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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

TERRY L. JOYCE,

Respondent.

Case No. 93,540

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 REGARDING TYPE

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STATEMENT OF THE CASE AND FACTS

On September 21, 1995 the respondent, Terry J. Joyce was charged by information with 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. (R. 28-37) The offenses were alleged to have been committed between July 3, 1995 and August 22, 1995. (Id.) On January 29, 1996 the state filed its notice that the respondent would be treated as a habitual felony offender. (R. 41)

On the same date, the respondent executed a Plea Form, Acknowledgement And Waiver of Rights. The plea form advised the respondent of the maximum penalties for the crimes to which he was pleading, but not the applicable penalties if he were habitualized. (R. 42, 43) The plea was open to the court, with no agreement what sentence would be imposed. (Id.) The plea form specifically advised the respondent that prior convictions or habitual offender treatment would affect his eligibility to earn gain/credit time. (R. 43)

At the January 29, 1996 plea hearing, defense counsel advised the court that the respondent was entering an open plea and requested a pre-sentence investigation. (R. 104) The state responded that he had been noticed as a habitual felony offender. (Id.) The court then initiated the plea colloquy. The Honorable Judge Allen ascertained that the respondent understood the plea

was open to the court, that the court would decide the appropriate sentence. (R. 106) She further informed the respondent that he had been noticed as a habitual felony offender, but would not be sentenced as such on the possession charges. (Id.)

He could, however, be sentenced as a habitual felony offender on the counts of delivery of cocaine. (Id.) The judge then informed the respondent that, if sentenced as a habitual felony offender on the delivery counts, the maximum sentence could be as high as thirty years. (R. 107) The respondent indicated he understood. (Id.) The respondent indicated he was entering the plea freely and voluntarily with a full understanding of the rights he has, the ones he gave up, and the consequences of the plea. (R. 107, 108) The judge ascertained that the respondent had reviewed the plea form with his attorney and that he understood the rights on the form. (R. 108) No one had threatened or promised the respondent to induce the entry of the plea. (Id.)

Judge Allen then heard the factual basis for the plea. (R. 108-110) She then found a factual basis for the plea and accepted it as being freely and voluntarily entered. (R. 110) In addition, the respondent admitted to violating his probation in circuit court case number 94-14251. The court found the respondent guilty of violation of probation and revoked that probation. (R. 111) Judge Allen ordered a pre-sentence investigation and set sentencing for February 29, 1996. (Id.)

The sentencing hearing was convened as scheduled. The court confirmed that the respondent had been noticed as a habitual felony offender at the time he entered his plea. (R. 119) She also confirmed that he had been notified of the maximum possible sentence. (Id.) The defense had no objections to the pre-sentence investigation; in addition, there was no objection to the guidelines scoresheet. (R. 120) The state then introduced exhibits in support of habitualization. In reference to exhibit one, the state represented that the respondent had been sentenced to forty-two months state prison on a violation of probation on November 1, 1993, which was within five years of the commission of the new offenses. (Id.) The defense agreed the predicate conviction was within the five year window necessary for habitualization. (R. 122)

The state introduced its remaining exhibits. (R. 122-123) The defense had no objection, other than to note that the convictions arose out of the same series of episodes, much as in the present case. (R. 123) Neither the state nor the defense had anything further to offer. The court then found that the respondent qualified for sentencing as a habitual felony offender, having previously been convicted of two or more felonies of which the state had provided certified copies. The court also found that one of the prior convictions was within five years of the date of the offenses before the court for sentencing. (R. 123, 124)

The court made the further finding that there was no evidence the prior convictions had been the subject of pardon, appellate reversal, or post-conviction relief. (R. 124) She directed the Clerk to insert the state's exhibits into the court file as part of the record. (R. 124) The court then noted that the respondent's habitual offender status would take him out of the guidelines. (R. 125)

The court then heard the defense submission on behalf of the respondent. The defense requested a suspended sentence with the respondent placed on community control or house arrest and in drug treatment. The respondent did not feel society would benefit from long term incarceration of a small time street drug dealer. (R. 127, 128) The state responded that the respondent had been selling cocaine in a habitual pattern for almost nine years. It pointed out that drug dealers such as Joyce destroy the fabric of society, making rock heads and crack addicts out of people that cannot control their impulses. The state noted that an earlier fifteen year sentence had made no impact on the respondent. (R. 128) It asked for a fifteen year habitual felony offender sentence to Florida State Prison with five years concurrent on the third-degree felonies. (R. 129)

