IN THE SUPREME COURT OF FLORIDA

SID J. WHITE

JUN 15 1998

CLERK, SUPREME COURT
By
Chief Deputy Clerk

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

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent was charged by information 95-2563 with the offenses of Escape (count 1); Obstructing or Opposing an Officer with Violence (count 2);No valid Driver's License (count 3);and Alteration of License Plates (count 4). (R 11-12). All of the offenses occurred on February 22, 1995. (R 11-22).

The case was called for status review on April 20, 1995 (R 2). The prosecutor immediately advised the trial court:

> 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 Ms. Swanick. She can copy her client's.

(R 46)

Defense Counsel (Ms. Swanick) then advised the court:

> 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.
>
> We're going to enter a no contest plea today and I guess we need a PSI and put it off for sentencing.

(R 46)

Respondent was then sworn (R 46). The plea colloquy then followed. Appellant was advised of the maximum penalties for his offenses including the enhanced penalties for habitualization:

> Q. Do you understand the representation

made by Ms. Swanick that you will enter a plea of no contest to count one of escape from police custody, a second 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.

Q. There are two misdemeanor charges, a no valid driver's license and alteration of a license plate. Do you understand that.

A. Yes, ma'am.

(R 46-47)

The plea colloquy continued and included a factual basis for the plea (R 47-48). The case was continued for sentencing to May 19, 1995 and a PSI was ordered. (R 48-49).

On April 28, 1996, respondent filed a written motion for a downward departure sentence requesting drug treatment. (R 16-18).

At the sentencing hearing conducted on May 19, 1995, defense counsel again advised the court that respondent had entered, "an open no contest plea to the court," and that the defense had filed a motion for downward departure and was asking that the court not sentence the appellant to prison. (R 53). The defense presented testimony from respondent's brother and sister regarding appel-

lant's abuse of drugs and that they believed that appellant is sincere in his desire to seek drug treatment. (R 54-56). Respondent, himself, apologized to the court and to his family for what happened, and that he realizes that he has no control over drugs. (R 56).

Defense counsel advised the court:

> Additionally he from the onset since I met him at arraignment has never indicated that he wanted to fight these charges or waste the court's time. He admitted his guilt from the start, but a focus on he's sick and tired of the life that he has been leading and interested in rehabilitation. (R 57).

The state called Officer D.L. Williams of the Tampa Police Department, Career Criminal Unit. Officer Wilson advised the court that respondent has been targeted as a career criminal, that he surpasses the state requirement of two priors, that he has 9 priors, has preyed not only upon his victims, but on the taxpayers of Tampa, costing an enormous amount of money in investigation, incarceration and supervision in the past. (R 57). Officer Wilson asked that the court impose the highest sentence possible. (R 57).

The State presented a composite exhibit of certified copies of appellant's prior convictions. (R 58, 62-103). These exhibits indicated convictions in July of 1994 for sale of counterfeit controlled substance and obstructing an officer without violence for which appellant received concurrent 10 month sentences (R 95-103); a conviction in September of 1992 of grand theft in the third de-

gree for which he received time served (R 92-94); a conviction in April 1990 for sale of counterfeit controlled substance for which he received a sentence of 3 ½ years imprisonment (R 88-91); convictions in July 1989 for possession of cocaine, possession of drug paraphernalia, trespass in an unoccupied structure, and obstructing or opposing an officer without violence for which he was sentenced to 30 months on the cocaine charge and to time served on the other offenses (R 81-87); convictions in October of 1988 for robbery and obstructing or opposing an officer without violence for which he was sentenced to 3 ½ years on the robbery and time served on the obstruction charge (R 76-80); convictions in January of 1986 for carrying a concealed firearm, felon in possession of a firearm, and grand theft for which he received concurrent sentences of 1 year and a day (R 67-76); and convictions in June 1979 for possession of cocaine and battery on a law enforcement officer for which he was sentenced to 18 moths on the possession charge and a consecutive sentence of 2 years probation of the battery on a law enforcement officer charge. (R 63-63-66).

The defense suggested that the court give the respondent a suspended sentence on the condition that he complete drug treatment. (R 59).

