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IN THE SUPREME COURT OF FLORIDA

ROGER DENNIS CHURCHILL, JR.,

Petitioner,

v. CASE NO. SC16-654

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF FACTS

Respondent notes that Petitioner's "Statement of Facts" includes an extensive discussion of the evolution of case law involving pleas as well as an argument that the lower court erred. This discussion is more appropriate for the Argument section of the brief. (Initial Brief on Merits at p. 1-2, 7-16).

Respondent further submits the following additions to the Statement of Facts:

Petitioner's briefs on appeal challenged the identification of the methamphetamine based on the alleged failure of the presumptive field test to meet the standard of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Petitioner never contested on appeal the trial court's ruling allowing the identification of the methamphetamine based on the law enforcement officer's training and experience. See Briefs on Appeal.

The State noted in the trial court that it did not contend that these field tests are conclusive or determinative on the issue of identifying a controlled substance. (R. 73).

SUMMARY OF ARGUMENT

The district court of appeal correctly concluded that a stipulation by the parties cannot confer appellate jurisdiction to review a non-dispositive issue. A plea should end litigation and preclude further review except in those limited circumstances where the case turns on a disputed point of law. Eliminating the requirement that such an issue be legally dispositive opens the door for advisory opinions and lets parties bargain for the time and effort of appellate courts.

ARGUMENT

THE DISTRICT COURT OF APPEAL PROPERLY CONCLUDED THAT A STIPULATION CANNOT CONFER JURISDICTION TO REVIEW A NON-DISPOSITIVE ISSUE.

In 1971, this Court held that a defendant could enter a conditional plea of no contest reserving for review a question of law. State v. Ashby, 245 So. 2d 225, 228-29 (Fla. 1971). In so holding, this Court concluded that this practice was appropriate because it "expedites resolution of the controversy and narrows the issues to be resolved." Id. at 228.

This Court subsequently narrowed that holding in its opinion in Brown v. State, 376 So. 2d 382 (Fla. 1979). There, this Court specifically agreed that "the policies underlying the Ashby rule are in fact *subverted* by permitting a Nolo plea conditioned upon the right to appeal nondispositive issues." Id. at 384. (emphasis added). This Court then went on to explain what constitutes a dispositive issue for purposes of allowing a conditional plea:

> In most cases the determination will be a simple one. Motions testing the sufficiency of the charging document, the constitutionality of a controlling statute, or the suppression of contraband for which a defendant is charged with possession are illustrative. This case, however, presents us with one of the truly inscrutable areas confessions. In order to determine accurately whether a confession is dispositive of a case, the prosecution would have to present to the trial judge all of the evidence it intended to introduce at trial. The judge would then have to decide, on the basis of hearsay and summarized information, *whether there was sufficient evidence apart from the confession to support a conviction*. Such a procedure would be unwieldy and time-consuming. Therefore, in order to avoid a

> mini-trial on the sufficiency of the evidence in each case involving a confession, we hold that as a matter of law a confession may not be considered dispositive of the case for purposes of an Ashby nolo plea.

Id. at 385 (emphasis added).

In implementing this holding, a trial judge is given discretion to accept or reject an Ashby plea "based upon his perception of the dispositive nature" of the issue reserved, and this decision may be overturned on appeal "only upon a showing of a clear abuse of discretion." Id.

In short, then, this Court has explicitly held that a dispositive issue is one in which there is insufficient evidence to support a conviction in the event the defendant's motion should have been granted – that is, the case is ended as a matter of law. Further, this Court has explicitly held that the question of whether an order is dispositive is subject to review on appeal. Petitioner's argument here eviscerates these holdings, allowing the *parties* to determine whether an order is dispositive and *eliminating any review* of that decision.

Admittedly, some district courts, post-Brown, have allowed appeals of confessions where the parties stipulate that the State would be unable to proceed in the absence of this key evidence. In doing so, however, these courts have recognized that going behind the stipulation in this type of case would require an independent examination of the record to determine whether there was other evidence that could be used to establish guilt – a complicated and

time-consuming exercise that would, in short, conflict with Ashby's approval of the expediency of such pleas. See Zeigler v. State, 471 So. 2d 172, 175-76 (Fla. 1st DCA 1985).

