OA 11-5-93

FILED
SID J. WHITE
AUG 12 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,183

JUAN NOVATON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1320 Northwest 14th Street
Miami, Florida 33125
(305) 545-1958

LOUIS CAMPBELL
Assistant Public Defender
Florida Bar No. 0833320

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,183

JUAN NOVATON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER

INTRODUCTION

Petitioner, Juan Novaton, was the appellant in the district court of appeal, and the defendant in the trial court. Respondent, The State of Florida, was the appellee in the district court of appeal, and the prosecution in the trial court. This brief refers to the parties as the "state" and the "defendant." The symbol "T." denotes the transcript of the proceedings in the trial court. The symbol "R." denotes the remainder of the record on appeal.

STATEMENT OF THE CASE AND FACTS

On October 17, 1990, Mr. Novaton was charged in two informations with a total of thirteen felonies. The offenses occurred during two separate incidents in September of 1990. The information filed in Circuit Court Case Number 90-38637, charged Mr. Novaton and two codefendants with armed burglary of a dwelling (count 1), armed burglary of a conveyance (count 2), armed robbery (counts 3 and

4), aggravated battery with a firearm (count 5), unlawful possession of a firearm while engaged in a criminal offense (count 6), and grand theft (count 7). (R. 1-7). The information filed in Circuit Court Case Number 90-38933, charged Mr. Novaton and a codefendant with armed burglary of a dwelling (count 1), armed burglary of a conveyance (count 2), armed robbery (count 3), aggravated assault with a firearm (count 4), unlawful possession of a firearm while engaged in a criminal offense (count 5), and unlawful possession of a firearm by a convicted felon (count 6). (R. 39-45). Mr. Novaton pled not guilty in both cases. (R. 8, 10).

The victims in case 90-38933 were alleged to be Joseph Nesbitt, Lenore Nesbitt, and Sarah Nesbitt. (R. 39-42). Mr. Novaton moved for a change of venue, on the ground that Judge Lenore Nesbitt was a judge of the Federal District Court, Southern District of Florida, and Judge Joseph Nesbitt was a judge of the Third District Court of Appeal. (R. 47-49). Mr. Novaton also sought a change of venue in case 90-38637, because one of the victims was a former prosecutor who was presently practicing as a criminal defense attorney and received many appointments from circuit court Judges in Dade County. (T. 14). The Chief Justice temporarily assigned the Honorable William P. Dimitrouleas, a judge of the Seventeenth Judicial Circuit of Florida, to the Eleventh Judicial Circuit to hear case 90-38933. (R. 18).

Mr. Novaton had two prior second-degree felony convictions: one for strong-arm robbery, the other for escape from the sentence imposed for the robbery. (R. 60; T. 21). The sentencing guidelines scoresheet indicates that had he gone to trial and been convicted of all thirteen offenses as charged, the recommended sentence would be of 12 to 17 years. (R. 60). However, the state filed notice of its intent to seek a habitual offender sentence in both cases. (R. 19, 50). Accordingly, Mr. Novaton faced the possibility of being sentenced to life imprisonment as a habitual violent felony offender.

On March 11, 1991, the defendant withdrew his previously entered pleas of not guilty, and entered negotiated pleas of guilty in both cases. (T. 1-52).[1] Under the plea agreement, the defendant would be sentenced under section 775.084, Florida Statutes, as a habitual violent felony offender. For each count which was punishable with a life sentence he would receive fifty years in prison, and would be required to serve fifteen years before being eligible for release. For each of the remaining counts, he would receive the maximum habitual violent felony offender sentence. All the sentences were to run concurrently. (T. 2-3, 8, 13-14).

The factual basis for the pleas was summarized by the prosecutor.

In case 90-38933, the state would have been prepared to prove the following: On September 21, 1990, Novaton and co-defendant Amondo arrived at the driveway of the Nesbitts' home in a stolen vehicle. Novaton exited the vehicle and robbed Judge Lenore Nesbitt at gunpoint, taking jewelry, money and other items from her person. He then threatened Sarah Nesbitt with the firearm when she attempted to go to the house to get help. Both Novaton and the co-defendant were convicted felons and were both in possession of a firearm. (T. 40-41).

In case 90-38637, the state would have been prepared to prove the following: On September 26, 1990, Novaton and co-defendants Amondo and Delgado pulled into the driveway of the Rodriguez family, just as members of the Rodriguez family were coming home in their Mercedes. The defendants were driving a stolen vehicle. At gunpoint, the defendants ordered the victims out of the Mercedes, and took their purses and wallets and the Mercedes. There was a child in the back of the vehicle.

---

[1]At the outset of the proceeding, Judge Dimitrouleas stated that he had only been appointed to hear case 90-38933, and did not know if he had jurisdiction to accept a plea in both cases. (T. 3-4). Although the judge expressed doubt that the "jurisdictional" problem could be waived, the prosecutor and defense counsel stated that they would "waive it" and stipulated that Judge Dimitrouleas should accept the pleas in both cases. (T. 3-4).

One of the defendants removed the child from the vehicle. There were numerous threats to kill or hurt the Rodriguez family if they did not cooperate and relinquish custody of their property. Amondo drove from the scene in the first stolen vehicle. Delgado and Novaton left in the Mercedes. A chase ensued. The Mercedes crashed, and Delgado and Novaton were caught by the police. At least one firearm was recovered. Amondo and Novaton were convicted felons and in possession of a firearm. (T. 41-42).

The court accepted the pleas after a plea colloquy. (T. 13-45). Mr. Novaton was adjudicated guilty on all counts and was sentenced in accordance with the plea agreement. (R. 20-28, 51-59).

In case 90-38933, he was sentenced as a habitual violent felony offender to serve four concurrent 50-year prison terms for armed burglary (counts 1 and 2), and armed robbery (count 3), with no eligibility for release for 15 years, and with a 3-year minimum mandatory for use of a firearm (R. 53, 56); to 10 years for aggravated assault (count 4), with no eligibility for release for 5 years, and with a 3-year minimum mandatory for use of a firearm (R. 54, 57); and to two 30-year prison terms for unlawful possession of a firearm while engaged in a criminal offense (count 5) and unlawful possession of a firearm by a convicted felon (count 6), with no elibility for release for 10 years. (R. 55, 58).

In case 90-38637, the defendant was sentenced as a habitual violent felony offender to four concurrent 50-year prison terms for armed burglary (counts 1 and 2) and armed robbery (counts 3 and 4), with no eligibility for release for 15 years, and with a 3-year minimum mandatory for use of a firearm (R. 22, 25); to 30 years in prison for aggravated battery (count 5), with no eligibility for release for 10 years, and with a 3-year minimum mandatory for use of a firearm (R. 23, 26); to 30 years in prison for unlawful possession of a firearm while engaged in a criminal offense

(count 6) (R. 23); and to 10 years in prison for grand theft (count 7), with no eligibility for release for 5 years (R. 24, 27).

All thirteen sentences, including their minimum mandatory provisions, were to run concurrent. (R. 28, 59).

The defendant filed a pro se notice of appeal. (R. 29). Through appointed counsel, he argued that the convictions and sentences for the two counts of possession of a firearm in the commission of a felony were barred by the double jeopardy principles enunciated in *Cleveland v. State*, 587 So. 2d 1145 (Fla. 1991). (R. 62). The district court of appeal agreed, but held that the plea bargain effected a waiver of the double jeopardy claim, both as to the multiple convictions, and as to the multiple sentences. (R. 62). In the Third District "a waiver of a *Cleveland*-type violation with respect to multiple convictions takes place when the defendant voluntarily pleads guilty to the alleged duplicitous charges in question." (R. 63). Moreover, although an open plea "does not waive a challenge to dual or multiple sentences which are also precluded by the *Cleveland* rule," (R. 63), "a defendant who enters into a negotiated plea and sentence bargain with the prosecution thereby waives an otherwise viable double jeopardy objection to sentences which form part of the agreement." (R. 61).

Mr. Novaton sought discretionary review in this Court, on the ground that the decision conflicts with decisions of the Fourth and Second District Courts of Appeal, which hold that a plea does not waive double jeopardy challenges to either multiple convictions or multiple sentences. This Court granted discretionary review.

QUESTION PRESENTED

WHETHER A PLEA OF GUILTY WAIVES THE DOUBLE JEOPARDY VIOLATION OF IMPOSING MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE, WHERE THE VIOLATION IS APPARENT ON THE FACE OF THE RECORD.

SUMMARY OF THE ARGUMENT

A plea of guilty does not not waive constitutional claims, such as a claim of double jeopardy, which affect the court's power to adjudicate and sentence. What the plea waives is the defendant's right to present supplemental evidence to demonstrate the claim. When a double jeopardy violation is apparent on the face of the record existing at the time of the plea, it is not waived by the entry of the plea, and may be challenged on appeal. Such patent double jeopardy violations, if waivable at all, must be affirmatively waived.

This case involves a patent violation of the guarantee against multiple punishments for the same offense imposed in a single proceeding. By its very nature, that aspect of the double jeopardy guarantee is not susceptible to waiver. The power to prescribe penalties for crimes depends entirely on legislative authorization, and where that authorization is absent, it cannot be conferred by the parties. In this context, the purpose of the double jeopardy clause is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishment. This aspect of the clause is jurisdictional, not personal, and cannot be bargained away.

The factual predicate needed to impose a particular sentence, a predicate which the state would otherwise be required to prove, can be waived by the defendant, just as he can waive the state's burden of proving his guilt. But neither the defendant nor the state can create new sentencing alternatives, or extend the sentencing limits prescribed by the legislature, or confer upon the court the authority to do either of these things. The double jeopardy clause guarantees that this allocation of authority will not be evaded by doing indirectly what cannot be done directly.

The Florida legislature has manifested the intent that convictions not be entered when a separate sentence based on that conviction is not authorized. Moreover, in Florida, convictions have sentencing effects, even when they are not themselves the basis for a sentence. Accordingly, both convictions and sentences must be treated as punishments for double jeopardy purposes, and since the multiplicity is equally unauthorized, neither the illegality of multiple convictions nor the illegality of multiple sentences is waived by the entry of a guilty plea.

In this case, it is apparent from the record made at the time of the plea that the convictions and sentences for the two counts of possession of a firearm during the commission of a felony are barred by the double jeopardy principles enunciated by this Court in *Cleveland v. State*, 587 So. 2d 1145 (Fla. 1991). Even if such a violation were waivable, in this case, it was not expressly and affirmatively waived. To the contrary, it is obvious from the record that the impermissibly cumulative character of these convictions and sentences was not even noticed at the time of the plea. Mr. Novaton agreed to the convictions and sentences, but never expressly waived the double jeopardy violation. Accordingly, those convictions and sentences must be vacated.

ARGUMENT

A PLEA OF GUILTY DOES NOT WAIVE THE DOUBLE JEOPARDY VIOLATION OF IMPOSING MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE, WHERE THE VIOLATION IS APPARENT ON THE FACE OF THE RECORD.

The double jeopardy clause of the fifth amendment to the United States Constitution, and of Article I, section 9, of the Florida Constitution, protects against multiple punishments for the same offense. As the state and the district court of appeal acknowledged, this case presents a patent violation of that constitutional guarantee. The petitioner, Juan Novaton, entered into a negotiated plea agreement with the state, under which he would plead guilty to the several offenses charged in two separate informations, and would be sentenced as a habitual violent felony offender to concurrent terms totalling fifty years in prison, subject to a fifteen-year minimum-mandatory requirement. The convictions and sentences for the two counts of possession of a firearm during the commission of a felony would normally be barred by the double jeopardy principles enunciated by this Court in *Cleveland v. State*, 587 So. 2d 1145 (Fla. 1991). The district court of appeal held, however, that the negotiated plea of guilty constituted a waiver of the right to challenge the double jeopardy violation. The case is before this Court to resolve the conflict between that decision and decisions of the Second and Fourth District Courts of Appeal, which hold that a guilty plea does not waive the right to challenge the illegality of entering a conviction or imposing a sentence that is barred by the double jeopardy clause.

As set forth below, a plea does not waive constitutional claims which affect the court's power to adjudicate and sentence. All double jeopardy claims are "jurisdictional" in this sense, and, when apparent on the face of the record, are not waived by the entry of a plea. If waivable at all, such claims must be affirmatively

waived. Moreover, the power to impose cumulative punishments depends entirely on legislative authorization, and where that authorization is absent, it cannot be conferred by the parties. Accordingly, apparent *Cleveland*-type violations are not waivable, and even if they were, in this case, the violation was not expressly and affirmatively waived.

Plea of Guilty as Waiver of Constitutional Claims

A knowing and voluntary plea of guilty removes the issue of a defendant's guilt from the case. *See Robinson v. State*, 373 So. 2d 898, 901-2 (Fla. 1979). A guilty plea "is more than a confession which admits that the accused did various acts." *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). It is an "admission that he committed the crime charged against him." *North Carolina v. Alford*, 400 U.S. 25, 32, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970). Accordingly, as a general rule, such a plea bars the defendant from subsequently challenging alleged constitutional deprivations that occurred prior to the plea. *Tollet v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973); *Robinson* at 902. The only points available for an appeal concern actions which took place contemporaneously with the plea. *Robinson*, 373 So. 2d at 902; *see also Tollett*, 411 U.S. at 267, 93 S.Ct. at 1608 (explaining the rule in the context of federal collateral attack to conviction based on guilty plea).[2]

However, "[t]here are exceptions where on the face of the record the court had no power to enter the conviction or impose the sentence." *United States v. Broce*, 488 U.S. 563, 569, 109 S.Ct. 757, 762, 102 L.Ed.2d 927 (1989). Constitutional violations that affect the court's power to proceed to adjudication and

---

[2]The rule is codified in the Florida statutes and rules governing appeals by defendants in criminal cases. *See Robinson*, 373 So. 2d at 902. The same rule applies to pleas of nolo contendere entered without reservation of the right to appeal. *See Peel v. State*, 150 So. 2d 281 (Fla. 2d DCA 1963).

sentencing are not waived by a guilty plea. *See Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975); *United States v. Cortez*, 973 F.2d 764, 767 (9th Cir. 1992) (a guilty plea "removes the question of the defendant's guilt from the case, [but] the issue of whether the government had the power to bring the charge at all still remains"). Because such claims challenge the court's authority to enter the conviction or impose the sentence, they are referred to as "jurisdictional." *See Cortez*, 973 F.2d at 767.

In Florida, the "jurisdictional defects," *Bridges v. State*, 376 So. 2d 233, 233-34 (Fla. 1979), which may be reviewed despite the entry of a guilty plea include the lack of subject matter jurisdiction, the failure of the charging instrument to charge an offense, and the illegality of the sentence, *see Bridges*, at 234; *Robinson* at 902.[3] Double jeopardy claims may also fall into this category, *see, e.g., State v. Johnson*, 483 So. 2d 420 (Fla. 1986); *Arnold v. State*, 578 So. 2d 515 (Fla. 4th DCA 1991); *Kurtz v. State*, 564 So. 2d 519 (Fla. 2d DCA 1990); *Robbins v. State*, 413 So. 2d 840 (Fla. 3d DCA 1982), but, as the present case indicates, the Florida courts are not of one mind in this regard.

In the federal courts, the "jurisdictional claims" which have been recognized include claims of double jeopardy, claims that the statute is facially unconstitutional, claims that the indictment failed to state a claim, and claims of vindictive prosecution. *See Cortez*, 973 F.2d at 767 (listing the "jurisdictional claims" and citing cases).

