SUPREME COURT OF FLORIDA

CASE NO.: 75,606
4th District No.: 88-2559

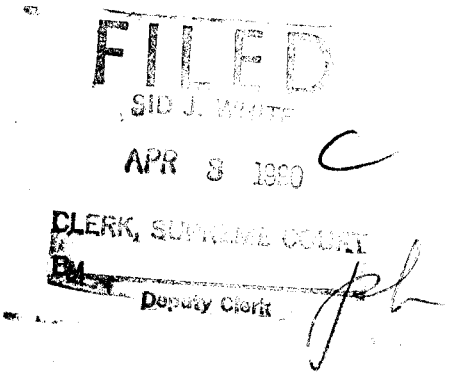
HOWARD CHARATZ,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.
_____/



INITIAL BRIEF OF PETITIONER

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INTRODUCTION

The Petitioner, HOWARD CHARATZ, was the Appellant in the Fourth District Court of Appeal. The Respondent, STATE OF FLORIDA, was the Appellee in the Fourth District of Appeal. The Petitioner, HOWARD CHARATZ, will be referred to herein as the Petitioner, and the Respondent, STATE OF FLORIDA, for clarity's sake and brevity's sake will be referred to as STATE. The symbol "App." will be used to refer to the Appendix attached to this Initial Brief in conformity with the requirements of Rule 9.220 of the Florida Rules of Appellate Procedure.

STATEMENT OF THE CASE AND FACTS

On January 7, 1985 Petitioner was charged with one count of conspiracy to commit bookmaking and ten counts of bookmaking in violation of F.S., 849.25(i) and F.S. 849.25(2)(App., page 3-5). On April 29, 1985 Petitioner changed his original plea of not guilty to guilty on Counts I and II, and the State entered a nolle prosequi to Counts III through XI, Petitioner received a sentence of three years probation and fines and was adjudicated guilty on Counts I and II to the offenses of conspiracy to commit bookmaking and bookmaking (App. 6-11). On September 11, 1987 an Affidavit Of Violation Of Probation was filed which alleged violation by:

I. On August 5, 1987 having in his constructive possession a controlled substance, to wit-methaqualone.

II. On August 5, 1987 having in his constructive possession a controled substance, to-wit: cannabis.

III. On August 5, 1987 unlawfully possessing paraphenalia, to-wit: a cigarette roller with the intent to use said paraphenalia for the unlawful administering of a controlled substance (App. 18). On January 8, 1988, Petitioner admitted allegations contained in said Affidavit Of Violation, had his probation revoked and received a sentence of one year of Community Control on each of Counts I and II in case number 84-14487-CF-10-A to run concurrent (App. 20-24). In addition, the trial court withheld adjudication as to Counts I and II on the

offenses of conspiracy to commit bookmaking and bookmaking (App. 21-22, 62).

On May 20, 1988 the State filed State's Motion To Correct Sentence setting out as grounds therefore paragraphs one through seven (App. 27). On May 20, 1988 the trial court entered an Order which states as follows in paragraph 4, and 4.(a):

> 4. That the court did not, and could not, revisit the adjudication phase of the earlier plea, and of the words of the court implied, then the court misspoke. In so finding, it is hereby: ORDERED AND ADJUDGED that:
> (a). The adjudications of guilt as found in the pleas of Bookmaking and Conspiracy to Commit Bookmaking are confirmed and affirmed. (App. 28-29).

On June 22, 1988 Petitioner's attorney filed Defendant's Memorandum In Opposition to State's motion to Correct Sentence which the trial court treated as a Motion For Rehearing (App. 30-36). On August 22, 1988 the trial court entered an Order which denied said Motion for Rehearing, but contained the following finding in paragraph (1):

> 1. That should the law permit, the court would be inclined to grant the relief requested due to the confusion created by the documental error of January 8, 1988, as well as the transcripts of that date (App. 43).

The trial court's Orders of May 20, 1988 and August 22, 1988 were timely appealed by Petitioner to the Fourth District Court of Appeal in a Notice of Appeal filed on September 20, 1988 (App. 44) and an Amended Notice of Appeal filed on October 5, 1988 (App. 45). Said court filed an opinion on January 24, 1990 which affirmed the trial court's correction of sentence as contained in its Order entered on May 20, 1988 and August 22, 1988 (App.

107-112), and which certified of great public importance:

> Whether a trial court's discretion, to deviate from statutory and constitutional requirements in order to give effect to a plea agreement, allows the trial court to modify a prior adjudication to a withhold adjudication, outside of the time limitation provided by Rule 3.800 (b), Florida Rules of Criminal Procedure, where such modification would serve the interests of rehabilitating the defendant?

This Honorable Court's jurisdiction was timely invoked by Petitioner's Notice To Invoke Discretionary Jurisdiction to review said opinion filed on January 24, 1990.

