IN THE SUPREME COURT OF FLORIDA

DANNY LEE COCHRAN,

Petitioner,

vs. CASE NO. 66,388

STATE OF FLORIDA,

Respondent.

_____/

RESPONDENT'S BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

HENRI C. CAWTHON
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS
(CON'T)

TABLE OF CITATIONS
(CON'T)

TABLE OF CITATIONS
(CON'T)

IN THE SUPREME COURT OF FLORIDA

DANNY LEE COCHRAN,

Petitioner,

vs. CASE NO. 66,388

STATE OF FLORIDA,

Respondent.

_____/

PRELIMINARY STATEMENT

Petitioner, Danny Lee Cochran, the criminal defendant in the trial court and the Appellant in the First District Court of Appeal, will be referred to as "Petitioner." Respondent, the State of Florida, the prosecution and Appellee in the courts below, will be referred to as "Respondent."

References to the record on appeal, which contains the legal documents filed in this cause and the transcript of testimony and proceedings at the sentencing hearing, will be designated "(R)."

All emphasis is supplied by Respondent.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as being supported by the record. Additional facts deemed relevant and necessary to a disposition of the legal issues raised will be included in the argument portion of Respondent's brief.

SUMMARY OF ARGUMENT

ISSUE I

There is no requirement that a knowing and intelligent election to be sentenced pursuant to the guidelines appear in the record because there is no recognized right to parole. As a strategic decision, an election can be announced by counsel and is binding upon the accused. Furthermore, because the election was not challenged in the trial court, it cannot be challenged for the first time on direct appeal.

Therefore, the Petitioner is not entitled to relief.

ISSUE II

This Court should decline to review an issue which is being raised for the first time on appeal because a decision favorable to Petitioner would be dispositive of the case and render the certified question moot.

However, should the Court review the question, it should find that the trial court had jurisdiction because the original affidavit and warrant for violation of probation were issued before Petitioner's probation ended.

ISSUE I

WHEN IT IS NOT REQUIRED THAT A KNOWING AND INTELLIGENT ELECTION TO BE SENTENCED PURSUANT TO THE GUIDELINES BE MADE TO AFFIRMATIVELY APPEAR IN THE RECORD, AND THE ELECTION WAS NOT CHALLENGED IN THE TRIAL COURT, IT CANNOT BE CHALLENGED FOR THE FIRST TIME ON DIRECT APPEAL.

Petitioner tried to challenge, for the first time on direct appeal, his election to be sentenced under the sentencing guidelines, Fla.R.Crim.P. 3.701. This challenge was predicated upon the argument that his election constituted a waiver of protection from ex post facto application of the guidelines, requiring a showing that the waiver was knowingly and intelligently made. There is no indication in the record that Petitioner moved to withdraw his election on these or any other grounds.

In essence, Petitioner is asking this Court to presume that defense counsel never informed him that one of the hazards of electing to be sentenced under the guidelines was that he would be ineligible for parole if the judge deviated from the guidelines by imposing a non-presumptive sentence.[1] The record reveals such a presumption mere conjecture and reversible error

---

[1] Cf. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), footnote 3 at 27 L.Ed.2d 166.

cannot be predicated upon conjecture. Sullivan v. State, 303 So.2d 632, 635 (Fla. 1974).

Petitioner relies upon State v. Williams, 397 So.2d 663 (Fla. 1981) for the proposition that application of the retention statute (Fla.Stat. §947.16) to persons whose crimes occurred before the act became effective was proscribed by the prohibition against ex post facto laws. However, it has also been held that ex post facto application of Section 947.16 is not fundamental error and objection must be made at trial to preserve the issue for appellate review. Fredericks v. State, 440 So.2d 433 (Fla. 1st DCA 1983); Springfield v. State, 443 So.2d 484 (Fla. 2d DCA 1984), Mobley v. State, 447 So.2d 328 (Fla. 2d DCA 1984). Likewise, if Petitioner is to be afforded review of the voluntariness of his election, then the issue must have been properly preserved in the trial court.

Petitioner also cites Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), Peak v. State, 399 So.2d 1043 (Fla. 5th DCA 1981), Williams v. State, 316 So.2d 267 (Fla. 1975), and State v. Green, 421 So.2d 508 (Fla. 1982), cases which hold that a defendant who enters a plea of guilty must be informed of and understand his eligibility for parole, and argues that a judge should make a similar set of inquiries to a defendant to assess the voluntariness of a sentencing election. This analogy is faulty in that this Court has mandated that specific inquiries be made in the former instance but not in the latter. See Fla.R.Crim.P. 3.172 and 3.701;

in Re Rule of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848 (Fla. 1983). If this Court had intended the inquiries be made to assess the voluntariness of a defendant's sentencing election, it would have said so. Moreover, the courts in the above cases recognized the need to preserve the issue for review.[2] In the face of a silent record, it is unreasonable to assume that trial counsel was ignorant of the law. In the instant case, the trial court gave Petitioner's counsel advance notice of its intention to impose a sentence outside of the guidelines if it was Petitioner's choice to be sentenced under Rule 3.701:

> THE COURT: Your welcome to get a scoresheet and put it in the record for the purpose of preserving, but I am of the opinion and take the position that once they violate conditions of probation, that that is sufficient aggravating circumstance for me to impose the maximum penalty allowable by law and I do not feel bound by the sentencing guidelines and I will announce to you now that I will not follow sentencing guidelines. But you may want to get that in the record for the purpose of preserving your appeal. Also you may want to get in the record an election to be sentenced under sentencing guidelines. I see no reason not to sentence him tomorrow.

---

[2] Carnley v. Cochran, 369 U.S. 508, 82 S.Ct. 884, 8 L.Ed.2d 70 (1962), also relied upon by Petitioner, addressed the issue of waiver of the right to assistance of counsel. Here again, unlike Rule 3.701, Fla.R.Crim.P. 3.111 and 3.130 require an affirmative showing of a knowing and intelligent waiver.

MS. SUTTON: Okay.

THE COURT: Can you assist her, Joe, in getting the scoresheet in the record, please.

PROBATION OFFICER: Yes, sir.

MS. SUTTON: Judge, of course, make it clear for the record that I have not discussed with my client whether or not it's in his interest to elect the sentencing guidelines at this time, but we can announce that tomorrow.

(R 45-46). It is the duty of the defense attorney to insure that a guilty plea is entered voluntarily and knowingly. U.S. v. Crook, 607 F.2d 670, (5th Cir. 1979); Bradbury v. Wainwright, 658 F.2d 1083, (5th Cir. 1981). It should be presumed that Petitioner's counsel acted in a professional manner by apprising him of the consequences of electing to be sentenced under the guidelines.

Given that neither Florida Statutes §921.001 nor Fla.R. Crim.P. 3.701 require that a knowing and intelligent election be made to appear in the record, Petitioner should not be heard to assert as reversible error, the silence of a record concerning issues he never raised. See Richardson v. State, 247 So.2d 296 (Fla. 1971) where this Court held that a defendant who is unhappy with the results of a criminal proceeding at which he did not request the making of a record, should not be granted a new trial on the ground that no record was made. See also Rose v. State, 461 So.2d 84 (Fla. 1984), where it was held that a

contemporaneous objection is necessary to preserve an issue for appeal of a sentencing error in a capital case.

Even if this Court were to review Petitioner's claim on the merits, it should affirm the lower court's decision. The First District has correctly held that the "affirmative election" provided under the sentencing guidelines is qualitatively different from the "knowing and intelligent waiver" involved in cases where constitutional rights are at stake. Williams v. State, 454 So.2d 751 (Fla. 1st DCA 1984); Jones v. State, ___ So. 2d ___ (Fla. 1st DCA 1984), 9 F.L.W. 2478; Coates v. State, ___ So.2d ___ (Fla. 1st DCA 1984), 9 F.L.W. 2421. Petitioner's argument that his "right" to parole must be knowingly and intelligently waived on the record is based on a false premise.

In Greenholtz v. Inmates at the Nebraska Penal and Correctional Complex, 442 U.S. 1, 60 L.Ed.2d 668 (1979), the Court reaffirmed its previous holding that there is no constitutional right to parole, and that the question of whether a state statute provides a protectable entitlement was one to be resolved on a case by case basis. Accordingly, Florida inmates have no right to release on parole. Daniels v. Parole and Probation Commission, 401 So.2d 1351 (Fla. 1st DCA 1981); Staton v. Wainwright, 665 F.2d 686 (5th Cir. 1982), cert. den., 72 L.Ed.2d 166; Moore v. Florida Parole and Probation Commision, 289 So.2d 719 (Fla. 1974), cert. den., 41 L.Ed.2d 239. Parole is not a termination of sentence or completion of sentence - it is merely a means for serving out the "balance" of a sentence outside the

prison walls. Marsh v. Garwood, 65 So.2d 15 (Fla. 1953). Thus, a parolee can file habeas corpus petitions because he is in custody, not at liberty. Because of this, a waiver of parole is distinguishable from a waiver of a constitutional right. Boykin v. Alabama, supra.

