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IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,948

DON WHITE,

Petitioner

vs.

THE STATE OF FLORIDA,

Respondent.

* *

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEALS, THIRD DISTRICT OF FLORIDA

* *

BRIEF OF RESPONDENT ON MERITS

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

FARIBA N. KOMEILY
Assistant Attorney General
Department of Legal Affairs
Suite 820
401 Northwest 2 Avenue
Miami, Florida 33128

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INTRODUCTION

Petitioner, DON WHITE, was the Appellant in the District Court of Appeal and the Defendant in the trial court. Respondent, THE STATE OF FLORIDA, was the Appellee in the District Court of Appeal and the prosecution in the trial court.

The Opinion of the District Court of Appeal herein was reported as White v. State, 499 So.2d 14 (Fla. 3rd DCA 1986).

In this brief, the parties will be referred to as Petitioner and State, respectively. The symbols "App. A" and "App. B" will be used to refer to the April 25, 1985 plea bargain hearing and the October 13, 1986 Order Denying Defendant's Motion for Post-Conviction Relief, respectively.

All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The Petitioner's Statement of the Case and Facts is a substantially accurate account of the proceedings below, with certain omissions noted as follows. The State reserves the right to address and argue additional facts from the record.

The Petitioner was indicted for the crime of first degree murder with a firearm, in violation of Florida Statute 782.04, a capital offense. (App. A, P.5). In exchange for a plea of guilty to the lesser included offense of second-degree murder with a firearm, a life felony, Petitioner agreed to waive the sentencing guidelines. (App. A, P. 2,8).

At the plea hearing, the trial judge inquired as to whether petitioner understood the negotiated plea ramification of being subject to any sentence ranging from minimum mandatory three years to a life sentence. The Petitioner responded: "It goes from three to life... its your discretion." (App. A, P. 8). At the sentencing hearing the Petitioner further stated:

> "I was provided the information of the laws ... avoiding death penalty because it was pre-med. ... I was offered no guidelines. I took it."
>
> (See Petitioner's App. A, T. 3-4).

No question of "competency" for "trial, plea or anything else" was ever raised. (App. A, P. 18). Based upon "prior hearings," review of the Complaint, Affidavit and other documents in the file," the trial judge found a factual basis for the Petitioner's plea. The court further found that said plea was knowingly, voluntarily and intelligently entered. (App. A, P. 19).

At the sentencing hearing, the Petitioner spoke on his own behalf. (See Petitioner's App. A, T. 3-7). The victim's family also made statements, none of which were objected to. (See Petitioner's App. A, T. 12-13). The trial judge stated that the sentencing guidelines range was 12 to 17 years, but that the parties had waived said guidelines. (See Petitioner's App. A, T. 14). The Petitioner was sentenced to 30 years on May 30, 1985.

The Petitioner, having previously indicated his knowledge of right to appeal within 30 days (App. A, P. 13), did not file a direct appeal. The Petitioner filed a Rule 3.850 motion for post-conviction relief alleging: (1) that the trial court imposed a "constitutionally illegal" sentence, because "the trial court had no authority to waive the guidelines ..."; (2) that his attorney had no authority to waive the guidelines and he was, therefore, denied effective

assistance of counsel; and (3) that his guilty plea was involuntary, because, he "could not be sentenced upon a waiver of the sentencing guidelines." (See Petitioner's App. A, p. 5).

The trial court denied Petitioner's motion, finding that the latter had failed to demonstrate illegality of the sentence. (App. B, P. 1). The trial court further found that the transcripts of the negotiated plea and sentencing hearings demonstrated a knowing, voluntary and intelligent agreement by the Petitioner to a sentence in excess of the guidelines. (Id.). Furthermore, the trial court stated that the trancripts failed to show ineffective assistance of counsel as alleged by the Petitioner. The Third District Court of Appeals, per curiam affirmed the trial judge's order, citing Rowe v. State, 496 So.2d 857 (Fla. 2nd DCA 1986), and Bell v. State, 453 So.2d 478 (Fla. 2nd DCA 1984). This court granted discretionary review based upon an alleged conflict between Rowe, supra, and the decision of this court in William v. State, 500 So.2d 501 (Fla. 1986).

