as legally valid).

The State, therefore, submits that the Fourth District misapplied Ashley, and in effect misinterpreted the holding of this Court in Ashley. The sentence in Ashley was illegal only because the defendant therein did not 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. In other words,

Ashley was not given the opportunity to take that into account in deciding whether or not to plead. Such is not the situation in the instant case. The instant case is more similar to the circumstances in Bell v. State, 624 So. 2d 821 (Fla. 2d DCA 1993), rev. denied, 634 So. 2d 622 (Fla. 1994). The State submits that Bell was correctly decided. Therefore, the Fourth District's opinion at bar, which certified conflict with Bell, needs to be quashed on the reasoning that Bell set forth the proper remedy when the second prong of Ashley has not been complied with under the particular circumstances of the case under review.

Bell holds as follows:

> The record in this case does not reveal that the trial court ever confirmed that Bell personally knew that he could receive up to thirty years in prison and that the would not be eligible for some gain time. Thus, there was no showing that Bell knowingly and intelligently entered the plea.
>
> * * *
>
> Bell's was an open plea, and he was not promised anything. He was misinformed about the possible maximum sentence and was uninformed as to how habitualization would affect his early release. Based on these circumstances, we vacate Bell's sentence and remand this case to the trial court to allow Bell to withdraw his plea and thereafter to enter a new plea to the charge or to proceed to trial.

Bell, 624 So. 2d at 821-822. Accord Gonzalez v. State, 639 So. 2d

134 (Fla. 2d DCA 1994); Ciccarelli v. State, 635 So. 2d 149 (Fla. 2d DCA 1994); Syples v. State, 621 So. 2d 574 (Fla. 2d DCA 1993). The State would point out that the First District, Third District and Fifth District Courts of Appeal agree with the Second District's remedy set out in Bell, see Hall v. State, 643 So. 2d 635 (Fla. 1st DCA 1994) (remanded for the trial court to determine whether the requirements of *Ashley* were complied with prior to entry of Hall's plea; if they were not, then Hall's habitual offender sentence is illegal and he must be permitted to withdraw his plea or be sentenced within the guidelines); Lee v. State, 642 So. 2d 1190 (Fla. 1st DCA 1994) (same); Cole v. State, 640 So. 2d 1194 (Fla. 1st DCA 1994) (The sentence is reversed and the case remanded to the trial court to allow appellant to withdraw her plea or be sentenced again after proper inquiry pursuant to *Ashley*); State v. Will, 19 Fla. L. Weekly D2334 (Fla. 3d DCA Nov. 9, 1994) (order granting motion to withdraw reversed, and remanded for specific finding on the defendant's claim that he did not agree to a habitual offender disposition); State v. Brown, 622 So. 2d 17 (Fla. 5th DCA 1993).

Thus, since in the instant case, just as in Bell, the record does not reveal that the trial court ever confirmed prior to acceptance of the plea that Respondent was aware of the maximum

habitualized penalty he could receive as an habitual offender, the question is one of whether Respondent **knowingly and intelligently** entered the plea. The State maintains that under the facts and circumstances of the instant case, Respondent should not have been allowed to challenge the sentence until he had moved to withdraw the plea with the trial court. Robinson v. State, 373 So. 2d 898 (Fla. 1979); Brown v. State, 616 So. 2d 1137 (Fla. 4th DCA 1993) (Since appellant did not present the contention that his plea of guilty was invalid because the trial court failed to advise him of the ten year mandatory minimum sentence as an habitual felony offender as required by Rule 3.172(c)(1) to the trial court in his motions to withdraw his plea, appellant cannot raise it for the first time on appeal). Had this procedure been followed in the instant case, the trial court could have held a hearing to determine whether the defense attorney informed Respondent of the maximum sentence he would have been facing under the habitual offender statute, and that he would not be eligible for some gain time. The trial court could then have made findings to support its conclusion as to whether Respondent **knowingly and intelligently** entered the plea.

