IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

v.

TERRY J. JOYCE,

Respondent.

CASE NO. 93,540

DCA NO. 96-1508

COURT APPOINTED

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

ANSWER BRIEF OF RESPONDENT ON THE MERITS

Submitted by:
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PRELIMINARY STATEMENT

The record on appeal consists of one volume. Volume I, numbering pages 1 through 100, and numbering pages 136 through 185 contains documents from the court file and will be referred to as "R". Pages 101 through 135 contain transcripts and will be referred to as "T".

SUMMARY OF ARGUMENT

The Respondent argues that his conviction and sentence should be reversed and remanded for the Respondent to be given the opportunity to withdraw his pleas in these cases. The Respondent bases his argument on the failure of the trial court to adequately confirm that Appellant was personally aware of the possibility and the reasonable consequences of habitualization, as required by Ashley v. State, 614 So. 2d 486, 490 (Fla. 1993). Respondent was not advised of the fact that habitualization may affect the possibility of early release through certain programs, or that the sentencing guidelines would not apply to the Appellant. This error is apparent on the face of the record and therefore may be raised for the first time on appeal. Furthermore, this issue is not harmless error because the failure to inform the Respondent of the possible effects of habitualization on early release by such factors as changes in the statutes regarding early could affect Respondent's habitualized sentence even if such factors has no present affect on the sentence.

STATEMENT OF FACTS AND OF THE CASE

On September 21, 1995, an information was filed against the Appellant, Terry J. Joyce. Between the dates of July 3, 1995 and August 22, 1995, the Respondent was alleged to have committed eight counts of Delivery of Cocaine, eight counts of Possession of Cocaine and one count of Sale of a Substance in Lieu of a Controlled Substance. On January 29, 1996, a pretrial conference was held. (T 101-114). At that time, counsel for the Respondent informed the court of the Respondent's desire to enter an open plea to the charges and Appellant's counsel requested that a presentence investigation report be prepared for the Respondent. (T 104). The state informed the court that the Respondent had been "noticed as a habitual felony offender".(T 104). A copy of a notice is found in the court file (R 41). No reference was made on the record concerning whether the Respondent personally received a copy of the notice or if the notice was filed contemporaneously with the announcement on the record. The Respondent executed a PLEA FORM, ACKNOWLEDGEMENT AND WAIVER OF RIGHTS form. (R 42-43). The court advised the Respondent of the maximum penalties for each of the charges (105-106), and informed the Respondent of the increase in the maximum penalties that could be imposed if the Respondent were sentenced as a habitual felony offender. (T 106-107). No mention was made concerning the effect of habitualization on the applicability of the sentencing guidelines or the collateral effects of habitualization on Respondent's possibility of early release through certain programs. The court then proceeded to

conduct a plea colloquy and establish a factual basis for the charges on the record (T 107-110). The court made a finding that the plea was freely and voluntarily entered and that there was a sufficient factual basis to justify the plea. (T 110). The Court ordered the preparation of a pre-sentence investigation and set the sentencing hearing for February 29, 1996. (T 111).

On February 29, 1996, the sentencing hearing was held . The court reminded the parties that the Respondent had been noticed as a habitual felony offender (T 119). The court determined that there were no corrections or deletions requested by the Respondent in concerning the pre-sentence investigation report (T 119-120), and determined that the defense had no objection to the state's calculations concerning the guidelines score sheet. After the presentation of various certified copies of the Respondent's prior convictions, the court found that Respondent qualified as a habitual felony offender and stated its intention to sentence the Respondent as such. (T 124). After hearing argument of counsel concerning sentencing and taking testimony from the Respondent concerning the issue of sentencing, the court then adjudicated the Respondent guilty of each count and sentenced him to fifteen years Florida State Prison, to be served as a habitual felony offender, on each of the counts of Delivery of Cocaine, and five years Florida State Prison, without habitual felony offender sanctions, on each of the other counts of Possession of Cocaine or Sale of a Substance in Lieu of a Controlled Substance. (T 130-133). Each of these sentences were to run concurrently. On appeal, the

Respondent argued that the trial court failed to properly comply with either prong of Ashley, that the trial court erred when it neglected to make a finding that the Respondent's previous felony convictions qualified as sequential convictions for purposes of habitual offender sentencing and that the trial court erred when it sentenced Appellant on the non-habitualizable counts of the information with an incorrectly prepared scoresheet. In Joyce v. State, Case No. 96-01508 (Fla. 2d DCA, June 26, 1998) the Court reversed the Respondent's habitual offender sentences and remanded those counts with instructions to allow the Respondent the opportunity to withdraw his pleas to those counts and the Court reversed the Respondent's non-habitual offender sentences under the rational of Eblin v. State, 677 So. 2d 388 (Fla. 2nd DCA 1996) and remanded those counts with instructions to resentence the Respondent with a properly prepared scoresheet.

ARGUMENT

THE SECOND DISTRICT COURT OF APPEAL PROPERLY HELD ON DIRECT APPEAL THAT THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT AS A HABITUAL FELONY OFFENDER AFTER A PLEA COLLOQUY WHICH DID NOT MENTION THE COLLATERAL EFFECTS OF HABITUALIZATION ON APPELLANT'S POSSIBILITY OF EARLY RELEASE THROUGH CERTAIN PROGRAMS.

