

SUPREME COURT OF FLORIDA

DEIDRE MICHELLE HUNT

Appellant

CASE NO. 76,692

-vs-

FILED

SID J. WHITE

THE STATE OF FLORIDA

JUL 10 1991

Appellee

CLERK, SUPREME COURT

By 
Chief Deputy Clerk

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

GERARD F. KEATING, P.A.

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STATEMENT OF THE CASE AND FACTS

Appellant agrees with **the** statements from the State's Answer Brief Statement of the Case and Facts, page 7, "The parties agreed that any information coming to light during the Fotopoulos trial could be considered in Hunt's sentencing (R 1470)." "Judge Foxman outlined the arrangement for Hunt as follows: That she would plead guilty to all counts in the indictment and information. The ssntancinu would be postponed until after the Fotopoulos matter was disposed of; there would be a sentencing phase and the State would **seek** the death penalty whether or not she cooperated in **the** Fotopoulos matter. Both parties waived an advisory recommendation as to sentence, and it would be left up to the Judge whether to sentence her to life imprisonment or to death penalty," (R 1483) State Brief page **8**. Emphasis added. "Judge Foxman indicated that he was inclined to grant the motion to exclude Hunt, and the State responded it was premature at this point." (R 1558-1562) State brief page 14. "Damore noted for the record that Hunt's perception that she was needed for the Fotopoulos trial was very much mistaken." (R 1359) State brief page 5. The last **two** matters of record indicate that the State Attorney was taking inconsistent positions in stating that Hunt's testimony was not needed for the Fotopoulos trial but then objecting when the co-defendant's attorney intended to exclude Hunt from the Fotopoulos trial. In view of the fact that the State of Florida flew Deidre Hunt up from Ft. Lauderdale to the trial

and used her testimony for three (3) days, Hunt's testimony was essential and the State intended to use her testimony all along, contrary to its assertions on the record. "Example seven was that after the plea had been entered Niles had let Damore and State Attorney Investigator Joe Gallagher see her without him being present. (R 1602) State brief page 15. This was further evidence of Deidre Hunt's cooperation post plea and of the State's intention to use Deidre Hunt as a witness in the trial of co-defendant Fotopoulos.

ARGUMENT

ISSUE I.

THE STATE HAS NOT REBUTTED THE LAW THAT A CRIMINAL PLEA IS A CONTRACT BETWEEN SOCIETY AND THE ACCUSED.

The law in Florida and in the United States is clear that a criminal plea agreement is a contract which is governed by the principles of contract law. The State has not denied this nor has it rebutted this by presenting any law to the contrary. All contract theories in Hunt's initial brief stand untarnished and apply. The entry of pleas are governed by Florida and U.S. Constitution and by general contract law as well as by the Florida Rules of Criminal Procedure but not by the Uniform Commercial Code. See State brief page 32.

The Appellee's flippant comparison of the Uniform Commercial Code and this plea contract case is totally out of place. As the State is well aware, the Uniform Commercial Code only applies to the sale of goods. For the Uniform Commercial Code to apply in this case justice would have to be a goods for sale in the trial court. Since justice was not for sale the Uniform Commercial Code does not apply. Of course, Hunt did not rely on any Uniform commercial Code cases in her initial brief.

Hunt agrees with the State when it states at page 33 of its brief that Florida "precedent already embodies contract principles in determining whether a party has breached its agreement. See Lopez v. State, 536 So.2d 226 (Fla. 1988); Hoffman v. State, 474 So.2d 1178, (Fla. 1985)."

Hunt agrees with the State's Statement of Facts on page 34 when it states, "In terms of an agreement with the state, the prosecutor stated:

The only agreement that the State has entered into in the sentencing of Ms. Hunt with the addition that it would seek the death penalty before this court is that the State would agree if the Court saw fit to defer the sentencing of Deidre Hunt until Deidre Hunt was given an opportunity to testify in the Kosta Fotopoulos case, whether it be separated, severed or a change of venue might be ordered by this Court. That is within the sound discretion of this Court. Emphasis added.

(R 1475-76). This clearly indicates that the State Attorney did negotiate that part of the agreement and that the plea was expressly conditioned on Deidre Hunt being sentenced after the trial of co-defendant Fotopoulos. Thus the State did bargain for the defendant's guilty plea and the above quotation is evidence of the consideration flowing from the State in deferring sentencing of Hunt until later. If this was not a negotiated-for-concession by the State then the State would have immediately set the sentencing for Deidre Hunt in May, 1990. It did not do so.

Hunt agrees with the State's statement in its brief at page 36, "Thus the only thing the State agreed was to postpone Hunt's sentencing until after the Fotopoulos trial so that Hunt could have the opportunity to present additional mitigation on her own behalf at sentencing," (R 1469-70, 14-77-83.)"

The following statement from the State's brief is

illogical. Page 37. "A defendant cannot be allowed to arrange a bargain, back out of his part, yet insist the prosecutor uphold his end of the agreement." First of all Hunt did not back out of her part of the bargain since she ultimately testified for three (3) days against Fotopoulos.

Second, once she performed her part of the agreement she could insist that the prosecutor uphold his end of the agreement, to-wit: expressly to agree to a deferred sentence hearing and implicitly to agree to recommend a life sentence.

Third, in the trial court Deidre Hunt did not insist that the prosecutor uphold his end of the agreement because that was not allowed to be put on the record per her attorney. What she did insist on was that she be permitted to have a jury trial which is her constitutional right.

