IN THE SUPREME COURT OF FLORIDA

DONNA MELISSA COLLINS,	:	
Petitioner,	:	
v.	:	CASE NO. 95,869
STATE OF FLORIDA,	:	
Respondent.	:	

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0513253
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

DONNA MELISSA COLLINS,	:	
Petitioner,	:	
vs.	:	CASE NO. 95,869
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

PETITIONER'S INITIAL BRIEF ON THE MERITS

I PRELIMINARY STATEMENT AND CERTIFICATION OF FONT AND TYPE SIZE

This is an appeal from the decision of the First District Court of Appeal. Collins v. State, 732 So.2d 1149 (Fla. 1st DCA April 13, 1999).

Petitioner, Donna Melissa Collins, pleaded guilty to multiple charges, primarily theft and forgery, and was sentenced above the guidelines, in Columbia County by Circuit Judge E. Vernon Douglas.

The three-volume record on appeal will be referred to as "R1," "R2," and "R3," the transcript of the plea colloquy of October 21, 1997, as "Plea," and the sentencing hearing of November 10, 1997, as "Sent."

This brief is typed in Courier New 12.

II STATEMENT OF THE CASE AND FACTS

Under a plea agreement, the state dropped some charges against petitioner, Donna Collins, but there was no agreement to the sentence. The court departed upward from a discretionary-prison guidelines category and imposed a sentence of 5 years prison followed by 5 years probation. Collins, 732 So.2d at 1150-51.

Collins pleaded guilty to a total of 5 felony petit thefts, and 4 counts of "cheating" by fraudulently returning merchandise for refunds; she also admitted violating probation in a 1996 case involving 6 counts of forgery and 3 felony petit thefts. The state dropped 3 counts of felony petit theft and single counts of cheating and opposing an officer without violence. The state also dropped some counts in the original plea to the 1996 case, which are not at issue here. Id. at 1150.

On appeal, Collins argued her sentence should be vacated because 1) the trial judge failed to enter written reasons for departure, and 2) the cheating convictions violated double jeopardy.

The First District Court held 1) the facially-apparent sentencing guidelines issue - no written departure order - was not preserved for appeal, and 2) petitioner's "plea bargain" waived her double jeopardy claim.

III SUMMARY OF THE ARGUMENT

There are two discrete sentencing issues in this case. First is whether an upward departure from the guidelines without written reasons is reversible on appeal under the Criminal Appeal Reform Act of 1996 (CARA), although not objected to. Second is whether a defendant can raise a double jeopardy issue for the first time on appeal, where the state dropped some charges as a result of a "plea agreement," but the charges dropped did not mitigate the upward departure sentence imposed.

The district court held the absence of a written departure order not preserved, and the double jeopardy issue barred by Collins' "plea bargain." Petitioner contends that the absence of a written departure order is fundamental error, correctable on appeal. She also contends that, because she received no meaningful benefit from her "plea bargain" when the judge exceeded the guidelines, she is not precluded from raising a double jeopardy claim on appeal.

IV ARGUMENT

ISSUE I

PETITIONER'S GUIDELINES-DEPARTURE SENTENCE MUST BE REVERSED BECAUSE THE COURT FAILED TO ENTER WRITTEN REASONS FOR DEPARTURE; AS THIS WAS FUNDAMENTAL ERROR, NO OBJECTION WAS NECESSARY.

Petitioner argued on appeal to the district court that her departure sentence should be vacated because the trial court failed to enter written reasons, and the issue is cognizable on appeal, even though not objected to. The district court held the issue was not reversible error because it was not preserved.

This issue is in the general category of what kinds of facially-apparent sentencing errors can be raised on direct appeal, although not objected to, after the Criminal Appeal Reform Act of 1996 (CARA). May 11, 1999, this court heard oral argument on four consolidated cases on this general issue. Hyden v. State, 715 So.2d 960 (Fla. 4th DCA 1998), review granted, 728 So.2d 203 (Fla. 1999); Speights v. State, 711 So.2d 167 (Fla. 1st DCA 1998), review granted, 728 So.2d 203 and 204 (Fla. 1999); Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998) (en banc), review granted, 718 So.2d 169 (Fla. 1998) and 728 So.2d 204 (Fla. 1999); Edwards v. State, 707 So.2d 969 (Fla. 5th DCA), review granted, 718 So.2d 167 (Fla. 1998).

This case does not involve a specific issue like any in the cases just cited, but this court has granted review in another case from the First District with the same issue - no written reasons for departure. Butler v. State, 723 So.2d 865

(Fla. 1st DCA 1998), review granted, 735 So.2d 1283 (Fla. April 26, 1999). It would advance the administration of justice that both Butler and the instant case ultimately share the same ruling on the same issue.

