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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 92,254

WILLIAM THOMPSON, :

Respondent. :

_____:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

DEBORAH K. BRUECKHEIMER
Assistant Public Defender
FLORIDA BAR NUMBER 0278734

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(941) 534-4200

ATTORNEYS FOR RESPONDENT

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OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

In the present case the trial court failed to advise Mr. Thompson of the full consequences of his plea to a possible habitualized sentence when it failed to inform Mr. Thompson that habitualization may affect the possibility of early release. There is also the additional factor that Mr. Thompson was not told that the State wished to habitualize his sentence until about five minutes before the plea. The trial court erred in accepting Mr. Thompson's plea; this issue is apparent on the face of the record so that it can be raised for the first time on appeal, and Mr. Thompson is entitled to either be sentenced pursuant to guidelines without regard to habitualization **or** is entitled to withdraw his plea.

This case is not moot because there are two problems with the plea -- lack of proper notice of intent to habitualize, as well as failure to inform of the possible affects of habitualization on early release. In addition, there are factors out there (such as controlled release being reinstated) that could affect Mr. Thompson's habitualized sentence even if such a factor has no present affect on the sentence.

ARGUMENT

ISSUE

WAS THE PLEA VOLUNTARILY ENTERED IN THIS CASE?

At the plea hearing the trial court asked if Mr. Thompson understood that he was facing up to 30 years on one count and 10 years on another count as a habitual offender. (V1/R46,47) Nowhere during this open plea of nolo contendere does the trial court ask Mr. Thompson if he is also aware of the fact that habitualization may affect the possibility of early release. This failure was a fatal flaw in accepting the plea, and Mr. Thompson should be allowed to withdraw his plea.

In Ashley v. State, 614 So. 2d 486 at 490 (Fla. 1993), this Court held ". . . that in order for a defendant to be habitualized following a guilty or nolo plea, the following must take place prior to acceptance of the plea: 1) The defendant must be given written notice of intent to habitualize, and 2) the court must confirm that the defendant is personally aware of the possibility and reasonable consequences of habitualization." In a footnote, "reasonable consequences of habitualization" are defined as the maximum habitual offender term for the offense, the fact that habitualization may affect the possibilities of early release through certain programs, and if habitual violent felony offender provisions are at issue then the minimum mandatory term. Id. Ashley goes on to note that the defendant's failure to object in the case was not a bar to raising this issue. No contemporaneous

objection is required to preserve a purely legal sentencing issue. "The requirement of rule 3.172 and section 775.084 concerning pre-plea notice of habitualization is clearly a legal matter, involving no factual determination." Id. Significantly, this Court noted that Ashley did not seek to withdraw his plea in this appeal but wanted a guidelines sentence imposed. This Court reversed for a guidelines sentence on a departure sentence inasmuch as that was consistent with the terms under which Ashley's plea was proffered and accepted. Id. at 491.

More recently in State v. Wilson, 658 So. 2d 521 at 522 (Fla. 1995), this Court re-emphasized the language in Ashley defining "reasonable consequences of habitualization" to include both the maximum habitual offender term for the offense **and** the fact that habitualization may affect the possibility of early release through certain programs. In Wilson, the State provided the written notice of intent to habitualize before the plea was accepted, thereby meeting the first requirement of Ashley; however, the trial court's failure to confirm that the defendant was aware of the possibilities of habitualization -- i.e., the maximum habitual offender term and the possibility of not being eligible for certain programs affecting early release -- made the plea involuntary. The defendant was allowed to withdraw his plea. Significantly, Wilson involved raising this Ashley issue for the first time on the direct appeal. Wilson had not filed a motion to withdraw his plea, but this Court held that Wilson was not entitled to be resentenced

within the terms of Wilson's plea. This Court ordered that Wilson be allowed to withdraw his plea due to the invalidity of the plea.

The State claims the dictates of Ashley and Wilson should not be applied to Mr. Thompson's case for several reasons, but all of these reasons fail:

(1) The State tries to claim that Ashley is factually distinguishable because Ashley attempted to withdraw his plea at the trial court level and Mr. Thompson did not attempt to withdraw his plea. What the State fails to mention is that at the appellate level Ashley did not want to withdraw his plea but wanted his plea agreement enforced. Ashley got what he wanted -- this Court did not set aside the plea agreement and ordered that Ashley be sentenced without habitualization. It is also to be noted that Wilson did not try to withdraw his plea and argued that he be sentenced without regard to habitualization. Although this Court did not give Wilson the same remedy as Ashley, it did allow Wilson to withdraw his plea.