The right to raise such claims despite a plea of guilty is limited, at least in the federal courts, by the requirement that the claim must be apparent from the face of

---

[3]Challenges to the knowing and voluntary character of the plea, and claims that the prosecution failed to abide by the plea agreement, which present disputed issues of fact, must first be presented to the trial court. *See Robinson*, 373 So. 2d at 902.

the indictment or record existing at the time of the plea. If supplemental evidence is required, the claim is barred. *Broce*, 488 U.S. at 571, 576; 109 S.Ct. at 763, 766; *United States v. Pollen*, 978 F.2d 78, 84 (3d Cir. 1992) (*Broce* establishes the principle that a defendant who pleads guilty to a criminal charge may subsequently assert a claim of multiple punishment in violation of the Double Jeopardy Clause only if the violation is apparent on the face of the indictment or record), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2332 (1993); *Taylor v. Whitley*, 933 F.2d 325, 328 (5th Cir. 1991) (same); *United States v. Quinones*, 906 F.2d 924, 927 (2d Cir. 1990) ("the test that apparently emerges from *Broce* seems to turn on whether the claim of Double Jeopardy may be adjudicated on the face of the record or requires supplemental evidence"), *cert. denied*, ___U.S.___, 111 S.Ct. 789, 112 L.Ed.2d 851 (1991).

In other words, what the guilty plea waives is the defendant's right to make the evidentiary showing needed to demonstrate the violation, and which he neglected to make below, when he had the opportunity to do so. *Broce*, 488 U.S. at 571, 573-74, 575-76, 109 S.Ct. at 763, 764, 765-66. The plea does not cut off the right to argue the illegality which is apparent on the face of the record. *See Taylor*, 933 F.2d at 328-29. *See also Menna*, 423 U.S. at 63 n. 2, 96 S.Ct. at 242 n. 2 ("a plea of guilty to a charge does not waive a claim that--judged on its face--the charge is one which the State may not constitutionally prosecute").[4]

---

[4]The case of *Dermota v. United States*, 895 F.2d 1324 (11th Cir. 1990), upon which the district court of appeal relied in this case, is not to the contrary. In *Dermota*, as in *Broce*, the defendant plead guilty to counts of an indictment that, on its face, described separate offenses. He subsequently sought to prove that the offenses were in fact a single offense. The circuit court of appeals held, following *Broce*, that he had waived the opportunity to raise that claim.

Plea of Guilty as Waiver of Double Jeopardy Claim

The guarantee against double jeopardy "has been said to consist of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969).

Because courts lack the authority to enter a conviction or impose a sentence in violation of the double jeopardy clause, a deprivation of any of the three protections guaranteed by the clause presents a "jurisdictional claim" which, if apparent from the face of the record, may be raised in the federal courts, even when the conviction and sentence resulted from a guilty plea. *See Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975); *United States v. Kaiser*, 893 F.2d 1300, 1302 (11th Cir. 1990); *United States v. Pollen*, 978 F.2d 78, 84 (3d Cir. 1992). The right to challenge an apparent violation of the prohibition against multiple punishments for the same offense imposed in a single proceeding was specifically recognized in *Kaiser*, and *Pollen*, and implicitly in *Broce*.

Certain double jeopardy protections, such as the protection afforded to a defendant's expectations of finality, may be waivable. *See Ricketts v. Adamson*, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987) (defendant's breach of plea agreement by refusing to testify at codefendants' trial removed double jeopardy bar to prosecution of defendant on original charges, where plea agreement provided that if defendant refused to testify, entire agreement under which he pled to reduced charge would be void and original charge automatically reinstated); *Goene v. State*, 577 So. 2d 1306 (Fla. 1991) (defendant's affirmative misrepresentation of prior record at time of sentencing removed double jeopardy bar to later imposition of

correct sentence).

However, none of the double jeopardy protections are waived by the mere entry of a plea, if the violation is apparent on the record. *See Menna*; *Kaiser*; *Pollen*. *See also State v. Johnson*, 483 So. 2d 420, 422-23 (Fla. 1986) ("the failure to timely raise a double jeopardy claim does not, in and of itself, serve as a waiver of the claim," and "the law is clear that the claim of double jeopardy may be raised in a post-conviction relief proceeding after the second conviction, even when that conviction is the result of a guilty plea"). Patent violations of those protections must be *affirmatively* waived. *See State v. Johnson*, 483 So. 2d 420, 422-23 (Fla. 1986); *Taylor*, 933 F. 2d at 330 ("A defendant who enters a guilty plea despite indictments or a trial court record that evince on their face a double jeopardy violation must expressly relinquish his rights against double jeopardy; otherwise, he has not waived his right to challenge the double jeopardy violation."). *See also Pollen* (where waiver was not found even though the defendant entered a negotiated plea).

A *Cleveland* Violation is not Waivable

This case involves a patent violation of the guarantee against multiple punishments for the same offense imposed in a single proceeding. While all three of the double jeopardy protections have "obvious jurisdictional overtones," *People v. Michael*, 394 N.E.2d 1134, 1136 (N.Y. 1979), that jurisdictional character is particularly obvious with respect to this aspect of the double jeopardy clause. By its very nature, the protection against multiple punishments for the same offense imposed in a single proceeding is not susceptible to waiver. This aspect of the double jeopardy clause is jurisdictional, not personal, and cannot be bargained away.

The power to prescribe penalties for crime rests with the legislature, not with the courts, and where the requisite legislative authorization is absent, it cannot be

conferred by the parties. *E.g., Larson v. State*, 572 So. 2d 1368, 1371 (Fla. 1991); *Williams v. State*, 500 So. 2d 501, 503 (Fla. 1986), *receded from on other grounds in Quarterman v. State*, 527 So. 2d 1380 (Fla. 1988); *Brown v. State*, 152 Fla. 853, 13 So. 2d 458 (1943).