The court then sentenced the respondent to fifteen years state prison on the eight delivery of cocaine counts, to five years state prison on the possession counts, and to five years state prison on the sale of a substance in lieu of a controlled

substance count. Each count was to run concurrent. (R. 51-85, 130, 133)

The respondent filed a timely Notice of Appeal, pro se, on March 29, 1996. Appointed counsel served the brief on behalf of the respondent on August 20, 1997. The brief raised three issues:

> THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT AS A HABITUAL FELONY OFFENDER AFTER THE PLEA COLLOQUY DID NOT MENTION THE EFFECT OF HABITUALIZATION ON THE APPLICABILITY OF THE SENTENCING GUIDELINES OR THE COLLATERAL EFFECTS OF HABITUALIZATION ON APPELLANT'S POSSIBILITY OF EARLY RELEASE THROUGH CERTAIN PROGRAMS.
>
> THE TRIAL COURT ERRED IN SENTENCING THE DEFENDANT AS A HABITUAL FELONY OFFENDER WITHOUT MAKING THE REQUISITE FINDING THAT THE CONVICTIONS UPON WHICH THE QUALIFICATION FOR HABITUAL OFFENDER STATUS WAS BASED MET THE REQUIREMENT OF SEQUENTIAL CONVICTIONS UNDER F.S. 775.084.(5).
>
> WHEN SENTENCING APPELLANT AS A HABITUAL OFFENDER FOR SOME CASES AND UNDER THE SENTENCING GUIDELINES FOR OTHER CASES AT THE SAME SENTENCING HEARING, THE TRIAL COURT ERRED IN SCORING CRIMES FOR WHICH APPELLANT RECEIVED HABITUAL OFFENDER TREATMENT AS ADDITIONAL OFFENSES IN CALCULATING THE GUIDELINES SENTENCES.

The state responded to the issues raised by the appellant through its answer brief served on November 4, 1997.

The state responded that the respondent was made aware that he was eligible for habitualization, was aware of the maximum penalty that could be imposed, and was aware that habitualization would affect gain/credit time eligibility by virtue of the plea

form. In a footnote the state noted that he had not moved to withdraw his plea; nor had he expressly reserved the right to direct appeal of any issue. As a result, the state argued that the respondent should not be entitled to review of the *Ashley*[1] question.

The state further argued that the respondent's convictions were, in fact, sequential for purposes of habitual offender sentencing. Finally, the state agreed the respondent was entitled to be resentenced with a corrected scoresheet. After consideration, the Second District Court of Appeal filed its opinion in the matter on June 26, 1998. (See Appendix) The court rejected Joyce's argument that the state failed to prove his predicate convictions were sequential.

The court, however, found merit in respondent's contention that the trial court had failed to follow the requirements of *Ashley* in accepting his plea: "The court failed to explain the consequences of habitual offender sentences, other than to tell Joyce that they carried a higher maximum penalty than guidelines sentences. It did not discuss the effect of habitual offender sentences on eligibility for early release. Consequently, we must reverse Joyce's habitual offender sentences and remand with instructions to give him the opportunity to withdraw his plea. *Joyce v. State*, 713 So. 2d 1053, ___ (Fla. 2d DCA 1998).

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[1]*Ashley v. State*, 614 So. 2d 486 (Fla. 1993).

However, the court in a footnote recognized that it had acknowledged conflict with *Williams v. State*, 691 So. 2d 484 (Fla. 4th DCA 1997) in *Thompson v. State*, 706 So. 2d 1361, 1362 n. 1 (Fla. 2d DCA 1998) in reference to the state's argument that the trial court's failure to follow the *Ashley* requirements was not cognizable on direct appeal. Accordingly, the state timely filed its Notice to Invoke Discretionary Jurisdiction on July 21, 1998. Upon submission of jurisdictional briefs, the Court on October 30, 1998 entered its order accepting jurisdiction and dispensing with oral argument.

The state submits the instant brief on the merits.

SUMMARY OF THE ARGUMENT

This Court should find 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 affect 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 affect his eligibility for any early release programs.

