IN THE SUPREME COURT OF FLORIDA

CASE NO. 86-052

4TH DCA CASE NO. 95-1019

STATE OF FLORIDA

Petitioner,

vs.

PAUL LEROUX,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Respondent is in agreement with the preliminary statement of the petitioner in this case.

STATEMENT OF THE FACTS

The Respondent is in agreement with the statement of facts given by the petitioner in this case. and would supplement that statement with the following information.

SUMMARY OF ARGUMENT

A defendant's negative response during a plea colloquy to the trial court's inquiry as to whether the defendant was promised or assured anything to influence his plea absent the trial court's failure to ascertain whether or not any promises were made to a defendant concerning the sentence apart from the discussion during the plea colloquy is not sufficient to conclusively refute the defendant's allegations in his motion for post conviction relief that his trial counsel indiced his plea by making false promises of an early release.

ISSUE

A DEFENDANT'S NEGATIVE RESPONSE DURING A PLEA COLLOQUY TO THE TRIAL COURT'S INQUIRY AS TO WEATHER THE DEFENDANT WAS PROMISED OR ASSURED ANYTHING TO INFLUENCE HIS PLEA ABSENT THE TRIAL COURT'S FAILURE TO ASCERTAIN WEATHER OR NOT ANY PROMISES WERE MADE TO THE A DEFENDANT CONCERNING THE SENTENCE APART FROM THE DISCUSSION DURING THE PLEA COLLOQUY IS NOT SUFFICIENT TO CONCLUSIVELY REFUTE THE DEFENDANT'S ALLEGATIONS IN HIS MOTION FOR POST CONVICTION RELIEF THAT HIS TRIAL COUNSEL INDUCED HIS PLEA BY MAKING FALSE PROMISES OF AN EARLY RELEASE.

In Florida, there is a history of criticism as it relates to the practice of requiring a defendant, upon a negotiated guilty plea, to give a negative reply to the court's inquiry concerning any " promise" made a defendant in order to avoid pitfalls and criticisms by having the negotiations made of record and permitting some control of them. See, Commentary to Standard 3.1 ABA Standards relating to Pleas of Guilty contained in In re Florida Rules of Criminal Procedure, 272 So.2d 65 (Fla. 1972).

In a number of district court opinions, the trial courts have been encouraged to question the defendant specifically about promises concerning eligibility for any form of early release authorized by law and the actual amount of time to be served under the sentence to be imposed, such additional inquiry would hopefully result in facilitating summary disposition of collateral attacks on sentences at both the trial and the appellate levels. Steele v. State, 645 So. 2d 59 (Fla. 4th DCA 1994); Carmichael v. State, 631 So. 2d 346 (Fla. 2d DCA 1994).

Because misinformation about gain time affects the length of a defendant's incarceration, the record before us should conclusively refute any possible interpretations of what a defendant meant or understood when responding to a general "promises" question before we affirm a summary denial. Leroux v. State, 656 So.2d 558 (Fla. 4th DCA 1994).

This Court has held that when pleas are based on a failure of communication or misunderstanding, the establishment of of prejudice by an honest misunderstanding contaminates the voluntariness of the pleas. Surace v. State, 351 So.2d 702 (Fla. 1977). See also, Costello v. State, 260 So.2d 198 (Fla. 1972).

Rule of Criminal Procedure 3.170(j), requiring interpretation, reads as follows:

> **Responsibility of Court on Pleas.** No plea of guilty or nolo contendere shall be accepted by a court without first determining, in open court, with means of recording the proceedings stenographically or by mechanical means, that the circumstances surrounding the plea reflect a full understanding of the significance of the plea and its voluntariness, and that there is a factual basis for the plea of guilty.
>
> A complete record of the proceedings at which a defendant pleads shall be kept by the court.

This rule is patterned in part after Federal Rule 11 and Standard 1.6, American Bar Association Standards of Criminal Justice. It sets out the guidelines necessary to meet the requirements expressed in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); Brady v. United States, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970); and McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969).

The taking of a guilty plea is one of the most important tasks of a trial judge. As many as ninety percent of the criminal felony cases in a particular jurisdiction may be disposed of by a guilty plea.

Surprisingly, fifty to sixty percent of the post-conviction proceedings heard in the federal and state courts come from defendants who have entered a plea of guilty. This illustrates the importance of a proper and thorough inquiry by the court at the time of the guilty plea in order to insulate the plea from unnecessary appellate and post-conviction proceedings.

Our Criminal Rule 3.170 principally sets forth necessary procedural steps to comply with the constitutional mandate of Boykin v. Alabama, supra. The defendant must be present before the court, and the proceedings must be recorded. The following are the three essential requirements for taking a guilty plea: (1) the plea must be voluntary; (2) the defendant must understand the nature of the charge and the consequences of his plea; and (3) there must be a factual basis for the plea. The risk that a plea which is obtained without resort to threats or other improper inducements and which is entered with full understanding of the possible consequences might nonetheless be inaccurate remains a matter of concern. Williams v. State, 316 So.2d 267 (Fla. 1975).

With or without a specific plea agreement, it can be expected that the "flat-time" sentence ultimately imposed by the court will be further reduced to some extent by gain time. Most defense attorneys, and perhaps a substantial percentage of their clients, presumably know this. However, as Tarpley and similar cases demonstrate, an attorney who promises a certain favorable result particularly one who does so to convince the client that a "maximum" sentence is shorter than it appears - operates at the risk he or she later will be accused of ineffectiveness. Simmons v. State, 611 So. 2d 1250, 1253 (Fla. 2d DCA 1992) (footnote omitted).

In Zduniak v. State, 620 So.2d 1083 (Fla. 2d DCA 1993), the district court of appeal reviewed a trial court's order in which the order refered to a written plea agreement which that court found sufficient to refute this portion of Zduniak's motion. Because the order denying post conviction relief did not indicate whether additional promises were made to the defendant apart from those specifically mentioned in court, the appellate court held that because only the maximum length of sentence was discussed at that time, and not the effect of gain time or other forms of early release, the plea was held invalid.

In Thompson v. State, 351 So.2d 701 (Fla.1977), cert. denied 435 U.S. 998, 98 S. Ct. 1653, 56 L. Ed.2d 88 (1978), this Court held that an allegation that a misunderstanding contaminated the voluntariness of the plea is best determined by the trial court after consideration of testimony from appellant and his trial attorney. See also, Costello v. State, 260 So.2d 198 (Fla.1972); Richmond v. State, 375 So 2d 1132 (Fla. 2d DCA 1979). In this case, the state would take the position that the defendant is not entitled to such a hearing.

This case is directly on point with this Court's ruling in Ramsey v. State, 408 So.2d 675 (Fla. 1981), in which an appeal from an order denying a motion to vacate judgment and sentence filed pursuant to Florida Rule of Criminal Procedure 3.850, was considered and vacated by this Court for an evidentiary hearing after the defendant informed the trial court that he was not made any promises

In Ramsey, the defendant changed his plea when his counsel informed the trial court that pursuant to negotiations with the prosecution the defendant would plead no contest to the charge of aggravated assault and would be sentenced to imprisonment for three years.

Like the respondent in this instant case, at the hearing on the change of plea, the defendant waived a pre-sentence investigation and the trial court sentenced him to imprisonment for three years. The trial judge recited on three separate occasions that appellant was being sentenced to a mandatory minimum of three years imprisonment. The following took place on one of the occasions:

> **THE COURT**: Have any promises been made to you other than the State will nolle prosequi Count II and that you will sentenced [sic] on your plea to be adjudicated guilty of aggravated assault and sentenced to three year's prison and that is a mandatory minimum sentence which means you have to serve the three calendar years before you are eligible for parole? Do you understand that?
>
> **MR. RAMSEY**: Yes.

(Emphasis added).

Within seven weeks of the sentencing, the defendant informed the trial court by letter that he learned upon imprisonment that he would not be eligible for parole, work release or gain time for three years although he had been told by his attorney that in return for a plea of no contest he would receive a "regular" sentence of three years. Like the respondent, defendant also obtained private counsel who filed the motion for post-conviction relief after he learned that he was misinformed by his trial counsel.

In his motion for post-conviction relief, Ramsey asserted that his attorney advised him that the mandatory minimum provisions of his sentence did not require him to serve three years before being eligible for parole and that had he known at the change of plea what he had since learned, he would not have changed his plea.

