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IN THE SUPREME COURT OF FLORIDA

LARRY D. FORD,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 78,810

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER

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SECOND JUDICIAL CIRCUIT

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REPLY BRIEF OF PETITIONER

ARGUMENT

I. PETITIONER'S CONVICTIONS AND SENTENCES RESULTED FROM A PLEA AGREEMENT IN WHICH THE PARTIES AND COURT MISTAKENLY AGREED TO AN ILLEGAL SENTENCE.

A brief response is offered to respondent's assertion that exclusion of first-degree felonies punishable by life from habitual offender punishment would be an absurdity because such crimes are the most serious of first-degree felonies. The absurdity is already built into the statute, for it excludes application to life felonies, by definition even more serious than first-degree felonies punishable by life. Respondent makes no claim that life felonies fall within the operation of the statute. Although, as noted by appellee, statutes should not be construed to yield an absurd result, no contrary construction is possible as to this flawed piece of legislation. The absurdity is built into it, and cannot rationally be extricated.

Respondent has addressed the second facet of petitioner's argument, that the plea is invalid if life sentences are mandatory under the statute for first-degree felony, in Point III of the answer brief. Respondent expresses surprise at the

appearance of this argument because, as to the state's thinking, Mr. Ford got a very good deal indeed. The state suggests that the undersigned counsel has raised this issue against Mr. Ford's best interests and wishes. Without divulging confidential communications, undersigned counsel responds emphatically that Assistant Attorney General & Criminal Appeals Bureau Chief Rogers is wrong. The state does not specify which of Mr. Ford's legal rights it seeks to protect in seeking his certification. The undersigned suspects the state's agenda lies elsewhere. Moreover, petitioner has consistently argued throughout these proceedings that the plea is void and must be vacated. On what basis does respondent now argue that presentation of an additional reason for this contention justifies inquiry into confidential communications? Petitioner suggests that the state direct its gaze away from attorney-client relations and stick to the specific issue raised.

Respondent asserts that as a matter of professional principle, it will not attempt to abrogate the plea agreement. (Answer brief at p.17) Should petitioner's sentence prove illegal and his plea void, he wonders if the state will still attempt as a matter of professional principle to enforce a deal built on mistaken assumptions by, among others, the state itself. Petitioner suggests the state's motive is pure expedience, no sin to be sure, but certainly nothing about which to make pious pronouncements. Petitioner will refrain from questioning the state's motivations if respondent refrains from announcing them.

Because the issue of an illegal sentence may be raised at any time, because the issues bearing on the legality of Mr. Ford's sentence are currently before this Court, and because the validity of his plea hinges on the Court's disposition of these issues, appellant makes his case here and now. He is within his rights in doing so.

II. THE DISTRICT COURT HAD JURISDICTION TO ENTERTAIN THIS APPEAL.

This argument has taken on the trappings of a crusade for respondent. Having been rebuffed by the First District Court of Appeal, and turned away once by this Court, it mounts another charge.

Petitioner relies in large part on the lower court's opinion to refute respondent's claims. Ford v. State, 575 So.2d 1335 (Fla. 1st DCA), rev. denied, 581 So.2d 1318 (Fla. 1991). Respondent's chief quarrel with Ford is that it fosters more appeals than the regime favored by the state. In en era of case overloads and multiple extensions for initial briefs, we cannot afford Ford, reasons respondent. This is a political appeal better made before the legislature than a court of law. It elevates economics and logistics over individual rights. Within limits, a legislature can make those choices; a court cannot.

Respondent portrays the instant case as an example of the abuse of the appellate process because it has reached this point without a motion to withdraw the plea having been made before the trial court. No motion was made because none of the parties contemplated the illegality of the sentence. Moreover, no motion to withdraw is necessary under these circumstances. All parties involved in the plea below evidently believed that the habitual offender statute applied to the offense and that the trial judge had discretion over sentence length under the statute. These very questions remain unsettled, pending this Court's decision in Burdick v. State, 584 So.2d 1035 (Fla. 1st DCA 1991), rev. pending, no. 78,466. Until these questions are answered, there

is no basis to move to withdraw the plea. If Ford's negotiated sentence violates this Court's holding on either issue, a motion to withdraw the plea will be superfluous, as a defendant cannot agree to an illegal sentence. Purvis v. Lindsey, 16 FLW D2673 (Fla. 4th DCA Oct. 16, 1991). A plea that contemplates an illegal sentence is void, not merely voidable, and must be set aside. Jolly v. State, 392 So.2d 54, 56 (Fla. 5th DCA 1982). Thus, before this Court decides Burdick, there is no basis to seek withdrawal of the plea; after it decides Burdick, there will be no need.

Perhaps these observations will convince the Court, if not respondent, of the need for independent review by appellate counsel of trial court proceedings. Had respondent succeeded in its efforts to dismiss this appeal, Mr. Ford would have been deprived of review of the legality of his sentence and hence the validity of his plea on two open questions of law, each certified by the First District Court of Appeal to be of great public importance. Rather than illustrating the fallacies of the DCA opinion denying the motion to dismiss this appeal, as asserted by respondent, this case instead illustrates the potential for injustice if this Court adopts respondent's position.

This Court should again decline to address this issue, or, in the alternative, fully and finally refute it.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, Petitioner requests that this Honorable Court reverse his convictions and remand to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon James Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32399, on this 19th day of December, 1991.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER