IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. 70,278

JAMES A. COBAN,

Respondent.

DISCRETIONARY REVIEW OF DECISION
OF THE DISTRICT COURT OF APPEAL,
STATE OF FLORIDA, SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CHARLES CORCES, JR
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

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PRELIMINARY STATEMENT

The record on appeal, which is contained in one volume will be referred to by the symbol "R" followed by the appropriate page number. Accompanying this brief is an Appendix which will be referred to by the symbol "R".

STATEMENT OF THE CASE

Respondent, on August 31, 1983, was indicted for murder in the first degree. (R-5).

On March 26, 1984, pursuant to plea negotiations, he pled guilty, as charged, in exchange for a life sentence. (R-15). He was adjudicated guilty and sentenced to life imprisonment.

Subsequently, on June 28, 1985 he filed a motion to vacate his judgment and sentence. (R-7). His motion was predicated on the contention that:

(1) His plea was not knowlingly and intelligently entered because he did not know, at the time he entered his plea, he would have to serve a minimum of 25 years before being eligible for parol, and that neither the court nor his lawyer so advised him. (R-7-10).

(2) His lawyer rendered ineffective representation because he failed to advise Respondent that he had to serve 25 years before being eligible for parol. (R-7-10). His motion did not allege he would not have so pled if he had

known he had to serve a 25 year minimum before becoming eligible for parol, (R-7-10), although he did so testify at the evidentiary hearing. (R-92).

A hearing was held on said motion. (R-46-120). The trial judge denied the motion, reasoning that, while a defendant must be advised of the maximum and minimum sentence, he need not be advised as to his parol eligibility.

On appeal the lower court held the plea to be voluntary as to the life sentence, but that since appellant had not been advised that he had to serve 25 years before being eligible for parol he didn't have to. (A-1-5).

The state filed a petition for rehearing pointing out that the lower court's decision results in an illegal sentence, citing Fla. Stat. 775.082(1) and Buford v. State, 403 So.2d 943 (Fla. 1981). (A-8).

On rehearing the lower court declined to hold the sentence it had imposed by virtue of its opinion illegal, but certified the following question to this court:

> WHETHER UNDER THE CIRCUMSTANCES OUTLINED IN OUR OPINION: (1) THE DEFENDANT'S PLEA MAY BE CONSIDERED VOLUNTARY AND HIS SENTENCE INTERPRETED TO BE A LIFE SENTENCE TO WHICH SECTION 775.082(1) HAS NO APPLICABILITY; OR (2) THE DEFENDANT'S SENTENCE IS SUBJECT TO THE MANDATORY REQUIREMENTS OF SECTION 775.082(1); OR (3) THE DEFENDANT'S PLEA MUST BE SET ASIDE AS INVOLUNTARY?
>
> (A-7)

Timely Notice of Invoking Discretionary Jurisdiction in this Court was filed.

STATEMENT OF THE FACTS

The plea colloquy discloses that the plea was entered as part of a plea bargain wherein Respondent was to receive a sentence of life imprisonment. (R-15). During the colloquy the court went through the litany of trial rights that Respondent would have and ascertained that Respondent had discussed the consequences of the plea with his attorney. (R-19).

The plea colloquy fails to disclose that Respondent was advised that he would have to serve 25 years before he would be eligible for parol.

At the evidentiary hearing, Respondent's counsel testified that he could not recall discussing with Respondent the fact that appellant had to serve a minimum mandatory sentence. (R-54-55).

On cross examination counsel clarified that he was not saying Respondent was not advised by him only that he had no recollection of having advised him. (R-64-65).

Counsel's associate also testified that he had no independent recollection of any mention of a mandatory sentence, (R-78), except to discuss the options between pleading to a life sentence and a possible death sentence.

(R-77-78). He did not recall any discussions as to parol or parol eligibility. (R-79-80).

Respondent testified he was not advised by counsel as to any minimum period of time he would have to serve before he would be eligible for parol. (R-83-84).

He also testified he would not have pled guilty if he had known he would not be eligible for parol for 25 years. (R-92).

