IN THE SUPREME COURT OF THE STATE OF FLORIDA

ALLEN SILAS,

Petitioner,

v.

Case No. SC 95,754
5 DCA Case No. 5D97-1376

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
AND THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR
SEMINOLE COUNTY, FLORIDA

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The relevant facts and procedural history of this case contained in the decision below are as follows:

"Silas was on probation for burglary and theft. He was charged with resisting an officer with violence and battery on a law enforcement officer, as well as with violating his probation. He pled guilty to the new offenses, based on an understanding with the trial court that he would receive five years drug offender probation, with the special condition that he receive specified drug treatment. The trial court (orally) justified the departure on the ground that Silas suffered from a drug addiction and was amenable to treatment. The prosecutor objected to entry of a downward departure sentence because of a lack of evidence to support the reasons given by the trial court. ...

"These five cases...concern the power of the trial court to enter into a plea agreement with the defendant, since the sentences were reached by plea negotiations between the trial judge and the defendant. We conclude, consistent with courts of other jurisdictions, that the 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. The inability of the trial court to plea bargain with a defendant has its genesis in the doctrine of separation of powers, which is a cornerstone of our form of government. ...

"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. 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. Commonwealth v. Corey, 826 S.W.2d 319 (Ky. 1992). Concentration of the power to plea bargain in the hands of the prosecutor also encourages greater prosecutorial accountability and fosters more even-handed enforcement of the laws within the jurisdiction. ...

"The role of the judiciary in the plea bargaining process is limited. The court's primary role is to act as a impartial arbiter between the prosecutor and the defendant, so as to enable the court to determine that the plea is voluntarily and intelligently entered and supported by a factual basis. ...The court's power to accept or reject a plea does not permit the court to interfere with the prosecutor's function. The trial court's entry into a 'plea agreement' with defendant, over the prosecutor's objection violates the doctrine of separation of powers. ...

"[I]n all of these cases, the plea was entered based on promises made by the trial court over the prosecutor's objection.

While the trial court clearly has the power to sentence a defendant to a downward departure once a plea has been entered, for the trial court to agree in advance to a sentence, without the knowledge of the case possessed by the prosecutor or without the benefit of having heard evidence at trial, is error. See, Corey, 826 S.W.2d at 322. It undermines the sentencing process, which contemplates independent sentencing by the trial court once plea negotiations are concluded." State v. Gitto, et al., 731 So.2d 686, 688-690 (Fla. 5th DCA 1999). (footnotes and some citations omitted)(See also, Respondent's Appendix A)

Only one of five Appellees moved for rehearing, Petitioner Silas. On the same day the corrected *en banc* decision issued, a separate order on the motion for rehearing was entered. State v. Gitto, et al., 731 So.2d at 691. Initially, the court rejected Silas' claim that the State's objection was inadequate to preserve review of the court's promise to downward depart in exchange for his guilty plea. The order expressed disagreement with the fourth district's decision in State v. Warner, 721 So.2d 767 (Fla. 4th DCA 1999). "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. As a panel of this court recently observed: 'We disagree with State v. Warner, 721 So.2d 767, 23 Fla. L. Weekly D2540 (Nov. 18, 1998), that simply because the court's commitment

is not binding, it is somehow appropriate. ... 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)." State v. Gitto, 731 So.2d at 692.

Notice to Invoke this Court's jurisdiction was filed by Silas on May 28, 1999. Oral argument in State v. Warner, SC 94,842 took place on October 5, 1999, but to date no opinion has issued. On March 17, 2000, this Court accepted jurisdiction in this case and dispensed with oral argument. This brief timely follows.

SUMMARY OF ARGUMENT

The trial judge should not participate in pre-plea negotiations due to several compelling policy and constitutional concerns. A judge's role in the plea bargaining process is limited to acting as an impartial arbiter that approves or disapproves of the fruits of the parties' labor. "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 1999). This Court should strongly condemn this unsavory practice.

CERTIFICATE OF FONT

The undersigned hereby certifies that this brief is submitted in Courier New, 12 point font, a font that is not proportionally spaced.

ARGUMENT

WHEN A JUDGE PARTICIPATES IN PRE-PLEA SENTENCE NEGOTIATIONS WITH THE DEFENDANT OVER THE STATE'S OBJECTION, THE INTEGRITY AND FAIRNESS OF THE CRIMINAL JUSTICE SYSTEM IS COMPROMISED

This case and its four companion cases provide stark examples of why trial judges should not be involved in the unseemly practice of inducing guilty pleas based on specific promises of lenient sentences. The prosecutor in this case announced that the State was ready for trial. (R 84) Judge Thomas Freeman asked the State, "Mr. Tabscott, can we do something to get rid of Allen Silas?" (R 84) The State replied that the recommended guidelines sanction was 64 points, corresponding to a mandatory 36 month prison sentence, and that the defense and the prosecution had not reached any agreement.

