IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,374

JOSEPH STEPHENS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant and Respondent the prosecution in the Criminal Division of Seventeenth Judicial Circuit Court in and for Broward County, Florida. Petitioner was the Appellant and Respondent the Appellee respectively in the Fourth District Court of Appeal.

In this brief, the parties will be referred to as they appear before this Honorable Court, except that Respondent will be referred to as the State.

The following symbols will be used:

"R" Record on appeal

"PB" Petitioner's initial brief on the merits

STATEMENT OF THE CASE AND FACTS

Respondent, the State of Florida accepts the statement of the case and facts contained in Petitioner's initial brief, to the extent that the facts represent an accurate, non-argumentative synopsis of the proceedings below. Pursuant to Fla. R. App. P. 9.210 (c), the State submits the following clarifications as points of disagreement between the parties over the rendition of the facts:

1. Contrary to Petitioner's assertion (PB 4) there was no evidence at the revocation hearing that Petitioner's financial difficulty was caused by the luxury tax (R 35).

2. When the trial court decided Petitioner should pay half the amount owed or $50,000 before he be allowed to travel outside the United States, defense counsel told the court, "you're clipping this guy's wings before he even gets started . I would rather him explain the Brushingham decision you have and let him do that...." [sic] (R 56). When the court later decided to reduce the $50,000 to $25,000, keeping the Brushingham requirement and to terminate probation if Petitioner paid restitution within five (5) years, defense counsel told the court he would, "speak to Petitioner and let Petitioner make the decision, and if the Supreme Court declares the case unconstitutional, then its not going to be effective" (R 59). Up until this point, all discussions pertained solely to Petitioner. It was only when Petitioner actually entered the guilty plea, that he did so with six other defendants. However, since Petitioner was present during all the discussions and

defense counsel discussed the consequences of taking the plea with Petitioner, defense counsel was on notice that Petitioner intended to take the plea - whether or not he was able to hear Petitioner's response.

3. The portion of the plea colloquy listed in Petitioner's brief (PB 7) occurred because Petitioner misunderstood the terms of the agreement, not the fact that he was waiving his constitutional rights. Petitioner thought that if he paid $25,000 right away, he would not have to serve the year in the county jail (R76-77). The trial court again explained that it was not bound by the parties' recommendation, and that it was only if Petitioner paid $50,000 after (5) months, depending on how soon he paid the $50,000. The trial court explained that Petitioner still had the opportunity to withdraw his plea, that the plea had to be voluntary (R 77). Petitioner thereafter voluntarily accepted the plea (R 78).

Respondent reserves the right to bring out additional facts during the argument portion of its brief.

SUMMARY OF THE ARGUMENT

Petitioner knowingly and voluntarily waived his constitutional right not to be imprisoned for a debt where both the trial court and defense counsel explained that he would have to give up that right as part of the plea agreement. As the plea colloquy demonstrates, Petitioner understood and accepted this requirement as a condition of the plea agreement, and fully understood the consequences of doing so.

Moreover, since Petitioner willfully refused to pay or to make bona fide efforts to pay in over five years and the trial court refrained from sentencing him to the maximum term of incarceration in exchange for probation, Petitioner chose this option in order to obtain a second chance and the benefit of the bargain.

ARGUMENT

PETITIONER KNOWINGLY AND VOLUNTARILY WAIVED HIS CONSTITUTIONAL RIGHT NOT TO BE IMPRISONED FOR A DEBT.

Petitioner plead guilty to grand theft of $100,000 dollars in 1988 (R 8). He was placed on five (5) years probation with the requirement that he pay restitution to the victim, Robert Sklare. Petitioner made one payment of $900 just before he was placed on probation, to show that he would be willing to pay restitution (R 7). Thereafter, for the next five (5) years, Petitioner never paid the victim even one cent! (R 8, 25). The victim informed the court that he was interested in seeing Petitioner punished and the trial court received information that Petitioner did abscond once from his probation (R 22, 25, 58). Because of this, the trial court informed Petitioner that it would impose the State's proposed sentence of one (1) year in the County jail followed by ten (10) years probation, as long as Petitioner entered a Brushingham plea, waiving his constitutional right not to be imprisoned for a debt (R 42).

