9-1

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 85,661

JOHNNY BOOTH,

Respondent.
_____/

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

MERITS BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BONNIE JEAN PARRISH
ASSISTANT ATTORNEY GENERAL
Fla. Bar #768870
444 Seabreeze Boulevard
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Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with one count of resisting an officer with violence (R 48). Respondent plead guilty as charged (R 4, 51-54). The written plea agreement contained the following:

> 4. I have read the Information or Indictment in this case and I understand the charge or charges which have been placed against me and to which I am pleading. My lawyer has explained the following to me:
>
> * * *
>
> 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.
>
> * * *
>
> g. I UNDERSTAND THAT THE DEPARTMENT OF CORRECTIONS IS SOLELY RESPONSIBLE FOR AWARDING GAIN TIME OR ANY TYPE OF EARLY RELEASE. I UNDERSTAND THAT ANY INFORMATION I HAVE RECEIVED CONCERNING GAIN TIME OR EARLY RELEASE IS STRICTLY AN ESTIMATE AND THAT IT IS NOT A PART OF ANY PLEA DISCUSSION OR AGREEMENT.

* * *

(R 51-52) (Appendix A). The plea agreement also set forth that respondent was aware of all of the provisions and representations of the plea agreement, that he discussed the plea agreement with his attorney and that he fully understood it (R 51-54). Respondent signed the written plea agreement (R 5, 54).

During the plea hearing held on February 9, 1994, respondent stated that he had thoroughly read the plea agreement (R 5). Respondent also stated he had an adequate opportunity to ask questions of his attorney about the plea agreement (R 5). Respondent understood the agreement and had no questions about it (R 5). Respondent understood the maximum sentence ha faced was up to 10 years as a habitual felony offender (R 5-6). Respondent stipulated to a factual basis based on the facts contained in the affidavits (R 6). The trial judge found respondent's plea was freely, voluntarily, knowingly and intelligently made and the plea was accepted (R 6). The plea agreement was filed on February 9, 1994 (R 51).

On March 23, 1994, the trial judge filed notice and order for a separate proceeding to determine if respondent qualified as a habitual felony offender (R 55-56). On March 25, 1994, respondent filed a motion to withdraw plea (R 57-58). On April 6, 1994, a hearing was held on the motion to withdraw plea (R 8-31). Respondent testified that he read and understood the plea form (R 18-19). Respondent's attorney explained the plea form to respondent (R 19). Respondent did not think he would be classified

as a habitual offender, he did not think he would qualify (R 20, 21). Respondent knew there was a possibility that a hearing may be set concerning habitual offender status, but he did not believe it would happen (R 23). Respondent understood what the plea form said (R 24). Defense counsel told respondent habitual offender sentencing was a possibility (R 25-27). On April 14, 1994, the trial judge denied the motion to withdraw plea (R 60).

On May 12, 1994, the sentencing hearing was held (R 32-45). Respondent objected to the scoring of victim injury points (R 34). The state did not object to the removal of the points and the points were removed (R 35). Respondent was adjudicated guilty (R 38, 62). The trial judge found, based upon respondent's prior convictions, that respondent qualified as a habitual offender (R 39, 71-72). Respondent was sentenced to 3 1/2 years incarceration followed by 5 years probation (R 39, 64-70).

Respondent appealed his conviction and sentence to the Fifth District Court of Appeal (R 76). On April 7, 1995, the Fifth District vacated respondent's sentence and remanded pursuant to the Fifth District's opinion in Thompson v. State, 638 So. 2d 116 (Fla. 5th DCA 1994), decision quashed, State v. Blackwell, 20 Fla. L. Weekly S354 (Fla. July 20, 1995). Booth v. State, 20 Fla. L. Weekly D858 (Fla. 5th DCA April 7, 1995) (Appendix B). In Thompson, supra, the Fifth District found that the acknowledgement contained in the plea agreement of the penalties that the defendant could receive if habitualized was insufficient to constitute notice of intent to habitualize. The acknowledgement found to be lacking

in Thompson is the same as that found in respondent's plea agreement (R 51); Thompson, at 117.

