IN THE SUPREME COURT OF FLORIDA

RICKY J. GOODLOE, Petitioner/Appellant, versus STATE OF FLORIDA, Respondent.	S.CT. CASE NO. DCA CASE NO. 94-1738

ON DISCRETIONARY REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Petitioner, Ricky Goodloe, was charged with three traffic offenses. In a separate case, Petitioner was charged with a felony based on the same episode which gave rise to the traffic charges. Over defense objections, the cases were tried together. Petitioner was convicted of the traffic offenses and acquitted of the felony.

Petitioner was sentenced to consecutive terms in County Jail totaling two and one half years. Petitioner appealed the joinder of offenses and his sentence to the Fifth District Court of Appeal. The Court of Appeal affirmed Petitioner's convictions and sentences. The Court did, however, acknowledge that its ruling on consecutive county jail sentences is in conflict with McGauley v. State, 632 So.2d 1154 (Fla. 4th.DCA 1994).

SUMMARY OF THE ARGUMENT

This Court should exercise its discretionary jurisdiction in this case. As acknowledged by the District Court, the decision of that court is in conflict with the decision of another District Court of Appeal. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030 (a)(2)(A)(iv).

POINT

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION IN THIS CASE BECAUSE THE OPINION OF THE DISTRICT COURT IS IN EXPRESS AND DIRECT CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

The Fourth and Fifth District Courts of Appeal have chosen to interpret this Court's decision in Singleton v. State, 554 So.2d 1152 (Fla. 1990) differently. The Fifth has held that the Singleton prohibition against consecutive county jail sentences exceeding one year applies only to felony sentences, Carson v. State, 635 So.2d 1007 (Fla. 5th.DCA 1994), Armstrong v. State, 640 So.2d 1250 (Fla. 5th.DCA 1994). The Fourth has held that the prohibition also applies to consecutive misdemeanor sentences, McGauley v. State, 632 So.2d 1154 (Fla. 4th.DCA 1994).

The Fifth DCA has acknowledged this conflict in its decision in this case, Goodlow v. State, 20 Fla. L. Weekly D859 (Fla. 5th.DCA April 7, 1995). This Court has granted review in Armstrong, No. 84,283 (Fla. Dec. 19, 1994). Petitioner asks this Court to grant review in this case, pursuant to Florida Rule of Appellate Procedure 9.030 (a)(2)(A)(iv).

CONCLUSION

BASED UPON the argument and authorities expressed herein, Petitioners respectfully request that this Honorable Court accept jurisdiction in this cause.

Respectfully submitted,

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT

Kenneth Witts

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal; and mailed to Ricky J. Goodloe, Post Office Box 585031, Orlando, Florida 32858, on this 21st day of April, 1995.

Kenneth Witts

KENNETH WITTS
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

RICKY J. GOODLOE,	)	
	)	
Petitioner/Appellant,	)	
	)	
vs.	)	S.CT. CASE NO.
	)	
STATE OF FLORIDA,	)	DCA CASE NO. 94-1738
	)	
Respondent.	)	
	)	

A P P E N D I X

The plea agreement in this case simply raised the possibility that Booth might be sentenced as an habitual offender. It provided:

> e. That a hearing may hereafter be set and conducted in this case to determine if I qualify to be classified as a Habitual Felony Offender or a Violent Habitual Felony offender, and:
>
> (1) 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 10 years imprisonment and a mandatory minimum of 5 years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.
>
> (2) 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.

Further, at the plea hearing, the judge asked Booth if he understood he could receive a sentence up to those maximum set forth in paragraphs 4(a) through (c) of the agreement, if Booth were found to be an habitual offender. Booth replied, "Yes." However, there was never any indication that the trial judge or the prosecution intended to pursue an habitual offender sentence.

A hearing was held on Booth's motion to withdraw his plea. He testified he did not think he would be sentenced as an habitual offender and that he entered his plea based on that understanding. He admitted he knew it was possible he could be found to be an habitual offender, but at the time he entered his plea, he did not think a hearing on that issue would be held.

