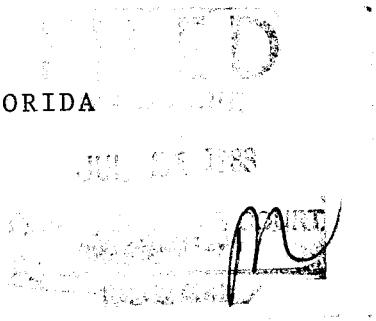
IN THE SUPREME COURT OF FLORIDA



CARLOS SANCHEZ,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

CASE NO. 72,389

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, Carlos Sanchez, the criminal defendant and appellant below, will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority and appellee below, will be referred to as "the State."

References to the one-volume record on appeal will be designated "(R:)." The decision under review, Sanchez v. State, 524 So. 2d 704 (Fla. 4th DCA 1988), is appended.

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner's "statement of the case" as a reasonably accurate portrait of the events below for the purpose of resolving the narrow legal issue presented upon certiorari, subject to the descriptive additions included in the argument portion of this brief.

SUMMARY OF ARGUMENTS

The Fourth District properly upheld the trial judge's denial of petitioner's motion to retract his adjudication of guilt for the instant drug offense because orders denying Fla. R.Crim. P. 3.800(b) relief are not appealable; because petitioner filed his motion too late; because §893.135 (3), Fla. Stat. specifically prohibits trial judges from withdrawing adjudications of guilt for petitioner's particular offense; because trial judges have no such authority generally.

ISSUE

THE FOURTH DISTRICT PROPERLY UPHELD THE TRIAL JUDGES OF PETITIONER'S UNTIMELY AND UNAUTHORIZED MOTION TO MITIGATE.

ARGUMENT

Broward County Circuit Judge Thomas M. Coker adjudicated petitioner guilty of conspiracy to traffic in over one hundred pounds of cannabis in violation of §893.135 (1) (a)(1), Fla. Stat. on May 29, 1988 (R3;8). Only through the State's waiver (R 2), see §893.135(4) Fla. Stat., did petitioner escape the three year minimum term of imprisonment mandated for such an adjudication under §893.135 (3), Fla.Stat., see State v. Niemcow, 505 So. 2d 670 (Fla. 5th DCA 1987); the judge instead placed petitioner upon three years' probation (R 8-11). On June 24, 1987, petitioner filed what was essentially a Fla.R.Crim.P. 3.800(b) motion to modify this legal sentence by retracting his adjudication of guilt, thus terminating his probation (R 12-13). The trial judge denied petitioner's motion on authority on State v. Beardsley, 464 So. 2d 188 (Fla. 4th DCA 1985) (R 15), which holds that Rule 3.800(b) does not confer upon trial courts the authority to withdraw adjudications of guilt. Petitioner disputed this disposition on "appeal" to the Fourth District (R 16), which unanimously upheld the trial judge, Sanchez v. State, 524 So. 2d 704

(Fla. 4th DCA 1988). As the State counts, the Fourth Districts' ultimate rejection of petitioner's "appeal" was correct for four reasons, not all of which were expressly relied upon by that court, but all of which the State as the prevailing party below is entitled to urge here, see Stone v. State, 481 So. 2d 478, 479 (Fla. 1985).

First, orders denying defense motions to mitigate are not appealable under either Rule 3.800(b), or Fla.R.App.P. 9.140(b), or §924.06, Fla. Stat., so petitioner's attempt at same was a nullity upon which no higher court relief could be predicated, see e.g. Hallman v. State, 371 So. 2d 482, 484 (Fla. 1979), Davenport v. State, 414 So. 2d 640 (Fla. 1st DCA 1982), Lori v. State, 482 So. 2d 562 (Fla. 2nd DCA 1986) and Adams v. State, 487 So. 2d 1209 (Fla. 4th DCA 1986). The State trusts that as a Court of law rather than of individuals, see Constitution of Massachusetts, Declaration of Rights, Article 30 (1780), this Court will reject petitioner's inevitable counterargument that it should ignore the foregoing law and find that the trial judge's decision was reviewable by petition for writ of common law certiorari in the alleged "interests of justice" under the First District's ill-reasoned, and distinguishable, decision of Marsh v. State, 497 So. 2d 954 (Fla. 1st DCA 1986). A court cannot fairly change the rules after the game has been played. This Court should accordingly dismiss the instant action without further ado.

Second, Rule 3.800 (b) authorizes trial judge mitigation of legal sentences only within "sixty days" of their ultimate finalization. Petitioner filed his motion to mitigate his adjudication of guilt more than two years after such was imposed. Although it is the academic certified conflict between the Fourth and First Districts as to whether Rule 3.800(b) requires a ruling within sixty days or simply a filing, compare Sanchez v. State and State v. Beardsley with Thompson v. State, 485 So. 2d 42 (Fla. 1st DCA 1986) and Marsh v. State which putatively vested this Court with jurisdiction to review Sanchez, petitioner cannot possibly benefit from the resolution of this conflict, since he did not even file his motion to mitigate within sixty days. This Court should accordingly dismiss the instant petition for writ of conflict certiorari as improvidently granted. Compare State v. Kinner, 398 So. 2d 1360, 1362 (Fla. 1981), stating that this Court generally will not resolve academic controversies; see also State v. Magrath, 512 So. 2d 29, 30 note 2 (Fla. 3rd DCA 1988), questioning whether Beardsley and Thompson conflict. Should the Court elect to resolve this "conflict," the State simply submits that the Fourth District's interpretation of Rule 3.800(b) is indisputably literally correct.

