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SUPREME COURT OF FLORIDA

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

WILLIAM ALBRITTON,

Appellant/Petitioner,

v.

STATE OF FLORIDA,

Appellee/Respondent,

_____/

CASE NO.: 89,364
5DCA CASE NO.: 94-02765

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF FACTS

Petitioner submits the following additions/corrections to Respondent's Statement of Facts. The following pertains only to the three (3) relevant time periods regarding this Appeal, to-wit:

(1) the original plea agreement and sentence;

(2) the violation of community control; and,

(3) the subsequent sentencing upon such violation.

The original plea agreement specifically provided that the court would "suspend-e top end of the guidelines as a habitual offender with the followins conditions: Defendant would be sentenced to a period of 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. (TR 39). The prosecutor also specifically stated the consequences of such plea agreement if Defendant should violate his community control, to-wit: "My only concern would be if at a later time, if there was a violation of community control, if the court is not sentencing Mr. Albritton to the twenty-two (22) years as a 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). The entire plea colloquy is set forth at pages two (2) through nine (9) of the Appendix hereto, The written plea agreement executed by Defendant is set forth at page one (1) of the Appendix. All remaining portions of the transcripts cited by the State in their Answer Brief occurred

subsequent to the plea colloquy, and are therefore irrelevant to the determination of the validity of the underlying plea agreement herein.

Subsequent to the entry of the plea, the trial court sentenced the Defendant in a manner so as to "carry out the terms of the Agreement." (TR 40). At the time of the sentencing, the trial judge properly noted that the Petitioner's criminal behavior consisted solely of crimes against property; and, further that he had never been convicted of violence against a person. (TR 52). On this basis, the trial court specifically stated that "it was not necessary at this time to sentence him (i.e., Petitioner) as a habitual offender." (TR 58). It should be noted that the armed burglary charge against Petitioner is predicated upon a rifle that was missing subsequent to the burglary and is not an instance where the Petitioner entered into a home with a loaded firearm. (TR 28) .

Thereafter, Petitioner was convicted of a violation of his community control on September 24, 1994. (TR 34-37). The sole basis for the conviction was that Petitioner left his approved residence without the permission of his community control officer. (TR 210-216).

On October 31, 1994, predicated solely upon the violation of probation described above, the trial court exceeded the authorized range of the original guideline sentence; and, sentenced Petitioner to sixty (60) years incarceration as a habitual felon, almost three (3) times the amount of incarceration authorized under the terms of the original Plea Agreement. (TR 26-28;TR 134-136).

SUMMARY OF ARGUMENT

The resolution of this case turns upon the validity of Petitioner's original plea agreement. As Petitioner was not sentenced as a habitual felon at the time of his original sentencing, he can not be sentenced as a habitual felon upon violation of his community control, unless the sentence is being imposed pursuant to an "otherwise valid plea agreement." Walker v. State, 682 So.2d 555 (Fla. 1996). Likewise, the Defendant must also have been properly advised of the consequences of the original plea. Walker v. State, id. In this case neither of these two (2) conditions has been satisfied. Accordingly, the original plea agreement is invalid and unenforceable for three (3) separate and independent reasons. First, Petitioner was never advised that a sentence under the habitual felony statute would result in the loss of basic gain. Second, he was never advised that his potential sentence as a habitual felon may be many times greater than a sentence imposed under the guidelines. Third, the sentence which was ultimately imposed (i.e., sixty (60) years incarceration) exceeded the contemplated guideline sentence by over thirty-five (35) years.

Regarding the first point, Respondent acknowledges that Petitioner was never advised regarding the loss of basic gain time. However, Respondent argues that this requirement was not created until Ashley v. State, 614 So.2d 486 (Fla. 1993), and therefore was not applicable to Petitioner's plea which was entered on May 4, 1992. This argument ignores Setzer v. State, 575 So.2d 747 (Fla.

5th DCA, 1991), which pre-existed Petitioner's plea and characterized the State's failure to advise a defendant of the potential loss of gain time as reversible error. As the trial court was within the Ninth Judicial Circuit, such court was obligated to comply with the requirements of Setzer v. State, id.

Regarding the second point, Respondent also claims that Defendant was properly advised that a potential sentence as a habitual felon could be many times greater than a guideline sentence. Respondent's sole basis for this assertion is the portion of the plea agreement which provides that the maximum sentence which would be imposed for one of the subject crimes was "life." This argument ignores that the same plea agreement provides that, "...if my plea is to a felony, my sentence will be imposed under the Sentencing Guidelines." (R 291). Likewise, except for the foregoing reference to "life," the record is devoid of any evidence showing that Defendant, prior to the entry of his plea, was ever advised regarding the consequences of being sentenced as a habitual offender.

