IN THE SUPREME COURT OF FLORIDA

BOBBY GLENN WASHINGTON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 86,082

PETITIONER'S BRIEF ON THE MERITS

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TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Petitioner was the defendant at trial and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and the appellee.

In the brief, the parties will be referred to as they appear before this Honorable Court. The following symbols will be used:

R = Record on appeal and sentencing transcript

T = Transcript of April 29, 1994 hearing

STATEMENT OF THE CASE AND FACTS

Petitioner was charged by an amended three count information with burglary, grand theft and dealing in stolen property (R 1). He entered a plea to the court to all charges (R 37-42). The state then filed a notice of intent to seek a habitual offender sentence which does not appear in this record. Petitioner was adjudged guilty of burglary and dealing in stolen property (R 52). He was sentenced to concurrent 9 year terms of imprisonment as a habitual offender (R 54-58). That sentence was reversed by the Fourth District Court of Appeal for violation of Ashlev v. State, 614 So. 2d 486 (Fla. 1993). Washington v. State, 631 So. 2d 367 (Fla. 4th DCA 1994).

At the subsequent resentencing hearing Petitioner moved to withdraw his plea arguing that striking the habitual offender classification or withdrawing the plea were alternate remedies authorized by this Court in Ashlev v. State, 614 So. 2d 486 (Fla. 1993), and followed by Bell v. State, 624 So. 2d 821 (Fla. 2d DCA 1993) (T 3-4). Petitioner also argued he was entitled to withdraw the plea under Koenig v. State, 597 So. 2d 256 (Fla. 1992) (T 4, 6-7). Finally, Petitioner argued that the court should order his presentence investigation corrected to conform to the findings at the original sentencing (T 31-35).

The court agreed that the language and facts of Bell "would require this court...to allow Mr. Washington to withdraw his plea," but the trial court declined to follow Bell. (T 19-20). The court then ordered an amended judgment deleting the habitual offender classification be filed but that the sentence would otherwise remain 9 years, the top of the permitted range of the guidelines (T 39, R 240-246). The court refused to consider Petitioner's request to withdraw the plea for the Koenig violation or to order the PSI corrected, even though the original sentencing judge had found the report to contain an inaccurate recitation of Petitioner's record. (T 37-40). Petitioner again appealed to the Fourth District. This time his judgment and sentence was summarily affirmed with citation to Wilson v. State, 645 So. 2d 1042 (FLa. 4th DCA 1994), certifying conflict with Bell v. State, 624 So. 2d 821 (Fla. 2d DCA 1993). Washington v. State, 20 Fla. L. Weekly D1349 (Fla. 4th DCA June 7, 1995)

On June **30, 1995,** Petitioner filed his notice of intent to invoke this Court's jurisdiction based on the certified conflict. On July **6, 1995,** this court quashed the Fourth District's decision in Wilson v. State. State v. Wilson, 20 Fla. L. Weekly **S313** (Fla. July **6, 1995).** On July **20, 1995,** this Court postponed a decision on jurisdiction and ordered briefing on the merits.

SUMMARY OF ARGUMENT

Petitioner initially entered an open plea to the trial court at a time when no written notice of intent to seek enhanced penalties had been filed and the consequences of enhanced penalties were not explained. Nevertheless, he was subsequently sentenced as a habitual offender but that sentence was reversed by the district court as a violation of Ashlev v. State, 614 **So.** 2d 486 (Fla. 1993). When Petitioner appeared for resentencing he sought to withdraw his plea as authorized by Bell v. State, 624 So. 2d 821 (Fla. 2d DCA 1993). The trial court refused to allow the withdrawal and the district court affirmed on authority of Wilson v. State, 645 So. 2d 1042 (Fla. 4th DCA 1994), noting conflict with Bell. This Court has since reviewed and quashed Wilson. State v. Wilson, 20 Fla. L. Weekly S313 (Fla. July 6, 1995). Petitioner is entitled to withdraw his plea under State v. Wilson.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN REFUSING TO ALLOW PETITIONER TO WITHDRAW HIS PLEA AFTER REMAND FROM THE DISTRICT COURT FOR A VIOLATION OF ASHLEY V. STATE, 614 SO. 2d 486 (FLA. 1993).

This case is controlled by the Court's decision in State v. Wilson, 20 Fla. L. Weekly S313 (Fla. July 6, 1995), quashing Wilson v. State, 645 So. 2d 1042 (Fla. 4th DCA 1994).

Petitioner's original habitual offender judgment and sentence were reversed by the district court as it violated Ashley v. State, 614 So. 2d 486 (Fla. 1993). Washington v. State, 631 So. 2d 367 (Fla. 4th DCA 1994). The mandate issued and Petitioner returned to the trial court for a new sentencing hearing. Petitioner argued that under Bell v. State, 624 So. 2d 821 (Fla. 2d DCA 1993), rev. denied 634 So. 2d 821 (Fla. 1994), he was entitled to withdraw his plea. The trial court denied the motion to withdraw and imposed a guideline sentence. The district court upheld the sentence based on its decision in Wilson v. State, supra, and certified conflict with Bell v. State, supra.

In Wilson the defendant submitted a written plea which reflected the maximum penalty for his second degree felony offense was 15 years. A notice of intent to seek habitual offender sanctions had previously been filed by the prosecution. During the plea colloquy the prosecutor confirmed the defendant was aware of the notice and the court asked "do you understand that the state is seeking an enhanced penalty to have you classified as an habitual offender?" to which the defendant replied "yes, sir." State v. Wilson, supra at S313. This Court agreed with the district court's finding that while the notice was sufficient, the requirement that the defendant understand the "reasonable consequences of habitualization" including "the maximum habitual offender term for the charged offense, [and] the fact that habitualization may affect the possibility of early release through certain programs" was not met. Supra at S314. Although Mr. Wilson argued that the remedy was to resentence him within the guidelines, the State of Florida argued that the remedy was for Wilson's plea to be withdrawn giving the state the opportunity to meet the requirements of Ashley should Wilson

again plead guilty. The state's position prevailed and this court ordered

> At resentencing, Wilson should be given the opportunity to withdraw his plea and proceed to trial if he so desires. Should he plead nolo or guilty, the court may in its discretion sentence him under the guidelines or impose an habitual offender term if the requirements of section 775.084, Florida Statutes (1993), and *Ashley* are met.

Id. That decision is consistent with the Second District's decisions in Bell, Syples v. State, 621 So. 2d 574 (Fla. 2d DCA 1993), Gonzalez v. State, 639 So. 2d 134 (Fla. 2d DCA 1994), and Ciccarelli v. State, 635 So. 2d 149 (Fla. 2d DCA 1994), and with the First District's decision in Byrd v. State, 643 So. 2d 1209 (Fla. 1st DCA 1994).

The Fourth district court previously determined that Petitioner's plea and sentence were in violation of Ashley. Washington v. State, supra. That decision became final when the mandate is issued.[1] At resentencing Petitioner properly sought to withdraw his plea alleging that it had not been knowingly and intelligently entered. The district court erred in upholding the trial court's refusal to allow Petitioner to withdraw his plea. The decision of the district court should be quashed and the case remanded to the trial court to allow Petitioner to withdraw his plea, consistent with State v. Wilson.

[1] Parenthetically, the decision was a correct one. No notice of intent to seek enhanced penalties had been filed by the state in Petitioner's case. He entered a plea to the court. In his written plea of nolo there is a nearly illegible notation "if habitual then double all amounts." (R 38). Petitioner's counsel makes the same statement in introducing the plea and the prosecutor states she will seek habitualization (R 102). There is no reference however to the actual number of years involved, 30, nor is there any reference to other consequences such as the lack of ability to earn gain time or otherwise qualify for early release (R 98-107).

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court to quash the decision of the district court and remand this cause for proceedings consistent with State v. Wilson.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Melynda Melear, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 29 day of August, 1995.

CHERRY GRANT
Counsel for Petitioner

IN THE SUPREME COURT OF FLORIDA

BOBBY GLENN WASHINGTON, Petitioner, vs. STATE OF FLOFUDA, Respondent.	)	Case No. 86,082

A P P E N D I X

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

BOBBY GLEN WASHINGTON,

.Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 94-1709

L.T. CASE NO. 92-2107CF

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

Opinion filed June 7, 1995

Appeal from the Circuit Court for St. Lucie County; Dan Vaughn, Judge.

Richard L. Jorandby, Public Defender, and Cherry Grant, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Melynda L. Melear, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

Affirmed. Wilson v. State, 645 So. 2d 1042 (Fla. 4th DCA 1994), rev. granted, No. 84,789 (Fla. April 3, 1995); Washinston v. State, 631 So. 2d 367 (Fla. 4th DCA 1994); State v. Whitfield, 487 So. 2d 1045 (Fla. 1986); White v. State, 446 So. 2d 1031 (Fla. 1984); Moblev v. State, 407 So. 2d 1037 (Fla. 1st DCA 1981 . As in Wilson and Washinston v. State, 20 Fla. L. Weekly D782 Fla. 4th DCA March 29, 1995), we certify conflict with Bell v. State, 624 So. 2d 821 (Fla. 2d DCA 1993), rev. denied, 634 So. 2d 622 (Fla. 1994).

STONE, PARIENTE and SHAHOOD, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appendix has been furnished by courier to Melynda Melear, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 29 day of August, 1995.

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