ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 93, 648

LAZARO GONZALEZ,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL,
THIRD DISTRICT

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF FONT AND TYPE SIZE

The Respondent has utilized 12 point Courier New typeface in preparing this brief.

INTRODUCTION

This case is an appeal from the Third District Court of Appeal (hereafter, "Third DCA"). In its opinion, which is attached to the Petitioner's brief, the Third DCA affirmed the trial court's order denying the Petitioner's motion for post-conviction relief.

The Petitioner, LAZARO GONZALEZ, was the Defendant in the trial court and the Appellant in the Third DCA. The Respondent, THE STATE OF FLORIDA, was the prosecution in the trial court and the Appellee in the Third DCA. In this brief, the parties will be referred to as they stood in the trial court. The symbol "SR" will refer to the supplemental record on appeal filed in the Third DCA by the State.

STATEMENT OF THE CASE AND FACTS

On August 20, 1996, the Defendant was charged by information with trafficking in cocaine and possession of cocaine, for events which occurred on July 30, 1996. (SR, Ex. A). The Defendant subsequently entered into a written plea agreement with the State, whereby the Defendant agreed to provide information to the State to aid in the prosecution of other drug related offenses, in exchange for a guidelines sentence and the waiver of the statutory minimum mandatory sentence of fifteen (15) years. (SR, Ex. B). Part of the agreement was that should the Defendant fail to return for sentencing on the court appointed date, the court would then sentence him to thirty (30) years with a fifteen (15) year mandatory minimum provision. (SR, Ex. B, page 2).

The Defendant appeared for the plea hearing on August 28, 1996. (SR, Ex. C). At that time, the court reviewed each paragraph of the plea agreement with the Defendant. The court informed the Defendant that the maximum statutory penalty that it could impose was life imprisonment with a minimum mandatory provision of fifteen (15) years. (SR, Ex. C, page 7). The court also informed the Defendant that pursuant to the terms of the agreement, he would receive a guidelines sentence of between forty-nine (49) months and eighty-three (83) months if he provided

information leading to a prosecutable case for the State. (SR, Ex. C, page 8). At that time, the court also ascertained that the Defendant understood that his failure to appear for sentencing would result in a sentence of thirty (30) years with a mandatory minimum of fifteen (15) years. (SR, Ex. C, pages 9-10). The State also ascertained that the Defendant understood the consequences of his failure to appear for sentencing. (SR, Ex. C, pages 12-13). Also at that hearing, defense counsel stipulated that there was a factual basis for the plea, and the court found that, based upon the stipulations and the arrest affidavit, there was a factual basis for the plea. (SR, Ex. C, page 14). Thereafter, the Defendant failed to appear for sentencing on October 30, 1996. (SR, Ex. D). On that date, the court entered adjudication and imposed sentence in accordance with the plea agreement. (SR, Ex. E).

On September 11, 1997, the Defendant filed a motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 seeking to withdraw his plea. (SR, Ex. F). As the ground in support of his motion, the Defendant claimed that his plea was coerced based on ineffective assistance of counsel. The Defendant claimed that his trial counsel's performance was deficient because the court misinformed him that the maximum possible penalty for the convicted

offense was life imprisonment and counsel failed to object when the trial court stated this. The Defendant claimed that the statutory maximum for the convicted offense, trafficking in more than 400 grams of cocaine, is thirty (30) years imprisonment with a fifteen (15) year mandatory minimum provision, and that there is a reasonable probability that he would not have entered the plea had he known this. However, the Defendant did not allege that if he had chosen to go to trial, he would have been acquitted or he would have received a reduced sentence.

The trial court denied this motion on December 22, 1997. (SR, Ex. G). The Defendant appealed, and on January 28, 1998, the Third DCA per curiam affirmed the decision of the trial court. (SR, Ex. H). On February 3, 1998, the Defendant filed a motion for rehearing and clarification, claiming that the Third DCA had issued its opinion without having reviewed a brief filed by the Defendant. (SR, Ex. I). Having reviewed the Defendant's brief, and the State's answer brief, on July 15, 1998, the Third DCA per curiam affirmed the decision of the trial court. Slip. Op. The Defendant filed its notice to invoke discretionary jurisdiction on August 3, 1998. This appeal now follows.

POINT INVOLVED ON APPEAL

WHETHER THE LOWER COURT ERRED IN HOLDING THAT A DEFENDANT MAY NOT COLLATERALLY ATTACK HIS PLEA BARGAIN WHEN HE FAILS TO ABIDE BY THE TERMS TO WHICH HE AGREED.

SUMMARY OF THE ARGUMENT

The Third DCA did not err in holding that the Defendant is precluded from collaterally attacking his plea bargain because he failed to abide by the terms to which he agreed. To begin with, the Defendant should have raised the instant issue on direct appeal, but he failed to do so. Thus, the Defendant is procedurally barred from raising it in a post-conviction motion. Moreover, because the Defendant has not shown that he suffered any prejudice as a result of the trial court's misstatement regarding the maximum penalty he faced, the Third DCA did not err in affirming the trial court's order denying the Defendant's motion for post-conviction relief.

ARGUMENT

THE LOWER COURT DID NOT ERR IN HOLDING THAT THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF.

In this appeal, the Defendant argues that the Third DCA erred in affirming the trial court's order denying his motion for post-conviction relief based upon his claim that his plea was involuntary, due to the trial court's misinformation regarding the maximum penalty he faced. That is, the Defendant's claim is that he chose to accept the plea because he thought he was facing a maximum sentence of life imprisonment, and had he known that the maximum penalty was thirty (30) years in prison, "there is a reasonable probability the defendant would not have entered the plea." (Petitioner's brief at page 3.) The State respectfully submits that this Court should affirm.

To begin with, the Defendant's instant claim is procedurally barred. The law is clear that "a court may refuse to address those issues contained in a motion for post-conviction relief that were raised on direct appeal or could have been raised on direct appeal." Christopher v. State, 489 So. 2d 22, 24 (Fla. 1986) (citing, Sireci v. State, 469 So. 2d 119 (Fla. 1985); Smith v. State, 457 So. 2d 1380 (Fla. 1984)); Lopez v. Singletary, 634 So. 2d 1054, 1056 (Fla. 1993) (citing Johnson v. State, 593 So. 2d 206

(Fla. 1992), cert. denied, __ U.S. __, 113 S.Ct. 119, 121 L.Ed.2d 75 (1992)). Moreover, post-conviction motions are not to be used as second appeals. Lopez, 634 So. 2d at 1056 (citing Medina v. State, 573 So. 2d 293 (Fla. 1990)).

Furthermore, although the Defendant entered a plea of guilty, and although direct appeals in plea cases are generally limited, this Court has recognized four exceptions to this rule. In Robinson v. State, 373 So. 2d 898, 902 (Fla. 1979), this Court held, "There is an exclusive and limited class of issues which occur contemporaneously with the entry of the plea that may be the proper subject of an appeal. To our knowledge, they would include only the following: (1) the subject matter jurisdiction, (2) the illegality of the sentence, (3) the failure of the government to abide by the plea agreement, and (4) the voluntary and intelligent character of the plea."

Since the Defendant's argument is that he did not freely and voluntarily enter his plea, and since this Court has held that such an issue may be raised on direct appeal following the entry of a plea, it is evident that the Defendant could have and should have raised this issue on appeal following the entry of his plea. The State is aware that this Court has held that "the failure of a defendant to raise the issue of the validity of the plea by an

appeal does not prohibit him from subsequently seeking collateral relief if the issues have not been previously addressed and ruled upon." Robinson at 903. However, this is contrary to Fla. R. Crim. P. 3.850(c) which states, "This rule does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence." Thus, since the Defendant could have and should have raised this issue on direct appeal, but did not, this ground is procedurally barred. Christopher, supra. Hence, the lower court's decision was correct.

However, even if this claim were not procedurally barred, this Court should still affirm because the Defendant did not and cannot show any prejudice resulting from the trial court's misstatement as to the maximum penalty he faced. Although Fla. R. Crim. P. 3.172(c)(1) states that the trial judge, when accepting a defendant's plea, must determine that the defendant understands the maximum possible penalty for the charge, Fla. R. Crim. P. 3.172(I) also provides that "failure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice." (emphasis added). Furthermore, in Wuornos v. State, 676 So. 2d 966 (Fla. 1996), this Court specifically approved of the following portion of the Fourth District's opinion in Fuller v. State, 578

So. 2d 887, 889 (Fla. 1st DCA 1991), quashed on other grounds, 595 So. 2d 20 (Fla. 1992):

> In the absence of an allegation of prejudice or manifest injustice to the defendant, the trial court's failure to adhere to Rule 3.172 is an insufficient basis for reversal.

Id.; see also State v. Fox, 659 So. 2d 1324, 1326 (Fla. 3rd DCA 1995); State v. Will, 645 So. 2d 91, 93 (Fla. 3rd DCA 1994); Suarez v. State, 616 So. 2d 1067, 1068 (Fla. 3rd DCA 1993)). Also, "it is the defendant's burden to establish prejudice or manifest injustice. 'It is not sufficient to simply make bald assertions.'" Fox, supra at 1327 (quoting State v. Caudle, 504 So. 2d 419, 421 (Fla. 5th DCA 1987)).

