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FILED
SID J. WHITE
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SUPREME COURT
CLERK
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

LEE ROBERTSON HAYLES,

Petitioner,

vs. CASE NO. 79,743

STATE OF **FLORIDA,**

Respondent.
_____/

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The state supplements with the following. The intended victims were the estranged wife of petitioner, who had announced her intention to divorce petitioner well prior to the crimes here, and her alleged boyfriend. R188. The circumstances surrounding the crimes are in the PSI at R225-226 and show that the petitioner's plan to commit the two murders was well-advanced, reaching the point where partial payment had been made to the undercover police officer hired to commit the murders.

At the plea hearing on 30 January 1991, counsel for petitioner (Beroset) began the hearing with the following uncontradicted representation to the court:

> MR. BEROSET: Your Honor, we believe we have worked out a plea agreement with Mr. Hayles and we've discussed it thoroughly in court. He had some reservation on prior occasions. I would like to take time to go over the plea agreement, if I could. Your Honor, he's going to plead nolo contendere to the courts as charged, two counts of solicitation for first degree murder. We've discussed with Mr. Hayles that the guidelines in this would be 12 to 17 years, that the permitted is 7 to 22, and if there was any reason to exceed, the Court could go to maximum punishment to 30 years on each count. The State has tendered to us a plea agreement for this plea of nolo contendere. That indicates that the State will not request a sentencing guideline departure or that the defendant will be sentenced in a permitted range. In other words, they will not request it --

R162

Thereafter, the following colloquy occurred:

MS. NEEL [Prosecutor]: He'll be sentenced in the recommended and not the permitted.

MR. BEROSET: Right, He will be sentenced in the recommended range, but if the Court concludes that probation or community control is necessary, the Court can impose that above the permitted range. In other words, he would receive a sentence within the recommended range of 12 to 17. The State is going to argue for probation in addition to it, we can argue for the lower end of the sentence and no probation, and that's our understanding of the agreement.

MS. NEEL: Right, because the State will be arguing for probation to be following it.

MR. BEROSET: This is a copy of the plea agreement that's been signed. We've gone over the rights with Mr. Hayles and talked to him about this.

THE COURT: Mr. Hayles, Have you read the agreement? I know you have signed it. And you have given up certain rights by entering the plea. You have given up your right to appeal, first of all. You've given up your right to a trial and appeal. You understand that, don't you?

THE DEFENDANT: Yes, sir.

THE COURT: And it's my understanding from what Mr. Beroset said, that basically the agreement provides that you'll be sentenced within the recommended range, which is 12 to 17 years in state prison. The State is going to argue for the 17, of course. They are going to make an argument for the 12. The State is going to also ask for an additional probation over and above that which the defense is going to argue that it's not necessary, and those type of things will be left up to me. We're not going to handle it today, I would assume, because we're not going to have time.

MR. BEROSET: That's correct. We want to have a PSI and we want to present letters of character reference, and so on.

THE COURT: Is that what your understanding of it is?

THE DEFENDANT: Yes, I understand, Your Honor.

THE COURT: That's what you want to do?

THE DEFENDANT: Yes.

R162-164.

SUMMARY OF ARGUMENT

1. The Court should approve the district court below and disapprove Tarawneh, infra.

2. There was no right to appeal the sentence or plea under the circumstances of the case here. Ford, infra, should be disapproved and Robinson, infra, reiterated.

ARGUMENT

ISSUE I

DID THE PARTIES, THE TRIAL COURT, AND THE DISTRICT COURT BELOW ERR IN CONCLUDING THAT SOLICITATION TO COMMIT FIRST DEGREE MURDER SHOULD BE SCORED USING A CATEGORY ONE GUIDELINES SCORESHEET FOR MURDER AND MANSLAUGHTER?

This case is before this Court to resolve conflict of decisions between the district court below and Tarawneh v. State, 588 So.2d 1006 (Fla. 4th DCA 1991), rev. denied, no. 79,195 (Fla. Feb. 17 1992). The arguments below on whether category one or nine scorssheets were appropriate are basically the same as those here. Because the 1st DCA below adapted the state's view in its analysis of the issue and the fallacy of the Tarawneh decision, and because that analysis is both cogent and short, the state will rely on that analysis with very brief comments.

