IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 85,921

ROY PHANEUF,

Respondent.
_____/

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

MERITS BRIEF OF PETITIONER

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CASES:

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information with one count of grand theft third degree and one count of possession of burglary tools (R 21). Respondent plead guilty to one count of grand theft third degree and to one count of the lesser offense of attempted possession of burglary tools (R 3, 23-24). The written plea agreement contained the following:

> 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:
>
> * * *
>
> 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 -- 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 23) (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 24). Respondent signed the written plea agreement (R 3, 24).

During the plea hearing held on March 1, 1994, respondent stated that he had thoroughly read the plea agreement (R 3). Respondent also stated he had an adequate opportunity to ask questions of his attorney about the plea agreement (R 3). Respondent understood the agreement and had no questions about it (R 4, 5-6). Respondent understood the maximum sentence he faced was up to 10 years as a habitual felony offender and that he would not be entitled to basic gain time if sentenced as a habitual offender (R 5). Respondent stipulated to a factual basis based on the facts contained in the affidavits (R 4). 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 March 1, 1994 (R 51).

On May 3, 1994, the trial judge filed notice and order for a separate proceeding to determine if respondent qualified as a habitual felony offender (R 25-26). On May 4, 1994, respondent filed a motion to strike the court's notice of habitual offender sentencing (R 27). On May 5, 1994, the motion was denied (R 29).

On June 30, 1994, the sentencing hearing was held (R 8-18). Respondent objected to the scoring of an offense as a felony as it was a misdemeanor (R 10). The state did not object to the correction (R 10). Neither the respondent nor the state had any submission as to whether or not respondent qualified as a habitual

offender (R 11).

The trial judge found respondent qualified as a habitual offender (R 11, 38-39). Respondent was adjudicated guilty (R 14, 31). Respondent was sentenced to 3 years incarceration followed by 2 years probation (R 14, 33-35, 41-48).

Respondent appealed his conviction and sentence to the Fifth District Court of Appeal (R 49). On June 9, 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), review granted, State v. Blackwell, 649 So. 2d 234 (Fla. 1994). Phaneuf v. State, 20 Fla. L. Weekly D1370 (Fla. 5th DCA June 9, 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 23); Thompson, at 117.

Petitioner filed a notice to invoke jurisdiction. Jurisdictional briefs were filed by both petitioner and respondent. This court accepted jurisdiction.

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 should 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. 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:
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> * * *
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> 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 :
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* * *

(R 23) (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 was advised during the plea hearing by the trial judge of the maximum possible habitual offender sentence he could receive and that if he was habitualized he would not receive basic gain time (R 5). Respondent understood this and still wanted to enter his plea (R 5). Also, 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,

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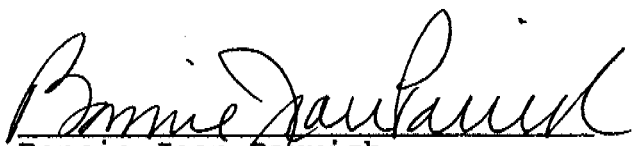
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing 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 12th day of September, 1995.



Bonnie Jean Parrish
Of Counsel

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APPENDIX

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