The court found that because of the respondent's long standing record and the convictions in September of 1992 for grand theft and in July of 1994 for sale of a counterfeit controlled substance

which were within the 5 years time period as well as the other convictions contained in the composite exhibit she would sentence the appellant as an habitual felony offender. (R 60).

Respondent was sentenced to 10 years imprisonment as an habitual felony offender concurrent for counts 1 and 2 (Escape from police custody and obstructing an officer with violence) and to time served on the misdemeanor counts 3 and 4. (R 60, 27-34). The sentencing guidelines provided for a sentencing range of 36.3 months to 60.5 months. (R 23).

Respondent took a direct appeal to the Second District Court of Appeals. The Second District found that the state had provided proper written notice of its intent to seek an habitual offender sentence. Thompson v. State, 706 So.2d 1361, at 1362 (Fla. 2d DCA 1998). However, the Second District found that the trial court failed to satisfy the second prong of Ashley v. State, 614 So.2d 486, at 490 (Fla. 1993), which the Court stated to be that the trial court "must confirm that the defendant is personally aware of the possibility and reasonable consequences of habitualization". The Second District cited to this Court's explanation of "possibility and consequences of habitualization" in footnote 8 of Ashley, *Id.*, wherein it was stated:

> 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 effect the possibility of early release through certain programs*, and, where habitual

felony offender provisions are implicated, the mandatory minimum term. (Emphasis added)

The Second District found that the trial court's plea colloquy was deficient because the respondent was not told that habitualization might effect the possibilities of early release. Thompson, *supra.* at 1363. The Second District found that Ashley, *supra.*, required that the habitual offender sentence be vacated and the case remanded for resentencing. Based upon this Court's reasoning in State v. Wilson, 658 So.2d 521 (Fla. 1995), the Second District held that respondent should be given an opportunity to withdraw his plea. Thompson, *supra.* at 1363.

The Second District rejected petitioner's challenge to the district court's jurisdiction and refused to certify the question, "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?" as one of great public interest. The Second District did acknowledge conflict with Williams v. State, 691 So.2d 484 (Fla. 4th DCA 1997).

This Court has accepted jurisdiction.

SUMMARY OF THE ARGUMENT

This Court should resolve the conflict of appellate decisions by adopting the reasoning of the First District in Rhodes v. State, 704 So.2d 1080 (Fla. 1st DCA 1997), and determine that a defendant who enters a plea of guilty or no contest may not take a direct appeal of an Ashley error regarding the failure of the trial court to ascertain that the defendant was aware of the sentencing consequences of habitualization (especially its effect on a defendant's eligibility for certain early release programs) unless he or she first preserves the issue at the trial level by filing a motion to withdraw the plea.

Moreover, even if this Court should reach the merits of the issue, any failure to advise the respondent that sentencing him as an habitual felony offender could effect his eligibility for certain early release programs was harmless error in this case. Based upon the laws in effect on the date the respondent committed his offenses, the habitual offender statute did not effect his eligibility for any early release programs.

ARGUMENT

ISSUE I

IN CASES INVOLVING AN ASHLEY VIOLATION (ASHLEY V. STATE, 614 SO.2D 486 (FLA. 1993) REGARDING THE FAILURE TO ADVISE A DEFENDANT ABOUT THE FACT THAT HABITUALIZATION MAY EFFECT HIS POSSIBILITY FOR EARLY RELEASE THROUGH CERTAIN PROGRAMS, MAY A DEFENDANT FILE A DIRECT WHEN A JUDGMENT IS ENTERED ON A NO CONTEST OR GUILTY PLEA OR MUST HE FIRST SEEK COLLATERAL REVIEW?.