SUMMARY OF ARGUMENT

Where a defendant either pleads guilty to or is convicted of a capital offense the imposition of a life sentence without being eligible for parol for 25 years is mandatory. A sentencing judge is without authority to excuse this 25 year requirement. Consequently, assuming a plea to a capital offense is voluntarily and intelligently entered, failure to advise a defendant as to the parol eligibility requirement cannot be considered as excusing that requirement. Either the plea is involuntary because the defendant has not been so advised or, if, in spite of the failure to advise, the plea is deemed voluntary, the 25 year eligibility requirement cannot be excused.

Constitutionally, a plea of guilty is not rendered infirm because of failure to advise as to parol eligibility requirements as these are not considered direct consequences of a plea. If this court holds such a plea infirm it would have to be predicated on state law. State law does not require that such a plea be declared infirm.

ARGUMENT

QUESTION PRESENTED

> WHETHER UNDER THE CIRCUMSTANCES OUTLINED IN OUR OPINION: (1) THE DEFENDANT'S PLEA MAY BE CONSIDERED VOLUNTARY AND HIS SENTENCE INTERPRETED TO BE A LIFE SENTENCE TO WHICH SECTION 775.082(1) HAS NO APPLICABILITY: OR (2) THE DEFENDANT'S SENTENCE IS SUBJECT TO THE MANDATORY REQUIREMENTS OF SECTION 775.082(1); OR (3) THE DEFENDANT'S PLEA MUST BE SET ASIDE AS INVOLUNTARY?

The question presented raised three issues. The first two will be argued together.

The Defendant's Sentence May Not Be Interpreted To Be A Life Sentence Without The Applicability Of Fla. Stat. 775.082(1)

The Defendant's Sentence Is Subject To The Mandatory Requirement Of Fla. Stat 775.082(1)

In a novel approach the lower court found the plea to first degree murder to have been voluntarily and intelligently entered, but not with respect to the 25 year minimum before becoming eligible for parol as required by Fla. Stat 775.082(1). (A-1-7). On rehearing, Petitioner pointed out that the decision essentially imposed an illegal sentence. (A-8). The lower court recognized the paradox, but continued to insist that Fla. Stat. 775.082(1) was inapplicable to Respondent. (A-6-7).

As Petitioner understands the lower court's decision, Respondent does not have to serve 25 years before becoming eligible for parol because the plea agreement was silent as to this aspect of the sentence and because neither the trial judge nor Respondent's lawyer mentioned this eligibility requirement to Respondent.

In other words, reasons the lower court, the plea was voluntary. It was also intelligently entered, but only in part. As to that part that it was not, the sentence did not apply.

This novel approach, we submit, if sustained, will create a windfall for defendants in cases where there may be a misunderstanding as to any aspect of a plea.

Consider, for instance, the following scenario. A defendant is charged with first degree murder. His counsel tells him that if he pleads guilty he will have to <u>serve</u>

only six months. During the plea colloquy the court is informed that the defendant will plead guilty provided he is not subjected to a death sentence. The court advises the defendant that the maximum sentence is death and the minimum is life, but that pursuant to the plea agreement it will sentence the defendant to life. However, since the court is not aware of what counsel told the defendant, the court does not, in the record, negate the defendant's understanding that in spite of the life sentence he will only have to serve six months. If one accepts the reasoning of the lower court in the instant case the plea, under the scenario advanced, would be voluntary, but the defendant would only have to serve six months of his life sentence. His misunderstanding results in a windfall to him.

In an apparently subconscious recognition that its novel approach would not survive logical analysis, the lower court sought to fortify its opinion by saying:

> "Moreover, the state made no challenge to the sentence as entered and no direct appeal ensued from the conviction."

(A-5)

With deference, we submit this statement cannot withstand scrutiny. Why should the state object, at the trial level, to the defendant not having to serve 25 years before

become eligible for parol when the first time that it was so suggested was in the challenged decision of the court below? When Respondent pled guilty, the law, as enunciated by this court, was that a life sentence with the 25 year requirement was automatic.

