FILED
SID J. WHITE
MAY 12 1995
CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

KIT GOINS,

Petitioner,

vs. CASE NO. 95-85,651

THE STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S JURISDICTIONAL BRIEF

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

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STATEMENT OF THE CASE AND OF THE FACTS

On February 4, 1994 PETITIONER was sentenced for the following charges; 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. PETITIONER pled nolo contendere to Counts I and III and the State nol prossed Count II.

During the sentencing hearing the Public Defender asked the Trial Court for a downward departure. 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] recommendation letter to the Court, and the State would stand by that agreement which had been negotiated prior to the plea being entered."

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 and sentenced PETITIONER to nine (9) years Department of Corrections and three (3) years probation and at no time indicated to

PETITIONER that he had the right to withdraw his plea agreement since the Court was not going to honor it. PETITIONER is currently serving this sentence.

An appeal was filed to the First District Court of Appeal to review the trial court sentencing order and on April 13, 1995, the district court affirmed the order of the trial court. 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.

Petitioner's notice to invoke the discretionary jurisdiction of this court was timely filed on May 4, 1995.

SUMMARY OF ARGUMENT

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.

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).

ARGUMENT

The decision of the First District Court of Appeal in this case expressly and directly conflicts with the decision of the Second District Court in Perry v. State, 510 So. 2d 1083 (Fla. 2d DCA 1987; Rodriquez v. State, 610 So. 2d 476 (Fla. 2d DCA 1992); and, Kiefer v. State, 295 So. 2d 688 (Fla. 2d DCA 1974).

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.

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). The First District Court based its holding in the case at bar on its prior holding in Lepper. Thus the First District Court has expressly held that a trial court has no affirmative duty to give a defendant an opportunity to withdraw his or her plea when it decides to impose a different sentence.

The First District Court's decision is in direct conflict with the decision in Perry v. State, 510 So.2d 1083 (Fla. 2d DCA 1987) and 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.

In Perry the Second District Court held

> Although the appellant did not file a motion to withdraw his plea (citations omitted) we nevertheless are required to reverse his judgment and sentence and remand for further proceedings at which he must be given the opportunity to withdraw his plea.

Perry, supra at 1084.

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 Kiefer, the Second District Court held

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

Kiefer, supra at 689.

The decision of the First District Court in this case is in conflict with the decisions of the Second District Court to the extent that the First District Court holds that there is no affirmative duty on the trial court to give a defendant the opportunity to withdraw his plea when a different sentenced is imposed, and the Second District Court holds that there is an affirmative duty and no motion to withdraw has to be filed prior to an appeal. This Court should affirm the Second District Court's holdings by accepting discretionary review and quashing the contrary decision of the district court below.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and the Court should exercise that jurisdiction to consider the merits of the petitioner's argument.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Jurisdictional Brief of Petitioner has been furnished to ROBERT A. BUTTERWORTH, Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32399-1050, by Regular U. S. Mail, this 9th day of May, 1995.

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APPENDIX

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

KIT GOINS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 94-864

Opinion filed April 13, 1995.

An appeal from the Circuit Court for Okaloosa County.
Jack R. Heflin, Judge.

Mark Evan Frederick, P.A., Destin, for Appellant.

Robert A. Butterworth, Attorney General, Douglas Gurnic, Assistant Attorney General, Tallahassee, for Appellee.

ERVIN, J.

Because appellant failed to move to withdraw his plea when the trial court imposed a sentence greater than that recommended in the plea agreement, we affirm appellant's convictions and sentences. 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. Lepper v. State, 451 So. 2d 1020, 1021 (Fla. 1st DCA 1984). And see Perkins v. State, 647 So. 2d 202 (Fla. 1st DCA) (in order for court to properly consider voluntariness of plea on direct appeal, trial court must have been asked to resolve the issue in a prior motion to withdraw), review denied, 648 So. 2d 723 (Fla. 1994); Robinson v. State, 373 So. 2d 898 (Fla. 1979) (appeal from plea should never be a substitute for motion to withdraw plea). In so ruling, we note our apparent conflict with Perry v. State, 510 So. 2d 1083 (Fla. 2d DCA 1987) (where trial court cannot honor plea agreement, it must affirmatively take action to permit the defendant the opportunity to withdraw the plea -- no motion to withdraw required). And see Rodriguez v. State, 610 So. 2d 476 (Fla. 2d DCA 1992); Kiefer v. State, 295 So. 2d 688 (Fla. 2d DCA 1974).

We affirm, however, without prejudice to appellant raising the issue in a motion for postconviction relief. See Eggers v. State, 624 So. 2d 336 (Fla. 1st DCA 1993).

AFFIRMED.

MINER and WOLF, JJ., CONCUR.