Courts have refused to find "due process" (U.S.C.A. Const. Amends. 5, 14) violations in cases where parole interviews were untimely held, see Staton v. Wainwright, supra; and where prisoners have not been given notice of rule changes affecting presumptive parole release dates, see Woulard v. Florida Parole and Probation Commission, 426 So.2d 66 (Fla. 1st DCA 1983); Hunter v. Florida Parole and Probation Commission, 674 F.2d 847 (11th Cir. 1982). Had Petitioner been given a sentence entitling him to parole consideration, his only "right" would be a right to consideration itself, not parole, Moore v. Florida Parole and Probation Commission, supra, because the actual granting of parole is purely discretionary. Gaines v. Florida Parole and Probation Commission, ___ So.2d ___ (Fla. 4th DCA 1985), 10 F.L.W. 153.

While it is undisputed that defendants may waive even constitutional rights, this must be distinguished from the waiver of a lesser right or privilege. "Waiver" is characterized as a voluntary or intentional relinquishment of a known right, an essentially unilateral act. 92 C.J.S., WAIVER pages 1041-1049, 1053-1055 and 1061-1062. See also Gilman v. Butzloff, 22 So.2d 263 (Fla. 1945). Of course, prisoners have a statutory

right to be interviewed periodically and evaluated for parole, but this right may be waived either expressly or impliedly, by conduct or acquiescence. See OP. ATTY. GEN. 78-29.

Assuming that a defendant may waive even a constitutional right, the question arises as to whether this "waiver" is sufficiently evidenced by an affirmative election, announced by counsel, or whether further inquiry is required. In Wainwright v. Sykes, 433 U.S. 72 (1972), the ability of trial counsel to make and announce strategic decisions of, by and for his client was recognized. Similarly, in Castor v. State, 365 So.2d 701 (Fla. 1978); McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971) and Ray v. State, 403 So.2d 956 (Fla. 1981) it was held that because defendants are bound by the acts of counsel, they cannot challenge judicial acts done at counsel's request. In other words, defendants should not be free to exercise one strategic move at trial and then, if dissatisfied with the result, challenge it on appeal. Curry v. Wilson, 405 F.2d 110 (9th Cir. 1968); Estelle v. Williams, 425 U.S. 501 (1976). In the instant case, defense counsel announced that Petitioner had affirmatively elected guidelines sentencing. (R 52). Since it must be assumed that defense counsel was competent, it follows that Petitioner was told there was no possibility of parole if a non-guidelines sentence was imposed.

Therefore, Petitioner elected guidelines sentencing with a complete understanding that he was sacrificing any statutory right to parole. Counsel announced this affirmative election

on the record, and the court had an absolute right to act on this representation in the Petitioner's presence.

In summary, Respondent submits that this question was not properly before the First District Court of Appeal because of Petitioner's failure to object to the alleged sentencing error at the hearing. Rose v. State, supra; State v. Barber, 301 So. 2d 7 (Fla. 1974). However, should this Court find it necessary to review this cause on the merits, Respondent submits that the certified question must be answered in a manner consistent with the First District's declaration:

> (1) An election to accept guidelines sentencing is qualitatively different from a knowing and intelligent "waiver" of a "right" since no right is being waived as a result of the election.
>
> (2) Since this is not a "waiver" per se, but rather a strategic decision, counsel's announcement of this strategic choice is:
>
> (a) presumptively the result of competent advice to the client, and
>
> (b) binding upon the client.
>
> (3) There is no requirement that the court look behind the pronouncement of counsel and inquire of the defendant the "knowing" and "intelligent" nature of his strategic decision.

See Moore v. State, 455 So.2d 535 (Fla. 1st DCA 1984).

ISSUE II

THE ARGUMENT THAT THE TRIAL COURT LACKED JURISDICTION TO REVOKE PETITIONER'S PROBATION IS NOT PROPERLY BEFORE THIS COURT. HOWEVER, SHOULD THIS COURT REVIEW THIS ISSUE, IT SHOULD BE FOUND THAT THE TRIAL COURT HAD JURISDICTION TO REVOKE PROBATION.

Petitioner argues for the first time on appeal that the trial court lacked jurisdiction to revoke his probation based on violations included in an amended affidavit. Respondent submits that this Court should decline to accept this issue for review which could result in the avoidance of a ruling on the legal issue which provoked its jurisdiction. State v. Hegstrom, 401 So.2d 1343 (Fla. 1981); State v. Thompson, 413 So.2d 757 (Fla. 1982). In Thompson, the defendant was convicted and sentenced for attempted robbery and felony murder, but the district court reversed the conviction for attempted robbery on double jeopardy grounds. The state appealed to this Court to review the evidence and find that the defendant was guilty of premeditated first degree murder, and not felony murder. This Court stated:

> We reject this contention. Again, as in Hegstrom, we decline to accept this case for review on one basis and then reweigh the evidence reviewed by the district court in order to avoid ruling on the real issue that brought the case to us.

413 So.2d at 758. In the instant case, neither the trial court nor the First District Court of Appeal were given the opportunity to rule on this issue. Petitioner should not now be allowed to challenge the revocation of probation where he pled guilty to violations which occurred during his probationary period. (R 44, 12-13).