In Buford v. State, 403 So.2d 943 (Fla. 1981), this court set aside a death sentence for sexual battery because it violated the Eighth Amendment to the Constitution of the United States. Nevertheless, it did not remand the cause to the trial court for re-sentencing on the sexual battery because the sexual battery was a capital offense. This Court said:

> The sentence of death imposed for conviction of sexual assault is vacated. Section 775.082(1), Florida Statutes, mandates a punishment of life imprisonment with a requirement that defendant serve no less than twenty-five years before becoming eligible for parole. This is an automatic sentence, and the Court has no discretion.
>
> Text 954
> (emphasis supplied)

This court may ultimately hold that a plea is not intelligently entered where a defendant is not advised as to the 25 year eligibility requirement. But, that is a far cry from saying that, if the plea colloquy is silent as to that requirement, the defendant is not bound to it unless the state objects and appeals the error occurring as a result of that silence. In Robinson v. State, 373 So.2d

898 (Fla. 1979) this Court emphasized that after a plea of guilty a party may appeal only identifiable errors. If the 25 year requirement is automatic, then how can the judge be considered to have erred by not making it part of his sentence? How does the state identify this error on appeal? It was only after Respondent filed his motion for post conviction relief that any error, if there is one, could be identified, and then only by him.

Either the decision of the lower court in the instant case is wrong or the decision of this court in Buford is.

If Buford is correct, then the sentencing Judge,would have been powerless to expressly excuse the 25 year requirement even if he wanted to. The lower court's decision creates an anomaly because it allows a judge, through silence, to do what he could not do expressly.

We recognize that there are cases holding that a defendant may be entitled to the specific performance of a plea bargain, Bishop v. State, 403 So.2d 1062 (Fla. 2 DCA 1981), Damm v. State, 402 So.2d 52 (Fla. 3 DCA 1981), but those cases involve situations where there is a specific agreement, not as here, where the record is silent as to that aspect of the agreement. The general rule continues to be that a defendant is not entitled to the specific performance of a plea agreement. The remedy is for the court to give the defendant the opportunity to withdraw his plea. Davis v. State, 308 So.2d 27 (Fla. 1975),

Reynolds v. State, 339 So.2d 714 (Fla. 2 DCA 1976). Even assuming that there had been an express agreement that Respondent did not have to serve the 25 year minimum eligibility sentence, Respondent would not be entitled to specific performance but only to an opportunity to withdraw his plea.

Consequently, should this court determine that failure to advise as to the 25 year eligibility requirement was fatal to the voluntariness of the plea, the proper remedy is to allow Respondent the opportunity to withdraw his plea, not excuse the requirement.

The Defendant's Plea was Voluntarily and Intelligently Entered

The test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among alternative courses of action. North Carolina v. Alford, 400 U.S. 25, 31, 27 L.Ed 2d 162, 191 S.Ct 160, (1970), Hill v. Lockhart, 88 L.Ed 2d 203, 208 (1985) Williams v. State, 316 So.2d 267, 271 (Fla. 1975).

This, of course, means that a defendant need not be aware of all the consequences of his plea, only those that are a direct consequence of that plea.

The details of parol eligibility are considered by federal courts to be collateral and not the direct consequences of a plea of guility. Hill v. Lockhart, 88 L.Ed 2d 203 (1985),

Owens v. Wainwright, 698 F.2d 1111 (11th Cir 1983), Cepulonis v. Ponte, 699 F.2d 573 (1st Cir 1983), Hunter v. Fogg, 616 F.2d 55 (2nd Cir 1980), Smith v. United States, 324 F.2d 436 (D.C. Cir 1963), Trujillo v. United States, 377 F.2d 266 (5th Cir 1967).

In Hill v. Lockhart the defendant contended that his attorney had provided ineffective assistance because he misinformed the defendant that he would be eligible for parol after serving one-third of his prison sentence when, in fact, the defendant had to serve one-half of his sentence because he was a second offender. In rejecting the ineffectiveness claim the High Court said:

> Here petitioner does not contend that his plea was "involuntary" or "unintelligent" simply because the State through its officials failed to supply him with information about his parole eligibility date. We have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary, and indeed such a constitutional requirement would be inconsistent with the current rules of procedure governing the entry of guilty pleas in the federal courts. See Fed Rule Crim Proc 11(c); Advisory Committee's Notes on 1974 Amendment to Fed Rule Crim Proc 11, 18 USC App, p 22 [USCS Court Rules, Fed Rules of Crim Proc, Rule 11(c) Note] (federal courts generally are not required to inform defendant about parole eligibility before accepting guilty plea). Instead, petitioner relies

> entirely on the claim that his plea was "involuntary" as a result of ineffective assistance of counsel because his attorney supplied him with information about parole eligibility that was erroneous.
>
> Id 88 L.Ed 2d at 208

Subsequently in Travis v. Lockhart, 787 F.2d 409, 410 (8th Cir 1986) the Eighth Circuit cited Hill for the proposition that:

> (Constitution does not require that state furnish defendant with information about parole eligibility in order for defendant's plea of guilty to be voluntary).