SUMMARY OF ARGUMENT

Direct Appeal of a sentence imposed outside the guidelines is available to a defendant who has pled guilty. Consequently, Petitioner's failure to appeal claims which could have been brought on direct appeal precludes consideration of same in a Rule 3.850 proceeding. This is especially so, where some of these issues were not even raised in the Rule 3.850 Motion as filed in the trial court.

The transcripts of the plea bargain and sentencing hearings support the trial court's denial of Petitioner's Rule 3.850 Motion, because, they evidence that the statutorily authorized sentence imposed was the result of plea negotiations between the parties. The Petitioner was charged with first degree murder with a firearm, a capital felony. The Petitioner pled guilty to second-degree murder with a firearm, upon the understanding and agreement that he would be subjecting himselt to a cap of life imprisonment, as authorized by statute. The trial court accepted the plea and sentenced Petitioner to thirty (30) years.

The Petitioner did not object to the statutorily permissible statements from the victim's family at the sentencing phase. In addition, said statements did not

constitute cruel and unusual punishment so as to violate the Petitioner's constitutional rights, because, this was not a death penalty case.

I

ARGUMENT

THE PETITIONER'S ACCEPTANCE OF AN AGREED TO LEGAL SENTENCE, PURSUANT TO A NEGOTIATED PLEA BARGAIN, CONSTITUTES A CLEAR AND CONVINCING REASON FOR DEPARTURE FROM THE GUIDELINES.

The Petitioner was charged with first degree murder, with a firearm. This charge is a capital felony and not subject to the guidelines. Florida Statutes 782.04 (1985); also see, Park v. State, 12 F.L.W. 1779 (Fla. 1st DCA, July 1987). The Petitioner subsequently pled guilty to the lesser included offense of second-degree murder with a firearm, a life felony. Florida Statutes 782.04(2). Hence, the Petitioner became subject to the guidelines only by virtue of his plea bargain. Park, supra.

The statutory maximum for punishment of said life felony was life imprisonment. Florida Statutes 775.082. The Petitioner was clearly informed and the plea bargain specified this cap, which was in excess of the presumptive term under the sentencing guidelines. (App. A, P. 7-8).

It is well established that a negotiated plea, which includes an agreement that defendant may be sentenced to imprisonment for a period of time in excess of the new sentencing guidelines (although within the minimum and

maximum sentence limitations provided by law), is a clear and sufficient reason for departure from these guidelines. Key v. State, 452 So.2d 1147 (Fla. 5th DCA 1984). Also see, Bell v. State, 453 So.2d 478 (Fla. 2nd DCA 1984); Geter v. State, 473 So.2d 31 (Fla. 1st DCA 1985); Lawson v. State, 497 So.2d 288 (Fla. 1st DCA 1986). This Court in Holland v. State, 508 So.2d 5, 6 (Fla. 1987), citing Key, supra, and Bell, supra, has also stated that if the sentence is a departure from the guidelines, the plea bargain constitutes a valid reason for departure.

The Petitioner, however, has argued that this Court's decision of Williams v. State, 500 So.2d 501 (Fla. 1986), in addition to Dunn v. State, 12 F.L.W. 389 (Fla. 5th DCA 1987) and Henry v. State, 12 F.L.W. 68 (Fla. 2nd DCA 1987) stand for the following propostion:

> "... a guideline sentence for crimes after October 1, 1983, cannot be waived either by the defendant or the trial sentencing court." (See Petitioner's Brief on the Merits, p. 4 and 9).

Proceeding from the premise that sentencing guidelines can never be waived by a defendant, the Petitioner than argues that in the instant case the trial judge's departure from the sentencing guidelines was without a clear and convincing reason and, thus, constituted an "illegal sentence."

