IN THE SUPREME COURT OF FLORIDA

HOWARD CHARATZ,

Petitioner,

v. CASE NO. 75,606

STATE OF FLORIDA,

Respondent.
_____/

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

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

HOWARD CHARATZ, the Appellant below, will be referred to as the "Petitioner" in this brief. The **STATE OF FLORIDA**, the Appellee below, will be referred to as the "Respondent." The record on appeal, consisting of pages 1-42, will be referred to by the symbol "R" followed by the appropriate page number. In the case sub judice, Petitioner supplemented the record with copies of the Motion to Suppress and the transcript of the change of plea and sentencing hearing held before the Honorable Thomas M. Coker, Jr. on January 8, 1988. Citations to the transcript of the hearing (attached to Petitioner's initial brief) will be referred to by the symbol "SR" followed by the page as numbered (6 through 24) in the fourth district supplemental record.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

Respondent offers the following to supplement Petitioner's Statement of the Case and Facts:

Petitioner entered a guilty plea to one count each of bookmaking and conspiracy to commit bookmaking on April 29, 1985 (R 4). He was adjudicated guilty by Judge Thomas M. Coker, Jr. on the same date and placed on probation for three years on each count, to be served concurrently (R 4-8). On August 26, 1987, Petitioner was charged with violation of probation resulting from his arrest for constructive possession of methaqualone, constructive possession of cannabis, and possession of drug paraphernalia (R 15-16). Appellant admitted violating probation and pled no contest to the new charges at the violation of probation hearing held on January 8, 1988, before the Honorable Thomas M. Coker, Jr. (R 17, 19-20; SR 22). Petitioner's probation was revoked and he was placed on community control for one year (R 17, 19-21). The trial court withheld adjudication on the bookmaking counts (R 17, 19). The State filed a Motion to Correct Sentence on May 20, 1988, claiming that the withholding of adjudication on the bookmaking charges was an inadvertent mistake, and cited Florida Statutes 849.25(2) and (4), which state that any person convicted of conspiracy to commit bookmaking "shall not" have adjudication of guilt deferred, suspended, or withheld (R 24). The trial court granted the State's motion by an order dated May 20, 1988 (R 25-26). In its order, the court stated that it "did not and could not, revisit the adjudication phase of the earlier plea, and if the words of

the Court implied otherwise, then the Court misspoke" (R 25). The court ordered that the original adjudications of guilt were confirmed and affirmed, and also granted Petitioner's request for early termination of community control (R 26). Petitioner's Motion for Rehearing was denied by the trial court on August 22, 1988. In that order, the court stated that it would be inclined to grant relief but was prohibited by law from doing so (R 40). At the plea and sentencing hearing held on January 8, 1988, the trial court informed Petitioner that the court, prosecutor, defense counsel and detectives had discussed the case in chambers and that "they are in agreement with cutting you a break" (SR 11). The actual details of the negotiations were not entered on the record. The court did advise Petitioner, "if you should admit that you violated your other probation, and plead no contest or nolo contendere to the substantive charge, then my inclination would be with the waiver of any further report to continue the withholding of adjudication upon you, and put you on one year Community Control" (SR 11-12). Neither defense counsel nor the state attorney pointed out to the court the earlier adjudication. The court revoked Petitioner's probation, left him on one year of community control, and withheld adjudication (SR 22).

The sentencing guidelines indicated a nonstate prison sanction (R 18).

RY OF THE ARGUMENT

The trial rder granting the State's Motion to Correct Sentence the trial court confirmed and affirmed the 1985 adjudi guilt in the bookmaking charges, was correct for tw First, according to this Court's decision in San tate, 541 So.2d 1140 (Fla. 1989), the trial court is risdiction to remove an adjudication of guilt more than ys after imposition. Second, section 894.25(2) and (a Statutes, prohibits the withholdilng of adjudication s convicted of bookmaking or conspiracy to commit bookma

Furthermore er is not entitled to equitable relief based upon an violation of the plea agreement. Petitioner rece benefit of the bargain in the plea negotiations an l no prejudice as a result of state action.

ARGUMENT

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 INTEREST OF REHABILITATING THE DEFENDANT?