ISSUE ON APPEAL

WHETHER A TRIAL COURTS DISCRETION, TO DEVIATE FROM STATUTORY AND CONSTITUTIONAL REQUIREMENTS IN ORDER TO GIVE EFFECT TO A PLEA AGREEMENT, ALLOWS THE TRIAL COURT TO MODIFY A PRIOR ADJUDICATION TO A WITHHOLD, OUTSIDE OF THE TIME LIMITATION PROVIDED BY RULE 3.800 (B), FLORIDA RULES OF CRIMINAL PROCEDURE, WHERE SUCH MODIFICATION WOULD SERVE THE INTERESTS OF REHABILITATING THE DEFENDANT?

SUMMARY OF ARGUMENT

The Fourth District Court Of Appeal erred in affirming the trial court's correction of Petitioner's sentence, as contained in its Order of May 20, 1988 and August 22, 1988. The trial court had the authority under F.S., 948.01 and F.S. 921.187 to modify the prior adjudication of Petitioner on charges of conspiracy to commit bookmaking and bookmaking contained in Counts I and II of case number 84-14487 to a withhold of adjudication, where as in this case to do so would serve the interest of rehabilitating the Petitioner.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE TRIAL COURT'S CORRECTION OF SENTENCE.

Several facts are crystal clear in this case and can not be disputed. On April 29, 1985 Petitioner pled guilty in case number 84014487-CF-10-A to one count of conspiracy to commit bookmaking and one count of bookmaking in violation of F.S., 849.25(1) and F.S. 849.25(2), and was sentenced by the trial court to three years probation with an adjudication of guilt on both counts, (App. 7-11). On August 5, 1987, Petitioner was arrested and charged with the offenses of possession of a controlled substance, to-wit:

Methaqualone; possession of a controlled substance, to-wit: cannabis; and possession of paraphenalia with the intent to use it for unlawfully administering a controlled substance, and an Affidavit of Violation Of Probation based on those charges was filed against Petitioner on August 26, 1987 (App. 18). On January 8, 1988, Petitioner entered into a plea whereby he plead no contest to the charge of possession of a controlled substance, to-wit: Methaqualone in Count I of case number 87-15757-CF-100A and admitted the allegations of violation of probation contained in case number 84-14487-CF-10-A (App. 20-23). The trial court clearly withheld adjudication on all of the above-noted offenses on January 8, 1988. (App. 20-23, 62).

The Fourth District Court Of Appeal affirmed the trial court's subsequent correction of sentence and affirmation and confirmation of the adjudications of guilt entered against Petitioner on April 29, 1985 based on the ruling in Sanchez v. State, 541 So.2d 1140 (Fla. 1989). This case held that an adjudication of guilt in conjunction with probation could not be removed more than 60 days after imposition. Interestingly enough, this court approved the holding in Thompson v. State, 485 So.,2d 42 (Fla.1st DCA 1986) that an adjudication of guilt may, in the trial court's discretion, be removed within sixty days of imposition pursuant to Florida Rule Of Criminal Procedure 3.800(b), but not thereafter. This court pointed out that the purpose behind allowing a trial court pursuant to F.S., 948.01 to withhold adjudication of guilt is similar to the purpose behind probation itself, i.e., the hope that a Defendant can be rehabilitated. See Holland v. Florida Real Estate Commission, 352 So. 2d 914 (Fla. 2d DCA 1977); and Pickman v. State, 155 So.2d 646 (Fla., 3rd DCA 1963), cert., denied, 164 So.2d 805 (Fla. 1964).

It would seem to this writer that the better view would be that expressed by Justice Barkett in her dissenting opinion in Sanchez, supra, wherein she states that once it has been determined that there is legal impediment against vacating and adjudication within sixty days, then it should be equally permissable during the period of probation. She goes on to point out that this authority by the trial court comports with the purposes or probation and the punitive use of adjudications, and

is not inconsistent with any statute or court rule. What she is really expressing is an argument for a logical extension and use of the trial court's authority under F.S. 948.01.

The extension of the trial court's authority to withdraw an adjudication of guilt at any time throughout the period of probation makes good sense. It would provide the trial courts' another very potent weapon to use in rehabilitating Defendants in accordance with the purpose behind probation in general and F.S., 948.01 in particular. The limitation of the court's authority to do so to motions filed within sixty days of sentencing makes no sense. There is no way the trial court or a Defendant in a particular case can have way of knowing only sixty days into a period of probation whether said Defendant would merit a withdrawal of an adjudication by the court. They can really only know that at the completion of the probation. Under this interpretation, every defense to counsel will be required to file a timely 3.800(b) motion in every case where his Defendant has been adjudicated guilty and put on probation within sixty days of imposition of sentence, and to request a court hearing on said motions.

A point that should be kept in mind is that in Sanchez, supra, and every other case cited by the State below, it was a Defendant who was trying to obtain a modification of sentence, and not the State. In the present case, we clearly have a negotiated plea between Petitioner and the State on January 8, 1988, (App. 46-64). The trial court clearly withheld

adjudication on Counts I and II of case number 84-14487-CF-10-A on the offenses of conspiracy to commit bookmaking and bookmaking in violation of F.S. 849.25(i) and 849.25(2). This was clearly done pursuant to plea negotiations, between the State and Petitioner's Defense counsel (App. 21-22, 46-64). The state did not object at the the time of the hearing on January 8, 1988 to the illegality of the sentence based on the requirements of F.S., 849.25 that there can be no withholding of adjudication on convictions of bookmaking and conspiracy to commit bookmaking. One must assume that the State was aware of these provisions of F.S. 849.25. The reasons why the State raised no objection on January 8, 1988 and did not take an appeal of the court's sentence on that date were simple. The state felt this was a fair and appropriate way to resolve these cases. It avoided the possibility of an outright loss on both cases should the Petitioner's Motion to Suppress Evidence have been granted, and based on the merits of said motion that was a distinct possibility. It further avoided the possibility of an appeal on any denial of said motion, as well as the possibility of litigating a Rule 3.850 Motion for Post-Conviction Relief and appeals thereon by Petitioner in case number 84-14487-CF-10-A. The State was well aware of the importance of a withhold of adjudication to the Petitioner, and what the consequences of a denial of said withhold on the bookmaking charges could have meant. These were the reasons the State entered into a negotiated plea with Petitioner, allowing said withhold of

adjudication on his bookmaking charges on January 8, 1988.

There are three good reasons why the trial court should have denied the State's Motion For Correction Of Sentence. First, logical extension of the trial courts' powers to supervise probation and to pursue the basic goal of rehabilitating Defendants where possible. Petitioner is a classic example of how this extension of authority can and should be used in a positive way. He is presently a licensed professional Jai Alai player, living a clean life and supporting his wife and two young children from his Jai Alai earnings (App. 32). The only reason he is able to do this is due to the withhold of adjudication by the trial court on his bookmaking charges if reinstated it will will destroy Petitioner's ability to play Jai Alai (App. 102-103), and in all likelihood do irreperable damage to his rehabilitation. The saddest and most offensive part of this scenario is that it is due in large part to publicity and political concerns of the press, the Broward County State Attorney's Office, and the Division Of Pari-Mutuel Wagering. Secondly, Petitioner should be entitled to specific performance of the plea agreement in this case. In Williams vs. State, 341 So.2d 214 (Fla. 2d 1976), the court held that despite the fact that the deferred sentence which the trial court had imposed was invalid, where the Defendant had affirmatively complied with the bargains which the trial judge had fashioned in connection with the invalid sentence, the Defendant had a right to specific performance of the bargain. This case is on all fours with the

present case. Even if you assume the State's position that Petitioner's sentence on January 8, 1988 was illegal, Petitioner relied on it and complied with the bargain by fully performing his community control which is not a pleasant or easy task. He waived his Motion to Suppress Evidence and his various other rights, he did not pursue his 3.850 Motion For Post-Conviction Relief case number 84-14487-CF-10-A, and he exposed himself to the risk of substantial prison time if he had failed to complete his community control. Interestingly enough, had Petitioner violated his community control, he could not have raised the defense of an illegal sentence at that point because it would have been waived. See King v. State, 373 So.2d 73 (Fla. 3rd 1979). If that sequence of events had occurred, I doubt very much the State would have been objecting to the illegality of the sentence or asking to have it corrected. In the case of Simpson v. State, 467 So.2d 437 (Fla. 5th 1985), the court held that the defense was not entitled to specific performance against the trial court of plea agreement absent a showing of irrevocable prejudice to the Defendant resulting from the plea agreement. Clearly the Petitioner meets the requirement of irrevocable prejudice resulting from the plea agreement. He has already been through community control. He has obtained a licence as a professional Jai Alai player and expended substantial time, effort and money to build a career which will be lost with reinstatement of adjudication on his bookmaking charges. Thirdly, is the concept of estoppel.

In the case of State Ex. Rel. Gutierrez v. Baker, 276 So.2d 470 (Fla. 1973), the court held that where an assistant state attorney agrees to a negotiated plea and the plea is accepted by the trial judge, the state attorney is not privileged to reopen the case and force a retraction of the plea merely because of an error was not caused in some way by the accused or his counsel. In this case, if there was any error made by the State. The State then made another error in not appealing the illegal sentence imposed on January 8, 1988, if it felt the sentence was illegal. Instead the State sat back and enjoyed the best of both worlds until bad publicity and political pressures forced it to file a Motion to Correct Sentence on may 20, 1988, well over four months after imposition of sentence upon Petitioner. Meanwhile, Petitioner had held up his end of the bargain and met every requirement of his community control. Clearly this case is one where the State should be estopped from sense of fundamental fairness from raising the issue of an illegal sentence months after its imposition, and after Petitioner has made substantial compliance with its terms and conditions.

CONCLUSION

Based upon the foregoing reasons and citations of authority, the opinion of the Fourth District Court Of Appeal filed on January 24, 1990 affirming the trial court's correction of sentence should be reversed, and this action remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to: Michele Taylor, Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602 on this 26th day of March, 1990.

Thomas J. McLaughlin
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