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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
OCT 5 1995
CLERK, SUPREME COURT
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BOBBY GLENN WASHINGTON,

Petitioner,

vs.

STATE OF FLOFUDA,

Respondent.

Case No. 86,082

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner will rely on the statement in his Brief on the Merits.

SUMMARY OF ARGUMENT

This case is controlled by the July 6, 1995, decision in State v. Wilson, wherein the state argued the remedy for an Ashley violation is to allow the defendant to withdraw his plea. The state offers absolutely no justification for now taking the opposite legal position from the one it took just two moths ago in Wilson. Consistent with this Court's decision in Wilson, Petitioner must be allowed to withdraw his plea before the trial court.

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).

In State v. Wilson, 658 So. 2d 521 (Fla. 1995), the State of Florida argued before this Court that the remedy for a plea found to be involuntary under Ashlev v. State, 614 So. 2d 486 (Fla. 1993), was not to strike the habitual offender classification and impose a guideline sentence as Mr. Wilson requested, but rather to require the plea to be withdrawn. To quote Wilson:

> The issue posed is whether, in light of this error, the case should be remanded for imposition of a sentence in conformity with the plea petition or whether Wilson should simply be given the chance to withdraw his plea. Wilson has not filed a motion to withdraw his plea and argues that the fifteen-year limit in the petition should be enforced. *The State, on the other hand, contends that Wilson's only option is to withdraw his plea and proceed to trial, if he so desires.*

658 So. 2d at 522-523 (emphasis added). This Court accepted the state's argument, ordering that at resentencing "...Wilson should be given the opportunity to withdraw his plea and proceed to trial if he so desires." 658 So. 2d at 523. The mandate issued July 27, 1995. The decision in State v. Wilson should control this case. See also State v. Larry Washington, 657 So. 2d 1156 (Fla. 1995) (same argument, same result). But, less than two months later, the State of Florida, in a complete turn around, now argues that Mr. Bobby Washington should not be allowed to withdraw his plea as he requested after the district court found Ashlev had been violated.

The state attempts to justify such a complete turn-around by claiming this case is "unlike Wilson." AB at 4. Not so. Like Wilson, petitioner offered his plea to the court without any agreement by the state. Compare R 37-42 to 658 So. 2d at 523. Petitioner was told the maximum sentence "can be doubled, if he's found to be a habitual," and the state said it "will

be seeking habitualization in this case," R 82, though no written notice had been or was filed. Like Wilson, the consequences of habitualization, particularly the ineligibility for programs affecting early release, were not disclosed to petitioner in violation of Ashley. See 658 **So.** 2d at 522. In Wilson this court found

> Under these circumstances it would be unfair to the State to remand for resentencing within the terms of Wilson's plea petition. Allowing Wilson to withdraw his plea, on the other hand, prejudices not one--it returns the players to square one, the same position they were in before the court erred.

658 So. 2d at 523. The only difference between Wilson and petitioner is that the two defendants wanted different remedies; Wilson wanted the remedy petitioner got and petitioner wants the remedy Wilson got. Apparently the state's real position in these cases is to just ask for the opposite of whatever the defendant requests.'

The state's attempt to justify opposite remedies in these cases because they were decided 9 months apart vaguely suggests that there is some procedural difference between the instant case and Wilson. Again, not so. Like Wilson, the district court here found that Ashley had been violated. The court's entire opinion read "We affirm appellant's convictions but reverse those portions of appellant's sentencing orders adjudicating him to be an habitual offender. see Ashlev v. State, (citation omitted)" Washington v. State, 631 **So.** 2d 367 (Fla. 4th DCA 1994). Pursuant to that reversal petitioner then made efforts to return to the trial court, where, armed with the Second District's decision in Bell v. State, 624 **So.** 2d 821 (Fla. 2d DCA 1993), petitioner asked for a legal remedy, namely the right to withdraw his plea. See also Gonzalez v. State, 639 **So.** 2d 134 (Fla. 2d DCA 1994), Bvrd v. State, 643 **So.** 2d 1209 (Fla. 1st DCA

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[1] "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean -- neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master -- that's all."

Through the Looking Glass, Lewis Carroll, 1872.

1994), Mearns v. State, 658 **So.** 2d 172 (Fla. 4th DCA 1995). Certainly petitioner had a right to attempt to convince the trial court to impose a lawful remedy, indeed the very remedy which the state itself would later claim in Wilson to be the *only* legal remedy for an Ashley violation.

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 2 day of October, 1995.

CHERRY GRANT
Counsel for Petitioner