This court has interpreted *Ashley v. State,* 614 So. 2d 486 (Fla. 1993) as requiring that a defendant be made aware, prior to entering a plea, either that the state intends to seek habitual offender treatment, or that the court intends to do so. *Thomspon v. State,* 638 So. 2d 116 (Fla. 5th DCA 1994). Giving notice that the possibility exists that a defendant may be sentenced as an habitual offender is not sufficient. *Santoro v. State,* 644 So. 2d 585 (Fla. 5th DCA 1994); *Jones v. State,* 639 So. 2d 147 (Fla. 5th DCA 1994); *Blackwell v. State,* 638 So. 2d 119 (Fla. 5th DCA 1994); *Thompson v. State,* 638 So. 2d 116 (Fla. 5th DCA 1994). We may not be correct in this interpretation of *Ashley* but as a court we are committed to it.

Accordingly, we vacate Booth's sentence in this case and remand to the trial court. At resentencing, the trial court should either sentence Booth pursuant to the guidelines (including a departure sentence), or, if the court believes a more severe sentence is necessary, it should allow Booth to withdraw his guilty plea and proceed to trial.

Judgment AFFIRMED; Sentence VACATED; REMANDED. (HARRIS, C.J., concurs. GOSHORN, J., dissents with opinion.)

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[1]§ 843.01, Fla. Stat. (1993).

(GOSHORN, J., dissenting.) I respectfully dissent for the reasons set forth in my dissent in *Thompson v. State*, 638 So. 2d 116 (Fla. 5th DCA 1994).

* * *

Torts—Limitation of actions—Error to dismiss, based on statute of limitations, action alleging federal civil rights violations, tortious interference with business relationship, and promissory estoppel—Complaint did not conclusively show when applicable statute of limitations began to run

RICHARD KHALAF, Appellant, v. CITY OF HOLLY HILL, a Florida municipal corporation, Appellee. 5th District. Case No. 94-0433. Opinion filed April 7, 1995. Appeal from the Circuit Court for Volusia County, William C. Johnson, Jr., Judge. Counsel: Eric A. Latinsky, Daytona Beach, for Appellant. David A. Vukelja, P.A., Ormond Beach, for Appellee.

(PER CURIAM.) Richard Khalaf appeals the trial court's order dismissing this action with prejudice. We respectfully disagree with the trial court's application of the statute of limitations to bar this action and, therefore, reverse and remand for further proceedings.

Rigby v. Liles, 505 So. 2d 598 (Fla. 1st DCA 1987), sets forth the applicable principles:

> . . . [T]he statute of limitations and laches are affirmative defenses which should be raised by answer rather than by a motion to dismiss the complaint; and only in extraordinary circumstances where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the statute of limitations bars the action as a matter of law, should a motion to dismiss on this ground be granted.

Id. at 601. Because the instant complaint does not conclusively show when the applicable statute of limitations began to run on Khalaf's causes of action for (1) violation of 42 U.S.C. §§ 1983-1988, (2) tortious interference with a business relationship, and (3) promissory estoppel, it was error to dismiss this action.

Accordingly, we reverse the trial court's order and remand for further proceedings.[1]

REVERSED and REMANDED. (DAUKSCH and PETERSON, JJ., concur. SHARP, W., J., concurs without participation in oral argument.)

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[1]Although the City of Holly Hill raised several additional issues in its motion to dismiss, we decline to expand our review to those issues because they have not yet been addressed by the trial court. *See State v. Rawlins*, 623 So. 2d 598, 601 (Fla. 5th DCA 1993).

* * *

Criminal law—Habeas corpus petitioner who has previously challenged conviction and sentence several times is prohibited from filing any further pro se pleadings concerning that conviction and sentence

RICARDO LOPEZ JOHNSON, Petitioner, v. STATE OF FLORIDA, Respondent. 5th District. Case No. 95-572. Opinion filed April 7, 1995. Petition for Writ of Habeas Corpus. A Case of Original Jurisdiction. Counsel: Ricardo Lopez Johnson, Punta Gorda, pro se. No Appearance for Respondent.

(PER CURIAM.) The number thirteen proves unlucky for petitioner. That is the number of times he has attempted to attack in this court his 1989 conviction and sentence for attempted murder. "Enough is enough." *Isley v. State,* 20 Fla. L. Weekly D547 (Fla. 5th DCA Mar. 3, 1995). The petition for writ of habeas corpus is denied. In order to protect the limited judicial resources available to our citizens, we further prohibit petitioner from filing any further *pro se* pleadings with this court concerning his 1989 conviction and sentence. *In Re Anderson*, __ U.S. __, 114 S. Ct. 2671, 129 L. Ed. 2d 807 (1994).

WRIT DENIED. (SHARP, W., GRIFFIN and THOMPSON, JJ., concur.)

* * *

Criminal law—Consolidation—No error to consolidate misdemeanors and felony charge where all charges arose from single criminal episode—Sentencing—No error in sentencing defendant to consecutive terms in county jail for misdemeanor offenses

RICKY J. GOODLOE, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 94-1738. Opinion filed April 7, 1995. Appeal from the Circuit Court for Orange County, Richard F. Conrad, Judge. Counsel: James B. Gibson, Public Defender, and Kenneth Witts, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Mark S. Dunn, Assistant Attorney General, Daytona Beach, for Appellee.

(GOSHORN, J.) Ricky Goodloe appeals from the judgments and sentences entered for three misdemeanors arising from a high speed chase. We find his contention that the trial court abused its discretion by consolidating the misdemeanors with a related felony charge to be without merit because all charges arose from a single criminal episode. *See* Fla. R. Crim. P. 3.150(a).

Goodloe's assertion that the trial court erred by sentencing him to consecutive terms in the county jail for the misdemeanor offenses is also without merit. Our decision is controlled by this court's opinion in *Armstrong v. State*, 640 So. 2d 1250 (Fla. 5th DCA 1994), *review granted*, No. 84,283 (Fla. Dec. 19, 1994). As we did in *Armstrong*, we acknowledge conflict with *McGauley v. State*, 632 So. 2d 1154 (Fla. 4th DCA 1994).

AFFIRMED. (DAUKSCH and COBB, JJ., concur.)

* * *

Criminal law—Argument—Error to grant motion for new trial on ground of prosecutorial misconduct in form of improper closing argument where defense counsel failed to move for curative instruction or for mistrial based on the improper comment—Prosecutor's comment that state implicitly vouches for its witnesses' credibility was not so outrageous as to taint jury's findings

STATE OF FLORIDA, Appellant, v. RICHARD STEVEN FRITZ, Appellee. 5th District. Case No. 94-1700. Opinion filed April 7, 1995. Appeal from the Circuit Court for Brevard County, John Antoon, II, Judge. Counsel: Robert A. Butterworth, Attorney General, Tallahassee, and Steven J. Guardiano, Assistant Attorney General, Daytona Beach, for Appellant. James B. Gibson, Public Defender, and Donna M. Krusbe, Assistant Public Defender, Daytona Beach, for Appellee.

(COBB, J.) The state appeals the trial court order granting the defendant's motion for new trial after he was convicted of battery on a police officer and criminal mischief (damage to a police vehicle). The basis for the trial court's order was prosecutorial misconduct in the form of an improper closing argument.

During closing argument, defense counsel made the following statement:

> The other thing about this case you have to realize is when the state brings forth the charges, there is not a validity, it doesn't make it a valid charge simply or merely because the state is charging it. If a police officer says something happens and an elected official who depends on police support to get reelected says file it, charge it, take it and throw it to the jury, that doesn't make it valid.

The defendant's closing argument provoked numerous objections which were sustained. The trial court admonished defense counsel to argue the merits of the case, and on several occasions instructed the jury to disregard defense counsel's improper comments and arguments.

During the state's rebuttal, the prosecutor stated:

> Also, ladies and gentlemen, when the state puts a witness on the stand, in fact they are vouching for their credibility as a witness. The state has to have some belief that what they are testifying to is the truth. The state cannot in good faith put a witness on the stand that they believe—

The defense objected on the basis that the prosecutor was improperly vouching for the credibility of the officers' testimony. The trial court noted that defense counsel had opened the door and that it was a fair response to defense counsel's previous improper comments; nevertheless, the trial court sustained the objection. Thereafter, at a post-trial hearing on the defendant's motion for new trial, defense counsel represented to the court that a motion for mistrial had been made immediately after closing argument. The prosecutor said that her notes did not reflect any such motion. There was no transcript of the trial available to the court at that time.