Third, §835.135(3) clearly provides that an "adjudication of guilt" entered for the offense to which petitioner pled "shall not be suspended...notwithstanding the provisions of §948.01," Fla. Stat., which deals with probation. Rule 3.800(b) provides that it "shall not be applicable to those cases...where the trial judge has no sentencing discretion." Compare State v. Niemcow. Therefore, regardless of whether some adjudications of guilt may be retracted once entered, petitioner's never can be. This Court must accordingly approve the Fourth District's rejection of petitioner's appeal on the foregoing basis if it gets this far.

Fourth, assuming arguendo that the vacating of petitioner's adjudication of guilt for his particular drug offense was not otherwise precluded, a trial judge "has no power to withdraw a previous adjudication of guilt." State v. Beardsley, 464 So. 2d 188; contra, Thompson v. State. As the Fourth District has lucidly explained in legally rejecting an equity-based claim identical to petitioner's:

> The defendant's motion was made pursuant to Florida Rule Criminal Procedure 3.800(b) which provides for the reduction or modification of a legal sentence imposed by the court but does not refer to any withdrawal of an adjudication of guilt.
>
> Section 940.05, Florida Statutes (1983) is the only provision governing the restoration of civil rights to a convicted felon, and limits the power to do so to the Governor and the Board of Pardons after expiration of the sentence. Likewise,

> Section 948.05 gives the trial judge the power to prematurely terminate probation, but does not permit of withdrawal of adjudication. We have gone so far as to hold in Knapp v. State, 405 So. 2d 786 (Fla. 4th DCA 1981) that once a trial court enters an order of probation, that order can only be modified if there has been a violation of the conditions of probation. See also Sweeting v. State, 390 So. 2d 773 (Fla. 3rd DCA 1980).
>
> In short, there is simply no authority to support what the trial judge did in this case. The defendant advances the not illogical theory that since a trial judge can rescind an adjudication withheld and adjudicate guilt if the defendant misbehaves, then as a quid pro quo it ought to be able to "unadjudicate" guilt when the probationer is exhibiting model behavior. Obviously and understandably, the trial judge had sympathy for this woman, who told him that she was being excluded from certain jobs because of her status as a convicted felon. However, her response to the petition filed herein cites no authority except Section 948.05, already discussed, and Section 948.01 which latter section delineates when a court may place a defendant on probation, but makes no mention of vacating an adjudication to remove the stigma of guilt.

State v. Beardsley, 464 So. 2d 188, 189. In other words, clemency is an executive rather than a judicial function. This court must accordingly approve the Fourth District's rejection of petitioner's appeal on the foregoing basis, if it reaches this point.

Petitioner's highly convoluted argument here that none of the foregoing dispositive authority is relevant to his case because he was placed upon probation and such does not

technically constitute a "sentence" under the inapposite Villery v. Florida Parole and Probation Commission, 396 So. 2d 1107 (Fla. 1980) is not presented for certiorari review because such was not properly presented to either the trial judge or to the Fourth District. See Cochran v. State, 476 So. 2d 207, 208 (Fla. 1985). Moreover, statutory developments after Villery have watered down the hypertechnical idea that probation is not a sentence. See Van Tassel v. Coffman, 486 So. 2d 529 (Fla. 1985) and State v. Bolyea, 13 FLW 117 (Fla. Feb. 19, 1988). In addition, petitioner's claim on this score overlooks that it was only through the grace of the State that petitioner was not "sentenced" to a mandatory minimum term of three years' imprisonment! Furthermore, this claim simply fails to process either the non-appealability of the instant order, or the fact that §893.135(3) specifically prohibits trial judges from withdrawing adjudications of guilt for petitioner's particular offense, or the fact that State v. Beardsley clearly explains why judges have no such authority generally. This Court must accordingly reject this claim.

There is simply no legal basis upon which this Court could grant this narcotics trafficking conspirator the relief he seeks.

CONCLUSION

WHEREFORE, the State respectfully urges this Honorable Court to either DISMISS petitioner's petition for writ of certiorari as improvidently granted, or APPROVE the decision of the Fourth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Respondent's Brief on Jurisdiction" with Appendix has been furnished, by United States Mail, to J. DAVID BOGENSCHUTZ, ESQ., Attorney for Petitioner, Suite 4F, Trial Lawyers Building, 633 Southeast Third Avenue, Fort Lauderdale, Florida, 33301, this 19 day of July, 1988.

Of Counsel