In this context, the purpose of the double jeopardy clause "is to ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." *Jones v. Thomas*, 491 U.S. 376, 109 S.Ct. 2522, 2527, 105 L.Ed.2d 322 (1989).[5]

The double jeopardy clause prohibition of multiple punishments which are not legislatively authorized, *see Jones v. Thomas*, 491 U.S. at , 109 S.Ct. at 2527, could only be waived if the defendant were able to confer upon the court the authority which the legislature has withheld. However, this is precisely the sort of authority that a defendant cannot give by agreement. The crimes for which a defendant may be convicted and sentenced are prescribed by the will of the legislature, not by that of the defendant or the prosecutor. "A defendant cannot confer on others the right to do something the law does not permit. For example, a defendant cannot by agreement confer on a judge authority to exceed the penalties established by law." *Larson*, 572 So. 2d 1371. Accordingly, neither the illegality of multiple convictions for the same offense, nor the illegality of multiple sentences, can be waived. All that is susceptible to waiver is the right to

---

[5]*See also Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983) (double jeopardy clause "does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended"; *State v. Smith*, 547 So. 2d 613 (Fla. 1989) (same); *Kaiser*, 893 F.2d at 1303 ("While the government may charge a defendant with both a greater and a lesser included offense and may prosecute those offenses at a single trial, ***, the court may not enter separate convictions or impose cumulative punishments for both offenses unless the legislature has authorized such punishment ....") (citations omitted).

demonstrate, in an evidentiary hearing, the existence of a double jeopardy claim. *See Broce*. If the violation is apparent, the trial court does not have the authority to adjudicate and sentence the defendant in a manner contrary to legislative intent, and in violation of the double jeopardy clause. And neither the defendant nor the prosecution can give the court that authority.

Challenge to Sentences

It appears to be well-settled that a sentence which constitutes multiple punishment for the same offense, in violation of the guarantee against double jeopardy, is an "illegal sentence," *see Arnold v. State*, 578 So. 2d 515, 516 (Fla. 4th DCA 1991), and that because the illegality of a sentence is not waived by a plea, *Robinson v. State*, 373 So. 2d 898, 902 (Fla. 1979), a violation which is apparent from the record may be challenged on appeal, even when the sentence was entered pursuant to a guilty plea, *see Arnold* at 516; *Robbins v. State*, 413 So. 2d 840 (Fla. 3d DCA 1982); *Dukes v. State*, 464 So. 2d 582 (Fla. 2d DCA 1985).[6]

However, in the present case, the district court of appeal made an exception for cases which involve negotiated pleas, and held that "a defendant who enters into a negotiated plea and sentence bargain with the prosecution thereby waives an otherwise viable double jeopardy objection to sentences which form a part of the agreement." (R. 61); *Novaton v. State*, 610 So. 2d 726, 727 (Fla. 3d DCA 1992).[7]

According to the district court of appeal, the illegality of a sentence which involves a violation of the rule against multiple punishments is not illegal in the same

---

[6]*See also Guardado v. State*, 562 So. 2d 696 (Fla. 3d DCA), *review denied*, 576 So. 2d 287 (Fla. 1990); *Irizarry v. State*, 578 So. 2d 711 (Fla. 3d DCA 1990), *disapproved on other grounds*, 594 So. 2d 273 (Fla. 1992); *Carr v. State*, 430 So. 2d 978 (Fla. 3d DCA 1983); *Anderson v. State*, 392 So. 2d 328 (Fla. 3d DCA 1981); *Davis v. State*, 392 So. 2d 947 (Fla. 3d DCA 1980); *Hines v. State*, 401 So. 2d 878 (Fla. 3d DCA 1981).

[7]In *Zaetler v. State*, 616 So. 2d 461 (Fla. 3d DCA 1993), the court extended this exception to a case involving a nolo contendere plea.

sense that a sentence which exceeds the statutory maximum is illegal. Such a sentence is not "void" and its illegality can be waived. (R. 65); *Novaton*, 610 So. 2d at 728 n. 3. Not only is waiver possible, it need not be affirmative or express. It is sufficient that the defendant agreed to sentences (which happen to be impermissibly multiplicitous) in consideration for the state's "leniency in other respects." (R. 64); *Novaton* at 728. The district court's analysis depends on ignoring the fact that a sentence which is illegal because it violates the double jeopardy clause is illegal because it exceeds the penalty established by law, and that it is precisely this sort of illegality which has always been held to be unwaivable. *E.g., Larson*

It is true that certain sentencing defects can be waived. For example, sentencing guidelines scoresheet errors that involve disputed issues of fact may be waived by the failure to object in the trial court. *See Huffman v. State*, 611 So. 2d 2 (Fla. 2d DCA 1992). Even certain fundamental sentencing errors, such as the court's failure to make the factual findings needed to impose a particular sentencing alternative, may be affirmatively waived. *E.g., State v. Rhoden*, 448 So. 2d 1013, 1017 (Fla. 1984 (legislative mandate that judge must make written findings required by section 39.111(7), Florida Statutes, before imposing adult sanctions on juvenile, cannot be avoided "absent an intelligent and knowing waiver of that right by a juvenile"); *Sirmons v. State*, 18 Fla. L. Weekly S356 (Fla. June 24, 1993) (negotiated plea of guilty does not automatically waive section 39.111(7) requirement of written findings; the waiver must be "manifest on the record"); *Suarez v. State*, 616 So. 2d 1067 (Fla. 3d DCA 1993) (defendant may stipulate that he qualifies as a habitual offender); *Quarterman v. State*, 527 So. 2d 1380 (Fla.

