IN THE SUPREME COURT OF FLORIDA

DONALD LEE SMITH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO. 72,008

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BRADFORD L. THOMAS
ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

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PRELIMINARY STATEMENT

Petitioner, Donald Lee Smith, was the defendant in the trial court and the appellant in the district court of appeal. The respondent, State of Florida, was the prosecution in the trial court and the appellee in the district court of appeal. In this brief the parties shall be referred to as petitioner and respondent respectively.

Reference to excerpts from the record on appeal will be indicated by use of the symbol "R" followed by an appropriate page number. All emphasis is supplied unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

The statement provided by the petitioner is accurate, but incomplete, in respondent's view. The court should also be aware that the petitioner was originally arrested and charged with first degree murder pursuant to Florida Statute Section 782.04(1)(a). During the plea hearing the trial court asked for a summary of the facts of the case from the prosecutor. (T 9-11) This summary indicates that after a day of fishing and drinking the petitioner became engaged in an altercation with his victim and that the petitioner had previously threatened his victim. On the day in question the petitioner stabbed his victim several times and then left him to bleed to death while petitioner returned to his trailer to wash the blood off the knife and change his pants. (T 10)

As the petitioner conceded in his original motion for reduction of sentence, (R 20-21), he was given the choice of a "plea bargain" to twenty-four years imprisonment for a plea of guilty to second degree murder or, a choice of going to trial on the charge of first degree murder.

QUESTION PRESENTED

The First District Court of Appeal has certified the following question to this court:

> In light of Williams v. State, 500 So.2d 501 (Fla. 1986), may a trial judge exceed the recommended guidelines sentence based upon a legitimate and uncoerced condition of a plea bargain?

SUMMARY OF ARGUMENT

The respondent urges this court to answer the question in the affirmative. The critical distinction between this case and cases such as Williams v. State, 500 So.2d 501 (Fla. 1986) is that in this case the basis for the plea bargain was legitimate, acceptable to both parties and clearly recognizable from the record.

Additionally, this court has promulgated two rules of procedure which specifically allow and promote plea bargaining. See, Rule 3.170(g) and Rule 3.171, Florida Rules of Criminal Procedure. Copies of these rules are attached to this brief as an appendix.

ARGUMENT

THE LOWER COURT DID NOT ERR IN SENTENCING PETITIONER WITHOUT A SENTENCING GUIDELINES SCORESHEET OR WITHOUT WRITTEN REASONS FOR DEPARTURE FROM THE SENTENCING GUIDELINES WHEN, AS HERE, THE SENTENCE IS IMPOSED PURSUANT TO A PLEA BARGAIN AGREEABLE TO THE PARTIES AND CLEARLY APPROPRIATE GIVEN THE RECORD BELOW.

The State of Florida urges this court to answer the certified question presented by the First District Court of Appeal in the affirmative. A trial judge should be allowed to exceed the recommended guidelines sentencing range upon a legitimate and uncoerced condition of a plea bargain. Such a determination would be appropriate given this court's long-standing policy encouraging plea bargaining. For example, Rule 3.170(g) provides "The defendant, with the consent of the court and of the prosecuting attorney, may plead guilty to any lesser offense than that charged which is included in the offense charged and the indictment or information or to a lesser degree of the defense charged." As noted by the rules committee, this rule derives from the American Bar Association's standards and is useful in avoiding multiple judicial and prosecutorial labors. Additionally, Rule 3.170(a) notes that although ultimate responsibility for sentencing rests with the trial court, the prosecution and the defense are encouraged to discuss and agree on pleas. Again, as noted by the rules committee in its 1972

revision note "Most criminal cases are disposed of by pleas of guilty arrived at by negotiations between the prosecutor and defense counsel...". The 1977 amendment to the rule indicates "Where the circumstances of the case so merit it is the responsibility of each respective party to discuss a fair disposition in lieu of trial."