The Petitioner's reliance upon the Williams, supra, Dunn, supra, and Henry, supra, decisions, for the proposition that a defendant can never waive sentencing guidelines, is misplaced. In Williams, supra, at page 503, this court held:

> A trial court can not impose an illegal sentence pursuant to a plea bargain... . A defendant can not by agreement confer on the court the authority to impose an illegal sentence.

Williams, supra, involved a guideline recommended sentence of any non-state prison sanctions. The trial judge agreed to follow the guidelines provided that the defendant reappeared for sentencing. Williams did not appear for sentencing. The trial judge departed from the guidelines and sentenced Williams to fifteen years for his non-appearance at sentencing. This Court noted that such non-appearance was a separate crime, and that Williams had not been convicted of this crime. The Court then presented the issue as "whether a defendant's failure to appear for sentencing constitutes a clear and convincing reason for departure from guidelines." Williams, supra, at page 502. The Court then observed that had Williams been tried and found guilty of failing to appear, then he would only be subject to a maximum statutory term of 5 years. The Court found the subsequently imposed sentence of fifteen (15) years to be "illegal" because it exceeded the maximum five (5) year sentence permitted by Statute.

The instant case, however, does not involve an "illegal" sentence. Unlike Williams, supra, Petitioner's sentence did not exceed the statutory maximum permitted for the punishment of the offense he was convicted for. The sentence received by the Petitioner (30 years) was within the statutory maximum life sentence for second-degree murder with a firearm. Florida Statutes 782.04(2). The sentence imposed was in excess of the guidelines and thus, a departure. However, Petitioner's bargain for said sentence, as opposed to Williams' stated reason of failure to appear for sentencing, constituted a clear and convicing reason for departure from the guidelines. Key, supra; Holland, supra.

Petititioner's reliance upon Henry, supra, is also misplaced, because, the court in that decision stated:

> "In this case, unlike the normal plea bargain, appellant in exchange for receiving probation without incarceration, a sentence already indicated by the guideline score sheet, was required to agree to allow the court to depart to an unspecified extent from a future unknown presumptive sentence if he violated the terms of his probation.
>
> Henry, supra, at p. 69.

In the instant case, there was a plea bargain. The guidelines became applicable in the first place only as a result of the plea bargain.

Likewise, the decision of Dunn is not applicable because said decision makes no mention of the plea bargain situation present in the instant case. The factual circumstances of the case are not stated in the decision either.

Finally, the Petitioner, in his Summary of the Argument, has alleged that the trial court's departure from the guidelines took place without written reason, thus resulting in error. (See Petitioner's Brief on the Merits, P. 4). The Petitioner has not elaborated nor cited any relevant case law in support of this portion in his Argument. We note that the instant case is on discretionary review from denial of a Rule 3.850 Motion for Post-Conviction Relief. The absence of written reasons for departure was not raised in said motion. (See Petitioner's Brief, App. A, P. 1-7). The Petitioner, thus, can not raise this issue for the first time on appeal of denial of said motion. Furthermore, failure to provide written reason for departure should have been raised on direct appeal and not through a Rule 3.850 Motion. Rowe v. State, 496 So.2d 857 (Fla. 2nd DCA 1986), cert. pending, case no. 69,606, citing State v. Whitfield, 487 So.2d 1045 (Fla. 1986).

In conclusion, the trial judge correctly denied the Petitioner's Rule 3.850 Motion, because, the latter did

not establish any "illegality" of his sentence by alleging that a defendant can never waive the guidelines. Petitioner's remaining grounds of (1) involuntary guilty plea due to "illegal" sentence; and (2) ineffective assistance of counsel because trial counsel "had no authority to stipulate to an illegal sentence," were also correctly found to be without basis, factually or legally, from the record reviewed by the trial judge. The Third District Court of Appeals, thus, properly affirmed the trial judge's denial of the Motion for Post-Conviction Relief. It is therefore, respectfully submitted that discretionary review in this case be dismissed because the Petitioner has not shown conflict with this Court's decision of Williams, supra.

