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IN THE

SUPREME COURT OF THE STATE OF FLORIDA

MILTON THOMAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 76,825
DCA NO. 89-1564

PETITIONER'S BRIEF ON THE MERITS

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AUTHORITIES CITED

PRELIMINARY STATEMENT

The Petitioner was the Appellant in the Fourth District Court of Appeal and the Defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For St. Lucie County, Florida. The Respondent was the Appellee and the Prosecution, respectively, in those lower courts.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

R = Record on Appeal

SR = Supplemental Record on Appeal (Presentence Investigation)

STATEMENT OF THE CASE AND FACTS

Milton Thomas, Petitioner, was charged by Information filed in the Nineteenth Judicial Circuit in and for St. Lucie County with battery on a law enforcement officer (R 24).

On March 10, 1989 Petitioner appeared before Judge Smith. In accordance with a signed written plea agreement Petitioner entered a nolo contendere plea to the offense. The state agreed to recommend a sentence of four (4) months in jail with credit for time served, to be followed by probation with restitution as a special condition (R 32-36, 2). The court accepted the plea and ordered a presentence investigation (R 4).

The Department of Corrections probation officer recommended three (3) years in prison with restitution to be ordered if Petitioner was placed on probation or work release in the presentence investigation report to the court (R 37-38). Although Petitioner moved to withdraw his nolo contendere plea after the DOC recommendation was conveyed to the trial court and prior to sentencing, the state opposed the withdrawal and the trial court denied the motion (R 6-14). At sentencing the state first announced it would stand silent because the guidelines range was higher than she had anticipated when she entered into the plea agreement with Petitioner (R 16-17). Even after the court warned her that if she did not stand by her agreement that Petitioner would have grounds to withdraw his plea, the prosecutor continued to refuse to reaffirm her recommendation pursuant to the plea agreement and indicated she was standing silent. Finally, the prosecutor stated

prosecutor stated she would recommend four months but she would not agree to the trial court using the "recommendation" of four months incarceration as a written reason to depart from the guidelines (R 19). The court sentenced Petitioner to three (3) years incarceration in the Department of Corrections, to be followed by (2) years on probation. The court also ordered $4,431.00 restitution and imposed numerous special conditions of probation (R 20).

Petitioner appealed from the judgment and sentence and denial of his motion to withdraw his plea. On July 25, 1990, the Fourth District Court of Appeal affirmed his conviction and the trial court's denial of his motion to withdraw his plea of nolo contendere. On August 9, 1990, Petitioner timely requested rehearing. The district court denied rehearing, but withdrew its earlier opinion and substituted the opinion filed September 19, 1990.

On October 19, 1990, Petitioner timely filed his Notice to Invoke the Discretionary Jurisdiction of this Court. On April 12, 1991, this Court accepted jurisdiction and issued an Order setting a briefing schedule and oral argument.

SUMMARY OF THE ARGUMENT

The trial court erred in denying Petitioner's motion to withdraw his plea. The state breached its plea agreement and Petitioner was denied the benefit of his bargain when a presentence investigation report and recommendation by the probation officer which was contrary to the state's plea agreement was communicated to the trial court. The agreement was further breached by the positions taken by the state attorney's office at the motion and sentencing hearings which were also contrary to the state's plea agreement with the defense. Further, the trial court erred as it had an affirmative duty to allow Petitioner an opportunity to withdraw his plea when it was unwilling to sentence him in accordance with the plea agreement. The decision of the fourth district must be quashed and the cause remanded to the trial court with directions to permit Petitioner an opportunity to withdraw his plea.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO WITHDRAW HIS NOLO CONTENDERE PLEA AFTER THE STATE BREACHED ITS PLEA AGREEMENT.

Petitioner moved to withdraw his nolo contendere plea to battery on a law enforcement officer in the trial court asserting that the state breached its plea agreement with Petitioner. The trial court denied the motion and sentenced Petitioner to a sentence in excess of the plea agreement (R 14, 20). The Fourth District Court of Appeal affirmed the trial court's denial of the motion. This Court accepted jurisdiction on April 12, 1991 after Petitioner asserted express and direct conflict with Lee v. State, 501 So.2d 591 (Fla. 1987), Goldberg v. State, 536 So.2d 364 (Fla. 2d DCA 1988), and State v. Newsome, 549 So.2d 818 (Fla. 2d DCA 1989).

