IN THE SUPREME COURT OF FLORIDA

Case No. 83,013

On Petition For Discretionary Review
From The Third District Court Of Appeal

FREDERICK E. MELVIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER FREDERICK E. MELVIN

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REPLY ARGUMENT

FREDERICK E. MELVIN ("Melvin") has a viable double jeopardy claim because he was convicted and sentenced for two lesser offenses that were fully subsumed within two primary offenses. This violates fundamental constitutional principles as applied in Cleveland v. State, 587 So. 2d 1145 (Fla. 1991).[1] Respondent STATE OF FLORIDA (the "State") does not dispute this. The State, however, claims that Melvin waived his right to challenge the unconstitutional convictions and sentences under the test applied in Novaton v. State, 610 So. 2d 726 (Fla. 3d DCA 1992), aff'd, 634 So. 2d 607 (Fla. 1994). According to the State, Melvin was fully advised of each individual sentence and the total sentence, either through the plea colloquy or by virtue of the charges stated on the Informations. The State also argues that Melvin is required to show ineffective assistance of counsel in order to obtain relief from the unconstitutional convictions and sentences. Neither of the State's arguments is meritorious.

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[1] U.S. Const. amend. V ("nor shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb"); art. I, § 9, Fla. Const. ("No person shall be ... twice put in jeopardy for the same offense ... ."). See also Lippman v. State, 633 So. 2d 1061, 1064 (Fla. 1994) (guarantee against double jeopardy " 'protects against multiple punishments for the same offense.' " (quoting from North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

I. The Plea Colloquy Reveals That Melvin Was Not Informed As Required By Novaton, And The Informations Themselves Do Not Substitute For The Required Notice.

The State does not dispute that no one told Melvin that a sentence including both counts of both informations against him would amount to double jeopardy in each case. Nor does the State dispute that no one advised Melvin of the statutory maximum penalties that could be imposed for each count of each information or whether or not there was a mandatory minimum for count two of each information. The Assistant State Attorney (and not defense counsel, as the State mistakenly asserts in its brief [2 A. Br. 11, 13])[2] said that the statutory maximum penalty for count two of the first information was 15 years, and that the minimum mandatory sentence for count one of each information was three years. No one, however, informed Melvin of the statutory maximum for count one of either information or count two of the second information; and no one informed Melvin whether or not there was a mandatory minimum sentence for count two of either information.

The undisputed failure to inform Melvin of each individual sentence, the statutory maximum sentence for each offense, and the mandatory minimum for each offense distinguishes this case from Novaton. Novaton requires that the defendant voluntarily and intelligently agree to "each individual sentence, as well as to the total sentence." Novaton, 634 So. 2d at 609.

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[2] The State filed an earlier Answer Brief in response to Melvin's pro se initial brief. The first Answer Brief will be designated "1 A. Br.," and the second Answer Brief will be designated "2 A. Br."

This requirement necessarily contemplates that the defendant be given the information upon which to base such a "voluntary and intelligent" agreement. The plea colloquy in this case establishes that Melvin was not given the necessary information.

The State's assertion that Melvin "had time in which to contemplate the State's offer" [2 A. Br. 12] is pure speculation, and in any event is legally insufficient. The Novaton test properly requires an affirmative showing on the record that the defendant was fully informed so as to make a voluntary and intelligent decision; only such a showing on the record would enable a reviewing court to apply the Novaton test.[3] The record in this case not only fails to reflect that Melvin was properly informed, but affirmatively shows that Melvin was not properly informed.

The failure to inform Melvin is not alleviated by the statement of charges on the Informations against him, as the State asserts [2 A. Br. 10]. If a defendant is assumed to be fully informed of each individual sentence and the total sentence merely because charges are printed on the Information, then under Novaton the State must show at the very least that the Information reflects

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[3] Florida Rules of Criminal Procedure 3.172(c) requires the trial judge to determine that the defendant understands "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law." Coupled with Novaton, which specifically states that the necessary information was included in the plea colloquy between the trial judge and the defendant, 610 So. 2d at 608, the rule requires that the plea colloquy between the trial judge and the defendant include the necessary information about each individual sentence and the total sentence. It is not enough to speculate that defense counsel may have explained these details to the defendant before the sentencing hearing.

each individual sentence and the total sentence, that the defendant was furnished a copy of the Information, and that the Information enabled the defendant to make a voluntary and intelligent decision about a plea bargain. None of these conditions exists here. The Informations against Melvin do not reflect individual sentences or the total sentence,[4] and the record does not reflect that Melvin was ever furnished a copy of the Informations. Therefore it is impossible to conclude that the mere existence of the Informations in the court file satisfied the notice requirements of Novaton.

The record in this case demonstrates that Melvin was not given the information about each individual sentence and the total sentence necessary for him to make a voluntary and intelligent choice in his plea bargain. The failure to inform Melvin belies the State's assertion that he should be held to his plea bargain because he knowingly accepted a reduced penalty [2 A. Br. 7]. He was not told what the full penalty potential was as to each individual sentence and the total sentence, and thus had no way to evaluate the relative benefits of the "reduced penalty." Therefore, under the Novaton test, his agreement to the plea bargain did not constitute a waiver of his right to object to his convictions and sentences on double jeopardy grounds.

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[4] Although the State in its Answer Brief lists the statutory sections defining the charged offenses and the penalties [2 A. Br. 10], the Informations themselves omit the penalty sections [In. Br. A. 3, 5].

II. Novaton Does Not Require An Additional Showing Of Ineffective Assistance Of Counsel.

Most of the State's Answer Brief is devoted to a discussion of whether or not Melvin's counsel was ineffective for failing to prevent the attachment of double jeopardy to Melvin's convictions and sentences. Although Melvin's counsel may well have been ineffective under these circumstances, as argued in Melvin's pro se briefs,[5] that issue is not dispositive. A failure to make sure the plea colloquy includes the necessary information could constitute ineffective assistance of counsel, but Novaton does not require an independent showing of ineffective assistance of counsel in order to void an unconstitutional conviction and sentence. Under Novaton, if the defendant is not given the information about each individual sentence and the total sentence that is necessary to a voluntary and intelligent plea bargain, then double jeopardy objections are not waived. Melvin was not given the necessary information, and therefore is entitled to contest his unconstitutional convictions and sentences.

CONCLUSION

Melvin did not waive his double jeopardy claim under the Novaton test because he did not voluntarily and intelligently accept each individual sentence and the total sentence; no one, including his appointed trial counsel, gave him the information he

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[5] Although Cleveland and Novaton were decided after sentencing in this case, Melvin's counsel should have been aware of State v. Smith, 547 So. 2d 613, 616 (Fla. 1989), which explains the circumstances under which multiple punishments may not be imposed for separate offenses.

needed to make a knowing waiver of his double jeopardy rights. As a result, Melvin's record includes convictions and sentences that are unconstitutional and impact his release dates and could impact any future scoresheets as prior convictions. The appropriate remedy for the illegality is to vacate the convictions and sentences for count II of each case, and remand for preparation of a new scoresheet and corresponding adjustments by the Department of Corrections.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail to Consuelo Maingot, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, Post Office Box 013241, Miami, FL 33101, this 8th day of September, 1994.

Susan L. Turner
Attorney

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