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IN THE SUPREME COURT OF FLORIDA

WILLIAM ALBRITTON,

Petitioner,

v. CASE NO. 89,364

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF FACTS

The State submits the following additions/corrections to Albritton's Statement of the Case and Facts:[1]

On May 4, 1992, Albritton entered a **no** contest plea in case #91-1679 (purchase of cocaine) and guilty pleas in case #91-1786 (burglary of a dwelling) and case #91-1843 (armed burglary of a dwelling). (Plea Tr. I at 4-5). Pursuant to this negotiated plea, Albritton was to receive **a** suspended habitual offender sentence and community control. (Id. at 5; R. 291).

The written plea form set forth the maximum possible penalties for each offense and specifically provided that Albritton would receive a habitual offender sentence (suspended). (R. 291). During the plea colloquy, Albritton stated that he had read the

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[1]The record on appeal contains transcripts of five separate proceedings, each of which is numbered independently (that is, each starts with page 1 and continues on). Accordingly, for the sake of clarity the State will refer to these transcripts as follows:

-- (Plea Tr. I) refers to the transcript of the May 4, 1992, plea hearing;

-- (Plea Tr. II) refers to the transcript of the June 26, 1992, hearing on the State's motion to set aside the plea;

-- (Sent. Tr. I) refers to the transcript of the June 30, 1992, sentencing hearing (wherein a community control sentence was imposed);

-- (VOP Tr.) refers to the transcript of the September 21, 1994, violation of community control hearing; and

-- (Sent. Tr. II) refers to the transcript of the October 31, 1994, sentencing hearing (wherein a habitual offender sentence was imposed).

written plea form, understood each and every word of it, and had no questions about it; he then signed the form in open court. (Plea TX. I at 7-8). Defense counsel confirmed this statement, noting that he had reviewed the plea form at length with his client. (Id. at 5).

Albritton then entered a knowing and voluntary plea to the above charges. (Id. at 7-9). Sentencing was delayed until a pre-sentence investigation report could be prepared. The court explained that a PSI was needed before anyone could be sentenced as a habitual felon. (Id. at 9).

On June 26, 1992, a hearing was held on the State's motion to set aside Albritton's pleas. At this hearing, the State argued that the plea should be set aside because it called for the imposition of a suspended habitual sentence, which had previously been held to be illegal. (Plea Tr. II at 3-5).[2]

The trial court agreed that a habitual sentence could not be suspended. However, the court found that the intent of the parties could be fulfilled by imposing a regular community control sentence, with the specific understanding that if Albritton

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[2]The State also argued the plea was illegal because it failed to include the three-year mandatory minimum sentence for the armed burglary (case #91-1843). (Plea Tr. II at 2-3). The trial court rejected this argument, finding that the State had agreed to a non-mandatory minimum sentence in the plea agreement. (Id. at 23-24).

violated his community control he would be sentenced as a habitual offender. (Id. at 24-25). With this understanding, the trial court denied the State's motion to set aside the pleas.

On June 30, 1992, Albritton was given the sentence agreed upon. At the sentencing hearing, the court noted once again that the terms of the plea agreement would be carried out by a habitual sentence upon violation of community control. (Sent. Tr. I at 4). Based on records provided by the State, the court then found that Albritton unquestionably qualified as a habitual offender. (Id. at 5-6).

During the sentencing hearing, Albritton was specifically warned that he would suffer severe consequences if he violated community control -- that the court had found him to be a habitual offender and would impose the maximum sentence, life, if he violated. (Id. at 21-22, 25-26). Albritton was then sentenced to 2 years community control followed by 13 years probation. (Id. at 22).

Albritton stopped reporting to his community control officer in November of 1992. (VOP Tr. at 5-7). At that time, he moved from his residence without the permission of his community control officer and disappeared. He never filed reports, paid for his supervision, or complied with the other supervisory conditions.

(Id. at 5-10). Albritton was aware that there was a warrant out for his arrest for violating community control, but he was afraid to turn himself in because the judge had told him he would get life in prison. (Id. at 8, 56-57).