Finally, it should be also noted that the original plea agreement provided that the court would "suspend the top end of the guidelines as a habitual offender..." (TR. 275). The State acknowledged that the top end of the guidelines was twenty-two (22) years (TR 39) and further explicitly stated, that if the Defendant should violate his community service control, "... the State has agreed the twenty-two (22) years is agreed on." Notwithstanding the foregoing, the trial court proceeded to sentence Defendant to

sixty (60) years incarceration.

In sum, the original plea agreement is invalid and unenforceable due to the foregoing deficiencies. Each point constitutes a separate and independent basis rendering such plea agreement null and void. Defendant's current sentence was not imposed pursuant to "an otherwise valid plea agreement," and further since Defendant was never advised regarding the consequences of his plea, the exception to King v. State, 681 So.2d 1136 (Fla. 1996), set forth in Walker v. State, supra, is not applicable. Therefore, the trial court was unable to sentence Defendant as a habitual offender upon the violation of community control. King v. State, supra. Further, since the underlying plea agreement is invalid, this Court should reverse the ruling of the Fifth District Court of Appeal; vacate the sentence imposed by the trial court; and, remand this case to the trial court with directions that Petitioner be allowed to either withdraw his original plea, or alternatively agree to a sentence no greater than twenty-two (22) years as a non-habitual offender.

ARGUMENT

POINT I

THE INVALIDITY OF PETITIONER'S ORIGINAL PLEA AGREEMENT PRECLUDES THE APPLICATION OF THE EXCEPTION TO KING V. STATE. CREATED RY WALKER V. STATE

Petitioner's original plea agreement stated that he would be sentenced to community control. It further essentially provided that if he violated such community control, he could then be sentenced as a habitual offender to the "top end of the guidelines...," (i.e., twenty-two (22) years). (TR 275; TR 39). Petitioner later was convicted of violating his community control for leaving his approved residence without the permission of his community control officer. (TR 210-216). Solely on the basis of this violation, the trial court sentenced Petitioner to sixty (60) years incarceration, almost three (3) times the term of incarceration authorized under the plea agreement. (TR 26-28; 134-136).

As the trial court initially declined to sentence Petitioner as a habitual offender at the original sentence, it was subsequently precluded from imposing a sentence, as a habitual offender, when he violated his community control. King v. State, 681 So.2d 1136 (Fla. 1996). A limited exception to this general principle was enunciated in Walker v. State, 682 So.2d 555 (Fla. 1996), authorizing this type of sentence when it is imposed pursuant to an "otherwise valid plea agreement." However, the application of the Walker exception mandates compliance with two (2) conditions precedent. First, the State must establish the

existence of an otherwise valid plea agreement." Walker v. State, id. Second, the State must establish that Petitioner understood the consequences of the sentence. Walker v. State, id.

Petitioner's original plea agreement was not " an otherwise valid plea agreement," as required by Walker v. State, id. Likewise, Petitioner was never properly advised regarding the consequences of his sentence. Accordingly, for the three (3) separate and independent reasons set forth below, Petitioner's original plea agreement was invalid and does not constitute a legitimate basis for the application of the Walker exception. Rather, this Court's prior holding in King v. State, supra, invalidates the trial court's sentencing of Petitioner as a habitual felon, upon his violation of community control. Further, the invalidity of Petitioner's original plea agreement requires that Petitioner's case **be** remanded to the trial court with directions that he be allowed to withdraw his original plea agreement.

POINT II

THE ORIGINAL PLEA AGREEMENT IS INVALID AND UNENFORCEABLE AS PETITIONER WAS NEVER PROPERLY ADVISED THAT A POTENTIAL HABITUAL FELONY SENTENCE WOULD RESULT IN A LOSS OF BASIC GAIN TIME

The record is devoid of any evidence showing that prior to the entry of his plea, Petitioner was ever advised that a habitual felony sentence would result in a loss of basic gain time. Respondent does not dispute this fact, but rather simply asserts that this requirement was not created until the case of Ashley v. State, 614 So.2d 486, 490 (Fla. 1993), approximately eight (8) months subsequent to the date upon which Petitioner entered his original plea agreement (i.e., June 30, 1992), and should not be applied retroactively. This argument mischaracterizes the status of the applicable law at the time the Defendant entered his plea. Specifically, Petitioner's plea agreement was accepted by a trial court in the Ninth Judicial Circuit, and consequently was governed by the current holdings of the Fifth District Court of Appeal. Prior to this Court's holding in Ashlev, supra, and prior to the time of Petitioner's initial plea agreement, the Fifth District Court of Appeal in Setzer v. State, 575 So.2d 747 (Fla. 5th DCA, 1991), had explicitly held that a defendant who was entering a plea to a potential habitual felony sentence, must be specifically advised that such plea would result in a loss of basic gain time. Respondent's reliance on the case of State v. Ginebra, 511 So.2d 960, (Fla. 1987), is misplaced. This case pre-dated the Setzer holding and did not address the loss of basic gain time, but rather

was concerned only with counsel's failure to advise his client that deportation was a possible consequence of a guilty plea. Rather, pursuant to Setzer v. State, supra, the applicable law of the Fifth District Court of Appeal explicitly provided that the "defendant would be entitled to withdraw his guilty plea if he was not informed or lacked knowledge of fact that plea as a habitual offender would result in loss of basic gain time."