Petitioner's primary contention is that the instant opinion must be quashed as it directly and expressly conflicts with this Court's holding in Lee v. State on the same point of law. Pursuant to Lee, the lower court should have found that the state breached its plea agreement with Petitioner and that his motion to withdraw his plea due to that breach should have been granted. Finally, Petitioner will briefly address the conflict presented with the cases from the second district on a related point of law - whether the trial court has an affirmative duty to offer a defendant an opportunity to withdraw his plea when the court is unwilling to sentence him in accordance with the plea agreement.

At bar, the state and defense entered into a signed written

plea agreement in which Petitioner agreed to enter a nolo contendere plea to battery on a law enforcement officer and "the state" (R 32) agreed to recommend a sentence of four months in jail, with credit for time served, to be followed by probation with a special condition of restitution (R 2, 32-36). The court accepted the plea agreement and ordered a presentence investigation (PSI) after advising Petitioner that it was not bound by the plea recommendation (R 3-4). At the beginning of the scheduled sentencing hearing, Petitioner moved ore tenus to withdraw his plea based on the state's failure to comply with the plea bargain. Petitioner contended the state Department of Corrections' recommendation of a three (3) year prison sentence, which was contained in the PSI provided to the trial court, constituted a breach of the state's agreement as to a recommended sentence. Sentencing was delayed for a hearing on a written motion to withdraw the plea (R 37-38).

At the hearing on the motion, another assistant state attorney, Ms. Blaxill-Deal, appeared for the state instead of Ms. Larson who had entered into the plea agreement (R 12). Ms. Blaxill-Deal argued against Petitioner being allowed to withdraw his plea, contending the Department of Corrections was not a state agency, and stating:

> Your Honor, our position is that in your plea colloquy you make it very clear to the defendant that you are not bound by the plea agreement and that you will sentence accordingly. I think that based on the defendant coming back in a higher grid that the (indiscernible) sentence would be outside the plea agreement range and that is at this

point the State's position.

(R 12). The Court denied Petitioner's motion (R 14).

Subsequently, at sentencing, the original assistant state attorney (Ms. Larson) indicated she had changed her position based on the unanticipated higher guidelines range reflected in the PSI.

> THE COURT: Okay. What's the State's recommendation?
>
> STATE: Your Honor, the State -- the points did come out higher than we had originally anticipated. The State is going to stand silent and leave the sentence to the court ...

(R 16-17). After she indicated to the court that she would stand silent and leave the sentence to the court's discretion, the court cautioned her that her failure to abide by her plea agreement constituted grounds for Petitioner to withdraw his plea. The following exchange took place:

> THE COURT: All right. Well, I think that under the case law the State has to recommend what they agreed to recommend, if you don't they can withdraw the plea under the case -- so I don't know if the State wants to recommend -- in other words, I think the case law is clear where you don't recommend what you agreed to, then the plea can be withdrawn.
>
> STATE: Well, the State is not going to recommend -- it's not going to agree that for a written reason that the judge can go underneath the guidelines. That was the original plea agreement and I am standing silent so I am not affirmatively recommending anything more than a four month period. However, the State is not agreeing that -- that the court could use the State's recommendation as a reason to go underneath the guidelines.
>
> DEFENSE: Your Honor, here's Curry v. State right here where the State stands silent and --

> THE COURT: Yeah, I know.
>
> DEFENSE: -- at a sentencing hearing.
>
> THE COURT: Okay, well, I'll just --
>
> STATE: Well, Your Honor, I'll recommend four months but I'm not agreeing that to be a written reason to go underneath the guidelines.
>
> THE COURT: All right, Milton B. Thomas, the State's recommending four months according to their original agreement. The Probation Department is recommending three years incarceration.

(R 19-20) (emphasis supplied). The court then sentenced Petitioner to three (3) years incarceration with credit for time served, to be followed by two (2) years probation with numerous special conditions (R 20).

The trial court erred in denying Petitioner's motion to withdraw his plea prior to sentencing for the following reasons: 1) The Department of Corrections is clearly a state agency and thus the department's recommendation to the court in the PSI of three years incarceration was a breach of the plea agreement which called for "the state" (R 32) to recommend four months in jail; 2) the positions taken by the state attorney's office during the motion and sentencing hearings also constituted a breach of the plea agreement, and 3) the trial court had an affirmative duty to offer Petitioner an opportunity to withdraw his plea when it was unwilling to sentence him pursuant to the plea agreement.