On March 21, 1994, Albritton was arrested in Valdosta, Georgia, and returned to Florida, (Id. at 8). A violation of probation hearing was held September 21, 1994. The trial court found Albritton guilty of violating community control by leaving his residence without permission. (Id. at 75-76). An additional basis had been charged for violation -- the commission of a new offense (burglary) -- but the State's witnesses did not show up at the VOP hearing so the State decided to abandon those charges and take care of them at a regular trial. (Id. at 42-43).

On October 31, 1994, Albritton was sentenced for violating community control. The trial court found that proper notice of habitualization had been provided to Albritton and sentenced him as a habitual offender. (Sent. Tr. II at 59-62). Albritton was given a 60 year habitual offender sentence for the armed burglary (case #91-1843) and 15 year habitual offender sentences for purchase of cocaine (case #91-1679) and burglary (case #91-1786). (Id. at 60-62).

On appeal, the district court affirmed Albritton's sentences in a per curiam opinion, citing King v. State, 648 So. 2d 183 (Fla. 1st DCA 1994), in which this Court granted review. 659 So. 2d 1087 (Fla. 1995). Albritton v. State, 681 So. 2d 759 (Fla. 5th DCA 1996).

This Court accepted jurisdiction of this case based upon article V, section 3(b) (3) of the Florida Constitution. See also Jollie v. State, 405 So. 2d 418 (Fla. 1981).

SUMMARY OF ARGUMENT

Albritton was properly sentenced as a habitual offender upon violating community control, as he agreed to such a sentence as part of a valid plea bargain. This Court has held that a habitual offender sentence is proper in such cases.

ARGUMENT

ALBRITTON WAS PROPERLY SENTENCED AS A HABITUAL OFFENDER.

In King v. State, 681 So. 2d 1136 (Fla. 1996), this Court held that a defendant may not be sentenced as a habitual offender upon violating probation where his original sentence was imposed under the guidelines, as such a hybrid split sentence is not authorized by statute. However, where a defendant *agrees* to such a sentence *as* part of an otherwise valid plea agreement, then such a sentence may be imposed. Walker v. State, 682 So. 2d 555 (Fla. 1996).

Here, the record reflects that Albritton entered a plea to his three crimes with the express understanding that he would be treated as a habitual offender if he violated community control. Accordingly, like the defendant in Walker, Albritton agreed to a habitual offender sentence as part of a valid plea agreement, and, like the defendant in Walker, Albritton was properly sentenced as a habitual offender when he violated community control. See also Dunham v. State, 686 So. 2d 1356 (Fla. 1997).

Albritton contends that his plea agreement could not be enforced for two reasons. First, he argues that the plea agreement provided for a maximum sentence of 22 years as a habitual offender,

not a sentence of 60 years as ultimately imposed by the trial court.

Initially, the State notes that this argument has nothing to do with whether Albritton can be sentenced as ***a habitual offender,*** but rather disputes the appropriate length of such a sentence. This issue clearly goes beyond the scope of the conflict in the cases below and therefore need not be addressed by this Court.

Moreover, it is clear that at the time of the original proceedings in this case all parties understood that there was no 22 year cap on any future prison sentence, as Albritton contends now.

At his plea colloquy, Albritton specifically stated that he had read and understood the written plea agreement. (Plea Tr. I at 7-8). This agreement clearly sets forth the maximum possible sentence for each offense -- including ***life*** for the armed burglary. (R. 291). Indeed, the possibility of a life sentence upon violation of community control was made abundantly clear to Albritton at his original sentencing, with no question or objection at that time. (Sent. Tr. I at 4-6, 21-22, 25-26).

Albritton's actual notice of the possibility of a lengthy habitual sentence is further reflected in his conversations with his father, wherein Albritton stated he was afraid to return to

Florida because he would get a life sentence. (VOP Tr. at 8, 56-57). Albritton obviously understood the terms of the agreement he entered into -- including the severe sentence he faced if he came before the court again. His current argument that he really only faced a maximum 22 year sentence is refuted by the record and should be rejected.

