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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,183

JUAN NOVATON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,183

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ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER

The state argues that the federal courts recognize only one exception to the rule that constitutional claims are waived by a plea of guilty, namely, when the claim challenges the state's power to bring the charge. Consequently, according to the state, the only double jeopardy claim which could be raised after a guilty plea is one involving an apparent successive prosecution. (Respondent's Brief at 8-11). The case law, however, is to the contrary. *See United States v. Kaiser*, 893 F.2d 1300, 1302 (11th Cir. 1990); *United States v. Pollen*, 978 F.2d 78, 84 (3d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2332, 124 L.Ed.2d 244 (1993). *Cf. United States v. Broce*, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989).

It is true that *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975), *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628

(1974), and *State v. Johnson*, 483 So. 2d 420 (Fla. 1986), involved claims challenging the government's right to prosecute the charge. However, the exception to the rule barring challenges to a conviction entered pursuant to a guilty plea is broader than that. As stated in *United States v. Broce*, "[t]here are exceptions where on the face of the record the court had no power to enter the conviction or impose the sentence." *Broce*, 488 U.S. at 569, 109 S.Ct. at 762. *See also Bridges v. State*, 376 So. 2d 233, 233-34 (Fla. 1979).

Broce itself involved the double jeopardy protection against multiple punishments, and implicitly recognized that where a violation of that protection is apparent from the record existing at the time of the plea, that violation can be challenged despite the plea. In *Broce*, the Court found the particular double jeopardy claim raised in that case to be barred. However, this was not because the double jeopardy claim was one of multiple punishment, rather than of successive prosecutions. It was because, unlike in *Blackledge* and *Menna*, the claim could not be proved by relying on the indictments and the existing record, and required further evidentiary proceedings. *Broce*, 488 U.S. at 575-76, 109 S.Ct. at 765-66.

The right to challenge an apparent violation of the prohibition against multiple punishments for the same offense imposed in a single proceeding has been specifically recognized by the federal appellate courts. *See United States v. Kaiser*, 893 F.2d 1300, 1302 (11th Cir. 1990); *United States v. Pollen*, 978 F.2d 78, 84 (3rd Cir. 1992).

In *Kaiser*, the defendant pleaded guilty to a four count tax indictment. He argued on appeal that the imposition of consecutive sentences violated the double jeopardy clause. The Eleventh Circuit Court of Appeals initially held that the claim was waived by the guilty plea. *United States v. Kaiser*, 833 F.2d 1019 (11th Cir. 1987). However, the United States Supreme Court vacated that decision and

remanded for further consideration in light of *Broce*. *Kaiser v. United States*, 489 U.S. 1002, 109 S.Ct. 1105, 103 L.Ed.2d 170 (1989). Upon reconsideration, the circuit court held that the guilty plea did not waive the right to raise the double jeopardy claim, because "[i]n contrast to *Broce*, the present case does not require this court to rely on evidence outside the guilty plea record to determine that Kaiser's punishment violated the Double Jeopardy Clause." *Kaiser*, 893 F.2d at 1303. The circuit court specifically noted that the principles involved in *Menna* and *Blackledge* were equally applicable to "the third prong of double jeopardy protection, i.e., the protection against multiple punishments for the same offense." *Kaiser*, 893 F.2d at 1302 n. 2. In the court's words:

> We note that both *Menna* and *Blackledge* involved attempts by the government to bring a second prosecution against a defendant who had already been convicted of the same offense. Thus, the language of those cases referred to a prohibition against a second prosecution. The instant case does not involve the double jeopardy protection against a second prosecution; rather, it involves the third prong of double jeopardy protection, i.e., the protection against multiple punishments for the same offense. * * *. However, the principle involved in *Menna* and *Blackledge* would seem to be equally applicable to this third prong of double jeopardy protection. Indeed *Broce* itself also involved the double jeopardy protection against multiple punishments.

Kaiser, 893 F.2d at 1302 n. 2.

The Third Circuit Court of Appeals came to the same conclusion in *United States v. Pollen*, 978 F.2d 78, 84 (3rd Cir. 1992). A defendant who pleads guilty to a criminal charge may assert a claim of multiple punishment in violation of the double jeopardy clause, if the violation is apparent on the face of the record existing at the time of the plea. *Kaiser*; *Pollen*; *cf. Broce*.

The state also suggests that this case involves no conflict with *Kurtz v. State*, 564 So. 2d 519 (Fla. 2d DCA 1990), because, as the state correctly points out, the double jeopardy claim addressed in *Kurtz* was properly reserved for appeal, and the

court was not faced with the problem of waiver. What *Kurtz* held was that a court could not enter an adjudication of guilt when it was barred by double jeopardy principles from imposing a sentence. *Kurtz* at 521. However--as the *Kurtz* court recognized in citing *Guardado v. State*, 562 So. 2d 696 (Fla. 3d DCA), *review denied*, 576 So. 2d 287 (Fla. 1990), as contrary authority, *Kurtz* at 521--that holding was directly contrary to the view that while a plea does not preclude a double jeopardy challenge to multiple sentences, it does preclude such challenges to multiple convictions. Under the then-prevailing view that a plea does not waive a double jeopardy challenge to multiple sentences for the same offense, *e.g., Dukes v. State*, 464 So. 2d 582, 583 n. 2 (Fla. 2d DCA 1985); *Guardado*, the specific holding of *Kurtz*, namely, that an adjudication of guilt cannot be entered when a sentence could not be imposed for that offense, *Kurtz* at 521, necessarily implies that a plea does not waive a double jeopardy challenge to either the sentences or the convictions. This was the conclusion drawn from *Kurtz* by the Fourth District Court of Appeal in *Arnold v. State*, 578 So. 2d 515 (Fla. 4th DCA 1991).[1]

As the district court of appeal's decision in this case recognizes, both *Arnold* and *Kurtz* are contrary to its holding that "a waiver of a *Cleveland*-type violation with respect to multiple convictions takes place when the defendant voluntarily pleads guilty to the allegedly duplicitous charges in question." (A. 3). If *Arnold* and *Kurtz* are correct, and the legislature has not authorized courts to convict defendants of offenses for which no sentence can be imposed, then it must follow that a successful challenge to multiplicitous sentences requires that the multiplicitous convictions be vacated as well.

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[1]The *Arnold* decision has been cited by the Second District Court of Appeal, although in the successive prosecution context, for the proposition that "[a] defendant does not waive an argument based on jeopardy, even if he has pled guilty." *Watson v. State*, 608 So. 2d 512, 513 (Fla. 2d DCA 1992).

Finally, the state requests that this Court reconsider its holding in *Cleveland v. State*, 587 So. 2d 1145 (Fla. 1991). (Respondent's Brief at 16-18). The same argument that the state now makes was considered and unanimously rejected in *Cleveland*. That decision, which put an end to the "enormous confusion" that had previously characterized this area of the law, *see Jones v. Singletarry*, 18 Fla. L. Weekly D1560 (Fla. 3d DCA July 6, 1993), has been relied upon in numerous cases since then, without giving rise to any apparent difficulty, and is consistent with this Court's recent pronouncements in this area[2]. The state's request for reconsideration of *Cleveland* should be denied.

As set forth at length in petitioner's brief, the patent *Cleveland* violation in this case was neither waivable nor affirmatively waived, and the multiplicitous convictions and sentences must be vacated.

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[2]*See State v. Chapman*, 18 Fla. L. Weekly S499 (Fla. Sept. 23, 1993) (1988 amendment to § 775.021(4), Fla. Stat., was only intended to limit the rule of lenity and overrule *Carawan v. State*, 515 So. 2d 161 (Fla. 1987), and did not require overturning this Court's decision in *Houser v. State*, 474 So. 2d 1193 (Fla. 1985), which recognized that although DWI manslaughter and vehicular homicide were two separate crimes, the legislature did not intend to punish a single homicide under two different statutes).

CONCLUSION

Based upon the foregoing argument and authorities, and those contained in petitioner's initial brief, 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.

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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, RANDALL SUTTON, 401 N.W. Second Avenue, Post Office Box 013241, Miami, Florida 33101 this 1st day of October, 1993.

Louis Campbell
LOUIS CAMPBELL
Assistant Public Defender

A P P E N D I X

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1992

JUAN NOVATON,	**	
Appellant,	**	
vs.	**	CASE NO. 91-1248
THE STATE OF FLORIDA,	**	
Appellee.	**	

Opinion filed December 29, 1992.