POINT III

THE ORIGINAL PLEA AGREEMENT IS INVALID AND UNENFORCEABLR AS PETITIONER WAS NEVER ADVISED THAT A POTENTIAL HABITUAL FELONY SENTENCE COULD BE MANY TIMES GREATER THAN A GUIDELINES SENTENCE

Prior to the entry of the original plea agreement, the trial court did not confirm that Petitioner was personally aware of the possibility and reasonable consequences of such plea. Snead v. state, 616 So.2d 964 (Fla. 1993); Ashley v. State, supra,; and, § 775.084(3)(b), Fla. Stat., 1989. 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, supra. In the case of Ashley v. State, supra, this court has previously elaborated upon the application of such requirement to a sentencing under the habitual offender statute, stating in pertinent part, as follows:

> "Because habitual offender maximums clearly constitute the "maximum possible penalty provided by law" - exceeding both the guideline and statutory maximum - 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 "knowing",i.e., in order for the defendant to understand the reasonable consequences of his or her plea, the defendant must "know" before hand that his or her potential sentence may be many times greater than what it ordinarily would have been under the guidelines and that he or she will have to serve more of it."

This Court further explained that the defendant should also be told of his or her eligibility for habitualization, and the maximum habitual offender term for the charged offense.

The record herein is devoid of any evidence of compliance with the foregoing requirements. Respondent asserts that such non-compliance should be excused as the language on the written plea agreement states that the maximum penalty for the crime of armed burglary of a dwelling is "life." However, such language must necessarily be read in conjunction with paragraph 4 of the plea agreement which expressly and unequivocally states, "I understand that if my plea is to a felony, my sentence will be imposed under the sentencing guidelines." Accordingly, although the written plea agreement does advise that the maximum penalty for the subject offense was "life," it also advises that Petitioner's sentence "will be imposed under the sentencing guidelines." Neither the written plea, nor the relevant portions of the transcript establish that Petitioner knew "beforehand" that his potential sentence would be many times greater than what it ordinarily would have been under the guidelines, and that he would have to serve more of it, Ashley v. State, supra. Accordingly, due to the non-compliance with the requirements set forth in Ashley v. State, supra, Petitioner's original plea agreement is invalid and unenforceable.

POINT IV

THE ORIGINAL PLEA AGREEMENT IS INVALID AND UNENFORCEABLE INSOFAR AS IT PURPORTS TO JUSTIFY A SENTENCE OF SIXTY YEARS INCARCERATION

The original plea agreement specifically provided that the court would "suspend the top end of a 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 one (1) year of probation." (TR 275). (emphasis supplied). The State acknowledged the top end of a guideline sentence would be twenty-two (22) years. (TR-39). Although the plea agreement did acknowledge that the maximum penalty for the crime of armed burglary to a dwelling was "life," such plea agreement also provided that if Petitioner's plea was a felony, his sentence "will be imposed under the sentencing guidelines." Even subsequent to the entry of the original plea agreement, the prosecutor unequivocally stated the position and intent of the State as follows, "My only concern would be if at a later time, if there is a violation of community control, if the court is not sentencing Petitioner to the twenty-two (22) years as a habitual offender, then at a later time, a later Court can impose a shorter sentence where the State has agreed the twenty-two (22) years is agreed on. (TR 40). (emphasis supplied.) Notwithstanding the clear and unequivocal language of the plea agreement and the statement made by the prosecutor in open court, subsequent to the violation of probation, the State sought and received a sentence of sixty (60) years incarceration. Such sentence is contrary to the

terms of the original plea agreement and renders such plea agreement null, void, and of no consequence.

Accordingly, as Petitioner's sentence as a habitual offender was imposed subsequent to his violation of probation, and was not part of an otherwise valid plea agreement, such sentence is improper. Kins v. State, 681 So.2d 1136 (Fla. 1996).

CONCLUSION

On the basis of the foregoing, the undersigned requests that this Court reverse the prior holding of the Fifth District Court of Appeal; vacate the sentence imposed by the trial court; and, remand this case to the trial court with directions that the Defendant be afforded an opportunity to withdraw his original plea to the three (3) underlying felonies, or alternatively choose to accept a sentence no greater than twenty-two (22) years as a non-habitual offender.

CERTIPICATE 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 Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118 **on** this 15th day of November, 1997.

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WP-51\docs\Albritt.38