Despite the fact that there was no agreement with the State whatsoever, the defense began to negotiate a sentence directly with Judge Freeman. The defense asked whether the court would consider sentencing Mr. Silas to a residential drug treatment program for the new law violation as well as pending violation of probation charges if he pleaded guilty. (R 84-86) Over the State's objection, the trial court promised that he would sentence the defendant on all three pending cases to "Two years or whatever the residential treatment program is a Day Top, and then he'll have to

serve drug offender probation for the balance of the five year period." (R 87-88)

The defense attorney briefly conferred with his client, and then recounted his "understanding of the plea agreement." (R 88) The Court replied, "I'll do that. Okay. Mr. Silas, raise your right hand please." (R 89) The court accepted the guilty plea and imposed the sentence he had just negotiated with the defense over the State's continued objection. (R 89) Although a written plea agreement was prepared, the State did not sign the agreement, and on its face it indicated that "the ~~State~~ Court of Florida and I have agreed upon the following sentence to be imposed as a condition of this plea." (R 68)(Strikeout in original)

The majority of Petitioner's brief addresses the propriety of the reasons given for downward departure. Respondent contends that this issue is immaterial. The plea was improperly induced by pre-plea promises of a downward departure by the trial court. The judge has no authority to strike plea bargains over the State's objection. Therefore, the sentence based on an invalid plea is a nullity. However, even if this Court were to review the oral reasons for downward departure, the State maintains its position that although the need for drug treatment was a valid reason for departure at the time of this hearing, the State notes that this reason is no longer valid. In any event, the defendant did not sustain his burden of establishing by the preponderance of the

evidence that he was amenable to treatment. He feigned illness to become admitted to the hospital immediately after arrest. The letter from Day Top indicating that they would consider him for placement is not sufficient to establish that it was likely he would successfully complete treatment.

Unfortunately this case is not isolated or unique. The companion cases from the consolidated fifth district decision are all essentially the same. This issue is also presently before this Court in other cases. See, e.g. State v. Warner, SC 94,842. Pre-plea sentence negotiations over the State's objection between the defense and the trial judge have become a common occurrence in Florida courtrooms which this Court should no longer countenance. "Nothing argues for this unsavory practice except expedience. If, in fact, criminal dockets have reached a critical mass, it would be better, as with prison overcrowding, that there be a systemic solution, even if drastic, rather than to have judges appear to

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The additionally egregious fact present in Gitto was that the prosecutor requested that the sentence not be imposed immediately, but asked for a continuance so that the victim could be present and provide input. Judge Freeman refused, and suggested that the victim could "write me a letter." (Respondent's Appendix B, p. 3)

sell their discretion in order to make a deal." State v. Gitto, 731 So.2d at 693.

This Court first addressed the practice of pre-plea sentence negotiations involving the trial court in Brown v. State, 245 So.2d 41 (Fla. 1971). In recognition of the increasing crime rate and crowding of criminal courts, this Court held, "*If the State and defense counsel agree* upon a specific statement of facts constituting the crime to be admitted and with the further understanding regarding the effect of subsequent presentence investigation, we see no reason why a judge should not, if he so chooses, make a specific announcement of the sentence he will impose upon a guilty plea." Brown v. State, 245 So.2d at 44. (Emphasis added). This holding is in harmony with the rule of criminal procedure, which permits a trial court to indicate whether it would approve of a fully negotiated plea and sentencing recommendation in the event of guilty plea. Fla.R.Crim.P. 3.171(d). Participation by and agreement of the prosecutor is required by Brown and the rules of procedure.

This state of affairs is a far cry from a defendant and the trial judge negotiating directly with each other over the State's objection, striking a plea bargain agreement. The trial court has no power to bargain directly with the defendant over the state's objection, nor does this "bargain" constitute a valid basis for downward departure.

Article II, section 3 of the Florida Constitution incorporates the well-known principles of the doctrine of separation of powers. The State Attorney enjoys the power of the executive branch in the criminal justice system. All parties agree that the prosecutor has the exclusive authority to decide when and whether to bring criminal charges. A necessary tool in this arsenal is plea bargaining.

> 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. 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. Commonwealth v. Corey, 826 S.W.2d 319 (Ky. 1992). Concentration of the power to plea bargain in the hands of the prosecutor also encourages greater prosecutorial accountability and fosters more even-handed enforcement of the laws within the jurisdiction.
>
> The role of the judiciary in the plea bargaining process is limited. The court's primary role is to act as a impartial arbiter between the prosecutor and the defendant, so as to enable the court to determine that the plea is voluntarily and intelligently entered and supported by a factual basis. ...The court's

> power to accept or reject a plea does not permit the court to interfere with the prosecutor's function. The trial court's entry into a 'plea agreement' with defendant, over the prosecutor's objection violates the doctrine of separation of powers.