> Appellant pled no contest to an information charging two counts of solicitation of first degree murder in violation of section 777.04(2) and 782.04, Florida Statutes (1989). The trial court adjudged Hayles guilty and sentenced him to a term of 17 years imprisonment followed by 13 years probation. In deriving the sentence, the trial court utilized a category 1 scoresheet. Fla. R. Crim. P. 3.988(a). Appellant, relying upon Tarawneh v. State, 16 F.L.W. D2510 (Fla. 4th DCA Sept. 25, 1991), urges error in the trial court's use of this scoresheet in determining a guidelines sentence.
>
> Florida Rules of Criminal Procedure 3.701(c) requires the use of a category 1 scoresheet for the following offenses: "Murder, manslaughter: Chapter 782 [except subsection 782.04(1)(a)], and subsection 316.193(3)(c)3, and section 327.351(2)." Committee Note (c) to the rule provides: "The guidelines do not

apply to capital felonies. Inchoate offenses are included within the category of the offense attempted, solicited, or conspired to, as modified by Ch. 777." In Tarawneh the Fourth District concluded that, given the text of the rule and the committee note, it was improper to use a category 1 scoresheet in sentencing a defendant convicted of solicitation to commit first degree murder. We must disagree with that conclusion.

In Tarawneh our sister court held that, under similar circumstances, the trial court should have used a category 9 scoresheet. Pursuant to Florida Rule of Criminal Procedure 3.701(c), category 9 is used for any felony offense not otherwise classified into a specific offense category. The Fourth District cited Committee Note (c), supra, as support for its conclusion that category 1 was not applicable. The note, however, on its face, seems to indicate that the guidelines would not apply at all to capital felonies. The Tarawneh court concluded, in light of the requirement that inchoate offenses are included within the category of the offense attempted, that solicitation to commit first degree murder would be excluded from category 1, since first degree murder is itself excluded from category 1. This analysis somewhat begs the question of how, if capital murder is excluded altogether from the guidelines, and therefore solicitation to commit capital murder is also excluded, the trial court can be required to sentence under a different category of the very guidelines from which the defendant's crime, according to Tarawneh, has been excluded.

The reason for excluding first degree murder (§ 782.04(1)(a), Florida Statutes (1989) from the sentencing guidelines is apparent. The only available sentences upon conviction of first degree murder are death or life without possibility of parole for 25 years. § 775.082, Fla. Stat. (1989). It would thus make no sense to utilize a

sentencing guideline in the instance of a capital felony. Hayles was not, however, convicted of a capital felony. One guilty of attempting or soliciting the commission of a capital felony is guilty of a felony of the first degree. § 777.04(4)(a), Fla. Stat. (1989). Accordingly, the trial court properly adjudicated Hayles guilty of two first degree felonies, each falling under the classification of offenses included in category 1 of the sentencing guidelines. Hayles' score of 165 resulted in a recommended range of sentencing under the guidelines of 12 to 17 years. The sentence is this case was, thus, appropriate. [1]

We hold that the trial court in the present case properly utilized a category 1 scoresheet in sentencing a defendant convicted of solicitation to commit first degree murder. [2]

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[1] Accordingly, we certify conflict with the Fourth District.

[2] If the underlying premise of Tarawneh is correct, i.e. that solicitation to commit first degree murder is excluded from the guidelines, then the trial court in the present case, rather than being required to utilize category 9, would be entitled to give a nonguidelines sentence, up to the maximum penalty allowed by law, for two first degree felonies. The resulting sentence could clearly be harsher than the sentence contemplated by category 1 of the guidelines. We would suggest that such a result is not warranted for at least two reasons. First, the guidelines expressly exclude only capital felonies, and not attempt to commit or solicitation to commit a capital felony. The second and related reason is that the legislature has specifically decreed that the sentencing guidelines shall be applied to all felonies, except capital felonies, committed after the effective date of the guidelines. § 921.001, Fla. Stat.