II

ARGUMENT

VICTIM'S NEXT OF KIN STATEMENTS DURING THE SENTENCING PHASE OF A NON-CAPITAL OFFENSE BEFORE THE TRIAL JUDGE ARE PERMISSIBLE AND NOT VIOLATIVE OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner has claimed that the victim's family's statements at the sentencing hearing, relating to the extent of harm which directly or indirectly resulted from the Petitioner's murdering of the victim, constituted cruel and unusual punishment, in violation of the Eigth Amendment to the United States Constitution. As authority for said proposition, Petitioner has cited the United States Supreme Court opinion of Booth v. Marland, ___ U.S. ___, 107 S.Ct. ___, ___ L.Ed.2d ___, (Slip Opinion, June 15, 1987) (See Petitioner's App. B).

Booth, supra, was a capital case where the death penalty was imposed. The Supreme Court held that the denial of a motion to suppress presentence reports, which were based upon interviews with the victim's family, was error. However, the Court specifically stated:

> "We note, however, that our decision today is guided by the fact death is a "punishment different from all other sanctions," [cite], and that therefore the considerations that inform the sentencing decision may be different from

> those that might be relevant to other liability or punishment determinations. At least 36 states permit the use victim impact statements in some contexts, reflecting a legislative judgment that the effect of the crime on victims should have a place in the criminal justice system. [cite]. Congress also has provided for victim participation in federal criminal cases. [cites]. We imply no opinion as to the use of these statements in non-capital cases.
>
> Booth, supra at p. 12-13.

The instant case did not involve the imposition of the death penalty, thus, Booth, supra, is not applicable.

The Petitioner contends that the victim's family statements were "prejudicial and irrelevant." (See Petitioner's Brief, P. 18). However, unlike Booth, supra, the Petitioner in the instant case made no objections to any of the subject statements (See Petitioner's App. A, T. 2-15). As to the issue of relevancy, the victim's family made their statements pursuant to Florida Statutes 921.132 which in relevant part provides:

> **921.143. Appearance of victim or next of kin to make statement at sentencing hearing; submission of written statement**
>
> (1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant ... who has pleaded guilty ..., the sentencing court shall permit ... the next of kin of the victim if the victim has died from causes related to the crime, to:

> (a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or
>
> (b) Submit a written statement under oath to the office of the state attorney, which statement shall be filed with the sentencing court.
>
> (2) The state attorney or any assistant state attorney shall advise all victims or, when appropriate, their next of kin that statements, whether oral or written, shall relate solely to the fact of the case and the extent of any harm, including social, psychological, or physical harm, financial losses, and loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced.

Therefore, the subject statements were statutorily relevant.

In any event, we again note that the instant case involves the denial of a Rule 3.850 Motion for Post-Conviction Relief. The Petitioner did not raise this issue in his motion. Furthermore, Rule 3.850 "does not authorize relief based upon grounds which could have or should have been raised at trial...". (See Florida Rule of Criminal Procedure 3.850).

CONCLUSION

WHEREFORE, the Respondent submits that no conflict with this Court's opinion of Williams, supra, has been established. The appeal herein may be dismissed, or in the alternative, the decision of the District Court of Appeal and the trial court denying the instant Rule 3.850 Motion should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

FARIBA N. KOMEILY
Assistant Attorney General
Department of Legal Affairs
Suite 820
401 Northwest 2 Avenue
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERITY that a true and correct copy of foregoing BRIEF OF RESPONDENT ON MERIT was furnished by mail to DON WHITE, 500 Orange Avenue Circle, Glade Correctional Institution, Belle Glade, Florida 33430, on this 19th day of August, 1987.

FARIBA B. KOMEILY

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