ARGUMENT

IT WAS ERROR FOR THE SECOND DISTRICT COURT OF APPEAL TO ENTERTAIN FOR THE FIRST TIME ON APPEAL THE RESPONDENT'S *ASHLEY* CLAIM THAT HIS PLEA WAS INVOLUNTARY DUE TO THE TRIAL COURT'S FAILURE TO ADVISE HIM OF THE CONSEQUENCES OF HABITUAL OFFENDER SENTENCING ON ELIGIBILITY FOR EARLY RELEASE THROUGH CERTAIN PROGRAMS IN THE ABSENCE OF A RESERVATION OF THE RIGHT TO APPEAL OR A MOTION TO WITHDRAW THE PLEA SUCH THAT THE ONLY AVENUE FOR RELIEF WAS COLLATERAL ATTACK.

The state seeks reversal of the Second District's opinion in which the court entertained the respondent's direct appeal of a violation of the second prong of *Ashley* in the absence of a proper reservation of the right to review or a motion to withdraw the plea. The state maintains that the Second District should have declined review of the *Ashley* error without prejudice to the respondent's seeking collateral relief with a proper showing of prejudice.

The emerging decisional law in cases involving alleged *Ashley* violations impacting the knowing and intelligent nature of a plea requires a defendant to file a motion for post-conviction relief or a motion to withdraw the plea in the trial court. For example, in *Surinach v. State*, 676 So. 2d 997 (Fla. 3d DCA 1996) the Third District remarked:

> If a defendant claims there is an *Ashley* error in the plea colloquy, defendant can only obtain post-conviction relief by following the same rules which would apply in any

> other case where a plea has been accepted and sentence has been imposed, namely, by moving to withdraw the plea. *See Williams v. State*, 316 So. 2d 267 (Fla. 1975). The motion must make a clear showing which explains why the *Ashley* error caused prejudice or manifest injustice to the defendant. *See id.* at 274-75 (Fla. 1975); *State v. Will*, 645 So. 2d at 93; *Suarez v. State*, 616 So. 2d 1067, 1068 (Fla. 3d DCA 1993) (footnote omitted)

676 So. 2d at 999-1000. Likewise, in *Williams v. State*, 691 So. 2d 484 (Fla. 4th DCA 1997) (en banc) the Fourth District receded from its previous decisions to the effect that the court would entertain a direct appeal of an alleged *Ashley* violation on direct appeal from a guilty or nolo contendere plea. The *Williams* court stated:

> 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. §924.06(3); *see Robinson v. State*, 373 So. 2d 898, 901-02 (Fla. 1979); *Norman v. State*, 634 So. 2d 212, 213 (Fla. 4th DCA 1994). Accordingly, we dismiss this appeal without prejudice to Appellant's right to withdraw his plea in the trial court. See *id.*

691 So. 2d at 485. Finally, in *Rhodes v. State*, 704 So. 2d 1080

(Fla. 1st DCA 1997) the First District distinguished between the first and second *Ashley* requirements, remarking:

> 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 the 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 apprised 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. *Heatley v. State*, 636 So.2d 153 (Fla. 1st DCA 1994); *Perkins v. State*, 647 So.2d 202 (Fla. 1st DCA 1994).

Rhodes, 704 So. 2d at 1081-82 (emphasis supplied).

The First District in *Rhodes* found that this Court's decision in *Wilson* 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 recede 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, 704 So. 2d at 1082. *Accord Glover v. State*, 702 So. 2d 561 (Fla. 4th DCA 1997) (defendant may not appeal *Ashley* violation on plea of guilty or nolo contendere); *Nettles v. State*, 645 So. 2d 1112 (Fla. 1st DCA 1994) (same). *See also Newsome v. State*, 704 So. 2d 213 (Fla. 2d DCA 1997) (defendant must allege prejudice when moving for post-conviction relief based on *Ashley* error).

Thus, a defendant who claims an *Ashley* violation upon entry of a plea of guilty or nolo contendere must first file a motion to withdraw the plea or a motion for post-conviction relief in the trial court alleging prejudice or manifest injustice in connection with the entry of the plea. *Robinson v. State*, 373 So. 2d 898, 903 (Fla. 1979). The mere fact that the plea colloquy was insufficient does not, per se, establish prejudice or manifest injustice. *Surinach*, 676 So. 2d at 999 n. 4. Even if the movant claims he did not know the consequences of habitualiza-

tion, he or she must still show prejudice or manifest injustice. *Id.*

As the Supreme Court stated in *Henderson v. Morgan*, 426 U.S. 637, 647-48, 96 S. Ct. 2253, 2258-59, 49 L. Ed. 2d 108 (1976) "it may be appropriate to assume in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." Likewise, it is appropriate to assume that defense counsel explained the maximum penalties and consequences of treatment as a habitual felony offender.