Moreover, the issue here is even more egregious than those in two other cases in which the court has granted review, Jordan v. State, 728 So.2d 748 (Fla. 3d DCA 1998), review granted, 735 So.2d 1285 (Fla. June 18, 1999); Weiss v. State, 720 So.2d 1113 (Fla. 3d DCA 1998), review granted, 729 So.2d 396 (Fla. 1999).

In Jordan, the trial court orally announced reasons for departure, the written order is dated the same day as sentencing, but the order was not filed until the 22nd day after sentencing, in violation of the statute and rule requiring filing within 7 days. The Third District held the issue was not preserved and not fundamental or prejudicial error.

In Weiss, the court orally announced reasons for departure when sentence was imposed August 19. The written judgment and sentence were filed August 26, but the written departure reasons were not filed until August 29. The Third District held the 7 days commenced when the written judgment was filed August 26, thus the written reasons were timely. If counted from the oral imposition, the issue was not preserved, fundamental or prejudicial.

The facts of the instant case are more egregious, because written reasons for departure here were not merely filed late;

they were **never** filed.

Petitioner contends that the lack of written reasons falls within the definition set out in State v. Mancino, 714 So.2d 429, 433 (Fla. 1998):

> A sentence that patently fails to comport with statutory or constitutional limita-tions is by definition "illegal".

Because the statute requires written reasons for departure, the court's failure to enter them "patently fails to comport with [a] statutory. . .limitation," thus Collins' sentence must be reversed for imposition of a guidelines sentence.

On the matter of objection in the trial court, petitioner argued on rehearing to the district court that contemporaneous objection to the lack of written departure reasons is either impossible or at least imprudent.

Section 921.0016(1)(c), Florida Statutes (1997), gives the trial court 7 days after sentencing to file written reasons for departure. It is therefor impossible to object contemporane-ously to an omission while the court may yet timely enter an order. As this court said in Davis v. State, 661 So.2d 1193, 1197 (Fla. 1995):

> it is difficult, if not impossible, for counsel to contemporaneously object to the absence of a written order at the sentenc-ing hearing because, at that stage, counsel does not know whether a written order is being filed or what it will say. (cite omitted)

More importantly, should the court fail to enter a written order timely, the relief to which the defendant is entitled is a guidelines sentence. See, e.g., Donaldson v. State, 722

So.2d 177, 188 (Fla. 1998); Pope v. State, 561 So.2d 554 (Fla. 1990). The result is that an attorney would be ineffective if he or she **did** object to the absence of a written order before 7 days had passed. Insofar as the district court held a defendant must contemporaneously object in order to preserve the court's failure to enter a written departure order, it has misapprehended the law and/or the untenable consequences of its ruling for defendants and defense counsel.

It was possible for defense counsel to have filed a motion to correct sentence under Rule 3.800(b) after the seventh day. Assuming this is the district court's ruling, petitioner contends it has misapprehended another area of the law.

Undersigned counsel does not claim to know how this first happened, but Davis, supra, has been frequently misapplied, even by this court itself, on the issue of fundamental error. Davis addressed fundamental error **only** in the context of what constituted an illegal sentence which could be raised for the first time on a motion for post-conviction relief under Rule 3.800(a), Florida Rules of Criminal Procedure, yet it is now cited with some frequency on the issue of what errors can be raised on direct appeal after CARA.

The district court said:

> Although Collins correctly notes the trial judge failed to provide contemporaneous written reasons for imposing a departure sentence, **such failure is not fundamental error**. (emphasis added)

732 So.2d at 1151, citing Neal v. State, 688 So.2d 392, 396 (Fla. 1st DCA 1997), which cited Davis, which the district

court summarized thus:

> failure to file contemporaneous written reasons when imposing departure sentence not “fundamental” error

Id. In the context of no objection, however, Davis held this issue **could** be raised for the first time on appeal:

> While the failure to file written reasons is error that may be raised for the first time on appeal, it is not, in our view, "fundamental" error that may be raised at any time if the sentence is within the maximum period allowed by law.

Davis, 661 So.2d at 1197.

Moreover, the district court expressly relied on Neal’s definition of fundamental error, when that definition has been superseded by this court’s decision in Mancino, supra:

> A sentence that patently fails to comport with statutory or constitutional limita-tions is by definition "illegal".

As noted above, because the statute requires written reasons for departure, the trial court’s failure to enter them “patently fails to comport with [a] statutory. . .limitation,” thus Collins’ sentence must be reversed. In the alternative, this error is also ineffective assistance of counsel on the face of the record, as there could be no strategic reason for counsel not to seek a reduced sentence after 7 days had passed.

ISSUE II

PETITIONER'S CONVICTIONS WHICH VIOLATE DOUBLE JEOPARDY MUST BE VACATED; DOUBLE JEOPARDY IS FUNDAMENTAL ERROR, AND A "PLEA BARGAIN" WHICH RESULTED IN NO BENEFIT TO THE DEFENDANT DOES NOT PRECLUDE A DOUBLE JEOPARDY CLAIM ON APPEAL.

Petitioner argued on appeal that dual convictions of cheating and felony petit theft violated double jeopardy. The district court held she was not entitled to relief according to Novaton v. State, 634 So.2d 607 (Fla. 1994), because she entered into a "plea bargain." Petitioner argued on appeal that Novaton requires an actual benefit from the "plea bargain" before the defendant is precluded from raising double jeopardy on appeal. As she received no benefit from the bargain, she is permitted to raise the double jeopardy issue.

Petitioner contends the district court misapplied Novaton to the facts of her case, which is a basis for conflict jurisdiction in this court. E.g. State v. Stacey, 482 So.2d 1350 (Fla. 1985) ("We have jurisdiction because the court below misapplied controlling case law to the facts of the case").

Before addressing the Novaton issue, petitioner will address the double jeopardy issue. In State v. McDonald, 690 So.2d 1317 (Fla. 2d DCA), review denied, 698 So.2d 849 (Fla. 1997),

> [t]he issue on appeal is whether the state can charge McDonald with both grand theft pursuant to section 812.014, Florida Sta-tutes (1993), and credit card fraud by a person authorized to provide goods and services pursuant to section 817.62, Flori-da Statutes (1993), without violating double jeopardy prohibitions.

690 So.2d at 1318. Based upon the reasoning in Thompson v. State, 585 So.2d 492 (Fla. 5th DCA 1991), app'd and adopted, 607 So.2d 422 (Fla. 1992), the Second District concluded that "illegally obtaining property through the use of a forged credit card and grand theft are degrees of the same offense." 690 So.2d at 1319.

In Thompson, the defendant was charged with fraudulent sale of counterfeit controlled substance under Chapter 817, and felony petit theft under Chapter 812, for a single sale. The Fifth District found that Chapter 817 offenses are "different degrees (or more specific descriptions) of the general statutory offense of theft defined in Chapter 812." 585 So.2d at 494. The district court noted:

> All specific theft by fraud offenses are theoretically subsumed in the general Anti-Fencing Act [theft statute], not in terms of comparing the essential elements of each offense, but in substance and by definition, since the Anti-Fencing Act broadly encompasses and proscribes these criminal frauds. . .The specific theft crimes have become "degrees" of the gener-ally defined theft crime in Chapter 812.

Thompson, 585 So.2d at 494, quoted in McDonald, 690 So.2d at 1319. Thompson further noted that "an act of criminal fraud should be prosecuted either under Florida's Anti-Fencing Act or under a more specific statute contained in Chapter 817." Id. See also Watson v. State, 655 So.2d 1250, 1251 (Fla. 1st DCA 1995):

> . . .the additional conviction for grand theft cannot stand because this offense did not involve a separate and distinct crimi-nal episode from either the offense of fil-ing a false insurance claim or the offense of burning with intent to defraud and these

> three crimes are merely aggravated forms or varying degrees of the core offense of theft. The legislature did not intend for a single act of criminal fraud involving the core offense of theft to be prosecuted as separate offenses under both a specific fraud statute and the grand theft statute.

Collins was charged with felony petit theft and "cheating" under section 817.29, Florida Statutes:

> Whoever is convicted of any gross fraud or cheat at common law shall be guilty of a felony of the third degree. . .

As in Thompson, McDonald and Watson, her chapter 817 offense is a variant of theft and will not support a separate conviction.

Petitioner returns now to the issue of raising double jeopardy issues for the first time on appeal. In Novaton, this court held that, even though double jeopardy is generally fundamental error, entering into a plea bargain waived the right to make a double jeopardy claim for the first time on appeal. Collins, 732 So.2d at 1152. On appeal to the district court, petitioner distinguished Novaton on the ground that the bargain there included an agreement as to sentence, while hers did not. The district court held, "This is not a controlling difference." Id.

The district court summarized Bryant v. State, 644 So.2d 513 (Fla. 5th DCA 1994), review denied, 654 So.2d 130 (Fla. 1995), thus:

> holding that similar distinction "lacks legal merit since no case we have found suggests that 'a bargained for plea' requires the courts to weigh the wisdom or sufficiency of consideration."