The State submits that the better rationale for such decisions is not that the appellate court *cannot* go behind a stipulation, but rather that there was no basis for doing so *on those facts*. The trial court, and the parties themselves, are often in the best position to judge the essential nature of a confession and whether a conviction would be impossible in the absence of such evidence. Under these circumstances, deferring to the stipulation, and the trial court's acceptance of the stipulation, makes sense – but again, it does not make this stipulation unreviewable.

Just because the parties agree that an issue is dispositive does not make it so. The parties cannot by agreement change a non-dispositive issue into a dispositive one any more than they can change an apple to an orange, and the appellate courts should not be precluded from reviewing this issue where the parties have attempted to do so.

In asking this Court to make stipulations of dispositiveness binding on appellate courts, Petitioner offers in support that efficiency and fairness are best served by allowing the parties to end their litigation below in a succinct manner so they can secure a review of their legal question. Such a holding would allow the parties to stipulate that *any* issue is dispositive, even discovery issues or evidentiary questions on collateral matters, just for the

sake of securing an opinion from the district court of appeal. By doing so, the parties would effectively be circumventing the Rules of Appellate Procedure, which preclude appeals from pleas except in certain very limited circumstances. See Fla. R. App. P. 9.140(b)(2)(A); Robinson v. State, 373 So. 2d 898, 902 (Fla. 1979).

Further, accepting Petitioner's position would require the district courts to address *any* questions chosen by the parties through stipulation. Parties cannot stipulate to appellate jurisdiction in any other context, and they should not be allowed to do so here. See Polk County v. Sofka, 702 So. 2d 1243, 1245 (Fla. 1997) ("the fact that the parties stipulated to the district court's jurisdiction has no bearing on whether, in fact, such jurisdiction existed"); Dept. of Revenue v. Kuhnlein, 646 So. 2d 717, 720-21 (Fla. 1994) (advisory opinions are not allowed except in certain limited circumstances, and standing requires "that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity"); Peltz v. District Court of Appeal, 605 So. 2d 865, 866 (Fla. 1992) (granting writ of prohibition precluding district court from exercising jurisdiction where notice of appeal was untimely filed; noting that "jurisdiction cannot be conferred by waiver or consent"); Grand Dunes, Ltd. v. Walton County, 714 So. 2d 473, 475 (Fla. 1st DCA 1998) (appellate court has the right and obligation to dismiss case where plaintiff lacks standing, even if defendant

did not notice; "A stipulation to jurisdiction over the subject matter where none exists is ineffectual.")

Indeed, even those cases finding stipulations on dispositiveness binding have recognized that such stipulations can lead to confusion or injustice. For example, the Zeigler court recognized the possibility of unfairness if a stipulation of dispositiveness is subject to no further review, such as where the State confesses error in the court's ruling on the merits but disavows the stipulation of dispositiveness as a mistake and requests that the defendant be allowed to withdraw his plea and the State be permitted to proceed with trial. 471 So. 2d at 180 n.4. Precluding this remedy based solely on a stipulation could result in a grave miscarriage of justice. See also Finney v. State, 420 So. 2d 639, 646-47 (Fla. 3d DCA 1982) (Baskin, J., dissenting) (finding stipulation binding "prevents the state from prosecuting its case solely because the trial prosecutor mistakenly stipulated that the state would be unable to prosecute if certain evidence were suppressed," creating an injustice that could be easily remedied by allowing the State to admit its error and allowing the defendant to withdraw his plea).