The state requests that this Honorable Court follow the reasoning of *Rhodes*, *Williams*, and *Surinach*. As a policy matter, it makes no sense to allow defendants to challenge their plea in a court of appeal based on the *Ashley* decision without first filing a motion to withdraw the plea asserting prejudice or manifest injustice. If there is an appeal following a circuit court's resolution of a motion to withdraw the plea, at least the court will have the benefit of a record such that review is better informed.

Finally, petitioner submits that any failure of the trial court, in not advising the appellant that sentencing under the habitual offender statute may affect 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 on or 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 July 3, 1995 through August 22, 1995. (R. 28-37) 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

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[2]Petitioner acknowledges that this harmless error was not raised in its argument to the Second District Court of Appeal. 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).

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 under paragraph 775.084(1)(a) of the statute. (R. 51-85) Consequently, respondent's adjudication as a habitual felony offender does not prohibit him from control release consideration.

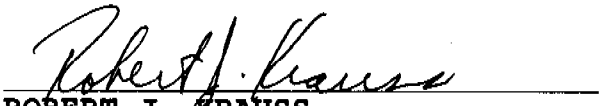
Since respondent's adjudication as an habitual felony offender did not affect his eligibility for any early release programs, the trial court did not commit any *Ashley* error by not determining that respondent was aware that sentencing him as an habitual offender would affect his eligibility for certain early release programs. *See Ferguson v. State*, 677 So. 2d 968, 969-70 (Fla. 3rd DCA 1996)

CONCLUSION

In light of the foregoing facts, arguments, and authorities the Honorable Court should quash the Second District's decision reversing the respondent's habitual offender sentences without prejudice to his filing a proper motion to withdraw the plea or a motion for post-conviction relief.

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 foregoing has been furnished by U.S. mail to Scott L. Robbins, Esq., 1409 Swann Avenue, Tampa, Florida 33606, this 24th day of November, 1998.

Dale Tampkey
COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. **Case No. 93,540**

TERRY L. JOYCE,

Respondent.

_____/

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

APPENDIX

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

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

TERRY L. JOYCE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 96-01508

Opinion filed June 26, 1998.

Appeal from the Circuit Court for Hillsborough County; Diana M. Allen, Judge.

Scott L. Robbins, Tampa, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Dale E. Tarpley, Assistant Attorney General, Tampa, for Appellee.

NORTHCUTT, Judge.

Terry Joyce pleaded guilty to numerous charges of delivery or possession of cocaine, and to one charge of sale of a counterfeit controlled substance. The court

sentenced him as a habitual offender on the delivery counts and under the guidelines on the other counts. Joyce challenges his sentences on appeal.

We first address the habitual offender sentences. We reject Joyce's argument that the State failed to prove that his previous convictions were separately sentenced, as required under section 775.084(5), Florida Statutes (1995). But there is merit in Joyce's contention that the circuit court, in accepting his plea, did not comply with the procedure described in Ashley v. State, 614 So. 2d 486, 490 n.8 (Fla. 1993). The court failed to explain the consequences of habitual offender sentences, other than to tell Joyce that they carried a higher maximum penalty than guidelines sentences. It did not discuss the effect of habitual offender sentences on eligibility for early release. Consequently, we must reverse Joyce's habitual offender sentences and remand with instructions to give him the opportunity to withdraw his plea.[1]

Regarding Joyce's guidelines sentences, the State concedes that the scoresheet was improperly prepared because it included crimes for which Joyce had been sentenced as a habitual offender. See Eblin v. State, 677 So. 2d 388, 389 (Fla. 2d DCA 1996). We reverse his guidelines sentences and remand for resentencing under a corrected scoresheet. See Watson v. State, 658 So. 2d 118, 119 (Fla. 2d DCA 1995).

PARKER, C.J., and RONDOLINO, ANTHONY, ASSOCIATE JUDGE, Concur.

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[1] The State has argued that the circuit court's failure to follow the procedure in Ashley v. State, 614 So. 2d 486 (Fla. 1993), is not cognizable on direct appeal, citing Williams v. State, 691 So. 2d 484 (Fla. 4th DCA 1997). We have acknowledged conflict with Williams. See Thompson v. State, 706 So. 2d 1361, 1362 n.1 (Fla. 2d DCA 1998).