1988) (plea bargain can be a valid reason for a departure sentence).[8]

However, those are all instances in which the legislature has given the courts the authority to impose a certain type of sentence when certain factual circumstances are found to be present, and the defendant in effect stipulates that those circumstances exist. They do not provide support for the view that a defendant waives the apparent error of imposing a sentence which exceeds the limits established by the legislature.

The factual predicate needed to impose a particular sentence, a predicate which the state would otherwise be required to prove, can be waived by the defendant, just as he can waive the state's burden of proving his guilt. But neither the defendant nor the state can create new sentencing alternatives, or extend the sentencing limits prescribed by the legislature, or confer upon the court the authority to do either of these things. *E.g.*, *Larson v. State*, 572 So. 2d 1368, 1371 (Fla. 1991) ("a defendant cannot by agreement confer on a judge authority to exceed the

---

[8]A defendant may also be estopped under certain circumstances from objecting to the correction of a sentence which is more lenient than could lawfully be imposed. *See Madrigal v. State*, 545 So. 2d 392 (Fla. 3d DCA 1989). That type of case, however, turns on a different aspect of the double jeopardy clause, namely, that of the protection of legitimate expectations of finality in the severity of a sentence. The two aspects are related because, obviously, the legitimacy of a defendant's expectations will be affected by the legislative limitations placed on the court's sentencing discretion. But they are also distinct.

A defendant may bargain away his expectations, or erode or do away with the the legitimacy of those expectations, *see Ricketts v. Adamson*, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987); *Goene v. State*, 577 So. 2d 1306 (Fla. 1991); *Prestridge v. State*, 519 So. 2d 1147 (Fla. 3d DCA 1988), but he cannot give to the court a power which the legislature has denied.

While the double jeopardy protection which was subject to waiver in cases such as *Ricketts*, *Prestridge*, and *Madrigal*, might be characterized as "personal" to the defendant, the protection against multiple punishments for the same offense in a single proceeding cannot be so characterized. A waiver of this protection is tantamount to conferring an authority upon the court to do what the legislature did not intend it to do. A defendant cannot have this ability, and therefore this protection is jurisdictional, not personal, and cannot be bargained away.

penalties established by law"); *Williams v. State*, 500 So. 2d 501, 503 (Fla. 1986) ("[a] trial court cannot impose an illegal sentence pursuant to a plea bargain"), *receded from on other grounds in Quarterman v. State*, 527 So. 2d 1380 (Fla. 1988). *See also Ex Parte Bosso*, 41 So. 2d 322 (Fla. 1949); *Helton v. State*, 585 So. 2d 412 (Fla. 2d DCA 1991). A sentence which on its face violates the double jeopardy prohibition of unauthorized punishment exceeds the penalty established by law, and constitutes jurisdictional error.

Challenge to Convictions

The Second and Fourth District Courts of Appeal have held that a guilty plea, or a plea of nolo contendere without reservation of the right to appeal, does not waive the right to challenge either convictions or sentences on double jeopardy grounds. *Kurtz v. State*, 564 So. 2d 519 (Fla. 2d DCA 1990); *Arnold v. State*, 578 So. 2d 515 (Fla. 4th DCA 1991). *Accord Rodriquez v. State*, 591 So. 2d 211 (Fla. 4th DCA 1991); *Lundy v. State*, 596 So. 2d 1167 (Fla. 4th DCA 1992); *Rembowski v. State*, 618 So. 2d 383 (Fla. 4th DCA 1993); *Watson v. State*, 608 So. 2d 512 (Fla. 2d DCA 1992). As noted in *Kurtz*, this view reflects the "general practice of the appellate courts," which has been "to vacate both the adjudication of guilt and the sentence associated with a second offense which presents a double jeopardy problem." *Kurtz* at 521.

In the Third District Court of Appeal, however, the rule is otherwise. As the district court of appeal reiterated in this case, in the Third District the entry of a guilty plea may not waive the right to challenge the double jeopardy violation involved in multiple sentences, but it does waive the right to challenge the convictions themselves. (R. 63); *Novaton v. State*, 610 So. 2d 726, 727 (Fla. 3d

DCA 1992).[9] This rule is founded on a view of double jeopardy protections which has not been the law since the decision in *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975). It derives from a line of cases which conceived double jeopardy as a purely personal (nonjurisdictional) defense which could be waived simply by the failure to timely raise it. Under that view, double jeopardy objections were waived if not timely raised in the trial court in accordance with the rules of criminal procedure. And this was so regardless of whether the defendant went to trial, or entered a guilty plea. *See Sands v. State*, 403 So. 2d 1090 (Fla. 3d DCA 1981); *Hines v. State*, 401 So. 2d 878 (Fla. 3d DCA 1981); *Taylor v. State*, 401 So. 2d 877 (Fla. 3d DCA 1981); *Chapman v. State*, 389 So. 2d 1065 (Fla. 5th DCA 1980); *Bell v. State*, 362 So. 2d 244 (Fla. 4th DCA 1972); *Suiero v. State*, 248 So. 2d 219 (Fla. 4th DCA 1971); *Robinson v. Wainwright*, 240 So. 2d 65 (Fla. 2d DCA 1970); *Robinson v. State*, 239 So. 2d 282 (Fla. 2d DCA 1970); *Peel v. State*, 150 So. 2d 281 (Fla. 2d DCA 1963).[10]

