IN THE SUPREME COURT OF FLORIDA

CASE NO. 68,711

STATE OF FLORIDA,

Petitioner,

vs.

EUSEBIO ACOSTA,

Respondent.

PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of the Case and Facts contained in its Initial Brief at pages two (2) through six (6).

POINTS ON APPEAL

POINT I

WHETHER IF A DEFENDANT FAILS TO PERFORM A CONDITION OF HIS PLEA AGREEMENT, A TRIAL COURT MAY PROPERLY VACATE BOTH THE DEFENDANT'S PLEA AND SENTENCE AND RESENTENCE THE DEFENDANT, AND SUCH RESENTENCING IS NOT ILLEGAL IN VIOLATION OF DOUBLE JEOPARDY PRINCIPLES?

POINT II
(Respondent's Point I)

WHETHER THE TRIAL COURT PROPERLY VACATED BOTH RESPONDENT'S PLEA AND SENTENCE WHERE RESPONDENT FAILED TO HONOR THE ONLY CONDITION OF HIS NEGOTIATED PLEA AGREEMENT?

SUMMARY OF ARGUMENT

POINT I

Petitioner relies on the summary of agreement argument in it's Brief on the Merits at page 8.

POINT II

Petitioner maintains that the trial court properly vacated Respondent's plea and sentence since it had more than substantial grounds to do so. Respondent's statement that he "found" the cocaine was belied by the facts and circumstances surrounding his arrest.

ARGUMENT

POINT I

WHERE A DEFENDANT FAILS TO PERFORM A CONDITION OF HIS PLEA AGREEMENT, A TRIAL COURT MAY PROPERLY VACATE BOTH THE DEFENDANT'S PLEA AND SENTENCE AND RESENTENCE THE DEFENDANT, AND SUCH RESENTENCING IS NOT ILLEGAL IN VIOLATION OF DOUBLE JEOPARDY PRINCIPLES.

Respondent's attempts to buttress the district court's decision are interesting but unpersuasive. The fact of the matter is that trafficking in cocaine and conspiracy to traffic in cocaine, the crimes with which Respondent was charged, both carry a fifteen (15) year mandatory minimum sentence as well as a $250,000 fine upon conviction. §893.135 Fla. Stat. These sentences are mandatory and not discretionary. State v. Benitez, 395 So.2d 514 (Fla. 1981); Morris v. State, 456 So.2d 471 (Fla. 3d DCA 1984). The only way for these mandatory sentences to be reduced is if the prosecutor moves to reduce or suspend the sentence and the defendant agrees to provide "substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals" pursuant to § 893.135(3) Fla. Stat., State v. Taylor, 411 So.2d 993 (Fla. 4thDCA 1982). In the instant case, the prosecutor filed a motion to reduce sentence and Respondent pled guilty to trafficking and promised to provide substantial assistance. Based upon Respondent's promise, the trial court sentenced him to only

seven (7) years in prison for trafficking. The State nolle prossed the conspiracy count of the information. No fines were levied against Respondent. Respondent's statement that he "found" the 400 grams of cocaine in a bag along with $350.00 and five (5) pairs of pants did not assist in the identification, arrest or conviction of any of his accomplices, accessories, coconspirators or principles as he had promised pursuant to his plea agreement with the State. Because Respondent did not provide substantial assistance pursuant to § 893.135(3), his seven (7) year sentencing was illegal. The mandatory minimum sentence for trafficking in cocaine, absent a defendant rendering substantial assistance, is fifteen (15) years, plus a $250,000.00 fine. Section 924.07 Fla. Stat. provides that the State may appeal illegal sentences. Because the State has a statutory right to appeal illegal sentences, the prosecutor was entirely correct in moving to set aside Respondent's plea and sentence. See, United States v. DiFrancisco, 449 U.S. 117 (1980).

Petitioner would again point out that the trial court was correct in vacating Respondent's conditional plea and sentence once it determined Respondent had not rendered substantial assistance. Flewellyn v. State, 308 So.2d 46 (Fla. 3d DCA 1975). The fifteen (15) year sentence later imposed by the trial court after Respondent pled guilty to trafficking in cocaine was the sentence mandated under §893.135 and was entirely legal. Petitioner maintains here

as it did below, that Respondent was barred from appealing that conviction and sentence because he pled guilty and his subsequent sentence was not illegal. Robinson v. State, 373 So.2d 898 (Fla. 1979).