In Ramsey, this Court held that the test to be applied in such circumstances is recited in Thompson v. State, 351 So.2d 701 (Fla. 1977), cert. denied 435 U.S. 998, 98 S.Ct. 1653, 56 L.Ed.2d 88 (1978). After applying the test, this Court also held the defendant has demonstrated that he was prejudiced by an honest misunderstanding which contaminated the voluntariness of the pleas under the standards set forth in Costello v. State, 260 So.2d 198 (Fla. 1972) and Richmond v. State, 375 So.2d 1132 (Fla. 2d DCA 1979).

As done in Leruox, this court ordered that an evidentiary hearing be held to determine whether or not the defendant can meet the test regarding the matters he raised in his motion.

Since the decisions of Pierce v. State, 318 So.2d 501 (Fla. 1st DCA 1975), and Garcia v. State, 228 So.2d 300 (Fla. 3d DCA 1969), in an effort to facilitate summary dispositions of these type of cases at the trial and appellate levels, the appellate courts have encouraged the trial courts to have the defendant affirm under oath that no one, especially the defendant's counsel, has made any promises concerning eligibility for any form of early release authorized by law and the actual amount of time to be served under the sentence to be imposed. See, Leroux; Steele v. State, 645 So.2d at 59 (Fla. 4th DCA 1994); and Carmichael v. State, 631 So.2d 346 (Fla. 2d DCA 1994).

Contrary to the argument of the State, the decisions of Pierce v. State, 318 So.2d 501 (Fla. 1st DCA 1975), and Garcia v. State, 228 So.2d 300 (Fla. 3d DCA 1969), do not conflict

with any prior rulings of the district court's of appeal since decisions of our courts are now in agreement and demonstrate that the issue of misadvice of counsel as it relates to the length of sentence or eligibility for gain time or early release forms a basis for post-conviction relief if not refuted by the record. See, Perez v. State, 605 So.2d 163 (Fla. 2d DCA 1992) (plea colloquy does not refute claim counsel misrepresented defendant's eligibility for parole); Young v. State, 604 So.2d 925 (Fla. 2d DCA 1992) (claim counsel misadvised defendant as to sentence and consequences of habitual offender status on gain time sufficient to require attachment of records refuting claim);Eady v. State, 604 So.2d 559 (Fla. 1st DCA 1992) (claim counsel misinformed defendant regarding eligibility for provisional gain time credits and early release sufficient to cast doubt on voluntary nature of plea); Bell v. State, 602 So.2d 693 (Fla. 2d DCA 1992) (record did not refute claim that counsel erroneously promised defendant he would be eligible for certain gain time); Middleton v. State, 603 So.2d 46 (Fla. 1st DCA 1992) (written plea did not refute claim that counsel misadvised defendant as to eligibility for incentive gain time which was only reason defendant entered plea); Small v. State, 600 So.2d 518 (Fla. 5th DCA 1992) (claim in direct appeal that public defender misrepresented sentencing guidelines range which induced defendant to plea sufficient to entitle defendant to withdraw plea); Cherry v. State, 590 So.2d 494 (Fla. 1st DCA 1991) (error to deny claim that plea was coerced without understanding of habitual offender consequences based on plea agreement and transcript not attached); Colon v. State, 586 So.2d 1305 (Fla. 2d DCA 1991) (claim that plea was entered due to counsel's advice that defendant would only serve two years sufficient to require further proceedings); Corbitt v. State, 584 So.2d 231 (Fla. 5th DCA 1991) (claim that decision to plead to habitual offender sentence was based on erroneous advice of counsel as to gain time eligibility not refuted by plea transcript so evidentiary hearing required).

The Petitioner's reliance upon Pierce v. State, is misplaced. The Respondent's case is indistinguishable to the facts of Eady v. State, 622 So.2d 61 (Fla. 1st DCA 1993). In Eady v. State, on review of an order denying a motion for post-conviction relief, the First District Court of Appeal held:

> Eady pled guilty to second-degree murder in return for a 35-year sentence. He thereafter filed a 3.850 motion alleging that he had entered his plea based on assurances by trial counsel that he would be eligible for provisional credits, and thus would serve no more than 5 years. Department of Corrections personnel later informed Eady that, due to the nature of his offense, he was not eligible for provisional credits. Eady alleged that, absent counsel's affirmative misinformation, he would not have entered the plea, but would have insisted on a trial. The trial court denied the motion, finding it refuted by the signed plea form. The form indicated that Eady both agreed to a sentence which did not specify provisional credits, and stated that his plea had not been coerced. Eady appealed. This court held that the allegations that counsel erroneously advised Eady that he would be eligible for provisional credits, and affirmatively misrepresented the actual length of time he would be required to serve, were sufficient to undercut the voluntary character of the plea. Eady, 604 So.2d at 561. The court further found that the plea form did not conclusively refute the allegations, and remanded for further proceedings.
>
> The trial court reconsidered the motion on remand, and entered the instant order on January 20, 1993. The court again denied the motion, this time finding it refuted by the transcript of the plea proceeding, at which Eady acknowledged that his attorney had explained the plea to him, that he had sufficient time to consider it, and desired to plead guilty. The court also cited Simmons v. State, 611 So.2d 1250 (Fla. 2d DCA 1992) (where the plea does not specify a sentence, and the defendant does not reveal at the plea proceeding any sentencing expectations he

> may have, he is generally estopped from later arguing ineffective assistance of counsel regarding those expectations).
>
> Careful examination of the transcript attached by the trial court to the order on remand convinces us that there is nothing therein refuting Eady's allegation that trial counsel affirmatively misinformed him that he would be eligible for provisional credits, and thus for early release. The transcript does not show that the trial court ascertained, prior to accepting the plea, that Eady had been given no further promises or had no further expectations regarding his sentence. We therefore reverse, and remand for an evidentiary hearing, at which evidence can be received as to trial counsel's representations regarding Eady's possible sentence.

(Emphasis added).

The recent decision of the First District Court of Appeal in Eady, which was decided in 1993 demonstrates that the decision of Leroux v. State, does not conflict with the decision of the First District Court of Appeal rendered in Pierce in 1975.

The State's reliance upon the decision of the Third District Court of Appeal in Garcia v. State is also misplaced.

In Griffin v. State, 644 So.2d 351 (Fla. 3d DCA 1994), 26 years after the ruling of Garcia, citing Ortiz v. State, 622 So.2d 131 (Fla. 3d DCA 1993); Eady v. State, 604 So.2d 559 (Fla. 1st DCA 1992); Carter v. State, 599 So.2d 773 (Fla. 2d DCA 1992); McCray v. State, 578 So.2d 29 (Fla. 2d DCA 1991); and Tarpley v. State, 566 So.2d 914 (Fla. 2d DCA 1990), the Third District Court of Appeal reviewed an order summarily denial a motion for post-conviction relief, the appellate court specifically addressed the identical plea colloquy circumstances that occurred in the Respondent's case and held:

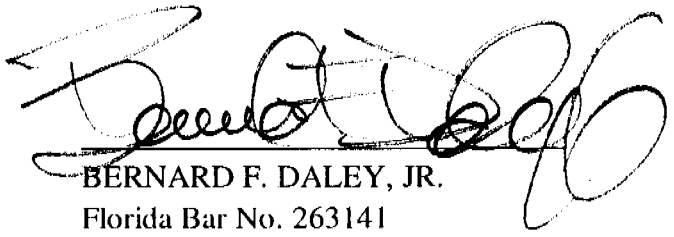
> Neither the plea colloquy nor any other portion of the record refutes the appellant's claim that his nolo plea to two counts of battery on a law enforcement officer was induced by his counsel's erroneous advice that he "would be eligible for controlled release credits" on the agreed sentence. Griffin was therefore entitled to an evidentiary hearing on his 3.850 motion to set the plea aside.

(Citations omitted, Emphasis added).

In the instant case, the Respondent's plea colloquy did not refute his allegations that his trial counsel promised him that he would receive an early release as a result of gain time credits he would receive.

CONCLUSION

WHEREFORE, Respondent respectfully moves this Honorable Court to affirm the ruling of the Fourth District Court of Appeal in this case.



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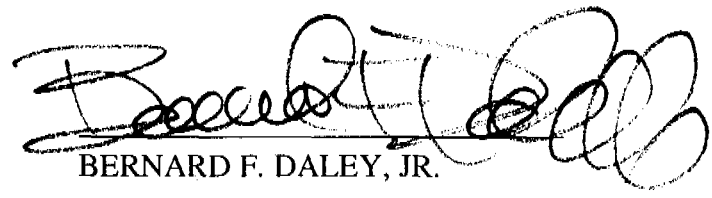
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of the Respondent has been furnished by U.S. Mail to: Office of the Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299, this 22nd day of December, 1995.



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