

IN THE SUPREME COURT OF FLORIDA

BENNY RAY SMITH,

Petitioner,

vs.

CASE NO. 71,372

STATE OF FLORIDA,

Respondent.

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FILED  
NOV 22 1987

CLERK, SUPREME COURT  
By *M*  
Deputy Clerk

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Petitioner, BENNY RAY SMITH, was the defendant in the Circuit Court of Gadsden County, Florida, and the appellant in the First District Court of Appeal. Respondent, the State of Florida, was the prosecuting authority and the appellee, respectfully. Petitioner will be referred to as "Smith" or "petitioner." Respondent will be referred to herein as "the state."

The record on appeal consists of two volumes. References to the volume containing the docket instruments will be made by the symbol "R," followed by the appropriate page number. References to the transcript of Smith's September 19, 1986, sentencing hearing will be made by the symbol "S," followed by the appropriate page number.

## II STATEMENT OF THE CASE AND FACTS

Petitioner relies upon the facts as set forth in the First District's opinion filed September 10, 1987, a copy of which is attached hereto as Exhibit A. The First District affirmed petitioner's sentence, but certified to this Court the following question of great public importance:

IS A PLEA AGREEMENT, PROVIDING ONLY FOR A SENTENCE WITHIN A TERM LESS THAN THE STATUTORY MAXIMUM FOR A SINGLE CHARGED OFFENSE, AN ADEQUATE REASON FOR EXCEEDING GUIDELINES UP TO THE AGREED MAXIMUM WITHOUT STATING REASONS OTHER THAN THE FACT OF THE AGREEMENT?

Petitioner's Motion for Rehearing was denied October 21, 1987. Notice to invoke discretionary jurisdiction of this Court was timely filed on October 26, 1987. This brief is filed pursuant to the briefing schedule issued on October 29, 1987.

### III SUMMARY OF ARGUMENT

The facts of this case do not support a finding that petitioner had agreed to a sentence in excess of the guidelines, and that this departure sentence was the result of a plea agreement. Even if this Court determines that petitioner agreed to the sentence, it is still an illegal departure sentence because it is not supported by clear and convincing reasons.

IV ARGUMENT

ISSUE PRESENTED

THE FIRST DISTRICT REVERSIBLY ERRED IN HOLDING THAT THE PLEA AGREEMENT IN THIS CASE WAS A VALID REASON FOR DEPARTING FROM THE RECOMMENDED GUIDELINES SENTENCE.

The First District certified to this Court the following question of great public importance:

IS A PLEA AGREEMENT, PROVIDING ONLY FOR A SENTENCE WITHIN A TERM LESS THAN THE STATUTORY MAXIMUM FOR A SINGLE CHARGED OFFENSE, AN ADEQUATE REASON FOR EXCEEDING GUIDELINES UP TO THE AGREED MAXIMUM WITHOUT STATING REASONS OTHER THAN THE FACTS OF THE AGREEMENT?

Smith v. State, 12 FLW 2207 (Fla. 1st DCA September 10, 1987).

Petitioner contends that this question must be answered in the negative.

Unlike the usual situation in which a negotiated plea agreement has been held to be a valid reason for departure, i.e. Holland v. State, 508 So.2d 563 (Fla. 1987); Geter v. State, 473 So.2d 31 (Fla. 1st DCA 1985); Bell v. State, 458 So.2d 478 (Fla. 2nd DCA 1984), in this case, petitioner received no benefit from this "plea bargain."

Petitioner was charged with robbery with a firearm (R-7), and he pled guilty to the charged offense (R-17). Though the recommended guidelines sentence was 4 1/2 to 5 1/2 years incarceration (R-23), petitioner was sentenced on remand to 12 years incarceration (R-40-42). The only reason given for departure was that there was a negotiated plea agreement (R-42). However, the sole basis for petitioner entering into

this "agreement" was to avoid a possible sentence of life imprisonment.

The record indicates that at the time petitioner entered his plea to the offense charged in the information, the trial court made it clear that if he went to trial and was found guilty, the court would sentence petitioner to life imprisonment, but if he entered a plea the court would cap the sentence at 20 years incarceration (S-4, 6-7). Being caught between a "rock and a hard place" and choosing the lesser of two evils is not the same as entering into a negotiated plea. Though petitioner was aware that by entering a plea he was exposing himself to 20 years incarceration, this awareness did not constitute an agreement as to his permissible sentence. Coates v. State, 458 So.2d 1219 (Fla. 1st DCA 1984).

In Coates, the trial court's stated reason for departing from the guidelines was that under the plea agreement, the prosecution and defense counsel agreed to leave the sentence to the court's discretion with only a 15 year cap on prison time. On appeal the First District held that this was not a clear and convincing reason for departure. The "plea bargain" did not specify the defendant's permissible sentence, but rather it merely indicated that the defendant knew he was exposing himself to 15 years imprisonment by entering the plea. This could not be construed as an agreement to the sentence.

Likewise Smith's awareness that by entering a plea he was exposing himself to 20 years incarceration cannot be construed as acquiescence to a departure sentence. Coates, supra.



An analogous factual situation was addressed in Henry v. State, 498 So.2d 1006 (Fla. 2nd DCA 1986). In that case, the presumptive guidelines sentence was any nonstate prison sanction. Prior to placing the defendant on probation, however, the trial court required him to waive his right to be sentenced under the guidelines in the event he violated his probation. Henry subsequently violated his probation and was sentenced in excess of the guidelines without any written reasons being filed. In remanding the case for resentencing the Second District Court of Appeal noted that the defendant's waiver of his right to be sentenced under the guidelines did not constitute a clear and convincing reason for departure. The court stated:

Guidelines sentencing cannot be waived. If appellant's waiver was intended to be an agreement to allow the court to depart from the appellant's presumptive sentence, rather than a waiver of guidelines sentencing, it was still invalid. We cannot approve an agreement which would frustrate guidelines sentencing.

In the present case, petitioner was told he would not receive a guidelines sentence. The trial court gave him the choice of entering a plea to a cap of 20 years incarceration or risk being found guilty at trial and receiving a sentence of life imprisonment (S-4, 6-7). This coerced waiver of Smith's right to be given a guidelines sentence was not a negotiated plea agreement and does not constitute a clear and convincing reason for departure. Henry, supra.

Even if this Court determines that petitioner acquiesced to the sentence, in that he pled to the offense rather than proceeding to trial, that fact does not make any difference. As this Court stated in Williams v. State, 500 So.2d 501 (Fla. 1986),

A defendant cannot by agreement confer on the court the authority to impose an illegal sentence. If a departure is not supported by clear and convincing reasons, the mere fact that a defendant agrees to it does not make it a legal sentence.  
500 So.2d at 503.

Petitioner entered a plea to the charged offense (R-7, 17). This he had a right to do. The mere fact that he entered his plea after being informed by the trial court that he would receive a departure sentence, does not make this a legal sentence. Williams, supra. This departure sentence is not supported by clear and convincing reasons, and is, thus, an illegal sentence. State v. Whitfield, 487 So.2d 1045 (Fla. 1986).

V CONCLUSION

Based on the argument presented here, petitioner asks this Honorable Court to answer the certified question in the negative, and remand his case for resentencing within the guidelines.

Respectfully submitted,

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PUBLIC DEFENDER



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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand-delivery to John Koenig, Assistant Attorney General, The Capitol, Tallahassee, Florida, and by U.S. mail to Mr. Benny R. Smith, #062854, Post Office Box 699-W, Sneads, Florida 32460, on this 23rd day of November, 1987.

A handwritten signature in cursive script, appearing to read 'Pamela D. Presnell', written in black ink on a white background.

PAMELA D. PRESNELL