IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JOHN WARNER,

Respondent.

Case No. 94,842
DCA Case No. 97-2862

****
ON DISCRETIONARY REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL
****

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties will be referred to as they appear before this Court, except that the Petitioner may also be referred to as “State” or “Prosecution”.

STATEMENT OF THE CASE

An Information was entered against Respondent in the Seventeenth Judicial Circuit on October 21, 1996 (R 28-29). The charges were one count of Driving Under The Influence/Serious Bodily Injury/Unlawful Blood Alcohol Level; and two counts of Driving Under The Influence (a misdemeanor) (R 28-29).

Respondent entered a plea of guilty to all three counts (R 30, 31). Respondent's scoresheet totalled 114.4 points, which came out to a minimum of 65 months in prison and a maximum of 108 months in prison (R 37-39). The trial court imposed a downward departure over the objection of the State (T 23-24). Respondent was adjudicated on all three counts (R 33), and was sentenced to two years of community control, followed by three years of Drug Offender Probation on count one, and six months probation on counts two and three (concurrent to count one) (R 30, 33-36). Respondent was also given 364 days in the Broward County Jail with one day credit for time served, random drug urinalysis testing, DUI School, one year suspension of his driver's license, and fifty hours of community service (R 30-34). The trial court also reserved the right to impose restitution (R 30).

On the written scoresheet, the trial court's written reasons for the downward departure was that this was an isolated incident,

and Respondent was 37 years old and had never been arrested prior to this incident (R 38). The court also checked off the following reasons for departure on the form attached to the scoresheet: "[t]he capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired;" "[d]efendant requires specialized treatment for addiction, mental disorder, or physical disability and the defendant is amenable to treatment;" and "[t]he offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse" (R 40).

The State filed a timely notice of appeal on August 11, 1997 (R 43-44). On appeal, Petitioner alleged that the trial court had erred in imposing a downward departure sentence over the objection of the State. Respondent alleged that the trial court's decision for a downward departure was valid. The Fourth District Court of Appeal issued an opinion on November 18, 1998, State v. Warner, 721 So. 2d 767 (Fla. 4th DCA 1998) reversing the sentence imposed by the trial court. In that opinion, the Fourth DCA addressed the Fifth District's decision in State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998), disagreeing with Gitto "to the extent that it holds that a court can never, over the state's objection, advise a defendant of the sentence it would impose if

the defendant pleads guilty to the charges filed by the state" (footnote omitted). State v. Warner, 721 So. 2d 767 (Fla. 4th DCA 1998).

On December 3, 1998, Petitioner moved for rehearing, certification of conflict, and for a question of great public importance with the Fourth DCA for the **limited** purpose of the Fourth DCA's holding as it refers to conflict with State v. Gitto. On January 5, 1998, the Fourth District denied Petitioner's motion. Mandate issued on January 22, 1998. Petitioner filed a Notice To Invoke Discretionary Jurisdiction with the Fourth District Court of Appeal on February 2, 1999, as well as a Motion to Stay Mandate And/Or Recall Mandate. This Court accepted jurisdiction of the above-styled cause and set a briefing schedule, to be followed by oral argument on October 5, 1999.

STATEMENT OF THE FACTS

According to the police report, on June 11, 1996 at 4:50 A.M., Respondent was driving a vehicle northbound on State Road 5 in Fort Lauderdale when he struck the rear of a 1991 GMC van at the corner of State Road 5 and State Road 84. This collision caused the GMC van to travel forward and hit the rear of a Chevrolet Caprice. The Caprice and GMC van were stopped at an intersection waiting for a red traffic signal to turn green. The occupant of the Caprice sustained injuries, was treated, and then released. The passenger of the GMC van sustained a broken leg. The driver of the GMC van sustained serious bodily injuries, including a fractured skull and a leg wound which developed a severe infection and required plastic surgery. Two blood samples were taken from Respondent shortly after the collision. The results indicated a blood alcohol level of .15 and .13 g% (R 26-27).

SUMMARY OF ARGUMENT

The trial court violated the separation of powers clause, Article II, section 3 of the Florida Constitution, by negotiating with the defendant for a downward departure sentence over the objection of the prosecutor. The trial court's role in plea negotiations should be limited to the role of an objective arbiter. Therefore, this Honorable Court should rule that a trial court may not negotiate a plea over the objection of the State. This Court should adopt the Fifth District Court of Appeal's decision in State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998)(en banc), rehearing granted 1999 WL 252130 (Fla. 5th DCA April 30, 1999), as it applies to the case at bar, and should reject the Fourth District Court of Appeal's reasoning that allows a trial court to negotiate a plea agreement over the State's objections. This case should be reversed on this issue only.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL INCORRECTLY DETERMINED THAT THE TRIAL COURT COULD OFFER THE RESPONDENT A DOWNWARD DEPARTURE SENTENCE OVER THE OBJECTION OF THE PROSECUTOR.

The trial court's involvement in negotiating a plea bargain over the objection of the prosecutor culminated in a violation of the separation of powers clause, Article II, section 3, of the Florida Constitution. This constitutional violation requires reversal as to this issue only.

In State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998)(en banc), rehearing granted, 1999 WL 252130 (Fla. 5th DCA April 30, 1999)(en banc), the Fifth District Court of Appeal concluded that a trial court "has no power unilaterally to enter into a plea agreement with the defendant and that such an agreement cannot form the basis of a downward departure from the guidelines." (Footnote omitted.) The Fifth DCA applied the doctrine of separation of powers, Article II, section 3, of the Florida Constitution:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998). The Florida Constitution "specifically prohibits a person belonging to one of such branches from exercising any powers 'appertaining to either of the other branches unless expressly provided herein.'" State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA 1998)(quoting Hoffman v. Jones, 280 So. 2d 431, 440 (Fla. 1973).

In the criminal context, the power of the executive branch, which enforces or executes the law, is wielded through the office of the prosecutor. It is up to the prosecutor to determine when to bring criminal charges, and which charges will be brought. State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA June 26, 1998)(en banc), citing Young v. United States ex.rel. Vuitton et Fils S.A., 481 U.S. 787 (1987). As an extension of the power to control the charges brought against a defendant, the prosecutor has the exclusive authority to enter into a plea bargain with the defendant. Id.

> Reposing this authority in the hands of the prosecutor is grounded on practical, as well as constitutional considerations. Since the prosecutor is the person most aware of the strengths and weaknesses of his case, and the facts upon which the prosecution is based, it is the prosecutor, and not the court, who should determine whether and when to enter into a plea bargain (citation omitted).

State v. Gitto, supra. A trial court's role in the plea bargaining process is limited. The trial judge's main role is to act as an impartial arbiter between the prosecutor and the defendant, so that the trial court may determine that the plea is entered into by the defendant voluntarily, and is supported by a factual basis. State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA 1998); Rule 3.172(a), Fla. R.Crim.P.; Albert W. Alschuler, "The Trial Judge's Role in Plea Bargaining," 76 Colum. L. Rev. 1059 (1976). Although the trial judge has the discretion to either accept or reject a plea, the trial court's acceptance of a plea over the objection of a prosecutor violates the doctrine of separation of powers. State v. Gitto, 23 Fla. L. Weekly D1550 (Fla. 5th DCA 1998).

It is error for the trial court to agree in advance to a sentence, either without the knowledge of the case possessed by the prosecutor or without the benefit of having heard evidence at trial, as it undermines the sentencing process, which contemplates independent sentencing by the trial court once plea negotiations are concluded. Id. See Tilghman v. Culver, 99 So. 2d 282 (Fla. 1957), cert. den. 356 U.S. 953 (1958), wherein that Court stated:

> According to the record before us the trial judge admits that he bargained with the petitioner and reached an agreement whereby the petitioner was to plead guilty to the breaking and entering charge in exchange for a particular sentence by the judge.