Petitioner maintains that Respondent's resentencing was not in violation of double jeopardy principals pursuant to this Court's decision in Brown v. State, 367 So.2d 616 (Fla. 1979). When a defendant fails to perform a condition of his plea agreement, it is not against double jeopardy principals for a trial court to vacate the defendant's plea and sentence, and to resentence him to an increased term of imprisonment. Miller v. Swanson, 411 So.2d 875 (Fla. 2d DCA 1981); Lerman v. Cornelius, 423 So.2d 437 (Fla. 5th DCA 1982).

Petitioner would also point out that the cases upon which Respondent relies, Troupe v. Rowe, 283 So.2d 857 (Fla. 1973), Cherry v. State, 439 So.2d 998 (Fla. 4th DCA 1983), Katz v. State, 335 So.2d 608 (Fla. 2d DCA 1976), and Pooly v. State, 403 So.2d 593 (Fla. 1st DCA 1981), are inapplicable to the instant case since none of those cases involved a defendant who had breached his negotiated plea agreement. Further, Petitioner would also argue that the Third District's decision in Scott v. State, 419 So.2d 1178 (Fla. 3d DCA 1982) and later decision in Pittman v. State, 478 So. 2d 1193 (Fla. 3d DCA 1985), are distinguishable from the instant case. In Scott, supra, the defendant had already been sentenced when the trial court vacated his

sentence due to the fact that the defendant violated a plea negotiation condition by failing to appear in court on a certain date to begin serving his sentence, and then aggravated the previously imposed sentence. The Third District held that the defendants later sentence violated double jeopardy principals because the earlier sentence was complete in itself and was legally incapable of being subject to a condition subsequent and therefore could not be vacated. Id. at 1179. In Pittman, supra, the Third District under similar circumstances, reversed the defendant's sentence on the authority of its earlier decision in Scott, supra. Petitioner would point out that the negotiated conditions in both Scott, supra and Pittman, supra were only incidental to the plea agreements entered, and are in stark contrast to the situation in the instant case which involved a condition central to the whole plea agreement. If Respondent did not expressly agree to render substantial assistance he could not be sentenced to a reduced term for his conviction under §893.135. Further, Respondent's seven (7) year sentence was not complete in itself until Respondent rendered substantial assistance according to the dictates of §893.135. See Scott at 1179. Thus the condition of Respondent's plea agreement was not truly a condition subsequent since his express agreement to render substantial assistance was the only way for Respondent to receive less than the mandatory minimum sentence under §893.135. Respondent having failed to do so thus essentially agreed to an illegal sentence which is clearly imper-

missible. Prunty v. State, 360 So.2d 147 (Fla. 1st DCA 1978); Smith v. State, 358 So.2d 1168 (Fla. 2d DCA 1978).

Petitioner therefor maintains that the trial court acted correctly when it vacated Respondent's seven (7) year sentence for trafficking in cocaine since he failed to perform the only condition of his negotiated plea agreement, a condition which rendered his seven (7) year sentence illegal unless satisfied. Respondent's subsequent fifteen (15) year sentence pursuant for his plea of guilty was a legal sentence and not in violation of double jeopardy principles.

POINT II

(Respondent's Point I)

THE TRIAL COURT PROPERLY VACATED BOTH RESPONDENTS PLEA AND SENTENCE WHERE RESPONDENT FAILED TO HONOR THE ONLY CONDITION OF HIS NEGOTIATED PLEA AGREEMENT.

Respondent essentially argues that the trial court erred in vacating his plea and sentence because it did so without an evidentiary foundation. Petitioner maintains however, that the trial court correctly vacated the plea and sentence since Petitioner failed to give the prosecutor a truthful statement as to the source of the cocaine pursuant to his negotiated plea agreement.

In the instant case, Respondent was charged in a two count information with trafficking in cocaine and conspiracy to traffic in cocaine after he was arrested for selling an amount of cocaine in excess of 400 grams to undercover agents (R 53). The facts giving rise to Respondent's arrest are as follows. Beginning on December 23, 1983, the Respondent met with undercover police officers and Jorge Estevez and on that occasion and later occasions, discussed the sale of cocaine (R 33). On December 30, 1983, the officers were directed to the home of Respondent and negotiations regarding the price and quantity of the cocaine to be sold were finalized (R 33). Respondent directed an officer to the location of the cocaine which was situated behind a stereo speaker in Respondent's living room (R 33). The cocaine was

retrieved and tested in front of Respondent (R 33). Officers then obstensibly then went out of the home to get the money and came back and arrested Respondent (R 33). The amount of cocaine involved was in excess of 400 grams.