To ignore a long-standing policy predicated on the reality of an ever growing criminal court docket would be disastrous. This case is a classic example. The case was a close one. The respondent's interest in obtaining a conviction was clouded by the slight possibility that witnesses would be less than unanimous in their observations of what took place. This might lead to a jury pardon or conviction of a lesser offense, although given the proffer of the state attorney, the case is clearly one of premeditated murder. On the other hand, the respondent, a previously convicted felon, was facing the outside possibility that he might be sentenced to death. Instead, the case was resolved in a manner agreeable to both sides and was presented to the trial court with a concise plan for reducing the charge to a lesser degree of murder and capping the sentencing limit.

The reasonableness of this type of plea bargaining agreement is set forth in a recent decision from the Second District Court of Appeal, Rowe v. State, 13 F.L.W. 541 (Fla. 2nd DCA, Case No. 88-4, Feb. 26, 1988):

> Additionally, it has long been recognized

> that a guidelines departure can be sustained if it is the product of a plea bargain. See, e.g. Orsi v. State, 515 So.2d 268 (Fla. 2nd DCA 1987). We recognize that a court is not authorized to impose an unlawful sentence just because the defendant agrees to it. Williams v. State, 500 So.2d 501 (Fla. 1986). However, this case is distinguishable from Williams in that both parties engaged in give and take. Rowe gave up his right to trial on the certainty of a ten year total sentence, while the state gave up whatever chance it might have had to ensure Rowe's detention far beyond ten years. After examination of the record in the present case we are convinced that the trial court would have imposed the same sentence notwithstanding any possible scoresheet errors.

In this case the condition of the plea bargain was both legitimate and uncoerced. Even the petitioner does not seriously contend that he should be allowed to build an error into the record and then later complain about its use on appeal. Indeed, such an argument would be inconsistent with a long line of case authority which precludes a criminal defendant from benefiting from "invited error". See, e.g. Jackson v. State, 359 So.2d 1190, 1194 (Fla. 1978). (Appellant cannot initiate error and then seek reversal based on that error).

The petitioner contends at page six of his brief that his sentence is "patently illegal". That is untrue. In Brown v. State, 13 F.L.W. 69 (Fla., Case No. 70,333, Feb. 4, 1988), this Court rejected a similar argument by the State of Florida. This court noted "The State attempts to distinguish Rumsey and Bullington by arguing that the judge did not conduct a penalty

phase as required by Section 921.141 and that the life sentence was thus illegal. We disagree." Id. at page 70.

The petitioner also contends that it was an error to sentence him without preparation of a sentencing guidelines scoresheet with written reasons for the departure included on the scoresheet. Respondent contends that such a proposition is not appropriately before this court as part of the certified question nor is it an issue which from the face of the First District Court's opinion, one could find express and direct conflict with another appellate level court. Accordingly, this court need not reach that issue.

However, if the court were inclined to reach the issue respondent would urge the court to reject the proposition that when a plea bargain is accomplished pursuant to Rules 3.171 and 3.172 the trial court must take the additional action of writing down on a sentencing guidelines scoresheet the details of the plea bargain agreement. This issue has been characterized as one involving harmless error by the Second District Court of Appeal. See Davis v. State, 461 So.2d 1361 (Fla. 2nd DCA) Rev. denied, 471 So.2d 43 (Fla. 1985) and State v. Burns, 513 So.2d 165 (Fla. 2nd DCA 1987). While the better policy might be to include a written reason on the guidelines such an omission should not automatically justify a reversal of the sentence. The record in this case clearly shows, and the petitioner has

conceded in his prior legal pleadings, that this sentence was arranged through a mutually agreeable plea bargain. This court need not disturb such an agreement when the only error is, at best, a highly technical omission by the trial court.

Accordingly, respondent urges this court to answer the certified question in the affirmative and to affirm the trial court.

CONCLUSION

Based upon the above-cited legal authority the respondent respectfully requests that this Honorable Court answer the certified question in the affirmative and affirm the judgment and sentence imposed in this case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

FOR
BRADFORD L. THOMAS
ASSISTANT ATTORNEY GENERAL
DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been forwarded by U.S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, on this 28th day of March, 1988.

FOR
BRADFORD L. THOMAS
ASSISTANT ATTORNEY GENERAL