(2) The State tried to argue that both Ashley and Wilson are distinguishable because Ashley was not given any notice of habitualization prior to entering his plea and Wilson was given notice of habitualization but not told any of the consequences of habitualization. The State is trying to fracture this Court's holding in Ashley and Wilson into small pieces. Both Ashley and Wilson require two basic elements prior to the acceptance of the plea -- defendant given written notice of intent to habitualize **and** the trial court must confirm that the defendant is personally aware of

the possibility and reasonable consequences of habitualization. Reasonable consequences of habitualization is then defined as maximum habitual offender terms for the offense, the fact that habitualization may affect the possibilities of early release through certain programs, and minimum mandatory terms if habitual violent felony offender provisions are at issue. It is readily apparent from Wilson that three basic things are required when a defendant is entering a plea and is facing a non-violent habitualized sentence: prior notice of habitualization, the maximum habitualized sentence, and that habitualization may affect the possibility of early release through certain programs. If any of these three are missing, the plea was not knowingly and voluntarily entered. In Horton v. State, 646 So. 2d 253 (Fla. 1st DCA 1994), the First District held that giving the defendant prior notice of habitualization and the maximum habitualized sentences was good enough. Language about how habitualization may affect early release was only considered "aspirational," but failure to advise a defendant that habitualization may affect early release did not render the plea involuntary. After this Court issued Wilson, the First District was forced to reverse its decision in Horton based on "exceptional circumstances and where reliance on the previous decision would result in manifest injustice." Horton v. State, 682 So. 2d 647 at 648 (Fla. 1st DCA 1996), citing from Preston v. State, 444 So. 2d 939 at 942 (Fla. 1984). Horton was then allowed to withdraw his plea because he was not told the effect habitualization would have on his gain time. Thus, the State's argument

that complying with **some** of the Ashley requirements is "good enough" has been answered in Wilson with a resounding "no." The ultimate decision in Horton clearly points out that telling a defendant **all** the possible consequences of habitualization is required in Wilson, not just some of the consequences.

(3) The State argues that the jurisdictional aspect of raising such an attack on the habitualized sentence for the first time on appeal was not considered by this Court in either Ashley or Wilson. This argument assumes that jurisdiction was not raised or even considered by this Court. Jurisdiction, of course, is an issue that can be addressed at any time, and this Court could have considered it sua sponte. See Martin Electronics, Inc. v. Glombowski, 705 So. 2d 26 (Fla. 1st DCA 1997); Polk v. Sofka, 702 So. 2d 1243 (Fla. 1997). When this Court decided Wilson, it had before it the Fourth District's decision in Wilson v. State, 645 So. 2d 1042 (Fla. 4th DCA 1994); and that decision discusses jurisdiction of raising the issue without having first tried to withdraw the plea on the trial court level. Id. at 1045, fn. 3. Thus, the issue of whether or not a motion to withdraw the plea must be filed before the habitualized sentence could be raised on appeal was there for all to see. It is also to be noted the neither Ashley nor Wilson wanted to withdraw their pleas but wanted a non-habitualized sentence enforced pursuant to their plea agreements. Ashley won this relief and Wilson did not. However, neither Ashley nor Wilson wanted to withdraw their pleas. If a defendant does not want to withdraw his plea, then it makes no sense to require a defendant to

file a motion to withdraw the plea before the habitualized sentence can be raised on appeal. Inasmuch as the failure to properly inform the defendant as to the consequences of the habitualized sentence when a plea is taken is obvious on the face of the record and, pursuant to Ashley, no contemporaneous objection is required to preserve this purely legal sentencing issue, such an issue can be raised for the first time on appeal.

The State cites to two District Court cases that have recently decided that an Ashley issue must first be raised in the trial court -- Williams v. State, 691 So. 2d 484 (Fla. 4th DCA 1997); and Rhodes v. State, 704 So. 2d 1080 (Fla. 1st DCA 1997). The Fourth acknowledged in Williams that prior decisions that court had issued had entertained on a direct appeal an Ashley issue and that it was receding from those cases. Neither case addresses the issue of what if the defendant doesn't want to withdraw his plea, and both cases rely on Robinson v. State, 373 So. 2d 898 (Fla. 1979). Respondent has already addressed the issue of a motion to withdraw plea not being the proper remedy in all Ashley issues, so the application of Robinson will now be addressed.

