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SUPREME COURT OF FLORIDA

500 South Duval Street
Tallhassee, Florida 32399-1927
(904) 488-0125

WILLIAM ALBRITTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

CASE NO.: 89,364
5DCA CASE NO.: 94-02765
CIRCUIT CASE NO.: 91-1679/
1843/1786

INITIAL BRIEF

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PRELIMINARY STATEMENT

Throughout this brief, the Appellant, WILLIAM ALBRITTON, will be referred to as either the "DEFENDANT" or "APPELLANT". The Appellee will be referred to as the "STATE". The following symbols will be used to refer to the record on appeal:

(TT) - Trial Transcript

(TR) - Trial Record

STATEMENT OF CASE

On May 4, 1992, Defendant/Appellant, WILLIAM ALBRITTON, entered a negotiated plea of nolo contendere to pending felony charges in case no, 91-1786; case no. 91-1679 and case no. 91-1843. (TR 274-279). Pursuant to such negotiations, on June 30, 1992, Defendant/ Appellant was sentenced to two (2) years of community control to be followed by thirteen (13) years of probation. (TR 239-243).

Therefore Defendant/Appellant was charged with a violation of the terms and conditions of his community control in each of the foregoing cases. (TR 48-50). The State predicated such violations upon the alleged commission of two new criminal charges and upon the Defendant's leaving his approved residence without the permission of his community control officer. (TR 48-50). A non-jury trial was held on September 21, 1994, wherein the Defendant was found not guilty of violating his community control by the commission of new criminal charges, but was found to have violated his community control by leaving his approved residence without the permission of his community control officer. (TR 34-36 and TR 210-216).

A sentencing hearing was then held on October 21, 1994. (TR 26-28). At the time of such sentencing, the State presented a Guideline Scoresheet which indicated a recommended sentence of seventeen (17) years to twenty two (22) years and a permitted sentence of nine (9) years to twenty seven (27) years. (TR 25). Notwithstanding such Guidelines Scoresheet, and the timely

objections of the Defendant/Appellant (TR 6-11), the trial court declared the Defendant/Appellant to be a habitual felon and imposed a sentence of sixty (60) years incarceration. (TR 26-28 and TR 134-136).

A timely Notice of Appeal was then filed by the Defendant/Appellant. (TR 2). The Fifth District Court of Appeal issued a per curiam affirmed opinion on the authority of Kins v. State, 648 So.2d 183, (Fla. 1st DCA, 1994) rev. granted, 659 So.2d 1087 (Fla. 1995), on September 6, 1996. Appellant, subsequently, filed a timely Motion for Rehearing which was denied by the Fifth District Court of Appeal on September 26, 1996, Thereafter, on October 24, 1996, this Court issued an opinion addressing the certified question raised in Kins v. State, supra., and reversed the prior holding of the appellate court. A timely Notice to Invoke Discretionary Jurisdiction was then filed by Defendant/ Appellant. On May 14, 1997, this Court accepted jurisdiction in this matter.

STATEMENT OF FACTS

Defendant/Appellant, WILLIAM ALBRITTON, was charged with multiple felonies in case no. 91-1786; case no. 91-1679; and case no. 91-1843. (TR 111-118). On June 30, 1992, Defendant/Appellant entered a negotiated plea of nolo contendere to specified charges in each of the three pending cases. (TR 274-279). The negotiated plea, which was approved by the trial court, provided, inter alia that the court would "suspend the top end of the guideline sentence of a habitual offender with the following special conditions: The Defendant would be sentenced to community control which would be in the court's discretion followed by a period of probation." (TR 275). (emphasis supplied). The State acknowledged that the top end of a guideline sentence would be twenty-two (22) years. (R 39).

The record is devoid of any evidence establishing that prior to the entry of such plea that the Defendant/Appellant was ever made aware of the possibility and reasonable consequences of habitualization. (TR 272-280). Specifically the record establishes that the Defendant/Appellant was never advised of the maximum habitual offender term for the charged offenses or that habitualization may effect his eligibility for certain early release programs. (TR 272-280).

After denying the subsequent motion to vacate such plea agreement filed by the State, (TR 266-270) the trial court subsequently sentenced the Defendant to two (2) years of community control followed by thirteen (13) years of probation. (TR 26-28 and TR 134-136).

Thereafter, Defendant/Appellant was convicted of a violation of his community control on September **21, 1994.** (TR **34-**37). The sole basis for the conviction was that the Defendant left his approved residence without the permission of his community control officer. (TR 210-216).

On October 31, 1994, the Defendant/Appellant was sentenced by the trial court. (TR 26-28). Pursuant to the Guidelines Scoresheet presented by STATE, the maximum permitted sentence, inclusive of the one cell bump-up, was twenty-seven (27) years. (TR -25). At the time of such sentencing the trial court exceeded such permitted range; declared the defendant to be a habitual felon; and sentenced the Defendant to sixty (60) years incarceration as a habitual felon. (TR 26-28 and TR 134-136))

SUMMARY OF ARGUMENT

The trial court erred in sentencing Appellant under the habitual offender statute, despite having declined to impose such sentence at the original sentencing. Kins v. State, 681 So.2d 136 (Fla. 1996).