The reasoning espoused by the federal courts is that

> ". . .eligibility for parole is not a "consequence" of a plea of guilty, but a matter of legislative grace. It is equally true that non-eligibility for parole is not a "consequence" of a plea of guilty in §4705(a) cases, even under the judicial expansion of Criminal Rule 11; rather, it is a consequence of the withholding of legislative grace."
>
> Smith v. United States, 324 F.2d 436 (D.C. Cir 1963) at 441

The State of Oregon was presented with the identical question presented here. In Jones v. Cupp, 490 P. 2d 1038 (Or. App 1971) the defendant had pled guilty to second degree murder. A post conviction court found that Jones had not been advised either by his attorney or the court that he

would not be eligible for parol until he served a minimum sentence of 7 years. Reasoning that "[i]t is necessary to draw the line as to what must be told the defendant as the 'basic legal consequences' of his plea of guilty" id 1040, the court said:

> We think the proper place to draw the line for which the court is responsible to a defendant on the advice of the basic consequences of his plea is with the information as to the maximum sentence which may be imposed. See also Sali v. Warden, Nev., 482 P. 2d 287 (1971) and Stocks v. Warden, 86 Nev. 758, 476 P.2d 469 (1970). We note that in the federal cases holding that parole ineligibility is not "a 'consequence' of a plea of guilty" (Smith, Trujillo, Onick) writs of certiorari have been uniformly denied. This tends to support our conclusion that pleading guilty without being informed as to parole ineligibility raises no constitutional issues.
>
> Id at 1040

Consequently, if this court holds that Respondent's plea is infirm because he was not advised that he would not be eligible for parol for 25 years it would have to be based on state rather that federal constitutional law.

The lower court relied, in part at least, on Fla. R. Crim P. 3.172(i) which requires a court to advise as to the mandatory minimum and maximum penalties provided by law and this court's decision in State v. Green, 421 So.2d 508 (Fla. 1982).

Green is distinguishable. In the first place Green was decided by this court before Hill v. Lockhart. Consequently, to the extent that Green is based on federal constitutional principles, as it may be applicable to parol eligibility requirements, it is not controling.

To the extent that Green may be considered to be predicated on Florida law it is unavailing. In Green this court held that where a trial judge intends to retain jurisdiction over the sentence, pursuant to Fla. Stat 947.16(4), he must advise the defendant of this fact prior to accepting the plea. This court held that retention of jurisdiction was a direct consequence of the plea. The distinction is, of course, that parol eligibility is a matter of legislative grace whereas retention of jurisdiction by a court, in order to allow that court to overrule any parol, is a matter of judicial grace. It is not only a matter of judicial grace but one which is a direct consequence of the plea. It is a direct consequence of the plea because the order retaining jurisdiction to overrule parol could not be entered without that plea.

Rule 3.172(i) does require a court to advise as to the maximum and minimum penalties. But, the maximum penalty imposed for first degree murder is death. The minimum is life. The lower court considered the ineligibility for parol requirement of Fla. Stat 775.082(1) to be the functional

equivalent of a 25 year minimum mandatory sentence. (A-4 footnote 1). At first glance this has some plausibility. But, if one accepts the reasoning of the federal courts it is not the functional equivalent. It is not because, while the legislature may not reduce the sentence imposed by a court in any given case, it may reduce or even abolish the parol eligibility requirement.[1/]

That is why they hold that non-eligibility for parol is not a consequence of a plea, but a consequence of the withholding of legislative grace.

1/ It is only when the legislature increases parol eligibility requirements that there may be ex post facto problems.

CONCLUSION

Based on the above and foregoing reasons, arguments and authorities the decision of the lower court should be quashed. The plea should be declared to be voluntarily and intelligently entered and the 25 year minimum before becoming eligible for parol considered to be automatic.

Repectfully Submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnish by U.S. Mail to: Thomas M. Jaworski, Attorney At Law, 2614 Southwest 34th Street, Gainesville, Florida, 32608, on this 21st day of April, 1987.

OF COUNSEL FOR PETITIONER