

FILED ⁰⁷⁵

SID J. WHITE

SEP 15 1998

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By

Chief Deputy Clerk

STATE OF FLORIDA)

Petitioner,)

v.)

TERRY J. JOYCE,)

Respondent.)

CASE NO. 93,540

DCA NO. 96-1508

COURT APPOINTED

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

JURISDICTIONAL BRIEF OF RESPONDENT

Submitted by:
SCOTT L. ROBBINS, ESQUIRE
1409 Swann Avenue
Tampa, Florida 33606
(813) 258-2909
F.B.N.: 0352111
Attorney for Respondent

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SUMMARY OF THE ARGUMENT

The Court should not accept conflict jurisdiction based on the Second District's acknowledgment of conflict with the Fourth District's decision in Williams v. State, 691 So. 2d 484 (Fla. 4th DCA 1997) or based on a conflict with the First District's decision in Rhodes v. State, 704 So. 2d 1080 (Fla. 1st DCA 1997). The Second District's acknowledgment of conflict with Williams in the instant case is premised upon the same issue as in Thompson v. State, 706 So. 2d 1361, 1362 n.1 (Fla. 2d DCA 1998). The Florida Supreme Court has accepted conflict jurisdiction in Thompson in Case Number 92,254. However, since in the instant case another argument separate from the Ashley issue has required that the Respondent be returned to the Circuit Court for resentencing and since it is clear from the record that the District Court of Appeal has found that the Respondent must be given the opportunity to withdraw his plea due to the failure of the trial court to follow the correct procedure in Ashley v. State, 614 So. 2d 486 (Fla. 1993) it is in the interest of judicial economy for this Honorable Court to decline to exercise it's discretionary jurisdiction in this case.

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). This form did not make any reference to any aspect of habitual offender sanctions. 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 rationale 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

AS A MATTER OF JUDICIAL ECONOMY, THIS HONORABLE COURT SHOULD NOT ACCEPT JURISDICTION OF THE INSTANT CASE BASED ON THE SECOND DISTRICT COURT OF APPEALS ACKNOWLEDGMENT OF CONFLICT WITH THE FOURTH DISTRICT AS TO WHETHER IT IS COGNIZABLE ON DIRECT APPEAL TO RAISE THE CIRCUIT COURT'S FAILURE TO FOLLOW THE CORRECT PROCEDURE IN ASHLEY V. STATE, 614 SO. 2D 486 (FLA. 1993) IN REGARD TO FULLY ADVISING OF THE CONSEQUENCES OF HABITUAL OFFENDER SENTENCING.

The Court should not accept conflict jurisdiction based on the Second District's acknowledgment of conflict with the Fourth District's Williams decision or based on a conflict with the First District's decision in Rhodes v. State. The Second District's acknowledgment of conflict with Williams in the instant case is premised upon the same issue as in Thompson v. State, 706 So. 2d 1361, 1362 n.1 (Fla. 2d DCA 1998). The Florida Supreme Court has accepted conflict jurisdiction in Thompson in Case Number 92,254. However, since in the instant case another argument separate from the Ashley issue has required that the Respondent be returned to the Circuit Court for resentencing and since it is clear from the record that the District Court of Appeal has found that the Respondent must be given the opportunity to withdraw his plea due to the failure of the trial court to follow the correct procedure in Ashley v. State, 614 So. 2d 486 (Fla. 1993) in regard to adequately advising the Respondent of the consequences of habitual offender sentencing, it is in the interest of judicial economy for this Honorable Court to decline to exercise it's discretionary jurisdiction in this case.

"[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 District Court of Appeal found that there was significantly inadequate compliance with the second prong of Ashley. Joyce v. State, Case No. 96-01508, slip op. at 2 (Fla. 2d DCA, June 26, 1998). The plea form executed by the Respondent made no mention of habitual felony offender sanctions (R 42-43). Concerning the second prong of Ashley, the record is devoid of a significant portion of the plea colloquy necessary to insure that the Appellant 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 is also required to advise a Defendant of the fact that habitualization may affect the possibility of early release through certain programs. Ashley at 490.

In a situation where the second prong of the Ashley test has not been met, the Respondent 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 the instant case, as well as in Thompson v. State, 706 So. 2d 1361 (Fla. 2d DCA 1998), the District Court acknowledged and rejected the State's argument that the circuit court's failure to follow the procedure in Ashley is not cognizable on direct appeal and the court acknowledged the conflict with Williams. However, the court in Thompson at 1362 expressly declined to certify this conflict as a question of great public importance and the court made no attempt to characterize this issue as one of great public importance in the instant case. Since the Petitioner has not attempted to invoke this Honorable Court's jurisdiction to address the issue Respondent raised concerning the resentencing of the non-habitual offender sentences in Issue III of his initial brief, it would be an inefficient use of this Court's resources to require the Respondent to file a post-conviction motion to request something that the District Court of Appeals has already determined to be required under Ashley, and then to resolve the sentencing for both the habitual and non-habitual offender sentences after going through that duplicative step. Since the ultimate resolution of the conflict between Thompson and Williams can be resolved by this Honorable Court having accepted jurisdiction in Thompson, it serves no purpose to accept jurisdiction in the instant case as well.

CONCLUSION

WHEREFORE, based upon the foregoing arguments, citations of authority and references to the record, the Respondent respectfully

requests that this Honorable Court decline to exercise its discretion to review the instant case and the conflict to which the lower court referred in its opinion in this case.

Respectfully submitted,



Scott L. Robbins, Esquire
1409 Swann Avenue
Tampa, Florida 33606
(813) 258-2909
Fla. Bar No. 0352111

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, Wakulla Correctional Institution, P.O. Box 3000, Crawfordville, Florida 32327. The original hereof has been filed with the Clerk this 14th day of September, 1998.



Scott L. Robbins, Esquire
1409 Swann Avenue
Tampa, Florida 33606
(813) 258-2909
Fla. Bar No. 0352111