In the instant case, Respondent never moved to withdraw his plea in the trial court. As shown above, however, Respondent is

now challenging the voluntary or intelligent character of his plea without having presented this issue to the trial court. In Robinson v. State, 373 So. 2d 898, 902 (Fla. 1979), this Court specifically held as follows:

> The appellant contends that he has a right to a general review of the plea by an appellate court to be certain that he was made aware of all the consequences of his plea and apprised of all the attendant constitutional rights waived. In effect, he is asserting a right or review without a specific assertion of wrongdoing. We reject this theory of an automatic review from a guilty plea. The only type of appeal that requires this type of review is a death penalty case. See Sec. 921.141(4), Fla. Stat. (1977). Furthermore, we find that **an appeal from a guilty plea should never be a substitute for a motion to withdraw a plea**. If the record raises issues concerning the voluntary or intelligent character of the plea, that issue should first be presented to the trial court in accordance with the law and standards pertaining to a motion to withdraw a plea. If the action of the trial court on such motion were adverse to the defendant, it would be subject to review on direct appeal.

(emphasis added).

The State maintains that the record in the case at bar does not raise any issue concerning the voluntary or intelligent nature of the plea. Thus, in the action before the Fourth District below, Respondent was "asserting a right of review without a specific assertion of wrongdoing," which he did not have. Respondent not

having filed a motion to withdraw the plea with the trial court, the Fourth District should have affirmed the sentence. See Simmons v. State, 19 Fla. L. Weekly D2407 (Fla. 1st DCA Nov. 14, 1994); Heatley v. State, supra 636 So. 2d at 154; Brown v. State, supra, 616 So. 2d 1137. Thus, on this basis also the Fourth District's opinion here under review should be quashed.

Lastly, the State submits that the Fourth District's opinion below should be quashed, and the sentence imposed affirmed, under the authority of Massey v. State, 609 So. 2d 598 (Fla. 1992), by applying the harmless error rule to the particular facts of the instant case. See Lewis v. State, 636 So. 2d 154 (Fla. 1st DCA 1994) (In Massey the supreme court has held that failure to satisfy the written notice requirements of the habitual offender statute is subject to a harmless error analysis.) In Massey, 609 So. 2d at 599, this court quoted with approval Roberts v. State, 559 So. 2d 289, 290-91 (Fla. 2d DCA), rev. dismissed, 564 So. 2d 488 (Fla. 1990), as follows:

> Defendant's attorney was served with ... notice, and there is no question that defendant had knowledge of the notice. While section 775.084(3) does ... state that such notice shall be served "on the defendant and his attorney," that section gives the purpose of that requirement as being "so as to allow the preparation of a submission on behalf of the defendant" in response to the notice. In

> this case there was such a response prepared and made on behalf of defendant, thus the purpose of the statute was fulfilled. We do not conclude that the legislature intended to permit a defendant to avoid the application of the statute on the technical grounds raised here.

This Court, in Massey, went on to hold that the district court was correct in affirming the sentence, although the notice requirement had not been strictly complied with, and in applying the harmless error rule because both Massey and his attorney had actual notice of the state's intention to seek habitual felony offender status, Id. at 599; this Court stated as follows:

> 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 the written notice.

Id. at 600.

In the instant case, the record demonstrates that Respondent was aware that the State was seeking to sentence him as an habitual felony offender (R. 2-13). The State filed its notice of intent to seek habitual sentence on September 18, 1992 (R. 5, 42-43). At the change of plea hearing on October 19, 1992, Respondent acknowledged that he knew the State had filed its notice to declare Respondent

an habitual offender (R. 5). At the sentencing hearing on November 18, 1992, the State introduced certified judgments and sentences of Respondent's prior convictions; Vivian Hart of the Broward County Sheriff's Office testified as a fingerprint expert and stated that the fingerprints on the prior judgments matched the fingerprints of Respondent, which were rolled in open court (R. 17-24). The State requested that Respondent be declared an habitual felony offender. Defense counsel then stated in part as follows:

> And another positive was basically I went over the score sheet with him and running the local cases. All his cases are in Broward County. I advised in my estimate that his guidelines would be nine to twelve or twelve to seventeen. They are in that range right in the middle.
>
> I have advised him the permitted range is nine to twenty-two. I advised him even if I filed a Barbera motion the likelihood of him getting that is slim. He has a long history. He has prior similar offenses, and Larry might be looking at a habitual offender. I explained to him that he qualified. Legally that would be up to the court.
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> I have no idea when he plead on October 9th what the court would do. I'm not a mind reader. I advised him that most clients think I am a mind reader, but I'm not. I have no idea what the court is going to do this morning. So all I can add is that Larry has plead open to the court guilty and knowing full well that he is running that risk.

(emphasis added) (R. 30). Defense counsel then asked the trial court to sentence Respondent to a guidelines sentence of nine years' imprisonment to be followed by a probationary period (R. 31). The Sentencing Guidelines Scoresheet shows a recommended sentence range of 12 to 17 years, and a permitted sentence range of 9 to 22 years (R. 60). Respondent received a 12-year habitual offender sentence, followed by five years probation (R. 34, 57-59). Thus, it is clear that Respondent was not prejudiced by not being advised of the maximum sentence as an habitual felony offender prior to the plea of guilty being accepted. Respondent had notice, was prepared for the hearings, and received a sentence within the terms of the plea agreement. Under these circumstances, applying the harmless error rule, the sentence imposed must be affirmed. Massey.

Because **notice** is the main concern, and Respondent received written notice well in advance of the change of plea hearing, no prejudice has been established in the instant case. Massey; Voth v. State, 638 So. 2d 121 (Fla. 5th DCA 1994); Jenkins v. State, 634 So. 2d 1143 (Fla. 3d DCA 1994) (failure to give notice of habitualization harmless error). Here, Respondent received written notice, and the plea negotiations were with the understanding that although he knew the State would seek a habitual offender sentence,

Respondent was requesting a sentence within the guidelines. Respondent confirmed that he knew the State was seeking habitualization. This fact distinguishes the instant case from Ashley, where at the time the plea was accepted, the defendant had no personal understanding that he would be habitualized. Further, the record also shows that after receiving written notice on September 18, 1992, Respondent signed the written plea agreement on October 19, 1992, which stated that he understood the legal consequences of his plea and which provied a maximum penalty of an habitual offender sentence (R. 44-45). Therefore, Respondent's sentence as an habitual offender should be affirmed. See Mansfield v. State, 618 So. 2d 1385 (Fla. 2d DCA 1993). Here the State presented uncontradicted evidence establishing that Respondent qualified as an habitual felony offender. Moreover, there is no suggestion in the transcript of the sentencing hearing that either Respondent or his attorney was surprised by or unprepared to deal with the state's request for imposition of habitual felony offender sentences. Accordingly, on the facts presented, the failure of the trial court to confirm from Respondent that he knew what the maximum sentence he could receive as an habitual offender prior to acceptance of the plea was harmless beyond any reasonable doubt. See Lewis v. State, 636 So. 2d 154 (Fla. 1st DCA 1994).

In the alternative, the State submits that the sentence should be affrimed, without prejudice for Respondent to file a motion to withdraw his plea. At the hearing on such motion, the trial court can hear testimony from defense counsel and Respondent on whether the maximum sentence as an habitual felony offender was discussed by them prior to the change of plea hearing held October 19, 1992. See Anderson v. State, 637 So. 2d 971 (Fla. 5th DCA 1994); Hannah v. State, 623 So. 2d 855 (Fla. 3d DCA 1993).

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,

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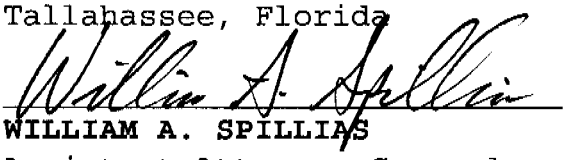

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Initial Brief on the Merits" has been furnished by Courier to: DAVID McPHERRIN, Assistant Public Defender, Attorney for Respondent, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this 6th day of March, 1995.