> Courts cannot bind themselves to agreements such as that shown by this record. To countenance such would require too high a price for administrative efficiency. The judge is an instrument of the law charged with meting out just punishment to convicted men. Just punishment is that which fits the circumstances of the crime and the particular criminal; therefore, expediency has no place in formulating the judge's act.

99 So. 2d at 286. Here, the trial judge in the case *sub judice* exceeded her authority in entering into a plea bargain with Respondent without the prosecutor's consent.

On Motion For Rehearing And/Or Request For Certification En Banc, the Fifth District Court of Appeal in State v. Gitto, 1999 WL 252130 (Fla. 5th DCA April 30, 1999), discussed its original opinion as well as the Fourth District Court of Appeal's application of State v. Gitto to the above-styled cause. The Fifth District considered the reasons for keeping the trial judge out of plea negotiations:

> "There are a number of valid reasons for keeping the trial judge out of plea discussions, including the following: (1) judicial participation in the discussions can create the impression in the mind of the defendant that he would not receive a fair trial were he to go to trial before this judge; (2) judicial participation in the discussions makes it difficult for the judge objectively to determine the voluntariness of the plea when it is offered; (3) judicial participation to the extent of promising a certain sentence is inconsistent with the

> theory behind the use of the presentence investigation report; and (4) the risk of not going along with the disposition apparently desired by the judge may seem so great to the defendant that he will be induced to plead guilty even if innocent." (citation omitted, footnote omitted).

State v. Gitto, 1999 WL 252130 (Fla. 5th DCA April 30, 1999), quoting State v. Buckalew, 561 P. 2d 289, 291 (Alaska 1977).

Along with the above delineated concerns for keeping the trial judge out of plea negotiations, the Gitto court also considered its concern for victims' legislatively created rights. State v. Gitto, supra. Section 921.143, Florida Statutes, requires that the victim be given an opportunity to speak before the trial court imposes sentence upon the defendant. On rehearing, the Gitto court reasoned that "[s]ince the victim has the statutory right to be heard at sentencing, due process requires that he or she not only be given notice of the sentencing hearing but also that such victim will be heard at a 'meaningful' time." State v. Gitto, supra. "It is not a meaningful time to hear the victim after the court has pre-determined the sentence in order to get a plea agreement. The victim should not be required to change the court's mind. A pre-disposed judge does not give the appearance of impartiality." Gitto, supra.

In State v. Clark, 724 So. 2d 653, 654 (Fla. 5th DCA Jan. 15,

1999), the Fifth District Court of Appeal disagreed with the Fourth District Court of Appeals' conclusion in State v. Warner that because the trial court's commitment is not binding, it is therefore appropriate. The Clark court stated that both the State and the victim are entitled to present their argument "as to an appropriate sentence to an uncommitted judge." State v. Clark, 724 So. 2d 653, 654, n.2 (Fla. 5th DCA Jan. 15, 1999). According to the court in Clark:

> ...They should not have the burden of having to convince a judge that he or she should renege on his or her previous commitment. It is unseemly for a judge, the personification of the lady with the blindfold and set of scales, to make an independent compact with an admitted felon to sentence him to less than the law prescribes.

State v. Clark, 724 So. 2d 653, 654, n. 2 (Fla. 5th DCA Jan. 15, 1999).

In its *en banc* opinion issued upon rehearing in State v. Gitto, the Fifth District Court of Appeal also disagreed with the Fourth District's claim in State v. Warner, 721 So. 2d 767 (Fla. 4th DCA 1998)[1], that a trial judge's plea bargain between a

[1] It should be noted that recently, in State v. Odum, Slip Opinion Case No. 98-2977 (Fla. 4th DCA May 26, 1999), the Fourth DCA concluded that "...where the state is not a party to the plea agreement, the agreement between the court and the defendant cannot serve as a basis for a downward departure from the sentencing guidelines." Although the Fourth DCA also held that a

defendant and the trial court was not actually a binding contractual agreement between the two parties involved.