An Appeal from the Circuit Court for Dade County, William Dimitrouleas, Judge.

Bennett H. Brummer, Public Defender and Louis Campbell, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General and Randall Sutton, Assistant Attorney General, for appellee.

Before SCHWARTZ, C.J., and BARKDULL and LEVY, JJ.

SCHWARTZ, Chief Judge.

We hold here for the first time 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.

Novaton was accused in two informations of multiple violent offenses which occurred during separate incidents in 1990. As a part of a broad agreement with the state, in which it agreed, among other things, to forgo the possibility of securing a life-without-parole habitual-violent-offender sentence, Novaton agreed to plead guilty to all of the charges and to concurrent sentences totaling fifty years, subject to a fifteen year minimum-mandatory requirement. The specific sentences to be imposed as to each of the counts were accepted by the defendant as a part of a detailed plea colloquy conducted by the trial judge prior to his acceptance and implementation of the agreement. The resulting adjudications and sentences included several for the enhanced felonies of burglary, robbery, aggravated battery with a firearm and two for the separate crimes of possessing a firearm in the commission of those same felonies. The defendant correctly points out that, as an original matter, the latter two sets of convictions and sentences are barred by the double jeopardy principles enunciated in Cleveland v. State, 587 So. 2d 1145 (Fla. 1991). Benedit v. State, ___ So. 2d____ (Fla. 3d DCA Case no. 92-1329, opinion filed, December 22, 1992), and cases cited. The state counters with the argument that the defendant's bargain effected a waiver of the double jeopardy claim. We agree with that position and therefore affirm both the convictions and sentences on the possession counts.

Challenge To Convictions Waived. There is no question either that (a) as a general proposition, a right to double jeopardy protection against multiple adjudications is susceptible

to a knowing waiver by the defendant, [1] Ricketts v. Adamson, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987); State v. Johnson, 483 So. 2d 420, 423 (Fla. 1986); Guardado v. State, 562 So. 2d 696 (Fla. 3d DCA 1990), review denied, 576 So. 2d 287 (Fla. 1990); Rodriguez v. State, 441 So. 2d. 1129 (Fla. 3d DCA 1983), pet. for review denied, 451 So. 2d 850 (Fla. 1984), and that (b) in this district, a waiver of a Cleveland-type violation with respect to multiple convictions takes place when the defendant voluntarily pleads guilty to the allegedly duplicitous charges in question. Guardado, 562 So. 2d at 696; Anderson v. State, 392 So. 2d 328 (Fla. 3d DCA 1981). Contra Arnold v. State, 578 So. 2d 515 (Fla. 4th DCA 1991); Kurtz v. State, 564 So. 2d 519 (Fla. 2nd DCA 1990). We reiterate that holding here.

Challenge To Sentences Waived. The defendant, however, argues that a mere plea does not waive a challenge to dual or multiple sentences which are also precluded by the Cleveland rule. Guardado, 562 So. 2d at 696; Taylor v. State, 401 So. 2d 877 (Fla. 3d DCA 1981); Hines v. State, 401 So. 2d 878 (Fla. 3d DCA 1981); Anderson, 392 So. 2d at 328; Davis v. State, 392 So. 2d 947 (Fla. 3d DCA 1980). While this observation is correct, the cases cited do not involve[2] and therefore do not apply to the present

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[1] The rule is otherwise as to the separate double jeopardy right to protection against a successive prosecution after a finding of not guilty. See infra note 3. See generally Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980); Scalf v. State, 573 So. 2d 202 (Fla. 1st DCA 1991).

[2] These cases either do not indicate there was an agreement to the sentences or affirmatively show that there was none. Thus, in Guardado, the sentences we vacated were imposed upon the revocation of the probation granted when Guardado originally pled to the duplicitous charges in question.

situation, in which the defendant agreed not only to plead to the offenses themselves, but also to the imposition of specified sentences tendered by the state in partial consideration of its own agreement for leniency in other respects. In these circumstances, by the same token that a voluntary plea to the charge waives the double jeopardy guarantee against multiple adjudications of the "same offense," an agreement to the sentences waives the protection from multiple punishments. We have already explicitly so stated:

> Prestridge now claims that double jeopardy safeguards preclude imposition of an increased sentence after the conclusion of the sentencing hearing. This principle does not pertain to Prestridge's sentence because it was the product of a plea agreement with the state. [e.s.]