In the order granting the motion for new trial, the trial court specifically found that defense counsel had moved for a mistrial at the conclusion of the arguments. The record does not reflect that defense counsel moved for a curative instruction or for a mistrial based on the state's improper comment, either at the time of the objection or at the end of the closing arguments.

The law is clear that, in order to preserve a claim based on improper prosecutorial conduct, defense counsel must object, and if the objection is sustained he must then request a curative instruction or mistrial; he cannot await the outcome of the trial to seek the relief of a new trial. *Holton v. State*, 573 So. 2d 284, 288 n.3 (Fla. 1990), *cert. denied*, 500 U.S. 960, 111 S. Ct. 2275, 114 L. Ed. 2d 726 (1991); *Nixon v. State*, 572 So. 2d 1336, 1340 (Fla. 1990), *cert. denied*, 502 U. S. 854, 112 S. Ct. 164, 116 L. Ed. 2d 128 (1991); *Clark v. State*, 363 So. 2d 331, 335 (Fla. 1978), *abrogated on other grounds*, *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986); *Houston v. State*, 394 So. 2d 557 (Fla. 3d DCA 1981); *see also Simpson v. State*, 418 So. 2d 984, 986 (Fla. 1982), *cert. denied*, 459 U.S. 1156, 103 S. Ct. 801, 74 L. Ed. 2d 1004 (1983).

Additionally, we reject any notion that the state's comment represents fundamental error. *Crump v. State*, 622 So. 2d 963 (Fla. 1993). Even if we considered the issue preserved for appeal, the prosecutor's comment is not so outrageous as to taint the jury's findings. *Crump* at 972. Moreover, the state's evidence of guilt was clear and compelling, and was reinforced, in large measure, by the defendant's own trial testimony.

Accordingly, we reverse the trial court's order granting new trial, and remand this cause for sentencing.

REVERSED AND REMANDED. (GOSHORN and THOMPSON, JJ., concur.)

* * *

Criminal law—Sentencing—Habitual offender—Conditional statement in defendant's plea agreement with state pertaining to sentencing and provision of substantial assistance to state provided sufficient notice of intent to seek habitual offender sentencing—Any inadequacy in written notice was harmless where record reflected that defendant had actual notice of state's intent to seek habitual offender sentencing if he violated plea agreement

ANTONIO CYRIL DERAMUS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 94-1373. Opinion filed April 7, 1995. Appeal from the Circuit Court for Brevard County, Edward J. Richardson, Judge. Counsel: James B. Gibson, Public Defender, and Daisy G. Clements, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Barbara Arlene Fink, Assistant Attorney General, Daytona Beach, for Appellee.

(PETERSON, J.) Antonio Cyril Deramus appeals three 30 year concurrent habitual offender sentences.

Deramus and the state entered a plea agreement pursuant to which a guidelines sentence was conditioned upon Deramus' providing substantial assistance to the state. Upon Deramus' failure to provide substantial assistance the court imposed the habitual offender sentences. In this appeal Deramus argues the habitual offender sentences violate the first prong of the rule set forth in *Ashley v. State*, 614 So. 2d 486 (Fla. 1993):

> In sum, we hold that in 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 possible and reasonable consequences of habitualization.

Contrary to Deramus' contention, the state did provide the written notice of intent required in *Ashley*. Pursuant to the plea agreement he and the state agreed to a "mid-recommended guidelines sentence." They further agreed, "No habitual [sentence] by agreement." We hold that the last-quoted satisfies the first prong of *Ashley* as it constituted advance written notice of intent to habitualize.

If there can be any question of the import of "No habitual [sentence] abide by agreement," it is clarified by the plea colloquy. During the plea colloquy Deramus' attorney stated:

> He would be adjudicated guilty and sentenced in the mid-recommended guidelines range . . . the state would not be seeking habitual offender penalties as long as Mr. Deramus would abide by a substantial assistance agreement which he has executed.

Also, before accepting Deramus' plea the court referred to the possible imposition of a habitual offender sentence should Deramus fail to abide by the plea agreement. The prosecutor responded: