IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,013

FREDERICK E. MELVIN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

****

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
Attorney General

CONSUELO MAINGOT
Assistant Attorney General
Florida Bar No. 0897612
Office of the Attorney General
Department of Legal Affairs
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441

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INTRODUCTION

Respondent, the STATE OF FLORIDA, was the prosecution at trial. Petitioner, FREDERICK E. MELVIN, was the Defendant. All parties will be referred to as they stood at trial. The symbols "App." followed by the appropriate letter and number will be used to refer to the Petitioner's Appendix on appeal in this case, including the transcript of the plea colloquy conducted June 14, 1990, and "B" will refer to the Defendant's brief on the merits, respectively.

STATEMENT OF THE CASE AND FACTS

The Defendant, Frederick E. Melvin, was charged by Information with attempted first degree murder and unlawful possession of a firearm while engaged in a criminal offense, in the courts of the Eleventh Judicial Circuit Court of Dade County, Florida, Case No. 89-46022. (App. A3). He was additionally charged with second degree murder and unlawful possession of a firearm while engaged in a criminal offense, Case No. 90-3133. (App. A5).

On June 14, 1990, the Defendant negotiated a plea with the State of Florida wherein he pled no contest to both Informations. The Defendant's trial counsel, Mr. Robert Singer, stipulated that each Information, if proved, would constitute *prima facie* cases of guilt. (App. A6). The trial court conducted the following colloquy:

> **THE COURT:** Is that your understanding?
>
> **MR. SINGER:** (Defense Counsel) That's correct, Judge. The bottom line is that it's 30 years with a minimum mandatory of three included, and all sentences to run concurrent.
>
> **THE COURT:** This is what you communicated to your client?
>
> **MR. SINGER:** Pardon me?
>
> **THE COURT:** Is this what you communicated to your client?
>
> **MR. SINGER:** That's correct, judge.

THE COURT: That's your understanding, Mr. Frederick Melvin?

THE DEFENDANT: Pardon me? Yes, Sir.

THE COURT: Mr. Frederick Melvin, I find that you are alert and intelligent, that you have understood the terms of the plea as explained to you by your lawyer, you have had ample opportunity to discuss this case with your lawyer, your lawyer is able and competent, your plea is free and voluntary, you understand the nature and consequences of your plea, you have no right to a presentence investigation, and there is ample evidence to support the plea based upon the stipulation of counsel.

(App. A6, p. 7).

Pursuant to the plea, the trial court sentenced the Defendant in Case No. 89-46022 to thirty years on Count I, with a three-year minimum mandatory term, plus fifteen years on Count II to be served concurrent with Count I. (App. A6, p. 7-8). As to Case No. 90-3133, the Defendant was sentenced to thirty years state prison on Count I, with a three-year minimum mandatory term, plus fifteen years on Count II to be served concurrent with Count I. (App. A6, p. 7-8). Terms on all counts in both cases were to be served concurrently including the two three-year minimum mandatory terms which were to be served concurrently to each other. (App. A6, p. 7-8).

On March 16, 1993, the Defendant filed a Petition for Writ of Habeas Corpus in the Circuit Court, which was treated as a Motion for Post-Conviction Relief pursuant to Rule 3.850,

Fla.R.Crim.P. (App. A7). The Honorable Leslie Rothenberg denied the motion as untimely and legally insufficient. (App. A8). The Third District Court of Appeal affirmed the lower court's denial of the motion on the authority of Novaton v. State, 610 So. 2d 726 (Fla. 3d DCA 1992), *rev. granted*, 624 So. 2d 267 (Fla. 1993), certifying the question as one of great public importance.

> DOES A DEFENDANT, WHO KNOWINGLY ENTERED INTO A PLEA AGREEMENT, THEREBY WAIVE AN OTHERSIDE VIABLE DOUBLE JEOPARDY CLAIM.

(App. A1).

QUESTION PRESENTED

WHETHER THE DEFENDANT WAIVED HIS DOUBLE JEOPARDY CLAIM AS TO BOTH CONVICTION AND SENTENCE BY KNOWINGLY AND VOLUNTARILY ENTERING INTO A COMPREHENSIVE NEGOTIATED PLEA AGREEMENT? [RESTATED]

SUMMARY OF THE ARGUMENT

The Defendant contends that he should not have been convicted and sentenced for both use of a firearm in the commission of a felony and for other felonies which were enhanced because of the use of a firearm. He bases this argument upon double jeopardy principles. As a general rule, under federal law, double jeopardy claims are waived by the entry of a guilty plea to the charges. In Florida, it is well settled that a defendant's entry into a plea bargain waives his double jeopardy objections to sentences that form part of the plea agreement.

The Defendant maintains that he cannot have waived his double jeopardy objections on grounds that his plea was involuntarily and unknowingly entered because he was not told of the consequences of his plea and his counsel was ineffective for failing to so inform him, and further, that he agreed only to a "bottom line" sentence. (B, p. 6, 13). This contention is belied by the plea colloquy and the record.

Where the Defendant's plea is negotiated both as to conviction and sentence, and by so pleading he avoided the possibility of two consecutive life sentences without possibility of parole, it would be unjust to allow him to renege on his bargain.

ARGUMENT

THE DEFENDANT WAIVED HIS DOUBLE JEOPARDY CLAIM AS TO BOTH CONVICTION AND SENTENCE BY KNOWINGLY AND VOLUNTARILY ENTERING INTO A COMPREHENSIVE NEGOTIATED PLEA AGREEMENT.

The sole issue in the case at bar is whether the Defendant waived double jeopardy by entering into a plea bargain in which he accepted conviction and sentencing in two cases on four counts, in exchange for the benefit of the State's offer of a reduced penalty.

Initially, the State agrees that under other circumstances, such as a trial or a general plea of guilt absent any bargaining posture, a conviction for possession of a firearm would not stand where a defendant is convicted at the same time of a felony which has been enhanced for use of the firearm. Cleveland v. State, 587 So. 2d 1145 (Fla. 1991); Section 775.021(4)(a), Fla. Stat. (1989). However, that is not the case here, where the facts and circumstances indicate that the Defendant entered into a bargain with the State accepting thirty years incarceration on each of the four counts concurrently, rather than the possibility of two consecutive life sentences, thus waiving his double jeopardy objections. (App. A6). Novaton v. State, 610 So. 2d 726, 728 (Fla. 3d DCA 1992), *aff'd* 634 So. 2d 607, 609 (Fla. 1994).

The Defendant contends that the facts and circumstances of Novaton v. State are not applicable in this case, specifically because Novaton entered his plea bargain recognizing the possibility the he could be treated as an habitual felony offender, and that the Defendant, here, was not properly apprised of the consequences of his plea. The Defendant contends that he was not informed of the statutory maximum penalties on either the attempted first degree murder, the second-degree murder charge, or the second charge for unlawful possession of a firearm while committing a felony. (B, p. 6). Additionally, he argues that no one advised him whether there was a minimum mandatory sentence applicable to the two unlawful use of a firearm counts. (B, p. 6).

The Defendant has previously argued before this Court that his plea was involuntary because he was not apprised of the consequences of the plea, there was no factual basis for the plea, and he did not know that he could be sentenced on each of the counts to which he pled. Separately he contends that this lack of knowledge was due to incompetent counsel. The Defendant's allegations of ineffective assistance of counsel set out in his petition for writ of habeas corpus, categorically establish that his defense counsel had communicated to him, not only the nature of the plea and the potential consequences of a trial, but that the State could seek the death penalty. (App. A7, p. 12). A review of the plea colloquy in this case refutes

each of those claims, and the Defendant should not be afforded relief on this basis. (App. A6).

In Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), the United States Supreme Court held that the two part Strickland v. Washington test applies to challenges to guilty pleas based on ineffective assistance of counsel claims. This two part test requires that a defendant 1) show that his counsel's representation fell below an objective standard of reasonableness, and 2) demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In analyzing such a claim, the fact that the defendant entered a plea is an important fact. Indeed, less than the exhaustive and plenary investigation that would accompany a trial is required to enter a plea. Lee v. Hopper, 499 F.2d 456 (5th Cir.), *cert. denied*, 419 U.S. 1053, 42 L.Ed.2d 650, 95 S.Ct. 633 (1974). In addition, it has been held that "counsel owes a lesser duty to a client who pleads guilty than to one who decides to go to trial, and in the former case counsel need only provide his client with an understanding of the law in relation to the facts, so that the accused may make an informed and conscious choice between accepting the prosecution's offer and going to trial." Wofford v. Wainwright, 748 F.2d 1505, 1508 (11th Cir. 1984), *citing* Walker v. Caldwell, 476 F.2d 213, 218 (5th Cir.

1973). In addition, in order to obtain relief counsel must show that there is a reasonable probability that he would not have pled guilty but for counsel's error. Hill v. Lockhart, *supra*. Applying these standards to the case *sub judice*, it is apparent that relief must be denied.

On the basis of the Informations alone, Defendant was apprised of the fact that he was being charged with two life felonies and two second degree felonies. (App. A). In Case No. 89-46022, on the charge of attempted first degree murder with a firearm, he faced a life felony punishable by life or a term of years not to exceed forty years, and fifteen years on the second degree felony of unlawful possession of a firearm. Sections 782.04(1), 777.04, 775.087, 775.082(3)(a), (c), Fla. Stat. (1989). In Case No. 90-3133, on the charge of second-degree murder with a firearm, he faced a life felony and a second degree felony punishable by fifteen years. Sections 782.04(2), 775.087, 775.082(3)(a), (c), Fla. Stat. (1989).