Trafficking in cocaine and conspiracy to traffic in cocaine both carry a 15 year mandatory minimum sentence and a large fine upon conviction. As part of a negotiated plea agreement, Respondent pled guilty to trafficking and was sentenced to only seven (7) years in prison. The State nol-prossed the conspiracy count. In exchange for this, Respondent agreed to give a truthful statement to the prosecutors satisfaction regarding the sourse of the cocaine (R 4). Respondent's plea and sentence was clearly conditioned upon him giving the prosecutor a full and truthful statement (R 12). Two days after Respondent was sentenced and agreed to give a statement to the prosecutor pursuant to his substantial assistance agreement. Respondent told the prosecutor that he found the cocaine along with $350.00 and five pair of pants in a package on Young Circle in Hollywood, Florida (R 51). The trial court vacated Respondent's plea and sentence after Respondent failed to honor his negotiated plea agreement by not giving a full and truthful statement as to the source of the cocaine pursuant to § 893.135(3), Fla. Stat.

Petitioner maintains, despite the Fourth District's opinion in the case sub judice, that the trial court acted properly when it vacated Respondent's plea and sentence. The facts surrounding Respondent's arrest establish that Respondent

was personally involved in negotiations for the sale of the cocaine for not one, but several days before the transaction was finally consummated (R 33). The sale took place in Respondent's own home and Respondent himself personally directed the undercover officer to the location of the cocaine which was behind a stereo speaker in Respondent's living room (R 33). The amount of cocaine involved was in excess of 400 grams. Respondent stipulated to these facts when he entered his plea agreement (R 8). It is clear that Respondent's story that he "found" the cocaine in a bag was not only a fairy tale but a blatant lie considering the facts surrounding his arrest and the large amount of cocaine involved. It is equally clear that Respondent did not provide "substantial assistance in the identification, arrest or conviction of any of his accomplices, co-conspirators, or principals" as he expressly agreed to do as part of his plea agreement. Having failed to provide the substantial assistance to which he agreed, the trial court correctly vacated Respondent's plea and sentence. While it is true that the prosecutor was not satisfied with Respondent's statement, it was the trial court who had the ultimate responsibility and discretion to determine of Respondent had actually rendered substantial assistance. State v. Benitez, 395 So.2d 514 (Fla. 1981); Cherry v. State, 439 So.2d 998 (Fla. 4th DCA 1983). The trial court having found that Respondent had not provided substantial assistance, properly vacated Respondent's conditional plea and sentence. Flewellyn v. State, 308 So.2d 46

(Fla. 3d DCA 1975), See also, M.R.S. v. State, 478 So.2d 1166 (Fla. 1st DCA 1975). Appellant's "statement" was belied by the very facts and circumstances surrounding his arrest which showed him to be a shrewd and enterprising drug salesman. Based on those facts and circumstances, the trial court had more than sufficient grounds to vacate Respondent's conditional plea and sentence. Flewellyn, supra.

Further, Petitioner would also argue that it has never been the duty of the State to take a proffer in order to determine if a defendant's assistance under § 893.135(3), Fla. Stat., is "substantial" prior to a plea being accepted or sentence imposed. The State would not offer a defendant a reduced sentence under § 893.135(3) if a defendant didn't expressly agree to provide "substantial assistance in the identification, arrest or conviction of any of his accomplaces, accessories, co-conspirators, or principals." The State in the case sub judice entered into the plea agreement in obviously misguided good faith and the Respondent should have been held to the same good faith standard in performing his end of the plea agreement. This Court has expressly stated that a defendant cannot be allowed to arrange a plea bargain, back out of his part of the bargain, and yet insist that the prosecutor uphold his end of the agreement. Hoffman v. State, 474 So.2d 1178 (Fla. 1985). Clearly, the trial court was correct in vacating Respondent's plea and sentence. See, Brown, supra; Lerman, supra; Miller, supra. The Fourth District erred in holding otherwise and it's decision should be reversed.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully prays this Honorable Court reverse the decision of the District Court of Appeal of the State of Florida, Fourth District and answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply Brief has been sent by United States Mail to: ROBERT BOGEN, ESQUIRE, Attorney for Respondent, Braverman and Bogen, 625 Northeast 3rd Avenue, Fort Lauderdale, Florida 33304, this 31st day of July 1986.

Carolyn V. McCann

Of Counsel