Although this Court has recognized a limited exception to this general rule when the sentence is imposed as part of an otherwise valid plea agreement, such exception is not applicable herein for two (2) reasons. First, assuming arsuendo, the propriety of the initial plea agreement, such agreement provided that upon a violation of probation, that the defendant would be sentenced to twenty-two (22) years as a habitual felon. Notwithstanding such agreement, the trial court herein imposed a sentence of sixty (60) years, or alternatively stated more than three (3) times the actual period of incarceration provided for under the terms of the plea agreement. Second, the original plea agreement is invalid as the original trial court did not confirm that defendant was personally aware of the possibility and reasonable consequences of habitualization. Specifically, the trial court failed to confirm, inter alia, that the defendant knew of the maximum habitual offender term and that the defendant could be ineligible for certain programs effecting early release.

ARGUMENT:

POINT I

THE TRIAL COURT IMPROPERLY SENTENCED APPELLANT TO SIXTY YEARS AS A HABITUAL FELON UPON A REVOCATION OF PRORATION AFTER INITIALLY DECLINING TO IMPOSE SUCH A SENTENCE AT THE ORIGINAL SENTENCING

Appellant was originally sentenced by the trial court on June 30, 1992. At that time, the court noted that "Mr. Albritton's criminal behavior consists of crimes against property," and that, "Mr. Albritton has never been convicted of violence against a person..." (TR 52). On this basis, the court noted that, "...I do not find it necessary at this time to sentence him as a habitual offender," (TR 58) and sentenced Appellant to twenty four (24) months of community control, followed by thirteen (13) years of supervised probation. (TR 58). Thereafter, Appellant was charged with violating the terms and conditions of his community control. (TR 48-50). On September 21, 1994, Appellant was found to have violated his community control by leaving his approved residence without permission of his community control officer. (TR 35-36 and TR 210-216.) On the basis of such violation, the trial court declared Appellant to be a habitual offender, and imposed a sentence of sixty (60) years incarceration. (TR 26-28 and TR 134-136) .

Absent a valid agreement to the contrary, the trial court erred in sentencing Appellant to sixty (60) years as a habitual felon upon a revocation of probation, after initially declining to impose such a sentence at the original sentencing. King v. State, 681 So.2d 1136 (Fla. 1996), and Simon v. State., 684 So.2d 263

(Fla. 1996). As more fully set forth below, Appellant's original plea agreement does not support the sentence imposed herein.

POINT II

ALTHOUGH A DEFENDANT MAY BE SENTENCED AS A HABITUAL FELON UPON A REVOCATION OF PROBATION, IF SUCH SENTENCE IS PART OF AN OTHERWISE VALID PLEA AGREEMENT, SUCH EXCEPTION IS NOT APPLICABLE TO THE CASE SUB JUDICE

This Court has recognized a limited exception to the general principal enunciated in Kins v. State, supra. Specifically, this Court has held that a hybrid split sentence of incarceration under the guidelines followed by probation as an habitual offender, although not authorized by statute or rule, is not an illegal sentence unless the total sentence imposed exceeds the statutory maximum for the particular offense at issue. King v. State, supra. This Court has further elaborated that "thus where a defendant agrees to such a sentence as part of an otherwise valid plea asreement and the negotiated sentence does not exceed the statutory maximum for the particular offense involved, the court may impose incarceration under the guidelines followed by probation as a habitual offender." Walker v. State, 682 So.2d 555 (Fla. 1996). However, as part of such plea agreement, it must be evident that the defendant understood the consequences of the sentence. Walker v. State, id.

On the basis of the foregoing, the plea agreement entered into by Appellant herein is legally insufficient to support the sentence imposed by the trial court for two (2) reasons. First, even if such initial plea agreement was valid and enforceable, it provided only for a twenty-two (22) year period of incarceration as a habitual felon, as contrasted to the sixty (60) years of

incarceration imposed by the court. Second, the original plea agreement is invalid as the record establishes that the Appellant did not understand the consequences of his sentence. Each of the foregoing points is more fully set forth below.

(A) ASSUMING ARGUENDO, THE PROPRIETY OF THE ORIGINAL PLEA AGREEMENT, SUCH AGREEMENT PROVIDED FOR A MAXIMUM PERIOD OF INCARCERATION OF TWENTY TWO YEARS, AS OPPOSED TO THE SIXTY YEAR SENTENCE IMPOSED BY THE TRIAL COURT

The original written plea agreement executed by the State and the Defendant, and subsequently approved by the trial court provided, inter alia, that, "... the court will suspend the top end of a guideline sentence as a habitual offender, with the following special conditions: Defendant will be sentenced to a period of community control followed by probation; defendant must attend and complete in-house drug treatment; credit for time served." (TR 291). At the time of the plea agreement, prior counsel for Appellant specifically reiterated the relevant terms of the agreement stating, "...it is agreed that Mr. Albritton would be adjudicated guilty on all counts and the trial court will suspend the top end of the guideline sentence of habitual offender with the following special conditions..." (TR 275). At the time of the original sentencing, the State presented a guideline score sheet which indicated a recommended sentence of seventeen (17) years to twenty-two (22) years. If there was any doubt as to the meaning of the term "guideline sentence" as used herein, the State clarified that point at the time of the sentencing on June 30, 1992, wherein

the prosecutor stated, "... the Court would not sentence that, since the State agreed and was under the assumption that today as a sentencing that Mr. Albritton would be sentenced as a habitual offender to the top end of the guidelines, which at this point would be twenty-two (22) years, and then suspended." (TR 39). (emphasis supplied). The prosecutor further elaborated stating, "The bargain in this case was for a habitual sentence, to be suspended, since everyone was under a wrong understanding. The State did not deal for just a community control and probation sentence." (TR 39-40). Finally, the prosecutor again stated, "My only concern would be if at a later time if there is a violation of community control, if the Court is not sentencing Mr. Albritton to the twenty-two (22) years as an habitual offender, then at a later time, the later court can impose a shorter sentence where the State has agreed the twenty-two (22) years is agreed on." (TR 40). (emphasis supplied). As the foregoing establishes, it was the intent of the parties in entering into the plea agreement that if the Defendant/Appellant should subsequently violate his community control, that he would then be sentenced to twenty-two (22) years of incarceration as a habitual felon. Notwithstanding the foregoing, and contrary to the terms of the plea agreement, when Appellant violated his community control, the trial court then sentenced him to sixty (60) years incarceration. Such sentence is illegal as it exceeds the term of incarceration provided for in the original plea agreement by thirty-eight (38) years. Accordingly, even if this Court should hold that the existing plea agreement is valid and enforceable, the Appellant's sentence should still be

reduced to twenty-two (22) years incarceration, as contemplated by the original plea agreement. However, as more fully set forth below, it is Appellant's position that the original plea agreement is not enforceable and, accordingly, that the Defendant cannot be sentenced as an habitual felon.

B) THE ORIGINAL PLEA AGREEMENT IS INVALID AND UNENFORCEABLE AS APPELLANT WAS NEVER PROPERLY ADVISED OF THE CONSEQUENCES OF HIS SENTENCE

The original plea agreement in invalid and unenforceable as the Defendant/Appellant was never properly advised of the sentence contemplated therein. Specifically, prior to the entry of the original plea agreement, the Court did not confirm that the Defendant was personally aware of the possibility and reasonable consequences of habitualization, Snead v. State, 616 So.2d 964 (Fla. 1993); Ashley v. State, 614 So.2d 486 (Fla., 1993); and F.S. 5775.084 (3) (b) (1989). (TR 274-279). Specifically, before a court may accept a guilty or nolo plea, it must determine on the record that the defendant is aware of the "maximum possible penalty provided by law" that may be imposed for the crime (emphasis supplied) . Rule 3.172, Fla.R.Crim.P. and Ashley v. State, 614 So.2d 486 (Fla., 1993). In the case of Ashley v. State, supra, the Supreme Court of Florida elaborated upon the application of such requirement to a sentencing under the habitual offender statue, stating, in pertinent part, as follows:

> Because habitual offendermaximums clearly constitute the maximum possible penalty provided by law' - exceeding both the guidelines and statutory maximums - and because

> habitual offender sentences are imposed in a significant number of cases, our ruling in Williams and the plain language of Rule 3.172 require that before a court may accept a guilty or nolo plea from an eligible defendant, it must ascertain that the defendant is aware of the possibility and reasonable consequences of habitualization. To state the obvious, in order for the plea to be 'knowing,' i.e., in order for the defendant to understand the reasonable consequences of his or her plea, the defendant must 'know' beforehand that his or her potential sentence may be many times greater what it ordinarily would have been under the guidelines and that he or she will have to serve more of it.

The Court further explained that the defendant should be told of his or her eligibility for habitualization, the maximum habitual offender term for the charged offense, the fact that habitualizationmay effect the possibility of certain early release programs, and where habitual violent felony provisions are implicated, the mandatory minimum term. Ashley v. State, supra.

Finally, although the record contains various references made by the State subsequent to the entry of the plea, regarding Defendant/Appellant's minimum sentence, such comments are of no legal significance. Under no circumstances can such later discourse serve as a substitute for the pre-plea personal interview required by Rule 3.173, Fla.R.Crim.P.. Ashley v. State, 614 So.2d 486, 489, n.9 (Fla. 1993). In this regard, it should also be noted that even the State's subsequent comments do not advise the Defendant/Appellant that habitualizationmay effect the possibility of certain early release programs.

Accordingly, on the basis of the foregoing, the Defendant/Appellant's prior sentence should be vacated and Appellant should be remanded to the trial court for the imposition of a guideline sentence as a non-habitual felon.

CONCLUSION

Based on the argument and authorities set forth herein, Appellant requests that this Court vacate Defendant/Appellant's sentence and remand this case for sentencing consistent with the ruling herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **Kristen L. Davenport, Esquire**, Office of the State General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118 on this 11th day of August, 1997.

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