IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,167

STATE OF FLORIDA,

Petitioner,

vs.

LARRY WASHINGTON,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

****

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Petitioner, **THE STATE OF FLORIDA**, was the Appellee in the Fourth District Court of Appeal. The Respondent, **LARRY WASHINGTON**, was the Appellant in the Fourth District Court of Appeal. The parties will be referred to as they stand before this Honorable Court, except that Petitioner may also be referred to as the State.

STATEMENT OF THE CASE AND FACTS

Petitioner relies upon the Statement of the Case and Facts as set forth in its initial brief on the merits, pages 2-5. However, Petitioner notes that on March 29, 1995, the Fourth District Court of Appeal issued an opinion in the instant case on Respondent's motion for rehearing and/or clarification, which opinion clarified that Respondent's sentence was to be reversed and remanded for resentencing to a maximum sentence not to exceed fifteen years; said opinion is attached to this brief as an appendix.

SUMMARY OF ARGUMENT

The record in the instant case indicates that Respondent was in fact aware of the consequences of habitualization, and thus, pursuant to the harmless error analysis set forth in Massey v. State, 609 So. 2d 598 (Fla. 1992), was not prejudiced. The undisputed and unrefuted record shows 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; furthermore, the plea form that Respondent executed on October 19, 1992, provided an habitual offender sentence as the maximum penalty, and stated that Respondent had discussed the legal consequences of his plea with defense counsel (See R. 30. 44-45).

ARGUMENT

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

The State reasserts its reliance upon its arguments and analyses set forth in its initial brief, including Bell v. State, 624 So. 2d 821 (Fla. 2d DCA 1993), rev. denied, 634 So. 2d 622 (Fla. 1994), and its interpretation of Ashley v. State, 614 So. 2d 486 (Fla. 1993). However, the State strongly submits that this Court's reasoning and analysis in Massey v. State, 609 So. 2d 598 (Fla. 1992), clearly apply to the instant case.

In Ashley, this Court, as noted in the State's initial brief, held as follws:

> [I]n order for a defendant to be habitualized following a guilty or nolo plea, the following must take place prior to the 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 omitted). Ashley, 614 So. 2d at 490. In Massey, the defendant was not given prior written notice of the State's intent to habitualize, but this Court, in approving the district court's application of the harmless error rule, 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.

Massey, 609 So. 2d at 600. The facts thus clearly show that, although the defendant was not provided with written notice of habitualization, he did receive actual notice and thus was not prejudiced.

Likewise, in the instant case, despite Respondent's assertions to the contrary, it is inconceivable that Respondent was prejudiced, for the record indicates that Respondent was in fact aware of the consequences of habitualization, and thus the reasoning and analysis set forth by this Court in Massey should apply to the instant case. The undisputed and unrefuted record shows 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; furthermore, the plea form that Respondent executed on October 19, 1992, provided an habitual offender sentence as the maximum penalty, and stated that Respondent had discussed the legal consequences of his plea with defense counsel (See R. 30. 44-45). Thus, the record is clear that Respondent was aware of the consequences of habitualization, and that he therefore was not prejudiced.

CONCLUSION

WHEREFORE, based upon the foregoing points and authorities, as well as the arguments and analyses set forth in Petitioner's initial brief, Petitioner respectfully requests that the decision of the district court be **QUASHED** and the judgment and sentence imposed by the trial court be **AFFIRMED.**

Respectfully submitted,

ROBERT A. BUTTERWORTH
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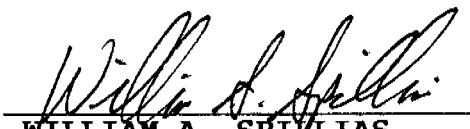

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S REPLY BRIEF** has been furnished by Courier to: **DAVID McPHERRIN, ESQUIRE,** Counsel for Respondent, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, Florida, 33401, this 30th day of March, 1995.

William A. Spillias
Assistant Attorney General

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

LARRY WASHINGTON, Appellant, v. STATE OF FLORIDA, Appellee.	CASE NO. 94-1271. L.T. CASE NO. 92-16005CF10A.

Opinion filed March 29, 1995

Appeal from the Circuit Court for Broward County; Sheldon M. Schapiro, Judge.

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.

ON MOTION FOR REHEARING AND/OR CLARIFICATION

PER CURIAM.

We deny appellant's motion for rehearing, but grant his motion for clarification to clarify the sentence which may be imposed on him upon remand. We therefore withdraw our original opinion and substitute the following opinion.

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, 645 So. 2d 1042 (Fla. 4th DCA 1994), is directly on point and compels reversal and remand for resentencing to a maximum sentence not exceeding fifteen years.

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 sentence not exceeding the fifteen year statutory maximum, with the term of incarceration not exceeding twelve years, which was the original term of incarceration imposed. See Morganti v. State, 573 So. 2d 820 (Fla. 1991); Requeiro v. State, 619 So. 2d 463 (Fla. 4th DCA 1993). Because we reject the state's alternative suggestion of allowing, on remand, appellant to withdraw his plea, 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.