State v. Gitto, 731 So.2d at 690.

Some observers attempt to distinguish the power of the court to sentence the defendant with the prosecutor's ability to bargain to reduce charges. As exemplified by this case, if the trial court bargains directly with the defendant for essentially no punishment, the court has infringed on the authority of the prosecutor. The trial court agreed to a downward departure of several weeks' probation after credit for time served, from a mandatory prison sentence of 36 months required by the guidelines. Where, as here, the trial court induces the defendant to plead guilty based on the promise of no punishment, the separation of powers is illusory.

Respondent understands that a defendant can always plead "straight up", without any agreement. That situation is materially different from the guilty plea being induced by the promise by the judge of a specific, lenient sentence, over the State's objection.

The Warner court observed that the "bargain" with the judge was not binding, and if the sentence was in excess of what the trial court had led the defendant to believe he would receive, the remedy was to withdraw the plea. The fifth district responded

sharply to this argument. "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. As a panel of this court recently observed: 'We disagree with State v. Warner, 721 So.2d 767, 23 Fla. L. Weekly D2540 (Nov. 18, 1998), that simply because the court's commitment is not binding, it is somehow appropriate. ... 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)." State v. Gitto, 731 So.2d at 692. Respondent requests this Court to adopt this reasoning and reject Warner.

Many states, as well as the federal rules of criminal procedure, prohibit judges from making pre-plea sentencing pronouncements or severely restrict their participation on public policy grounds. Fed.R.Crim.P. 11(e); State v. Buckalew, 561 P.2d 289 (Alaska 1977); People v. Clark, 515 P.2d 1242 (Col. 1973); State v. Starcher, 465 S.E.2d 185 (W.Va. 1995); State v. Byrd, 407 N.E.2d 1384 (Ohio 1980). These considerations are at the foundation of the court's decision below.

These compelling policy considerations include: 1) providing the victim a meaningful time to be heard; 2)creating

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See footnote 1 above.

the impression in the defendant's mind that rejection of the offer will result in an unfair trial; 3) making it difficult for the trial judge to objectively determine the voluntariness of the plea; 4) promising a certain sentence is inconsistent with the theory of presentence investigation reports; 5) the risk associated with rejecting the court's offer may cause innocent people to plead guilty; 6) the potential for vindictive sentencing; and 7) public perception of the judge as less than an impartial dispenser of justice when he or she barters with the defendant over the terms of the deal.

At the oral argument in State v. Warner, the defense suggested that these policy concerns may be addressed by adopting a test set forth in People v. Cobbs, 505 N.W.2d 208 (Mich. 1993), with one extremely significant modification. The Michigan Supreme Court articulated four procedural safeguards to allay their substantial fears raised by this practice, the first of which being that the trial court could not initiate the pre-plea pronouncement. At oral argument, counsel for Mr. Warner added the caveat that the *defense* should not initiate the bargain with the trial court. More important than who first broaches the subject, the defense or the judge, is the fact that the State is completely shut out of the plea bargaining process.

As a practical matter, what occurred in each of these cases before the Court is the most common way for this scenario to

unfold. The state and the defense come before the court unable to reach an agreement. The defense suggests to the trial judge that his client may be inclined to plead guilty if the sentence was a downward departure. The trial court indicates that yes, it would countenance a punishment of less than the law allows in exchange for a guilty plea. This practice is no less unsavory because the defense first suggests the bargain as opposed to the trial court. The State agrees with counsel for Mr. Warner that neither the court nor the defense should initiate the pre-plea sentencing pronouncement. It is only when the State and the defense agree that the constitutional and practical policy concerns are quieted.

The argument has now come full circle back to the beginning. Agreement of the State and the defense as to plea negotiations is necessary prior to any participation by the trial court in the plea negotiation process. The trial court sits as a neutral sentencer that either approves or rejects the fruits of the parties' negotiations. That is required by this Court's decision in Brown, as well as the rules of criminal procedure. This rule is easy to follow, and resolves the serious concerns with this practice by curtailing it altogether.

CONCLUSION

Based upon the foregoing argument and authority, Respondent respectfully requests this Honorable Court to affirm the district court's decision in this case in all respects.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing brief has been furnished by delivery via the basket at the 5th DCA, to Assistant Public Defender M.A. Lucas, at 112A Orange Avenue, Daytona Beach, FL 32114, this ____ day of May, 2000.

Belle B. Schumann
Assistant Attorney General