7-26

IN THE SUPREME COURT OF FLORIDA

DONNA COLLINS, :

Petitioner, :

v. : CASE NO. 95,869

STATE OF FLORIDA, :

Respondent. :

/

BRIEF OF PETITIONER ON JURISDICTION

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

OTHER AUTHORITIES

IN THE SUPREME COURT OF FLORIDA

DONNA MELISSA COLLINS,	:	
Petitioner,	:	
VS.	:	Case no. 95,869
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

BRIEF OF PETITIONER ON JURISDICTION

I PRELIMINARY STATEMENT AND CERTIFICATION OF FONT AND TYPE SIZE

This is an appeal from the decision of the First District Court below. Collins v. State, 24 Fla.L. Weekly D981 (Fla. 1st DCA April 13, 1999), rehearing denied May 26, 1999. Petitioner, defendant/appellant below, will be referred to by name or as petitioner. Respondent, prosecutor/appellee below, will be referred to as the state.

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 in prison followed by 5 years probation. Collins, supra, 1999 WL 201976, p.2.

Collins pleaded to a total of 6 counts of forgery, 3 petit theft, 4 felony petit theft, and 3 "cheating" (fraudulently returning merchandise for refunds). The state dropped multiple counts of uttering, petit theft, felony petit theft, and single counts of cheating and opposing an officer without violence. Id. at 2.

On appeal, Collins argued her sentence should be vacated because 1) the trial judge failed to enter written reasons for departure, and 2) some 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 issues in this case, and each is a discrete basis for this court's discretionary review. The first is whether an upward departure from the sentencing guidelines without written reasons is reversible on appeal, although not objected to; the second is whether a defendant can raise a double jeopardy issue on appeal, where the state dropped some charges as a result of a "plea agreement," but the dropped charges did not affect 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 petitioner's "plea bargain." Petitioner contends that the

absence of a written departure order is fundamental error, correctible on appeal. Petitioner 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 PRESENTED

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL BELOW IS IN DIRECT AND EXPRESS CONFLICT WITH THIS COURT'S DECISION ON 1) FACIALLY-APPARENT SENTENCING ERRORS GENERALLY, STATE V. MANCINO, 714 SO.2D 429 (FLA. 1998); 2) WRITTEN REASONS FOR DEPARTURE, STATE V. JACKSON, 478 SO.2D 1054 (FLA. 1985), *RECEDED FROM ON OTHER GROUNDS*, WILKERSON V. STATE, 513 SO.2D 664 (FLA. 1987); AND 3) DOUBLE JEOPARDY WHERE DEFENDANT PLEADS, NOVATON V. STATE, 634 SO.2D 604 (FLA. 1994).

There are two issues in this case, and each is a discrete basis for this court's discretionary review. The first is whether an upward departure from the sentencing guidelines without written reasons is reversible on appeal, although not objected to; the second is whether a defendant can raise a double jeopardy issue on appeal, where the state dropped some charges as a result of a "plea agreement," but the dropped charges did not affect the upward departure sentence imposed.

A. No written departure order

Petitioner argued on appeal 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 preserved. The district court held the issue was not preserved by contemporaneous objection or a motion to correct under Rule 3.800(b), Florida Rules of Criminal Procedure.

Petitioner argued on rehearing, inter alia, that it was not feasible, or effective assistance, for defense counsel to make a contemporaneous objection to the lack of a written order. First, the court has 7 days to enter the order, so it is bizarre to expect an objection to something not yet due. Second, because the relief to which the defendant would be entitled is a guidelines sentence, a defense attorney would be ineffective if he or she did object. Pope v. State, 561 So.2d 554 (Fla. 1990).

The first 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 the issue here is even more egregious

than those in two cases in which the court has recently granted review, Jordan v. State, 728 So.2d 748 (Fla. 3d DCA 1998), review granted, no. 95,325 (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 judge 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 and thus even more deserving of this court's review, because written reasons for departure here were not merely filed late; they were **never** filed, in violation of State v. Jackson, 478 So.2d 1054, 1055 (Fla.1985), *receded from on other grounds*, Wilkerson v. State, 513 So.2d 664 (Fla.1987).