Rhodes claims that this Court held in Robinson that a defendant **cannot** challenge the validity of a plea for the first time on direct appeal. However, Robinson points out that an appeal from a guilty plea should never be a substitute for a motion to withdraw a plea and issues concerning the voluntary or intelligent character of the plea **should** first be presented to the trial court in a motion to withdraw the plea. Robinson does not prohibit such

direct appeals, but only states they "should" be presented to the trial court first. Robinson does not state that issues on the voluntary/knowing nature of the plea **must** be presented to the trial court first. Robinson involved a defendant who entered a guilty plea and had his appeal dismissed on the district court level because it was frivolous. This Court held that when a defendant pleads guilty, his appeal issues are limited to only the following:

> (1) the subject matter jurisdiction,
> (2) the illegality of the sentence,
> (3) the failure of the government to abide by the plea agreement, and
> (4) the voluntary and intelligent character of the plea.

Robinson, 373 So. 2d at 902. The last area does **not** state or include that the voluntary and intelligent character of the plea can **only** be raised if a motion to withdraw the plea is filed first.[1] And, although Robinson says an issue concerning the character of the plea **should** first be presented to the trial court, this Court went on to examine the entire record and found there was no error in the presentation and acceptance of the defendant's negotiated plea. Thus, this Court had the jurisdiction to review the face of the record for issues which occurred contemporaneously with the entry of the plea; and finding no grounds for appeal, held that dismissing the appeal was justified. Dismissing the appeal, however, was only a proper remedy after the record was examined for

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[1] In January 1997, Appellant Rule of Procedure 9.140(b)(2)-(B)(iii) was amended to add this language to an attack on a plea. This addition should not apply to Mr. Thompson's case where the defect occurred in 1995 and was immediately attacked in the direct appeal. This addition should also reinforce the concept that such an act was **not** required before January 1997.

issues in the limited four areas. This Court also said "the failure of a defendant to raise the issue of the validity of the plea by an appeal does not prohibit him from subsequently seeking collateral relief if the issues have not been previously addressed and ruled upon." Robinson, 373 So. 2d at 903. This statement implies that a defendant **can** raise the validity of the plea on appeal. The bottom line is that Robinson did **not** hold that a challenge to the voluntariness of a plea must be first raised at the trial level and that an appellate court has **no** jurisdiction to consider such an issue on the direct appeal. By examining the record and the plea, this Court found it had jurisdiction to consider such an issue; and when it came upon the Ashley issue several years later, it discovered an attack on a plea that was evident on the face of the record, required no contemporaneous objection, and did not require the withdrawal of the plea as the appropriate remedy but the enforcement of the plea. Ashley and Wilson do **not** conflict with Robinson but are in accord with its basic principles.

The State's claim that the plea was only defective in one minor aspect that must be attacked on the trial court level first is further diminished by the fact that Mr. Thompson was not given proper notice that he was facing a habitualized sentence. Although the Second District found the failure to give notice of habitualization to Mr. Thompson prior to the plea hearing (notice was given **at** the plea hearing) to be harmless error because neither Mr. Thompson nor his attorney objected and the record does not show

that defense counsel was unprepared to deal with the State's request for habitualization, this analysis was erroneous.

Massey v. State, 609 So. 2d 598 (Fla. 1991), dealt with a defendant who was given oral notice at trial that the state wished to have the defendant sentenced as an habitual offender. Sentencing was more than 3 months later, and the defendant complained he had not been given **written** notice. Because the defendant had been put on notice of the State's intent to seek habitualization and had the opportunity to prepare for the hearing, the error to provide written notice was deemed harmless. There are two important things to note about Massey -- the defendant had a trial and did not plead, and the burden was on the State to affirmatively prove no harm had resulted to the defendant as a result of the technical error.

In Ashley, 614 So. 2d at 490, this Court quoted approvingly from Inmon v. State, 383 So. 2d 1103 at 1104 (Fla. 2d DCA), rev. den., 389 So. 2d 1111 (Fla. 1980), when it found that the requirements of §775.084(3)(b), Fla. Stat. (1987), as to giving notice of intent to habitualize meant that "the State shall serve notice on the defendant either before he enters a plea of guilty or nolo contendere, **or**, in the event he enters a plea of not guilty and submits to trial, prior to the imposition of sentence." In Massey the defendant had gone to trial, so he had to have notice prior to sentencing. He received oral notice more than 3 months prior to sentencing. In plea situations, however, the notice requirement is different -- the notice is required prior to the plea hearing. In Mr. Thompson's case the State provided notice **at** the plea hearing

only a few minutes before Mr. Thompson was to enter his plea. Under §775.084(3)(b), Fla. Stat. (1993), which requires "a sufficient time prior to the entry of a plea" for the notice of intent to seek habitualization, Mr. Thompson was not given sufficient time prior to the entry of his nolo plea in which to be put on notice of habitualization and all of its consequences.