Similarly, Judge Pearson, in his concurring opinion in Finney, praised the majority's conclusion that a stipulation of dispositiveness is binding while recognizing that such a stipulation could result in the court rendering an opinion on matters that are not actually conclusory (and accordingly over

which it did not actually have jurisdiction), such as when multiple evidentiary issues are resolved in one purportedly dispositive order but the appeal results in affirming some issues and reversing others. 420 So. 2d at 645-46. While Judge Pearson suggested a relinquishment of jurisdiction in these "ambiguous" cases to allow the parties to clarify which parts of the order are truly dispositive, the State submits that such a procedure directly contradicts the finality and expediency benefits of pleas and exacerbates a problem that could easily be resolved by finding the order nondispositive despite the parties' stipulation.

This case presents a related concern, where the dispositiveness of the order being reviewed is lacking because the defendant abandoned part of the multifaceted issue on appeal, thereby rendering his remaining argument non-dispositive because other evidence is admissible without question. Churchill v. State, 169 So. 3d 1260, 1261 n.2 (Fla. 5th DCA 2015) ("the stipulation was based on the exclusion of all of the deputy's testimony, including his identification of the methamphetamine based on his training and experience. Churchill waived any argument as to this additional testimony by not raising it in his initial brief.")

The State's proposed resolution eliminates all of these expressed concerns, as well as the untenable situation of parties creating jurisdiction through stipulation. Simply stated, this Court should reiterate that the issue of dispositiveness is a legal question that can be reviewed on appeal no matter what the parties

have stipulated to in the trial court. See Morgan v. State, 486 So. 2d 1356, 1358 n.1 (Fla. 1st DCA 1986) (noting that stipulation of dispositiveness has been sanctioned in district courts of appeal, but Florida Supreme Court has taken a more conservative path on this matter; collecting cases).

In Brown, this Court concluded that "the benefits derived from permitting the appeal of confession issues after an Ashby nolo plea are outweighed by the disadvantages militating against it." 376 So. 2d at 385 n.5. The same reasoning applies to stipulations here. District courts of appeal should not be bound to review an issue simply because the parties have stipulated that the issue is dispositive, where the court's independent review of this legal issue leads to a conclusion to the contrary. The lower court's opinion dismissing Petitioner's appeal should be approved.

Additionally, should this Court agree with the State, and the lower court, that a stipulation is not the final say on the matter of dispositiveness, it should further clarify that the State is not precluded from raising this issue on appeal. As the law now stands, the State is put in the awkward position of being unable to argue that an issue is not dispositive because it remains bound by the stipulation in the trial court – even when the issue is clearly not dispositive and the appellate court has no jurisdiction. See, e.g., Debiasio v. State, 789 So. 2d 1061, 1063 (Fla. 4th DCA 2001).

Because of this case law, the district courts are left to consider this legal issue without input from either party, as the

State cannot raise the issue and accordingly the defendant is given no opportunity to respond, except in a motion for rehearing after the district court dismisses the appeal. This situation is unfair for both parties, as well as the court of appeal, and can be easily rectified by this Court.

Finally, regarding the proper remedy where a stipulated issue is found not to be dispositive, the State agrees with Petitioner that fairness generally requires that defendants in such cases be allowed an opportunity to withdraw their pleas. While there are certainly exceptions, such as where the State objects to preservation below or a defendant is told that the appellate court may not find the preserved issue to be dispositive and goes forward with the plea despite this warning, that is not the case here. Cf. State v. Carr, 438 So. 2d 826 (Fla. 1983) (defendant not entitled to withdraw plea where State had objected to defendant reserving right to appeal); Blanco v. State, 752 So. 2d 79, 81 (Fla. 2d DCA 2000) (dismissing appeal without remand for withdrawal of plea where trial court made it clear that right to appeal hinged on contested issue of dispositiveness).

Here, Petitioner was told that the issue was dispositive, even though it was not, and a remand should be ordered to allow Petitioner the opportunity to file a motion to withdraw his plea.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable Court approve the decision of the Fifth District Court of Appeal.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief On the Merits has been furnished to Rocco J. Carbone, III, counsel for Petitioner, 599 Atlantic Boulevard, Suite 6, Atlantic Beach, Florida 32233, by e-service to rocco.carbone@comcast.net, this 28th day of September, 2016.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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