After *Menna*, and this Court's decision in *State v. Johnson*, 483 So. 2d 420 (Fla. 1986), double jeopardy violations are no longer waived merely by the failure to make a contemporaneous objection. In *Johnson*, this Court held that "the failure to timely raise a double jeopardy claim does not, in and of itself, serve as a waiver of the claim," *Johnson* at 423, and recognized that double jeopardy claims may be reviewable, even when the conviction is the result of a guilty plea, *Id.* at 422. The

---

[9]*See also Guardado v. State*, 562 So. 2d 696 (Fla. 3d DCA), *review denied*, 576 So. 2d 287 (Fla. 1990); *Irizarry v. State*, 578 So. 2d 711 (Fla. 3d DCA 1990), *disapproved on other grounds*, 594 So. 2d 273 (Fla. 1992) *Dukes v.State*, 464 So. 2d 582 (Fla. 2d DCA 1985); *Williams v. State*, 400 So. 2d 100 (Fla. 3d DCA 1981); *Williams v. State*, 397 So. 2d 438 (Fla. 3d DCA 1981); *Davis v. State*, 392 So. 2d 947 (Fla. 3d DCA 1980).

[10]It appears that this is also the rule in the First District. *See Wright v. State*, 573 So. 2d 998 (Fla. 1st DCA 1991) (holding, in a case which went to trial, that double jeopardy challenge to multiple convictions was waived because of failure to object in the trial court).

holding of *Johnson* overruled the whole line of cases which required a timely objection, and thereby removed the foundation for the doctrine that the mere entry of a plea constitutes a waiver of the right to challenge duplicitous convictions.

It might have been possible, even after *Menna*, to assert that, by entering a guilty plea, the defendant has affirmatively waived the right to challenge the illegality of multiple convictions, on the theory that the plea is an agreement to an adjudication of guilt. *See Robinson v. State*, 373 So. 2d 898, 901-2 (Fla. 1979); *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274 (1969) ("a plea of guilty is more than an admission of conduct; it is a conviction"). *See also Arnold*, 578 So. 2d at 517 (noting that cases relied upon by Third District appear to turn on view that "where two or more crimes are alleged in the charging document so that the accused knew or reasonably should have known that the charges were multiplicitous and the accused enteers a counselled and knowing plea to those charges, it may be assumed that he voluntarily waived his double jeopardy claim"). However, that argument is contrary to *United States v. Broce*, 488 U.S. 563, 569, 109 S.Ct. 757, 762, 102 L.Ed.2d 927 (1989). Under *Broce*, the entry of a plea does not waive double jeopardy violations which are apparent on the face of the record. All that is waived is the right to present supplemental evidence to show the existence of a nonapparent violation. *United States v. Pollen*, 978 F.2d 78, 84 (3d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2332 (1993); *Taylor v. Whitley*, 933 F.2d 325, 328 (5th Cir. 1991); *United States v. Quinones*, 906 F.2d 924, 927 (2d Cir. 1990), *cert. denied*, ___U.S.___, 111 S.Ct. 789, 112 L.Ed.2d 851 (1991).

The *Broce* limitation--that the violation must appear on the record existing at the time of the plea--is not applicable here, since, as both the state and the district court of appeal recognized, the *Cleveland* violation is apparent from the face of the

record. Nor will it ever be an impediment to asserting a *Cleveland*-type violation. That type of violation will always be apparent from the face of the record which existed at the time of the plea, because the court is required to "receive in the record factual information to establish the offense to which the defendant has entered his plea." *Koenig v. State*, 597 So. 2d 256, 258 (Fla. 1992). Since it is fundamental error not to receive such a factual basis in the record, *Koenig*, it must follow that *Cleveland*-type violations are always appealable.

Moreover, as noted in *Arnold* and *Kurtz*, the legislature has not authorized convictions in which additional punishment would be improper. Although the legislative intent may once have been different, *see State v. Hegstrom*, 401 So. 2d 1343, 1346 (Fla. 1981) (construing former section 775.021(4)), the present version of section 775.021(4), Florida Statutes, "announces the legislature's intent to both 'convict and sentence' for each criminal offense committed in the course of one criminal episode or transaction with certain exceptions." *Kurtz*, 564 So. 2d at 521; *accord Arnold*, 578 So. 2d at 517. That interpretation of the legislature's intent is supported by the fact that in Florida, convictions can affect the length of other sentences.