The district court concluded:

> . . .Novaton does not require any particu-lar component to be part of a plea bargain as a prerequisite to entry of the conform-ing plea's effecting a waiver of double jeopardy rights. The opinion clearly provides that the only "requirement" is a "plea bargain" followed by implementation of the conditions of the plea bargain. **In the face of such a clear expression by the court, any exception must come from it.** (emphasis added)

Id.

With all due respect, the district court misapprehended petitioner's argument as to "consideration" and overlooked crucial distinctions between Novaton, Bryant and the instant case. Novaton stands for the principle that the defendant must derive a real, not merely an illusory, benefit from the plea bargain (which must be "mutually advantageous," id. at 608) in order to preclude him or her from raising double jeopardy on appeal.

Omitting the facts of Novaton and Bryant from the district court's opinion had the effect of glossing over significant distinctions between this case and those. Novaton received a benefit, which has no analogy in the instant case, from his bargain:

> Novaton entered into a plea bargain with the State to eliminate the possibility of being sentenced to life without parole as a habitual violent felony offender. . . Nova-ton agreed to. . .a total [sentence] that was clearly less than that which he could have received absent this bargained plea. . .the offenses that he claims violate the double jeopardy clause would not have affected his adjudication as a habitual violent felony offender and his sentence of life without parole.

634 So.2d at 609.

Bryant pleaded to vehicular homicide and driving with

license suspended resulting in death, and the state dropped DUI manslaughter. Bryant received consecutive sentences totaling 10 years, which was apparently within the same guidelines range had manslaughter been included. As the district court said, even if it did not look like much of a "bargain," Bryant avoided having to go to trial on a higher-degree crime. This led to the holding above - that maybe Bryant did not get much of a bargain, but the court would not reweigh the wisdom or sufficiency of consideration.

This court has already said, however, that it would reach a different result in the case of a failure of consideration. Collins' situation approaches a failure of consideration. Thus, it is far closer to the exception expressly recognized in Novaton for lack of consideration, than to the facts of either Novaton or Bryant.

Novaton expressly recognized that a "straight up" plea with no agreement as to sentence does **not** preclude a double jeopardy argument on appeal. The slightly more narrow question here is whether that principle applies when some charges have been dropped, but the fact some charges were dropped did not mitigate the departure sentence imposed.

The district court said any exception to Novaton would have to come from this court, 732 So.2d at 1152, but it already has. Petitioner contends that the Novaton exception applies to her, because she received no benefit from her "plea bargain."

The charges dropped against Collins ranged from misdemean-

ors to Level 2 offenses, and some would have violated double jeopardy. Dropping charges which violate double jeopardy is not meaningful consideration. Even had they **all** been scored - ranging from misdemeanors to Level 2 crimes - they would have added only 10.8 points. This would have increased Collins' presumptive sentence 5 months, from 17.1 to 22.1 months (R2 274-75), but the court imposed 5 years plus 5 years probation. As noted above, Novaton by comparison received a benefit, which has no analogy in the instant case, from his bargain.

Because only same or lesser-degree charges against Collins were dropped; no higher-degree charges were dropped; the dropped charges would have made little difference in the guidelines; and the trial court exceeded the guidelines, Collins received little or no benefit of the purported plea bargain, thus her case comes within the exception in Novaton, and not its holding. It is interesting to compare what this court said in a different context in Puffinberger v. State, 581 So.2d 897 (Fla. 1991):

> nonscoreable juvenile record may be consi-dered as a reason for departure. . . only if the record is significant and **the resul-ting departure sentence is no greater than that which the defendant would have received if the record had been scored.**" (emphasis added)

Id. at 899-900.

The essence of Novaton is that the defendant may not argue double jeopardy on appeal where she has received a benefit from plea negotiation. Where, as here, the defendant received no benefit from dropping some charges, petitioner contends she may

make a double jeopardy argument on appeal.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this court vacate her convictions of "cheating" on double jeopardy grounds and reverse her sentences and remand for imposition of guidelines sentences.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

KATHLEEN STOVER
Fla. Bar No. 0513253
Assistant Public Defender
Leon County Courthouse
301 S. Monroe, Suite 401
Tallahassee, Florida 32301
(904) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James W. Rogers, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, Florida, and a copy has been mailed to Ms. Donna Melissa Collins, inmate no. 0100967, Florida Correctional Institution, P.O. Box 147, Lowell, FL 32663, this _____ day of December, 1999.

KATHLEEN STOVER