IN THE SUPREME COURT OF FLORIDA

BUSH WADE HOLLAND,

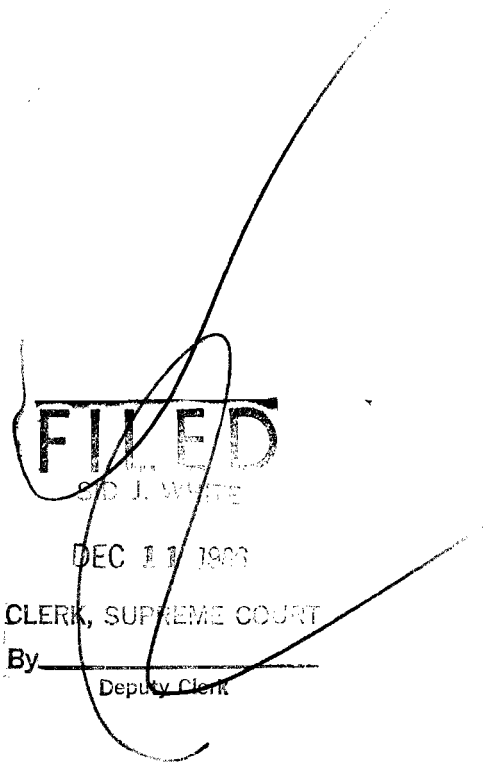
Petitioner,

vs. CASE NO. 68,605

STATE OF FLORIDA,

Respondent.

_____/



RESPONDENT'S BRIEF ON THE MERITS

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RESPONDENT'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Bush Wade Holland, the criminal defendent and appellant below will be referred to herein as Petitioner. The State of Florida, the prosecution and appellee below will be referred to herein as Respondent.

The record on appeal consists of one record volume and one supplemental record volume. Citations to the record volume will be indicated parenthetically as "R" with the appropriate page number(s). Citations to the supplemental record volume will be indicated parenthetically as "SR" with the appropriate page number(s). Citations to Petitioner's brief on the merits will be indicated parenthetically as "PB" with the appropriate page number(s). Citations to the appendix attached hereto will be indicated parenthetically as "A" with the appropriate page number(s).

The opinion of the lower court is currently reported as Holland v. State, 485 So.2d 471 (Fla. 1st DCA 1986).

STATEMENT OF THE CASE AND FACTS

Respondent rejects Petitioner's Statement of the Case and Facts (PB 2-5) on the grounds that it contains irrelavent information and argumentative commentary. The procedural and factual matters pertinent to the disposition of the case below was set out in the lower court's opinion on rehearing as follows:

> The [Petitioner] in this case was originally charged with DWI manslaughter (Count I), manslaughter (Count II), leaving the scene of an accident (Count (III), and driving with a suspended or revoked license (Count IV), all alleged to have occurred on July 28, 1984. The second count (manslaughter) was nolle prossed and [Petitioner] pled nolo contendere to Counts I, III, and IV. A sentencing guidelines scoresheet was then prepared, reflecting a total of 150 points and a recommended range of seven to twelve years incarceration. [Petitioner] was sentenced on December 5, 1984 to twelve years incarceration on Count I to be followed by a three-year term of probation (to expire on July 28, 2004), and one year probation on Count IV (to expire on July 28, 2005). As grounds for departure, the lower court attached a "laundry list" from which he checked off several "aggravating circumstances" and added a hand-written note under the section entitled "other reasons." [Petitioner] was also ordered to make restitution in the amounts of $46,462.75 and $249.65.
>
> No direct appeal was filed. A first motion for post-conviction relief was filed raising, as grounds, that there was no statutory provision under section 316.1931 relating to manslaughter. That motion was denied on January 4, 1985 without a hearing. [Petitioner] then filed the instant motion for post-conviction relief raising, as grounds: (1) that the scoring of 16 points for an additional offense at conviction was erroneous since the charge was nolle prossed by the State; (2) that the court imposed an excessive split sentence;

> and (3) that the restitution order was invalid because no hearing was held on the matter. The second motion was also denied without a hearing, the trial court finding the motion to be without merit and facially deficient.

Holland v. State, supra at 471, 472. On motion for rehearing the lower court affirmed the trial court's denial of Petitioner's Rule 3.850 motion finding, in essence, that all of Petitioner's claims were procedurally barred. Id. at 472.

Subsequently, Petitioner timely filed a Notice to Invoke Discretionary Jurisdiction and a jurisdictional brief. However, by letter dated April 18, 1986, Petitioner was advised by the clerk of this Court that his jurisdictional brief was in excess of the ten page limit and was given until April 25, 1986, to file an amended brief. Petitioner timely filed an amended jurisdictional brief. Due to oversight on the part of counsel for Respondent,[1] no jurisdictional brief was filed on behalf of Respondent and this Court accepted jurisdiction of this cause by Order dated October 20, 1986. Pursuant to said Order, Petitioner timely filed his brief on the merits wherein he advances arguments concerning ineffective assistance of cousel, an apparent desire to withdraw his nolo plea, and a challenge to the lower court's denial of his motion for recognizance release (PB 7-20). Petitioner's arguments

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[1] See Respondent's Motion to Accept Brief as Timely Filed.

predicated upon ineffectiveness of trial counsel and a desire to withdraw his plea were not presented to either the lower court (See Petitioner's briefs filed below (A 1-30)), or the trial court (R 6-10). Respondent's brief on the merits follows.