With the enactment of the guidelines, it is no longer possible to neatly separate the ideas of conviction and sentence. The operation of the guidelines makes clear that convictions are in a very real sense "penalties." Even when a separate sentence is not imposed for a particular conviction, it may nevertheless be scored (either in that case, or in a subsequent case) and thereby affect the other sentences imposed. *See Guardado v. State*, 562 So. 2d 696, 697 (Fla. 3d DCA) ("by virtue of the nolo contendere plea the convictions for the two offenses cannnot be attacked," and "[b]ecause the conviction itself will stand, it follows that the points for that offense were properly included in the scoresheet"), *review denied*,

576 So. 2d 287 (Fla. 1990). The Second and Fourth District Courts of Appeal have properly concluded that this is impermissible, and that the distinction between convictions and sentences for double jeopardy purposes must be rejected. Whether or not the conviction occurs in a guidelines case, it can have the effect of a penalty, and for double jeopardy purposes it must be treated as such. "This is necessary under the sentencing guidelines to avoid scoring 'unsentenced' convictions as additional offenses or prior offenses, and thereby impermissibly punishing the defendant." *Kurtz*, 564 So. 2d at 521; *Arnold*, 578 So. 2d at 517.

Because a defendant cannot confer on others the authority to do what the law does not permit, *Larson*, 572 So. 2d at 1371, and because an unauthorized conviction is no less unauthorized than an unauthorized sentence, the right to challenge either convictions or sentences on double jeopardy grounds is not waived by a plea of guilty. *See Kurtz*; *Arnold*.

In this case, the *Cleveland* violation was not affirmatively waived

Under this Court's decision in *Cleveland v. State*, 587 So. 2d 1145 (Fla. 1991), where an offense has been enhanced because of the use of a firearm, the legislature did not intend that separate punishment also be exacted for the offense of possession of a firearm during the commission of the same felony, and, accordingly, such cumulative punishment is barred by the double jeopardy clause.

Here, as the state and the district court of appeal both recognized, Mr. Novaton's convictions and sentences for unlawful possession of a firearm while engaged in a criminal offense, are impermissibly duplicitous under *Cleveland*, and the violation is apparent from the face of the record.[11] In both cases, the use of a

[11]According to the informations, and the factual basis stated for the pleas, the defendant used a firearm to effect a robbery in the driveway of the victims' home, resulting in charges for armed burglary, armed robbery, aggravated assault with a firearm, and aggravated battery with a firearm. (R. 1-7, 39-44; T. 40-42).

firearm resulted in enhancement of the defendant's other convictions, and, accordingly, the double jeopardy clause barred the separate convictions and sentences for unlawful possession of a firearm while engaged in a criminal offense, based on the same act of using that firearm. *Cleveland*.

As set forth above, this particular type of double jeopardy violation is not waivable. It certainly is not waived by the mere entry of a plea. If it is waivable at all, the waiver must be express. *See State v. Johnson*, 483 So. 2d 420 (Fla. 1986); *Taylor v. Whitley*, 933 F.2d 325, 328 (5th Cir. 1991). As stated in *Taylor*: "A defendant who enters a guilty plea despite indictments or a trial court record that evince on their face a double jeopardy violation must expressly relinquish his rights against double jeopardy; otherwise, he has not waived his right to challenge the double jeopardy violation." *Taylor*, 933 F. 2d at 330.

The record in this case contains no express or affirmative waiver of the double jeopardy claim, or even any awareness on the part of anyone that the charges were impermissibly cumulative. Mr. Novaton agreed to the convictions and sentences, but never expressly waived the double jeopardy violation. Although, as in every negotiated plea, the agreement to particular sentences and convictions was given in consideration for the state's "leniency in other respects," (R. 64); *Novaton* at 728, this is not the same as the express relinquishment of a known right. *See*

Based on the same incidents, he was also charged with two counts of unlawful possession of a firearm while engaged in a criminal offense, in violation of section 790.07(2), Florida Statutes. Count 5 of case 90-38933, alleged that the defendant displayed a firearm, "while at said time and place the defendant was committing a felony, to-wit: burglary and/or robbery and/or aggravated assault and/or any lesser included felonies ..." (R. 43). Similarly, count 6 of case 90-38637, alleged that the defendants displayed firearms, "while at said time and place the defendants were committing a felony, to-wit: burglary and/or robbery and/or aggravated assault and/or any lesser included felonies ..." (R. 6).

He was adjudicated guilty and sentenced for all thirteen charged offenses pursuant to his guilty plea. (R. 20, 51; T. 43, 48-49).

Taylor; *see also, e.g.*, *Sirmons v. State*, 18 Fla. L. Weekly S356 (Fla. June 24, 1993) (negotiated plea does not automatically waive requirement of written findings when sentencing minor as adult, the wavier must be manifest on the record). All that he waived was his right to make an evidentiary showing that the convictions and sentences were in fact impermissibly duplicitous. *See Broce*. Here, however, no such additional showing is necessary. The illegality is apparent on the face of the record. Accordingly, those illegal convictions and sentences must be vacated. *See State v. Johnson*, 483 So. 2d 420 (Fla. 1986); *Menna*; *Kaiser*; *Pollen*; *Taylor v. Whitley*; *Arnold*; *Kurtz*. *Cf. Broce*.

CONCLUSION

Based upon the foregoing argument and authorities, petitioner requests that this Court quash the decision of the district court of appeal, and remand with directions to vacate the two counts of possession of a firearm during the commission of a felony.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit
of Florida
1320 Northwest 14th Street
Miami, Florida 33125
(305) 545-1958

BY: Louis Campbell
LOUIS CAMPBELL
Assistant Public Defender
Florida Bar No. 0833320

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by mail to the Office of the Attorney General, Criminal Division, Post Office Box 013241, Miami, Florida 33101 this 11th day of August, 1993.

Louis Campbell
LOUIS CAMPBELL
Assistant Public Defender