The opinion of the Second District Court of Appeals in Thompson v. State, 706 So.2d 1361 (Fla. 2d DCA 1998) on this issue conflicts not only with the Fourth District in Williams v. State, 691 So.2d 484 (Fla 4th DCA 1997) but also with the reasoning of the First District in Rhodes v. State, 704 So.2d 1080 (Fla. 1st DCA 1997).[1]

In Ashley v. State, 614 So.2d 486 (Fla. 1993), the defendant, at the time he entered his plea (July 24, 1990), had not been notified that the state intended to seek an habitual offender sentence. Notice was filed 3 days after the plead has been accepted. *Id.* At 487. Additionally, Ashley had not been advised of the possibility or consequences of habitualization at the time he entered his plea; the entire discussion focused on the sentencing guidelines and suggested a forthcoming guidelines sentence. *Id.* 490. Ashley un-

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[1]This case was cited to the Second District in a notice of supplemental authority which was filed while a motion for clarification/certification of conflict jurisdiction and a question of great public importance was pending before the court.

successfully sought to withdraw his plea on August 29, 1990 and on October 31, 1990, was sentenced to 6 years imprisonment for battery on a law enforcement officer (a third degree felony - 5 year maximum sentence). *Id.* at 487. This Court held that in order for a plea to be voluntary the defendant must understand the consequences of his plea and that this includes the maximum penalty that can be imposed for the offense he has committed. *Id.* at 488. The Court noted that the Fla. R. Crim. Pro. 3.172(c)(1) provides that in determining the voluntariness of a plea, that the trial judge should insure that the defendant understands the "maximum penalty provided by law". *Id.* This Court then stated:

> In sum, we hold that in order for a defendant to be habitualized following a guilty or nolo plea, the following must take place prior to the acceptance of the plea: 10 The defendant must be given written notice of intent to habitualize, and 20 the court must confirm that the defendant is personally aware of the possibility and reasonable consequences of habitualization.

Id. at 490.

This Court, in explaining what the trial court should do to confirm the defendant's awareness of the consequences of habitualization, stated in Ashley, *Id.* at 490, footnote 8:

> 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 effect the possibility of early release through certain programs*, and, where habitual felony offender provisions are implicated, the mandatory minimum term. (Emphasis added)

Ashley, *Id.*, is legally and factually distinguishable from the present case. It is legally distinguishable due to the fact that in the Ashley the defendant had attempted to withdraw his plea, Ashley, *Id.* at 487. In the instant case, respondent never attempted to withdraw his plea. It is factually distinguishable, because in the instant case, respondent was given notice of the state's intent to seek an habitual offender sentence before the plea was tendered. (R 46). Unlike Ashley where there was no discussion at the time the plea was entered as to the consequences of habitualization, in the instant case, the respondent was advised by the trial court of his maximum penalties as a habitual offender. (R 47).

In State v. Wilson, 658 So.2d 521 (Fla. 1995), the defendant entered an open plea. The plea form was not joined in by the state and at the plea colloquy all parties understood that the state was seeking habitualization. *Id.* At 523. This Court noted that although the first prong of Ashley, *supra.*, was satisfied - the court confirmed that the defendant was aware of the possibility of habitualization - the court failed to confirm that the defendant knew the maximum habitual offender term for the charged offense and *that he could be ineligible for certain programs affecting early release. Id.* at 522, (Emphasis added). This Court determined that the proper remedy was to remand and to give the defendant an opportunity to withdraw his plea and proceed to trial, but that if the

defendant decided to again enter a plea, the trial court could sentence him under the guidelines or impose an habitual offender sentence if the requirements of s. 775.084 and Ashley, *supra.*, are met. Wilson, *supra.* at 523.

The instant case differs from Wilson, *supra.*, because in the instant case, respondent was advised of the state's intent to seek an habitual offender sentence and also of the maximum penalty for his offenses if these were habitualized. The only thing respondent was not advised of was that habitualization could make him ineligible for certain early release programs.

In neither Ashley, *supra.*, nor Wilson, *supra.*, did this Court consider the argument raised by the petitioner in the instant case, to wit: whether an Ashley error can be raised on direct appeal from a judgment and sentence based upon a no contest or guilty plea. To the contrary, this Court went right to the merits of the issue and considered whether the errors in question made the plea involuntary.