A sentencing recommendation by an agent of the state which is contrary to the state's plea bargain agreement constitutes a breach of the agreement if the inconsistent recommendation is communicated

to the court in any manner, whether in a presentence investigation report or in open court. Lee v. State, 501 So.2d 591 (Fla. 1987). Although in Lee this Court determined that a law enforcement recommendation in the PSI contrary to the state's plea agreement constituted a breach of the plea agreement and entitled defendant to withdraw his plea, the holding applies to any representative or agent of the state government. Id. at 593. This is reflected in the Court's analysis which follows:

> In his dissent in the case sub judice Judge Ervin takes the position that 'a breach [of the plea agreement] occurs if any representative of the government fails to honor a plea bargain agreement entered into between the state and the defense, particularly if it influences a consequence not contemplated by the agreement.' 490 So.2d at 84, (Ervin, J., concurring in part and dissenting in part). Under Florida Rule of Criminal Procedure 3.171, the prosecuting attorney represents the state in all plea negotiations. We agree with Judge Ervin, that once a plea bargain based on a prosecutor's promise that the state will recommend a certain sentence is struck, basic fairness mandates that no agent of the state make any utterance that would tend to compromise the effectiveness of the state's recommendation. We also agree with the Fortini[1] court that it matters not whether the recommendation contrary to the agreement is made in open court or whether, as here, it is contained in a PSI report. 'The crucial factor is that a recommendation contrary to the state's agreement came to the sentencing court's attention.' 472 So.2d at 1385. Regardless of how a recommendation counter to that bargained for is communicated to the trial court, once the court is apprised of this inconsistent position, the persuasive effect of the bargained for recommendation is lost.

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[1] Fortini v. State, 472 So.2d 1383 (Fla. 4th DCA 1985).

Id. at 593 (emphasis supplied)

Sub judice, the district court of appeal found that because the state, "albeit reluctantly, reaffirmed its recommendation" of four months incarceration pursuant to the plea agreement after a Department of Corrections presentence investigation (PSI) report recommended three years incarceration to the court, that the Petitioner got the benefit of his bargain. Thomas v. State, 566 So.2d 613, 614 (Fla. 4th DCA 1990). The district court therefore determined that the trial court did not err in denying Petitioner's motion to withdraw his plea which was made before sentencing. The district court did so despite the state's announcement to the trial court that it would not agree to the trial court using its recommendation of four months incarceration as a written reason to depart from the guidelines.

Lee v. State clearly dictates a contrary finding; that by the DOC probation officer making an inconsistent sentencing recommendation to the court in its PSI, the state had breached the plea agreement and the Petitioner lost the persuasiveness of the bargained for recommendation. Clearly, the state Department of Corrections probation officer who prepared the PSI is a representative or agent of the state government and is bound by a plea agreement entered into by the state attorney's office on behalf of the state.

Thus, the probation officer's PSI recommendation which was communicated to the court constituted a breach of the plea agreement and Petitioner should have been permitted to withdraw his

plea. Lee; accord Curry v. State, 513 So.2d 204 (Fla. 4th DCA 1987); Fortini v. State, 472 So.2d 1383 (Fla. 4th DCA 1985), review denied, 484 So.2d 10 (Fla. 1986) (grudging compliance by law enforcement with state's sentencing recommendation, together with presentation of initial contrary recommendation, deprived defendant of benefit of his bargain, whereby he entered a plea in exchange for assistant state attorney's agreement that "the state" would recommend a five-year sentence).

In addition, the record further reflects that the state attorney's office was totally opposed to Petitioner being sentenced pursuant to the original plea agreement of four months.

First, an assistant state attorney other than the one who entered into the plea agreement took the position at the motion hearing that Petitioner should not be permitted to withdraw his plea. Further, the state did not reassert the state's prior plea agreement. In fact, the position the state took was far from its plea agreement. Not content with even remaining silent (which still would have been a breach of the agreement), the state took the position that although the sentence recommended by the PSI was outside the plea agreement range that the court could still sentence Petitioner to the PSI-recommended sentence since the court had previously advised Petitioner that it was not bound by the plea agreement (R 12). By taking this position and not affirmatively reasserting the plea agreement, the assistant state attorney thereby breached the plea agreement the state had entered into with Petitioner.

Second, the state later added insult to injury with the position(s) the prosecutor took at sentencing, where Ms. Larson (who entered into the plea agreement) represented the state. After twice stating that she would remain silent, and after being reminded repeatedly by the court that she was bound by her plea agreement, the state with great reluctance grudgingly stated she would recommend four months. However, the prosecutor still repeated for the third time that she did not agree that the court could use the state's four month recommendation as a reason to go below the guidelines range of two and a half ($2\frac{1}{2}$) to three and a half ($3\frac{1}{2}$) years (R 16-19, 50). The state was clearly recommending a guidelines sentence and not four months as required by its plea agreement. The state was not, in reality, recommending or even agreeing to, four months in jail.

