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IN THE SUPREME COURT OF FLORIDA

CASE NO. 64, 640

FELIPE RUIZ,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The petitioner, Felipe Ruiz, was the appellant in the District Court of Appeal of Florida, Third District, and the defendant in the trial court, the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County. The respondent, the State of Florida, was the appellee in the District Court of Appeal and the prosecution in the trial court. The symbols "TR.", "R." and "S.R." shall designate the transcript of the probation revocation hearing, the record, and the supplemental record on appeal, respectively.

STATEMENT OF THE CASE AND FACTS

On April 20, 1979, an information was filed charging petitioner with sexual battery not involving serious personal injury. (R. 1). On June 6, 1979, petitioner entered a plea of not guilty to the charge; the court found him guilty and withheld adjudication at that time. (R. 2-3). On June 14, 1979, petitioner was adjudged a Mentally Disordered Sex Offender, and was subsequently committed to the Department of Health and Rehabilitative Services. (R. 4). On October 2, 1980, petitioner was placed on three years' probation. (R. 32-32a).

On April 13, 1982, a hearing was held in the Circuit Court of the Ninth Judicial Circuit of Florida, in and for Orange County, before the Honorable Lon S. Cornelius, Jr., at which petitioner entered a plea of nolo contendere to the charge of simple battery. (S.R. 4). During this proceeding, it was

explained to petitioner that his nolo contendere plea would not be construed as an admission of guilt, and that it would be viewed only as a refusal to contest the charge. (S.R. 8, 12). Defense counsel stipulated that a factual basis existed upon which the case could be brought before a jury on the misdemeanor charge. (S.R. 9). Petitioner's plea was entered pursuant to negotiations that he would be released on that date, having been incarcerated four months previously. (S.R. 3-4). Petitioner was to be released immediately subject to the condition that he not be arrested for a new offense during the next eight months. (S.R. 3, 4, 13). Petitioner's probation officer was present at this hearing in Orange County. (TR. 5, 6).

On July 22, 1982, an affidavit of probation violation was filed in the case at bar charging petitioner with violating his probation "by failing to remain at liberty without violating any law, in that, on or about April 13, 1982, the aforesaid was convicted in the Circuit Court of Orange County, Florida, of the offense of battery". (R. 35-37).

On September 28, 1982, a probation revocation hearing was held before the Honorable Robert Paul Kaye, Judge of the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County. (TR. 1-22). At the hearing, Joseph F. Hayden, petitioner's probation officer, testified that he was present at the April 13, 1982 plea proceeding in Orange County. (TR. 5, 6). The state then introduced a certified copy of petitioner's judgment of conviction of simple battery based upon the plea of nolo contendere in Orange County. (TR. 6-7; S.R. 17-18). Defense

counsel moved to dismiss on the ground that the state's evidence, which was solely predicated upon the conviction stemming from the nolo contendere plea, was insufficient proof of a probation violation. (TR. 10-12, 14-15). At the hearing, petitioner asserted that he was innocent of the battery charge, stating "I was not even guilty to the complaint. . .". (TR. 19, 20).

At the hearing's conclusion, the court revoked petitioner's probation on the basis of the battery conviction. (TR. 16, R. 43). The court adjudicated petitioner guilty and sentenced him to ten years' imprisonment. (TR. 20; R. 37-40).

A timely appeal was taken to the District Court of Appeal of Florida, Third District. (R. 42). On November 22, 1983, the district court affirmed the judgment of the trial court. Ruiz v. State, 441 So.2d 1152 (Fla. 3d DCA 1983).

A notice to invoke the discretionary jurisdiction of this Court was timely filed on December 9, 1983. This Court accepted jurisdiction on June 1, 1984.

ARGUMENT

THE TRIAL COURT ERRED IN REVOKING PETITIONER'S PROBATION WHERE THE REVOCATION WAS PREDICATED SOLELY UPON A CONVICTION ENTERED PURSUANT TO A NEGOTIATED PLEA OF NOLO CONTENDERE AND PETITIONER MAINTAINED HIS INNOCENCE OF THE CRIME.

Petitioner's probation was revoked in this case based upon his misdemeanor conviction of battery for which he had entered a nolo contendere plea. At issue is the procedure to be followed at a probation violation hearing where a conviction based on a nolo plea is sought to be the ground of revocation. In Maselli v. State, 446 So.2d 1079 (Fla. 1984), this Court affirmed the Second District's holding that the state can rely exclusively on the conviction, with the burden then shifting to the defendant to establish his innocence. This Court declined to endorse Donaldson v. State, 407 So.2d 623 (Fla. 5th DCA 1981), in which the Fifth District had held that under the circumstances where a defendant enters a nolo plea pursuant to negotiations and the defendant maintains his innocence, the state must present some evidence in addition to the conviction to sustain a probation revocation order. For the reasons set forth below, petitioner suggests that Donaldson presents the sounder procedure to be followed and, accordingly, that the conclusion reached in Maselli should be reconsidered by this Court.