Petitioner filed a notice to invoke jurisdiction. Jurisdictional briefs were filed by both petitioner and respondent. This court accepted jurisdiction. On July 20, 1995, this court quashed the decision in Thompson. Blackwell, supra.

SUMMARY OF ARGUMENT

The instant case is identical to State v. Blackwell and those cases consolidated with Blackwell. In Blackwell, this court determined that the Fifth District erred in determining that an identical plea agreement to the instant case was insufficient to give respondent notice that he may be sentenced as a habitual offender. In the instant case as in Blackwell, respondent read, understood, signed and discussed the plea agreement with his attorney. The plea agreement set forth that respondent could be habitualized, the maximum sentence he faced and that he would not be entitled to gain time. As this court held in Blackwell, this was sufficient notice. The decision in the instant case shopuld be quashed, as were the decision in Blackwell, Brown, Holmes, Jones and Thompson. Blackwell, at S355.

ARGUMENT

POINT ON APPEAL

THE FIFTH DISTRICT COURT OF APPEAL ERRED IN FINDING THAT RESPONDENT HAD NOT BEEN GIVEN NOTICE OF THE INTENT TO HABITUALIZE PRIOR TO RESPONDENT ENTERING HIS PLEA; THE PLEA FORM RESPONDENT SIGNED, READ AND UNDERSTOOD GAVE RESPONDENT SUFFICIENT NOTICE, AS IT SET FORTH THE MAXIMUM SENTENCE THAT COULD BE IMPOSED IF RESPONDENT WAS HABITUALIZED AND THAT RESPONDENT WOULD NOT BE ENTITLED TO BASIC GAIN TIME.

In the instant case, the plea agreement which respondent read, understood and signed set forth the following:

> 4. 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 :
>
> * * *
>
> 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.
>
> * * *

(R 51) (Appendix A). Respondent signed the plea form (R 5, 54). Respondent has thoroughly read the plea agreement, understood it and had no questions about it (R 5). respondent had the opportunity to ask questions of his attorney concerning the plea form (R 5). During the plea hearing, the trial judge asked respondent if he understood the maximum sentence he faced was 10 years as a habitual felony offender (R 5-6).

Pursuant to this court's recent decision in State v. Blackwell, 20 Fla. L. Weekly S354, S355 (Fla. July 20, 1995), this court determined that plea forms virtually identical to respondent's plea form were sufficient to give the defendants notice of the possibility of habitualization before the pleas were accepted. This court held that the plea forms satisfied the first prong of Ashley, infra. Id., at S355.

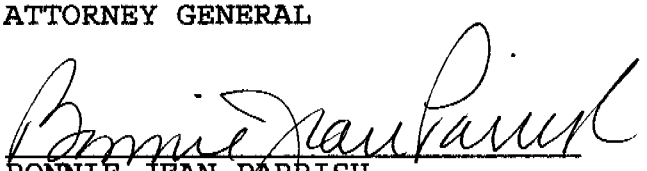
Here, respondent acknowledged that he knew of the possibility of habitualization (R 23). Respondent signed the plea form and understood the possibilities. Respondent had sufficient notice and the plea form met the requirements of Ashley v. State, 614 So. 2d 486 (Fla. 1993). Blackwell, at S355. As in Blackwell, Brown, Holmes, Jones and Thompson, the decision in the instant case should be quashed. Id.

CONCLUSION

Based on the arguments and authorities presented herein and pursuant to Blackwell, supra, petitioner requests this court quash the decision in the instant case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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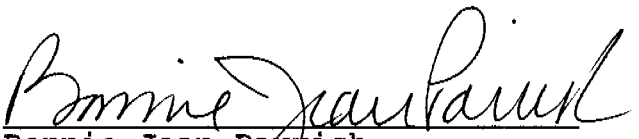
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Amended Merits Brief of Petitioner and Appendix has been furnished by delivery to Nancy Ryan, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 7th day of August, 1995.



Bonnie Jean Parrish
Of Counsel

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

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JOHNNY BOOTH,

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_____/

APPENDIX

ROBERT A. BUTTERWORTH
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INSTRUMENTS

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

Filed in open Court
Seventh Judicial Circuit,
Volusia County, Florida
FEB 9 1994

STATE OF FLORIDA

VS.