The trial court would have been well within its right to sentence Petitioner to the maximum term of imprisonment for failure to pay restitution imposed as a condition of probation. Petitioner not only failed to pay, but violated his probation by failing to report and by leaving the jurisdiction by when he went to New York (R 23). As an alternative to imprisonment, the trial court offered, and Petitioner chose to accept, the Brushingham plea.

In Brushingham v. State, 460 So. 2d 523 (Fla. 4th DCA 1984), the Appellant entered into a plea bargain agreement which required that he make restitution payments within six months as a condition of probation, and provided that he waive the requirement that the State prove his financial ability to pay in order to prove his violation of probation. The Appellant then appealed, contending that the agreement was unenforceable as against public policy. The Fourth District Court of Appeal concluded, based on the reasoning of Doherty v. State, 448 So. 2d 624 (Fla 4th DCA 1984) that:

> ... a person charged with a crime can legally enter into a plea bargain agreement with the State that he receive probation rather than be imprisoned on conditions that he make restitution within a set period of time and that he waive his right to be imprisoned for failure to pay a debt if he failed to make restitution as he has agreed, whether or not the State can prove his financial ability to make restitution. Such an agreement is not void as against public policy and is enforceable.

Brushingham, 460 So. 2d at 524.

Subjudice, Petitioner's agreement to the Brushingham plea does not conflict with Bearden v. Georgia, 461 U.S. 660, 103 S.Ct. 2064, 76 L.Ed 2d 221 (1983). In Bearden, the Petitioner was placed on three years probation for burglary, ordered to pay $250 in restitution and a $500 fine. Petitioner borrowed the money from his parents and paid the first $200. However, about a month later, he was laid off from his job and was unsuccessful in finding other work. Petitioner notified the probation office that he was going to be late with his payment because he could

not find a job. When the balance became due, the court, after an evidentiary hearing, sentenced Petitioner to serve the remaining portion of his probationary period in prison.

In overturning the trial court's decision, the Supreme Court held that a sentencing court may not automatically revoke probation without determining that the probationer had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist. The court reasoned however that, "if the probationer has willfully refused to pay the fine or restitution when he has the means to pay, the State is perfectly justified in using imprisonment as a sanction to enforce collection." Id. at 461 U.S. 668, 76 S.Ct._, 76 L.Ed 2d 230. In so doing, the court distinguished the limitation on the imprisonment of indigents from the situation where a defendant was at fault in failing to pay the fine. Thus, imprisonment may be used as a means to enforce collection of fines, court costs or restitution when the probationer willfully refuses to pay, although he has the means to pay, or he does not make a bone fide effort to acquire the resources to pay. Likewise, in Tate v. Short, 401 U.S. 395, 400-401, 91 S.Ct. 668, 672, 28 L.Ed 2d 130 (1971) upon which Bearden relied, the Court noted:

> We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so. Nor is our decision to be understood as preluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fine by those means ....

Id.; see also Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed 2d 586 (1970).

In the instant case, the trial court could have lawfully imprisoned Petitioner for violating his probation by failing to pay court ordered restitution. In over five (5) years Petitioner willfully refused to pay. There is no indication as to why Petitioner neglected to the to pay the victim. Contrary to Petitioner's assertions, there was no evidence that the luxury tax and the recession were the cause of Petitioner's failure to pay. This information came from defense counsel, not Petitioner, and was clearly not evidence because it was not supported by any factual basis in the record (R 35). In fact, the victim informed the court that they had information Petitioner had travelled extensively in and out of the country during his probationary period and had resources that they were told did not exist (R 40).

This case can be distinguished from Bearden because Petitioner clearly had the ability to pay, yet willfully refused to do so. The law is well settled that there is no due process violation in imprisoning a defendant who has the ability to pay, yet willfully refuses to pay. Here, although Petitioner did not pay or make bona fide efforts to comply with the court order, the trial court reimposed another term of probation as an alternative to the maximum term of imprisonment. Petitioner chose to accept the Brushingham plea as a condition precedent to being given a second chance. The Brushingham plea was the benefit of the bargain.

Florida Statutes section 948.032 provides that in determining whether to revoke probation the court shall consider the defendant's employment status, earning ability, and financial resources; and the **willfulness of the defendant's failure to pay.** The trial court considered Petitioner's circumstances and his willful failure to pay in over five years. Petitioner had no reason for his noncompliance with the court's order. Section 775.089 (7) provides that, "burden of demonstrating the **present financial resources and the absence if potential future financial resources** and the financial needs of the defendant is on the defendant." Petitioner stood silent while the trial court evaluated his ability to pay. He then agreed to the Brushingham plea with full knowledge that if he violated the terms of probation this time, the State would be relieved of its obligation to prove his ability to pay. Now that Petitioner has received the benefit of the bargain by being placed on probation again, he is attacking the constitutionality of his plea. If Petitioner did not have the ability to pay now or in the future, all he had to do was to tell the court that he could not agree to the Brushingham plea. Instead, Petitioner accepted the plea to avoid the maximum jail time, and although Petitioner has not yet violated probation by failing to pay (thereby triggering his incarceration), he is attempting to collaterally attack the plea agreement.

Hamrick v. State, 519 So. 2d 81 (Fla. 3rd DCA 1988), upon which Petitioner relies, is not controlling. Even Hamrick does not stand for the proposition that due process protects a

defendant who refuses to make payments when he is financially able to do so. The right not to be imprisoned for a debt is only limited to a defendant who does not have the ability to pay. Here, Petitioner, unlike the defendant in Hamrick, is not an indigent person caught up in the court system. This was Petitioner's second chance. For over five years, he made no effort to comply with the terms and conditions of a lawful court order and that was why the trial court was able to sentence him to a year in the County jail followed by ten years probation. By not sentencing Petitioner to the maximum sentence authorized by law for violation of probation, Petitioner received the benefit of the bargain. The trial court recognized that since Petitioner's problem was not inability but rather, refusal to pay, the Brushingham plea merely provided the incentive to ensure the court that Petitioner complied by making the victim whole.

While Petitioner challenges the automatic revocation aspect of his Brushingham plea, the State must point out that Petitioner has not yet violated his probation so as to trigger his automatic imprisonment. Petitioner knowingly and voluntarily entered into the plea bargain agreement and he should be estopped to complain about it now, since he has already received the benefit of the bargain, and knew before he accepted the plea, the consequences of doing so. In light of this, State v. Beasley, 580 So.2d 139 (Fla. 1991) is not dispositive because Petitioner expressly waived the requirement that the State prove his ability to pay.

The record illustrates that Petitioner knowingly and intelligently waived his right not to be imprisoned for a debt. Petitioner would have this court believe that his attorney did not hear his response when he decided to take the plea. However, the transcript shows that on February 28, 1992, the trial court explained to defense counsel what a Brushingham plea was, and told him to discuss it with Petitioner (R54). When the trial court decided Petitioner should pay half the amount owed before he be allowed to travel outside the United States, defense counsel told the court, "you're clipping this guy's wings before he even gets started [sic]. I would rather him explain the Brushingham decision you have and let him do that...." (R 56). When the court later decided to reduce the $50,000 to $25,000, keeping the Brushingham requirement and agreed to terminate probation if Petitioner paid restitution within five (5) years, defense counsel told the court he would, "speak to Petitioner and let Petitioner make the decision, and if the Supreme Court declares the case unconstitutional, then its not going to be effective" (R 59). Up until this point, all discussions pertained solely to Petitioner. It was only when Petitioner actually entered the guilty plea, that he did so with six other defendants. But given the fact that Petitioner was present during all the discussions and defense counsel discussed the consequences of taking the plea with Petitioner, it is unbelievable that defense counsel did not know that Petitioner intended to take the plea - whether or not he was able to hear Petitioner's response.