> ...The Warner court, citing the supreme court's decision in Davis v. State, 308 So. 2d 27, 29 (Fla. 1975), urges that such 'plea agreements' are not objectionable because they are not truly 'agreements.' Because the court cannot be bound to impose the sentence that the court either 'suggested' or 'agreed to,' the Warner court finds there really is no 'plea bargain' that the state can complain about. The court can simply change its mind at any point and impose whatever sentence it pleases. If this occurs, however, the defendant is entitled to withdraw his plea. What the Warner court approved appears to be in the nature of a criminal equivalent of 'quasi-contract.' Because the judge knew a defendant expected to receive the sentence stated by the judge, and because the defendant did rely upon it in offering the plea, if the court fails to sentence in accordance with its representation, the defendant can rescind. If, on the other hand, the court acts in a manner consistent with its representation, there is no basis for the state to complain. This seems to us the worse of all worlds: one that permits judicial 'representations,' 'agreements,' or 'suggestions' that are, in effect, plea bargains but which give the court free rein to renege on them.

State v. Gitto, 1999 WL 252130 (Fla. 5th DCA April 30, 1999).

The plea agreement entered into by the trial court and the Respondent was an illusory contract, because it was unenforceable

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trial court may accept a plea over the State's objection, that court has apparently begun to recede from its original opinion in State v. Warner.

and ineffective as to one party of the case: the State. At the very least, the trial court became a party in interest when it offered the plea before hearing the State's evidence and determining if there was a factual basis for the plea. The rules of contract law are applicable to plea agreements, State v. Frazier, 697 So. 2d 944 (Fla. 3d DCA 1997), and under contract law the court is to remain an impartial arbiter. Further, plea bargaining or negotiation does not include the situation in which a defendant, for his own reasons, makes a unilateral offer to enter a particular plea which is neither initiated, approved nor responded to in any way but rejection by a representative of the State. Stell v. State, 366 So. 2d 825 (Fla. 4th DCA 1979). Here, the trial court, rather than remain an impartial arbiter, made the plea offer to the Respondent over the objections of the State's representative, the prosecutor.

In reaching its conclusion below, the Warner court relied on Davis v. State, 308 So. 2d 27, 29 (Fla. 1975), where this Court refrained from condemning a trial court from becoming involved in plea negotiations. This Court determined that trial judges could be trusted to take all necessary precautions to protect defendants' rights. Davis v. State, 308 So. 2d 27, 29 (Fla. 1975).

However, Davis v. State is distinguishable from the case at

bar. In Davis, although there is a reference to an agreement between the defendant and the trial court, it cannot be determined whether a true negotiated plea agreement actually existed. Nor is there any indication whether the State objected to the trial court's concession. Further, in Davis, the issue was whether the trial court's agreement could be enforced. If the plea agreement in Davis had occurred because all three parties (the State, the defendant, and the trial court) concurred as to the plea agreement, then such a plea would be appropriate as proposed by Standard 14-3.3(c), the American Bar Association's Standards for Criminal Justice. Standard 14-3.3(c) allows for the prosecutor and the defendant to bring in the trial judge if the State and the defense are unable to reach an agreement first. However, the judge, at that point, shall serve only as a moderator, and may make suggestions as to what might be acceptable. It is then up to the State and the defense to either accept or reject the proposed plea of the court.

This goes beyond what is allowed under Florida law, as seen in Rule 3.171(d), Florida Rules of Criminal Procedure. Rule 3.171 governs plea discussions and agreements, and delineates the responsibilities of the prosecutor, the defense counsel and the trial judge. The responsibilities of the trial judge, Rule

3.171(d), Florida Rules of Criminal Procedure, provides:

> **After an agreement on a plea has been reached**, the trial judge may have made known to him or her the agreement and reasons therefor prior to the acceptance of the plea. Thereafter, the judge shall advise the parties whether other factors (unknown at the time) may make his or her concurrence impossible.

