A-22 OIA 2-5-93

FILED
SID J. WHITE
AUG 31 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF APPEAL, SECOND DISTRICT
STATE OF FLORIDA

CORNELIUS C. SIRMONS,)
Appellant,)
v.) Case No. 79,754
STATE OF FLORIDA,)
Appellee.)
_____)

DISCRETIONARY REVIEW OF DECISION
OF THE DISTRICT COURT OF APPEAL OF
FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ERICA M. RAFFEL
Assistant Attorney General
WESTWOOD CENTER
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-3749

COUNSEL FOR RESPONDENT

/mad

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITY:

SUMMARY OF THE ARGUMENT

The plea agreement obviated the necessity of written findings pursuant to Fla. Stat. 39.111 because Petitioner entered his plea knowingly and intelligently thereby waiving any requirement of written reasons regarding the suitability of an adult sentence.

It is an anomaly to allow an attorney to negotiate a sentence on behalf of a juvenile defendant, previously waived into adult court, to then attack on appeal the very sentence bargained for without any request for written findings because obviously aware of eligibility for a juvenile sentence.

ARGUMENT

ISSUE I

THE TRIAL COURT CORRECTLY SENTENCED PETITIONER AS AN ADULT DESPITE THE ABSENCE OF WRITTEN FINDINGS PURSUANT TO 39.111 FLA. STAT.

In the instant case the Petitioner entered a plea fully cognizant of the fact that he would most likely be sentenced as an adult. (R167-168) This was of course an individual who had been referred to HRS 15 times between 1989 and 1990 (R178), had 6 juvenile adjudications for robbery and theft, and at the tender age of 15 had accumulated enough points to score a recommended guideline sentence of 9-12 years.[1]

The threshold issue herein is whether or not a plea bargain can contemplate a waiver of written findings pursuant to Fla. Stat. 39.111[2] at all. Should this Court determine no plea bargain can ever obviate the requirement of such written findings, the inquiry need go no further as none were made in this case.

The next issue is factual - i.e. whether such a waiver was made in the instant case. It is well established that the validity of a plea is dependent upon an awareness of the

---

[1] The anticipated plea contemplated a choice of either 9 years straight time or alternatively 3 years followed by 5 years probation, and Petitioner opted for 9 years straight time.

[2] Now Section 39.059(7)(a)-(d), effective October 1, 1990.

consequences thereof; thus a defendant must be aware of the direct sentencing consequences which attend a plea. See State v. Green, 421 So.2d 508 (Fla.1982). However Petitioner does not challenge the validity of his plea, but seeks only to have his sentence vacated so that his sentence can be revisited upon written reasons therefor. The necessity of written findings however is not a consequence which attends the plea itself; nor is it a consequence which attended Petitioner's determination herein to avoid a probationary period following his prison term. In Taylor v. State, 534 So.2d 1181 (4th DCA 1988) the defendant was convicted after trial after having been waived into adult court. The record did not reveal whether defendant knew he had a right to request treatment as a juvenile. The court went onto say however,

> "Rhoden[3] suggests it is possible for the defendant to waive the Section 39.111 mandate. It appears to us that where waiver has been found to have occurred it was because in connection with the plea bargain, the defendant was questioned in open court, as is customarily done, to determine whether his plea was intelligent and knowing. If his plea was intelligent and knowing he had waived the Section 39.111 procedure, having intelligently and knowingly agreed to imposition of the particular adult sanctions."

Id. at 1182 (emphasis added)

---

[3] State v. Rhoden, 448 So.2d 1013 (Fla.1984)

Further supporting a knowing waiver is the absence of this issue from the 'Notice of Judicial Acts to be Reviewed' which does list the waiver into adult court, but not the failure of the trial court to make any such findings.

Respondent would therefore assert there was a complete knowing and voluntary waiver of written findings and the opinion of the Second District Court of Appeal not only should be upheld but poses no conflict with the authority cited by Petitioner.

In Crosby v. State, 17 FLW D1672 (2 DCA July 10, 1992) relied on by Petitioner, the defendant was sentenced as an adult pursuant to a plea bargain, but

> "There was no discussion at the sentencing hearing concerning the court's decision to sentence Croskey as an adult. Furthermore, there is nothing in the record that indicates the trial court considered the criteria of Section 39.059(7)(c) prior to imposing adult sanctions."

Id. at D1672

The Croskey court specifically said the reason for their holding was based on the premise that a child could enter a plea without the knowledge he had the right to have his suitability for adult sanctions considered under Chapter 39, and the court was not satisfied that Crosby was either aware of that right or obviously whether he made a knowing and intelligent waiver of that right. Id. at D1673. The instant case has a record of an entirely different complexion however and it is absurd to allow

an attorney to argue for a juvenile sentence but fully contemplating adult sanctions and then turn around and attack the very sentence bargained for. Even the Croskey court limited its opinion "we recede from Davis to the extent that it fails to recognize the requirement of an intelligent and knowing waiver." Id. at D1673 (emphasis added).

In Hill v. State, 596 So.2d 1210 (1st DCA 1990) cited by Petitioner, the court found there was no waiver because the court went on to make findings, albeit orally and incomplete.

In Dixon v. State, 451 So.2d 485 (3rd DCA 1984) cited by the Petitioner, the court receded from its initial opinion on rehearing on the basis of this Court's then newly released opinion in State v. Rhoden. [4] However, the Dixon court completely ignored the fact that Rhoden itself contemplates the possibility of a waiver.

In Sheffield v. State, 509 So.2d 1351 (3rd DCA 1987) cited by Petitioner, the defendant's counsel objected to the imposition of adult sanctions and requested the court make the requisite written findings which was not done.

In Sullivan v. State, 587 So.2d 599 (5th DCA 1991) cited by Petitioner, the defendant pled to and agreed to a DOC sentence if sentenced as an adult. The sentencing hearing indicated that written findings would be prepared to accompany the judgment and

---

[4] 448 So.2d 1013 (Fla.1984)

sentence, but no such findings were in the record on appeal. Certainly it is difficult to imagine a waiver of anything that was specifically preserved, i.e. a waiver of written findings when such findings were intended to be made.

Respondent would assert that none of the cases above relied on by Petitioner preclude what he urges the rule should prohibit. The instant record is manifest with knowledge regarding imposition of an adult sentence despite trial counsel's argument and effort to have Mr. Sirmons sentenced otherwise. But the trial court should not now bear the burden or the blame for failing to provide written findings where the record addresses each of the requisite criteria and the defendant's plea clearly contemplated and encompassed a waiver of any such written findings, particularly in light of those cases which provide authority for a waiver.

In Lang v. State, 566 So.2d 1354 (5th DCA 1990) the court specifically held that a juvenile can waive the necessity of written reasons for imposition of an adult sentence but merely that such a waiver must be manifest EITHER in the plea agreement or in the record. The court found that neither the State or Lang's counsel considered the issue of juvenile status to have been preempted by the plea agreement. In fact, the court entered findings, albeit on a checklist which was found to be insufficient. The court noted that counsel for Lang argued

vigorously for a juvenile sentence and the State never claimed there was a waiver. But in the instant case the plea itself encompassed defendant's right to argue for a juvenile sentence, knowing full well that if he did not prevail in his arguments, an adult sentence would be imposed. In Lang, the deciding factor appears to be the filing of the checklist which of course contradicts any waiver. The fact that a checklist purporting to comply with the statutory criteria was filed indicates no waiver was contemplated. There is no such blatant indicia in contradiction of a waiver here.

In Davis v. State, 528 So.2d 521 (2nd DCA 1988) the court found that a plea agreement itself obviates the necessity written reasons for the imposition of an adult sentence. This reasoning invokes sound policy. First by way of analogy if a plea agreement dispenses with the requirement of written reasons for a departure sentence Adams v. State, 497 So.2d 53 (Fla.1986), Long v. State, 540 So.2d 903 (2nd DCA 1990), then the same should hold true in the instant scenario as well. Further, the current practice certainly does not encourage faith in a system already scoured in the public eye by attorneys who will bargain for a specific sentence, (not even raising in the Judicial Acts to be Reviewed any complaint relative to that sentence) and then have another attorney attack the very sentence the defendant successfully bargained for. Surely this Court could use this

case to stop a practice that merely erodes the finality of the criminal justice system that has became synonymous with the words "only in theory."

Broome v. State, 466 So.2d 1271 (1st DCA 1985) also held that a court must consider suitability for adult sanctions and place its resons in writing unless the parties negotiated a sentence certain or the plea negotiations contemplated a bargaining away of a judicial finding of suitability for adult sanctions. Sub judice, the court made its reasons for suitability known, but did not reduce its reasons in a written order because there was an obvious bargaining away or waiver of the necessity therefor should the court decide to sentence the defendant as an adult.

In Bradley v. State, 559 So.2d 283 (4th DCA 1990) the court held that written reasons for an adult sentence are not required if the record reflects the court considered the criteria at the time of sentencing. Certainly the instant record satisfies this mandate. It should be noted also that Bradley called only for a remand for resentencing - not necessarily as a juvenile, after the court considered all of the requisite factors.

Respondent would urge this Court to find not only that the instant plea negotiation resulted in an intelligent and knowing plea to the charges and encompassed a waiver of Ch. 39 findings, but also that policy should forbid attacking on appeal a sentence bargained for below.

CONCLUSION

WHEREFORE based on the foregoing arguments, citations of authority and references to the record, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

ROBERT A BUTTERWORTH
ATTORNEY GENERAL

ERICA M. RAFFEL
ASSISTANT ATTORNEY GENERAL
FLA BAR NO. 329150

PEGGY A. QUINCE
FLA. BAR. NO. 261041
WESTWOOD CENTER
2002 N. LOIS AVENUE, SUITE 700
TAMPA, FLORIDA 33607
(813) 873-4739
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JENNIFER Y. FOGLE, Assistant Public Defender, Polk County Courthouse, P O. Box 9000-Drawer PD, Bartow, Florida 33830 this 28th day of August, 1992.

COUNSEL FOR RESPONDENT