Further light on the state's position on the plea agreement is shed by reference to the presentence investigation report (SR). First, under the section provided for state attorney statements, the PSI reads, "ASA Keith Pickering will hold comments until sentencing" (SR 5). Second, and most significantly, there are handwritten notes on the face of that same section of the PSI which could only have been made by the trial court itself that state: "(State stands silent)" (SR 5).[2]

In any event, the state's changed posture and demeanor

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[2] There are other handwritten notes apparently also made by the court which are less clear, but appear to read, "Thought he was 1st grid (indecipherable) not agree on 4 mons j. prob. + rest." and "defendant has extensive prior record that (indecipherable) weren't aware of" (SR 5).

certainly denied Petitioner the benefit of his bargain, the persuasive effect of the state's recommendation. Lee; Fortini; Curry. Thus, Petitioner's motion to withdraw his plea should have been granted on the basis of this additional breach of the plea agreement.

In Curry v. State, 513 So.2d 204, which is also quite similar to the case at bar, the state had agreed to recommend one year in jail followed by a long period of probation but the PSI recommended seven to nine years. When the defendant moved to withdraw his plea based on that conflict, the assistant state attorney who had entered into the plea agreement was not present and the state took the position that the defendant should not be permitted to withdraw his plea and at the same time did not reassert the state's prior agreement. The fourth district reversed, finding:

> The spirit of the state's agreement is violated by the state's remaining silent while the P.S.I. speaks of a recommendation contrary to the state's specific recommendation to which it had preciously agreed. As in Fortini, the defendant here has been denied the benefit of his bargain; i.e., the persuasive effect of the state's recommendation. The defendant showed good cause for the withdrawal of his plea, and his motion should have been granted.

Id. at 205-206 (emphasis supplied).

Thus, Petitioner's motion was based on good cause, and the trial court erred in denying it. See McBride v. State, 508 So.2d 757 (Fla. 4th DCA), review denied, 515 So.2d 230 (Fla. 1987) (prosecutor's extravagant and lengthy tirade against defendant at sentencing hearing was in violation of prosecutor's agreement in plea bargain not to "rant and rave" and mandated defendant be

allowed to withdraw no contest plea).

In addition, the district court's decision is in express and direct conflict with Goldberg v. State, 536 So.2d 364 (Fla. 2d DCA 1988), and State v. Newsome, 549 So.2d 818 (Fla. 2d DCA 1989), on a related point of law. At bar, the district court found that the trial court did not err by failing to offer Petitioner an opportunity to withdraw his plea when the court did not impose a sentence in accordance with the plea agreement or by denying Petitioner's motion to withdraw his nolo contendere plea. Thomas v. State, 566 So.2d at 615. This holding is in express and direct conflict with the aforementioned decisions of the second district which hold that before being sentenced a defendant should be given an opportunity to withdraw his plea if a trial court is unwilling to impose a sentence in accordance with the plea agreement. See also Lamar v. State, 496 So.2d 191 (Fla. 4th DCA 1986).

In Goldberg v. State, 536 So.2d 364, the second district held that when a negotiated plea agreement could not be honored the defendant should have been allowed to withdraw his plea and the trial court had an affirmative duty to so advise the defendant. In Goldberg, all parties anticipated a guidelines sentence of probation based on the defendant's representation that he had no prior record. When the PSI revealed an extensive prior record, the court refused to honor the plea agreement and sentenced the defendant to a guidelines sentence of five years on each count. Id. at 365.

In State v. Newsome, 549 So.2d 818, the second district held

that if a trial court finds that it cannot accept the plea agreement as presented to the court, it must allow the defendant to withdraw his plea and return to the position he was in prior to tendering his plea.

Thus, the instant decision of the Fourth District Court of Appeal is in express and direct conflict with Lee v. State, Goldberg v. State, and State v. Newsome. This Court should therefore quash the decision of the fourth district and remand the cause with instructions to the trial court to grant the motion and permit Petitioner an opportunity to withdraw his plea if he still desires to do so.

CONCLUSION

Based on the foregoing argument and authorities cited therein, Petitioner respectfully requests this Honorable Court to quash the decision of the Fourth District and remand this cause with appropriate directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereto has been furnished to Patricia Lampert, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 1st day of May, 1991.

Susan D. Cline

Of Counsel