JOHNNY BOOTH
Defendant

CASE NUMBER PLED TO: 93-35121

OTHER CASE NUMBERS PENDING:

WRITTEN PLEA(S)

1. I, JOHNNY BOOTH, defendant herein, withdraw my Plea(s) of Not Guilty, and enter Plea(s) of:

(X)Guilty ( )Nolo Contendere to RESISTING OFFICER WITH VIOLENCE TO HIS PERSON as to Count____
( )Guilty ( )Nolo Contendere to_____ as to Count____
( )Guilty ( )Nolo Contendere to_____ as to Count____
( )Guilty ( )Nolo Contendere to_____ as to Count____

2. I understand that, if the Court accepts my plea(s), I give up the following rights:
   a. The right to a trial by jury or, if charged with violation of probation or community control, the right to a non-jury hearing before a Judge.
   b. The right to confront and cross-examine the witnesses called against me.
   c. The right to compel the attendance of witnesses and the production of evidence in my behalf and to present any defenses I may have to the charges.
   d. The right not to be compelled to incriminate myself.
   e. The right to require the State to prove my guilt by admissible evidence beyond any reasonable doubt (or by a preponderance of the evidence if charged with violation of probation or community control).
   f. The right to appeal the facts of my case(s) or any other matters except the legality of my sentence or the Court's authority to hear this case including any grounds to appeal any ruling, order, decision this Judge has made in this case up to this date, unless I have entered a plea of No Contest and specifically reserved the right to appeal. I am not giving up my right to review by appropriate collateral attack.

3. I understand that a Plea of Not Guilty denies that I committed the crime(s); a Plea of Guilty admits my guilt and admits that I committed the crime; a Plea of Nolo Contendere, or "No Contest", says that I do not contest the evidence against me.

4. I have read the Information or Indictment in this case and I understand the charge or charges which have been placed against me and to which I am pleading. My lawyer has explained the following to me:
   a. The essential elements of the crime(s) to which I am pleading.
   b. Any possible defenses I may have to the crime(s) to which I am pleading.
   c. That should the Judge impose a guidelines sentence, I could receive up to a maximum sentence of ____years imprisonment and a maximum fine of $_____ or both.
   d. That should the Judge impose a departure sentence, I could receive up to a maximum sentence of 5 years imprisonment and a fine of $5000 or both.
   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

J. B.
Defendant's Initials

_____years imprisonment and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.

f. That whether a guidelines sentence or departure sentence or habitual offender sentence, I will receive a mandatory minimum sentence of _____ years imprisonment.

g. I UNDERSTAND THAT THE DEPARTMENT OF CORRECTIONS IS SOLELY RESPONSIBLE FOR AWARDING GAIN TIME OR ANY TYPE OF EARLY RELEASE. I UNDERSTAND THAT ANY INFORMATION I HAVE RECEIVED CONCERNING GAIN TIME OR EARLY RELEASE IS STRICTLY AN ESTIMATE AND THAT IT IS NOT A PART OF ANY PLEA DISCUSSION OR AGREEMENT.

5. IF I AM NOT A CITIZEN OF THIS COUNTRY, MY PLEA(S) TO THE CRIME(S) MAY ADVERSELY AFFECT MY STATUS IN THIS COUNTRY AND MAY BE SUBJECT TO DEPORTATION AS A RESULT OF MY PLEA(S). I UNDERSTAND THAT, IF I AM NOT A CITIZEN OF THE UNITED STATES, THIS PLEA OR ADMISSION COULD CAUSE ME TO BE DEPORTED FROM THE UNITED STATES.

6. I understand that, if I am on parole, this plea may result in the revocation of my parole and my return to prison to complete the sentence from which I was paroled. I further understand that if I am on probation, my probation can be revoked and I can receive a separate legal sentence on the probation charge in addition to a sentence imposed on this case.