However, the Second District, in rejecting petitioner's jurisdiction argument, acknowledged conflict with the Fourth District in Williams v. State, 691 So.2d 484 . 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, 704 So.2d 1080 (Fla. 1st DCA 1998). The Fourth District distinguished between the first prong of Ashley, *supra*. -notice of the state's intent to habitualize- and the second prong -that the defendant is personally aware of the possibility and reasonable consequences of habitualization, which includes the fact that he may be ineligible for certain early release programs. As the Fourth District explained:

> A failure to comply with either of the *Ashley* requirements could invalidate a habitual offender sentence based upon a plea of guilty or nolo contendere, *but the two requirements are actually quite different. The state's failure to give notice of its intention to seek an enhanced sentence under the habitual offender statute violates the express requirements of the habitual offender statute and deprives the defendant of the fundamental right of due process of law. A defendant cannot be expected to plead guilty or nolo contendere to a criminal offense only to find out later that the penalty could be double that which had been discussed at the time of the*

plea, and that the procedure would require involuntary participation in a separate evidentiary proceeding at the time of sentencing. As explained in Ashley, this kind of error results in a "purely legal sentencing issue." The court reasoned that the defendant should be resentenced without any enhancement under the habitual offender sentence.

In contrast, a failure to advise the defendant of the consequences of habitualization affects only validity of the plea. If a defendant has notice of the state's intent to seek habitualization but is simply unaware of certain legal consequences such as the loss of gain time, the error can be corrected by vacating the plea. In this situation, the defendant can withdraw the plea with the permission of the court and decide once again whether to offer to plead guilty or nolo contendere in the face of the state's notice of intent to seek an enhanced penalty.

A challenge to the validity of a plea may not be asserted for the first time on direct appeal. As the supreme court explained in *Robinson v. State*, 373 So.2d 898 (Fla. 1979), a defendant may challenge the voluntariness of a plea of guilty or nolo contendere on direct appeal only if the issue had been previously raised in the trial court. The court squarely rejected the notion that a defendant can challenge the validity of the plea for the first time on direct appeal:

> The appellant contends that he has the right to a general review of the plea by an appellate court to be certain that he was made aware of all the consequences of his plea and appraised of all the attendant constitutional rights waived. In effect, he is asserting a right to review without a specific assertion of wrongdoing. We reject this theory of an automatic review from a guilty plea... Furthermore, we find that an appeal from a guilty plea should never be a substitute for a motion to withdraw a plea. If the

record raises issues concerning the voluntary or intelligent character of the plea, that issue should first be presented to the trial court in accordance with the law and standards pertaining to a motion to withdraw a plea.

Robinson at 902. Based on these principles, we have held that a claim that a defendant was not informed of the consequences of habitualization cannot be presented for the first time on direct appeal unless the defendant has preserved the issue for review by filing a timely motion to withdraw the plea in the trial court. *Heately v. State*, 636 So.2d 153 (Fla. 1st DCA 1994): Perkins v. State, 647 So.2d 202 (Fla. 1st DCA 1994).

Rhodes, *supra*. at 1081-1082 (Emphasis added).

The First District in Rhodes, *supra*., found that this Court's decision in Wilson, *supra*., did not modify the existing preservation of error argument:

> The defendant suggests that we reconsider this line of cases in light of the supreme court's decision in *State v. Wilson*, 658 So.2d 521 (Fla. 1995), but that decision does not modify the existing preservation of error requirement. The issue settled in *Wilson* was the proper remedy for an *Ashley* violation, not the requirements for preserving such a claim for direct review. It does not appear to us that the supreme court intended to receded from its holding in Robinson that a defendant may not challenge the voluntariness of a plea of guilty on direct appeal unless the issue has been preserved for review by a motion to withdraw the plea. This principle of law has been widely accepted for many years, and even after *Wilson* it was incorporated in the Florida Rules of Appellate Procedure. *See* Fla. R. App. P. 9.140(b)(2)(B)(iii).
>
> Rhodes, *Id*. at 1082.

Petitioner submits that this Court should adopt the reasoning of the Fourth District in Williams, *supra*., and the First District in Rhodes, *supra*.

Finally, petitioner submits that any failure of the trial court in not advising the appellant that sentencing under the habitual offender statute may effect his eligibility for early release under certain programs, was harmless in the instant case[2]. The habitual offender statute in effect at the time of the appellant's offenses was the 1993 statute. Section 774.084(4)(e), Fla. Stat. (1993) provides in pertinent part:

> The provisions of s. 947.146 shall be applied to persons sentenced as habitual offenders under paragraph (1)(a), but shall not be applied to persons sentenced as habitual violent felony offenders under paragraph (1)(b). The provisions of s. 947.1405 shall apply to persons sentenced as habitual felony offenders and persons sentenced as habitual violent felony offenders. a defendant sentenced under this section is not eligible for gain-time granted by the Department of Corrections, except that the department may grant up to 25 days of incentive gain-time each month as provided in s. 944.275(4).

For offenses committed on or after January 1, 1994, the legislature has abolished basic gain time. *See* s. 944.275(4)(a), (6)(a), Fla. Stat. (1993). For offenses committed after on or

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[2]Petitioner acknowledges that this harmless error was not raised in its argument to the Second District Court of Appeals. However, this Court has held that the failure of the state to make a harmless error argument does not prevent the appellate court from applying the harmless error test sua sponte. Heuss v. State, 687 So.2d 823 (Fla. 1997)

after January 1, 1994, inmates may earn incentive gain time. *See* s. 944.275(4)(b)-(c), (6)(b), (Fla. Stat. 1993). The date of the respondent's offenses was February 22, 1995. (R 11-12). Consequently, the respondent was not eligible for basic gain time under any circumstances. However, respondent is able to earn incentive gain time just like any other prisoner.

Respondent is eligible for control release (due to prison overcrowding). The 1993 version of the habitual offender statute provides in pertinent part, "The provisions of s. 947.146 [control release program] *shall be applied to persons sentenced as habitual felony offenders under paragraph (1)(a)*, but shall not be applied to persons sentenced as habitual violent felony offenders under paragraph (1)(b)." Respondent was sentenced as an habitual felony offender paragraph 775.084(1)(a) of the statute .(R 30-34). Consequently, respondent's adjudication as a habitual felony offender does not prohibit him from control release consideration.

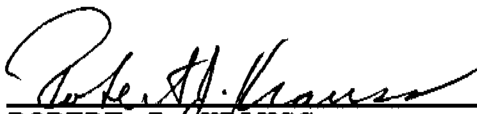
Since respondent's adjudication as an habitual felony offender did not effect his eligibility for any early release programs, the trial court did not commit any <u>Ashley</u> error by not determining that respondent was aware that sentencing him as an habitual offender would effect his eligibility for certain early release programs. *See* <u>Ferguson v. State</u>, 677 So.2d 968, at 969-970 (Fla. 3rd DCA 1996)

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Appellee respectfully requests that Appellant's convictions and sentences be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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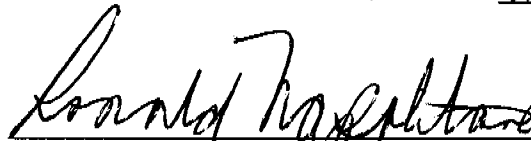
COUNSEL FOR PETITIONER

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 N. Parsons Avenue, Suite D, Brandon, Florida 33510-3112, this 11th day of June, 1998.



COUNSEL FOR PETITIONER

IN THE DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

January 9, 1998

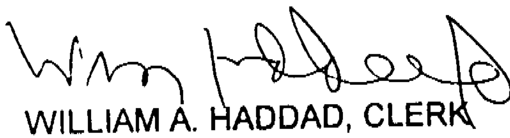
WILLIAM THOMPSON,	)	
Appellant,	)	
v.	)	CASE NO. 95-02363
STATE OF FLORIDA,	)	
Appellee.	)	

BY ORDER OF THE COURT:

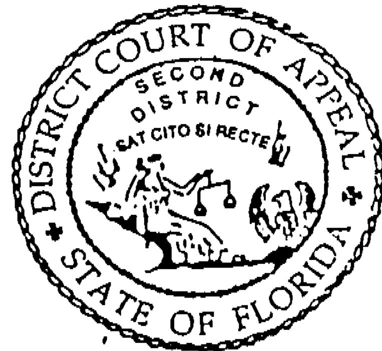
ORDER

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



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.