Prestridge v. State, 519 So. 2d 1147, 1148 (Fla. 3d DCA 1988); see also Ricketts, 483 U.S. at 1, 107 S.Ct. at 2680, 97 L.Ed.2d at 1; United States v. Broce, 488 U.S. 563, 109 S.Ct.757, 102 L.Ed.2d 927(1989); Dermota v. United States, 895 F.2d 1324, 1325 (11th Cir. 1990)("plea agreement in exchange for which the government dismissed eight counts" waives double jeopardy objection to consecutive sentences for crimes which "arose out the same transaction and constitute a single offense"), cert. denied, ___ U.S.___, 111 S.Ct. 107, 112 L.Ed.2d 78 (1990); Rodriguez, 441 So. 2d at 1129 (waiver of protection from increase in sentence upheld).

In many other contexts as well, this court and others have upheld otherwise arguably defective sentences when they have been voluntarily accepted by the defendant as part of a mutually

advantageous agreement with the state.[3] See, e.g., Jacobs v. State, 522 So. 2d 540 (Fla. 3d DCA 1988)(denial of motion to correct allegedly illegal sentences affirmed as part of negotiated plea), review denied, 531 So. 2d 1353 (Fla. 1988); Preston v. State, 411 So. 2d 297, 298-99 (Fla. 3d DCA 1982)(defendant who should have been sentenced as a youthful offender but was placed on probation "waived his right to question the legality of a probation which he has enjoyed and violated"), petition for review denied, 418 So. 2d 1280 (Fla. 1982); Smith v. State, 345 So. 2d 1080, 1082 (Fla. 3d DCA 1977)(sixteen-year-old defendant estopped from challenging probation after violation when she had given a false age and was sentenced as an adult; "[s]he accepted the benefits of probation and had one of the counts against her dropped as part of the plea negotiations"), cert. denied, 353 So. 2d 678 (Fla. 1977); see also Johnson v. State, 458 So. 2d 850, 851 (Fla. 2d DCA 1984)("Because Johnson was bound by her contract, we affirm the sentence."); Bell v. State, 453 So. 2d 478, 480 (Fla. 2d DCA 1984)(plea bargains are encouraged and defendant "bound by

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[3] A waiver cannot be effective, however, when the sentence in question is "void," Rodriguez, 441 So. 2d at 1129, that is, for example, to the extent it exceeds the statutory limit, Ruiz v. State, 537 So. 2d 682 (Fla. 3d DCA 1989), when the court lacks jurisdiction over the case itself, see Solomon v. State, 341 So. 2d 537 (Fla. 2d DCA 1977), or--in the double jeopardy context--when, after an acquittal, the state has lost the power to prosecute a particular charge again. See Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975). Sentences like the present ones, which involve a violation of the rule against multiple convictions or sentences, are not "void" within the meaning of this principle. See Dermota, 895 F.2d at 1326; United States v. Pratt, 657 F.2d 218 (8th Cir. 1981), cited with approval in State v. Johnson, 483 So. 2d at 423; Rodriguez, 441 So. 2d at 1129.

his contract"). See generally Madrigal v. State, 545 So. 2d 392, 394 (Fla. 3d DCA 1989), and cases collected. Having accepted its benefits by avoiding a life sentence without parole, Novaton cannot, any more than any other contracting party, be relieved of the burden of his contract. [4] See Madrigal, 545 So. 2d at 395.

Novaton also claims that a minimum mandatory term may not be required in a habitual offender sentence imposed for a first degree felony punishable by life. This contention is wholly without merit. See Burdick v. State, 594 So. 2d 267 (Fla. 1992); Young v. State, 600 So. 2d 24 (Fla. 3d DCA 1992).

Affirmed.

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[4] We note that, if we ruled otherwise, the defendant might well be faced with the choice of unraveling the entire agreement and facing possible consequences he obviously wishes to avoid. See Prestridge v. State, 519 So. 2d at 1147.