> (1989). The legislature does know, however, how to exclude a particular crime, other than a capital felony, from the guidelines. See § 775.0825, Fla. Stat. (1989) (any person convicted of attempted murder of a law enforcement officer shall be required to serve no less than 25 years before becoming eligible for parole, and such sentence shall not be subject to the sentencing guidelines.

Two of the court's points deserve emphasis. First, solicitation to commit first degree murder is not a capital felony under sections 782.04(1)(a) and 921.141, Florida Statutes, and, thus, is not excludible from the sentencing guidelines. §921.001(4)(a), Fla. Stat. The Tarawneh reading of Florida Rule of Criminal Procedure 3.701c and the Committee Note creates an entirely unnecessary and absurd conflict with sections 782.04(1)(a) and 921.141 by treating a solicitation or attempt as a capital felony. The settled rule that statutes should be interpreted to avoid unnecessary conflict and absurd results needs no citation. Second, as the district court below noted, the Tarawneh rule also creates the absurd result that a solicitation or attempt to commit lesser degrees of murder or manslaughter would receive more severe penalties than attempted first degree murder. Finally, the state adds to the court's analysis that the sentencing guidelines are constructed on the theory that the most severe penalty should be imposed when faced with potential options. See the rule for preparing and selecting alternative primary offenses, rule 3.701d3b): "The guidelines scoresheet which recommends the most severe sentence range shall be the scoresheet to be utilized by the sentencing judge pursuant

to guidelines." (e.s.). This approach is correct because the defendant, who was presumptively innocent for the purposes of interpreting ambiguous guilt statutes, has now become a criminal convicted beyond a reasonable doubt. The balance now is between the guilty criminal and innocent victims, whether society in general or specific individual victims, Under these circumstances, the legislature has mandated that sentencing *statutes* be applied so as to impose the most severe punishment available. To put it another way, real or imagined ambiguity no longer favors the defendant/criminal, it now favors the state. In the same vein see the controlling and exceptionally explicit statement of the legislative intent behind sentencing statues in rule 3.701b2, adopted by section 921.0015, Florida Statutes, "[t]he primary purpose of sentencing is to punish the offender ... [everything else is subordinate]."

This Court should approve the decision below and disapprove Tarawneh.

ISSUE II

IS THERE ANY JURISDICTIONAL BASIS FOR APPEALING A PRIMA FACIE LEGAL SENTENCE WHICH DOES NOT DEPART FROM THE SENTENCING GUIDELINES, AS HERE?

Following entry of the unreserved plea which included an agreement on sentencing, petitioner filed a pro *se* notice of appeal. R264. His trial counsel moved to withdraw, explaining that they had not been further retained, did not believe there was any justiciable issue for appeal, and that the appeal notice had been filed pursuant to the client's instructions. R269-271. The state's subsequent motions to dismiss for lack of jurisdiction were denied by the district court on the authority of Ford v. State, 575 So.2d 1335 (Fla. 1st DCA), rev. denied, 581 So.2d 1318 (Fla. 1991), on the urging of appellate counsel even though appellate counsel filed a brief pursuant to Anders v. California, 386 **U.S. 429** (1967) acknowledging that there were no arguable issues pursuant to Robinson v. State, 373 So.2d 898 (Fla. 1979). Later, after petitioner failed to file a pro se Anders brief and Tarawneh issued, petitioner's appellate counsel was permitted to file a supplemental brief which ultimately resulted in discretionary review here.

Robinson, and other settled law, recognizes that jurisdiction is always at issue and the state again asserts that there was no jurisdictional authority for review in the district court below pursuant to section 924.06, Florida Statutes (1989) and this Court's decision in Robinson.

It is settled law that there is no right to appeal criminal judgments, death penalties aside, under either the Florida or

United States Constitutions. Ross v. Moffitt, 417 U.S. 600, 611 (1974); Abney v. United States, 431 U.S. 651, 656 (1977); Evitts v. Lucey, 469 U.S. 387, 393 (1985); and McKane v. Durston, 153 U.S. 684, 687 (1894). As this Court held in State v. Creighton, 469 So.2d 735, 739 (Fla. 1985), nothing in the Florida or United States Constitutions, possibly excepting death penalty appeals, grants "an aggrieved litigant" the right to an appeal. However, the Court pointed out at footnote 8, page 740, "Florida grants such an appeal as a matter of right in section 924.06, Florida Statutes (1983)."