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 limitations 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 petitioner's sentence must be reversed. This court should accept review in order to harmonize this decision of the district court with Mancino and Jackson.

B. Double jeopardy

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 under Novaton v. State, 634 So.2d 607 (Fla. 1994), because she entered into a "plea bargain." Petitioner argued on appeal and rehearing that Novaton requires an actual benefit from the "plea bargain" before the defendant is precluded from raising double jeopardy on appeal.

Petitioner contends that the district court misapplied Novaton to the facts of her case, which is a basis for conflict jurisdiction in this court. 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").

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, 1999 WL 201976, at p.3. Petitioner distinguished Novaton on the ground that the bargain there included an agreement as to the sentence, while hers did not. The district court held, "This is not a controlling difference." Id. The district court concluded:

> . . .Novaton does not require any particular component to be part of a plea bargain as a prerequisite to entry of the conforming 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.

Petitioner contends that the district court overlooked crucial distinctions between Novaton and the instant case and thereby misapplied it to the facts here. 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," 634 So.2d at 608) in order to preclude her from raising double jeopardy on appeal.

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. . . Novaton 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.

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

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 they did not affect the sentence imposed.

The district court said any exception to Novaton would have to come from this court, 1999 WL 302976, p.3, but it already has. Unlike Novaton, Collins did not receive a sentence which was clearly less than what she could have received without the "bargain." The dropped charges would have added only a few points to her scoresheet, but the judge did not sentence her in accordance with the guidelines (with or without the additional points), but rather, imposed an upward-departure sentence. Petitioner contends the district court misapplied Novaton to her, because she received no benefit from her "plea bargain."

Because only the same or lesser-degree charges were dropped; the dropped charges would have made little difference

in the guidelines; and the trial court exceeded the guidelines, petitioner received little or no benefit of the purported plea bargain, thus her case comes within the exception in Novaton, 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 considered as a reason for departure. . . only if the record is significant and **the resulting 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 some benefit from the plea negotiation. Where, as here, the defendant received no benefit from dropping some charges, she may make a double jeopardy argument on appeal. Petitioner therefor asks this court to accept jurisdiction to consider the correctness of the district court's application of Novaton to the facts of her case.

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner urges this Court to accept jurisdiction to resolve these issues.

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
(850) 488-2458

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Veronica McCrackin, 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, Jefferson Correctional Institution, Route 1, Box 225, Monticello, Florida 32341, this 15t day of ~~June,~~ July 1999.

KATHLEEN STOVER

IN THE SUPREME COURT OF FLORIDA

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

_____/

APPENDIX

Donna Melissa COLLINS, Appellant,
v.
STATE of Florida, Appellee.

No. 97-4780.

District Court of Appeal of Florida,
First District.

April 13, 1999.

After defendant entered nolo contendere plea pursuant to plea bargain with state, the Circuit Court, Columbia County, E. Vernon Douglas, J., sentenced defendant to prison and probation. Defendant appealed. The District Court of Appeal, Browning, J., held that: (1) issue of whether upward departure sentence was valid was not preserved for review; and (2) defendant's plea bargain constituted waiver of her double jeopardy rights.

Affirmed.

[1] CRIMINAL LAW ⚿1042
110k1042
Issue of whether trial court's upward departure sentence was valid was not preserved for review, where defendant failed to make contemporaneous objection or file written motion to correct sentence within 30 days after entry of sentence. West's F.S.A. § 924.051(3); West's RCrP Rule 3.800(b).

[1] CRIMINAL LAW ⚿1044.1(1)
110k1044.1(1)
Issue of whether trial court's upward departure sentence was valid was not preserved for review, where defendant failed to make contemporaneous objection or file written motion to correct sentence within 30 days after entry of sentence. West's F.S.A. § 924.051(3); West's RCrP Rule 3.800(b).

[2] CRIMINAL LAW ⚿1043(1)
110k1043(1)
Defendant's statement, during sentencing hearing, that she objected to scoresheet, as written, and that she would "like to have a standing objection to the guideline, or to the sentence," was not sufficient to preserve objection to upward departure sentence; objections did not fairly apprise trial court of relief sought and grounds therefor. West's F.S.A. § 924.051(1)(b).

[3] CRIMINAL LAW ⚿1042
110k1042
Trial judge's failure to provide contemporaneous written reasons for imposing departure sentence is not fundamental error.

[4] CRIMINAL LAW ⚿1030(2)
110k1030(2)
Double jeopardy violation constitutes fundamental error. U.S.C.A. Const.Amend. 5.

[5] DOUBLE JEOPARDY ⚿202
135Hk202
Conviction and sentence based upon general plea entered pursuant to plea bargain effects waiver of double jeopardy rights. U.S.C.A. Const.Amend. 5.

[6] DOUBLE JEOPARDY ⚿202
135Hk202
Defendant's agreement to enter nolo contendere plea on some charges in exchange for state's nol prossing remaining charges was plea bargain, and constituted waiver of defendant's double jeopardy rights, even though plea bargain did not include sentence. U.S.C.A. Const.Amend. 5.

An appeal from the Circuit Court for Columbia County. E. Vernon Douglas, Judge.

Nancy A. Daniels, Public Defender; and Tracy T. Murphy, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; and Veronica S. McCrakin, Assistant Attorney General, Tallahassee, for Appellee.

BROWNING, J.

***1** Donna Melissa Collins (Collins) appeals from a prison and probation sentence after her entry of a nolo contendere plea pursuant to a plea bargain with the State. Collins argues that her sentence should be vacated, because the trial judge failed to provide written reasons for her departure sentence, and the sentence violates her constitutional protection from double jeopardy. We affirm.

Facts

On December 31, 1996, Collins was charged with six counts each of forgery, uttering, and felony petit theft, in circuit court case no. 96-988 CF. On March 4, 1997 Collins pled no contest to the forgery charges and three counts of petit theft. The State nol prossed the six uttering charges, and three counts of felony petit theft. On May 5, 1997, Collins was placed on probation for 30 months for forgery, and 6 months concurrent on the petit theft charges.

On June 30, 1997, in case no. 97-465 CF, Collins was charged with one count of felony petit theft and opposing an officer without violence. She pled guilty to felony petit theft, and the state nol prossed the charge of opposing an officer without violence.

On July 8, 1997, in case no. 97-347, Collins was charged with six counts of felony petit theft and four counts of cheating, based on allegations that she fraudulently returned merchandise and received refunds during November and December 1996 at several local businesses. She pled guilty to three counts of cheating and three counts of felony petit theft. The state nolle prossed one count of cheating and three counts of felony petit theft.

On September 13, 1997, in case no. 97-687, Collins was charged with one count each of felony petit theft and cheating, again, for fraudulently returning merchandise and receiving refunds. She pled guilty to both counts. Collins was alleged to have violated her probation in case no. 96-988 by virtue of all of the new cases.

Collins was sentenced in all of the cases on November 10, 1997. During the plea colloquy, Collins stated she believed the plea was in her best interest and she fully understood the rights she gave up by entering the guilty pleas. The state argued that a departure sentence was warranted because Collins was engaged in a "crime wave." The trial court agreed and sentenced Collins to five years in the Florida Department of Corrections (DOC) in case no. 97-347 for three of the felony petit theft counts, to be followed by five years' probation on each of the four cheating counts. In case no. 97-465, she was sentenced to five years' probation for one count of felony petit theft, consecutive to her DOC sentence and concurrent with 97-347. In case no. 97-687, she was sentenced to five years' probation for each count of felony petit theft and cheating, consecutively to her DOC sentence, but concurrent with each other and concurrent with the sentence in 97-465. For violating her probation in case no. 96-988, Collins' probation was revoked and she was sentenced to time served (57 days) on the three petit theft charges. In addition, she was sentenced to five years' probation on each forgery count. The probationary term was to run consecutively to her state prison sentence in the "97" cases. At sentencing, the judge informed Collins as to his reasons for imposing an upward departure sentence.