Defense Counsel, Mr. Singer, attested before the court that he had consulted with his client and communicated the plea to him, and the Defendant responded affirmatively when asked if, indeed the terms of the plea had been so communicated to him by counsel. (App. A6). The factual basis for the plea was stipulated to by counsel as stated in the Informations. (App. A6, p. 5). Furthermore, after Mr. Singer announced that

predicated on negotiations with the State, the Defendant would plea no contest and agreed to thirty years concurrent on each case, Mr. Vargas (also defense counsel) alerted the trial court that the statutory maximum on counts II of each Information was fifteen years and the recommended sentence should be fifteen concurrent to the thirty years agreed to in counts I. (App. A6, p. 5-6).

Finally, the Defendant has not demonstrated that he would have gone to trial, but for the alleged errors of his attorney. Had Defendant not pled guilty and stood trial, the jury could properly have found him guilty of the lesser offense of attempted second degree murder without a firearm **and** of possession of a firearm while committing that attempted homicide in Case No. 89-46022. (App. A3). Or the jury could have found that he was guilty of manslaughter without a firearm in Case No. 90-3133 and properly convicted him also of possession of the firearm during that homicide. (App. A5). In neither case would the "double enhancement" which Cleveland proscribes have arisen. The plea colloguy clearly supports the trial court's finding that the Defendant's plea was voluntary and knowingly entered, and absent an abuse of discretion should not be disturbed on appeal.

Notwithstanding the Defendant's contentions to the contrary, the principles of Novaton v. State are entirely applicable in the instant case, where the Third District Court of

Appeal held that a defendant who enters into a negotiated plea and sentence bargain with the State, as here, thereby waives an otherwise viable double jeopardy objection to sentences which form part of the agreement. Novaton v. State, 610 So. 2d 728. Moreover, this Court has agreed that where a defendant enters into more than a general plea by bargaining and accepting a benefit from the State in exchange for conviction and sentence on multiple charges, he waives the right to attack the multiple convictions on double jeopardy grounds. Novaton v. State, 634 So. 2d 609.

The Defendant's knowing and intelligent waiver of his double jeopardy claim survives the Novaton test requiring that he accept each individual sentence. There is no evidence in the record or in the plea colloquy to support the Defendant's bare allegation that his defense counsel failed to consult with him or inform him of the extent of the consequences he would face. A review of the plea colloquy (App. A6) indicates that Defendant and his counsel had time in which to contemplate the State's offer. At no point was any objection to the counts in question or the sentences raised by Defendant or his counsel. By agreeing to the thirty-year sentences with the three-year minimum mandatory terms, all to run concurrently, the Defendant avoided the possibility of consecutive life sentences without possibility of parole, which would have been within the judge's discretion to impose as within the statutory maximum penalty. Additionally,

defense counsel's intervention alerting the trial court as to the statutory maximum penalties on the second degree felonies, was not only evidence that counsel was effective and a zealous advocate for his client's interests, but that the Defendant was also on notice as to the maximum penalties applicable on those counts. His contention with respect to lack of information on minimum mandatories applicable to the second degree felonies is not an issue. The Defendant should be held to his bargain.

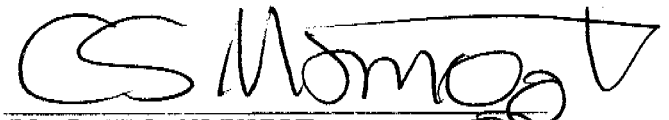
The decision below comports with the law as established by this Court and the Supreme Court of the United States, and the Defendant's convictions and sentences should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

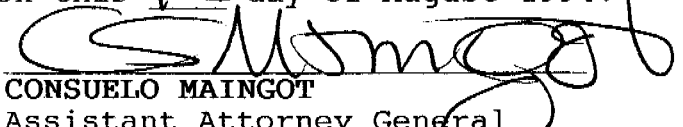
ROBERT A. BUTTERWORTH
Attorney General



CONSUELO MAINGOT
Assistant Attorney General
Florida Bar No. 0897612
Office of the Attorney General
Department of Legal Affairs
Post Office Box 013241
Miami, Florida 33101
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was furnished by mail to **JULIAN CLARKSON, and SUSAN L. TURNER,** Holland & Knight, P. O. Drawer 810, Tallahassee, Florida 32302 on this 15 day of August 1994.



CONSUELO MAINGOT
Assistant Attorney General