SUMMARY OF ARGUMENT

Petitioner first challenges the lower court's affirmance of the trial court's denial of his Rule 3.850 motion wherein he sought vacation of his sentence due to a guidelines scoresheet computational error. Respondent argues that the lower court's affirmance was correct since Petitioner's sentence was an integral component of, and resulted from, a plea bargain agreement. Respondent further argues that this Court should not consider Petitioner's prayer for relief--vacation of his plea--and line of argument based on ineffective assistance of trial counsel since those matters were presented for the first time in this Court.

Petitioner also challenges the lower court's denial of his motion for recognizance release. Respondent argues that said claim is not cognizable by this Court since there is no constitutional provision or procedural rule providing for this Court's review of such interlocutory orders. Respondent further argues that the claim is not cognizable because it was rendered moot by the lower court's affirmance of the trial court's order.

ARGUMENT

ISSUE I

THE LOWER COURT'S DECISION AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S RULE 3.850 MOTION WAS NOT ERROR. (Restated by Respondent).

Petitioner, who had originally sought a mere resentencing based, inter alia, upon a 16 point error in a guidelines scoresheet calculation (R 6-10), challenges the lower court's decision affirming the trial court's denial of his Rule 3.850 motion and requests this Court to set aside his plea bargain agreement (PB 21). Respondent submits that the lower court's decision is correct and should be affirmed.

At first blush, it would appear that disposition of this cause is controlled by this Court's decision in State v. Chaplin, 490 So.2d 53 (Fla. 1986), to-wit: since an alleged scoring error can be challenged at any time pursuant to Fla.R.Crim.P. 3.800(a), as amended, Petitioner's sentence should be vacated and the cause remanded for resentencing. However, due to the fact that Petitioner's sentence resulted from, and was an integral part of, a plea bargain agreement (SR 3-9), Chaplin is wholly inapposite to the instant case. Had the lower court applied its decision in Chaplin v. State, 473 So.2d 842 (Fla. 1st DCA 1985), or should this Court apply its Chaplin decision to vacate Petitioner's sentence and remand the cause for resentencing, the result would fly in the face of this Court's decision in Hoffman v. State, 474 So.2d 1178 (Fla. 1985).

Put simply, such a disposition of this case would, in effect, amount to vacation and restructuring of Petitioner's negotiated plea agreement without the State having been heard upon the issue or given the option to reject the materially altered plea agreement and go to trial on all of the original counts. This would be entirely incorrect since "[a] defendant cannot be allowed to arrange a plea bargain, back out of his part of the bargain, and yet insist the prosecutor uphold his end of the agreement." Hoffman v. State, supra at 1182. Consequently, the lower court's decision should be affirmed without prejudice to Petitioner's filing a Rule 3.850 motion wherein he can seek to withdraw his plea, the State can have an opportunity to be heard and, if necessary, a proper record can be developed as a basis for meaningful appellate review.

At this point, Respondent would point out that neither in the trial court (R 6-10) nor in the district court (A 1-30) did Petitioner advance arguments based upon ineffective assistance of counsel or seek to withdraw his plea. These matters were not raised until Petitioner came before this Court. Indeed in his response to the State's motion for rehearing in the lower court Respondent represented to that court that he was not seeking vacation of his plea (A 31,32). While this Court quite properly affords pro se litigants liberal construction of their pleadings, State v. Stacey, 482 So.2d 1350 (Fla. 1985), it should not consider Petitioner's new line of argument or prayer for relief presented at such a late stage of the case. Cochran v. State, 476 So.2d 207, 208 (Fla. 1985).

In the event this Court should be inclined to entertain these matters, Respondent once again submits that the lower court's decision should be affirmed without prejudice to Petitioner's filing a Rule 3.850 motion to challenge his plea. However, it should be emphasized that if Petitioner is permitted to withdraw his plea, all of the original charges may be reinstated, the State can proceed to trial, and Petitioner, if convicted, could be exposed to a term of incarceration up to the statutory maximum for each count for which he is convicted. See Hoffman v. State, supra at 1182.

Accordingly, the lower court's decision affirming the trial court's denial of Petitioner's Rule 3.850 motion should be affirmed.

ISSUE II

PETITIONER'S CLAIM CONCERNING THE LOWER COURT'S DENIAL OF HIS MOTION FOR RECOGNIZANCE RELEASE IS NOT COGNIZABLE UNDER THIS COURT'S DISCRETIONARY JURISDICTION. (Restated by Respondent).

Petitioner seeks to obtain review of the district court's interlocutory order, entered on March 18, 1986, denying his motion for recognizance release. Respondent submits that Petitioner's claim is not cognizable by this Court since review of such interlocutory orders is not provided for by Article V, Section 3 of the Florida Constitution or Fla.R.App.P. 9.030(a)(2). Moreover, to the extent that Petitioner is heard to contend that the district court should have afforded him bail because, prior to its decision on rehearing, the court had remanded the cause for resentencing,[2] that claim was rendered moot by the district court's opinion on rehearing and therefore not properly subject to review here. State v. Kinner, 398 So.2d 1360 (Fla. 1981).

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[2] Petitioner clearly was not entitled to recognizance release under Fla.R.Crim.P. 3.691 since his conviction was never challenged. Collins v. State, 478 So.2d 402 (Fla. 1st DCA 1985).

CONCLUSION

Based upon the foregoing arguments and the authority cited herein, the decision of the First District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Bush Wade Holland, DC# 029346, Apalachee Correctional Institution, Post Office Box 699-W, Sneads, Florida, 32460 by U. S. Mail on this 11th day of December, 1986.

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ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT