IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 85,324

RICHARD EVERSOLE,

Respondent.
_____/

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

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

Respondent was sentenced as a habitual offender after pleading no contest to sexual battery. Respondent signed a plea form which set forth that a hearing may be held to determine if respondent was a habitual felony offender, what the maximum sentence respondent was facing as a habitual offender and that he would not be eligible for gain time if found to be a habitual offender. The Fifth District Court of Appeal vacated the habitual offender sentence and remanded the case for resentencing. In doing so the court relied on Santoro v. State, 644 So. 2d 585 (Fla. 5th DCA 1994), and Thompson v. State, 638 So. 2d 116 (Fla. 5th DCA 1994). Eversole v. State, 20 Fla. L. Weekly D548 (Fla. 5th DCA March 3, 1995). The state timely filed a notice to invoke discretionary jurisdiction of this court.

SUMMARY OF ARGUMENT

This court has accepted jurisdiction in Santoro, supra, and Thompson, supra, and the two cases, as well as several others, are currently pending review by this court. The Fifth district relied on those cases in reaching its decision. This court should accept jurisdiction in this case.

ARGUMENT

POINT ON APPEAL

THE DECISIONS RELIED UPON BY THE DISTRICT COURT IN VACATING THE SENTENCE IMPOSED ARE PENDING REVIEW BEFORE THIS COURT; THERE IS PRIMA FACIE EXPRESS CONFLICT AND THIS COURT SHOULD EXERCISE ITS JURISDICTION.

A district court decision that is either pending review in or has been reversed by this court constitutes prima facie express conflict and allows this court to exercise its jurisdiction. Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981). In vacating the habitual offender sentence imposed in this case, the Fifth District relied upon Santoro, supra, and Thompson, supra. Both cases are currently pending review in this court. See case nos. 84,758 and 83,951 respectively. This court should exercise its jurisdiction in this case. Jollie, supra.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner requests this 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 of Petitioner has been furnished by delivery to Nancy Ryan, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 15th day of March, 1995.

Bonnie Jean Parrish
Of Counsel

standard rule 3.850 motion, and he attempts to reallege that he received ineffective assistance of trial counsel, and that his plea was involuntary because of poor advice of counsel and because at the time of the plea he was incompetent. Specifically he alleges:

1. The petitioner Contends That His Lawyer Was Ineffective When He Failed To Investigate Illegal Acts By Police Detective Delingo.

2. The petitioner Contends That His Court Appointed Lawyer Coerced Him Into Accepting His Nolo Plea.

3. Failure To Investigate Facts Supporting Insanity Plea.

This petition raises issues basically identical to those in his appeal from the denial of his rule 3.850 motion. *Isley v. State,* 634 So. 2d 638 (Fla. 5th DCA 1994). In fact, he appears to have re-submitted the same pleading in this case as in that one. He merely dressed it in a new cover page, re-shuffled the pages, and whited out "motion" for "petition" and "defendant" for "petitioner."

Isley is now well beyond the two year time limit for filing motions pursuant to rule 3.850 and he has failed to allege any valid exception to the limitations period. Rule 3.850 provides that no motion, other than to vacate a sentence which exceed the limits provided by law, may be filed or considered more than two years after the judgment and sentence became final, unless the motion alleges facts upon which the claim for relief is predicated which were unknown to the movant or his attorney and could not have been ascertained by due diligence within the two year time period, or unless a fundamental constitutional right asserted was not established until the two year time period had run, and that right has been held to apply retroactively. *See, e.g., Bannister v. State,* 606 So. 2d 1247, 1248 (Fla 5th DCA 1992). There is not a shred of a suggestion Isley could allege such an exception to the two year time limit, nor has he attempted to do so. He will not be permitted to escape the two year limit by labeling this or any other pleading as a petition for habeas corpus. *See Regal Marble, Inc. v. Drexel Invs., Inc.,* 568 So. 2d 1281 (Fla. 4th DCA 1990); *U.S. Fire Ins. Co. v. Franko,* 443 So. 2d 170 (Fla. 1st DCA 1983) (courts are concerned with the substance of pleadings, not the labels the parties place on them).

Further, *res judicata* and the law of the case, bar Isley's repetitive arguments concerning withdrawing his pleas and ineffective assistance of trial counsel. They have been heard, considered and rejected. To raise them again is an abuse of process. *See Foster v. State,* 614 So. 2d 455 (Fla. 1993). Even if they had not specifically been raised in a prior proceeding where other grounds concerning the involuntary nature of the plea or ineffective assistance of counsel were raised, they too would be barred. *Jones v. State,* 591 So. 2d 911 (Fla 1991); *Adams v. State,* 484 So. 2d 1216 (Fla. 1986); *Stewart v. State,* 632 So. 2d 59 (Fla. 1986). This bar to successive claims applies equally to petitions for habeas corpus. *Mason v. State,* 627 So. 2d 1352 (Fla. 5th DCA 1993).

Isley's claims in this proceeding are untimely and successive, and, taken in the context of his prior appeals to this court, they constitute an abuse of process. Accordingly, in order to protect the limited judicial resources available to our judicial system and this court, we prohibit Isley from filing any further *pro se* pleadings with this court concerning his 1988 conviction and sentence. *See in re Grant Anderson,* __ U.S.__, 114 S.Ct. 2671, 129 L.Ed.2d 807 (1994). Enough is enough.

AFFIRMED. (PETERSON and DIAMANTIS, JJ., concur.)

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[1]*Isley v. State,* 565 So. 2d 389 (Fla.5th DCA 1990).

* * *

Criminal law—Sentencing—Habitual offender sentence reversed and remanded where state did not file notice it would seek imposition of habitual offender sentence, and plea agreement only indicated that habitualization hearing "may" be conducted—Assessment of fee to First Step as special condition of probation was erroneous

RICHARD EVERSOLE, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 94-551. Opinion filed March 3, 1995. Appeal from the Circuit Court for Volusia County, John W. Watson, III, Judge. Counsel: James B. Gibson, Public Defender, and Susan A. Fagan, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Barbara Arlene Fink, Assistant Attorney General, Daytona Beach, for Appellee.

(SHARP, W., J.) Eversole appeals from his sentence after he pled no contest to one count of sexual battery and violation of probation on an unrelated charge. The state did not file notice it would seek imposition of an habitual offender sentence pursuant to section 775.084, Florida Statutes (1993). After the trial judge accepted Eversole's plea, the judge served notice he would conduct a hearing to determine whether or not to classify Eversole as an habitual offender. The plea agreement only indicated that this "may" be set and a hearing conducted to determine if he should be sentenced as an habitual offender. Following the hearing, Eversole was given a 15 year habitual felony offender sentence, followed by 10 years on probation.[1]

In view of this court's decisions in *Santoro v. State,* 644 So. 2d 585 (Fla. 5th DCA 1994) and *Thompson v. State,* 638 So. 2d 116 (Fla. 5th DCA 1994), *rev. granted,* Case No. 83,951 (Fla. Nov. 23, 1994), we conclude error occurred in sentencing Eversole in this case. Accordingly, we reverse the sentence and remand for resentencing. The trial court may sentence as it deems appropriate consistent with the sentencing guidelines, or it may impose an habitual felony offender sentence, so long as it gives Eversole an opportunity to withdraw his plea and proceed to trial. At resentencing, the court should either sentence Eversole within the guidelines (including a departure sentence) or as an habitual offender if the court believes a greater sentence is justified, so long as it advises him of its intent to impose an habitual offender sentence, and permit him to either accept the greater sentence or withdraw his plea and proceed to trial. In addition we note the imposition of a $120.00 fee to First Step as a special condition of probation was erroneous and should not be imposed on remand.

Sentence VACATED; REMANDED FOR RESENTENCING. (HARRIS, C.J., concurs. GRIFFIN, J., dissents with opinion.)

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[1]Although this sentence falls within both the permitted (7-17 years) and recommended (9-12 years) guideline ranges, habitualization also results in the ineligibility for basic gain time and the central release of prisoners program. § 775.084(4)(e).

(GRIFFIN, J., dissenting.) I agree that *Santoro* controls and, as I did in *Santoro,* I dissent.

* * *

Criminal law—Sentencing—Guidelines—Scoresheet—Error to use one scoresheet for 1994 offense and another scoresheet involving probation for offenses committed in 1993—Trial court erroneously failed to give defendant option of being sentenced pursuant to 1994 guidelines for all offenses

KATHY WOOD, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 94-1413. Opinion filed March 3, 1995. Appeal from the Circuit Court for St. Johns County, Richard O. Watson, Judge. Counsel: James B. Gibson, Public Defender, and Dan D. Hallenberg, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Wesley Heidt, Assistant Attorney General, Daytona Beach, for Appellee.

(SHARP, W., J.) Wood appeals from the sentences she received after pleading guilty to a third degree felony (desertion of a child),[1] after her probation was revoked in a prior criminal case involving two counts of forgery.[2] The trial judge sentenced Wood pursuant to two different scoresheets. He used a 1994 scoresheet for the desertion offense and sentenced Wood to 364 days in the county jail with credit for time served. For the two forgery offenses, the judge used a 1993 scoresheet because Wood committed the crimes in 1993. He sentenced her to five year