7. I represent that I have told this Judge my true name. Any other name that I have used I have made known to the prosecutor. I understand that in the event my true name is different than that represented to the Judge or in the event my criminal record is different than that which is so represented in open court or should I be arrested prior to sentencing herein for a criminal offense, or violation of probation or community control, although my plea(s) will stand, any recommendation that the prosecutor has made herein that a particular sentence or disposition be imposed or any agreement that the prosecutor has made to not seek a determination of habitual offender status and/or a habitual offender sentence herein, is no longer binding on the State, and any promise or agreement by the Judge (if any) made and acknowledged in this agreement in open court as to what I will receive as a sentence or disposition herein is no longer binding on the Judge.

8. The prosecutor, based upon my identity and my criminal record disclosed on the record by me or in my presence, has recommended:_____
_____.

9. I fully understand that the Judge is not bound to follow any recommendations or agreements of the prosecutor as to sentence or disposition and that the Judge has made no promise or agreement as to what I will receive as a sentence or disposition herein other than that made by the Judge and acknowledged in this agreement to have been so made, or otherwise been made by the Judge in my presence in Open Court at the time of my plea(s) being entered. I acknowledge that should the Judge promise or agree as acknowledged herein or made in Open Court at the time of my plea(s) being entered, to a particular sentence or disposition herein, and later announce prior to sentencing that the promised or agreed sentence or disposition will for any reason not be imposed, that I will be permitted to withdraw my plea(s) herein and enter a plea(s) of not guilty and exercise my right to a trial or hearing described in (2) above.

10. That I waive any requirement that the State establish on the record a factual basis for the charge(s) being pled to. I have read the facts alleged in the sworn Information (or Indictment) and in the sworn arrest reports, and/or complaint affidavits in the Court file, (and/or in the sworn affidavits alleging violation of probation or community control, and alleged in any probation or community control violation reports in the Court file if charged with such violations) and I agree that the Judge can consider those facts as the evidence against me and as describing the facts that are the basis for the charge(s) being pled to and the facts to which I am entering my plea(s). I do not require the State to tell the Judge the facts upon which the charge is based before the Judge accepts my plea and I agree that the Judge may rely upon any probable cause statement or violation of probation affidavit in the court file for a factual basis to justify the acceptance of my plea or admission.

11. I agree and stipulate to pay costs of $50.00 pursuant to F.S. 960.20, or $3.00 pursuant to 943.25(4); of $2.00 pursuant to 943.25(8); and $_____ (as a court cost) pursuant to 943.25(8)(a). I understand these costs may be imposed as a condition of probation or as a lien under authority of one or more

J.B.
Defendant's Initials

of the following statutes: F.S.27.3455, F.S.960.20, F.S.775.0835, F.S.775.0836 or F.S.943.25. Further, I agree to pay:

( ) F.S. 893 Criminal Lab Costs of $_____.
( ) A Public Defender fee of $_____.
( ) State Attorney costs of $_____.
( ) Law enforcement agency costs of $_____.
( ) Restitution to _____in the amount of $_____.

I understand that the above amounts are to be paid by me either as a condition of probation or community control, subject to violation if I fail to fully pay, or if I am not placed on a form of supervision, then after my release from custody I am subject to contempt of court if I fail to pay or been late. I further state that I have received sufficient notice and hearing as to the above amounts and agree that I have the ability to pay them. I understand that costs in the amount of $_____ will be imposed against me as a condition of probation. Further, I do hereby agree and stipulate to _____
_____
_____.

12. If I am unable to agree to an amount of restitution at this time, I agree to the establishment of a preliminary amount of restitution without advance notice to me. I further understand that I will have 30 days from the date written notification of the preliminary amount of restitution is mailed to me or otherwise delivered to me to deliver to the Court a written request for a hearing contesting the preliminary amount of restitution. I understand that I have the absolute right to a hearing before the Court to determine the amount of restitution and that I will be waiving or giving up that right if I do not deliver my written request for a contested hearing to the Court within this 30 day time period. My mailing address is as follows:_____
_____.
I acknowledge that it is my responsibility to provide the Court with written notice of any change of address. FAILURE TO DELIVER A WRITTEN REQUEST FOR A RESTITUTION HEARING WITHIN THE 30 DAY TIME PERIOD SPECIFIED HEREIN WILL RESULT IN THE PRELIMINARY AMOUNT OF RESTITUTION BEING ESTABLISHED AS THE FINAL AMOUNT OF RESTITUTION.