(Emphasis added.) The above language implies that the agreement is reached between the prosecutor and the defense attorney prior to the judge being informed of the terms of the agreement. Under that rule, once a plea agreement is reached between the State and the defendant, both parties may tell the trial judge the reasons for the plea agreement, prior to accepting the plea. Then the trial judge must tell both parties whether or not the plea is acceptable; if not, the judge must give his or her reasons for not accepting the plea.

Also, to allow the trial court to become involved in plea negotiations in order to expedite a judge's court docket would create the additional problem that appellate courts might be called upon to consider the issue as to whether such pleas should be set aside because they are coercive. State v. Gitto, 1999 WL 252130 (Fla. 5th DCA April 30, 1999). See United States v. Werker, 535 F.2d 198 (2d Cir. 1976).

One should also consider the possibility that allowing the

trial judge to negotiate a plea over the objections of the State could create potential constitutional violations of the Fifth and Sixth Amendments. If a trial judge tells a defendant he will give him a lesser sentence if he pleads guilty instead of going to trial, there is the implication that the defendant will be treated differently if he does go to trial. State v. Gitto, 1999 WL 252130 (Fla. 5th DCA April 30, 1999)(concurring opinion). See Gallucci v. State, 371 So. 2d 148, 149 (Fla. 4th DCA 1979).

This Court recognized the potential consequences of such a problem in City of Daytona Beach v. Del Percio, 476 So. 2d 197, 205 (Fla. 1985)(quoting United States v. Jackson, 390 U.S. 570 (1968)):

> The law is clear that any judicially imposed penalty which needlessly discourages assertion of the Fifth Amendment right not to plead guilty and deters the exercise of the Sixth Amendment right to demand a jury trial is patently unconstitutional.

The Florida Rules of Criminal Procedure have not yet adopted the American Bar Association's position allowing limited judicial participation in plea negotiations. The judge's role in plea negotiations should be limited to approving the plea negotiations between the prosecutor and the defendant. By limiting the trial judge's role in this respect, there would be little danger of a violation of a defendant being coerced into accepting a plea and thus giving up his constitutional right to trial. If the plea

negotiations are kept between the State and the defendant, then there will be little chance that a defendant could allege that the trial court treated defendants who plead guilty differently from those who go to trial.

It is the Petitioner's position that the trial court erred by accepting a plea agreement which the State opposed and by downwardly departing based on reasons which were unsupported by the record. In State v. Herrick, 691 So. 2d 540 (Fla. 5th DCA 1997), the court held that it was error to accept a plea agreement opposed by the State and to impose a downward departure sentence based on a reason unsupported by evidence. In Herrick, as in the case at bar, the defendant entered into a plea agreement with the court and not with the State. The Herrick court noted that "[W]e are unaware of any authority for this highly unusual contractual arrangement." State v. Herrick, at n. 1.

In the instant case, the State did not enter into the agreement with Respondent as it was signed by all parties involved except the State. The State clearly opposed the sentence contained in the agreement. The trial court erred in accepting the plea agreement which was entered into with the court and not with the State. Therefore, this Court should hold that the trial court erred in entering a plea agreement over the State's objections.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the Petitioner respectfully requests this Honorable Court to reverse the the Fourth District Court of Appeal's ruling **only** as to the validity of the trial court's entrance into a plea bargain with the defendant over the objection of the State. The Fourth DCA's ruling as to the impropriety of Respondent's downward departure sentence for other reasons should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to David McPherrin, Assistant Public Defender, Criminal Justice Building, 421 3rd Street, 6th Floor, West Palm Beach, FL 33401, on June _____, 1999.

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