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IN THE SUPREME COURT OF FLORIDA

KIT GOINS,

Petitioner,

vs.

CASE NO. 95-85,651
(DCA No. 94-864)

THE STATE OF FLORIDA,

Respondent.

/

PETITIONER'S INITIAL BRIEF

ON REVIEW FROM THE DISTRICT COURT
OF APPEAL, FIRST DISTRICT
STATE OF FLORIDA

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IN THE SUPREME COURT OF FLORIDA

KIT GOINS,

Petitioner,

vs.

CASE NO. 95-85,651
(DCA No. 94-864)

THE STATE OF FLORIDA,

Respondent.

_______________________________/

PETITIONER'S INITIAL BRIEF

PRELIMINARY STATEMENT

Petitioner, Kit Goins, Appellant/Defendant below, will be referred to herein by name or as "Petitioner." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s). References to the Appendix will be by the use of the symbol "A", "B", "C" and "D" followed by the appropriate page number(s).

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JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal on the same point of law. Art. V, section (3)(b)(3) Fla. Const.; Fla.R.App.P. 9.030(a)(2)(A)(iv).

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, KIT GOINS, was charged with: Count I, sexual activity with a child; Count II, Lewd and Lascivious act upon a child; and Count III, Solicitation of child to engage in sexual activity (R.3). He pled nolo contendere to Counts I and III and the State nol prossed Count II (R.4).

On December 27, 1993 KIT GOINS entered into a written plea agreement wherein he stipulated to an incarceration of five and one-half (5-1/2) years at the Department of Correction, three (3) years of probation and certain special conditions (R.6)(A.1). Seconds after signing the written plea agreement (R.6)(A.1) KIT GOINS was brought before the Court for his plea hearing (R.47)(B.1). The Public Defender stated that "[w]e have a signed plea agreement in this case" (4.48). He went on to indicate to the Court that " [t]he State's going to recommend an adjudication and five and one-half (5-1/2) years Department of Corrections followed by three (3) years probation." (R.48)(B.2).

During the plea hearing the Court asked if KIT GOINS thought the terms [of the agreement] were in his best interest and he said "Yes." (R.50)(B-4). The Court then said "has anyone promised you anything other than what's on this piece of paper, all promises are right here?" KIT GOINS replied "Yes sir." (R.50).

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Since the State agreed to nol pros Count II, a presentence investigation was ordered (R.51). The presentence investigation was completed on January 14, 1994 (R.38). In the document the probation officer noted that there is a written plea agreement which states that the Defendant would plead nolo contendere to Counts I and III, be adjudicated guilty and be sentenced to five and one-half (5-1/2) years in the Department of Corrections followed by three (3) years probation (R.39). Sentencing was left to the Judge (R.38). Under "Assessment and Recommendation" in the presentence investigation report, the Probation Officer recommended disposition as follows, "[i]t is recommended that the Defendant be sentenced to nine (9) years in the Department of Corrections followed by three (3) years probation . . . " (R.45).

On February 4, 1994 KIT GOINS was sentenced (R.53)(C.1). During the hearing the Public Defender asked the Court for a downward departure (R.57)C.5). He asked "that this Court impose a sentence of two (2) years community control followed by probation, court cost, and appropriate counseling and contact provisos . . ." (R.57)(C.5). In response, the State indicated it had "agreed to dismiss one of those charges and allow him to plead to two of them in accordance with the plea agreement that was set out in [its]

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recommendation letter to the Court, and the State would stand by that agreement which had been negotiated prior to the plea being entered." (R.58)(C.6).

The trial court declined to follow either the States' recommendation or the Defense' request. Instead, the trial court took the Probation Officer's recommendation as set forth in the presentence investigation report. The Court sentenced KIT GOINS to nine (9) years Department of Corrections and three (3) years probation and at no time indicated to KIT GOINS that he had the right to withdraw his plea agreement since the Court was not going to honor it (R.58)(C.6). KIT GOINS is currently serving this sentence.

An appeal was taken to the First District Court on the basis that the trial court did not give Petitioner a clear opportunity to withdraw his plea when the trial court imposed a greater sentence than what had been agreed upon in the negotiated plea agreement.

On appeal the district court affirmed the order of the trial court (D.1). The district court held that a trial court is under no duty to provide a defendant with a clear opportunity to withdraw a plea at sentencing when it decides to impose a sentence greater than that recommended in a plea agreement, and that the defendant should have filed a motion to withdraw his plea prior to filing an appeal.

The First District Court and the Second District Court are in direct conflict regarding whether a trial court has an affirmative duty to offer a criminal defendant the opportunity to withdraw his or her plea when the trial court imposes a different sentence than that presented with the plea agreement. The First District Court holds that there is no affirmative duty and the Second District Court holds that there is an affirmative duty. Thus the Petitioner contends that the decision of the two district courts are expressly and directly in conflict.

SUMMARY OF ARGUMENT

It is true that a plea offer from the state is not binding upon the trial judge. Nevertheless, should the court determine it cannot accept a negotiated plea agreement, it should permit the defendant to withdraw the plea if he so desires. A defendant should be allowed to withdraw his plea agreement when he has conditioned it upon the understanding that his plea is only being entered upon a joint recommendation by the State and defense counsel as to the length of incarceration his sentence should be. When a trial court does not follow the negotiated plea agreement, then it is legally obligated to allow the defendant to withdraw the plea.

Furthermore, should a defendant not take the initiative by objecting to the different sentence at the time of sentencing, then the trial court must affirmatively permit the defendant to withdraw his plea. It is incumbent upon the judge to take action in permitting the defendant the opportunity to withdraw his plea. A defendant should be informed by the court that he could withdraw his plea when it is determined that the sentence is longer than that contemplated when the plea was entered.

The decision of the First District Court held that "when the trial court does not participate in the plea negotiations or promise the defendant that it will impose the recommended sentence, it is under no duty to provide the defendant with a clear opportunity to withdraw his or her plea at sentencing when it decides to impose a sentence greater than that recommended in the plea agreement." As explained below, the decision of the district court conflicts with a decision of the Second District Court in Perry v. State, 510 So.2d 1083 (Fla. 2d DCA 1987) and Rodriquez v. State, 610 So. 2d 476 (Fla. 2d DCA 1992); and, Kiefer v. State, 295 So. 2d 688 (Fla. 2d DCA 1974) holding that where a trial court does not honor a plea agreement, it must affirmatively take action to permit the defendant the opportunity to withdraw his or her plea and that a motion to withdraw is not required.

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ARGUMENT

ISSUE ONE

WHETHER A DEFENDANT WHO WAS REASONABLY LED TO BELIEVE THAT A NEGOTIATED PLEA WAS CONDITIONAL UPON THE TRIAL COURT FOLLOWING THE RECOMMENDATION MUST BE GIVEN THE OPPORTUNITY TO WITHDRAW HIS PLEA WHEN THE TRIAL COURT DECLINES TO FOLLOW THE PLEA AGREEMENT.

In a criminal case, a trial court is not bound to impose a sentence recommended by the defense counsel or the state. Sharpe v. State, 547 So.2d 334 (Fla. 1st DCA 1989). However, where a defendant enters a plea, understanding that it is conditioned upon the court following the recommendation, and the court declines to follow the recommendation, then the defendant must be permitted to withdraw his plea and must be so informed. Id. Should a defendant not be allowed to withdraw his plea, then the voluntariness of the plea becomes suspect, since it was agreed to in reliance upon the offer and acceptance of the plea agreement. Humphries v. State, 563 So. 2d 1124 (Fla. 2d DCA 1990), Demcak v. State, 616 So.2d 519 (Fla. 5th DCA 1993).

In reading the transcript of the plea hearing in the case at bar, it can be determined that the State and the defense counsel had an understanding that Defendant would only be sentenced to an adjudication and five and one-half (5-1/2) years in the Department of Corrections, followed by three (3) years probation (R.48)(B.2).

Defendant conditioned his plea and entered it based upon the written plea agreement, wherein in writing, it states five and one-half (5-1/2) years Department of Correction, with three (3) years probation.

The Defendant entered into this written plea agreement agreeing to certain terms he considered in his best interest. When questioned by the Court, he indicated that he understood the terms and agreed upon them as set forth in the written plea agreement (R.50)(B.4). He also agreed with the Court that all of the promises made to him were contained in the written plea agreement (R.50)(B.4).

Since part of the Defendant's agreement was to enter a no contest plea to Counts I and III, the trial court ordered a presentence investigation. The presentence investigation report noted that there was a written plea agreement with a term of incarceration of five and one-half (5-1/2) years with three (3) years probation, as further evidence of the Defendant understanding his plea to be conditioned on this sentence of incarceration. However, in submitting the report to the Court, the Probation Office recommended nine (9) years incarceration with three (3) years probation (R.45).

On February 14, 1994, the Defendant appeared at his sentencing hearing. After taking testimony from Defendant's wife and sister and hearing from the Defendant, the Court entered its sentence. The trial court declined to follow the written plea agreement and sentenced Defendant to nine (9) years in the Department of Corrections and three (3) years probation (R.58)(C.6).

The trial court in entering this sentence declined to take the recommendation of the State, which stood by the written plea agreement that had been negotiated prior to the plea day, or the Public Defender's request for a lesser sentence (R.57)(C.5). The trial court was put on notice at the sentencing hearing that there was a negotiated plea agreement and that there had originally been three charges (R.57)(C.5). The State had allowed him to plead to two of the charges in accordance with the written plea agreement, which Defendant had signed. At no time in the sentencing hearing did the trial court question the Defendant as to his understanding or awareness that when he entered his plea and negotiated a sentence of five and one-half (5-1/2) years, that the trial court was not bound by counsels' recommendation, as set forth in the written plea agreement.

In a similar case, Sharpe v. State, 547 So.2d 334 (Fla. 1st DCA 1989), the trial court declined to follow the joint recommendation of the State and defense counsel regarding the

sentence to be imposed. At the sentencing proceeding, the Defendant moved to withdraw his plea, but the trial court denied the motion. The First District held that "if a defendant enters a plea with the understanding that the recommendation will be followed and the court declines to follow it, the defendant must be permitted to withdraw the plea." Id. at 335. Furthermore, a trial court should determine whether the defendant was aware, prior to the entry of the plea, that it was not bound to abide by counsels' sentencing recommendation. Id. If a trial court determines that a defendant was reasonably led to believe that the plea was conditional upon the trial court following the recommendation, then "the court must either allow defendant to withdraw the plea or sentence defendant according to the recommendation." Id. In the case at bar, it is clear from the transcript to the plea hearing and the sentencing proceedings, that Defendant was never informed by either his counsel or the Court that he had the right to withdraw his plea, when the Court declined to follow the plea agreement. Therefore, just as in Sharp, the Petitioner should be given the opportunity to withdraw his plea.

The case at bar does not have the same factual circumstances as found in State v. Adams, 342 So.2d 818 (Fla. 1977). In Adams, the court specifically asked the defendant the "whether he understood that the court was not bound by the State's

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recommendation as to any sentence" Id. and the defendant indicated that he knew that the judge could sentence him to a higher sentence. Id. at 820. In this case, the court never asked Petitioner this question and therefore, the facts of Adams are inapplicable.

The opinion in Oglesby v. State, 584 So. 2d 93 (Fla. 1st DCA 1991) cites Adams, for the proposition that if a plea is not conditioned upon a specific sentence, then it is not binding and there is no need for the court to give the defendant an opportunity to withdraw. Id. at 94. As explained above, the facts of Adams are different than the case at bar and therefore, Oglesby does not apply. The plea recommendation in Oglesby was centered on "guideline sentence" not a specific sentence, as was contemplated in the case at bar.

The case at bar is similar to in Goldberg v. State, 536 So.2d 364 (Fla. 2d DCA 1988). In Goldberg, the defendant entered into a negotiated plea agreement, which was not honored by the court. Id. The Second District Court reversed and remanded the case, based upon the holding that "when a negotiated plea agreement cannot be honored, the defendant may withdraw his plea and the trial court has an affirmative duty to so advise the defendant." Id. In that case, as in the case at bar, the defendant had entered into a negotiated plea agreement prior to sentencing and was not given the

opportunity to withdraw his plea when the trial court wanted to impose a greater sentence than agreed to in the negotiated written plea agreement.

The agreement Petitioner entered into is the one stated in open court by the Public Defender (R.49)(B.3). The agreement was signed just seconds prior to the initial plea hearing. (R.49)(B.3). It is reasonable to assume that Petitioner signed the agreement conditioned upon the understanding that he would only receive five and one-half
(5-1/2) years, when his own attorney stood up in court seconds after the agreement was signed and stated that that was the written terms of the plea agreement.

At no time in the hearing, or in the record, was Petitioner asked if he knew or had any knowledge as to an understanding that the court could impose a sentence other than that which the state recommended. In fact, the testimony shows just the opposite. Therefore, the record and the facts indicated that the Petitioner was of the understanding that the negotiated written terms of the agreement were conditioned upon acceptance of the trial court.

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ISSUE TWO

WHETHER THE TRIAL COURT HAD AN AFFIRMATIVE DUTY TO PROVIDE THE DEFENDANT WITH A CLEAR OPPORTUNITY TO WITHDRAW HIS PLEA WHEN THE TRIAL COURT DECLINED TO FOLLOW THE RECOMMENDED NEGOTIATED PLEA AGREEMENT.

In the case at bar, the trial court failed to affirmatively give the Defendant the right to withdraw his plea. This failure to question the Defendant of his awareness and understanding of the sentence recommendation and the failure to affirmatively give the Defendant the right to withdraw his plea, undercut Defendant's rights and brought into question the voluntariness of his plea. Based upon Florida law, Defendant should be granted the right to withdraw his plea where the trial court has not followed the negotiated plea agreement.

The Second District Court is in direct conflict with the First District Court. In Goldberg v State, 536 So.2d 354 (Fla. 2d DCA 1988) the court stated "When a negotiated plea agreement cannot be honored, the defendant may withdraw his plea and the trial court has an affirmative duty to so advise the defendant." Id. See also Perry v. State, 510 So.2d 1083 (Fla. 2d DCA 1987); Rodriguez v. State, 610 So. 2d 476 (Fla. 2d DCA 1992); and Kiefer v. State, 295 So. 2d 688 (Fla. 2d DCA 1974), wherein the Second District Court has held that a trial court has an affirmative duty to present a

defendant with an opportunity to withdraw his plea, when it decides to impose a different sentence and no motion to withdraw is required prior to an appeal.

The Second District Court has found that the opportunity must be presented affirmatively to a defendant to withdraw his plea by the trial court. It is not necessary for a defendant to file or make a motion to withdraw a plea, when the trial court has not affirmatively taken action to permit the defendant the opportunity to withdraw his plea. Perry v. State, 510 So.2d 1083 (Fla. 2d DCA 1987).

In Perry, supra, at the sentencing hearing, the State and the Public Defender agreed to two years incarceration in exchange for his plea of nolo contendere. The trial court accepted the Defendant's plea and ordered a presentence investigation deferring sentencing. The plea was not conditioned upon the presentence investigation. Id. At the second hearing the Defendant was sentenced to a longer incarceration period than had been agreed upon. The Defendant did not object to the sentence in the trial court and did not file a motion to withdraw his plea, instead raising it for the first time in the Appellate Court. Id. The Second District Court reversed the judgment and sentence and

remanded for further proceedings, at which the Defendant had to be given the opportunity to withdraw his plea. Id., see also Rodriguez v. State, 610 So.2d 476 (Fla. 2d DCA 1992).

In Rodriguez the Second District Court held

> On appeal, Mr. Rodriguez correctly contends the trial court erred in sentencing him to a greater term than agreed upon when he tendered his plea. Because the trial court failed to affirmatively permit Mr. Rodriguez to withdraw his plea after it decided to depart from the guidelines rather than sentence him to the agreed-upon 22 years' imprisonment, we must reverse his judgments and sentences.

Rodriguez, supra at 477. In Rodriguez, the defendant did not object to the departure sentence and did not file a motion to withdraw his plea in the trial court; nevertheless, the district court made the above ruling. This is exactly the situation of the defendant in the case at bar.

In Kiefer, the Second District Court held

> that where the trial court finds that it cannot conscientiously honor a plea bargain it must affirmatively take action to permit the defendant the opportunity to withdraw his plea.

Kiefer, 295 So.2d 688, 689 (Fla. 2d DCA 1974) (emphasis added). As in the other case, the defendant nor his counsel in Keifer did not object to the sentence at the time of sentencing.

Other cases in the Second District Court have upheld this same ruling. In Gumbiner v. State, 429 So. 2d 823 (Fla. 2d DCA 1983) the defendant pled no contest, based upon a bargain with the state. The lower court did not follow the agreement and did not give the defendant an opportunity to withdraw his plea. It appeared that the lower court did not follow the agreement because of the results of a presentence investigation. The district court held that the lower court must grant the defendant the opportunity to withdraw his plea and, is in fact, under a duty to do so. Id. at 828.

In Freeman v. State, 376 So. 2d 294 (Fla. 2d DCA 1979) the defendant, pursuant to a plea bargain, pled nolo contendere. The lower court did not impose the agreed upon sentence and the district court held that the defendant "should have had the opportunity to withdraw his plea before sentencing." Id.

The defendant in Dunkel v. State, 432 So.2d 201 (Fla. 2d DCA 1983) entered a plea of guilty, pursuant to a plea bargain. He later changed the plea, based upon statements by the trial judge that he could anticipate a maximum sentence of one year. At sentencing, another judge sentenced him for four years. The district court held that "when the terms of an earlier plea bargain are not honored, defendant should be given the opportunity to withdraw his plea, and the trial judge has an affirmative duty to so advise the defendant." Id. (emphasis added).

As in the above cases, the Defendant in the case at bar had an agreed upon sentence, and yet, was sentenced to a longer sentence than was recommended by the State and the defense counsel. Defendant did not object at the sentence proceedings and was never told by the trial court that he had a right to withdraw his plea. This lack of notification by his counsel and the Court has denied Defendant his right to withdraw his conditional plea. See also Parker v. State, 616 So.2d 1121 (Fla. 1st DCA 1993).

The First District Court has ruled in the following cases on this issue. In Little v. State, 492 So.2d 807 (Fla. 1st DCA 1986) and State v. Adams, 342 So.2d 818 (Fla. 1977) the court stood for the proposition that the lower court did not have a duty to affirmatively give the Petitioner an opportunity to withdraw his negotiated plea agreement when the court imposed a higher sentence.

In Little, the defendant pled guilty in hopes of receiving a probationary sentence. There was no negotiated written plea agreement, and at the sentencing hearing, the court questioned the defendant as to whether he knew that the court could impose the maximum sentence. Based on these factors, the First District Court found that there was no duty to provide a defendant with a clear opportunity to withdraw his plea. The case at bar differs from

Little in that here the Petitioner was never questioned by the court as to whether he knew that the court could impose a higher sentence than the one negotiated and agreed upon in the written plea agreement.

Furthermore, in the case at bar, there is testimony that indicates there was a definite negotiated plea agreement. (R.58)(C.6). The State Attorney at the sentencing hearing himself stated that "the State would stand by that agreement which we had negotiated prior to the plea being entered." (R. 58)(C.6)(emphasis added).

In its opinion on the case at bar, (D.1), the First District Court relies on Lepper v. State, 451 So.2d 1020 (Fla. 1st DCA 1984). In Lepper the First District Court held that a trial court was under no duty to provide the defendant a clear opportunity to withdraw his plea at sentencing. Lepper v. State, 451 So. 2d 1020, 1021 (Fla. 1st DCA 1984) and see Perkins v. State, 647 So. 2d 202 (Fla 1st DCA 1994) (defendant must file a motion to withdraw prior to seeking an appeal); Robinson v. State, 373 So.2d 898 (Fla. 1979) (an appeal should not be substituted for a motion to withdraw). However, in Lepper, when the Defendant entered his plea, "the trial judge said he wanted a P.S.I. prior to sentencing and said he would not be bound by the plea agreement." Id. at 1021. Clearly, from

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the record in the case at bar, the Petitioner was never notified by the court that it did not have to accept the written negotiated plea agreement. This being the case, the Appellant/Defendant must now be given the opportunity to withdraw his plea.

The First District Court has been divided on this issue as seen in the dissent in Lepper v. State, 451 so.2d 1020 at 1022. The dissent states that

> "under the Florida Rules of Criminal Procedure 3.171(d) and 3.172(g) is that they place first an affirmative duty on the trial judge to offer the defendant the opportunity to withdraw his plea. It is not enough for the trial court to represent, as in the present case, that it may not be bound by the plea agreement. The duty abides with the trial judge to extend the offer to the defendant to withdraw, otherwise it cannot be said that the plea was voluntarily obtained."

Id. The dissent cites State ex re. Wilhoit v. Wells, 356 So.2d 817 (Fla. 1st DCA 1978), cert. denied, 359 So.2d 1222 (Fla. 1978) for the proposition that "regardless of whether a trial judge disavows any intention to be bound by a plea agreement, he must nevertheless grant the defendant a clear opportunity to withdraw his plea, if the judge determines he cannot later accept the recommended disposition." Id.

Based upon the facts that Defendant must be affirmatively given the opportunity to withdraw his plea when a trial court imposes a longer sentence than agreed to in the plea agreement, Defendant should now be given this opportunity.

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CONCLUSION

For the reasons set forth, Petitioner respectfully requests that the judgment of the District Court of Appeal of the First District of Florida be reversed, and that the conviction and sentence of the Circuit Court in and for the First Judicial Circuit, Okaloosa County, Florida be set aside and Petitioner be given the opportunity to withdraw his plea agreement, or alternatively, the Court in the Circuit Court in and for the First Judicial Circuit, Okaloosa County, Florida, should be ordered to sentence the Defendant to a period of incarceration in the Department of Corrections as contemplated by him in his written plea agreement.

Respectfully Submitted,

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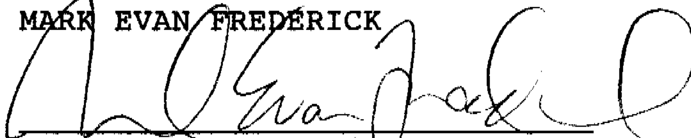

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Initial Brief of Appellant has been furnished to ROBERT A. BUTTERWORTH, Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32399-1050, by Regular U. S. Mail, this 14th day of August, 1994.

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