13. No one has pressured or forced me to enter the Plea(s), no one has promised me anything to get me to enter the Plea(s) that is not represented in this Written Plea. I am entering the Plea(s) voluntarily of my own free will because I acknowledge my guilt or acknowledge that the plea is in my best interest.

14. If I am permitted to remain at liberty pending sentencing, I must notify my lawyer, my bondsman/ROR or pre-trial release officer and the Court of any change in my address from that address at which I received the previous notices to appear or telephone number, and if the Judge orders a Pre-Sentence Investigation (PSI) and I willfully fail to appear for an appointment with the probation officer, THE JUDGE CAN REVOKE MY RELEASE AND PLACE ME IN JAIL UNTIL MY SENTENCING.

15. My education consists of the following: 9th GRADE
I am not under the influence of alcohol, drugs or medicine at the present time and I am not presently suffering from any mental, emotional or physical problems which adversely affect my understanding of this plea or admission.

16. If my lawyer was appointed by the judge to represent me, I understand that the Court will assess attorney's fees and/or costs against me pursuant to F.S.27.56. A preliminary figure for fees and/or costs will be mailed to me at the address shown in paragraph 12, unless that address has been changed as set forth in paragraph 12. I understand that I will have 30 days from the date the preliminary figure is mailed or otherwise delivered to me to deliver to the Court a written request for a hearing contesting the preliminary figure. I understand that I have the absolute right to a hearing before the Court to determine the amount of attorney's fees and/or costs and that I will be waiving or giving up that right if I do not deliver my written request for a contested hearing to the Court within this 30 day time period. FAILURE TO DELIVER A WRITTEN REQUEST FOR A CONTESTED HEARING ON ATTORNEY'S FEES AND/OR COSTS WITHIN THE 30 DAY TIME PERIOD WILL RESULT IN THE PRELIMINARY FIGURE FOR ATTORNEY'S FEES AND/OR COSTS BEING ESTABLISHED AS THE FINAL AMOUNT OF ATTORNEY'S FEES AND/OR COSTS.

17. I have read every word in this written plea form or had every word in it read to me by my lawyer, or by a translator and have discussed it with my lawyer. I understand this form completely. I am completely satisfied with the services of my lawyer and I feel that I have had enough time to discuss my case(s) and this plea with my lawyer.

18. I understand that I have 30 days from the date of my sentencing to appeal the Court's Judgement and

J.B.
Defendant's Initials

Sentence or other final disposition. If I cannot afford a lawyer to help me with any appeal, one will be appointed for me.

SWORN TO, SIGNED AND FILED by the defendant in Open Court in the presence of defense counsel and Judge and under penalty of perjury this 4TH day of FEBRUARY, 1994.

X By: Johnny A. Bath
Defendant's Signature

DIANE M. MATOUSEK
Clerk of the Court

Defendant's Initials: J. A. B.

By: Robin Malek 2/9/94
Deputy Clerk in Attendance

CERTIFICATE OF DEFENSE COUNSEL

I hereby certify that I am counsel for the above-named defendant and that I have discussed this case with my client and explained the rights, defenses, elements and evidence relating to this case to my client. I believe the defendant understands this plea form, his rights an the consequences of his plea and that he is entering this plea freely, voluntarily and knowingly. No promises have been made to the defendant other than as set forth in this plea or on the record. I have explained fully this written plea to the defendant and I believe he/she fully understands this written plea, the consequences of entering it, and that defendant does so of his/her own free will. Further, from my interpretation of the facts and my study of the law there are facts to support each element of the charges to which the foregoing pleas are being entered. I further stipulate and agree that the Judge can consider the facts alleged in the sworn Information (or Indictment) and in the sworn arrest reports, complaint affidavits in the file, or in the sworn affidavits alleging violation of probation or community control, or alleged in any probation or community control violation reports in the court file as the evidence against the defendant and as describing the facts that are the basis for the charge(s) being pled to and the facts to which the defendant is entering the plea(s).

Counsel for Defendant

CERTIFICATE OF PROSECUTOR

I confirm that the recommendations set forth in this plea agreement have been made.

Assistant State Attorney

ORDER ACCEPTING PLEA

The foregoing was received and accepted in open Court. The defendant has signed the foregoing in my presence or has acknowledged his above signature hereto in my presence. Such plea(s) is found to be freely and voluntarily, knowingly and intelligently made with knowledge of its meaning and possible consequences, and the same is hereby accepted.

Circuit Judge

adjudication was withheld and she was placed on community control.

S.L.R. urges that the trial court erred in admitting the cocaine because the consensual stop became a "seizure" based on the conduct of the officers. It appears to be her position that when the officer stated that he would like her to give him any controlled substance that she might have, it was "a show of authority" which restrained her freedom of movement. She maintains that the she turned over the cocaine only because she thought she had to comply with his request.

The issue before us is whether the evidence supports the trial court's finding that S.L.R. voluntarily agreed to comply with the officer's request that she turn over any "controlled substance" that she might have in her possession. In *Florida v. Bostick*, 501 U.S. 429, 435, 111 S.Ct. 2382, 2386, 115 L.Ed.2d 389 (1991), the Supreme Court stated:

> [E]ven when officers have no basis for suspecting an individual, they may generally ask questions of that individual . . . and request consent to search . . . as long as the police do not convey a message that compliance with their request is required.

In the instant case, the officers' initial contact with the appellant when they approached her in the parking lot and asked if they could speak with her was consensual. Their actions and her agreement to answer their questions was an appropriate police/citizen encounter. Moreover, defense counsel conceded at trial that there was nothing wrong with the initial stop. But did the officer's subsequent request that S.L.R. turn over any controlled substance cross the line?

The United States Supreme Court faced a similar issue in *Bostick* and defined "the appropriate inquiry" as "whether a reasonable person would feel free to decline the officer's request or otherwise terminate the encounter." *Bostick*, 501 U.S. at 429. In discussing whether a defendant's cooperation with the police is voluntary, the court stated:

> "Consent" that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse.

Id. at 438. In the instant case, S.L.R. does not contend that her path was blocked or that she was in any way prevented from merely walking away. So where is the intimidation, the harassment, or the coercion in this case?

The court in *Thames v. State*, 592 So. 2d 733, 735-36 (Fla. 1st DCA), *rev. denied*, 599 So. 2d 1280 (Fla. 1992), made the analysis most applicable to the facts of our case:

> [T]he record reflects that this initial stop was consensual. The dispute pertains to whether appellant consented to accompany the officers to the sheriff's office or whether his conduct constituted a mere submission to authority. As the trier of fact, it was the trial court's prerogative to determine this question, *Wade v. State*, 589 So. 2d 322 (Fla. 1st DCA 1991), and the court's resolution of such matters should not be disturbed on appeal unless clearly erroneous. *Jordon v. State*, 384 So. 2d 277, 279 (Fla. 4th DCA 1980). Upon application of the foregoing principles, together with the presumption of correctness due a trial court's ruling on a motion to suppress *Medina v. State*, 466 So. 2d 1046, 1049 (Fla. 1985); *State v. Pye*, 551 So. 2d 1237 (Fla. 1st DCA 1989), we conclude the trial court could find that appellant consented to accompany officers to the sheriff's office.[1]

By the same analysis, we conclude that, based on the testimony presented and on the court's unique ability to view the maturity and intelligence of S.L.R., an opportunity this court does not enjoy, the evidence supported the trial judge's finding that S.L.R.'s relinquishment of the cocaine was consensual.

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

[1]The *Thames* court went on to say:

> The test for seizure of the person for fourth amendment purposes was set forth in *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980), and was reaffirmed in *California v. Hodari D.*, __ U. S. __, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991), as follows: "*Mendenhall* establishes that the test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." Here, the trial court accepted the officer's version relating to the voluntariness of appellant's consent to go to the sheriff's office which, as trier of fact, the court was entitled to do. Under the officers' account of events, a reasonable person would not have considered his movement restricted.

* * *

Criminal law—Sentencing—Correction—Where guidelines departure sentence was previously affirmed on direct appeal, the legal sufficiency of reasons for departure has been established as law of the case, and the issue could not be raised in collateral attack on the sentence by using rule 3.850 or rule 3.800—Summary denial of rule 3.800(a) motion affirmed

WAYNE PULA, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 94-2904. Opinion filed April 7, 1995. 3.800 Appeal from the Circuit Court for Volusia County, Edwin P.B. Sanders, Judge. Counsel: Wayne Allen Pula, Punta Gorda, pro se. Robert A. Butterworth, Attorney General, Tallahassee, and Carmen F. Corrente, Assistant Attorney General, Daytona Beach, for Appellee.

(SHARP, W., J.) Pula appeals from the summary denial of his motion filed pursuant to Florida Rule of Criminal Procedure 3.800(a). He asserts that the departure reasons given by the trial judge for his sentence, which exceeds the permissible range, were legally insufficient. We affirm.

Pula previously filed a direct appeal in this court after he was convicted of second degree murder and sentenced to life in prison. The judgment and sentence were affirmed. *See Pula v. State*, 578 So. 2d 1115 (Fla. 5th DCA 1991). Pula also collaterally attacked the judgment by filing a motion pursuant to Florida Rule of Criminal Procedure 3.850. The trial court's denial was also affirmed by this court. *See Pula v. State*, 624 So. 2d 737 (Fla. 5th DCA 1993).

The validity of written reasons to support an upward departure from the permissible guidelines sentence is an issue that should and must be raised in the context of the direct appeal. Whether Pula challenged the departure reasons on direct appeal, the legal sufficiency of the reasons has been established as the "law of the case" and this issue cannot be raised in a collateral attack on the sentence by using rule 3.850 or rule 3.800. *Sanders v. State*, 621 So. 2d 723 (Fla. 5th DCA), *rev. denied*, 629 So. 2d 135 (Fla. 1993). *See also Gartrell v. State*, 626 So. 2d 1364 (Fla. 1993); *Blount v. State*, 627 So. 2d 576 (Fla. 2d DCA 1993).

AFFIRMED. (HARRIS, C.J., and GRIFFIN, J., concur.)

* * *

Criminal law—Sentencing—Habitual offender—Notice in plea agreement that possibility exists that defendant may be sentenced as habitual offender was not sufficient to meet requirement that defendant be notified prior to plea of state's or court's intent to impose such sentence

JOHNNY BOOTH, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 94-1268. Opinion filed April 7, 1995. Appeal from the Circuit Court for Volusia County, William C. Johnson, Jr., Judge. Counsel: James B. Gibson, Public Defender, and M.A. Lucas, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Michael D. Crotty, Assistant Attorney General, Daytona Beach, for Appellee.

(SHARP, W., J.) Booth appeals from a judgment and sentence for resisting an officer with violence.[1] He pled guilty after entering into a plea agreement and entering into a dialogue with the trial judge. Subsequently, the court served notice on Booth that it intended to hold a hearing to sentence Booth as an habitual offender. Booth moved to withdraw his plea, which the trial judge denied. He adjudicated Booth guilty and sentenced him as an habitual felony offender. We vacate the sentence and remand for further proceedings.

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).

Whether characterized as a request or an order, we conclude that Deputy Willmot's direction for Popple to exit his vehicle constituted a show of authority which restrained Popple's freedom of movement because a reasonable person under the circumstances would believe that he should comply. See Does v. State, 564 So.2d 1156 (Fla. 1st DCA 1990).

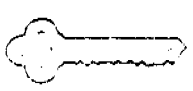
Popple v. State, 626 So.2d 185 (Fla.1993) (emphasis added).

The state relies on this court's decision in *Curry v. State*, 570 So.2d 1071 (Fla. 5th DCA 1990). In *Curry*, the police entered a bar, walked up behind Curry, and told him: "Stop. Police." Curry walked away but threw a pill bottle containing rocks of cocaine on the ground. In affirming the denial of a motion to suppress this court held, "Only when the police begin an actual physical search of a suspect does abandonment become involuntary and tainted by an illegal search and seizure." *Curry* at 1073. *Curry* is supported by the decision in *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (U.S.Cal.1991) which held that a seizure does not occur until a person is actually physically subdued by an officer or submits to an officer's show of authority. *Hodari* drew "a clear distinction between those who yield to the authority of the police and those who flee." *Hollinger* at 1243. In *Curry*, the defendant did not submit to authority or comply with the officers' demand; he simply walked away, abandoning the cocaine as he ignored the order to stop. Here, Harrison, in full submission to the show of authority made, followed the order given to him by removing his hand from his pocket. The order and submission therefore constituted a seizure.

The judgment and sentence are vacated, the denial of the motion to suppress is reversed, and we remand for further proceedings.

REVERSED; REMANDED.

W. SHARP and GOSHORN, JJ., concur.



Melvin OGLESBY, Appellant,

v.

STATE of Florida, Appellee.

No. 92-1844.

District Court of Appeal of Florida, Fifth District.

Dec. 3, 1993.

Defendant appealed from judgment of the Circuit Court, Volusia County, John W. Watson, III, J., sentencing him as habitual offender. The District Court of Appeal, Goshorn, J., held that: (1) it was proper for trial court, rather than state, to file notice of habitual offender sentencing, and (2) trial court's failure to provide defendant with written notice of intent to habitualize prior to entry of defendant's guilty plea was harmless error.

Affirmed.

Criminal Law ⇐1203.3, 1203.26(4)

Trial court's failure to provide defendant with written notice of intent to habitualize prior to entry of defendant's guilty plea was harmless error, where defendant, by his signed written plea agreement, specifically acknowledged that his attorney explained to him total maximum penalties for charges and that he understood consequences of judge's determining him to be violent or nonviolent habitual felony offender, including maximum sentences and fact that he would not be entitled to receive any basic gain time.

James B. Gibson, Public Defender and Brynn Newton, Asst. Public Defender, Daytona Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Barbara Dawson, Asst. Attorney General, Daytona Beach, for appellee.

GOSHORN, Judge.

Melvin Oglesby appeals from the judgment of the trial court sentencing him as a habitual offender. On appeal, he contends that it was error for the trial court, rather than the State, to provide him with the notice of intent to habitualize. He further argues that his sentence must be reversed because the notice was not provided prior to the entry of his plea. We affirm.

As to Oglesby's first contention, this court has previously held that it is proper for the trial judge to file the notice for habitual offender sentencing. *Toliver v. State*, 605 So.2d 477 (Fla. 5th DCA 1992), *review denied*, 618 So.2d 212 (Fla.1993). As to Oglesby's second contention, we acknowledge that approximately one year after Oglesby tendered his plea, but while this appeal was pending, the Florida Supreme Court decided *Ashley v. State*, 614 So.2d 486 (Fla.1993). In *Ashley*, the court held 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 possibility and reasonable consequences of habitualization.

Id. at 490 (footnote omitted). However, unlike the plea agreement in *Ashley* which expressly provided that Ashley would be sentenced under the guidelines, Oglesby, by his signed written plea agreement, specifically acknowledged that

> 4. I have read the information or indictment in this case and I understand the charge(s) to which I enter my plea(s). *My attorney has explained to me the total maximum penalties for the charge(s) and as a result I understand the following:*
>
> * * * * * *
>
> c. 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 30 years imprisonment and a mandatory minimum of 0 years imprisonment *and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.*
>
> d. 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 30 years imprisonment and a mandatory minimum of 0 years imprisonment *and that as to any habitual offender sentence I would not be entitled to receive any basic gain time.* [Emphasis added].

The plea agreement further set forth that Oglesby had read the written plea, discussed it with his attorney, and that Oglesby fully understood the plea agreement. Oglesby made the same representations to the trial court in open court at the plea proceeding. We therefore find that the protections afforded by *Ashley* were provided to Oglesby prior to the entry of his plea and find that the "harmless error" analysis set forth by the supreme court in *Massey v. State*, 609 So.2d 598 (Fla.1992) applies. To hold otherwise would elevate form over substance.

AFFIRMED.

PETERSON and GRIFFIN, JJ., concur.

TOWN OF PONCE INLET, a Florida municipal corporation, Petitioner,

v.

Edmond R. RANCOURT and Paula Rancourt, husband and wife, Respondents.

No. 93–1667.

District Court of Appeal of Florida, Fifth District.

Dec. 3, 1993.

Town petitioned for writ of certiorari seeking review of order of the Circuit Court.