Under section 924.06(1)(d) & (e), criminal defendants are authorized to appeal sentences which are either illegal or outside the range recommended by the sentencing guidelines. In interpreting and upholding the constitutionality of section 924.06(3), which restricts the right to appeal following guilty or unreserved nolo pleas, this Court held that a defendant who pled guilty [or nolo without reservation] could nevertheless appeal an illegal sentence. Robinson v. State, 373 So.2d 898 (Fla. 1979). In other words, such pleas on guilt did not waive the statutory right under section 924.06(1)(d), Florida Statutes (1979) to appeal an illegal sentence. That 1979 holding, prior to the sentencing guidelines, would now expand to encompass the right to appeal departures from the sentencing guidelines pursuant to section 924.06(1)(e), Florida Statutes (1983 and thereafter). However, neither Robinson nor the statute create a general right to appeal all sentences: the statute because it specifically identifies only two grounds for appealing a

sentence, thus excluding all others, and Robinson because it merely preserves whatever statutory rights may otherwise exist while expressly warning that "[t]here is no [statutory] authority to seek an appellate review upon unknown or unidentified grounds, and it is improper to appeal on grounds known to be nonappealable." Robinson, 373 So.2d at 903.

Jurisdiction may, as Robinson recognized, be raised at anytime. But, as Robinson held, there is no right to a general review of a plea:

> Furthermore, we find that an appeal from a guilty plea should never be a substitute for a motion to withdraw a plea. If the record raises issues concerning the voluntary or intelligent character of the plea, that issue should first be presented to the trial court in accordance with the law and standards pertaining to a motion to withdraw a plea. If the action of the trial court on such motion were adverse to the defendant, it would be subject to review on direct appeal. The standards for the withdrawal of a guilty plea both before and after sentence were discussed in detail in Williams v. State, 316 So.2d 267 (Fla.1975). After sentence is imposed, the burden is on the defendant to prove that a manifest injustice has occurred. Williams v. State; ABA Standards Relating to the Administration of Criminal Justice, Plea5 of Guilty, 14-2.1 (1979). To adopt the view asserted by the appellant in this case would in effect eliminate both the necessity for a defendant to move for a withdrawal of hi5 plea and the obligation to show a manifest injustice or prejudice as grounds for such a plea withdrawal after sentence.
> Robinson, 373 So.2d at 902-903.

Finally, before specifically examining the petitioner's right to appeal here, the state points out that there is no right to raise an ineffectiveness of trial counsel claim on direct appeal, with rare exceptions which are not present here. State

v. Barber, 301 So.2d 7 (Fla. 1974); Adams v. State, 456 So.2d 888 (Fla. 1984); Kelley v. State, 486 So.2d 578 (Fla. 1986).

Applying the above settled law, it is readily apparent that there was no jurisdictional basis for the appeal to the district court. Section 924.06(1) authorizes appeals from guidelines departures and illegal sentences. As shown by the state's supplementation of the colloquy surrounding the plea bargain at R162-164, the parties bargained for and flatly agreed that petitioner could be subject to a term of imprisonment of up to 17 years under the written plea bargain as accepted by the trial court. Pursuant to this Court's decisions in Holland v. State, 508 So.2d 5 (Fla. 1987), Quarterman v. State, 527 So.2d 1380 (Fla. 1988), and Smith v. State, 530 So.2d 304 (Fla. 1988), regardless of the guidelines scoresheet range, parties may agree to any legal sentence. It is uncontroverted that petitioner pled to felonies of the first degree, section 777.04(4)(a), each punishable by a term of imprisonment of up to 30 years, section 775.082(3)(b)[1]. It cannot be seriously suggested that a plea bargain sentence which falls within the statutorily authorized maximum is either illegal or a departure from the sentencing guidelines. Holland, Quarterman, Smith, State v. MacLeod, 583 So.2d 781 (Fla. 1st DCA 1991), affirmed, 17 F.L.W. S260 (Fla. April 30, 1992), petition for rehearing/clarification pending, Rouse v. State, case no. 91-991 (Fla. 1st DCA June 9, 1992). See also, Judge v. State, 17 F.L.W. D835 (Fla. 2d DCA March 20, 1992)