Petitioner must overcome two hurdles in order to gain relief in this case. First, as this Court held in Sanchez v. State, 541 So.2d 1140, 1141-42 (Fla. 1989), pursuant to Florida Rule of Criminal Procedure 3.800(b), an adjudication of guilt may only be removed within sixty days of imposition, but not thereafter. The fourth district acknowledged the holding in Sanchez and relied upon that case in denying relief to Petitioner in the instant case. Charatz v. State, 555 So.2d 1303 (Fla. 4th DCA 1990). The adjudication of guilt on the bookmaking charges was properly imposed on April 29, 1985 (R 4). Petitioner did not challenge the adjudications or request that they be vacated during the sixty day period or at any other time during the probationary period until sentencing on his probation violation on January 8, 1988. Even then, it is not entirely clear from the record that a withhold of adjudication on the original bookmaking charges was specifically part of the plea negotiations. Sanchez is controlling here and Respondent respectfully submits that it should not be reconsidered or receded from. As this Court stated in Sanchez:

> Sanchez contends that because the trial judge can adjudicate him guilty if he fails to meet

> the requirements of probation, he can likewise vacate an adjudication if Sanchez complies with probation. As intriguing as the argument is, there is no rule, statute, or decision of this Court authorizing such action beyond the sixty-day limitation of rule 3.800(b). The district court was correct in so holding. We are not convinced that we should now vest such power in the trial courts absent an appropriate rule or statute. 541 So.2d at 1142.

Second, even if Petitioner had requested the trial court to remove the 1985 adjudications within the applicable sixty-day time frame, the court could not have done so. Section 849.25, Florida Statutes (1989) contains a clear legislative mandate against withholding adjudication upon persons convicted of bookmaking or conspiracy to commit bookmaking:

> (2) Any person who engages in bookmaking shall be guilty of a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084. Nothwithstanding the provisions of §948.01, any person convicted under the provisions of this subsection shall not have adjudication of guilt suspended, deferred, or withheld.
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> . . . .
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> (4) Notwithstanding the provisions of §777.04 any person who is guilty of conspiracy to commit bookmaking shall be subject to the penalties imposed by subsections (2) and (3).

The bookmaking statute was considerably amended so as to provide stiffer penalties for wagering violations, including the addition of subsections (2) and (4), by Chapter 78-36 §1, Laws of Florida. The amended provision became effective on May 11, 1978. Petitioner was properly adjudicated guilty of the bookmaking offenses, pursuant to the above section, on April 29, 1985. The trial court acknowledged the mandatory nature of the provision in

its order granting the State's motion to correct sentence on May 23, 1988 (R 25), and in the order denying rehearing (R 40). The fourth district also recognized that section 849.25(2) prohibits the withholding of adjudication of guilt for any person convicted of bookmaking in its opinion affirming the trial court's correction of sentence. Charatz, supra, 555 So.2d at 1305.

The adjudication provision of section 894.25 is mandatory and does not involve an exercise of the trial court's discretion. Counsel for Respondent has been unable to discover any Florida case law wherein the adjudication provision is specifically discussed or applied. However, the plain language of the statute prohibits the trial court from withholding adjudication in bookmaking convictions, and should be construed in that manner. St. Petersburg Bank and Trust Co. v. Hamm, 414 So.2d 1071 (Fla. 1982). The certified question in this case asks whether the trial court, in its discretionary powers, may deviate from statutory and constitutional requirements in order to give effect to a plea agreement. However, the fourth district did not cite any authority for the proposition that a trial court may ignore or deviate from legislative mandates even for the exemplary purpose of meeting a defendant's rehabilitative needs. There are circumstances, not existing in this case, where the rules or statutes themselves provide the mechanism for deviating from their terms. For instance, the trial court is allowed to mitigate a defendant's sentence by departing below the recommended guidelines range after stating factors which

reasonably justify such a departure. Florida Rule of Criminal Procedure 3.701(d)(11). Or, in drug trafficking cases, the court may reduce or suspend the sentence of a drug trafficker who provides substantial assistance to law enforcement, notwithstanding the provision for a minimum mandatory term of imprisonment. Section 893.135(4), Florida Statutes (1989); Doumar v. State, 507 So.2d 735 (Fla. 4th DCA 1987). The Court in Doumar held that a trial court is authorized, pursuant to section 8893.135(4), to reduce or suspend the sentence of a defendant who provides substantial assistance to law enforcement, but has no authority to withhold adjudication of guilt contrary to subsection 893.135(3). Id. at 736. See also State v. Gibron, 478 So.2d 475 (Fla. 2d DCA 1985), where the second district court held that a trial court can not withhold adjudication of guilt for the charge of manslaughter resulting from operation of a motor vehicle if the court intended to sentence outside the Youthful Offender Act. Similarly the bookmaking statute, section 894.25(2), lacks a specific provision for discretionary withholding of adjudication. Respondent would remind this Honorable Court of its cautionary statement in Sanchez that such power should not be vested in the trial courts "absent an appropriate rule or statute." 541 So.2d at 1142. Given the proscription against removing an adjudication of guilt beyond the sixty day limit of Rule 3.800(b), and the statutory prohibition against withholding adjudication on the bookmaking offenses, the trial court's order "confirming and affirming" the 1985 adjudication of guilt should be approved and the certified question answered in the negative.

Petitioner has also argued in his brief that principles of estoppel and specific performance should be applied to gain relief. These issues are not relevant to the certified question before this Court. However, Respondent will address the additional arguments and demonstrate that such relief is not appropriate here.

Petitioner maintains that the withholding of adjudication on the earlier bookmaking charges was a material consideration for the agreement to admit to the probation violation and that the later correction of sentence constituted a violation of the plea contract. However, the specific terms of the plea agreement do not appear on the record. Contrary to Petitioner's assertions, it is not clear from the representations made at the change of plea hearing that withholding adjudication on the earlier counts was an important consideration for the exchange of the nolo contendere plea (SR 11-12). Actually, the record evidence points to the reasonable conclusion that the trial court simply misspoke. The trial judge stated at the hearing that he was inclined "to continue the withholding of adjudication" on the bookmaking charges, apparently not realizing that Petitioner had already been adjudicated on those counts (SR 11-12). Even more important, the court later admitted in the order correcting sentence that if the words of the court implied that it intended to revisit the adjudication phase of the earlier plea, "then the Court misspoke" (R 25). Also, a review of the January 8, 1988 hearing indicates the absence of any discussion directed to any intent of the court to remove or vacate the earlier adjudication

in order to give effect to the plea agreement. Respondent could find no discussion concerning Petitioner's desire to seek employment as a Jai-Alai player or the necessity for removing the original adjudication so as to make such employment feasible. In fact, according to Petitioner's Memorandum in Opposition to State's Motion to Correct Sentence, Petitioner was not approached by the West Palm Beach Jai-Alai Fronton to become a replacement player until after the January 8, 1988 plea hearing (R 28-29). As for the terms of the plea agreement, it can be reasonably inferred from the record that the one year community control sentence was intended as the means to "cut a deal" for Petitioner. The sentencing guidelines scoresheet called for a nonstate prison sanction (R 18). However, with a one-cell "bump-up" for violation of probation, authorized by Florida Rule of Criminal Procedure 3.701(d)(14), Petitioner could have received a sentence of 12-30 months imprisonment or two years on community control. Florida Rule of Criminal Procedure 3.988(g); Franklin v. State, 545 So.2d 851 (Fla. 1989).

Respondent is aware that the trial court in this case would have liked to grant relief to Petitioner due to confusion created by the documental error of January 8, 1988 (R 40). However, in addition to the legal prohibition against such action, Respondent would note the strong public policy against allowing a convicted bookmaker to be a licensed participant in a pari-mutuel wagering sport.

In Petitioner's brief, improper references were made regarding the State's motions and knowledge surrounding the

circumstances of the case. For instance, Petitioner claims that 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" (Petitioner's brief, p. 9). Such assertions are not supported by the record and are entirely speculative. Consequently, this Court should not consider assertions of this nature when reaching a decision.

The State's actions in this case did not cause Petitioner's present dilemma. Petitioner's inability to be licensed as a Jai-Alai player was caused by his admitted commission of bookmaking crimes in 1984 and 1985. Had Petitioner successfully completed the three-year probationary term imposed in 1985, the adjudication of guilt would have remained unchallenged and unchanged. The irony of the present situation is that by violating probation by the commission of new drug possession charges, Petitioner stands to benefit on the bookmaking sentence.

Petitioner has suffered no prejudice in this case which would entitle him to equitable relief. Petitioner received a fairly lenient sentence of one year community control rather than incarceration. He was granted early termination of community control (R 26). Petitioner was able to capitalize on the trial court's error by playing Jai-Alai in spite of his status as a convicted felon.

The record indicates that Petitioner received the benefit of the plea bargain in this case. A defendant is not entitled to specific performance against the court of a plea agreement with

the state absent a showing of irrevocable prejudice to the defendant resulting from the plea agreement. Davis v. State, 308 So.2d 27 (Fla. 1975). Moreover, Respondent has been unable to find any authority in which the State is estopped from moving to correct a sentence where, as in this case, the withholding of adjudication of guilt in 1988 was a nullity due to the trial court's lack of jurisdiction. State ex rel. Gutierrez v. Baker, 276 So.2d 470 (Fla. 1973), the case relied upon by Petitioner in his estoppel argument, did not involve a jurisdictional defect or illegal sentence. In that case, the State was estopped from reneging on the terms of a legal plea offer which had already been accepted by the trial court. Id. at 472. In the instant case, the trial court's mistaken action in withholding adjudication of guilt created an illegal sentence. The court's later correction of sentence was therefore proper.

CONCLUSION

Based upon the foregoing facts, arguments, and citations of authority, Respondent respectfully requests this Honorable Court to answer the certified question in the negative and affirm the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Thomas J. McLaughlin, 370 Minorca Avenue - Suite 21, Coral Gables, Florida 33134, this 2nd day of May 1990.

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