In order to properly allege prejudice in this context, the Defendant should have claimed that had he been informed of the correct maximum penalty he faced, he would have rejected the plea offer, gone to trial, and most importantly, he would have most probably been acquitted. See Ross v. State, 687 So. 2d 1357 (Fla. 3rd DCA 1997). The Defendant did not do this, however. Instead, the Defendant claimed that "but for counsel's misadvice, there is a reasonable probability the defendant would not have entered the plea." (Petitioner's brief at 3). As such, because the Defendant did not and has not properly alleged prejudice in connection with

the trial judge's misstatement regarding the maximum penalty he faced, this Court should affirm the district court's ruling.

Furthermore, as to the Defendant's claim that his counsel provided him with ineffective assistance for not objecting to the trial court's misstatement, the law is clear that in claims of ineffective assistance of counsel, the defendant bears the burden of showing that counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 252, 80 L.Ed. 2d 674 (1984). In reviewing whether counsel's performance was deficient, "courts must, in a highly deferential manner, examine 'whether counsel's assistance was reasonable considering all the circumstances.'" Atkins v. Singletary, 965 F. 2d 952, 958 (11th Cir. 1992). As to the prejudice prong of Strickland, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Also, in making the determination of prejudice, a court hearing the ineffectiveness claim must consider the totality of the evidence before the fact finder. Id. at 695. Also, in assessing an ineffectiveness claim, either the performance prong or the

prejudice prong can be evaluated first. Id. at 697. If either one of these showings is insufficient, a defendant's claim of ineffective assistance of counsel must fail. Id.

In the instant case, the Defendant's claim that his counsel was ineffective because he failed to object when the trial judge misinformed him of the maximum possible sentence he faced fails the prejudice prong of the Strickland test. More specifically, the Defendant cannot demonstrate any prejudice resulting from the alleged misinformation received from counsel and the trial court. The Defendant entered his plea with the understanding that he would be sentenced to a guidelines sentence of between 4.08 and 6.91 years, with a waiver of the fifteen (15) year mandatory minimum, but if he failed to provide the information needed by the State Attorney's Office and failed to return for sentencing on the specified date, he would instead be sentenced to thirty (30) years with the fifteen (15) year mandatory minimum. (SR, Ex. C). Because the Defendant failed to honor his part of the plea bargain, he received a sentence of thirty (30) years. Thus, the Defendant is estopped from seeking to void the plea, since he bargained for a certain agreement and then reneged on his portion of that agreement. See Novaton v. State, 610 So. 2d 726 (Fla. 3d DCA 1992), aff'd, 634 So. 2d 607 (Fla. 1994).

Moreover, the Defendant cannot demonstrate any prejudice resulting from the alleged misstatement from the trial court. In other words, the Defendant knew that if he did not assist the State Attorney's Office as he agreed to in the plea bargain, he would receive a thirty (30) year sentence, as opposed to the far less agreed upon guidelines sentence. Here, the Defendant's own actions resulted in his thirty (30) year sentence. As such, because the Defendant ultimately received a thirty (30) year sentence, and he knew beforehand that he would receive this sentence if he did not fulfill his portion of the agreed upon bargain, the Defendant cannot establish prejudice. The Defendant received the sentence he knew he would receive. In other words, it was the Defendant's actions, rather than any ineffectiveness on the part of defense counsel, that resulted in the Defendant's thirty (30) year sentence.

Furthermore, as stated above, the Defendant did not suffer any prejudice because he cannot show that had counsel's conduct been different, he would have chosen to go to trial with a favorable verdict. Frazier v. State, 447 So. 2d 959, 960 (Fla. 1st DCA 1984). That is, the Defendant has failed to meet his burden of establishing that the alleged error was prejudicial in fact and that he had a "viable" defense. Buford v. Wainwright, 28 So. 2d

1389, 1391 (Fla. 1983) (citing Knight v. State, 394 So. 2d 997 (Fla. 1981)); Diaz v. State, 534 So. 2d 817 (Fla. 3rd DCA 1988); Siegal v. State, 586 So. 2d 1341, 1342 (Fla. 5th DCA 1991). On the contrary, by entering his plea of guilty, and stipulating to a factual basis for the plea (SR, Ex. C, pages 13-14), the Defendant was confessing to the crime. Robinson at 902. Thus, it is clear that the Defendant could not have a "viable" defense. As such, because the Defendant cannot demonstrate any prejudice as a result of counsel's actions, counsel cannot be said to have been ineffective. As such, this Court should affirm the district court's ruling.

CONCLUSION

Based on the foregoing points and authorities, the Third DCA properly held that did not err in holding that a defendant may not collaterally attack his plea bargain when he fails to abide by the terms to which he agreed. Thus, this Court should affirm the decision of the Third DCA.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT was mailed this 28th day of January, 1999 to Lazaro Gonzalez, DC# 196774, at Glades Correctional Institution, 500 Orange Avenue Circle, Belle Glade, Florida 33430-5221.

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