Ashley does not require a contemporaneous objection; and even though Mr. Thompson's attorney went ahead with the plea in spite of the lack of notice, there is nothing in the record that shows that defense counsel was prepared for such a notice.[2] In addition, the trial court's failure to inform Mr. Thompson of all the possible, reasonable ramifications of a habitualized sentence add up to a plea that was not knowingly and intelligently made. It is the State's burden to prove no harm was done to Mr. Thompson as a result of their not providing adequate notice of its intent to seek habitualization, and the record does not establish the State met its burden.

Because the notice requirements of §775.084(3)(b), Fla. Stat. (1993) -- sufficient notice prior to the plea hearing **and** written notice to both the defendant and defense counsel -- were not complied with by the State when the prosecutor provided written notice **only** to Mr. Thompson (and **not** to Mr. Thompson's attorney) a few minutes before the plea hearing, Mr. Thompson's sentence as a habitual offender was illegal. Since the notice requirements were

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[2] The State did not even provide written notice to defense counsel as is required under the statute. (V1/R46)

totally ignored by the State, Mr. Thompson specifically requests this Court find that the trial court did not have the option of sentencing him as a habitual felony offender at the time of the original sentencing hearing. This Court should remand this case with instructions for the trial court to sentence Mr. Thompson within the range of 36.3 state prison months and 60.5 state prison months as permitted under the sentencing guidelines scoresheet signed by the trial court. In Snead v. State, 616 So. 2d 964 (Fla. 1993), this Court held that the trial court did not have the option of sentencing a defendant to a habitualized sentence upon a violation of probation if the State had not sought habitualization at the original plea hearing prior to being placed on probation. Since the trial court did not have the option of imposing a habitual offender sentence when the defendant pled and was placed on probation, habitualization was not an option when the defendant violated probation. The same principle can be applied in this case. Since the State did not give proper notice at the plea hearing, habitualization was not an option. Mr. Thompson, as in Ashley, does not want to withdraw his plea; he only wants a non-habitualized sentence.

If this Court disagrees with this requested remedy, then remand is necessary in which to allow Mr. Thompson to withdraw his plea due to its lack of voluntariness.

The last issue the State raises -- for the first time -- is that Mr. Thompson's issue is moot because he has no adverse consequences to his early release because of the habitualization. This

argument, of course, only applies to the lack of information as to the consequences of habitualization as it may affect early release and does not apply to the argument of lack of notice (which was made to the district court). Since Mr. Thompson makes both arguments, his case is not moot; but if this Court only addresses the failure of being informed that habitualization may affect the possibility of early release, then there are two reasons why this case is not moot.

First, Ashley requires the defendant be informed that habitualization **may** affect the possibility of early release, not that it definitely would affect early release. Statutes are changing all the time, and a defendant's right to credit while in prison is not guaranteed in all circumstances. See Britt v. Chiles, 704 So. 2d 1046 (Fla. 1997); Orosz v. Singletary, 693 So. 2d 538 (Fla. 1997); State v. Lancaster, 687 So. 2d 1299 (Fla. 1997); Griffin v. Singletary, 638 So. 2d 500 (Fla. 1994). The question is whether the State can guarantee that Mr. Thompson's habitual offender status will have no affect -- past, present or future -- on his 10-year sentence. This, of course, then brings us to the second reason why mootness is not an issue. As this Court pointed out in Ashley, impact can include early parole release. As noted in Ferguson v. State, 677 So. 2d 968 at 969, fn. 4 (Fla. 3d DCA 1996), controlled release under §947.146(2), Fla. Stat. (1995), became void effective July 1, 1996. However, it can be reinstated if needed to control prison population. Should it ever be reinstated, there may be strings attached to habitualized sentences. The concept of inform-

ing a defendant of possible consequences to early release, therefore is not a moot one.

CONCLUSION

Based on the foregoing arugment and authorities, Mr. Thompson respectfully requests this Honorable Court to remand this case with instructions for the trial court to sentence him within the range of 36.3 state prison months and 60.5 state prison months as permitted under the sentencing guidelines scoresheet signed by the trial court or, in the alternative, allow Mr. Thompson to withdraw his plea due to its lack of voluntariness.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ronald Napolitano, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 29 day of July, 1998.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(941) 534-4200

DEBORAH K. BRUECKHEIMER
Assistant Public Defender
Florida Bar Number 0278734
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

DKB/ddv