Petitioner is a sixty-three (63) year old man with two years college experience (R 67). He told the court he understood he was pleading guilty, was not insane, had not used drugs or alcohol, and reads and writes English well. Petitioner read the plea agreement, understood every paragraph, discussed the ramifications of the plea with his attorney, and signed the plea agreement (R 68). He told the court he was not threatened, no one promised him anything, there was no outside influence that was causing him to plead guilty, and he was happy with the services of his attorney (R 68-69). The trial court concluded that there was a factual basis for Petitioner's plea, "that the defendants were alert, competent and intelligent enough to enter their pleas and that they were voluntarily pleading guilty". (R 69).

After discussing the sentence imposed and the amount of restitution (R 70-73), the trial court explained to Petitioner his right not to be imprisoned for a debt and the Brushingham plea (R 73). Petitioner indicated to the court that he understood that he would be waiving his constitutional rights in order to gain the benefits of the plea (R 73-74). Petitioner further indicated his willingness to waive his constitutional right not to be imprisoned for a debt (R 76). In light of this, the portion of the plea colloquy quoted by Petitioner in his brief (PB 7) is not dispositive, because what transpired below is not reflected in its entirety in the initial brief on the merits.

Petitioner misunderstood the terms of the agreement, not the fact that he was waiving his constitutional rights. Petitioner thought that if he paid $25,000 right away, he would not have to serve the year in the county jail (R76-77). The trial court again explained that it was not bound by the parties' recommendation, and that it was only if Petitioner paid $50,000 within (5) months, depending on how soon he paid the $50,000, that his year of incarceration would be terminated. The trial court explained that Petitioner still had the opportunity to withdraw his plea, that the plea had to be voluntary (R 77). Petitioner thereafter voluntarily accepted the plea (R 78).

A plea bargain is a contract. Pate v. State, 547 So. 2d 316 (Fla. 4th DCA 1989); Brown v. State, 367 So. 2d 616, 622 (Fla. 1979). Here, the court reviewed the terms of the agreement with Petitioner, and Petitioner not only expressed that he understood those terms, but agreed to perform them. A voluntary plea of guilty in the criminal case is both a confession of guilt in open court and an agreement for the entry of a conviction; a guilty plea waives all fundamental constitutional rights as well as all non-jurisdictional defenses known and unknown. Long v. State, 529 So. 2d 291 (Fla. 1988); Trawick v. State, 473 So. 2d 1235 (Fla. 1985); Bridges v. State, 376 So. 2d 233 (Fla. 1979); Williams v. State, 316 So. 2d 267 (Fla. 1975); Reed v. State, 447 So.2d 933 (Fla. 3rd DCA 1988). Thus, Petitioner's sentence is valid, because it was in conformity with the plea agreement which was legal and fully enforceable. Brushingham v. State, 460 So. 2d 523 (Fla. 4th DCA 1984).

If this court rules otherwise, it would adversely impact upon the effectiveness of plea bargain agreements in the future, and would open the floodgates for other defendants to collaterally attack an otherwise valid agreement. It would also have a debilitating effect on Florida Statutes section 775.089 (1)(a) (1991) which dictates that "the court shall order restitution, unless it finds clear and compelling reasons not to order such restitution." Brushingham is a remedy of last resort; here, it was offered by the State only after Petitioner violated the terms and conditions of probation, to ensure that the victim would be compensated. This court must keep in mind the difficulty faced by the courts in enforcing restitution orders where defendants willfully refuse to pay. As evidenced by the sparse amount of cases on this subject, the State is unlikely to propose, and defendants are unlikely to accept a Brushingham plea initially, thereby waiving their "inability to pay" defense. Hence, this court need not be concerned that in upholding this decision, the State will automatically require all defendants to enter these pleas. Accordingly, the decision of the Fourth District Court, upholding the Brushingham agreement, must be upheld.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities cited herein, Respondent respectfully requests that the decision of the Fourth District Court, upholding the trial court's decision, be **AFFIRMED**.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was furnished by U.S. Mail to: **MICHAEL J. DODO, ESQUIRE**, Counsel for Petitioner, 1133 South University Drive, Suite 210, Ft. Lauderdale, Florida 33324, on this 4/4 day of June, 1993.

MICHELLE A. SMITH