[1] If petitioner successfully overturns this plea bargain, he may well find on trial and resentencing that the plea bargain, as his trial attorneys obviously believed, was advantageous.

where the en banc court examined in depth the meaning of "illegal" sentence.

Even though there is no jurisdictional bar for appealing the sentence itself, Robinson recognizes that there is a right to challenge the "voluntary and intelligent character of the plea." Robinson, 373 So.2d at 902. This right exists because it goes to the validity of the plea and conviction but, as this Court quickly pointed out in the extended quote above at 902-903, this fact-bound question must first be raised with the trial court by a motion to withdraw the plea and, as necessary, from an appeal of the denial of the motion to withdraw the plea. Looking at the true nature of petitioner's argument here and in the district court, it is actually grounded on a purported misunderstanding by both parties and the trial court of the plea bargain into which the parties entered and the trial court accepted. The remedy for that, should petitioner truly want to withdraw from the bargain, is to file a motion to withdraw in the trial court and appeal therefrom as appropriate. There is no statutory basis for an appeal of the plea in the current posture of the case, as Robinson so explicitly holds[2].

The above analysis shows that the district court's interpretation of Robinson in its Ford decision, and its application here and elsewhere, is erroneous in at least four respects. First, Robinson does not create a general right to

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[2] Conceivably, petitioner might raise a claim of ineffective assistance of counsel by a rule 3.850 motion but there is no basis on the facts here to raise such claim on direct appeal. Barber, Adams, Kelley.

appeal sentences merely because they are imposed following entry of a guilty or unreserved nolo plea. Instead, it preserves the statutory rights in section 924.06(1) to appeal sentences on the grounds of illegality or departure from the sentencing guidelines. Second, in the same vein, contrary to the Ford approach that an appeal should be entered in order for appellate counsel to search for issues:

> There is clearly no authority to seek an appellate review upon unknown or unidentified grounds, and it is improper to appeal on grounds known to be nonappealable.
>
> . . . .
>
> The appeal is clearly not from any identified error which occurred contemporaneously with the plea, and the district court was justified in granting the motion to dismiss. Robinson, 373 So.2d at 903.

Third, nothing in Robinson abrogates the settled rule that issues and arguments are not cognizable for the first time on appeal if they have not been raised below. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Even if there is a right to appeal, issues and arguments must still be preserved and a party may not, as petitioner did in the district court, claim for the first time that a voluntary plea bargain was illegal or erroneous. Fourth, sentences are illegal only if they depart from statutorily mandated maximum or minimum sentences. Holland, Quarterman, Smith. A departure from the sentencing guidelines may be erroneous but it does not render the sentence illegal. In this connection, note that Robinson issued in 1979, before the sentencing guidelines were adopted and before the legislature granted a right to appeal from departure sentences in subsection 924.06(1)(e). Treating an erroneous departure sentence as

illegal renders the legislative adoption of subsection 924.06(1)(e), and the same right in section 921.001(5), a useless act.

The state urges the Court to hold that there is no right to appeal from a prima facie legal sentence which does not depart from the range prescribed by the sentencing guidelines scoresheet. Here, where the prima facie legal Sentence was imposed pursuant to a plea bargain there was no right to appeal the sentence or the plea bargain until a motion to withdraw the plea had been filed and denied.

CONCLUSION

1. On the conflict question, the Court should disapprove Tarawneh.

2. The Court should hold that Ford conflicts with Robinson, and is disapproved for the reasons, and as set forth, above.

Respectfully submitted,

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COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Kathleen Stover, Assistant Public Defender, Leon County Courthouse, Tallahassee, Florida 32301, this 15th day of June, 1992.

JAMES W. ROGERS