William A. Spillis
Of Counsel

Criminal law—Sentencing—Habitual offender—Error to sentence defendant as habitual offender where court accepted open plea of guilty without first confirming that defendant was aware of ramifications of habitualization—Conflict certified—Probation—Conditions of probation prohibiting use of intoxicants and possession, carrying or ownership of a weapon without consent of probation officer stricken because they were not orally pronounced

LARRY WASHINGTON, Appellant, v. STATE OF FLORIDA, Appellee. 4th District. Case No. 94-1271. L.T. Case No. 92-16005CF10A. Opinion filed January 25, 1995. Appeal from the Circuit Court for Broward County; Sheldon M. Schapiro, Judge. Counsel: Richard L. Jorandby, Public Defender, and David McPherrin, Assistant Public Defender, West Palm Beach, for appellant. Robert A. Butterworth, Attorney General, Tallahassee, and William A. Spillias, Assistant Attorney General, West Palm Beach, for appellee.

(PER CURIAM.) Appellant, Larry Washington, asserts that the trial court erred in sentencing him as a habitual felony offender where the trial court accepted his open plea of guilty without first confirming that he was personally aware of the ramifications of habitualization. Because the trial court did not confirm that appellant was aware of the maximum habitualized penalty he could receive as a habitual offender, we are compelled to reverse appellant's sentence pursuant to *Ashley v. State*, 614 So. 2d 486, 490 (Fla. 1993). Although only the second prong of *Ashley* was violated and although this case involves an open plea, our recent decision in *Wilson v. State*, 19 Fla. L. Weekly D2353 (Fla. 4th DCA Nov. 9, 1994), is directly on point and compels reversal and remand for resentencing to a maximum fifteen-year sentence.

While the written plea agreement did not promise a guidelines sentence, it did indicate a maximum sentence of fifteen years. The trial court classified appellant as a habitual felony offender and sentenced him to twelve years imprisonment, to be followed by five years probation, for a sentence totalling seventeen years. Without habitualization, the statutory maximum sentence for burglary in the second degree is fifteen years. § 775.082(3)(c), Fla. Stat. (1993). Therefore, on remand, we direct the trial court to resentence appellant to a maximum fifteen-year sentence. *See Wilson*; *Harrelle v. State*, 632 So. 2d 280 (Fla. 4th DCA 1994). As we did in *Wilson*, we certify conflict with *Bell v. State*, 624 So. 2d 821 (Fla. 2d DCA 1993), *review denied*, 634 So. 2d 622 (Fla. 1994).

Defendant also contends, and the state concedes, that the trial court erred by including special conditions of probation prohibiting defendant from using intoxicants and possessing, carrying or owning a weapon without the consent of his probation officer. We therefore strike these special conditions of probation not orally pronounced. *See Shacraha v. State*, 635 So. 2d 1051 (Fla. 4th DCA 1994).

REVERSED AND REMANDED. (WARNER, PARIENTE and STEVENSON, JJ., concur.)

* * *

HARRY NAYLOR, Appellant, v. STATE OF FLORIDA, DEPARTMENT OF REVENUE ON BEHALF OF BETTY LONG, Appellee. 4th District. Case No. 94-2410. L.T. Case No. 82-1401[illegible]01. Opinion filed January 25, 1995. Appeal from the Circuit Court for Indian River County; L.B. Vocelle, Judge. Counsel: Richard Saliba of Saliba & [illegible]onough, P.A., Vero Beach, for appellant. No brief filed for appellee.

(PER CURIAM.) Pursuant to appellee's confession of error we reverse and remand for further appropriate proceedings. (DELL, C.J., HERSEY and FARMER, JJ., concur.)

* *

Dissolution of marriage—Equitable distribution—Wife entitled to life insurance policy on which she has been making premium payments—Distribution of credit card debt reversed and remanded where, although court intended to divide liabilities equally, effect of distribution scheme was to allocate to husband the credit card debt incurred solely by him after separation and to allocate to wife the credit card debts incurred for joint benefit of the parties

CONSUELO M. PALERMO, Appellant, v. EDGARD F. PALERMO, Appellee. 4th District. Case No. 93-3748. L.T. Case No. 93-611[illegible]. Opinion filed January 25, 1995. Appeal from the Circuit Court for Broward County; C. Lavon Ward, Judge. Counsel: Roberta G. Stanley of Roberta G. Stanley, P.A., Fort Lauderdale, for appellant. William L. Gardiner of Gardiner and Gardiner, P.A., Fort Lauderdale, for appellee.

(PER CURIAM.) Appellant, former wife, appeals from a final judgment of dissolution of marriage. We reverse as to the award of life insurance and distribution of credit card debt. We affirm as to all other points raised.

With respect to the life insurance policy, [illegible]n at trial and on appeal, the appellee concedes that the former wife has been making the premium payments and that the policy should be her property provided that she is solely responsible for the payments. We reverse and remand for modification of the final judgment to reflect this concession. *See Edwards v. Edwards*, 559 So. 2d 281 (Fla. 4th DCA 1990); *Sobelman v. Sobelman*, 541 So. 2d 1153 (Fla. 1989); *Thiel v. Thiel*, 426 So. 2d [illegible]12 (Fla. 4th DCA 1983).

As to the allocation of credit card debt, the trial court clearly intended to divide liabilities equally. Although the court allocated the credit card liability so that the sums owed by each party were roughly equal, the net effect of the distribution scheme was to allocate to the husband the credit card debt incurred solely by him after separation and to allocate to the wife credit card debts that were incurred for the joint benefit of both parties. We reverse and remand for a redetermination of credit card debt which distributes the joint credit card debts equally. *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980).

Affirmed in part, reversed in part and remanded for treatment consistent with this opinion. (WARNER, PARIENTE and STEVENSON, JJ., concur.)

* * *

Criminal law—Juveniles—Appeals—Order withholding adjudication in juvenile case is an appealable order—Motion to dismiss appeal denied

IN RE THE INTEREST OF T.G., a child. 4th District. Case No. 94-1807. L.T. Case No. 94-2628 CJ. Opinion filed January 25, 1995. Appeal from the Circuit Court of Broward County; Stephanie May, Judge. Counsel: Richard Jorandby, Public Defender and David McPherrin, Assistant Public Defender, West Palm Beach, for Appellant-T.G. Robert A. Butterworth, Attorney General, Tallahassee, and Aubin Wade Ryson, Assistant Attorney General, West Palm Beach, for Appellee-State of Florida.

ON MOTION TO DISMISS

(PER CURIAM.) Appellant was charged in a petition for delinquency with possession of cocaine, and after denying his motion to suppress, the court withheld adjudication and placed appellant on community control. Appellant has appealed the order withholding adjudication, and the state moves to dismiss on the ground that the order withholding adjudication is not an appealable order under Florida Rule of Appellate Procedure 9.140(b), citing *Martin v. State*, 6[illegible]So. 2d 20 (Fla. 2d DCA 1992).

The state's reliance on *Martin* is misplaced because the defendant in *Martin* was not a juvenile. As the first district explained in *M.R.S. v. S[illegible]*, 478 So. 2d 1166 (Fla. 1st DCA 1985), in which a juvenile was appealing an order withholding adjudication, the juvenile's right to appeal arises under chapter 39, Florida Statutes, and this court's appellate jurisdiction is thus invoked by Florida Rule of Appellate Procedure 9.110, not 9.140(b). *See also State v. C.C.*, [illegible]6 So. 2d 144 (Fla. 1985).

The motion to dismiss appeal is therefore denied. (HERSEY, WARNER and KLEIN, JJ., concur.)

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EXHIBIT "A"