IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 85, 857

STATE OF FLORIDA,

Petitioner,

vs.

CLYDE JEFFERSON,

Respondent.

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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 Nineteenth Judicial Circuit, in and for St. Lucie 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 of Appeal 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 Jefferson v. State, Case No. 94-1591 (Fla. 4th DCA May 24, 1995).

All emphasis in this brief is supplied by Petitioner unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On April 19, 1994, Respondent was sentenced to a total sum of forty-five years, as a habitual offender, in three separate cases (R 82-102, 32-37). The record is undisputed that Respondent was on notice of the State's intent to seek habitual offender treatment prior to acceptance of the plea; the only dispute below was where Respondent fell in the guidelines (T 4-5). The plea agreement form indicates that Respondent was informed of the maximum habitual offender penalties applicable to each new offense in case number 93-2914 (thirty years and ten years, respectively), prior to the acceptance of the plea (R 50). Respondent in fact conceded below that Respondent was fully aware that his plea agreement encompassed sentencing him as a habitual offender, although the sentence he hoped for was a guidelines sentence, numerically speaking (Initial Brief at 3).

The Sentencing Guidelines Scoresheet shows a recommended sentence range of 12 to 17 years, and a permitted sentence range of 9 to 22 years (SR 4). The trial court declared Respondent an habitual offender and sentenced him to concurrently to 15 years and 10 years, on counts one and two respectively, in case number 93-2914; to 15 consecutive years as an habitual offender in case number 89-2582; and to an additional 15 consecutive years as an habitual offender in case number 88-2492 (R 82-90, SR 36).

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

On appeal to the District Court of Appeal, Fourth District,

Respondent challenged the habitual offender sentences imposed alleging that the trial court violated the requirements set out by this Court in Ashley v. State, 614 So. 2d 486 (Fla. 1993), when the court failed to inform him, inter alia, that if sentenced as an habitual felony offender, he could be sentenced to forty-five years, total on the three cases. Respondent asked the District Court to remand with directions that the habitual offender classification and sentence be vacated and a guideline sentence be imposed.

The State responded that because Respondent was aware that the State was seeking habitual felony offender treatment in case number 93-2914-CF, leaving the decision as to the extent of the sentence to the discretion of the trial court, the question was one of knowingly, freely and voluntarily entering the plea, when Respondent knew the State was seeking an habitual offender sentence. Therefore, the State asserted the sentence in that case was legal and should be affirmed. Once the sentence was found to be legal and affirmed on appeal, if Respondent wanted to further challenge the sentence on the basis now contended, he must begin by filing a motion to withdraw plea with the trial court alleging he had entered his plea involuntarily, not knowing what the maximum sentence under the habitual felony offender statute was to be.

As to case number 88-2492-CF, the State conceded that the habitual offender sentence in that case was infirm as no notice of intent to habitualize had been filed in that case. Similarly, the State conceded that the habitual offender sentence imposed in count

two of case number 93-2914-CF was erroneous.

In its opinion filed May 24, 1995, the Fourth District Court of Appeal confirmed its view that an Ashley violation creates an "illegal sentence", and does not involve an involuntary plea issue, again certifying conflict with the decision of the Second District Court of Appeal in Bell v. State, 624 So. 2d 821 (Fla. 2d DCA 1993), rev. denied, 634 So. 2d 622 (Fla. 1994). Accordingly, it remanded the case for resentencing within the guidelines, in accordance with its prior opinion in Wilson v. State, 645 So. 2d 1042 (Fla. 4th DCA 1994) (Wilson I), quashed, State v. Wilson, 20 Fla. L. Weekly S313 (Fla. July 6, 1995) (Wilson II).

Based on the certified conflict, the State invoked the discretionary review jurisdiction of this Court, and by order issued Friday, July 21, 1995, this Court postponed decision on jurisdiction, but set a briefing schedule.

Petitioner's Brief on the Merits follows.

SUMMARY OF THE ARGUMENT

WHETHER THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, ERRED IN HOLDING THAT AN ASHLEY VIOLATION REQUIRES REMAND TO THE TRIAL COURT FOR RESENTENCING WITHIN THE GUIDELINES.

The problem below arose because the trial court failed to confirm from Respondent that he was aware of the maximum sentence he could receive, for all three cases together, and of other consequences of habitual offender sentencing.

The District Court below, certifying conflict with Bell, held that because this amounted to an Ashley violation, the sentence must be reversed and remanded to the trial court for resentencing under the guidelines recommended range, without giving the trial court the opportunity to allow Respondent to withdraw his plea, following their decision in Wilson I.

The State submits 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 did or did not have actual knowledge of the maximum total penalty under the habitual felony offender statute. Thus, the decision rendered below should be quashed, and remanded to the trial court to give Respondent an opportunity to withdraw the plea, and thereafter to enter a new plea to the charges or proceed to trial.

ARGUMENT

WHETHER THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, ERRED IN HOLDING THAT AN ASHLEY VIOLATION REQUIRES REMAND TO THE TRIAL COURT FOR RESENTENCING WITHIN THE GUIDELINES.

Petitioner, the State of Florida, submits that the Fourth District Court of Appeal was incorrect when it held below that an Ashley[1] violation automatically created an illegal sentence, and did not involve a question of voluntariness of the plea, in reliance upon its prior decision in Wilson I.

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 Wilson v. State, 19 Fla. L. Weekly (Fla. July 6, 1995), this court quashed Wilson I, holding that it would be unfair to the State to remand for resentencing within the guidelines, after an Ashley violation, where the State had not affirmatively misled the defendant as to the maximum habitual offender sentence possible.

In the instant case, Respondent was **fully informed** in the plea agreement what the maximum possible habitual offender sentence was as to the new offenses in case number 93-2914, thirty years and ten

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

years, on counts one and two respectively. In actuality, the sentence Respondent received in that case was less than the maximum, or fifteen years on count one, and ten years on count two.

Respondent asserts, however, that he was never advised about the total maximum sentence he could receive, in the three cases. The State, unfortunately, cannot refute that assertion. However, in the unusual circumstances of this cases, where this oversight occurred through no misrepresentation by the State, it is appropriate to return all parties to square one as this court did in Wilson, as no one will be prejudiced thereby.

In the case at bar, it is uncontroverted that 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:

> 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.

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 Court 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 District Court below should have affirmed the sentence. See Simmons v. State, 19 Fla. L. Weekly D2407 (Fla. 1st DCA Nov. 14, 1994); Heatley v. S, 636 So. 2d 154 (Fla. 1st DCA 1994); Brown v. State, 616 So. 2d 1137 (Fla. 4th DCA 1993). Thus, on this bases as well, the District Court's opinion here under review should be quashed.

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.**

Respectfully submitted,

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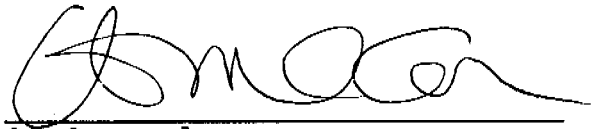
Counsel for Appellee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing 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 15th day of August, 1995.



Of Counsel

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

CLYDE JEFFERSON, Appellant,	)	
v.	)	CASE NO. 94-1591
STATE OF FLORIDA, Appellee.	)	L.T. CASE NO. 88-2492 CF 89-2582 CF 93-2914 CF

Opinion filed May 24, 1995

Appeal from the Circuit Court for St. Lucie County; Larry Schack, Judge.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Richard Jorandby, Public Defender, and David McPherrin, Assistant Public Defender, West Palm Beach, for appellant.

Robert Butterworth, Attorney General, Tallahassee, and Anne Carrion Pinson, Assistant Attorney General, West Palm Beach, for appellee.

STEVENSON, J.

Appellant challenges habitual felony offender sentences imposed for six different felonies under three separate case numbers. We vacate the enhanced sentences and remand for resentencing within the guidelines.

Appellant pled no contest in case number 93-2914-CF to charges of sale and possession of cocaine. In addition, he admitted to violating probation in two earlier cases: case number 88-2492 CF, where he had previously pled no contest to three counts

of sale and delivery of cocaine and case number 89-2492 CF, where he had previously pled no contest to sale of a controlled substance. The trial court declared appellant a habitual felony offender and imposed enhanced penalties on each charge resulting in a combined sentence of 45 consecutive years in prison.

In *Ashley v. State*, 614 So. 2d 486 (Fla. 1993), the supreme court held that before a defendant may be habitualized following a guilty or nolo contendere plea, the defendant must be given written notice of intent to habitualize and the trial court must confirm that the defendant is personally aware of the possibility and reasonable consequences of habitualization. *Id.* at 490. A trial court's failure to comply with the dual requirements of *Ashley* renders the habitual offender sentence illegal and requires resentencing within the guidelines. *Wilson v. State*, 645 So. 2d 1042 (Fla. 4th DCA 1994).

In the instant case, neither prong of *Ashley* was fully met. First, although the state's form plea agreement contemplated sentencing appellant as a habitual offender, the state never gave appellant prior written notice of its intent to habitualize. Second, the trial court accepted appellant's *nolo contendere* pleas without fully ascertaining that appellant was aware of the reasonable consequences of habitualization. The record reveals that appellant was never made aware of how habitualization would affect his consideration for gain time and early release and he was

not told that he could receive a maximum sentence of 45 years. Because the dual requirements of *Ashley* were not met, we agree with appellant that the trial court erred in sentencing him as a habitual felony offender.

Although the above analysis is dispositive of the instant appeal, we address two other issues raised by appellant. Appellant argues, and the state concedes, that the trial court erred in sentencing him as a habitual offender in case number 88-2492 CF because a notice of habitualization was never filed in the original prosecution of that case. We agree. A trial court cannot habitualize a defendant on a case if it did not, at the time of the original sentencing, have the option of imposing a habitual offender sentence. *Snead v. State*, 616 So. 2d 964 (Fla. 1993).

The state also concedes that the trial court erred in sentencing appellant as a habitual offender in count two of case number 93-2914-CF (possession of cocaine) because section 775.084(1)(a)(3), Florida Statutes (1993), provides that a defendant may be sentenced as a habitual offender so long as "[t]he felony for which the defendant is to be sentenced, and one of two prior convictions, is not a violation of s. 893.13 relating to the purchase or the possession of a controlled substance." Since count two charged appellant with a violation of section 893.13, Florida Statutes (1993) relating to the possession of a controlled substance, a habitual offender sentence should not have been

imposed.

We have examined the other issues appellant raises on appeal and find that the issues either lack merit or were not properly preserved below. Nevertheless, because the requirements of *Ashley* were not fully met, we vacate appellant's sentence and remand with direction that appellant be resentenced within the guidelines in accordance with *Ashley* and *Wilson*.[1]

FARMER, J., concurs.
STONE, J., concurs specially with opinion

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[1] As in *Wilson*, we certify conflict with *Bell v. State*, 624 So. 2d 821 (Fla. 2d DCA 1993), *rev. denied*, 634 So. 2d 622 (Fla. 1994).