A corollary of the State's above quoted statement is "Part of the plea contract is null and void but part is not null and void." We agree with the State's implied contention that if part of a contract is null and void then it is all null and void. Therefore, once the contract was rendered null and void by Hunt's anticipatory repudiation on July 20, 1990 then the entire contract became null and void and she was entitled to a trial on the merits and not to be sentenced on a void plea agreement.

If Hunt's refusal to testify relieved the State of its reciprocal obligation to postpone the sentencing, (Brief page 38), then each party is relieved of its contractual obligations, no contract exists and each party must go to a

jury trial.

In order to have avoided reversible error the trial court should have stuck to its original sentencing date in the end of October, 1990.

The State on page 39, the Appellee incorrectly states, "Hunt originally pushed for a speedy trial." There is no speedy trial demand in the file. Therefore, the trial dates were governed by Florida Rules of Criminal Procedure and Florida Statutes and the Constitutions.

Hunt would agree that there is no constitutional right to a plea bargain, and the prosecutor need not do so if he prefers to go to trial. (State brief page 40) But once a State Attorney accepts the plea and all its conditions on record the State Attorney is bound to the full performance and enforcement of the plea agreement. If the prosecutor cannot abide by the plea agreement then the prosecutor must bring the defendant to trial.

The State on page 40 states, "The fact that Hunt later testified at the Fotopoulos trial has no bearing on the events as they unfolded at the trial court in the instant case..." This position is absurd. Hunt's testimony in the Fotopoulos trial was the primary inducement for the State to enter into the plea. Hunt's later testimony at the Fotopoulos trial was her agreed upon performance of express covenants of the plea agreement, i.e. that she would testify against Fotopoulos and that her sentencing would be delayed until after she testified against Fotopoulos. The same Judge

who accepted Hunt's plea presided over the Fotopolous trial and Hunt's sentencing. The fact that Judge Foxman did not have available to him at Hunt's sentencing her cooperation and testimony against Fotopolous had ultimate importance in her sentence hearing.

Hunt agrees with the State's statement, "The State did not force Hunt to commit these crimes, and owed her nothing but a fair trial." The State did not give Hunt a trial at all and still owes her a fair trial. Fotopoulos, not the State, did force Hunt to commit these crimes.

The trial court should have applied contract principles to the plea once the plea appeared to break down in July, 1990. The trial court was one of the performing parties in the three way contract among the trial court, the state and the defendant. The trial court was an innocent party to the breach of plea agreement which was induced by the State's demand that Hunt be sentenced before the Fotopoulos trial. It is unrealistic to expect the trial court to declare itself in breach of contract by the Court's own premature sentencing of Hunt. But an appellate court can declare that the trial court and the state breached its contract. The Appellate Court can and does analyze the performance of all parties in the performance of the plea contract below. Deidre Hunt has not waived any rights to assert these breaches of contract. In fact she did raise all the points on appeal by her actions in the trial court.

ISSUE 11.

THE TRIAL COURT SHOULD BE LIBERAL IN EXERCISING ITS DISCRETION TO PERMIT THE WITHDRAWAL OF A PLEA.

Hunt agrees with the State's brief at page 49 which states, "Judge Foxman outlined the agreement for Hunt as follows: She would plead to guilty to all counts, the sentencing would be postponed until after the Fotonoulas matter was disposed of, the State would seek the death penalty whether or not she cooperated, and it would be up to him whether to sentence her to life or death. (R-1483) (Emphasis Added) Hunt was told that she did not have to do any of that and could go to trial. (R-1484) Likewise, the State didn't have to do any of that and could go to trial. When the State prematurely advanced the sentencing of Hunt the State wilfully and intentionally breached the plea agreement and should have gone to trial instead.

The case of Costello v. State, 260 So.2d 198 (Fla. 1972) is on all fours with the instant case. In Costello there was no on the record mention of a life sentence. Yet the defendant had the mistaken but reasonable assumption that the State Attorney had promised a life sentence and not a death sentence. The court in Costello ruled that the plea was not freely entered into and the defendant was given a new trial. Likewise in the instant case Deidre Hunt has relied on the promise of the prosecutor and of her defense attorney in entering her plea.

Hunt disagrees with the State's brief at page 52 where it states: "*Hunt is not* entitled to appeal any court rulings

made **prior** to the entry of her plea, **so** any claims relating to matters prior to that time are not cognizable." The plea was entered on **May 7, 1990**. Both before and after May 7, 1990 Hunt filed motions to discharge counsel and counsel filed motions to withdraw and various and sundry other motions. Hunt would **be** entitled to appeal any court rulings made prior to the entry of her plea if the court reheard those matters or ruled on any identical or similar matters after the entry of the **plea**.

Hunt has properly perfected her right to appeal from the guilty plea by filing her Motions to Withdraw the Plea. The issues of voluntary or intelligent character of the guilty plea and the failure of the government to **abide** by the plea agreement **were** properly presented to the trial court.

Robinson v. State, 373 So.2d 898 (Fla. 1979).

Hunt **agrees** with the **State's** brief at page **54** which states, "Hunt states that at the April **14th** hearing the trial court did not make any **inquiry** regarding her right **of** self representation **and** while this is true...

CONCLUSION

Based on the arguments and authorities presented herein, Hunt respectfully requests that this court reverse the judgment and sentence of the trial court in all respects and remand for a new jury trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Reply Brief of Appellant has been furnished by hand delivery to Kellie A. Nielan, Esquire, Asst. Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, FL 32114 this 8th day of July, 1991.

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