Petitioner's reliance upon Trushin v. State, 425 So.2d 1126 (Fla. 1982), is faulty in that this Court reviewed those questions which had already been ruled upon by a lower tribunal. The same can be said for Bould v. Touchette, 349 So.2d 1181 (Fla. 1977). Thus, Respondent submits that Petitioner's attempt to invoke this Court's jurisdiction on a claim being raised for the first time on appeal by attaching it to a certified question is improper. Silver v. State, 188 So.2d 300 (Fla. 1966).

Should this Court accept review, however, it should deny relief in that the violation of probation affidavit was filed before the termination of Petitioner's probation. (R 7, 10).

In Carroll v. Cochran, 140 So.2d 300 (Fla. 1962), this Court ruled that where the processes of the court had been set in motion for revocation of probation, the court's jurisdiction is not divested by the expiration of the probationary period. 140 So.2d at 301, citing State ex rel. Ard v. Shelby, 97 So.2d 631 (Fla. App. 1957). Of course, the violations at issue in Carroll had occurred during the probationary period.

Petitioner relies upon Clark v. State, 402 So.2d 43 (Fla. 4th DCA 1981), for the proposition that Carroll must be interpreted in a restrictive manner. There, an amended affidavit of violation of probation alleging two additional counts was filed after the probationary period had expired. The district court found that, even though "the processes of the trial court had been timely set in motion, new, substantive charges could not be filed after the date of termination." There was no case law cited in support of this decision, and there is no apparent reason why this aberration of Carroll should be followed.

Respondent would rely on Kimbell v. State, 396 So.2d 815 (Fla. 4th DCA 1981), and Jess v. State, 384 So.2d 328 (Fla. 3d DCA 1980), for the proposition that where the processes have been set in motion, the court preserves for consideration those violations which have occurred or are alleged to have occurred during the actual term of probation. 396 So.2d at 817.

Petitioner's argument that the amended affidavit of violation of probation filed January 20, 1984, is not the same affidavit which was filed February 20, 1979, because the latter does not incorporate by reference the former, is patently erroneous. There are only two affidavits in the record, both of which relate to Case number 77-326. It is ludicrous for Petitioner to argue that the amended affidavit does not relate back to the original affidavit which was never withdrawn. The fact that the violations cited in the 1979 affidavit were not included in the 1984 amended version is unimportant - the

processes of the court were set in motion before the probationary period expired, and the violations for which probation was revoked also occurred during the probationary period.

The other cases cited by Petitioner are also distinguishable from the instant case. In Carpenter v. State, 355 So.2d 492 (Fla. 3d DCA 1978), the trial court was divested of jurisdiction when it found defendant to be not guilty of alleged violations. Because the hearing was held after the probationary period, the court's instruction to the probation officer to file an amended affidavit alleging additional violations was improper for lack of jurisdiction. In Brooker v. State, 207 So.2d 478 (Fla. 3d DCA 1968), an affidavit of probation violation was not filed during the probationary period. Thus, these holdings are inapplicable.

Respondent urges this Court to follow the decision of Jess v. State, supra, (should it review this issue) as being dispositive. There, an affidavit was filed alleging that the defendant failed to submit monthly reports during his probationary period. This affidavit was never withdrawn by the state. A new affidavit was untimely filed alleging a burglary which occurred after probation had expired. As stated by the District Court:

> The defendant's reliance upon the trial court's statement at the revocation hearing that it was proceeding under the latter affidavit is misplaced. Obviously, that comment did not affect the court's jurisdiction to revoke probation based upon the timely filed and

still-effective affidavit of December 9, 1977. 384 So.2d at 329.

Respondent submits that the holding in Clark v. State, supra, is conceptually irrational. Its decision on this issue was not dispositive of the case because it also found a lack of evidence to support the alleged violations. 402 So.2d at 45.

It should also be noted that Petitioner cannot demonstrate any prejudice to his cause. At the time his probation expired, he was incarcerated in South Carolina and was not released until December 23, 1983. (App. at A-1). He was arrested for violation of probation December 23, 1983. Obviously, Petitioner could not have attended a violation hearing in Florida during his incarceration in South Carolina. Moreover, he did not challenge the eight guilty pleas and convictions disposed of in South Carolina.

WHEREFORE, Respondent respectfully submits that this Court should strike the issue raised for the first time on appeal, and in the alternative, should this Court decide to review the question presented, relief should be denied on the merits.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

HENRI C. CAWTHON
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on the Merits has been forwarded by hand delivery to Paula S. Saunder, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 1st day of March, 1985.

HENRI C. CAWTHON
ASSISTANT ATTORNEY GENERAL