Written Reasons for Departure

***2** [1] This court cannot address the validity of the departure sentence because the issue was not preserved for appeal as required by Florida Rule of Criminal Procedure 3.800(b) and section 924.051 Florida Statutes (1996). Neal v. State, 688 So.2d 392 (Fla. 1st DCA 1997). Section 924.051(3), Florida Statutes, and Rule 3.800(b) require defendants to preserve sentencing errors by making a contemporaneous objection or filing a written motion to correct sentence within 30 days after entry of the sentence. Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773, 775 (Fla.1996); Amendments to the Florida Rules of Criminal Procedure, 685 So.2d 1253, 1271 (Fla.1996); Quesada v. State, 707 So.2d 808 (Fla. 4th DCA 1998), citing Mason v. State, 698 So.2d 914 (Fla. 4th DCA 1997); Neal, 688 So.2d at 396. Section 924.051(3), Florida Statutes, provides that:

> An appeal cannot be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error. A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court or, if not properly preserved, would constitute fundamental error.

Section 924.051(1)(b), Florida Statutes, provides that an issue is "preserved" when:

> an issue, legal argument, or objection to evidence was timely raised before, and ruled on by, the trial court, and ... the issue, legal argument or objection to evidence was sufficiently precise that it fairly apprised the trial court of the relief sought and the grounds therefor.

[2] In this case, during the sentencing hearing, Collins objected "to the scoresheet, as written" and stated: "For the record, I'd like to have a standing objection to the guideline, or to the sentence." These objections were not "sufficiently precise" so as to fairly apprise the trial court "of the relief sought and the grounds therefor" as required by section 924.051(1)(b), Florida Statutes.

[3] Although Collins correctly notes the trial judge failed to provide contemporaneous written reasons for imposing a departure sentence, such failure is not fundamental error. Neal, 688 So.2d at 396, citing Davis v. State, 661 So.2d 1193 (Fla.1995) (failure to file contemporaneous written reasons when imposing departure sentence not "fundamental" error). Additionally, Collins did not file a written motion to correct the sentence within thirty days after the rendition of the sentence. Fla.R.Crim.P. 3.800(b); Amendments to the Florida Rules of Appellate Procedure, 685 So.2d at 775; Amendments to the Florida Rules of Criminal Procedure, 685 So.2d at 1271; Quesada, 707 So.2d at 811; Mason, 698 So.2d at 914.

Double Jeopardy

***3** [4][5] Collins next argues that her conviction and sentence violate her rights against double jeopardy. As a double jeopardy violation constitutes fundamental error, we are compelled to address Collins' contentions, but find them without merit. Henry v. State, 707 So.2d 370 (Fla. 1st DCA 1998). A conviction and sentence based upon a general plea (nolo contendere or guilty) entered pursuant to a plea bargain effects a waiver of double jeopardy rights. Novaton v. State, 634 So.2d 607, (Fla.1994).

[6] Collins and the State entered into a plea agreement providing for Collins to enter a plea to the charges, upon which her conviction and sentence are based, provided the State would nol pros other pending charges against Collins. As a result of, and in compliance with the plea agreement, Collins entered a plea of nolo contendere, and the State nol prossed the remaining charges. These actions constitute a "plea bargain" under Novaton. Accordingly, Collins thereby waived her double jeopardy rights and is barred from seeking reversal on that basis.

Collins contends that Novaton is inapplicable, by distinguishing the facts. She argues that the plea agreement considered by the court in Novaton included the sentence the defendant was to receive, whereas the plea bargain here does not include a sentence. This is not a controlling difference. See Bryant v. State, 644 So.2d 513 (Fla. 5th DCA 1994)(holding that a 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.") rev. den. 654 So.2d 130 (Fla.1995)

Further, the supreme court in Novaton does not require any particular component to be a part of a plea bargain as a prerequisite to entry of the conforming 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.

We affirm the trial court's conviction and sentence for the reasons stated.

ALLEN and WEBSTER, JJ., CONCUR.

END OF DOCUMENT