ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

WILLIAM THOMPSON,

Respondent.

Case No. 92,254

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

The opinion of the Second District Court of Appeal, in the instant case of Thompson v. State, No. 95-02363 (Fla. 2d DCA January 9, 1997) [a substitute opinion for the Second District's previous opinion which was issued on October 8, 1997 published at 22 Fla. L. Weekly D2386 upon consideration of the petitioner's Motion for Clarification and Certification of Conflict] a copy of which is appended hereto, outlines the relevant facts at this stage of the proceedings.

Respondent Thompson took a direct appeal of his habitual felony offender sentence which was imposed after he entered an open plea of no contest to the charge of escaping from police custody, obstructing or opposing an officer with violence. The Second District held that respondent received sufficient notice of the state's intent to seek an habitual offender sentence and that informed of the maximum habitual offender terms for each felony offense but that the trial court failed to advise the respondent that habitualization might effect the possibility of early release. Relying on this Court's decision in Ashley v. State, 614 So.2d 486 (Fla. 1993), the Second District vacated the habitual offender sentenced and pursuant to this Court's reasoning in State v. Wilson, 658 So.2d 521 at 523 (Fla. 1995) remanded the case to the trial to give the respondent an opportunity to withdraw his plea.

The Second District, in its substituted opinion at footnote 1

acknowledged conflict with the Fourth District Court of Appeal in the case of Williams v. State, 691 So.2d 484 (Fla. 4th DCA 1997).

SUMMARY OF THE ARGUMENT

ARGUMENT

ISSUE I: WHETHER CONFLICT EXISTS BETWEEN THE INSTANT DECISION AND DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS ON THE ISSUE OF WHETHER A TRIAL COURT'S FAILURE COMPLY WITH THE ASHLEY V. STATE, 614 SO.2D 486 (FLA. 1993) MAY BE RAISED ON DIRECT APPEAL FROM A JUDGMENT AND SENTENCE ENTERED ON A NO OR GUILTY PLEA, OR MUST THE DEFENDANT FIRST SEEK COLLATERAL REVIEW?

The Second District acknowledges in footnote 1 of its substituted opinion that its holding conflicts with that of the Fourth District in Williams v. State, 691 So.2d 484 (Fla. 4th DCA 1997). In Williams, *id.* at 485, the fourth District in an en banc decision held:

> Even in matters involving alleged *Ashley* violations, a defendant is precluded from bringing a direct appeal when judgment has been entered on a plea of guilty or nolo contendere. A defendant may not appeal from a judgment entered on his guilty plea or from a judgment "entered on a plea of nolo contendere without an express reservation of the right of appeal from a prior order of the lower tribunal, identifying with particularity the point of law being reserved. Fla. R. App. P. 9.140(b).
>
> In the instant case, since appellant has not expressly reserved the right to direct appeal, he may obtain review only by collateral attack. S. 924.06(3); *see Robinson v. State*, 373 So.2d 898, 901-902 (Fla. 1979); *Norman v. State*, 634 So.2d 212, 213 (Fla. 4th DCA 1994).

The decision of the Second District is also in direct and

express conflict with the reasoning of the First District in Rhodes v. State, 22 Fla. L. Weekly D 2733 (Fla. 1st DCA December 1, 1997). In Rhodes, *id.*, the First District stated that the failure to advise the defendant of certain legal consequences such as the loss of gain time, affects only the validity of the plea and can be corrected by allowing the defendant to withdraw his plea the permission of the court. However, as the court noted in Rhodes, *id.*, a challenge to the validity of the plea may not be asserted on direct appeal but must first be addressed to the trial court by a motion to withdraw his plea in accordance with the dictates in Robinson v. State, 373 So.2d 898 (Fla. 1979).

The First District in Rhodes, *supra.*,also distinguished this Court's reasoning in State v. Wilson, 658 So.2d 521 (Fla. 1995):

> [t]hat decision does not modify the existing preservation of error The issue settled in *Wilson* was the proper remedy for an *Ashley* violation, not the requirement for preserving such a claim for review. It does not appear to us that the supreme court intended to recede from its holding in *Robinson* that a defendant may not challenge the voluntariness of a guilty plea on direct appeal unless the issue has been preserved for review by a motion to withdraw the plea.

Since Second District's substituted opinion in the instant case expressly and directly conflicts with the decision of the Fourth District in Williams, *supra.*, and with reasoning of First District in Rhodes, *supra.*, this Court has jurisdiction to review the instant case on the basis of conflict and should exercise that

jurisdiction in order to resolve the conflict between the Second District in the instant case and the Fourth District and First districts in the cases of Williams, *supra*., and Rhodes, *supra*, respectively.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Petitioner respectfully requests that this Honorable Court exercise its discretion to review the instant case and resolve the existent conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to John N. Conrad, Esq., 1104 North Parsons Avenue, Brandon, Florida 33510-3112, this 15th day of January, 1998.

COUNSEL FOR PETITIONER

IN THE DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

January 9, 1998

WILLIAM THOMPSON, Appellant, v. STATE OF FLORIDA, Appellee.	)	CASE NO. 95-02363

BY ORDER OF THE COURT:

ORDER

Upon consideration of the State's Motion for Clarification and Certification of Conflict, we withdraw this court's previous opinion in this case, which was issued on October 8, 1997, and published at 22 Fla. L. Weekly D2386, and substitute the attached opinion therefor.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK

DISTRICT COURT OF APPEAL SECOND DISTRICT SAT CITO SI RECTE STATE OF FLORIDA

cc: John N. Conrad, Brandon.
Ron Napolitano, Assistant Attorney General, Tampa.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

WILLIAM THOMPSON,	)	
	)	
Appellant,	)	
	)	
v.	)	CASE NO. 95-02363
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

Opinion filed January 9, 1998.

Appeal from the Circuit Court for Hillsborough County; Cynthia Holloway, Judge.

John N. Conrad of Law Office of John N. Conrad, Brandon, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Ronald Napolitano, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

William Thompson appeals his habitual felony offender sentence which the trial court imposed after Thompson entered an open no contest plea to escaping from police custody, obstructing or opposing an officer with violence, no valid driver's license and alteration of license plates. Because the trial court failed to comply with

the requirements of Ashley v. State, 614 So. 2d 486 (Fla. 1993), we vacate the habitual offender sentences imposed and remand for further proceedings.[1]

First, Thompson asserts that the State failed to provide proper written notice of its request for a habitual felony offender sentence. Thompson argues that the service of the notice at the outset of the status hearing was not a sufficient time prior to the entry of his plea and that the State failed to serve defense counsel with written notice.

At the status hearing, the State announced:

> Your Honor, at this time the State is going to file its notice of its intent to treat this defendant as a habitual felony offender, serving a copy of that notice on the defendant and on the clerk.
>
> I don't have one for [defense counsel]. She can copy her client's.

Defense counsel immediately replied, "Judge, my client knew this was coming as of about five minutes ago, but we've discussed the case and we don't feel that we need to waste the Court's time with a trial just because he's been noticed." Thompson then entered his pleas.

Section 775.084(3)(b), Florida Statutes (1993), provides, "Written notice shall be served on the defendant and his attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence so as to allow the preparation of a

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[1] The State challenges this court's jurisdiction and asks that the following question be certified: "In matters involving the trial court's failure to comply with Ashley, 614 So. 2d 486, may a defendant file a direct appeal when a judgment is entered on a no contest or guilty plea, or must he first seek collateral review." The State also asks this court to certify conflict with Williams v. State, 619 So. 2d 484 (Fla. 4th DCA 1997). We decline to certify the question as one of great public importance. However, we acknowledge conflict with Williams.

submission on behalf of the defendant."[2] In this case, the State provided notice before Thompson entered his plea and there is no indication that Thompson did not have adequate time for preparation. In fact, defense counsel's comment indicates the contrary. Furthermore, both counsel and Thompson essentially received the written notice, regardless of whether they each had a copy to call their own.

Even if we construed these facts to be violations of the proper procedure for providing notice, they are so inconsequential that they do not require vacating the habitual felony offender sentence. In Massey v. State, 609 So. 2d 598, 600 (Fla. 1992), the supreme court held that a trial court's failure to strictly comply with the notice requirement of section 775.084(3)(b) is subject to the harmless error analysis. There is no question that Thompson and his attorney were aware that the State sought habitual felony offender sentencing. Moreover, there is no suggestion in the transcript that either Thompson or his counsel objected to or was unprepared to deal with the State's request for imposition of habitual felony offender sentences. Accordingly, we hold that Thompson's habitual felony offender sentence should not be vacated on this ground.

Second, Thompson asserts that the trial court failed to advise him of the possibility of habitualization and its consequences. The following colloquy took place concerning habitual offender sentencing:

> THE COURT: Do you understand the representations made by [defense counsel] that you will enter a plea of no contest to one count of escape from police custody, a second

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[2] The defendant's sentence is governed by the version of the habitual felony offender statute in effect on the date of his offense. See Bond v. State, 675 So. 2d 184, 185 (Fla. 5th DCA 1996); Williams v. State, 600 So. 2d 524, 526 (Fla. 2d DCA 1992); Wahl v. State, 568 So. 2d 1303, 1305 (Fla. 2d DCA 1990).

> degree felony which carries a maximum sentence of 15 years Florida State Prison as a regular sentence or 30 years Florida State Prison as a habitual felony offender?
>
> A. Yes, ma'am.
>
> Q. In addition you are charged with one count of obstructing or opposing an officer with violence, charged as a third degree felony carrying a 5 or 10 year Florida State Prison sentence.
>
> A. Yes, ma'am.

Under Ashley, 614 So. 2d at 490, the trial court must confirm that the defendant is personally aware of both the possibility of and the reasonable consequences of habitualization. The supreme court explained the proper inquiry by the trial court as follows:

> The defendant should be told of his or her eligibility for habitualization, the maximum habitual offender term for the charged offense, the fact that habitualization may affect the possibility of early release through certain programs, and, where habitual violent felony offender provisions are implicated, the mandatory minimum term.

Ashley, 614 So. 2d at 490 n. 8. In this case, the plea colloquy quoted shows that the trial court told Thompson he was eligible for habitualization and informed him of the maximum habitual offender terms for each felony offense. However, Thompson was not told that habitualization might affect the possibility of early release. Therefore, Ashley requires that we vacate the habitual felony offender sentence on this ground and remand for resentencing. At resentencing, Thompson should be given the opportunity to withdraw his plea and proceed to trial if he desires. Should Thompson

plead no contest or guilty, the trial court may in its discretion resentence him under the guidelines or impose a habitual felony offender sentence if the requirements of section 775.084 and Ashley are met. See Wilson, 658 So. 2d at 523; Collins v. State, 687 So. 2d 919, 920 (Fla. 2d DCA 1997); Bell v. State, 624 So. 2d 821, 821-822 (Fla. 2d DCA 1993).

PARKER, C.J., and PATTERSON and FULMER, JJ., Concur.