Albritton also contends that he should not be subject to a habitual offender sentence at this point because the trial court failed to properly inform him of the consequences of habitualization -- specifically, the maximum sentences and the loss of eligibility for early release programs. Once again, this argument is refuted by the record.

It is obvious that Albritton had notice of the State's intent to seek habitualization well before he entered his plea. (Sent. Tr. II at 49). In fact, the plea agreement itself specifically stated that Albritton would be habitualized, and the plea colloquy reflected this understanding as well. (R. 291; Plea Tr. I at 5).

As noted above, Albritton confirmed that he had read and understood the written plea agreement. This agreement clearly sets forth the maximum possible sentence for each offense. (R. 291). Accordingly, Albritton cannot claim now that he was unaware of the maximum sentences for his crimes,

Albritton's argument regarding information as to his eligibility for early release programs should also be rejected. The record reflects that the trial court fully complied with all the plea colloquy requirements in effect at the time Albritton entered his plea.

The plea colloquy requirement at issue here -- informing the defendant of his plea's effect on early release programs -- was created in February of 1993, nearly a year after Albritton's plea hearing. See Ashley v. State, 614 So. 2d 486, 490 n. 8 (Fla. 1993). Prior to Ashley, ineligibility for early release was a mere collateral consequence, and there was no requirement that such a consequence be covered in the plea colloquy. See State v. Ginebra, 511 So. 2d 960 (Fla. 1987).

Ashley was not the law at the time of Albritton's plea, and its requirements should not be imposed retroactively to invalidate a plea that was fully voluntary. See State v. Will, 645 So. 2d 91, 94-96 (Fla. 3d DCA 1994).

Moreover, the failure to cover this one aspect of habitualization has never been applied as a per se rule of reversal which invalidates a voluntary plea, and it should not be so used in this case -- especially where there was never a motion to withdraw the plea below and Albritton has already reaped the benefits of his

plea agreement. See Horton v. State, 646 So. 2d 253, 256 (Fla. 1st DCA 1994); cf. Lewis v. State,, 636 So. 2d 154, 156 (Fla. 1st DCA) (where defendant managed to convince everyone to give him one last chance on community control, with the understanding that a habitual sentence would follow a violation, habitual sentence was properly imposed), rev. denied, 642 So. 2d 1362 (Fla. 1994).

The proceedings in this case reflect Albritton's full understanding of habitualization and its severe consequences, and he should not be allowed to escape these consequences now. At the time he entered his initial plea in this case, Albritton was fully aware that if he violated community control he would be given a severe habitual offender sentence. In fact, such a future sentence was an express part of his plea agreement at the time. Albritton did violate community control, and the trial court gave him the sentence he was warned of.

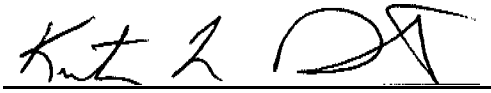
Because Albritton agreed, as part of his plea bargain, that he would be habitualized if he violated his community control, his habitual offender sentence should be approved by this Court.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully requests this honorable Court approve the result reached by the district court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Respondent's Brief on the Merits has been furnished by U.S. mail to Joseph A. Frein, 118 East Jefferson Street, Orlando, Florida 32801, this 30th day of September, 1997.

Kristen L. Davenport
Counsel for Respondent

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STATE OF FLORIDA,

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RESPONDE ' PPENDIX

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William ALBFUTTON, Appellant,
v.
STATE of Florida, Appellee.

No. 94-2765.
District Court of Appeal of Florida,
Fifth District.
Sept. 6, 1996.
Rehearing Denied Oct. 15, 1996,

Appeal from the Circuit Court for Osceola County, Jose R. Rodriguez, Judge.

Joseph A. Frein, Winter Park, for Appellant.

Robert A, Butter-worth, Attorney General, Tallahassee, and Kristen L. Davenport, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED., See *Snead v. State,* 616 So.2d 964, 965 (Fla.1993); *King v. State, 648* So.2d 183. 185 (Fla. 1st DCA 1994), rev. *granted, 659* So.2d 1087 (Fla. 1995).

HARRIS, THOMPSON and ANTOON, JJ., concur.