In Joyce v. State, 713 So.2d 1053 (Fla. 2d DCA 1998), the Second District Court of Appeal held that the circuit court, in accepting Respondent's plea, did not comply with the procedure described in Ashley v. State, 614 So. 2d 486, 490 (Fla. 1993). The trial court failed to explain the consequences of habitual offender sentences, other than to tell Respondent that they carried a higher maximum penalty than guideline sentences. The circuit court did not discuss the effect of habitual offender sentences on eligibility for early release. Consequently, the Second District Court of Appeal reversed Respondent's habitual offender sentences and remanded with instructions to give him the opportunity to withdraw his plea. Pursuant to Thompson v. State, 706 So. 2d 1361, 1362 n.1 (Fla. 2d DCA 1998), the Second District also held in Joyce that the circuit court's failure to follow the procedure in Ashley was cognizable on direct appeal, and the Court acknowledged conflict with the Fourth District's decision in Williams v. State, 691 So. 2d 484 (Fla. 4th DCA 1997). Joyce at 1053 n.1.

In reaching its opinion in this case, the Second District followed the well settled law that:

"[F]or 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." Ashley v. State, 614 So. 2d 486, 490 (Fla. 1993). In the instant case, the record revealed significantly inadequate compliance with the second prong of Ashley. The record was devoid of a significant portion of the plea colloquy necessary to insure that the Respondent was personally aware of the reasonable consequences of habitualization. Along with the need to advise the Defendant of his eligibility for habitualization and the maximum habitual offender term for the charged offense, the court was also required to advise a Defendant of the fact that habitualization may affect the possibility of early release through certain programs. Ashley at 490. The Respondent was never advised on the record in the instant case concerning the effect of the collateral effects of habitualization on Respondent's possibility of early release through certain programs.

In a situation where the second prong of the Ashley test has not been met, the Appellant should be given a chance to withdraw his plea. This situation is controlled by State v. Wilson, 658 So. 2d 521 (Fla. 1995). In similar circumstances, when the defendant was not properly advised of the reasonable consequences of habitualization in Wilson, the defendant was granted the right to withdraw his plea if he so desired. In Wilson, as in Ashley, 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. In Wilson at 522, the Court reasserted the principle that the reasonable consequences of habitualization 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. However, the trial court failed to confirm that the defendant was personally aware of the maximum habitual offender term and the possibility of not being eligible for certain programs affecting early release. Accordingly, the court vacated the habitual offender sentence and remanded the case for resentencing and the opportunity for the defendant to withdraw his plea and proceed to trial if he desired to do so. Wilson at 523. Wilson had raised this issue for the first time on the direct appeal.

The State relies upon Surinach v. State, 676 So. 2d 997 (Fla. 3d DCA 1996), Williams v. State, 691 So. 2d 484 (Fla. 4th DCA 1997), and Rhodes v. State, 704 So. 2d 1080 (Fla. 1st DCA 1997) as "emerging decisional law" that supports the proposition that Respondent should not be permitted to raise on direct appeal a violation of the second prong of Ashley absent a motion to withdraw the plea in the trial court or a specific reservation of the review of the issue. However, careful analysis of these cases does not support the argument that Ashley and Wilson should not be applied to Respondent's case. Each of these cases rely upon an interpretation that Robinson v. State, 373 So. 2d 898 (Fla. 1979)

precludes raising a violation of the second prong of Ashley for the first time on direct appeal. That interpretation of Robinson is not well taken. Robinson does not state that issues on the voluntary and intelligent nature of the plea must only be raised in the trial court prior to consideration in the appellate court. Robinson involved a defendant who entered a guilty plea and had his appeal dismissed on the district court level because it was frivolous. The Court in Robinson held that:

> There is an exclusive and limited class of issues which occur contemporaneously with the entry of the plea that may be the proper subject of an appeal. To our knowledge, they would include(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 Court in Robinson does not specifically state that the voluntary and intelligent nature of the plea may only be raised through collateral relief. While the opinion in Robinson does address the responsibility of attorneys to immediately advise the court of error or defects in the plea proceedings and the opinion observes that an appeal should never be a substitute for a motion to withdraw a plea, the Court in that case did conduct an examination of the entire record in that case and found that there was no error in the presentation and acceptance of that appellant's plea. Robinson at 903. Therefore, the Court exercised its jurisdiction to review the face of the record for issues which occurred contemporaneously with the entry of the plea. In this respect, the Court in Robinson reviewed the face of the record

consistently with the review conducted in Wilson. Furthermore, the Court's reference in Robinson to a defendant's right to seek collateral relief if a defendant failed to raise the validity of the plea on direct appeal implies that a defendant would not necessarily be precluded from addressing the validity of the plea on direct appeal. Robinson at 903.

Therefore, since Wilson does not require a contemporaneous objection, the trial court's failure to inform Respondent of all the possible, reasonable ramifications of a habitualized sentence requires that the case be remanded to allow Respondent to withdraw his plea due to its lack of voluntariness.

The Petitioner raises as a final issue that the failure of the trial court to properly advise Respondent of the effect of the habitual offender statute on his eligibility for early release under certain programs was harmless error under the law in effect at the time of Respondent's offenses. This issue was not raised in the Second District Court of Appeal. This argument is not well taken. 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 subject to change, 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). Therefore, it is still necessary that a defendant be advised that habitual

offender status may have some affect on his sentence and the concept of informing a defendant of possible consequences to early release is still significant.

CONCLUSION

WHEREFORE, based upon the foregoing arguments, citations of authority and references to the record, the Appellant respectfully requests that the sentences in this case be reversed and that the case be remanded for a new sentencing hearing in which the Respondent is given the opportunity to withdraw his previously entered pleas to the aforementioned cases.

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 regular U.S. Mail to the Office of the Attorney General, 2002 N. Lois Ave., Westwood Center, 7th Floor, Tampa, Florida, 33607 and Terry Joyce, inmate number 505833, Putnam Correctional Institution, P.O. Box 279, East Palatka, Florida, 32031. The original hereof has been filed with the Clerk this 31st day of December, 1998.

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