It is well-settled that a plea of nolo contendere, unlike a guilty plea, does not admit the allegations of the charge in a technical sense; it is merely a formal declaration that the accused will not contest the charges with the prosecutor, and is in the nature of a compromise between the state and the

accused. Vinson v. State, 345 So.2d 711 (Fla. 1977). Various reasons may exist why a defendant, conscious of innocence, may be willing to forego his rights to present a defense if he can be permitted to do so without acknowledging his guilt; as such, a plea of nolo contendere admits the facts for the purpose of the pending prosecution. Id. at 713. Pleas of nolo contendere may be entered "for reasons of convenience and without much regard to guilt and collateral consequences." McCormick, Evidence (2d ed. 1972) § 265, p. 636. Even though the plea may be regarded as a tacit admission, its inconclusive and ambiguous nature dictates that it, unlike a guilty plea, carries no evidentiary weight beyond the particular case in which it was entered. Lawrence v. Kozlowski, 372 A.2d 110, 115 n. 4 (Conn. 1976); State v. Thrower, 131 So.2d 420, 422 (Ala. 1961). The nolo plea assures that the defendant can plead not guilty in another proceeding.

In this case, petitioner entered his plea of nolo contendere to a misdemeanor of simple battery with the promise by the state that he would be released from jail that same day, petitioner having had already served four months' incarceration. (S.R. 3, 4). Petitioner was specifically advised by the trial judge that his nolo plea would not be construed as an admission of guilt, and that it would be viewed only as a refusal to contest the charge. (S.R. 8, 12). Petitioner tendered this plea with the probation officer present in court; petitioner was not arrested by the court or the probation officer but, rather, was given time served and released. (TR. 5-6; S.R. 4, 13).

By entering his nolo plea, petitioner forfeited his right to contest the battery charge in that particular case only. Legally, his right to assert his innocence at all subsequent proceedings, with the state's concomitant burden of establishing his guilt, remained intact. Under Maselli, however, the no contest plea in the battery case in effect functioned to create a rebuttable presumption of guilt against petitioner at the revocation proceedings.

This result is justified in Maselli on the ground that prior to acceptance of the plea, the trial judge must ascertain that there exists a factual basis for it. See Rule 3.172(a), Fla.R.Crim.P. This factual basis inquiry, however, is performed only to insure that an accused's plea is knowingly and intelligently entered with a basic awareness of the crime's elements and defenses. This factual basis differs markedly from the factual foundation of either a conviction arising from a guilty plea which stands as a judicial confession of guilt as to all elements, or a conviction following a verdict of guilty which signifies proof of culpability beyond a reasonable doubt. The evidentiary standard employed by judges to conclude that there is a factual basis for a nolo plea, in contrast, is both far less exacting and certain. It may comprise a very cursory review of the evidence, which evidence itself may consist solely of hearsay. Nor is there any requirement in the rules of criminal procedure that a trial judge employ the greater weight of the evidence standard and determine that a substantial violation of the law has occurred, as is required at probation revocation

proceedings. Additionally, in cases involving plea bargaining, as in the instant case, a judge's recitation regarding the existence of a factual basis may be done perfunctorily in order to effectuate the intent of the parties that the defendant be released immediately from incarceration pursuant to the nolo plea and the prosecution thereby terminated.

Donaldson's requirement that where the defendant maintains his innocence and the nolo plea has resulted from negotiations, the state must present some evidence in addition to the conviction, therefore insures that the trial judge has reliable evidence and knowledge concerning the underlying facts of the conviction before he renders his decision to revoke probation. The case at bar is illustrative. The nolo plea-conviction forming the basis for revocation involved a simple battery. The state presented absolutely no evidence concerning the facts of the battery at the revocation hearing. (TR. 1-22). Whether the petitioner had picked up a stranger and violently assaulted the person or whether he had an argument with his girlfriend who chose not to come to court to pursue the charge was never addressed by the state's proof. Without ever assessing the facts and despite petitioner's assertion that he was not culpable of the battery, the trial judge, based soley on the fact of the nolo plea-conviction, revoked probation and sentenced petitioner to ten years' imprisonment.

The facts of the present case further demonstrate the soundness of the Donaldson procedure requiring some additional proof by the state where the no contest-conviction results from

plea bargaining. Petitioner's probation officer was present in the courtroom when petitioner entered his no contest plea upon the assurance by the court and state that he would be sentenced to four months' time served and released immediately. In the probation officer's presence, the judge advised petitioner that his nolo plea did not constitute an admission of guilt and, pursuant to the entry of adjudication, petitioner's liberty was restored and he was ordered released. Neither the court nor the probation officer ordered petitioner's arrest for any claimed probation violation. The entire record unerringly points to the conclusion that had petitioner's arrest been sought at this proceeding following acceptance of the negotiated plea, a controversy would have promptly ensued resulting shortly thereafter in the vacatur of the plea. Accordingly, the record strongly indicates that petitioner had entered his plea of no contest without any apprehension that revocation would be predicated upon it.

The Donaldson procedure insures against this concern with its requirement that at a revocation hearing the state present some evidence regarding the alleged violation where a defendant's no contest plea conviction has resulted from plea bargaining and he has asserted his innocence. Both the factual reliability of the revocation process, and fair and open dealing with defendants commend reconsideration of Maselli by this Court and its adoption of the procedural rule set forth in Donaldson.

CONCLUSION

BASED upon the foregoing cases, authorities and policies cited herein, the appellant respectfully requests this Court to reverse the judgment of the lower court.

Respectfully submitted,

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BY: Beth C. Weitzner
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, 401 Northwest Second Avenue, Miami, Florida this 12th day of June, 1984.

Beth C. Weitzner

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